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Congressman John Joseph Moakley

Volume 24, No. 2, Spring 1994

The Suffolk University Law School Journal

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Spring 1994

Table of Contents:

	A Conversation with Congressman John Joseph Moakley by William B. Moran	3
Joseph D. Cronin <i>Professor of Law</i> <i>Editor-In-Chief</i>	A History of the Supreme Court Reviewed by Joseph D. Cronin	15
Editorial Board:	A Conversation with Professor Rounds by George L. McElroy, Jr.	23
Gerard J. Clark <i>Professor of Law</i>	Interview with Dawn Marie Driscoll by John R. Sherman	27
John C. Deliso <i>Dean of Admissions</i>	Punitive Damage Awards by Michael Rustad and Chrisann Leal	31
Charles E. Rounds, Jr. <i>Professor of Law</i>	In Memoriam: Professor Alexander Cella	41
Michael J. Slinger <i>Law Library Director</i> <i>Professor of Law</i>	A Stop in Austria by John J. Nolan	53
	A Conversation with Duncan Kennedy by Gerard J. Clark	56
Secretary to the Advocate:	A Challenge to Law School Accreditation by Gerard J. Clark	62
Marla R. Smith	Poems by Stacey Harris	68
	Technology and the Role of the Law Library by Michael J. Slinger	71
	Recent Practice Oriented Acquisitions by Susan D. Sweetgall, Sonia Ensins and Elizabeth Gemellaro	73
	Power of Attorney by Martha Siegel	77

Note From the Advocate

THE ADVOCATE WELCOMES COMPLETED MANUSCRIPTS AND IDEAS FOR ARTICLES THAT WOULD BE OF INTEREST TO OUR READERSHIP. PLEASE CONTACT PROFESSOR JOSEPH D. CRONIN, SUFFOLK UNIVERSITY LAW SCHOOL, BEACON HILL, BOSTON, MA 02114, TEL.: 617-573-8547. FAX: 573-8143.

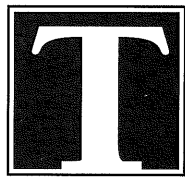
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A CONVERSATION WITH CONGRESSMAN JOHN JOSEPH MOAKLEY

BY WILLIAM B. MORAN



The Honorable John Joseph Moakley graduated from Suffolk University Law School in 1956. After serving as a representative and then as a senator in the Massachusetts State House, he served on the Boston City Council. In 1972 he was elected to Congress as a representative for the 9th Congressional District. "Joe" Moakley has served continuously in Congress since then and now is Chairman of the powerful House Rules Committee. Representative Moakley received an honorary Doctor of Public Administration degree from Suffolk University in 1977 and has received many other honorary degrees. Congressman Moakley continues to live in South Boston.

This conversation with *the Advocate* was conducted in Washington, D.C. on February 2, 1994. Representing *the Advocate* was William B. Moran, J.D., class of 1975. Bill is currently a Counsel with the Federal Mine Safety & Health Review Commission.

ADVOCATE: On behalf of *the Advocate*, I first want to thank you for setting aside time for this conversation. As I understand it you were born in Boston in 1927. Would you tell us a little about your roots?

MOAKLEY: Yes, I was born in South Boston on April 27, 1927. In fact it's where I still live. I've never left. My father did a number of things. He drove a truck for awhile, owned a tavern, and worked as a safety inspector for the highway department, while my mother was a homemaker. I've got two brothers,

Bob and Tom. Bob is the Regional Chief of the Veterans Administration while Tom has been a court officer for 30 years.

ADVOCATE: Can you give us a picture of what the community was like where you grew up? What was South Boston like at that time?

MOAKLEY: Sure. Everybody knew each other. The police officer on the street knew all the kids. It was very much living for the person upstairs, downstairs and over the back fence...very homogeneous community...Catholic, Irish and Italian, all together...a very good community. And in those days crime was unheard of...nobody locked their door, but I suppose that was a common story back then.

ADVOCATE: I note that you served in the U.S. Navy from

1943-1946. Your biographical material indicates that you were in the South Pacific during World War II and that you enlisted at age 15. Was that legal then?

MOAKLEY: Well, no but you have to put yourself back in that milieu. In World War II patriotism was flowing in the streets. There was nobody dissenting or at least very few people dissenting against the war. Everybody had their little blue stars in the window showing they had a son in the service and if you looked like you were of an age to be in the military you'd get these glances from elderly people in the community. I was a big kid and I felt, then, that I had all the education I needed. So I just mentioned it to my father one day. He thought it was a good idea, so he presented me with a birth certificate "ready to go" and I went in and that was it.

ADVOCATE: What were your duties in the Navy, and what sort of experiences did you encounter in the South Pacific?

MOAKLEY: I was a stevedore. We used to load the ammunition for the ships headed for the battle zones. I spent a year in Pearl Harbor. I also spent about eight months in the Philippines and finished up in Japan just after the surrender agreement was signed. So it was good training for me. What it did was make me very much aware that three years of high school weren't enough to carry anybody through. So I developed a renewed interest in resuming my schooling, which I did when I got out of the service. The war experience was also a good part of growing up for me. When you're only 15 or 16 you have the kind of energy that allows you to do obstacle courses on your lunch break. It was a time when you could chew nails. I weighed about 165 pounds, so I was tough. The experience was something that really helped me in my life, being in the military.

ADVOCATE: I read that you began your political career at age twenty-five. When did you realize that you might want to enter politics?

MOAKLEY: Actually after I got out of the service I went to prep school, then went on to college. Then one day a couple of my friends just brought up the subject and suggested: "Why don't you run for political office?" They said: "You know everybody in the town, you played football either for or against everybody and we need somebody your age." So, the idea didn't really come from within. I thought about it and concluded that it was a good idea. But I wasn't one who aspired to run although as a kid I'd been involved in campaigns.

In the 1930's and the early 40's a large part of the excitement in town came from the torch light parades that the politicians used to put on. It used to engender so much curiosity in me and so much good will all around that everybody used to look forward to it. So, like a moth attracted to the flame, I was interested. By age 12 I was giving out hand cards at the polls for candidates, and then I got to know some of the public officials and I liked what I saw.

ADVOCATE: Now when you first ran for office was there any kind of assessment or calculation about the best time and place to run? I am thinking by comparison to today when some people test the waters and conduct surveys prior to actually declaring their candidacy.

MOAKLEY: I first ran in 1950. In those days there was none of that. It was "Let's just do it!" We were young, energetic, and had a lot of people. We just missed by 199 votes the first time out in a field of ten or twelve people, but the next time I topped the ticket and ever since.

ADVOCATE: This was running against a Republican opponent?

MOAKLEY: No, there are no Republicans in my district. There were two Democrats. It was a two seat district at that time. I had to run against two incumbents and the fellow across the street from me, who was Chief Counsel to the Knights of Columbus, got 1500 votes. That took at least 200 from me, otherwise I would've won in 1950.

... I also knew some people who had attended Suffolk. I knew that the school was really up and coming. I was aware that there were a lot of judges sitting on the bench that came from Suffolk. ... overall it was the fact that most of the professors were practitioners of the trade, so you were dealing with those who had real world experience, not academics alone.

ADVOCATE: Which committees did you serve on while you were in the Massachusetts legislature?

MOAKLEY: I served on Harbors and Public Lands, Housing and Urban Affairs. In fact under my committee we passed legislation to allow tenants in public housing to serve on the housing board. We also put stricter regulations in so that tenants couldn't be evicted pell mell, which they were in those days. We also increased the Massachusetts housing fund from 50 million to about 500 million dollars in order to provide more money to lend people so that they could build homes. Also I led the way in passing legislation for the Commonwealth of Massachusetts to take over all of the Boston Harbor Islands because I felt that if we didn't someday I'd look out there and see a roller coaster or a ferris wheel on them and that's not what they're there for. We put in a land bank so that now they are just being looked at by the federal government to do something with them.

ADVOCATE: Your political career seems to have had strong apprenticeship elements to it, since you first served in the Massachusetts House of Representatives, in 1952, then in the State Senate in 1964, and then with the Boston City Council in 1971 before you moved to Congress in 1972. Do you think that your state house experience was vital to your effectiveness in Congress or did you find your earlier experience to be so different that it was largely not transferable to the federal level?

MOAKLEY: No, it was very transferable because you know from that earlier experience how the legislative mind works and that everything you pass requires a consensus. It's a lot different from being a governor or a mayor and you learn the rules of



the game and the rules are pretty similar between state and federal office. Also you learn how to get along with people to build that consensus. So I think that the time spent in the Massachusetts legislature was very necessary for me.

ADVOCATE: While serving as a member of the Massachusetts legislature you attended Suffolk University Law School in the evening, graduating in 1956. Given the proximity of the law school to Beacon Hill this question may have an obvious answer, but how was it that you came to choose Suffolk?

MOAKLEY: Of course the proximity was a consideration but I also knew some people who had attended Suffolk. I knew that the school was really up and coming. I was aware that there were a lot of judges sitting on the bench that came from Suffolk. So there were several considerations but proximity helped on those occasions when I was called out of class by pages during roll calls. There were several of us fellow legislators at Suffolk: Senator George Kenneally, Representative Theodore J. Vaites and Representative John C. Bresnahan, and Representative Gilbert M. Coroa were all in my class. So there were a lot of legislators attending Suffolk.

ADVOCATE: Tell us about your law school experience at Suffolk.

MOAKLEY: Well, as I said, I was a night student. So for me it was basically the classrooms and the library. There just wasn't time to interact with the activities at the school.

ADVOCATE: Looking back at your time at Suffolk did any professors stand out, leaving a particularly lasting impression with you?

MOAKLEY: Yes, my professor for contracts, Kenneth Williams. I was impressed with him. But overall it was the fact that most of the professors were practitioners of the trade, so you were dealing with those who had real world experience, not academics alone. President David Sargent attended Suffolk at about the same time I did. (*the Advocate* notes that President David J. Sargent graduated with the class of 1954.) I also remember Jeanne Hession. She was one of the brightest in my class. She was also willing to help out others by sharing her detailed class notes with us. It was a great help to many of us in the class. We all decided that because Jeanne was such a public-spirited person that she should be president of the class, so we elected her as the first woman class president of Suffolk. In fact she's a trustee at Suffolk. Jim Linnehan, who also was in my class, is a trustee at Suffolk too. (*the Advocate* notes that Jeanne M. Hession is the Vice Chairperson and James F. Linnehan is the Chairman of Suffolk's Board of Trustees.)

ADVOCATE: Were there any particular areas of the law that interested you at that time?

MOAKLEY: The municipal law courses were valuable, of course, to my role as a legislator. The torts course helped me survive since I was a local lawyer when I was first admitted to the Bar, taking whatever cases walked in the door. You see I practiced law while I was a legislator. At that time a legislator's salary was just \$4,500 a year.

ADVOCATE: Turning to your career in Congress, which began in 1972, did you know as a freshman that you wanted to serve on the House Rules Committee, or were you undecided about the committees on which you wanted to serve?

MOAKLEY: I was undecided. At that time I didn't fully appreciate the function of the House Rules Committee. Of course, everyone wants to serve on Ways and Means or Appropriations because their functions are better understood, even by their titles. When I began my second term, I talked with the Speaker who noted that there was an opening on the Rules Committee and he told me "you ought to take that." The Speaker explained: "You'll be part of the leadership and you'll have something to say about every bill that goes through the Congress. People get to know you and you'll have an impact on legislation because you devise the rules."

In order to get a piece of legislation to the House Floor the bill has to clear the Rules Committee

ADVOCATE: That leads me to the next question. I believe that most people, including most lawyers, have only a nebulous grasp of the functions of the House Rules Committee, and as Chairman of that Committee I wonder if you could sum up its role in the legislative process?

MOAKLEY: Sure, the Rules Committee is a nonlegislative committee. In order to get a piece of legislation to the House Floor the bill has to clear the Rules Committee, with very few exceptions. If an appropriations bill is filed on time, or if somebody can get two thirds of the votes present on the Floor of the House, they can suspend the rules and go without them, but most of the Appropriation Committee reports don't come out on time so they have to come to the Rules Committee.

We look at both the substantive and procedural ends of the bill, although technically we're just supposed to look at procedures, because we don't hear testimony on the bills. But as a result of being on the Rules Committee which, by the way, is the smallest committee in Congress, with only 13 members, 9 Democrats and 4 Republicans, sometimes members, in order to get our favorable attention, will make sure that our districts are taken care of when certain pieces of legislation affect us. For that reason I feel that a member of the Rules Committee has better results when he is looking for help in legislation because the Rules Committee has an impact on nearly every piece of legislation.

Also the Rules Committee has the power of holding bills. In fact, much of late President Kennedy's legislation was held in the Rules Committee. He couldn't get it out because at that time it was controlled by a very conservative rules committee. It wasn't until Lyndon Johnson became President and started pushing the Great Society legislation that things moved out of that committee.

It may be helpful to compare the House Rules Committee with the Senate's. The House and Senate Committees have a

couple of significantly different rules. The filibuster rule exists in the Senate, but not in the House, so the House Rules Committee assigns the time, which representatives get the time, and how long each one gets to speak.

Secondly, the Senate doesn't have a germaneness requirement. So in the Senate you can put anything on any bill. In effect in the Senate you can put a Volkswagen bumper on a Rolls Royce, if you want. Nothing has to fit, but in the House an amendment to a bill has to be able to fit four square inside the bill. It has to be germane. Now if it is not germane, the only way it can be made germane is by coming to the Rules Committee and having the Rules Committee say it's germane. So the House Rules Committee has that power too.

We also are the committee that usually cleans up the differences that exist in conference between the House and Senate versions of a bill by making certain things in order, so when it goes to the House Floor people can vote on it.

ADVOCATE: So the House Rules Committee has some latitude in deciding what is germane and, in fact, it sounds as if it could construe an amendment very liberally in deciding whether something is germane. Is that accurate?

MOAKLEY: Yes, that's right, or we can just waive the rule

ADVOCATE: Is it the case that the rules for a piece of legislation might be unique, that there apparently isn't a uniform set of rules applied to each bill?

MOAKLEY: Yes, but a rule, as reported out by the Rules Committee, is only a one page thing. It's quite brief, but every

bill, with the exceptions I mentioned earlier, has to have a rule before it can get to the House Floor.

ADVOCATE: I read that recently the Rules Committee received a lot of attention from the press over a change to something called the "discharge petition process." This was in September 1993. As I understand this process, it's a way to force legislation out of committee and on to the House Floor. Apparently the new rule is that House members who sign such petitions will be known to the public right away, whereas previously their names used to remain undisclosed. While many members opposed this change privately, you were one of the few congressmen who openly criticized it. Could you tell us something about the genesis of this change and your misgivings about it?

MOAKLEY: Well, we need to talk about the basics for a minute. The Congress as a legislative body has its committees and subcommittees to hear pieces of legislation. The way that you get before a committee is a bill is filed by a member, there are cosponsors, then the appropriate committee takes it up or not, in its discretion. There was a move by some who felt the process wasn't quick enough, and that everyone, to show how much they really wanted a bill passed, should not only cosponsor it, but also sign a discharge petition. Well, a discharge petition means that the bill doesn't go to the appropriate committee and it doesn't get examined, and members don't really know what's in the bill. There's no real analysis of it. It just



Congressman Moakley with Bill Moran.

comes right to the Floor and you vote up or down on it.

The idea looked great on the surface because it took the secrecy away from members who didn't want their name known, but the whole matter, originally, of the discharge petition procedure was put in as a safeguard to the members. That's because at one time the committee chairs could hold up bills forever, so the process provided a way to move bills out of an ornery committee. Since the change I don't think it's been used more than four or five times, but somebody grabbed onto it as a reform measure, claiming it removed secrecy. I felt, as Chairman of the Rules Committee, that I just couldn't vote for the change because it really takes the power away from the committees, and committees are what Congress is all about. The people who pushed for the change got all the applause from the talk show hosts. It's funny though that there's no outcry about the Senate's filibuster system, or about the Senate's "one-man hold" provision. Any senator can just go up to the President of the Senate pro tempore and say, "I want a hold on that bill." The public never learns who that Senator is or why he or she put a hold on it. Those, I guess, are all right. But here, in the House, they want all kinds of "sunshine" flowing in. In the end it was much ado about nothing, but on principle I just had to speak my peace on it. I didn't hit the talk shows because I felt that anything that looked like a reform was going to pass through the Congress. Some people demagogued me on the issue though.

It's part of one's responsibility to cast votes that aren't always well received in your district.

ADVOCATE: I was wondering how it has played out since the change in the discharge petition process has become effective. What impact has it had on legislation?

MOAKLEY: It hasn't been used much since the change. My concern is that Congressmen will be subject to more pressure from lobbyists. Every lobbyist will know who's on a petition and who isn't, while the average citizen won't. I'm concerned about a vested interest with a lot of adherents writing to Congress and telling it to discharge a piece of legislation. I'm thinking about some measure that will be enormously expensive, and the risk is that some in Congress couldn't stand up to the pressure, with the result that it gets passed. It amounts to voting by referendum, but up here it's part of one's responsibility to cast votes that aren't always well received in your district.

ADVOCATE: What is your position on term limits?

MOAKLEY: I'm against term limits; and I can be objective about the issue since I'm grandfathered in, so it wouldn't affect me anyway. In this last Congress we've had approximately 137 new Congressmen. Since 1972 I've gone from the lowest man in the Massachusetts delegation to the most senior man. The point is that the composition does change; people don't stay here forever. Another example is that since 1982 out of 12 Congressmen from Massachusetts, there are only four of them left in Congress. So things change significantly, even without term limits.

ADVOCATE: I gather from your response that you would agree with those who contend that having term limits would destroy expertise because Congressmen wouldn't remain in office long enough to develop it?

MOAKLEY: It's true. Absolutely. What you would have is staff running this place because they will be the only ones that possess any continuity around here. The staff would always tend to stay while the Congressmen would come and go. It takes quite a while to develop expertise. If it weren't for the seniority system, if you had term limits, you'd never have figures like Tip O'Neill or a Senator Kennedy. These people blossomed after being in office for some years.

ADVOCATE: I'd like to turn now to some of the other noteworthy issues before this Congress. First, concerning the North American Free Trade Agreement or NAFTA as it is better known, have you felt any repercussions from the Clinton Administration by voting against it?

MOAKLEY: Not really. I mean I had pressure. I was visited by every cabinet member. The President had me in the back seat of his limousine for about twenty minutes, but I told him: "I won't embarrass the administration, I won't make a statement, but I can't vote for it."

ADVOCATE: Turning to the issue of health care reform, certainly this will be the major political debate this year in Congress. One of the proposed alternatives to President Clinton's plan is that presented by Representative Jim McDermott of Washington State. This plan, described as the "single payer plan," meets the President's bottom line requirement of universal coverage but would have the federal government finance the plan with the states controlling insurance costs and health care fees. I've read that you are in favor of Representative McDermott's approach. Would you elaborate on your position?

MOAKLEY: Actually my support for that plan was because it was the first one out there, and I wanted to show that I was in favor of health care reform. Often I'll sponsor a bill because I agree with its broad concept, but when it comes down to the nitty-gritty then I may favor amending it this way or that. So, while I like the universality and accessibility parts of it, the form the final bill will take still has a long way to go.

ADVOCATE: In addition to health care reform, a crime bill and welfare reform are before this Congress. Do you see any priority to these?

MOAKLEY: I think health care is way up there because the President put himself way out there on the issue and with his wife being involved too. They're all out there though; all of those issues will need to be addressed.

ADVOCATE: What is your view on a Constitutional Amendment to require a balanced budget?

MOAKLEY: It's a phony. I mean you can't balance a budget just by writing a constitutional amendment. I remember former President Reagan used to come in every year with a budget-busting budget and at the same time be asking for a balanced budget. I mean the way to have a balanced budget is to have

someone send in a balanced budget, but they never do. In fact, Congress cut money out of the Reagan and Bush budgets, so

...the way to have a balanced budget is to have someone send in a balanced budget, ... If you have a constitutional amendment that proclaims that all budgets must be balanced, you would then see that the programs cut would be those which affect the most helpless of all of us ... they'd be the first ones to suffer because they're at the bottom.

its not that Congress is the big spender. But the way to get a balanced budget is that you just have to make the cuts and it balances that way. If you have a constitutional amendment that proclaims that all budgets must be balanced, you would then see that the programs cut would be those which affect the most helpless of all of us ... they'd be the first ones to suffer because they're at the bottom.

It's possible such an amendment could trigger a depression too because there would be no government money available to spend to put people to work or to give the economy a shot in the arm. Our economy is better now than before President Clinton took over. Why? Because the budget the President put forth, and items such as the jobs training bill all reflect that he's ready and willing to invest in the people of the United States. All of this has instilled confidence in the people. I mean it's impractical to think that you can just lock the door and say we're not going to spend any more money. Merely passing a legislative edict is not the solution to a balanced budget.

ADVOCATE: Recent government projections seem to indicate that the budget deficit is shrinking; that it now is going in the right direction so that perhaps in time there will be a de facto balanced budget.

MOAKLEY: Right. Then on the other hand the unexpected can come along, such as the recent California earthquake necessitating that we spend nine billion dollars. That represents the most expensive disaster in our nation's history.

I'm really just a bread and butter, nuts and bolts kind of guy....

ADVOCATE: The subject of the policy of the United States towards El Salvador has been a matter of great concern to you and in connection with that you have wanted to investigate whether there was Miami-based funding for the death squads which operated down there. Recently the Justice Department agreed to your request to declassify all of its records relating to U.S. policy in El Salvador. Could you update us as to where the matter stands now?



MOAKLEY: Well I've been interested in the immigration of the Salvadorans to this country for a long time. The United States had a very callous policy about sending back these people where they would be subject to mistreatment and abuse. I maintained all along that those people that immigrated to the United States were doing so because they feared for their lives. The U.S. Immigration Department said no, they were only coming here for economic reasons. But we saw doctors shucking clams and other professional people working in kitchens and that didn't look like upward mobility to me.

Let me back up for a second. This all started when some people came to me and talked about the many people—75,000 who had been killed down there in a ten-year period. These were noncombatants and I just couldn't believe it until we checked it out and found out it was true. That's how I got interested in the first place.

So I started working on that and then during that time these six Jesuit priests were assassinated along with a housekeeper and her daughter. The Speaker of the House, knowing that I had been working on the immigration issue, set up a special commission and put me in charge to investigate the murders. We went to work on the matter and discovered that we had been fed a lot of lies by some of the high military people involved. After that we wrote our reports and brought it out into the open. A commission was then brought into being by the United Nations. They went down there and found the same thing we pronounced two years before and the peace process grew out of it.

Now they're going to have elections there and even though there's still some violence down there, it's a long way from where it started. Now I'm not a foreign diplomat...I know relatively little about foreign affairs...so in a sense this issue was just an aberration for me. I'm really just a bread and but-

ter, nuts and bolts kind of guy, but interestingly ever since this happened to me every time there's something that happens in some country around the world I get cards and letters urging me to get involved in the issue. But that's just not where I am although it was exciting and I think we showed that the Jesuits didn't die in vain. At least the Jesuits' efforts helped bring an end to a dictatorial country down there.

ADVOCATE: It seems that while the matter is moving in the right direction, there are still periods when the violence resurges. I noticed that on October 25, 1993 former leftist rebel Francisco Velis was shot.

MOAKLEY: Well, these things, the closer you come to peace the more violence strikes out because everybody is trying to intimidate each other. Of course, we have elections coming up in March and some of the candidates for local offices have been killed, but I wish that our country would pay more attention to the matter right now because we've expended a lot of money down there.

ADVOCATE: Has the Justice Department begun the process of declassifying the El Salvador records?

MOAKLEY: Yes, you see the reason we want the records declassified is we want to know – we're not looking for any pelts to hang outside – we just want to see how this thing came about so that we won't repeat it in the future. This is so we won't have another situation where the embassies or people in the embassy are closer to the people in the country they're in,

rather than our own country. It was frustrating to watch people representing the United States government rationalize or explain away some of the worst human rights atrocities imaginable. There was a view amongst some in the embassy and in the State Department that we had to defend the Salvadoran military ... no matter what they did. It was the wrong attitude and it produced a bad policy.

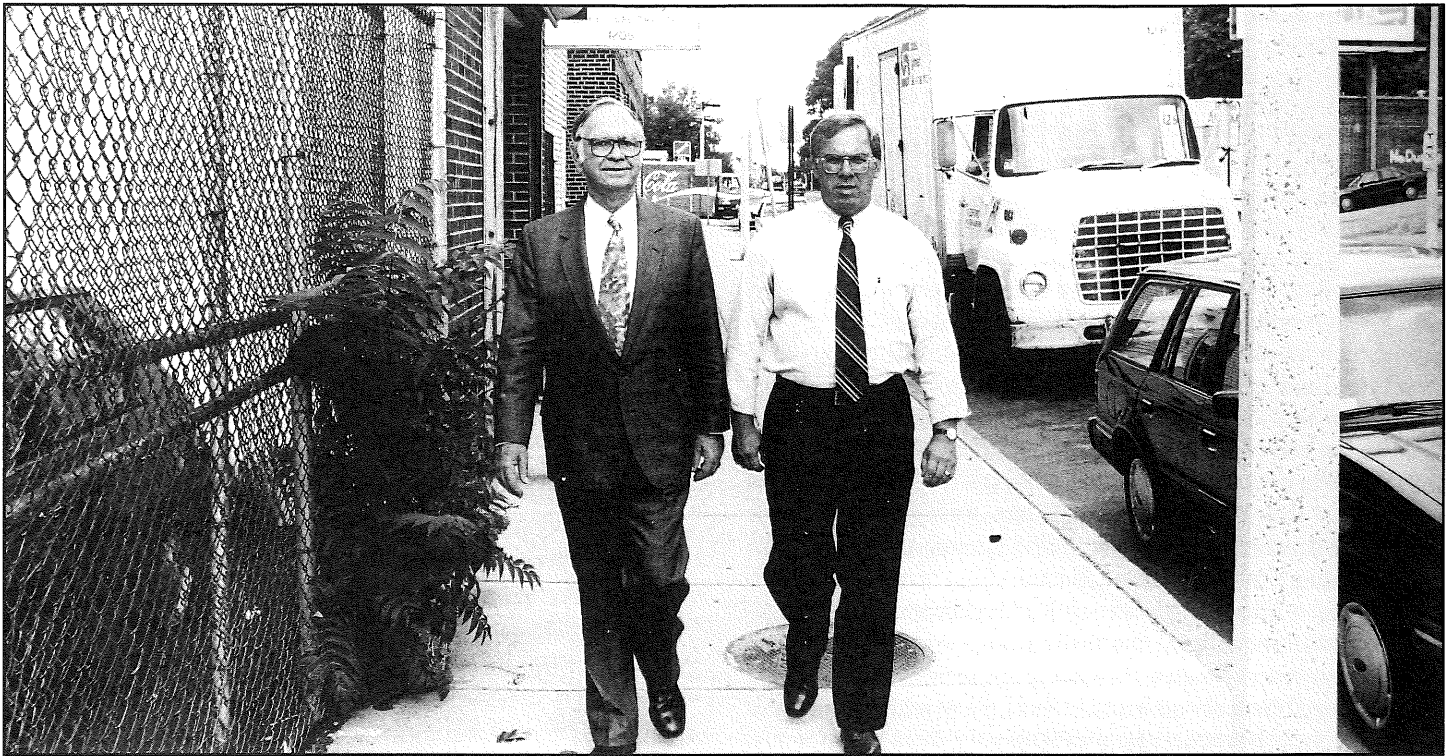
ADVOCATE: I understand that the current President, Alfredo Cristiani, refuses to have a death squad investigation. Is that your understanding?

MOAKLEY: Yes, that's true.

ADVOCATE: Recently retired Admiral Bobby Ray Inman asked that the President withdraw his nomination for Secretary of Defense—that happened January 18, 1994—and Mr. Inman likened some of the remarks made about him as “modern McCarthyism” and his withdrawal then revived the statement of deceased former White House Counsel Vincent Foster that ruining people is considered a sport in Washington. Mr. Inman's withdrawal also prompted remarks such as that by Senator John McCain that public service has become more difficult over the years. Now, apart from those particular individuals, what are your thoughts on this issue in general? Having served in Congress for over 21 years, do you feel that public service has become more difficult?

MOAKLEY: Absolutely. It's become more difficult because of the





Moakley with Mayor Menino

way campaigns are held. They are negative campaigns and the airwaves of radio and TV give instant communication you know, so that you could besmirch a person in a 30 second ad. When you think about some of the deliberative matters we work on in Congress, items that take three or four days to get through the House, and somebody takes a 30 second blip out of it, it can be twisted all around, distorted and sometimes you're left defenseless. So that's why people sometimes say the best person to run for office is one who has never run before because they've got no record on which they can be attacked. I've seen the House almost become an armed camp down there because of the divisiveness between Republicans and Democrats. It just gets so hot between the sides.

ADVOCATE: You remarked that there used to be more of a spirit of collegiality.

MOAKLEY: Oh yes, up until about ten years ago. Then it changed and the atmosphere started getting tough, playing real hard ball, going for the jugular vein.

ADVOCATE: At times I have been surprised by the hostility. I noticed in President Clinton's first State of the Union address that some members of Congress jeered at some points in the President's speech. I was surprised that in that setting the decorum broke down when he was delivering his speech.

MOAKLEY: Yes, well, I think there are some people in the Republican party who would just as soon have this place figuratively burned to the ground, I guess on the theory that they figure they'd have a chance of coming back as the majority. They forget that every time Republicans level a charge at the Democrats it hurts them too, but perhaps some of them figure that because there are more Democrats, the Democrats will be hurt more.

ADVOCATE: As a follow-up to that, do you feel that this atmosphere—this less collegial spirit—is keeping talented people away from government service?

MOAKLEY: Absolutely, I know people who would make great contributions to elected office, but they feel it would be crazy to serve. They see people like Senator Tower, Admiral Inman, Zoe Baird, and others bare their souls up there and what does it get them? Sure, I think today's climate keeps a lot of people out of public service, and as long as it continues it will keep a lot more away from public service.

ADVOCATE: Have any Congressmen who share your outlook on this issue gotten together to try to build bridges between the sides, or is it at an impasse?

MOAKLEY: Everyone wants to sit in the Speaker's Chair, the Republicans want to control the House and this is guerrilla warfare.

I think today's climate keeps a lot of people out of public service....

ADVOCATE: You mean there is no group of moderates who look at things as you do, in terms of improving the relationships between the parties?

MOAKLEY: There are moderates. A lot of Congressmen will say, privately, they hate the acrimony between the parties. But if their party dictates that they take a certain posture then they do it.

ADVOCATE: In January your colleague and friend Tip O'Neill

passed away. Tell us when you first came to know the late Speaker.

MOAKLEY: I knew the Speaker first because he was the Speaker of the Massachusetts House of Representatives. So I knew him to a degree for a long time before he came to Congress but we didn't really strike up the close relationship we had until I came to Congress. The Speaker was a fellow who lived politics just as he proclaimed it. That is, it was the Speaker's belief that all politics is local. He could've been laid out in the Capitol Rotunda and been buried in Arlington National Cemetery but instead he was laid out in the Massachusetts State House and buried out of St. John's Church. That was the same church where he was married and where his children were baptized. He was one of the first leaders to come out against the Vietnam War when Lyndon Johnson was President. He took a lot of heat for that. People would avoid him, walk to the other side of the street and spit on the ground because they thought he was being a traitor to his President.

For a fellow who is accessible to his constituents, a neighborhood-type fellow, this really hurts. Some Congressmen could care less because they rarely see their constituents, but Speaker O'Neill always kept in touch. He never changed in his years of public service. He was always the same, a warm guy. He always had time for you. If the Mayor of Chicago was waiting, well he could wait while he talked with a constituent and listened to how things were going. Always had a funny story, and always ready with a song. He was just a great person.

Actually the Republican Party made him. He was the first national Speaker because they put out ads of Tip O'Neill look-alikes running out of gas in a big Lincoln Continental. The idea was to hold him up as a symbol of government excess. The result was that Republicans from Districts all over the country pointed to O'Neill in their campaigns, telling voters not to send the Democrat in their District to Washington because they'll be working with O'Neill. But it backfired, a lot of people liked O'Neill and they voted for the Democratic candidates despite the ads.

As the highest ranking Democrat in the House he had to take these people on and he did. He wasn't afraid to stand up to anyone. I sat with him one time when he was talking with Ian Paisley of Northern Ireland, Belfast. He held his own and just stared Paisley right down and told him that his problem was that he just didn't like Catholics. He was never afraid to speak his mind and tell it like it is.

He had one motto that he went by and that was if you're going to make a change do it quickly, do it openly and explain it. Some people come out on one side of an issue and then, after they've been informed, they change their position, hoping that no one knows about it and hoping that they won't have to face the people on the other side of the issue. Speaker O'Neill felt that practice always catches up with you. People will always respect you when you give them immediate and open information on why you've made a change in your position on an issue.

On the lighter side, he certainly enjoyed golf and playing gin rummy. He had a knack for remembering what cards had been played. One time he called me up after a golf tourna-

ment, asking me who I drew as a partner in the gin game that followed it. I told him it was Representative Silvio Conte. Tip told me, "You drew the worst gin player around." I told him, "Not anymore!" He was just a big guy, many things to many people. I remember being in China with him, with Chinese people pointing at him, knowing he was someone of importance, but not knowing quite who he was. With his physical stature he always stood out. I recall there would always be people who would recognize him, no matter what state he was visiting, and as I say he was the first national Speaker. I don't think we'll ever have another Speaker that will be as well known nationally as O'Neill.

ADVOCATE: And with all the national recognition he apparently never lost his perspective?

MOAKLEY: He would be invited to eat with visiting dignitaries, but he'd rather go and eat with a couple of congressmen. He kept abreast of the issues too. I think people undersold him. They sold him short. They didn't feel he was as wise as he was, until time passed by. When he was fighting President Reagan on taxes, he had senior members of Congress telling him he was wrong and out of touch, that Reagan had the correct side of the issue. He was being criticized openly by members, but he withstood it and ultimately he was proven right.

ADVOCATE: Massachusetts and Suffolk Law School had another loss in January when Professor Alexander J. Cella died.

MOAKLEY: Yes, Professor Cella was an outstanding legislator. He was always very active. I remember that his favorite topic was the Sacco-Vanzetti case. He was a truly wonderful person and a distinguished public servant.

ADVOCATE: If you hadn't become a congressman have you mused over what other career you might have undertaken?

MOAKLEY: It probably would have been some form of government or social service, dealing with and helping people at some level. Law was a mix of both for me. I met a lot of people and developed a lot of friends and the confidence in oneself that comes from trying cases.

ADVOCATE: Many people, even those in public life, find public speaking to be extremely stressful. For many young lawyers it is downright traumatic.

MOAKLEY: It's one of the biggest fears in life, perhaps even greater than the fear of death.

My success in politics was due to an ability to sit down with small groups of people and get things through.

ADVOCATE: Were you ever plagued by this, the "butterflies" as it is sometimes called or were you one of the few people for whom it has never been a difficulty?

MOAKLEY: I'm not one of the few people. I've never considered

myself a speaker, even though people sometimes assume, incorrectly, that legislators have to give speeches every day. My success in politics was due to an ability to sit down with small groups of people and get things through. I've had times when I've been speaking and my mouth felt like cotton balls. It hasn't happened lately because I've done more public speaking.

ADVOCATE: Has there been any pivotal figure in your life, someone who had a great impact upon you?

MOAKLEY: I was very close to my father. He was as pivotal as anybody. I would have to say that Tip O'Neill was the other guy. Both of them had a great impact upon my life. My father was always pushing the importance of my schooling. He made sure that I was doing the right things at the right time.

There was one thing though. Actually my father didn't want me to get into politics. Once I got elected he changed his outlook. I think, like all fathers, they're afraid their sons are going to fall on their faces. When I came to Washington Tip O'Neill was great. He welcomed me with open arms.

In a sense he adopted me, and he helped me get on key committees.

ADVOCATE: Recently *The Boston Globe* carried a report of a legislative outcome study which measured House members' "batting averages." They translated each legislator's effectiveness into that baseball statistic. These "averages" were determined by comparing the number of bills introduced by a Congressman to the number of those that become law. Your average was one of the highest in Congress, over .700. To what do you attribute such a high average?

MOAKLEY: I'd like to claim another reason, but the truth of the matter is every bill has to have a rule. The rule is a bill in itself, so by being passed in that bill I get attributed as passing a piece of legislation. But really my role only makes it allowable for members to debate the bill on the Floor of the House. So that "batting average" is a bit slanted.

In order to be successful in this business you have to be sure that the skin you have doesn't get too thick because you have to be sensitive to other constituents....

ADVOCATE: What aspect of being a Congressman have you found to be most challenging?

MOAKLEY: I've had some votes that were very tough to take, such as those where my constituents are about 50/50 for or against a particular matter. In order to be successful in this business you have to be sure that the skin you have doesn't get too thick because you have to be sensitive to other constituents, and votes like that have been difficult.

I remember one time Speaker O'Neill called me to the podium to talk about a certain piece of legislation. I told him: "Gee Tip it's tough for me to be with you on that one." He replied: "I don't need you on the easy ones!" And especially

being on the Rules Committee you have to vote before anyone else, because we have to construct the bill and in that process we have votes taken and recorded by stenographers. So, as a result we get all kinds of bad votes because we have to vote against inclusion of items in bills that aren't germane to it or items that simply transgress the rules. But it's still tough to go back and tell an elderly person that you just voted against a social security bill because we were taking up a bill involving automobiles and a fellow Congressman stuck in the social security measure to be mischievous.

And you always make someone unhappy when you vote. When you're sitting on half a million laps you can always feel somebody squirming when you push that yes or no button. It's the nature of the beast. Sometimes your best friend is going to be very upset at you over a vote. You just can't extract that piece out of a bill to please one person. Government is doing the best for the most and that's what I try to do.

Sometimes you think that the constituents aren't up to speed on it, don't understand what is really encompassed in the bill, but you really don't have a lot of time to educate them. Sometimes now with FAX machines and everything and the way that they've got these pressure groups, you know that five minutes after a vote gets on the Floor you're getting thousands of letters to vote for or against it. These people that are signing the letters are only told, I'm sure, the part that affects them and not the entire bill. And that's very difficult to say: "I voted against the bill and this is why."

NAFTA, for example, as I mentioned earlier I voted against it. It was a very tough vote because with the President saying this was going to expand our horizons and make for better jobs in this country and all those things, naturally one wants to vote for it. But I kept looking at the people I knew were going to be adversely affected by it in my district.

Government is doing the best for the most and that's what I try to do.

ADVOCATE: As you look back on your congressional career thus far and as you are about to embark on your reelection drive, what one or two moments stand out in your mind, as giving the greatest sense of personal pride in your 21 years in Congress?

MOAKLEY: Helping bring the Salvadoran murders of the Jesuits case to completion. Doing the work down there, digging up things that the State Department overlooked or didn't care about. Having to fight the State Department all the time, trying to find out what really happened down there. You find out that they've been throwing camouflage nets over everything you stepped on. And to come up with a good conclusion.

ADVOCATE: What about back home, anything particular there?

MOAKLEY: Getting the money for the new federal courthouse in Boston. That involved 220 million dollars. Also, the 10 million dollar grant for Bridgewater State College, in southeastern Massachusetts, which was the oldest teaching college in the

U.S. This was the largest sum ever granted to a state college. Sixty percent of the students remain in the local area after they graduate from college. This area of Massachusetts is often underemployed because of the lack of education, so it may not pay dividends today or tomorrow but perhaps ten years from now there will be a lot of people getting jobs as a result of that grant.

There are a lot of things; it's hard to single out one thing. As a few other examples, I helped get GTE to locate in Taunton in 1986 because I helped them get a 4.3 billion

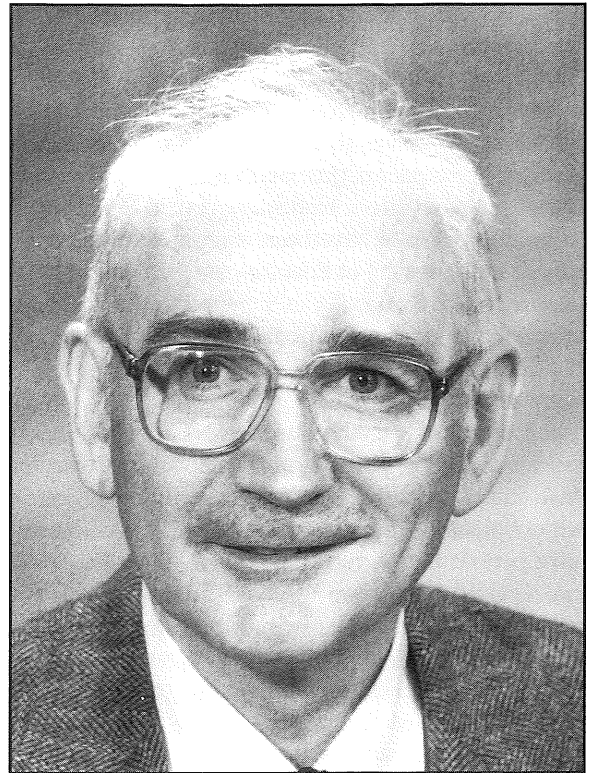
dollar contract with the Defense Department. Mass transit assistance, and money for veterans' homeless shelters, the restoration of historic shrines such as Faneuil Hall and the Old North Church, I take some pride in these accomplishments.

ADVOCATE: Again, on behalf of *the Advocate*, and the Law School, I want to thank you for all the time you've taken to share your experience and views.

MOAKLEY: It's been my pleasure.



A HISTORY OF THE SUPREME COURT



BY BERNARD SCHWARTZ
OXFORD UNIVERSITY PRESS, 465 PAGES (1993)

REVIEWED BY PROFESSOR JOSEPH D. CRONIN

“There is no good one-volume history of The United States Supreme Court.” Bernard Schwartz, Chapman Distinguished Professor of Law at the University of Tulsa, sets this challenge for himself in the opening sentence of the book. He meets the challenge very well. If there has been no such volume there is now. Inevitably much of the story will be familiar to students of the Court but Schwartz provides much new information and fresh insights.

The straightforward title, “A History of The Supreme Court,” is appropriate. Schwartz purports to tell the whole story of the Supreme Court. It is not about any one critical theory, although obviously the author’s views intrude. It is not about one case, one Justice or even one era. Rather, two centuries of Supreme Court history march before us. One volume does not provide room for detail but in broad outline the story appears.

The author’s approach is strictly chronological. In addition to discussion of cases and their historical context Schwartz provides brief bios of the major Justices and vignettes, sometimes peremptorily dismissive, of lesser known members of the Court. In order to achieve depth otherwise unattainable in a single volume the author devotes whole chapters totaling eighty-four pages to four “Watershed Cases”: *Dred Scott v. Sanford*; *Lochner v. New York*; *Brown v. Board of Education*; *Roe v. Wade*. The main text consists of 380 pages. The remainder of the book includes the full roster of Justices of the Supreme Court (with the Presidents who appointed them), plus Notes, Bibliography, List of Cases and an Index.

It would have been helpful if the Notes had been keyed at the top of the Notes pages to corresponding text pages for ease of reference, especially because the author had the distracting habit of referring in the text to authorities without disclosing who they were or what book was being cited. References such as “The leading modern student of *Dred Scott*,” “Holmes’s leading judicial disciple,” “one commentator,” “The Supreme Court historian,” “a book on the Burger Court,” “an eminent professor of Constitutional Law of the Court in the mid thirties,” abound and are distracting. Perhaps this is attributable to the author’s expressed desire to write in a manner suitable for the general reader. In any event it is a minor flaw, if flaw it be, in a work that should prove to be of enduring importance.

Today the appointment of Supreme Court Justices is more deliberate and public than formerly. Still, if anything, it is too casual considering the stakes. When asked whether he had made any mistakes as President, President Eisenhower famously answered that there were two and that both were sitting on the Supreme Court.

The reference was to Chief Justice Warren and Justice Brennan. It was a good quip but we should reflect on its implications. Chief Justice Warren served from 1953 until 1969. The importance of his tenure can hardly be overstated. Justice Brennan served from 1956 until 1990. 1990 was three decades after President Eisenhower left office. The impact of Justice Brennan's career on the Supreme Court, although less well known to the general public than Warren's, may well have been as great or even greater. Opinions vary as to the quality of Eisenhower's presidency and the impact of Warren and Brennan on the Supreme Court. This is certain, however. Two of the most important things that President Eisenhower did during his time in office were the appointments of Warren and Brennan to the Supreme Court.

This reminds us that American history has turned crucially at times on when appointments to the Court, particularly the Chief Justiceship, became available and thus who got to make the appointments. Schwartz asserts: "There have been two great creative periods in American public law." The first was the Marshall era, a period of "formative genius," driven by the vision of a strong national government that would promote economic growth and move the nation beyond being an agrarian society. The second such creative period was when Warren was Chief Justice. "In particular the Warren Court acted on the basis of two broad principles: nationalism and egalitarianism. It preferred national solutions to what it deemed national problems and, to secure such solutions, was willing to countenance substantial growth in federal power."

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The point is that both Marshall and Warren were driven by a vision. *They believed things* with conviction and without embarrassment. Also, they possessed the leadership skills to forge the consensus to get things done. Naturally, they were in part the prisoners of other factors, especially who else was on the Court. Nevertheless, an overarching vision and leadership personality were fundamental ingredients. Contrast this with the "rootless activism" of the Burger court, in part the product of Chief Justice Burger's lack of vision and deficiencies as a leader. It may be that Burger's lack of leadership skills made him appear to have less in the way of vision than he did.

Different as they were from one another as Chief Justice, the appointments of Marshall, Warren and Burger were all critically important. Adams appointed Marshall shortly before he left office in 1801. Eisenhower appointed Warren shortly after assuming office in 1953. Nixon appointed Burger shortly after assuming office in 1969. As Schwartz notes, had Chief Justice Ellsworth not resigned just in time, the appointment of his successor would have fallen to Thomas Jefferson rather than Adams. Jefferson might have

appointed Spencer Roane who shared Jefferson's states' rights and agrarian vision of America. The effect on history could have been profound. Events are not inevitable. People do make a difference.

Only months after Eisenhower assumed office Chief Justice Vinson died. This was while *Brown v. Board of Education* was pending in the Supreme Court. Eisenhower appointed Warren, perhaps after others declined the position and in part to remove him from the California political scene. See H. Abraham, *Justices and Presidents*, 254-256 (3d ed. 1992); D. Halberstam, *The Fifties*, 416 (1993). Scholars have concluded that John Marshall feared impeachment not only for obvious reasons around the time of *Marbury v. Madison* but because Jefferson might appoint Roane as his successor. See Haskins and Johnson, II *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* 185 n. 16 (1981).

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President Nixon appointed Burger in 1969 after an odd sequence of events. When Warren announced his intention to resign in 1968 President Johnson nominated Justice Fortas to succeed him. When that nomination ran into trouble in the Senate it was withdrawn. Warren then stayed on for another term and Nixon appointed Burger in 1969. If the Senate had confirmed Fortas things would have been different, although it must be remembered that Fortas resigned in 1969 because of accusations of financial irregularities. See *Justices and Presidents*, *supra*, at 290-91.

DRED SCOTT V. SANDFORD

Part of the reason for Chief Justice Marshall's enormous reputation is simply that he lasted so long, serving from 1801-1835. His successor, Roger Taney, appointed by President Jackson, served from 1835 to 1864. Thus Marshall and Taney occupied the center chair for a span of time from the end of the administration of John Adams to nearly the end of Abraham Lincoln's, with thirteen Presidents serving in between. While Marshall's reputation has endured, Taney's has been diminished, even defined, by *Dred Scott*.

Schwartz is generous in his appraisal of Taney. His assessment is that *Dred Scott* notwithstanding, Taney was a highly effective Chief Justice. Even as to *Dred Scott* Congress in effect forced the slavery issue on the Court because it could not decide the issue itself. "This widespread sentiment is plainly relevant to the charge that the Court's decision in the *Dred Scott* case amounted to mere judicial usurpation. It acted in response to congressional invitation and did no more than yield to the prevalent public demand for judicial pronouncement on the matter."

At first any attempt to rehabilitate Taney with reference to his performance apart from *Dred Scott* may seem like saying that Hoover did a great job apart from the depression. Still, it may be that the slavery issue was destined to be decided by force of arms and *Dred Scott* was simply one of the unhappy steppingstones

along the path to inevitable conflict. If that is so, *Dred Scott* need not fatally taint the otherwise strong reputation of Taney and the Court of that era.

Dred Scott involved the question whether Scott should be free because of his having been brought for a period of time to free territory. The state courts in Missouri ruled against him but the matter eventually came to federal court as a diversity suit. Schwartz recounts that at first the Court decided to rule only that Scott's status was a matter of state law and that issue had already been decided in the state courts. Broader issues concerning slavery would have been avoided. Five Justices from slave states then urged that other issues be reached. As a result of this Chief Justice Taney prepared the opinion of the Court that became so controversial. There were also concurring and dissenting opinions.

In addition to the ruling that Scott's status was a matter of Missouri law Taney reached two far more controversial points. First, the Court concluded that even free Negroes could not be citizens of the United States. Second, that Congress lacked the constitutional authority to forbid slavery in the territories and thus the Missouri Compromise, by then already repealed, was unconstitutional. These rulings caused much anger, even ridicule, to be heaped on the Court. That the Court divided largely on a sectional basis in *Dred Scott* did not help.

Schwartz observes that an irony of *Dred Scott* is that it was a departure from Taney's usual doctrine of self-restraint and deference to the legislature. As noted above, however, in this case Congress had made it plain that in this issue it did not desire deference. Schwartz also makes the intriguing claim that "As a general proposition, it may be said that the Supreme Court as an institution has never been harmed by abstention from political issues." He provides no examples, although the use of the armed forces problem, particularly relating to Vietnam, comes to mind.

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Very often opponents of *Roe v. Wade* draw a comparison with *Dred Scott*. In part this is to suggest a similarity between the denial of personhood to a fetus and the conclusion that Negroes at the time of *Dred Scott* were not regarded as part of the people. There is more to the comparison, however. *Roe* and other recent substantive due process cases find their intellectual antecedents in *Dred Scott*. Under the Territories Clause Congress has plenary authority to legislate for the territories. While the *Dred Scott* dissenters concluded that this gave Congress the authority to forbid slavery in the territories the majority ruled that it was a denial of due process for Congress to prohibit citizens from bringing their property, i.e., slaves, into territories. The reference is to substantive, not procedural due process and, of course, it is the due process clause of the fifth amendment because the fourteenth amendment did not yet exist and in any event applies to the states, not the federal government.

Certainly it is possible to defend *Roe* as a substantive due

process case without accepting *Dred Scott*. The problem, however, is that substantive due process cases inevitably have an *ipse dixit* quality to them. We confront the dilemma. If the courts cannot strike down legislation as substantively unreasonable in the absence of specific constitutional language (e.g., a provision of the Bill of Rights) applicable to the situation, the tyranny of legislative majorities is a risk. Also, the Constitution cannot be amended absent the combination of extraordinary majorities required by Article V. On the other hand if the courts have general authority to strike down legislation as substantively unreasonable, where are the constraints on the judiciary? The terms "liberty" and "due process" do not provide ascertainable limits.

To the modern mind, and to many even at the time, *Dred Scott* was an outrage. Perhaps, to some future mind, as to many now, *Roe v. Wade* will seem an outrage. Either objective standards will be articulated or the subjective standards of the judiciary of any given era will trump legislative judgments. More regarding this, *infra*, in connection with the discussion of *Roe v. Wade*.

Whether *Dred Scott* was an important contributor to the causes of the Civil War, war there was. Its aftermath presented additional constitutional questions, notably the constitutionality of the several Reconstruction Acts of 1867 in which Congress provided for military government in the south. This program may have been constitutional under the Guarantee Clause of Art. IV, section 4: "The United States shall guarantee to every state in this union a republican form of government . . ." Nevertheless a judicial challenge was attempted in the famous but enigmatic case of *Ex Parte McCordle*. In *McCordle* Congress repealed the relevant jurisdictional statute after the case had already been argued. Upon reargument the Court sustained the withdrawal of jurisdiction as a valid exercise of the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court. The dominant thrust of the opinion seemed to be that the power of Congress in that regard is broad. Because the Supreme Court is principally an appellate court this raises the specter of Congress having the authority to marginalize the role of the Supreme Court. Although such an interpretation seems justified under the language of the Exceptions and Regulations Clause of Art. III, section 2, clause 2, "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make," it also seems inconsistent with the tripartite, checks and balances design that is the overarching framework of the Constitution.

The matter is still unresolved. Schwartz adopts the "essential functions" theory, that is, that Congress can make exceptions but it cannot regulate Supreme Court jurisdiction in a way that undercuts the intended role of the Court. There are various problems with this theory. One is that it has a question begging quality. It presumes that the Court has a role beyond deciding cases that are within its jurisdiction. Also, there is a problem of vagueness in such a limit on the power of Congress to control the jurisdiction of the Supreme Court. If Congress cannot invade the "essential functions" of the Supreme Court the limits on the power of Congress would have to be defined. It is not obvious what those limits are and it would be embarrassing for the Supreme Court to have to articulate limits on what appears to be a broad and explicit power of Congress over the Court's own jurisdiction.

The final criticism of Schwartz's "essential functions" theory is

that while it is certainly quite respectable and has been advanced by other scholars over the years, it is only one among many competing views in a complex and unsettled area of the law that has produced an abundance, even surfeit, of scholarly literature. Schwartz presents a quick and glib "answer." In a one volume *History of the Supreme Court* the author did not have the space to present and appraise competing views about the implications of *McCordle* and whether, indeed, *McCordle* would be followed today.

Nevertheless, some reference to the complexity of the problem would have been appropriate. For a balanced and incisive review of the *McCordle* problem and the related question of the power of Congress to control the jurisdiction (and existence) of lower federal courts, see Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan. L. Rev.* 201 (1984).

THE LEGAL TENDER CASES AND ORIGINAL INTENT

In a few pages Schwartz discusses Supreme Court decisions about a problem that seems quaint but may be of enduring importance in terms of the role of the Court. Under the Constitution Congress has the power "to coin money." Does this mean only a metallic currency? Schwartz maintains that, consulting the words of the Constitution and the records of the Constitutional Convention the answer is a clear "yes." "The Framers' intent with respect to paper money and making it legal tender is as clear as anything that we know about the Philadelphia convention." That is, that they intended to forbid paper money.

At first Congress did not authorize paper money as legal tender but the Civil War created a new economic reality. After the war the Court by a vote of four to three invalidated the Legal Tender Acts on constitutional grounds. *Hepburn v. Griswold*. The Court relied on original intent: "The power conferred is the power to coin money, and these words must be understood as they were used at the time the Constitution was adopted." On the surface Schwartz is sympathetic to the result. "...it cannot be denied that the *Hepburn* decision was in exact accord with the original intention of the Framers of the Constitution." Nevertheless, shortly thereafter, with the appointment of two new Justices, the Court overruled the recently decided *Hepburn v. Griswold* in the *Legal Tender Cases*. The only difference was that the two new Justices joined the *Hepburn* dissenters to create a new five to four majority.

Although Schwartz maintains that *Hepburn* rather than the *Legal Tender Cases* was in accord with both the text of the Constitution and the intent of the Convention delegates he approves the *Legal Tender Cases*. It is simply a matter of economic reality. "It is all but impossible to conceive of a functioning modern economy without paper money...."

Unmentioned in all of this is the possibility of amending the Constitution. Perhaps the matter had to be swept under the rug while the civil war was raging. Indeed, it was. *Hepburn* was decided after the war. But one does not have to be a die hard originalist to conclude that in this case the Constitution should be amended if in some particular it has become outmoded. This is an extreme case. The "coin money" provision is specific. It is not like trying to determine what the amendment proposing Congresses meant by "due process" or "equal protection." Inevitably original intent must be at least less binding (even when ascertainable) about such general phrases. For example, the Congress that proposed the Fourteenth

Amendment may not have intended to forbid racial segregation but that is not what they enacted. What they wrote was equal protection. Inevitably, that calls for interpretation.

Nor is this, for Schwartz, a borderline case as to intent. He concludes that the words of the Constitution and the Convention debates present an exceptionally clear case of what the Constitution was intended to mean. Nevertheless, he applauds *The Legal Tender Cases*, not *Hepburn*, based on economic realities. Is this justifiable? The Constitution says you have to be at least thirty-five years of age to qualify as President. If, for whatever reason, life expectancy in the future was such that people generally did not live much beyond forty and the thirty-five age requirement seemed impractical, what should we do, look at thirty five and say it means twenty-five? The answer seems to be that we should amend the Constitution.

The problem is that the framers made it difficult to amend the Constitution because of the requirement of extraordinary supermajorities. This makes sense because the Constitution is meant to endure and should have a status different from that of ordinary Legislation. It should be amendable but should be protected against ill-considered, transient notions and the caprice of oppressive majorities. If we are serious about having a difficult amending process, however, we should not subvert it by espousing interpretations of the Constitution that are really sub silentio amendments that are adopted judicially outside the amending process. If the amending process is too severe it should itself be amended rather than subverted.

This is not a call for adherence to originalism as a general matter. The copious literature on that issue makes it plain that this subject resists simple analysis, including the issue whether the delegates to the Convention of 1787 thought that their intent should be binding. It does seem, however, that if the text of the Constitution and contemporary understanding are clear as to the meaning of the Constitution on a specific matter, that is what the Constitution means or the words of the Constitution are merely hortatory. We should follow that meaning and if the provision is outdated eliminate it through the amending process. The specific issue of paper money is, of course, water over the dam. The role of the Supreme Court in interpreting the words of the Constitution certainly is not.

The preceding discussion is not meant to imply that *Hepburn* and *The Legal Tender Cases* concerned only original intent about the Coin Money Clause. For a fuller treatment of the issues see D. Currie, *The Constitution in the Supreme Court*, 320-329 (1985).

LOCHNER

The second case Schwartz chose for full-chapter treatment was *Lochner v. New York*, decided by the Supreme Court in 1905. Practically anyone who has taken a basic course in Constitutional Law is familiar with this long overruled case and aware of the reasons for its enduring importance. In *Lochner*, the Court by a vote of five to four invalidated a law providing maximum hours for bakers. Schwartz recounts that the Court originally voted to uphold the statute but one of the Justices changed his vote. "It is not known who changed his vote, though the probability is that it was Chief Justice Fuller." Justice Harlan, who had been assigned to write the opinion of the Court, wrote a dissent. Justice Holmes also wrote a dissent that is one of his most famous opinions.

Although the narrow issue presented by *Lochner* no longer looms large the broader problem remains because of the open-

ended language of the Fourteenth Amendment. The amendment refers to "liberty" and "due process." It says nothing about work hours for bakers nor for that matter does it say anything about abortion. The *Lochner* Court, in accordance with then widely prevalent economic theory, concluded that unimpeded market forces should determine labor issues such as those in the *Lochner* statute and that legislative meddling in such matters is inappropriate. The issue, of course, is not the soundness of this economic theory but whether the Court had the right to impose it on the country under the guise of interpreting the word "liberty" in the Fourteenth Amendment.

In Schwartz's view, as in that of many commentators, the creative impact of the Warren Court can be compared only to that of Chief Justice Marshall.

Justice Holmes, in dissent, did not champion the statute or the economic-social theory behind it in his opinion. His position was that the Court's views in that regard were irrelevant. Legislative majorities ought to have their way. Holmes conceded that the Court in principle could invalidate irrational legislation but unlike the majority the dissenters would defer to legislative resolution of debatable economic questions. Schwartz quotes the famous Holmes standard: "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

One problem with the Holmes standard is that it concedes the existence of substantive due process, albeit with more deference to legislative judgments. Also, in one way the Holmes position is more arrogant than that of the Court presented in Justice Peckham's opinion. Although the Peckham opinion also contains words of deference to legislative judgments the Court ultimately invalidated the statute because the Court concluded that a different economic theory was correct. It seems merely to disagree with the legislative judgment rather than to accuse it of irrationality. The Holmes standard clearly defers more to legislative judgments but it reserves the right to strike down irrational Legislation. By hypothesis, however, the popularly elected branches have adopted the legislation in question. The Holmes standard would operate less frequently to invalidate legislation but when it did it would send the message that the legislature had not merely made a dubious choice in a debatable area but that it had erred over a matter where no fair debate was possible.

The issue recurs and will be seen again in Schwartz's chapter, *infra*, on *Roe v. Wade*. If the Holmes standard is correct in economic cases, as current judicial orthodoxy maintains, then why not apply it to cases such as *Roe v. Wade*? If the Court is interventionist in individual liberties matters but not economic matters that seems simply a matter of judicial choice, not something rooted in the words and history of the Fourteenth Amendment.

Schwartz suggests that we may not have heard the last of

Lochner even in the economic area. He refers to the influence of the Chicago School with its view that "the overriding goal of law, as of economics, should be that of efficiency." In particular Schwartz reviews the pertinent writings of the prolific Judge Richard Posner. Schwartz concludes that despite Posner's own denials "The Posner approach lends direct support to the effort to take our public law back to *Lochner*."

THE WARREN COURT

In Schwartz's view, as in that of many commentators, the creative impact of the Warren Court can be compared only to that of Chief Justice Marshall. Of course, in both cases the Court consisted of more than the Chief Justice. Despite the fact, however, that Warren was a less dominant figure on his Court than Marshall had been on his and also, Warren served a little less than half as long as Marshall, the impact of Chief Justice Warren on the Court clearly was momentous.

Schwartz stresses Warren's leadership skills rather than his scholarly attributes. Just as Joseph Story was superior as a scholar to John Marshall (or perhaps anyone else who ever sat on the Court) so also Warren's contribution was as a leader not a scholar. After all, as Governor of California he came from the political arena, not from a scholarly or judicial position.

The theme of the Warren Court was equal protection. This fits in with Warren's approach which was to ask whether something was fair rather than whether it was consistent with precedent or comported with legal technicalities. David Halberstam in *The Fifties*, 419 (1993) relates: "His law clerk, Earl Pollock, said years later that there were three things that mattered to Earl Warren: The first was the concept of equality; the second was education; and the third was the right of young people to a decent life."

This fits in with Warren's approach which was to ask whether something was fair rather than whether it was consistent with precedent or comported with legal technicalities.

Schwartz notes, and it has often been reported, that Warren considered the reapportionment cases to be his most important contribution. It was Warren's view, and others had expressed the same thought, that if there were equal access to the ballot box a lot of problems could be decided by the democratic process rather than through the courts. "According to Warren, 'Many of our problems would have been solved a long time ago if everyone had the right to vote, and his vote counted the same as everybody else's. Most of these problems could have been solved through the political process rather than through the courts.'"

The point may be a crucial one. If the civil rights movement and the courts had concentrated more on the right to vote, other issues such as segregated schools could have been resolved more easily. The reapportionment problem was part of this because the cities generally were underrepresented when legislatures were malapportioned and this had a de facto racial impact.

Another aspect of equality in voting has come into prominence because of the Supreme Court's decision in *Shaw v. Reno* in 1993.

The issue is whether it is required or even permitted in the course of redistricting to create “safe” minority legislative districts, especially when bizarre looking districts have to be created to achieve that result. *Shaw v. Reno* struck down the particular districts in that case but the broader impact of the ruling is unclear, in part because the Court remanded for further proceedings. The creation of “packed” minority districts seems to be a surrender to, and even validation of, the idea of bloc racial voting. Some would view this as only recognizing political realities, although it is contradicted to an extent by increasing evidence of electoral success by black candidates in state-wide races involving predominantly white constituencies. Also, minorities would control a limited number of legislative districts but at the price of being largely without influence in the remaining districts.

If they had a strong preference for one candidate they could “bunch” their impact by giving that candidate more than one or even all of their five votes. The theory is that this enables minorities to avoid being consistently outvoted by majorities without getting into the problems of gerrymandered district lines.

Those who favor the “packing” approach respond that controlling some districts at the sacrifice of being without influence in others is better than usually being outvoted across the board and holding a disproportionately low number of legislative seats overall. As this debate unfolds we may hear more of innovative suggestions for equality of results in the electoral process such as surfaced in the flap over the Lani Guinier nomination – “cumulative voting,” etc. Cumulative voting means that when there is more than one position to be filled, e.g., councillors running at large, voters would be allowed to cast more than one vote, even all their votes for one candidate. Thus, if there were ten candidates for five positions voters could cast up to five of their votes for one candidate. If they had a strong preference for one candidate they could “bunch” their impact by giving that candidate more than one or even all of their five votes. The theory is that this enables minorities to avoid being consistently outvoted by majorities without getting into the problems of gerrymandered district lines.

BROWN V. BOARD OF EDUCATION

If *Reynolds v. Sims* and the other reapportionment cases were the most important of Warren’s tenure it nevertheless seems fair to say that *Brown v. the Board* is the most famous. It is also a case in which Warren had a crucially pivotal role. The Court first heard argument in *Brown* while Vinson was Chief Justice. The Court was quite divided and would have repudiated the “separate but equal” doctrine narrowly if at all. At Justice Frankfurter’s suggestion the Court ordered reargument. By the time of reargument Vinson had died and been replaced by Chief Justice Warren.

Schwartz’s recounting of what followed stressed the impact of Warren’s leadership. At conference Warren presented the case as one raising a moral issue and not merely legal niceties. “Warren’s

Brown presentation clearly stated the question before the Court in terms of the moral issue of racial inferiority.” After the conferences Warren worked effectively with individual Justices to get a single, unanimous opinion of the Court. He managed to head off not only a dissent but concurring opinions. Of course, he had assistance. Justice Frankfurter had one of his clerks, Alexander Bickel, prepare a memo on the intent of the Congress that proposed the Fourteenth Amendment. Bickel concluded that the intent of the framers on the issue of segregated public schools was inconclusive. Whether that conclusion was correct or not the memo made things easier for Warren when it came time to write the *Brown* opinion. Also, the Court adopted Justice Jackson’s suggestion that the Court order reargument for purposes of formulating a decree in *Brown*. Thus, Warren was able to address the principle of segregated schools in *Brown* without getting bogged down in the complexities of remedy.

Schwartz stresses that although Warren was usually not bashful about allowing clerks to write drafts of opinions, essentially he wrote the *Brown* opinion himself. “The Warren *Brown* draft shows us that the Chief Justice was primarily responsible not only for the unanimous decision, but also for the opinion in the case. This was one case where the drafting was not delegated.” Whatever one thinks of the actual opinion in *Brown* Warren’s real achievement was not the opinion itself but bringing the Court around to accept a single, unanimous opinion repudiating the “separate but equal” doctrine in the public schools.

Most people, especially today, accept the general principle of *Brown* as obviously correct. There has always been some uneasiness, however, as to whether *Brown* is technically justifiable as constitutional interpretation. *Brown* was based on the equal protection clause of the Fourteenth Amendment, although the companion case, *Bolling v. Sharpe*, dealing with segregated schools in the District of Columbia, was based on the due process clause of the Fifth Amendment. This was because the Fourteenth Amendment applies to the states, not the federal government, and the Fifth Amendment has a due process clause but no equal protection clause.

In his book *The Tempting of America*, reviewed 20 *The Advocate* 41 (1990), former judge Robert Bork approves the result but not the reasoning in *Brown*. Bork concludes that the framers and ratifiers of the Fourteenth Amendment thought that segregation was compatible with equal protection. They intended equality but did not intend to ban racial segregation. Bork’s theory is that because we now see a clash between segregation and equality we have no choice but to abandon one aspect or another of the intent behind the Fourteenth Amendment. We must either abandon the view that racial segregation is constitutional or we must abandon equality.

That is not a hard choice. The amendment in terms provides for equal protection of the laws. It does not provide for segregation. If the choice is to be made segregation must be abandoned, not equality.

Bork also follows the heroic course of concluding that *Bolling v. Sharpe*, the companion to *Brown* for the District of Columbia, was wrongly decided. Although he agrees that it would have been ridiculous to continue segregation in D.C. after *Brown*, and Congress would have had an obligation to end it, Bork concludes that the text of the Constitution did not justify *Bolling*. There is no

equal protection clause that binds the federal government and it will not do to ignore the text of the Constitution to reach the "right" political result. As Bork reminds us, the consequence of *Bolling* is not isolated. Because of that case there is now effectively an equal protection clause that binds the federal government in cases that have nothing to do with racial segregation in the public schools, even though this has no sanction in the words of the Constitution.

It is not clear that Bork's sleight of hand that attempts to reconcile *Brown* with originalism is either convincing or necessary. It seems more reasonable to conclude that whatever one thinks of original intent as a standard of constitutional interpretation generally, an open-ended phrase like equal protection presents a special problem. This is not like the *Legal Tender Cases*, discussed, supra, where the framers may have had a clear intent about a narrow, specific problem and expressed that intent with reasonable clarity. Equal protection of the laws is something else again. If the framers of the Fourteenth Amendment believed that segregation was compatible with equal protection of the laws they did not say that. They simply said "equal protection." It is hard to believe that ever after we should ask whether a certain practice challenged as violative of equal protection would have passed muster with the framers. That would be unworkable now and would become progressively more so as years go by.

If one believes that it is anti-democratic for the judicial branch to have this authority to police a general equality standard in the actions of the political branches the problem may be with the language of the Constitution, not activist judges.

Of course, that means that judges would consult their own moral vision, as, indeed, they did in *Brown*. This is not judicial usurpation. It does not present the legitimacy problem that substantive due process does in the *Lochner-Roe* line of cases. There is a general equality standard that has to be applied and realistically cannot be restricted to the vision of 1868. It is at least doubtful that the framers would have expected it to be so restricted. If one believes that it is anti-democratic for the judicial branch to have this authority to police a general equality standard in the actions of the political branches the problem may be with the language of the Constitution, not activist judges. Many years ago Justice Holmes dismissed the equal protection clause as "the usual last resort of Constitutional arguments." *Buck v. Bell*, 274 U.S. 200 (1927). More recent Courts have not looked at it that way and there doesn't seem to be any reason why they should.

THE BURGER AND REHNQUIST COURTS

Schwartz portrays the Court of the Warren era as one with a strong sense of mission driven by a politically skilled and energetic Chief Justice. "In particular the Warren Court acted on the basis of two broad principles: nationalism and egalitarianism.... To Warren and his supporters, the Supreme Court was a modern Court of

Chancery— a residual 'fountain of justice' to rectify individual instances of injustice, particularly where the victims suffered from racial, economic or similar disabilities."

The Burger Court on the other hand lacked both a sense of mission and strong guiding hand in the center chair. One case may be cited to exemplify the difference between the Warren and Burger eras. In 1971 the Court decided *Swann v. Charlotte - Mecklenburg*, providing for broad remedies in the area of public school desegregation. It was not surprising that the Court eventually abandoned the "all deliberate speed" formula of *Brown II*, since that had led to lots of deliberation and not much speed.

In *Swann* the Court essentially chose between two remedial positions. One was that a desegregation decree should attempt to create the situation that would have existed in the school absent segregation. The other view was that the courts should have broad equitable discretion to use such remedies as quotas and busing to make the schools reflective of the overall racial makeup of the community. Integration as opposed to desegregation. The Court opted for the second, broader remedial rule with Chief Justice Burger writing the opinion of the Court. According to Schwartz, Burger actually favored a narrower remedy but had to write a different opinion to accommodate the views of the other Justices. See also Jeffrey Rosen, *Court Marshall*, The New Republic, June 21, 1993, at 14, 15: "Few case files in the 80's can compare to the 1971 busing case, where Black, Harlan, Brennan and Douglas, in a remarkably detailed flurry of memos, wrestled the opinion from a clueless Warren Burger."

Burger had firm ideas but unlike Warren he could not get the other Justices to embrace them. In fairness to Burger perhaps the battle was not winnable. Also, it seems that Burger preferred to trim his sails in order to write the opinion of the Court rather than express his own views regardless of whether he carried a majority of the Court with him.

If cases like *Swann* indicate that Burger lacked Warren's leadership skills, that doesn't mean that his original view in the case was wrong. After *Swann* the Court decided *Milliken v. Bradley* in which it rejected metropolitan busing. The Court refused to order an interdistrict remedy in the absence of an interdistrict violation. The distinction is logical enough but the combination of *Swann* and *Milliken* results in citywide remedies that go far beyond what was caused by the original segregative acts, while the wealthier suburbs are out of the picture. This applies not only to areas that had outright segregation along the lines of the pre-*Brown* southern model but also to jurisdictions where, despite the absence of official segregation, courts found that there were substantial, specific acts of de jure segregation.

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There were predictions in Boston and elsewhere that system-wide remedies permitted by *Swann* would contribute to the decline of such school systems and eventually the cities themselves. There

is reason to believe that this has indeed happened. There were constitutional violations that called for a remedy but there may have been remedial overkill. Remedies that were more violation-specific might have been implemented without resulting in the divisive bitterness and abandonment of school systems that were in part the product of *Swann* style system-wide remedies.

ROE V. WADE

For the more recent years of the Court's history, this volume may appear skimpy, especially as regards the dozens of cases in the Constitutional-Criminal area, search and seizure law, etc. This was inevitable. There was no way that a single volume of approximately four hundred pages would provide even cursory coverage of the myriad important cases that have emanated from the modern Court. In some matters all the author can provide is overview. To counteract in part the drawbacks that result from this approach the author provides in depth treatment of four cases, three of which have been discussed. The fourth, unsurprisingly, is *Roe v. Wade*. The Court decided *Roe* in 1973 but the controversy is still very much with us. With *Roe* as with *Swann* it seems that Chief Justice Burger was not able to lead the Court in the direction he wanted it to go. Ultimately he acquiesced and joined the majority. After an inconclusive first conference Burger assigned Justice Blackmun to write the opinions in *Roe*, involving a Texas statute, as well as the companion case, *Doe v. Bolton*, a Georgia case concerning a statute with looser restrictions on abortion. Burger's assignment of the opinions was controversial since it was not clear that he, or for that matter Justice Blackmun, was in the majority. Burger may have chosen Blackmun with the hope of winning him over eventually to an anti-abortion stand or at least on the basis that Blackmun would write a narrow opinion. At first he did. Blackmun's initial draft was much more favorable to restrictions on abortion.

Burger then sought reargument in the abortion cases because only seven Justices had participated in the first conference. Now Rehnquist and Powell had joined the Court. Burger hoped the new Justices would prove to be anti-abortion votes. In the event, they divided, Powell with the majority, while Rehnquist, along with Justice White, were the two dissenters. Burger prevailed in his desire to have reargument in the abortion cases, largely because Powell and Rehnquist favored reargument. Presumably Burger hoped that after reargument he could achieve his goal in *Roe* just as Warren had in *Brown*. Schwartz comments on Burger's strategy:

By moving for reargument, Chief Justice Burger hoped to secure the votes of the two new Justices and then persuade Justice Blackmun himself to switch to an opinion upholding the abortion laws. From his point of view, the Chief Justice would have been better off had the weak original *Roe* draft come down. As it turned out, he got a split vote from the new Justices and a vastly improved *Roe* opinion, with its broadside confirmation of the constitutional right to an abortion.

Schwartz details the development of Blackmun's final draft, which involved substantial contribution from other Justices. At the request of Justice Stewart, Blackmun inserted a section that a fetus is not a "person" within the meaning of the Fourteenth Amendment.

This explains the curious brevity of the "person" section of the majority opinion in *Roe*. *Roe* had a very long majority opinion, fifty pages in the U.S. Reports, not counting another long opinion in *Doe v. Bolton*. Yet the discussion of the "person" issue was terse and conclusory. Whether a fetus is a person seems to be both important and fundamental to *Roe*. Also, unlike much of what was in the *Roe* opinion, the Court in addressing the person issue would not be susceptible to the criticism that it was usurping a legislative function. Whether one agrees with the Court's answer or not, surely the question whether a fetus is a person in a constitutional sense is for the Court to decide.

The famous trimester formula in *Roe* is something else again. *Roe* held (roughly) that after the first trimester the state can regulate abortions in ways that are reasonably related to the health interests of the mother. After viability abortions may be regulated or even proscribed but even then with an exception for "the life or health of the mother." In a concurring opinion Chief Justice Burger wrote: "Plainly, the Court today rejects any claim that the Constitution requires abortion on demand." That may have been an attempt at damage control on the part of the Chief Justice.

Schwartz traces the evolution of the trimester approach in the various Blackmun drafts after reargument. At first Blackmun drew the line for allowing the state to proscribe abortions at the end of the first trimester rather than viability. What were the influences that led Blackmun to a three-part time division of pregnancy rather than two, with the resulting emphasis on viability rather than the end of the first trimester as the point where some abortions can be forbidden because of the state's interest in the fetus? Justice Marshall urged the change to viability in a letter to Blackmun. According to Jeffrey Rosen in an article in *The New Republic*, Marshall did this at the urging of one of his clerks, Mark Tushnet. *The New Republic*, June 21, 1993, p. 8. Justice Douglas was content with the end of the first trimester. Justice Brennan did not favor the end of the first trimester but thought viability an illogical cut-off point too. He favored emphasis on state regulations related to the health of the mother.

Twenty years after *Roe* the abortion debate rages with no end or even lessening in sight. Most people react to *Roe* (to the extent they understand it) simply based on whether they approve of abortion or at least do not wish to see abortion illegal. They are largely uninterested in the constitutional niceties and skeptical that constitutional principles really drove the votes of the Justices in *Roe* and the numerous abortion cases that have followed in its wake. The abortion issue also has heightened interest in the confirmation process of Supreme Court Justices.

A CONVERSATION WITH PROFESSOR CHARLES E. ROUNDS, JR.



Professor Charles E. Rounds, Jr.

CO-AUTHOR OF THE SEVENTH EDITION OF *LORING A TRUSTEE'S HANDBOOK*

FOR THE ADVOCATE: GEORGE L. MCELROY, JR., ESQ.
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ADVOCATE: Professor Rounds, how did you and your co-author, Eric P. Hayes, come to write the Seventh Edition of *Loring A Trustee's Handbook* (Little, Brown & Co) which is due out in May 1994?

ROUNDS: The idea originated with Mr. Hayes. Although it was generally known in the Boston legal community that the book had not been updated since 1962, he was the one with the presence of mind to submit a proposal to Little, Brown. He was also the one who solicited my involvement in the project. Mr. Hayes is a 1980 graduate of Suffolk Law School. He has worked in trust administration at the Bank of New England, State Street Bank & Trust Company, and Bank of Boston. In 1994 he returned to State Street Bank as its Trust Counsel.

ADVOCATE: A *Trustee's Handbook* is a venerable work. Tell us, if you would, something about its history.

ROUNDS: The first edition, by Augustus Peabody Loring, appeared in 1898. Mr. Loring, who saw his brainchild through its fourth edition, was a practicing lawyer and a Boston trustee. In the 40 years that passed before his death, the *Handbook* played an important role in the dramatic growth of trust administration in this country. In 1940, for example, Prof. Scott wrote that for more than three decades the *Handbook* had been on his desk or near at hand. Mayo Adams Shattuck, Esq. and James F. Farr, Esq. prepared the *Handbook's* fifth and sixth revisions respectively.

ADVOCATE: And the book itself, what is its format?

ROUNDS: The *Handbook* is not a treatise on the law of trusts nor was it ever intended to be such. The concept is that of a

handy, ready reference: a gateway, as it were, to the treatises, restatements, law review articles, uniform statutes, and seminal cases. In 1898 Mr. Loring succeeded in producing just such a book. On the eve of the twenty-first century we have endeavored to revive and carry on the Loring tradition. We hope that the book will have an answer for most of the trust-related questions a trustee or attorney may have and that it will provide a roadmap, by means of the footnotes, for tackling the tough ones. The *Handbook*, by the way, is geared to a national audience; it no longer can be said that it has a Massachusetts bias.

The HANDBOOK is not a treatise on the law of trusts nor was it ever intended to be such. The concept is that of a handy, ready reference: a gateway, as it were, to the treatises, restatements, law review articles, uniform statutes, and seminal cases.

ADVOCATE: Did the many changes in the tax code over the last 30 years provide the impetus for this latest revision?

ROUNDS: Not exactly. Our challenge was to produce a modern handbook that is convenient, practical and "user friendly" in the Loring tradition, but that can also serve as a guide to the fundamental principles of trust law that are no longer standard fare in American law schools today. It was a tall order. Thus the taxation of trusts was given only passing mention. To

attempt to cover tax in any depth would have thwarted our efforts to return the *Handbook* to “pocket-size.” The Sixth Edition had ballooned to 472 pages. As it was, it took some effort to bring down the size of the book. We have come in at about 278 pages which is about what the Loring editions were. We have also tried to get lean and mean when it comes to the footnoting.

ADVOCATE: Then why the need for a new edition?

ROUNDS: As I mentioned, the *Handbook* was last updated in 1962. Like Rip Van Winkle it awakens into a very different world where the state dispenses many more entitlements and regulates commercial activity far more intensely than it did then. In the late 1960s—perhaps in response to these developments—law schools set about the process of downgrading courses in the law of trusts from required to elective status, so that today, while almost all law schools have made courses on state regulation mandatory, only a few, most notably Suffolk, continue to afford the law of trusts the status that it enjoyed in Mr. Loring’s time. In most law schools, the law of trusts is now an afterthought, buried somewhere in an elective course on estate planning. Prior editions assumed that readers had a thorough formal grounding in the fundamentals, including the law of trusts. This assumption is no longer warranted.

Thus the Seventh Edition makes some effort to fill the gap, although I am somewhat pessimistic in this regard. My experience has been that those attorneys who have not had formal instruction in the law of trusts somehow never quite manage to get a handle on the concept. By the way, the Seventh Edition also attempts to pick up some of the slack of the single-volume abridged version of *Scott on Trusts* which is now out of print.

Our challenge was to produce a modern handbook that is convenient, practical and “user friendly” in the Loring tradition, but that can also serve as a guide to the fundamental principles of trust law that are no longer standard fare in American law schools today.

ADVOCATE: Moreover, there have been important developments in the field of trusts itself since the last revision.

ROUNDS: That is correct. The years since 1962 have seen major developments impacting the law of trusts in such areas as creditors’ rights, spousal rights, and Medicaid eligibility and recoupment. ERISA would not arrive on the scene until 1974. There was no such thing as an IRA or Keogh plan. RICO, CERCLA, and the consumer protection statutes had yet to be enacted. It would be many years before the social investment movement would come into its own. These are just some of the recent developments that have been worked into the new edition.

ADVOCATE: Do your political or philosophical predilections come through in the Seventh Edition?

ROUNDS: I suppose so, at least in this regard. It is my view that civil rights are illusory without private property rights, that the dichotomy between “personal” rights and “property” rights is a false one, and that private property offers something of a buffer between the citizen and the tyrannical impulses of the state bureaucrat. The book has a political or philosophical underpinning in the sense that it takes for granted that the institution of the trust has social utility; and because the trust is an outgrowth of private property, by implication it takes for granted that private ownership is a good thing.

It is my view that civil rights are illusory without private property rights, that the dichotomy between “personal” rights and “property” rights is a false one, and that private property offers something of a buffer between the citizen and the tyrannical impulses of the state bureaucrat.

ADVOCATE: Your opposition to IOLTA and social investing is well known. Does this come through in the book?

ROUNDS: From time to time I was tempted to use the book as a soapbox for railing against one thing or another, in other words to inflict my political views on the reader. I generally resisted the temptation, however. Towards the end of the process we conducted an ideology audit and cleaned up anything of that sort which may have crept in. Thus the text is pretty clean. Take IOLTA, for example. I personally feel that it is reprehensible, that it does violence to the concept of separation of powers, that it corrupts the attorney-client relationship, and that it undermines the institution of the trust. None of this comes through in the book, however. There is a suggestion that it represents a radical departure from traditional property concepts but that is about it. We inform the reader that a constitutional challenge to IOLTA failed in the First Circuit and that one is currently under way in the Fifth Circuit and leave it at that.

From time to time I was tempted to use the book as a soapbox for railing against one thing or another, in other words to inflict my political views on the reader. I generally resisted the temptation, however.

ADVOCATE: I know you feel that Trusts should be required in law school. Would you explain why you feel this way?

ROUNDS: The trust relationship, like the agency and the contract, is a fundamental legal relationship. Add to that torts and traditional property concepts and you have the common law. If we expect our lawyers to be able to work with the common law, not merely know something about it, then law students should

be required to take a course in the law of trusts before graduating. The concept of the trust is marbled throughout the common law. Moreover trusts are everywhere, from employee benefit arrangements to divorce settlements. Most of Boston's commercial real estate is held in trust. A mutual fund is essentially a trust. Even Suffolk itself, for all intents and purposes, is a trust.

By the way, the curriculum with perhaps the most internal logic and coherence is none other than that which Gleason Archer imposed upon Suffolk years ago. He required everything but the kitchen sink, from equity to Roman and Salic law.

ADVOCATE: There have been rumors that changes in Suffolk's curriculum are in the works, that some courses such as trusts are to be de-emphasized in order to make room for more electives. Do you think that the revision and republication of *Loring A Trustee's Handbook* may cause anyone here at Suffolk to rethink the wisdom of downgrading trusts from required to elective or quasi-elective status?

ROUNDS: No, it is likely that the publication of the *Handbook* will have no impact whatsoever on these deliberations. The process of changing a law school curriculum has more to do with the internal politics of the institution than anything else. The curriculum of one prestigious law school comes to mind. From the perspective of an outsider it has little or no internal logic or coherence. The only charitable explanation for the contraption is that it is the product of compromises between and among political forces within the institution. By the way, the curriculum with perhaps the most internal logic and coherence is none other than that which Gleason Archer imposed upon Suffolk years ago. He required everything but the kitchen sink, from equity to Roman and Salic law. With respect to the *Handbook*, there is some irony here. As I mentioned before, it was intended to fill a particular gap in modern legal education. Thus it may be of some help to the faculty and alumni from other law schools who are now beginning to rethink some of the curriculum reforms of the 60s and 70s.

ADVOCATE: Who is likely to find the *Handbook* useful?

ROUNDS: We, of course, hope that attorneys across the country who either directly or tangentially work with trusts will want to purchase the book. We hope that it will be perceived as a practical alternative for the attorney who cannot afford a complete set of *Scott and Bogert*—and a handy quick reference for the one who can. We have also stayed away from legalese in the hope of making some inroads into the lay markets, bank trust officers, financial planners, insurance agents and stockbrokers and the like.

Last but not least we have tried to accommodate the law student. For the student enrolled in a traditional course on trusts, the book is intended as a study aid. For the student who has not had a course in trusts but has nonetheless

enrolled in an estate planning course, for example, the *Handbook* may be the only game in town when it comes to picking up the common law fundamentals. If we have succeeded in straddling both academia and the real world, as I hope we have, the student is likely to find the *Handbook* a cost-effective long-term investment.

ADVOCATE: How does writing a book of this type compare with writing a law review article?

ROUNDS: Writing the *Handbook* was easier than writing a law review article in the sense that we tried to keep away from the cutting edge. When we came to an area where the law is unsettled, we felt that it was our job to raise the red flag and then cite to the treatises, not to inflict on the reader our particular policy views. What was hard about the project, however, much harder than writing a law review article, was keeping the number of pages down. It was a monumental challenge to synthesize one hundred years of material, to decide what to jettison and what to take on. Try compressing two volumes on conflict of laws in the trust context into eight paragraphs. Each sentence has to be agonized over like a poem and then checked and rechecked for accuracy. I am sure there are things we have missed and that our readers will be calling them to our attention.

When we came to an area where the law is unsettled, we felt that it was our job to raise the red flag and then cite to the treatises, not to inflict on the reader our particular policy views.

ADVOCATE: How did you find the time to do the project, what with your heavy teaching schedule, nine hours if my count is right, and your other projects? I know, for example, that while the book was being written you were also involved with the Franklin Trust.

ROUNDS: It wasn't easy. I wrote the book on a lap top which I kept continuously going in a room off my bedroom. Once a chapter was finished, as you know only too well, I would then turn the chapter disk over to you for integration into the main disk which you were keeping. The research assistants who came and went over the years would take a crack at footnoting those sentences that I felt needed footnoting. The whole process took about four years from start to finish. I personally finalized each footnote and personally cite checked all the footnotes three times in the period from September 1993 to January 1994 when the book was going through the editorial process at Little, Brown. And then, when everything else was done, I had to go back and finalize the index and compile the table of cases, restatements and uniform acts. That process took me eight straight very long days, a project that would have taken much longer were it not for all the class cancellations occasioned by last winter's series of blizzards.

By the way, preparing the index, at least for me, was like writing the book all over again, alphabetically. Once the end

matter was completed I was hit with 230 exams to correct. And then, the day I finished the last exam, the page proofs came in. My greatest fear was that I would be laid low by the flu during all of this. Somehow I dodged that bullet, probably because I had constructively quarantined myself in that room off the bedroom.

I guess it is safe to say that I have the Seventh Edition to thank for being out of shape. The project also took a tremendous amount of time away from my wife and two kids.

ADVOCATE: How has writing the Seventh Edition affected the rest of your life?

ROUNDS: Before we started the project, I was in fairly good physical shape. I soon found out that I simply did not have the time or physical stamina to write, teach, practice, have a modicum of family life and also maintain a meaningful fitness regime. And so the jogging and weight-lifting fell by the wayside and I

began to turn to Coca Cola and Hostess cupcakes. I guess it is safe to say that I have the Seventh Edition to thank for being out of shape. The project also took a tremendous amount of time away from my wife and two kids. I know they are very happy that the project is coming to an end. Much of the writing, for example, was done on weekends, holidays, and in the early morning hours. More than once I would jump out of bed in the middle of the night to enter some thought onto that infernal machine that was perpetually glowing in the next room.

ADVOCATE: Has the Suffolk community been supportive of your efforts?

ROUNDS: Yes. My thanks go to Prof. Slinger and the dedicated members of his library staff. They are a great bunch. Extremely competent and very generous with their time. My thanks also go to the folks at the Computer Center, specifically Gina Gaffney and Judy Nardelli for coming to the rescue when I accidentally spilled Coca Cola into the inner-workings of my lap top.

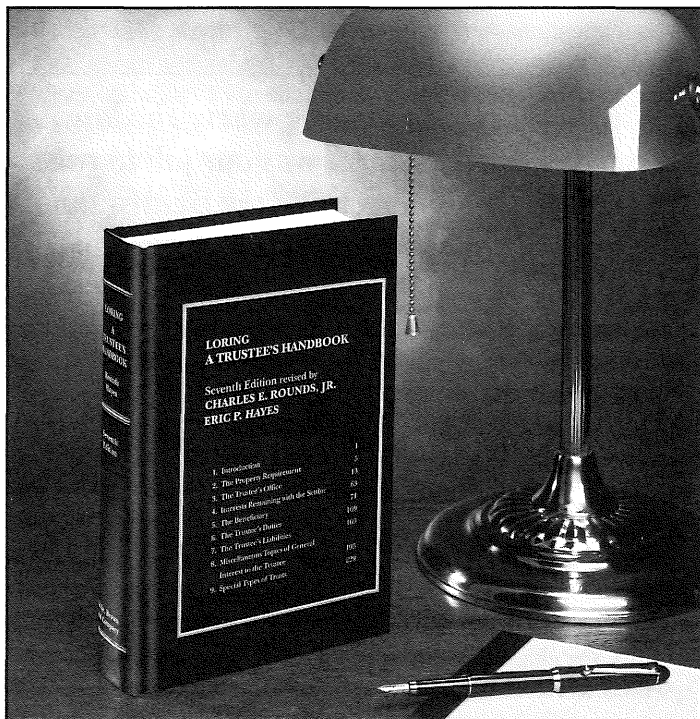
ADVOCATE: Do you have any parting thoughts before we end our conversation?

ROUNDS: Yes. I very much want to thank you, George, for staying with the project from beginning to end. If I had not had someone competent and reliable in place from year to year processing the chapter drafts and integrating the footnoting, things might never have gotten off the ground. My thanks also go to the other research assistants whose contributions are acknowledged in the front of the book. Finally I wish to thank Monte van Norden, Sandy Doherty, Bob Caceres, and Christine Nagle from Little, Brown. They run a class operation.

Yes. My thanks go to Prof. Slinger and the dedicated members of his library staff. They are a great bunch. Extremely competent and very generous with their time.

ADVOCATE: How can someone obtain a copy of the Handbook?

ROUNDS: By phoning 1-800-331-1664. (*Loring A Trustee's Handbook*, Seventh Ed., ISBN 0-316-35073-7)



INTERVIEW WITH DAWN MARIE DRISCOLL, ESQ.

SUFFOLK JD (CUM LAUDE) 1973, AND
DOCTOR OF HUMANE LETTERS (HON.)
1989, CO-AUTHOR, WITH CAROL R.
GOLDBERG, OF *MEMBERS OF THE
CLUB: THE COMING AGE OF
EXECUTIVE WOMEN*

BY PROFESSOR JOHN R. SHERMAN



On March 7, 1994, I interviewed Attorney Dawn Marie Driscoll. Her career span offers an example of the careers of many women today. While she has experience as Corporate Counsel and serves as a corporate director as well as operating her own consulting firm, the interview focused on her role as co-author of a timely and important book.

As the interview unfolded, the applicability of "The Club" to women in law practice became clear. The message of this lively and delightful interview for women in all stages of their legal career and for men as well is thoughtfully provocative and positively reassuring. I thoroughly enjoyed my visit to "The Club"; I am particularly grateful to my guide.

ADVOCATE: What is "The Club"?

DRISCOLL: In general, in every community, profession, industry or even in a company, there is a core group of opinion leaders who are the decision-makers. They need not all be CEOs—they can be investors, lawyers, elected officials, presidents of local organizations or even community volunteers. Ask yourself, are these people ones whose goals/abilities are compatible with mine? Look for persons who seem to matter.

ADVOCATE: Does "The Club" equate readily to Bar Associations and similar professional groups in the legal profession?

DRISCOLL: In many ways. In the legal profession, as in any other, you look for the power center; look for the association(s) of people who make things happen.

ADVOCATE: Why should women want to be members of "The Club"?

DRISCOLL: Because that's where decisions are being made that affect the economic status of all of us—which businesses will be given large contracts, which candidates will be supported, which agencies will receive United Way money and which people will be promoted.

ADVOCATE: Should a lawyer belong to and use "The Club" to influence such things as the level of support for the courts in legislatures dealing with budget matters?

DRISCOLL: Absolutely. In looking at "The Club" you should ask: "What kind of people are influencing our profession and the issues vital to it?" Also, "How can I influence these issues through or around or even in spite of these people?" It is very

important for lawyers, and particularly for women in the profession, to look at the issues they care about. "The Club" is particularly suited to this.

So we don't talk about a glass ceiling. We prefer to use another term, what we call "the comfort zone"—a much more subtle, perhaps unintentional, climate that keeps women as outsiders.

ADVOCATE: Do you think the "glass ceiling" is a myth?

DRISCOLL: Obviously the glass ceiling is not a myth in the minds of many women who feel they have encountered career obstacles. But we feel there are two problems with the glass ceiling analogy. If you believe there is a glass ceiling, you might not look beyond it and analyze and understand the real factors that have an impact on career success and on becoming members of "The Club," issues such as rainmaking, public visibility, assuming leadership roles. If you believe there isn't a glass ceiling, you might become complacent, and miss those very same factors. So we don't talk about a glass ceiling. We prefer to use another term, what we call "the comfort zone" — a much more subtle, perhaps unintentional, climate that keeps women as outsiders.

ADVOCATE: Does this "glass ceiling" concept relate to law firms, corporate law departments and government agencies as well?

DRISCOLL: To some extent, of course it does. However, we view the "glass ceiling," as being in many ways an irrelevant concept. Career paths today in all areas of professional activity are certainly not just vertical. Many professionals move laterally; move into other professional areas, such as out of law practice and into teaching or corporate management, etc. So long as young lawyers, especially young women lawyers, remain aware of the sometimes unintentional climate that may hold them back and keep their eyes on the many alternate career paths available today, the "glass ceiling" should not be a factor.

There are many "Clubs" with great emphasis on the plural. The club that is most important for any individual may not even be in that person's profession.

ADVOCATE: How do you see "The Club" in the environment of changing career paths?

DRISCOLL: "The Club" is extremely important. Remember, there is no one club or "The" club or "A" club. There are many "Clubs" with great emphasis on the plural. The club that is most important for any individual may not even be in that person's profession. We are now in, and I applaud it, an age of personal self-responsibility. The old in-house, lock-step, move along

until you hit your personal ceiling system is gone. Now you must decide what levers of power are important to you and whether they will do what you want them to do. This is where the "Club" concept becomes important. You must find the group that influences the areas important to you. Then your goal might be to access to those levers and become part of it.

ADVOCATE: Let's turn our attention now to the topic of "rainmaking." What is "rainmaking" and why is it important?

DRISCOLL: Rainmaking is bringing in business or revenues to the bottom line, and it is one of those gender-neutral yet very important issues that face women at senior levels whether in business or the professions. Can women generate sales, new clients and profits as well as men? The answer to that question then raises gender-based issues such as women's ability to break through the comfort zones of primarily male enclaves and develop relationships with business peers. Remember, good economic times cause all people—men and women, old hands and newcomers alike—to miss the importance of rainmaking. Bad or hard times bring it to the fore and many aren't ready for the issue. Those who don't generate revenue are particularly vulnerable when there is no work coming in from those who do.

Women should feel comfortable in pursuing "rain" in the same ways as men. For example, a woman who plays golf on Wednesday afternoon with potential clients ought not to feel that she has to "make up" the time on Saturday.

ADVOCATE: How should women approach the issue of rainmaking?

DRISCOLL: Women should look at rainmaking not just as getting credit for producing revenue, although that is central to the rainmaking issue, but also as a way of being respected or "obtaining currency" in the profession. Women should feel comfortable in pursuing "rain" in the same ways as men. For example, a woman who plays golf on Wednesday afternoon with potential clients ought not to feel that she has to "make up" the time on Saturday.

ADVOCATE: What are some of the other ways of gaining professional currency in addition to producing revenue?

DRISCOLL: What we call "binding" the client is very important. This means being so good at the work you do that you are seen as responsible for keeping the client with the firm. As a corporate in-house lawyer, it is also important to show management the economic advantages of the work you do. For example; if your analysis of a contract or your negotiation of a dispute resulted in real benefits to your company, be sure that your department, and you personally, get credit for it. All of this must be kept in mind while you build a client base and a base of contacts in a "Club" of your choice.

ADVOCATE: What did you find was among the most important factors in gaining membership in "The Club?"

DRISCOLL: One of the most important is what we call "personal currency." Women must be personally known by other members of "The Club," and generally must be well known in the community. Sometimes that is hard to achieve in the face of a biased or oblivious press, as we uncovered in our study of how women were covered on the business pages of newspapers.

What we call "binding" the client is very important. This means being so good at the work you do that you are seen as responsible for keeping the client with the firm.

ADVOCATE: Were there any surprises you found in writing the book?

DRISCOLL: Yes: golf! Neither my co-author nor I played golf, and it had not been a big issue in our career progress. But we heard so many stories from women in a variety of industries about the importance of golf, and the difficulty of breaking into the important foursomes, that we began to pay serious attention to it. We discovered it is a big issue, far more important than the "men only" clubs that received so much attention 10 or 15 years ago.

ADVOCATE: Can women be friends with men?

DRISCOLL: Yes, women told us over and over again that this was possible, and that women must make a special effort to make sure it happens. They have to support community activities in which their male peers are involved; they have to pro-actively invite them out to breakfast; they might have to learn golf. It is not the golf game itself that is important, but golf as a bonding and personal currency-producing kind of activity. But if women are ever going to hold equal membership in "The Club," they have to allow men to get to know them as individuals and talented businesswomen/professionals.

This does not, of course, imply that men and women are not now friends, because they are. Rather, there is now a heightened economic competition and a concern about friendship and business/professional intimacy. Women must understand the importance of establishing, and helping men establish with them, a personal relationship that will build personal and professional currency. This exposure then often leads to invitations to sit on corporate boards; or hold office in important civic and professional groups.

ADVOCATE: So you feel that these relationships exist now?

DRISCOLL: Absolutely. But they must increase. I feel that in many situations, women must take the lead. Many women are now recognizing the importance for their career of these relationships, and the personal, professional currency that comes from them. Women can help men overcome their concerns and reluctance. "The Club" is an important tool to accomplish this. Through "The Club," as we've defined it, women can project themselves professionally and work to establish these relationships.

ADVOCATE: Are you optimistic about the growth of these professional relationships?

DRISCOLL: Yes, very much so. For example, men and women are mixing at a much earlier age now. Co-educational colleges are the norm now and younger men and women are really much more comfortable with each other, having studied and lived together in dorms. This bodes well for a comfortable development in professional life.

ADVOCATE: To what did the women you interviewed attribute their success?

DRISCOLL: Many of them cited the importance of women's professional networking organizations, which have grown dramatically in the last 15 years. Now there are organizations for women in every profession, and from many fields, which serve as a source of business leads and sound advice.

ADVOCATE: Why have women's organizations been so effective?

DRISCOLL: We discovered that these organizations are safe places for women to try out their leadership skills before they then assume prominent positions in what we call mainstream organizations: the chambers of commerce, bar associations and community groups. They are also a very time-efficient way of gaining information, advice, support and in some cases, substantive skills, all of which help women advance in their own companies or careers.

ADVOCATE: In your book you talk about the "third stage" of the women's movement, what does that mean?

DRISCOLL: We call this stage one of partnership feminism, in which the goals are economic empowerment, with emphasis on improving the economic status of women and their families. What makes this stage different is that the avenues for change are economic ones, rather than legislation, lawsuits or protest marches. The women who will lead this stage are the female members of "The Club." They will be joined by many of their male peers who share the same objectives.

ADVOCATE: Where do you think women in the legal profession are now relative to the third stage?

DRISCOLL: Younger women lawyers are working along with men at all levels, especially entry levels, in the profession. They are assuming leadership positions in Bar Associations, on the bench and in effecting legislation. Women and their issues are no longer marginalized.

ADVOCATE: What's the harm if women don't gain membership in "The Club"? Why should we care?

DRISCOLL: We should all care because decisions are being made every day that affect our economic future. There is ample evidence that when we put women in decision-making positions they make a difference, beginning with the issues they decide are important, the facts they pay attention to, the resolutions they achieve, and the process they use to reach a decision. Women comprise over fifty percent of the population, and are increasingly important as wage earners for American families. They must be represented in the arenas in which decisions are made.

ADVOCATE: Do you have one or two stories from the book you can share with us.?

DRISCOLL: Two come to mind. The first illustrates the subtle challenges that women in senior positions face. One woman was an executive vice-president in a major national company, one of seven members of the management board, and the only woman. One Saturday, the other five men were invited to the Chairman's house to watch the NCAA basketball playoffs. As one of the senior vice-presidents walked in the living room, he said, "Hi, guys — where's Anne?" There was embarrassed silence, because of course, she was not invited. As she told the story to us the next week she made light of it at work, but inside, she was seething. Because, of course, such gatherings of "the team," the "top group," "the boys" is not about **basketball** at all: It is about being together, developing a personal relationship. The fact that they never even thought about her spoke volumes about their comfort zone, and the fact that she was outside it.

I would like to send the message to male colleagues: "Don't assume that your female associates don't want to attend these functions." Women do want to belong and participate. It's important for men and women to find common ground for social activities that develop personal and professional currency and bonds.

However, women supporting women is very much a reality. For example, there are many informal instances of "clubs" such as female senior partners, judges, executives and similarly situated women meeting informally to swap notes and provide a network of support.

The second story is one of a small satisfaction. A prominent investment company vice-president sued her firm after she discovered that men in her office were being paid hundreds of thousands of dollars to perform assignments that she had performed and received no compensation. As her case slowly moved through federal court, she received calls of support from a woman in a different industry whom she did not know but whose sex discrimination case was successful when it finally reached the court. Finally, after seven agonizing years,

the vice-president won her case. Not long after, she received a call from the other woman, who said, "You know, an old family friend and stockbroker has managed my investments for years, but he is associated with your old firm in my city. It's not his fault, but I can't in good conscience allow that firm to profit after what they did to you. I'm sending all my accounts to you to manage from now on." Now that's women helping other women be good rainmakers in a very tangible way!

ADVOCATE: Would you say a few words about women looking to other women as collaborators?

DRISCOLL: Once again, "The Club" becomes very important. You may have to look outside your own professional area for groups of like-minded women, or clubs, for support in any given circumstance. However, women supporting women is very much a reality. For example, there are many informal instances of "clubs" such as female senior partners, judges, executives and similarly situated women meeting informally to swap notes and provide a network of support.

I want to emphasize, though, that women must remain open to forging good, productive, professional relationships with men. I cited the example above of the NCAA game. These occasions for meeting and relating to men in bonding activities are important. In addition, "The Club" offers opportunities to forge relationships outside of the more traditional male-oriented bonding activities.

ADVOCATE: If you had one final piece of advice for women, what would it be?

DRISCOLL: Find the women's organizations in your community or profession, and join their activities. This will be one of the most important things you can do to improve your rainmaking skills, to solve harassment or comfort zone problems, to try out your leadership skills, to learn about job openings, to increase your own personal currency and public visibility. From there, look for opportunities to join, contribute and lead mainstream organizations you care about.

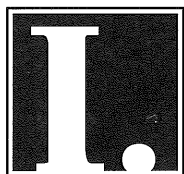
Economic success though is only one part of this. Leveraging your personal and professional skills and economic clout to make a real difference in personal, professional and public issues that you care about is another and important part. Women today are very much aware of the wider social issues and are using their professional status to advance them.

ADVOCATE: Attorney Driscoll, thank you very much.

AN EXAMINATION OF PUNITIVE DAMAGE AWARDS IN BREAST IMPLANT PRODUCTS LIABILITY CASES¹

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CHRISANN LEAL
SUFFOLK UNIVERSITY LAW SCHOOL, J.D., 1993



Introduction:

The words Dalkon Shield, Copper-Seven, DES, tampons, and now breast implants have become emblems of the systematic danger unleashed by product manufacturers on the women of this country. One to two million women are estimated to have undergone breast implant surgery between 1964 and 1992.² An estimated eighty percent of the breast implant surgeries were performed to augment healthy breasts.³ The other twenty percent were performed to correct congenital defects or as part of post-mastectomy reconstruction surgery.⁴

In recent years, an increasing number of product liability actions have been filed against the designers, manufacturers, and distributors of breast implants for injuries arising out of the use of defective implants.⁵ To date, there are an estimated 13,000 breast implant product cases pending in state and federal courts nationwide.⁶ The vast majority of the pending cases involve claims for punitive damages based on evidence that firms marketed breast implants with knowledge of design, manufacturing, and warning defects.⁷ Attorneys prosecuting breast implant product cases have indicated that the prospect of unlimited punitive liability has been a key factor in recent settlement negotiations with breast implant manufacturers.⁸ On February 14, 1994, three major manufacturers of breast implants, Dow Corning Corp., Bristol-Myers Squibb, and Baxter International, Inc., announced a tentative agreement to fund

a proposed \$4.75 billion global settlement.⁹ Several smaller breast implant manufacturers and component part suppliers also agreed to contribute \$300 million.¹⁰ Under the proposed settlement, each claimant will be placed into one of five schedules of silicone breast implant-related illnesses.¹¹ A specific dollar amount is assigned to each schedule of illness. For example, women with autoimmune diseases could receive anywhere from \$280,000 to \$2 million each, while others merely fearful of illness could receive compensation for medical examinations and implant removal.¹² The proposal allows women who are not satisfied with the settlement offer to opt out and pursue their own claims against breast implant companies.¹³

This article examines the first decade of breast implant product liability cases where punitive damages were awarded. Part II of this

report provides a description of the research methodology and sample design employed. Part III presents research findings from an empirical investigation of punitive damage awards in product liability cases involving silicone or saline breast implants. Part IV examines the evidentiary foundation for punitive damage awards in breast implant cases.

The words Dalkon Shield, Copper-Seven, DES, tampons, and now breast implants have become emblems of the systematic danger unleashed by product manufacturers on the women of this country.

A. PUNITIVE DAMAGES IN PRODUCTS LIABILITY

Punitive damages in products liability punish and deter manufacturers which knowingly market dangerously defective products or fail to take prompt corrective action in the face of a developing danger or risk. Every empirical study of the incidence of punitive damage awards has found these awards to be rare.¹⁴ Punitive damages are generally assessed only when a manufacturer's conduct goes well beyond the level of ordinary negligence.¹⁵ To receive punitive damages, a plaintiff in a products liability case must generally produce evidence of outrageous or aggravated misconduct.¹⁶ The evidentiary foundation for a punitive damage award is generally a showing that a company knew of the product's defective condition at the time it was sold or failed to recall the product after discovering a dangerous defect. Evidence probative of a company's knowledge may include "smoking gun" memoranda, letters, field tests, governmental reports, consumer complaints, lawsuits, and depositions by former employees. Grossly inadequate warnings can also support punitive damage instructions.¹⁷

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Punitive damages in products liability seek to punish and deter corporate behavior which arguably causes more harm to the public than many actions labelled as criminal.¹⁸ Even when such corporate behavior is defined as a crime, there is a low incidence of governmental prosecutions¹⁹ or the criminal penalties are too insignifi-

cant to effectively deter corporate misbehavior.²⁰ The documented cost-benefit analysis found in the Ford Pinto case²¹ and the "I don't care" mentality of a manufacturer which removed a necessary nutrient from infant formula²² is typical of the kind of corporate misconduct on the borderline between crime and tort that would go unpunished if not for the remedy of punitive damages.

B. PUNITIVE DAMAGES IN BREAST IMPLANT PRODUCTS CASES

Cutting corners on product development in a race to beat competitors to the market may be a source of punitive liability if the product proves to be dangerously defective. The first generation of punitive damage awards in breast implant products liability cases is based upon solid, documentary evidence that the breast implant industry acted in conscious, flagrant disregard of the safety and welfare of women in rushing their product onto the market. The first silicone gel-filled breast implant was manufactured by Dow Corning Corp. in 1963.²³ Prior to the early 1970s, Dow was the only maker of silicone breast implants. By the mid-1970s, other manufacturers began to introduce implants on a wide scale. Evidence in the recent breast implant litigation indicates that market dominance was the key reason why companies knowingly marketed poorly designed, inadequately tested breast implants and then failed to recall or warn consumers of the dangerously defective product.

The Food and Drug Administration was a slow starter and a slow finisher in uncovering corporate misconduct in breast implant product cases. "Smoking gun" evidence of corporate malfeasance was first uncovered and publicized by attorneys prosecuting breast implant cases rather than by government regulatory agencies.

Evidence shows that government agencies also have failed to protect women from death and serious bodily injury posed by breast implants with excessive preventable danger.²⁴ The Food and Drug Administration ignored warnings about the need to regulate breast implants for twelve years.²⁵ In addition, the agency permitted commercial distribution of breast implants until January 1992, even though internal documents dating back to 1991 indicated insufficient evidence of safety to keep the product on the market.²⁶

Punitive damage awards in breast implant litigation have the potential of becoming the most extensive use of civil punishment in American history. The first generation of decided breast implant cases has uncovered an industry-wide pattern of gross indifference to the thousands of women injured by breast implants. Government agencies have played no significant role in punishing and deterring breast implant product manufacturers which engaged in socially harmful activities. The Food and Drug Administration was a slow starter and a slow finisher in uncovering corporate miscon-

duct in breast implant product cases. "Smoking gun" evidence of corporate malfeasance was first uncovered and publicized by attorneys prosecuting breast implant cases rather than by government regulatory agencies.²⁷ In the absence of sufficient public regulation, punitive damages encourage plaintiffs to sue for safety, thus serving the public interest as "private attorneys general."²⁸ The use of punitive damages to vindicate the rights of women injured by breast implants and society in general is a proper role of the remedy.

II. RESEARCH METHODS AND DATA COLLECTION

This article examines the overall patterns of product liability litigation involving silicone or saline breast implants. The universe of case law is based upon all trial verdicts against designers, manufacturers, or distributors of finished breast implants or component parts, including silica, silicone, and polyurethane foam.²⁹ The goal was to develop a national data base of the first generation of decided silicone or saline breast implant product liability cases.

The information contained in the article was drawn from a search of all appellate state and federal decisions,³⁰ all verdicts reported to the Association of Trial Lawyers of America Exchange (ATLA Exchange) between January 1977 and March 1994³¹, trial verdict reporters available on the LEXIS system,³² and product litigation reporters. We also relied upon special purpose breast implant litigation reporters,³³ legislative hearings,³⁴ discovery documents,³⁵ and media reports.³⁶ Finally, we interviewed members of the Plaintiffs' Steering Committee in Multi-District Litigation 926³⁷ as well as plaintiff and defense attorneys. However, since there is no national trial verdict reporting system, there is no way of definitively knowing the universe of these cases. Our best estimate is that the sample depicted below constitutes the vast majority of breast implant product liability cases where punitive damages were awarded.

III. RESEARCH FINDINGS

We located a total of 17 product liability verdicts involving silicone or saline breast implants for the period between January 1970 and March 1994. Plaintiffs prevailed in 11 out of the 17 cases, for an overall success rate of 64.7 percent.³⁸ The success rate of plaintiffs in breast implant product liability cases is higher than the percentage of plaintiff victories reported in past studies of general products liability litigation.³⁹ The American Bar Foundation (ABF) found plaintiffs' success rate in general products liability cases to be only 39.2 percent.⁴⁰ The ABF study was of 967 verdicts decided in 47 counties between 1981 and 1985.⁴¹ The Rand Institute for Civil Justice examined civil verdicts rendered in two counties during the 1960s and 1970s and found a similarly low success rate among plaintiffs.⁴² The findings from these studies indicate that plaintiff attorneys have a significantly higher rate of success in obtaining plaintiff victories in breast implant cases than in general products liability.

Of all the breast implant products cases that have been decided, we found a high incidence of punitive damage verdicts.⁴³ Punitive damages were assessed against breast implant manufacturers in 63.6 percent (seven out of ten) of the cases in which plaintiffs pre-

vailed.⁴⁴ The percentage of punitive damage awards produced in the first generation of breast implant products cases is significantly greater than the percentage of punitive awards uncovered in prior studies of general products liability. The ABF researchers found that of the 967 products liability verdicts handed down in 47 counties between 1981 and 1985, only 3.5 percent of the sample (34 cases) included punitive damages.⁴⁵ The Rand study found that punitive damages were awarded in only one to three percent of the products cases decided in Cook County, Illinois and San Francisco, California during the quarter century 1965 to 1984.⁴⁶ The General Accounting Office (GAO) reached the same basic conclusion as the other studies. The GAO found that courts awarded punitive damages infrequently, in only 23 (7.5 percent) out of 305 products liability cases between 1983 and 1985.⁴⁷ Table One examines the rate of punitive damages awards in products liability.

TABLE ONE
EMPIRICAL STUDIES OF PUNITIVE VERDICTS IN PRODUCTS LIABILITY

STUDY	YEARS	% OF AWARDS	LOCATION
ABF	1981-85	3.5%	47 sites in Az., Ca., Ga., Ill., Kan., Mo., N.Y., Ore., Tex., & Wash. (State Cases)
Rand	1965-84	1%-3%	Cook County, Ill. and San Francisco, Ca. (Federal and State Cases)
GAO	1983-85	7.5%	Az., Mass., Mo., N.D., & S.C. (Federal and State Cases)
R & L	1970-Sept. 1993	63.6%	Published and Unpublished Federal and State Breast Implant Products Cases Nationwide

As Table One reveals, breast implant products cases resulted in the highest percentage of punitive awards. Of the seventeen breast implant product cases that have gone to verdict, seven punitive damage awards have been rendered. In contrast, of the thousands of MER/29 anticholesterol drug cases filed, there were only three punitive damages awards.⁴⁸ The thousands of Dalkon Shield cases yielded only eleven punitive awards.⁴⁹ If the first generation of decided breast implant cases is any indication of what is to come, then the breast implant industry may be facing punitive liability of unprecedented proportions. The threat of punitive damages claims undoubtedly helped even the playing field in the recent settlement negotiations.⁵⁰ The potential penalty, in terms of dollars and bad publicity, may have convinced manufacturers to settle.

TABLE TWO
PUNITIVE DAMAGES IN BREAST IMPLANT
PRODUCTS LITIGATION

STATE	YEAR	CD \$	PD \$	PD/CD \$ RATIO
Tex. ⁵¹	1983	\$1,128,000	\$10 Mill.	8.9 to 1
Cal. ⁵²	1984	\$211,000	\$1.5 Mill.	7.1 to 1
Cal. ⁵³	1986	\$28,500	\$75,000	2.6 to 1
Ala. ⁵⁴	1991	\$400,000	\$5 Mill.	16 to 1
Cal. ⁵⁵	1991	\$840,000	\$6.5 Mill.	7.7 to 1
Tex. ⁵⁶	1992	\$5 Mill.	\$25 Mill.	5 to 1
Tex. ⁵⁷	1994	\$12.9 Mill.	\$15 Mill.	1.2 to 1
Totals		\$20,507,500	\$63,075,000	3.1 to 1

Table Two provides a summary of decided breast implant products cases in which punitive damages were awarded.

As Table Two reveals, punitive damage awards in breast implant products cases range from \$75,000 to \$25 million.⁵⁸ The mean punitive award for the seven breast implant cases was \$9,010,714.⁵⁹ The median⁶⁰ punitive award in these cases was \$6,500,000, which is 10.4 times greater than the median punitive award in previously decided products liability cases in which punitive damages were awarded.⁶¹ As Table Two shows, there was no consistent pattern in the size of punitive damage awards in breast implant cases decided during the 1980s. Since 1991, however, punitive damage awards against breast implant manufacturers have steadily increased in size. We are not able, however, to predict patterns and changes in the frequency and size of punitive awards in future breast implant products cases because of our small sample size.

The mean compensatory award for the seven breast implant cases resulting in punitive damage awards was \$2,929,642. The median compensatory award in these cases was \$840,000, which is considerably greater than the \$500,100 median found in general products liability cases decided between 1965 and 1990.⁶²

As illustrated in Table Two, punitive damages were awarded in amounts greater than compensatory damages in all of the breast implant cases which resulted in punitive verdicts. Punitive damages were two or more times greater than compensatory damages in 86 percent of the breast implant cases and five or more times greater than compensatory damages in 71 percent of the cases. The ratio of punitive damages to compensatory damages in breast implant cases ranged from 1.2 to 1 - 16 to 1. The median ratio of punitives to compensatories in breast implant cases was 7.1 to 1. This is a much higher ratio than that reported in past empirical studies of general products liability. The median ratio of punitive damages to compensatory damages in general products liability cases handed down between 1965 and 1990 was 1.67 to 1.⁶³

Compensatory damages were less than punitive damages in all of the breast implant products cases studied. In contrast, compensatory damages were greater than punitive damages in 36 percent of the general products liability cases decided between 1965 and 1990.⁶⁴ One possible explanation for this is that in 81 percent of

the general products liability cases, there was some permanent disability and in 60 percent of the cases, the primary plaintiff was either totally disabled or killed.⁶⁵ In contrast, there were no deaths in the breast implant cases in which punitive damages were awarded.⁶⁶ In four of the breast implant cases, the plaintiffs were permanently and partially disabled. The other three plaintiffs who obtained punitive awards against breast implant manufacturers were only temporarily and partially disabled. Thus, the size of compensatory damage awards in breast implant cases was generally correlated with severity of the injury.

Six of the seven punitive damage verdicts against breast implant manufacturers were handed down in California or Texas, which were also punitive damages hotspots in general products liability cases.⁶⁷ Five of the seven punitive awards handed down against breast implant manufacturers were state court verdicts. Similarly, 74 percent of the punitive awards in general products liability cases were decided in state trial courts.⁶⁸

One of the breast implant cases in which punitive damages were awarded was reversed on appeal.⁶⁹ It has yet to be seen what will happen in the other breast implant cases where punitive damages were awarded.

IV. EVIDENTIARY FOUNDATION OF PUNITIVE DAMAGES IN BREAST IMPLANT PRODUCT LIABILITY LITIGATION

Five recurrent patterns of corporate misconduct constitute the evidentiary foundation for the vast majority of punitive damage awards in general products liability cases handed down in the period 1965-90: 1) fraudulent-type misconduct; 2) knowing violations of safety standards; 3) inadequate testing and manufacturing procedures; 4) failures to warn of known dangers before marketing; and 5) post-marketing failures to remedy known dangers.⁷⁰ The most solid cases for punitive damages involve several categories of corporate malfeasance.⁷¹ The breast implant cases thus far decided illustrate each of the recurrent patterns of corporate misconduct found to be the legitimate basis for civil punishment in past studies of products liability litigation. There is one exception. No firm has been charged with a knowing violation of a federal or state safety

standard. This is hardly surprising given the FDA's delay in regulating the breast implant industry.

Interestingly, the first punitive damages award uncovered in a breast implant case was in a case brought not by an injured woman, but a physician.⁷² The plaintiff in *Conlee* was a physician who had implanted 80 of McGhan's inflatable breast prostheses into patients, 48 of which failed. The physician replaced the implants without charging fees. The plaintiff sued McGhan for mental anguish, lost income, and other injuries suffered due to the defective design of the prostheses. The jury awarded \$10 million in punitive damages, \$1 million for mental anguish, and \$123,000 for economic loss.

Another early punitive damages award in a breast implant case was the California case of *Stern v. Dow Corning Corporation*.⁷³ The plaintiff underwent insertion of silicone breast implants following a bilateral subcutaneous mastectomy. The Dow breast implant at issue in that case was inserted in 1971. Within a year, the plaintiff began to experience arthralgia in her joints, cervical and auxiliary lymphadenopathy, granulomas, malaise and weight loss. An examination revealed that silicone had migrated to her lymph nodes. Two years later, the plaintiff developed cellular immune response to silicone, linked to the spontaneous rupture of the implants and leaking of the gel into her tissue.

The plaintiff's punitive damages claim against Dow Corning was based upon inadequate testing in light of its knowledge that migrating gel would cause a cellular immune response in humans. The plaintiff also contended that the firm knew that following rupture of the implant, leaking gel would migrate to distant sites. Fraud and misrepresentation of the safety of silicone gel implants in package inserts and product literature were also part of the plaintiff's punitive damages claim. She alleged:

that defendant Dow Corning, by virtue of its own testing knew that the gel would cause a cellular immune response in humans; that the defendant failed to sufficiently test silicone implants and silicone gel for safety and biocompatibility; that the defendant knew that implants could spontaneously rupture; that such ruptures could remain undetected; following a rupture or leak, silicone gel would migrate to distant sites, including regional lymph nodes. Plaintiff further contended...that all of this information was withheld from physicians...and that Dow Corning misrepresented the safety of implant and silicone gel in its package and product literature.⁷⁴

The jury award of \$211,000 in actual damages and \$1.5 million in punitive damages was predicated upon strict product liability theories of design, manufacturing, and warning defects. Punitive damages were also based upon fraud and breach of express and implied warranty and fraud.

A California appeals court upheld a punitive damages verdict against a successor corporation⁷⁵ in *Marks v. Minnesota Mining and Manufacturing Co.*⁷⁶ The plaintiff in that case received two inflatable breast implants in 1977. A year later, her left implant spontaneously deflated. She had a second operation in which the deflated left implant was replaced. One month later, the plaintiff's right implant ruptured. Her physician replaced it with an implant manufactured by another firm. The plaintiff had no subsequent problems with

the right replacement implant, but in 1981 her left implant deflated again.

The jury found in favor of the *Marks* plaintiff against three firms on strict products liability, breach of warranty, and negligence, assessing compensatory damages of \$25,850 and punitive damages of \$75,000 for scarring, temporary nerve loss and emotional stress suffered in the course of three breast implant surgeries. The appeals court held that the evidence supported the jury's conclusion that the firms acted with conscious disregard for the plaintiffs' safety. "Smoking guns" adduced at trial included testimony that McGhan knew as early as 1972 of the tendency of the implant's thin shell to crease inside a woman's body, causing leaks in the shell that led to deflation, and other problems. In the face of these problems, the firm neither altered the design nor warned doctors. In addition, the firm provided inaccurate information to the Food and Drug Administration as to the number of complaints it had received.

The plaintiff in *Toole v. McClintock*,⁷⁷ had two Heyer-Schulte silicone gel breast implants. Seven years later, a fibrous capsule of scar tissue formed around each implant. The plaintiff's surgeon performed a routine closed capsulotomy to treat this condition. Unknown to the doctor, both implants had ruptured during the procedure, causing silicone gel to leak into the plaintiff's breast tissue. When the plaintiff continued to experience problems, she consulted a second plastic surgeon who performed an open capsulotomy and discovered that the implants had ruptured. The plaintiff then underwent several operations to remove silicone granulomas from her breasts. She suffered excessive scarring, nerve damages, disfigurement, and emotional distress as a result of her defective implants.

The plaintiff sued Baxter Healthcare as successor to the Heyer-Schulte Corp., alleging that the implants were defectively designed, manufactured, and marketed. In addition, she contended that the defendant had failed to adequately warn of the risk of rupture during closed capsulotomies and of the serious consequences of a rupture. The jury awarded the plaintiff \$5 million in punitive damages⁷⁸ and \$350,000 in compensatory damages, as well as \$50,000 to her husband for loss of consortium. The basis of the punitive damages award was the company's failure to warn of known dangers. As the trial court explained:

The testimony of the former Heyer-Schulte vice-president, Seder, and of its former director of materials, Talcott, clearly indicates that the company had knowledge that the implants were likely to rupture when closed capsulotomies were performed...⁷⁹ Heyer-Schulte management knew that a certain procedure should not be performed because of the fragility of the product but Heyer-Schulte continued to ship the implants, month after month, without a warning that stated in terms as certain as its knowledge, that this procedure had a very high risk of causing rupture of the implant with resulting leakage of the silicone to other areas of the body.⁸⁰

On motion for a new trial, the court ordered a remittitur of \$100,000 in compensatory damages because of inadequate evidence of the plaintiff's increased risk of cancer from migrating silicone. The court also reduced punitive damages to \$3 million because the wrongdoing firm was no longer in existence and thus

the specific deterrent effect and punishment of a large punitive award could no longer be met. However, the court held that the \$3 million punitive award was justified on general deterrence grounds because other breast implant manufacturers would be sent a message by the punitive award. On appeal, the Court of Appeals for the Eleventh Circuit held that there was insufficient evidence to support an award of punitive damages, vacated the judgment, and remanded for a new trial.⁸¹

The Ninth Circuit recently held a hearing to review the propriety of a \$7.34 million award in *Hopkins v. Dow Corning Corp.*⁸² The plaintiff in that case developed mixed connective tissue disease as a result of two sets of Dow Corning breast implants that ruptured, causing silicone to migrate throughout her body. The plaintiff alleged strict product liability claims against Dow Corning based on design, manufacturing, and warning defects. Breach of express and implied warranties was also pleaded.⁸³ Hopkins further contended that:

Dow falsely and fraudulently represented to plaintiff, her physicians and other members of the general public, that the aforesaid product was safe for use in breast reconstruction...and made the aforesaid representations knowing them to be false and... with the intent to defraud and deceive plaintiff.⁸⁴

The jury awarded the plaintiff \$6.5 million in punitive damages and \$840,000 in actual damages. The jury found that Dow had marketed the implants with knowledge of design and manufacturing defects. Among the "smoking gun" documents produced at trial was a 1975 memo confirming a "high rate of rupture—several devices had ruptured as a surgeon was trying to put them in."⁸⁵ Another internal memo "noted that after the mammaries had been handled for awhile, the surface became oily; [indeed] some were bleeding on the velvet in the showcase."⁸⁶ As a result, salesmen were instructed to "be sure samples are clean and dry before customer dealing; wash with soap and water in nearest washroom, dry with hand towels."⁸⁷ There was also significant documentary evidence that Dow had fraudulently concealed clinical studies on the deleterious effect of silicone on the human immune system and made numerous affirmative misrepresentations of fact regarding the long term safety of its implants.

The imposition of punitive damages in breast implant litigation is emblematic of the well-established role of the remedy in punishing and deterring corporate misconduct on the borderline between crime and tort. Many of the large scale injuries and deaths in breast implant cases that punitive damages seek to punish and deter are not defined and will likely never be recognized as crimes.

The largest punitive award that has been assessed against a breast implant manufacturer to date was in the Texas case of *Johnson v. Bristol Myers Squibb Co.*⁸⁸ In 1976, the plaintiff in that case

received silicone gel implants to augment her breasts. The implants were manufactured by Medical Engineering Corp., which was later acquired by Bristol Myers Squibb. In 1989, the plaintiff began experiencing capsular contracture, which was treated by a closed capsulotomy. Within days, her breasts became red, painful, and swollen. Again, she underwent a closed capsulotomy, at which time it was discovered that the left implant had ruptured, causing silicone to leak into the plaintiff's body. Also, granulomas were found in her breast tissue, which necessitated a partial subcutaneous mastectomy. Two additional implants were inserted to reconstruct the breasts. The plaintiff later developed mixed connective tissue disease and an auto-immune response as a result of migrating silicone in her body.

There is little question that punitive damages is a sanction that gets the attention of the business community. For the past fifteen years, there has been a war on punitive damages in products liability.

The plaintiff in *Johnson* contended that the defendant defectively designed, manufactured, and marketed the implants. She also alleged negligence and violation of the Texas Deceptive Trade Practices Act. The defendant maintained that its product was not defective, that the plaintiff's plastic surgeon had caused the implant to rupture when he performed the closed capsulotomy, and that the plaintiff's smoking was the cause of her physical problems. The jury disagreed and found that the defendant's product was the cause of plaintiff's injuries and awarded her \$5 million in compensatory damages and \$25 million in punitive damages. The jury based its punitive damages finding on evidence that the defendant had aggressively marketed the device without adequate testing and with knowledge that its implants had a tendency to rupture and leak.⁸⁹

In the most recent breast implant product case, a Texas jury awarded three women \$12.9 million in actual damages for injuries ranging from nerve damage to autoimmune disease caused by defective implants.⁹⁰ McGhan Medical Corp., 3M Corp., and Inamed were also ordered to pay \$15 million in punitive damages based on the jury's finding that the three defendants had conspired to avoid liability.

None of the critics of punitive damages suggest that the remedy be replaced by jail sentences for corporate executives or by heightened civil enforcement.

V. CONCLUSION

The imposition of punitive damages in breast implant litigation is emblematic of the well-established role of the remedy in punishing and deterring corporate misconduct on the borderline between crime and tort.⁹¹ Many of the large scale injuries and

deaths in breast implant cases that punitive damages seek to punish and deter are not defined and will likely never be recognized as crimes. Mass torts committed in executive suites, such as the breast implant disaster, have caused more social harm than many crimes in the streets. Nonetheless, criminal justice and regulatory agencies⁹² have played no significant role in punishing and deterring breast implant products manufacturers which acted in conscious disregard of the rights of women in rushing their product onto the market and then not taking remedial steps in recalling and redesigning the devices. Dean Richard Stewart of Columbia University Law School has noted that private remedies protect the right of the public when the government fails.⁹³ This is the appropriate role of the remedy of punitive damages in breast implant products liability cases.

There is little question that punitive damages is a sanction that gets the attention of the business community. For the past fifteen years, there has been a war on punitive damages in products liability. The business community,⁹⁴ insurance industry,⁹⁵ the judiciary,⁹⁶ former Vice President Dan Quayle,⁹⁷ and many in the legal academy⁹⁸ have called for radical cutbacks on the availability of punitive damages in products liability. None of the critics of punitive damages suggest that the remedy be replaced by jail sentences for corporate executives or by heightened civil enforcement.

The first generation of punitive damage awards in breast implant products liability cases is based upon solid, documentary evidence that the breast implant industry placed profits ahead of the public interest.

The tort reformers seem concerned with only the protection of those few producers that trade safety for profits. The first generation of punitive damage awards in breast implant products liability cases is based upon solid, documentary evidence that the breast implant industry placed profits ahead of the public interest. For medical devices such as breast implants, it is crucial that manufacturers take every available step to test these devices before placing them on the market. Corporations must not be allowed to externalize the costs of safety by allowing consumers to be hurt.

When companies abuse their fiduciary duty to consumers, as in the breast implant cases, punitive damages are imposed to punish and deter corporate malfeasance on behalf of individual plaintiffs and the larger society.

Corporations have a monopoly of knowledge of known or developing dangers. Companies in the breast implant industry were aware of the medical hazards of breast implants for many years and suppressed their knowledge. When companies abuse their fiduciary duty to consumers, as in the breast implant cases, punitive damages are imposed to punish and deter corporate malfeasance on behalf of individual plaintiffs and the larger society.⁹⁹ In the breast implant litigation, the remedy of punitive damages serves the laudatory social function of punishment, deterrence of specific manufacturers and distributors, and general deterrence of those who would trade safety for profits. This function is consistent with the settled jurisprudence of this country.¹⁰⁰

REFERENCES

¹ This article is based on an earlier research report published in the *Journal of the Massachusetts Academy of Trial Attorneys*. The authors are interested in hearing from attorneys who have tried or are preparing to try a product liability or medical malpractice case involving silicone or saline breast implants or silicone breast injections. Professor Rustad can be reached at Suffolk University Law School, 41 Temple Street, Boston, MA. 02114. TEL.: 617-573-8190. FAX: 573-8143

² There has been no systematic data gathering on the number of women undergoing breast implant surgeries. The Food and Drug Administration's (FDA's) best estimate is that somewhere between one and two million women have been surgically fitted with breast implants since they were introduced to the market in the early 1960s. Staff of Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Government Operations, 102d Cong., 2d Sess., Report on the FDA's Regulation of Silicone Breast Implants (Comm. Print 1992)[hereinafter Staff of Human Resources and Intergovernmental Relations Subcomm., Report on the FDA's Regulation of Silicone Breast Implants].

³ *Id.*

⁴ *Id.*

⁵ The first generation of decided breast implant products cases has involved much of the breast implant industry: Dow, Dow Corning Wright, Hoyer-Schulte/Baxter Healthcare, Mentor, Cox Uphoff, Cooper, Surgitek/Medical Engineering, Bristol-Myers Squibb Co., and Bioplasty. Denise M. Dunleavy, *Theories of Liability in Breast Implant Litigation*, Chapter One in David B. Baum and & Martin Blake, *Preparing a Breast Implant Case for Trial*, Prentice Hall Law & Business (1993) at p. 4. Manufacturers of component parts, silica, silicone, and polyurethane foam have also been named as defendants. The primary manufacturers of silica are Cabbot and Cab-O-Sil; manufacturers of silicone are General Electric (to 1976) and Dow; manufacturers of polyurethane foam are Scotfoam and Foamex. *Id.* Salespersons are also potentially liable as product liability defendants. *Id.*

⁶ *Implant Makers to Fund Settlement*, New Jersey Law Journal, Feb. 21, 1994, at 8.

⁷ In December 1993, Judge Sam Pointer of the Northern District of Alabama, who was appointed to oversee the Silicone Gel Breast Implant Multi-District Litigation Panel, ruled that Dow Corning's parent companies, Dow Chemical Co. and Corning, Inc., are not liable in the silicone breast implant cases currently pending against Dow Corning Corp. *Dow Off Hook*, Nat'l Law Journal, Dec. 20, 1993, at 6.

⁸ On September 9, 1993, Judge Sam Pointer approved a \$28.5 million settlement agreement between Mentor Corp. and a class of 175,000 women. *Mentor Corp. Settles Breast Implant Suit*, Nat'l Law Journal, Sept. 27, 1993, at 14.

⁹ *Major Makers of Implants Announce \$4 Billion Settlement*, Liability Week, Feb. 22, 1994, available in LEXIS, Nexis library.

¹⁰ *Id.* Negotiations are continuing with McGhan Corp., 3M Corp., and General Electric.

¹¹ *Dow Corning Sets Aside \$640 Million For Implant Cases*, Nat'l Law Journal, Nov. 22, 1993, available in LEXIS, Nexis library.

¹² *Silicone Settlement*, Connecticut Law Tribune, Feb. 21, 1994, available in LEXIS, Nexis library. Many plaintiff attorneys have indicated their dissatisfaction with the proposed settlement agreement. Attorney Gail Armstrong of the National Plaintiffs Breast Implant Coalition said the group would file objections to the settlement on the grounds that it is underfunded. She has been quoted as saying "Everyone wins except the women. The lawyers, the experts, doctors, the companies, everybody gets a slice of the pie. Women get the leftovers." *Major Makers of Implants Announce \$4 Billion Settlement*, Liability Week, Feb. 22, 1994, available in LEXIS, Nexis library. William Levinson, a plaintiff's attorney in New Jersey, has described the settlement as "a Trojan horse. It looks really attractive and seductive, and in fact it's extremely dangerous and unreliable." *Implant Settlement Seen as a Bait and Switch*, Liability Week, Jan. 24, 1994, available in LEXIS, Nexis library.

Other attorneys, though dissatisfied with the dollar amount of the proposed settlement, note that the settlement also has good points. For example, the settlement waives the statute of limitations on implant injury cases and provides funding for women who received implants from companies that have since gone bankrupt. *Silicone Settlement*, Connecticut Law Tribune, Feb. 21, 1994, available in LEXIS, Nexis library.

REFERENCES

- ¹³ *Id.*
- ¹⁴ Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 36-40 (1992) [hereinafter Rustad, *In Defense of Punitive Damages*] (uncovering only 355 punitive awards nationwide during the quarter century 1965-90); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1 (1990) [hereinafter Daniels & Martin, *Myth and Reality*] (uncovering 34 punitive awards in 47 sites in Az., Ca., Ga., Ill., Kan., Mo., N.Y., Ore., Tex., & Wash.); United States Gen. Acct. Office, Report to the Chairman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, Comm. on Energy and Commerce, House of Representatives; Product Liability, Verdicts and Case Resolution in Five States, GAO/HRD-89-99, at 2 (Sept. 1989) [hereinafter GAO Product Liability] (finding 23 punitive awards in products cases in Az., Mass., Mo., N.D., & S.C. for 1983-85); Mark A. Peterson et al., *Punitive Damages: Preliminary Findings* (1987) [hereinafter Peterson et al., *Preliminary Findings*]; William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, 10 Reg. 33 (Sept/Oct. 1986) [hereinafter Landes & Posner *New Light on Punitive Damages*].
- ¹⁵ The fact that punitive damages are very rarely awarded and not generally assessed for ordinary negligence is hardly surprising. As Professor Richard A. Epstein has observed, "[i]n all jurisdictions allegations of negligence have been regarded as wholly insufficient to support punitive damages. Rather, proof of some conscious wrongdoing by the defendant has been required. Richard A. Epstein, *Cases and Materials on Torts*, 799 (5th ed. 1990).
- ¹⁶ Scholars rarely agree as to the level of culpability which amounts to "wanton" or "flagrant misconduct," but agree that corporate misconduct must far exceed ordinary negligence. The leading torts treatise states: Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation of outrage, such as spite or "malice", or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton...mere negligence is not enough.
- W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, §2 at 9-10 (5th ed. 1984). Further, the Restatement (Second) of Torts provides: Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause, and the wealth of the defendant. Restatement (Second) of Torts, §908 (2) (1977).
- ¹⁷ Mulligan v. Lederle Laboratories, 786 F.2d 859, 864-66 (8th Cir. 1986) and Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 146 (3rd. Cir. 1973) (companies violated government standards and failed to warn consumers of side-effects); Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038, 1060-64, *cert denied*, 468 U.S. 965 (1984) (post-sale duty to warn consumers of side-effects of drugs).
- ¹⁸ Rustad, *In Defense of Punitive Damages*, *supra* note 14, at 85.
- ¹⁹ The MER/29 litigation was the only products liability case during the quarter century 1965-90 where several corporate executives were indicted. They were, however, allowed to plead *nolo contendere* and escaped with a small fine paid by the company. *Id.* at 75.
- ²⁰ For example, the maximum civil and criminal penalties that could have been assessed against Ford Motor Company under federal law for violation of automobile standards was \$1,000 per vehicle up to a maximum of \$800,000 for any related series of offenses. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 389 (Ct. App. 1981) (citing 15 U.S.C. §1397-98).
- ²¹ Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981).
- ²² Duddleston and Sheridan v. Syntex Labs., Inc., No. 80-L-57726 (Cir. Ct. Ill. Feb. 28, 1985) and Pickren v. Syntex Labs., Inc., No. 83-303 (Cir. Ct. Fla. 1987). The defendant in these cases removed sodium chloride, an essential nutrient for brain development, from infant formula in order to save \$14,000 a year. The manufacturer of the formula never employed a nutritionist or other scientist to assess whether this absence of salt would impede the babies' development. Thousands of infants suffered learning disabilities as a result of using the infant formula. The juries in these cases were appalled by the company's affirmative defense that it removed the salt to prevent infants from getting high blood pressure.
- ²³ *Is the FDA Protecting Patients From the Dangers of Silicone Breast Implants: Hearing Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1990) [hereinafter *Is the FDA Protecting Patients From the Dangers of Silicone Breast Implants*].
- ²⁴ Government regulation of breast implants or any medical device was almost nonexistent prior to the enactment of the 1976 Medical Device Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et. seq. The Amendments required the Food and Drug Administration to classify all medical devices into one of three categories of risk and to regulate the devices accordingly.
- ²⁵ See Staff of Human Resources and Intergovernmental Relations Subcomm., Report on the FDA's Regulation of Silicone Breast Implants, *supra* note 2, at 13. In January 1982, the FDA recommended classifying breast implants as a Class III medical device. 47 Fed. Reg. 2810, 2820 (1982). At the time the proposed rule was published, the FDA was aware of most of the medical hazards associated with breast implants. Staff of Human Resources and Intergovernmental Relations Subcomm., Report on the FDA's Regulation of Silicone Breast Implants, *supra* note 2, at 13. Among the risks the FDA was aware of were: capsular contracture, implant failure, microleakage, migration of silicone, calcification of fibrous capsule, and the possibility of immune disorders and cancer. See 47 Fed. Reg. 2810 (1982). Despite this knowledge, the agency did virtually nothing to regulate the breast implant industry until 1988. At that time, the final rule classifying silicone and saline breast implants as a "high risk" Class III medical device was published and firms were required to submit proof of the safety and efficacy of the product. 53 Fed. Reg. 23856, 23874 (1988).
- ²⁶ Staff of Human Resources and Intergovernmental Relations Subcomm., Report on the FDA's Regulation of Silicone Breast Implants, *supra* note 2, at 41. In January 1992, FDA Commissioner David Kessler called for a moratorium on the sale of silicone breast implants. Although the moratorium was lifted in April 1992, only those women participating in controlled clinical studies are able to receive breast implants.
- ²⁷ The asbestos conspiracy and the Dalkon Shield scandal were also uncovered and publicized largely by attorneys pursuing punitive damages rather than by government regulatory agencies. M. Rustad, *In Defense of Punitive Damages in Products Liability*, *supra* note 14, at 74.
- ²⁸ The California Court of Appeals, in Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981), endorsed this social function of punitive damages: In the traditional noncommercial intentional tort, compensatory damages alone may serve as an effective deterrent against future wrongful conduct but income commercial-related torts, the manufacturer may find it more profitable to treat compensatory damages as part of the cost of doing business rather than to remedy the defect...Governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products...[Punitive damages] provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and [are] not otherwise recoverable. *Id.* at 382.
- ²⁹ We excluded cases against medical providers arising out of the use of defective breast implants.
- ³⁰ The authors spent over 100 hours searching the following LEXIS libraries: ABA, ALR, BNA, GENMED, HEALTH, MEGA, MEDMAL, MSTORT, NEXIS, and PRLIAB. These searches were augmented with WESTLAW system searches of the Product Liab. and Health Ser. data bases.
- ³¹ The search was for the entire ATLA Exchange data base for entries on "breast implants."
- ³² Searches were conducted of the following LEXIS, Verdict files: Association of Trial Lawyers of America; Shephards/McGraw-Hill, Inc.; Jury Verdict Research, Inc.; Northern California Verdicts; O'Brien's Evaluator, Verdictum Juris, Tri-Services; Confidential Report for Attorneys; Metro Verdicts Monthly; Florida Jury Verdict Reporter; Georgia Trial Reporter; Massachusetts, Connecticut and Rhode Island Verdict Reporter; Michigan Trial Reporter; and Ohio Trial Reporter.
- ³³ We examined Mealey's Litigation Reports: Breast Implants and the Multi-District Breast Implant Litigation Reporter.
- ³⁴ On December 18, 1990, the Human Resources and Intergovernmental Relations Subcommittee of the House Committee on Government Operations conducted a hearing on the Food and Drug Administrations' (FDA's) regulation of silicone breast implants. *Is the FDA Protecting Patients From the Dangers of Silicone Breast Implants*, *supra* note 23. On December 31, 1992, the subcommittee released a staff report on its three year investigation of the FDA's regulation of silicone breast implants. Staff of Human Resources and Intergovernmental Relations Subcomm., Report on the FDA's Regulation of Silicone Breast Implants, *supra* note 2.
- ³⁵ We had access to the complete record for several breast implant cases.
- ³⁶ We searched the NEXIS-OMNI data base as well as Westlaw's Newspaper data base for all references on breast implant litigation.
- ³⁷ U.S. District Judge Sam Pointer appointed the Plaintiffs' Steering Committee (PSC) in mid-1992. The primary role of the PSC is to assist in pretrial discovery and direct preparation of the litigation for trial. Medical-Legal Aspects of Breast Implants, vol. 1, no.5, Leader Publications (Apr. 1993) at 7.
- ³⁸ Evidence indicates that juries have tended to be more sympathetic to plaintiffs who received breast implants for reconstruction rather than for augmentation purposes. Eleven of the seventeen decided cases were brought by breast augmentation plaintiffs. Of these, only six (55%) of the cases resulted in plaintiff victories. In contrast, plaintiff verdicts were rendered in four out of five (80%) of the cases filed by women who had breast reconstruction surgery. Factors such as marital status and occupation also appear to have played a role in whether plaintiffs prevailed. For example, in McCartney v. Dow Corning Corp., a Colorado jury deliberated less than two hours before returning a defense verdict. The plaintiff's attorney contends that Dow's case was tried on "character assassination, not facts." *Colorado Jury Decides for Dow in Breast Implant Case*, Liability Week, June 14, 1993, available in LEXIS, Nexis library. At the close of the case, two jurors told reporters that they were offended by the fact that McCartney had worked as a topless dancer, had an abortion, and had placed a child up for adoption. *Id.*
- ³⁹ In the absence of a national reporting system, the success rate cannot be definitely ascertained. Estimates are based on the best available data. The methodology is consistent with past empirical studies in relying extensively upon verdict reporters in making estimates.

REFERENCES

- ⁴⁰ Daniels & Martin, *Myth and Reality*, *supra* note 14, at 38, tbl. v.
- ⁴¹ *Id.*
- ⁴² See Mark A. Peterson & George Priest, *The Civil Jury: Trends in Trial and Verdicts*, Cook County, Illinois, 1960-1979, at 36-57 (1982)[hereinafter Peterson & Priest, *The Civil Jury*].
- ⁴³ Punitive damages are not awarded in Massachusetts, except in cases of wrongful death.
- ⁴⁴ There are no reported medical malpractice cases involving silicone or saline breast implants in which punitive damages were awarded. We found two medical care cases where punitive damages were assessed against physicians who unlawfully injected raw silicone into patients' breasts. *Nelson v. Gaunt*, 178 Cal. Rptr. 167 (Ct. App. 1981) and *Short v. Downs*, 573 P.2d 754 (Colo. App. 1975). In *Nelson* and *Short*, the plaintiffs developed lumps throughout their bodies and other serious side-effects from direct silicone injections. The silicone used in the treatment was marked "not for human use" and was unapproved for use in augmentation.
- ⁴⁵ Daniels & Martin, *Myth and Reality in Punitive Damages*, *supra* note 14, at 28.
- ⁴⁶ Mark A. Peterson, *Punitive Damages: Preliminary Empirical Findings at 18* (1985)[hereinafter Peterson, *Preliminary Empirical Findings*].
- ⁴⁷ GAO Product Liability, *supra* note 14, at 29.
- ⁴⁸ Rustad, *In Defense of Punitive Damages*, *supra* note 14, at 76.
- ⁴⁹ *Id.*
- ⁵⁰ For example, in *Baleno v. Baleno v. Jacuzzi Research, Inc.*, 461 N.Y.S.2d 659 (N.Y. App. Div. 1983), a plaintiff suffered permanent brain damage when a Jacuzzi unit plugged into a defectively wired outlet delivered an electrical shock. A New York appeals court permitted the plaintiff to amend the complaint to include a request for punitive damages based upon "evidence concerning design modifications and safety tests." *Id.* at 660. There is no further mention of this case in any verdict reporters. It can be surmised that faced with the possibility of a punitive award, Jacuzzi Research settled the case. In *Daugherty v. Firestone*, 85 F.R.D. 693 (N.D. Ga. 1980), a plaintiff brought an action seeking compensatory and punitive damages from a tire manufacturer as a result of an exploding tire. The defendant moved the court to strike the portions of the complaint relating to fraud and punitive damages. The court found no reason to bar jury consideration of punitive damages and found that the complaint sufficiently set forth circumstances of the fraud. After defendant's motion to strike was denied, the case settled. The plaintiff's counsel speculated that "Firestone had so many problems with that model tire that the cumulative threat of punitive damages and adverse publicity in all of them helped to induce settlement." See Rustad, *In Defense of Punitive Damages*, *supra* note 14, at 33n. 168.
- ⁵¹ *Conlee v. McGhan Medical Corp.* No. 81-4062-F (Dist. Ct. Tex. 1983).
- ⁵² *Stern v. Dow Corning Corp.*, No. C 83-2348 (N.D. Cal. Nov. 15, 1984).
- ⁵³ *Marks v. Minnesota Mining and Mfg'g Co.*, 232 Cal. Rptr. 594 (Ct. App. 1986).
- ⁵⁴ *Toole v. McClintock*, 778 F.Supp. 1543 (M.D. Ala. 1991), rev'd, No. 91-7997 (11th Cir. Sept. 1993).
- ⁵⁵ *Hopkins v. Dow Corning Corp.*, No. 92-16132 (9th Cir. argued Feb. 1993).
- ⁵⁶ *Johnson v. Medical Engineering Corp.*, No. 91-021770 (Dist. Ct. Tex. Dec. 1992).
- ⁵⁷ This case was brought by three women against McGhan Medical Corp., 3M Corp., and Inamed.
- ⁵⁸ We identified two medical malpractice cases in which punitive damages were assessed against physicians who unlawfully injected silicone into patients' breasts. *Nelson v. Gaunt*, 178 Cal. Rptr. 167 (Ct. App. 1981) and *Short v. Downs*, 573 P.2d 754 (Colo App. 1975). The plaintiff in *Nelson* was awarded \$1.5 million in punitive damages and \$450,000 in actual damages. The plaintiff in *Short* received \$5,000 in punitives and \$8,500 in compensatories.
- ⁵⁹ A mean value is the average. The mean is computed by adding up all of the amounts awarded and dividing by the number of awards. *Black's Law Dictionary* 980 (6th ed. 1990).
- ⁶⁰ The median is defined as the "typical" value in a distribution, above and below which lie an equal number of values. See generally Hubert M. Blalock, Jr., *Social Statistics* 55 (2d ed. 1972). Because a few extremely large awards can inflate the mean, the median value is generally more accurate.
- ⁶¹ Rustad, *In Defense of Punitive Damages*, *supra* note 14, at 46, tbl. 6 (finding that the median size of punitive damage verdicts in nonasbestos products liability cases during 1965-90 was \$625,000).
- ⁶² *Id.*
- ⁶³ *Id.* at 50.
- ⁶⁴ *Id.* at 51.
- ⁶⁵ Michael Rustad, *Demystifying Punitive Damages In Products Liability Cases: A Survey Of A Quarter Of A Century Of Trial Verdicts* (1991) at 34 [hereinafter Rustad, *Demystifying Punitive Damages*].
- ⁶⁶ We did locate one breast implant case in which the plaintiff died as the result of defective breast implants, though no punitive damages were awarded. *Livshits v. Natural Y Surgical Specialties*, Lexis No. 17245 (U.S. Dist. Ct., N.Y., 1991). The plaintiff in that case was awarded \$4,450,000 in actual damages against a manufacturer based upon breach of warranty. The plaintiff alleged that her breast implants failed because the product did not meet the express product specifications of the defendant manufacturer. The jury found that the breast implant failure was a substantial factor in causing the plaintiff to undergo a mastectomy, in accelerating breast cancer, and causing ovarian and uterine cancer.
- ⁶⁷ Rustad, *Demystifying Punitive Damages*, *supra* note 65, at 25-6.
- ⁶⁸ *Id.*
- ⁶⁹ *Toole v. McClintock*, 778 F. Supp. 1543 (M.D. Ala. 1991), rev'd, No. 91-7997 (11th Cir. Sept. 1993). The plaintiff in that case was awarded \$5 million in punitive damages and \$400,000 actual damages. The court ordered a remittitur of \$100,000 in compensatory damages because of inadequate evidence and also reduced punitive damages to \$3 million because the wrongdoing firm was no longer in existence. In September 1993, the U.S. Court of Appeals for the Eleventh Circuit held that a one percent incidence of implant rupture did not constitute a likely event that would justify an award of punitive damages.
- ⁷⁰ These profiles of developing or known dangers were first introduced by Professor David G. Owen. *Punitive Damages Awards in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1329 (1976). The central issue in three out of every four punitive damage awards in Rustad's empirical study of punitive damages in products liability was the failure to warn of known dangers. The first three categories of corporate malfeasance or nonfeasance were much rarer. Rustad, *In Defense of Punitive Damages*, *supra* note 14, at 66.
- ⁷¹ For example, the MER/29 anticholesterol drug cases involved multiple wrongs. See e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) and *Toole v. Richardson-Merrell, Inc.*, 60 Cal. Rptr. 398 (Ct. App. 1967)(inadequate testing, failure to warn of known dangers, failure to recall the drug in the face of known dangers, and violation of FDA reporting requirements were at issue).
- ⁷² *Conlee v. McGhan Medical Corp.*, No. 81-4062-F (Dist. Ct. Tex. 1983).
- ⁷³ No. C 83-2348 (N.D. Cal. Nov. 15, 1984).
- ⁷⁴ *Id.*
- ⁷⁵ It is settled law that successor corporations may be assessed punitive damages for the excessive preventable dangers unleashed by their predecessor. In *Medical Reports Division v. Brown*, No. 8A-224 (Dist. Ct. Fla., September 19, 1985), an appeals court ruled that the trial court abused its discretion in holding as a matter of law that the defendant was not liable for punitive damages because it was a successor corporation.
- ⁷⁶ 232 Cal. Rptr. 594 (Ct. App. 1987).
- ⁷⁷ 778 F. Supp. 1543 (M.D. Ala. 1991), rev'd, No. 91-7997 (11th Cir. Sept. 1993).
- ⁷⁸ The \$5 million punitive damages was not subject to Alabama's punitive damages cap of \$250,000, since there was evidence that the defendant had engaged in a pattern of intentional wrongful conduct.
- ⁷⁹ *Id.* at 1550.
- ⁸⁰ *Id.* at 1551.
- ⁸¹ *Toole v. McClintock*, No. 91-7997 (11th Cir. Sept. 1993).
- ⁸² *Hopkins v. Dow-Corning Corp.* No. 92-16132 (9th Cir. 1993).
- ⁸³ See §2-313 ("Express Warranties") and §2-314 ("Implied Warranties") of the Uniform Commercial Code.
- ⁸⁴ Brief for Plaintiff-Appellee at 5, *Hopkins v. Dow Corning Corp.*, No. 92-16132 (9th Cir. Feb. 1, 1993)(counsel for plaintiff-appellee were Dan C. Bolton, Laurence H. Tribe, Kenneth J. Chesebro, and Jonathon S. Massey).
- ⁸⁵ *Id.* at 7.
- ⁸⁶ *Id.* at 6.
- ⁸⁷ *Id.*
- ⁸⁸ No. 91-021770 (Tex. Dec. 23, 1992).
- ⁸⁹ Summary of Trial Testimony of Defendant at 26, *Johnson v. Bristol-Myers Squibb*, No. 91-021770 (Tex. Dec. 1992).
- ⁹⁰ *Implants-Award*, AP Newswire, March 3, 1994, available in LEXIS, Nexis library. At the time this article was written, the verdict had not yet been published in a verdict reporter.

REFERENCES

⁹¹ William Prosser stated that punitive damages are controversial because "in one rather anomalous respect...the ideas underlying the criminal law had invaded the field of torts." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, §2, at 9 (5th ed. 1984). The term "crim-tort" acknowledges the blending of public (criminal) and private (tort) functions fulfilled by punitive damages. The remedy fills the gap between the private and public branches of the legal system.

⁹² See generally *Is the FDA Protecting Patients From the Dangers of Silicone Breast Implants: supra* note 23 (testimony confirming that the FDA regulatory actions were ineffective in assuring the safety and effectiveness of breast implants).

⁹³ Stewart, *The Role of the Courts in Risk Management*, 14th Annual Arlie House Convention Sponsored by the ABA Standing Committee on Environmental Law (Warrenton, Va. May 18, 1985).

⁹⁴ See generally Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 *Science*, 1395,1396 (1989).

⁹⁵ See generally Alfred G. Haggerty, *Insurer Plans Two-Pronged Attack to Slow Punitive Damage Roller Coaster*, 88 *National Underwriter*, 4 (1984) and Ruth Gastel, *Update*, Insurance Information Institute, May 1990.

⁹⁶ Justice Sandra Day O'Connor's dissenting opinion in *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (O'Connor dissenting), which was joined by Justice Stevens, observed that punitive damages in products liability cases are "skyrocketing." *Id.* at 282-85. Moreover, Justice O'Connor argued that these awards were having a chilling effect on the marketing of new products because of potential exposure to large punitive damage awards. *Id.* In *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct 1032 (1991), the Court held that a punitive damage award in an Alabama bad faith insurance case did not violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 1033. Justice O'Connor dissented, observing that Alabama's common-law scheme for awarding punitive damages provides a jury with "such skeletal guidance that it invites—even requires—arbitrary results." *Id.* at 1067.

⁹⁷ Dan Quayle, *Civil Justice Reform*, 41 *Am. U. L. Rev.* 559 (1992) (contending that punitive damages place U.S. firms at a competitive disadvantage).

⁹⁸ See e.g., Donald Eliot, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 *Ala. L. Rev.* 1053 (1989) and George Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *Yale L.J.* 1521, 1589 (1987).

⁹⁹ In the words of Professor Dan Dobbs, the principal justification for punitive damages "is that it will operate to punish and set an example that will deter similar conduct in the future." Dan B. Dobbs, *Handbook on the Law of Remedies: Damages-Equity-Restitution*, §3.9, at 205 (1973).

¹⁰⁰ See Restatement (Second) of Torts, §908 (1977) and Jane Mallor and Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 *Hastings L. J.* 639 (1980).

EULOGY FOR PROFESSOR ALEXANDER J. CELLA

GIVEN BY

CHIEF JUSTICE JOHN E. FENTON, JR.

AT ST. BRIGID'S CHURCH

LEXINGTON, MASSACHUSETTS

DECEMBER 6, 1993



On Thursday last, the second day of December, death as it must once for every person, came to our dear friend and colleague, Professor Alexander J. Cella, in the sixty-fourth year of his earthly life.

With great honor, and at the request of his beloved wife, Jo, I come to speak of this good and gentle man and this very special friend.

Like each of you, I have a heavy heart today, for like each of you I admired, respected and cared for him deeply. But as we tearfully mourn Al's death, let us somehow, if we can, rejoice and use this time to celebrate a happy, productive and triumphant life.

The long days and lonely nights of his final illness are ended. Our common vigil of deep concern and prayerful hope is over. His valiant march toward the stark reality of death is now concluded. This day, though unwelcome, was not totally unexpected by any of us. And in his final sacrifice Al wore his crown of thorns without complaint, and with the dignity and courage he characteristically demonstrated throughout his splendid life.

But now all of the pain, all of the suffering borne courageously by him, but so inadequately by us, are gone. Our dear and special friend, Al, is now at peace forever. And all of us left behind are diminished.

Al held his place and when he fell, it was as though a lordly cedar green with boughs went down and left a lonesome place against the sky.

As we grow older and the shadows lengthen, and the trees which seemed so thick above our heads grow thin and show the sky beyond, and those in the front ranks fall away, bringing us face to face with the eternal verities, we suddenly begin to realize that among the truly precious things in life, far dearer than money or all the objects of ambition here, is the love of those whom we love and the friendships of those whose friendship we revere.

Al was a real friend, a very special and true friend to me and to so many of us. In our lifetime if we can count ten people who are our true friends, we are very fortunate. These are the special people, the ones who really matter. We don't have to see them every day to be close. They are first to greet you on success and last to leave you in distress. You never have to take a count. Al was one of those to me and to so many others here today.

The accidentals of his life are quickly stated. A native son of Medford, he earned an undergraduate degree with honors at Harvard and a graduate degree in Public Administration also at Harvard. And then to acquire an appropriate balance to his education he earned his law degree at Suffolk University Law School as an evening student. He served with distinction for two terms in the Massachusetts House of Representatives as a productive member of several important committees. His legislative and public policy talents were quickly recognized by three successive Speakers of the House, Speakers Thompson, Davoren and Quinn whom he served as legislative assistant and legal counsel. He then was appointed legal counsel to the president of the Massachusetts senate, Maurice Donahue, whom he

served wisely and well. Al accepted the appellation "politician" proudly, without wincing. He believed in President Truman's phrase that "a politician is a person who understands government, and it takes a politician to run a government." A statesman, according to President Truman, "is a politician who has been dead for ten or fifteen years."

Al was also a valued confidant and advisor to many who served in government at all levels, including governors of this great commonwealth. His extraordinary public service was frequently commended by citations and proclamations.

Admitted to the Massachusetts Bar in 1962, he quickly and with passionate zeal represented clients in all walks of life. He was no ordinary lawyer. The sharpness of his mind, the depth of his knowledge of the law and his unimpeachable integrity deservedly earned for him the respect and esteem of his brethren at the Bar and members of the judiciary. Labor unions, teachers, the Congress of Racial Equality, those whose civil rights were violated found their way to Al's law office. They received from him eloquent advocacy as he appeared in the courts and administrative agencies of the commonwealth.

His passionate crusade on behalf of Sacco and Vanzetti, whom he firmly believed were unjustly convicted and executed in 1927, eventually resulted in a proclamation by Governor Dukakis deploring the unfairness of their trial.

There was never a sick soul too wounded to engage his compassion. There was never a signal of human distress which he did not view as a personal summons. There was never an affront to human dignity from which he ever fled because the timid cried "danger." And the number of times his legal and personal intervention turned despair into hope, failure into success and defeat into victory we may truly never know. But the multitudes who were the grateful beneficiaries of his service and generosity know and they, like us, will never forget him. To all he proclaimed as did Shakespeare in *The Merchant of Venice*, "my purse, my person, my extremest means lie all unlocked to your occasions."

I would submit that the most enjoyable years of Al's professional life began in 1971 when he joined the faculty of Suffolk University Law School where he remained a tenured professor of law until the day of his death. As a distinguished alumnus of the law school, who understood its roots and its mission, he rapidly earned a well deserved reputation as a brilliant scholar and classroom professor. His classes in Administrative Law and Legislation soon became oversubscribed as law students rushed to enroll in his courses to benefit from the depth of his brilliant mind and practical experience. The classroom was his laboratory as he engaged and expanded the fertile minds of the young men and women who were his students. He loved his students and they, in turn, returned that affection in abundance. His love for the classroom was never more evident than when between the ordeal of his periods of hospitalization, he valiantly returned to lecture. He had the marvelous ability to make the complex principles of law relatively simple and easy to understand. He had little tolerance for shoddy work and instilled in his students the objective of excellence in all that they did. As faculty advisor to the *Law Review* he provided wise counsel to its editorial board and nurtured it to the preeminent position of scholarship it now enjoys. He took great pride in the professional development of his former students and followed their careers with interest and concern. In April of this year more than 600 of his former students, friends and colleagues paid him honor and respect at a testimonial dinner at which a scholarship was established in his name. His scholarly publications provided a rich resource to the judiciary, the Bar and the public.

Al was a gentle and amiable colleague to members of the law faculty. His resonant voice will be missed at faculty meetings where he voiced his opinions with clarity and conviction, often advocating the cause of students who needed some special consideration or a second chance. He truly understood the meaning of the old proverb that "those who are carried away by their own self-importance seldom have far to walk back." In the vernacular of sports, Al was a franchise player — your go to guy — the one you'd want to take the last shot with the game on the line.

This brave and humble man in every storm of life was oak and rock. He was the friend of all heroic souls. He climbed the heights of his profession but never lost the common touch. He sided with the weak and disadvantaged and with a willing hand gave alms. With a loyal heart and with purest hands he faithfully discharged all private and public trusts.

In an age in which celebrity is so widely pursued, he chose to practice the anonymous art of helping others. In an age of rampant self-assertion, he was self-effacing. In a period of widespread domestic discord, he was a faithful and loving husband to Jo who cared for him so devotedly in health and in sickness until the final moment. Their marriage produced two wonderful children, Laura and Lisa, whom Al dearly loved and of whom he, with Jo, were so proud. His most recent treasures were his sons-in-law, John and Lawrence, and his grandchild, Andrew, all of whom he adored and whose affection brought such happiness to his life.

But now some might say it's all over — Al is gone — but not really. For as John Boyle O'Reilly wrote so eloquently:

"Those we love never truly die, for death the pure life saves, and love can reach from heaven to earth, and nobler lessons teach than those by mortals read. Well blessed is he who has a dear one dead, a friend he has whose face will never change, a clear communion that will not grow strange, the anchor of a love is death."

Yes, the curtain is now drawn. Al's eyes are closed in perfect peace. All that we now hold firmly are the happy memories which will enrich us and endure forever. Being totally reconciled with those he loved on earth, he now enjoys the ultimate reconciliation with his God. It is his crowning glory that he has kindled in all of our hearts an inextinguishable fire to live up to his high standards and lofty expectations.

And so today as we mourn, I take the liberty on behalf of all assembled here and particularly the entire Suffolk University community and all of my colleagues in the Massachusetts Judiciary to offer our prayerful condolences to Jo and to all members of the Cella family.

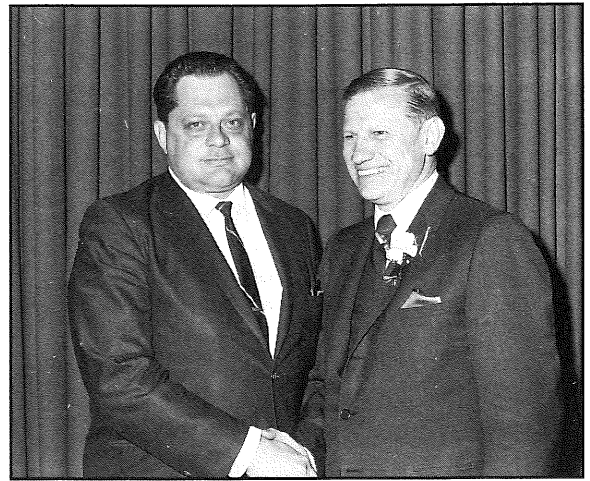
As we depart, we collectively say to our special friend Al, thank you for a life well spent and we ask you to remember that "Somewhere back of the sunset where loveliness never dies you now live in a land of glory with the blue and the gold of the skies and we who have known and loved you whose passing has brought sad tears will cherish your memory always to brighten the drifting years." For though on earth thy place a void must be beloved Al thou art not dead to me. May you rest in eternal peace.



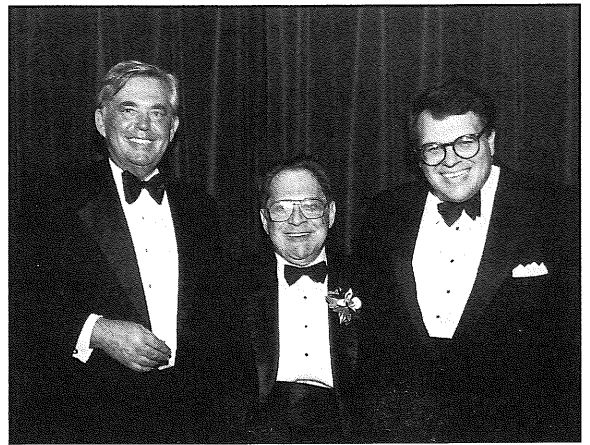




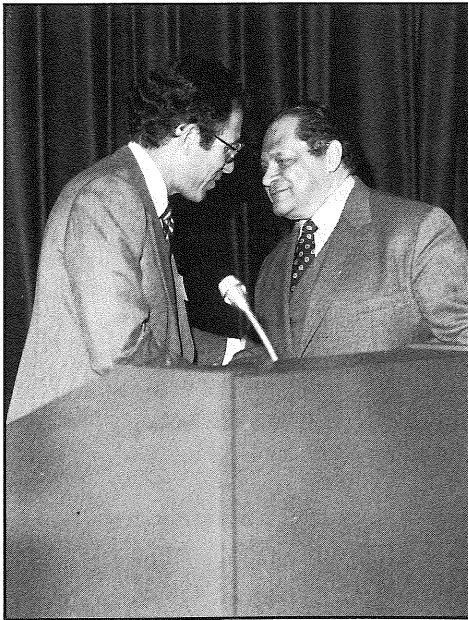
At a Suffolk Law graduation with Professors Clifford E. Elias (left) and Brian T. Callahan.



Al with Governor John A. Volpe.



Al with President David J. Sargent (left) and Suffolk trustee Richard J. Leon.



Al, with late Suffolk President Daniel H. Perlman.



REMARKS OF PROFESSOR CLIFFORD E. ELIAS
AT HIS FIRST CLASS AT SUFFOLK LAW SCHOOL FOLLOWING THE DEATH OF
PROFESSOR ALEXANDER J. CELLA WHO DIED ON DECEMBER 2, 1993

I regret the necessity of the class cancellation on Monday.

I regret even more the reason for the cancellation: the loss of my colleague and close friend, Professor Alexander J. Cella. We knew him affectionately as "Al."

I further regret that you will now be unable to enroll in one of his courses, for he was a giant on the law faculty.

The obituary in the *Boston Globe* captured the essence of Al Cella's professional life and it was a wonderful tribute to a unique man.

He was a politician, having served two terms in the House of Representatives.

He was a scholar, having authored many *Law Review* articles and the seminal text on Administrative Law in Massachusetts.

He was a public servant, having served on numerous committees on all levels of the community, legal and otherwise.

He was a stellar teacher; indeed, he was, in my view, at the crest, with 3 or 4 others, of superior teachers on our law faculty, and one with a huge heart.

The one aspect of Al Cella that the *Globe* obituary couldn't possibly have captured was his humanity. There wasn't anyone he wouldn't help. As an example, each summer, a faculty meeting is held toward the end of July, at which the fate of academically deficient students is decided. And at these meetings, Al Cella was a champion of every one of them. He believed, as I do, that everyone deserves a second chance.

And he loved to argue and fight. It was rare when he and I were on opposite sides of an issue. But that occurred at one faculty meeting some years ago. And I thought I could hold my own, but not, I'm afraid, against Al. On this occasion, he was unrelenting and tough...especially tough. As we left the meeting, he and I met in the lobby of the law school and, as good friends and fellow lawyers should, we talked and laughed about the meeting. I said to him, "Al, it's a good thing I am a friend of yours. What would you have done to an enemy." He responded, "I would have been easier on an enemy." On occasions like this, we think about our loss, but we also should think of the good times, the humorous times, as well.

When Al was in the state legislature, he was about 32 and decided it was about time for him to obtain a driver's license, which he never bothered to test for. As with me, Al had a lot of trouble with mechanical things. But he studied and passed the written test and then went out with a registry official for his driving test. He didn't mention that he was a state representative, for he wanted to do this on the merits. The test didn't go well and toward the end, he was told to "pull over here." Al did and hit a telephone pole. Needless to say, he flunked the test; he never went back for his license. He managed to get along for the rest of his life without one, but only with the help of a lot of people, especially his beloved wife, Jo.

He also knew something about passing glory, and how easily people forget. He was the chairman who ran the Massachusetts Humphrey-Muskie campaign for the presidency in 1968. He must have been with Humphrey 25 or 30 times during the campaign, in Boston and in Washington. That ticket won in Massachusetts by 700,000 or 800,000 votes, the largest plurality ever in the state. About nine months later, Humphrey was coming to Massachusetts for some function. Al was asked to greet him at the airport, along with other people in the Democratic party. When Al approached him, Humphrey couldn't remember who Al was. Al loved telling that story and he always closed by saying, "sic transit gloria mundi."

He symbolized the heart beat of this law school. The school and all of us on the law faculty are diminished by his loss.

He has been gone only a few days and, already, we miss him terribly. I ask that you remember this gentle and good man.

PROFESSOR ALEXANDER CELLA
BY MALCOLM M. DONAHUE, PROFESSOR OF LAW

Student, friend and colleague of mine over a thirty year period, Professor Alexander Cella was a man of many accomplishments. Having served in the Massachusetts Legislature and possessing a deep interest in government, he quite naturally gravitated toward such courses as Administrative Law and Legislation, both of which he taught for many years to a large number of inspired students.

His three volume treatise on *Massachusetts Administrative Law and Practice* is and will continue to be a landmark in the field of State Administrative Law. Remarkable for its breadth and depth of coverage, this treatise is a reflection of the importance and significance of state administrative decision making in the daily lives of the citizens of the commonwealth.

One of Al's unpublicized talents was that of "ghost-writing" for individuals in a variety of fields—education, public office, public administration, law and others. He had a natural flair for the use of language and facile style of writing. In short, he was a wordsmith of unsurpassed ability.

Personally, I am deeply indebted to Professor Cella for his initial sponsorship of the *Donahue Lectures*, which have been successfully carried on by the *Law Review* for many years. Since the lectures are named for a fairly close relative of mine, I have a deep and abiding interest in them, and I will be eternally grateful to Al for his thoughtfulness.

Professor Cella will long be remembered as an outstanding teacher, scholar, and writer, and most importantly as a warm and genuine friend.

ALEXANDER J. CELLA
BY JOHN C. DELISO

Al was my friend. Al was the energetic, the active, the professor, the political leader, the author, the doer, who always had a kind word for his friends, students, and acquaintances. When Al was ready to give a person his ultimate compliment, he would simply label that person "a great American." Having known Al the last 24 years of his life and having heard this compliment bestowed on certain people from time to time, I began to recognize that amongst Al's many qualities he was a patriot. Al understood what it took to be a great American and lived his life accordingly. He was a great American.

PROFESSOR ALEXANDER CELLA, A RECOLLECTION
BY JOHN R. SHERMAN, PROFESSOR OF LAW

- *"and soonest our best men with thee do go"* -

—John Donne

Al Cella holds a special place in the recollection of my beginnings at Suffolk Law School. When I joined the faculty in 1974, Al was director of the newly established summer school and had been instrumental in its founding. Although the rules, then and now, restricted teaching in the summer school to full time, resident faculty, Al offered me an invitation to teach in that first summer school session. He said he felt that the differential between my starting salary and what I had been earning worked a hardship and that teaching in the summer session would restore the balance. Salary and such matters were not Al's responsibility but he took the issue of hardship to heart and acted in a way that would benefit a colleague. This concern for his colleagues, expressed in this instance toward a new member of the faculty, was a hallmark of Al. He established a sense of collegiality for me that has grown through my years on the faculty. Al set the tone for my beginnings here.

As my early days became my early months, and so on into middle years and more, I found continuous pleasure, personal enjoyment and professional strength in Al's company. He was a man of wide ranging interests. In addition to our shared interest in teaching and matters of academe, we shared as well an interest in politics and government. Al was an expert on dictatorship, especially of the Italian fascist variety. We had several memorable discussions of Mussolini and his impact on Italian society. Al also had a particular passion for the celebrated case of "*Sacco and Vanzetti*." I was able to provide him with a modest footnote in that my late uncle was one of the police officers directly involved in their arrest. On these and other topics, Al shared his learning and wisdom with me. He enlightened me immensely and I would like to think that I was, in his eyes, a worthy companion.

In the last few years, Al labored under the increasing burden of failing health. Never did it weaken his spirit. His interest in the law review, of which he was the long time advisor, and the Catholic Lawyers' Guild, never waned. He advised the students continuously in the former and defended with remarkable vigor and learning the interests of the latter. Through it all, especially in the early evening when he was finishing a class and I was heading off to one, he offered a cheerful word, a smile and his trademark, "how ya doin', pal?"

These things of my recollection are gone now. I don't expect to see again their like. I shall not see again Al's like. He was quintessential: teacher, scholar, friend and Suffolk man. He left us far, far too soon.

ALEXANDER J. CELLA
BY CHARLES E. ROUNDS, JR.

Al Cella was at home in the trenches, as well as in the ivory tower. I know this from first-hand experience because he was involved in closing the book on The Franklin Trust. It was a matter which turned out as well to be the final chapter in Al's long and distinguished real world legal career. As one can imagine, my recollections of it all are bittersweet. While they are still fresh in my mind I would like to share them with you. For that, however, some background on the *Franklin* case is necessary.

Benjamin Franklin died April 17, 1790. Two trusts were established under his will, one sited in Pennsylvania and the other sited in Massachusetts. We were involved with the latter which, at its inception, was funded with (pounds sterling) 1,000. The city of Boston was its trustee, although my client, The Franklin Foundation, pursuant to legislation passed earlier in this century, came to be agent for the trustee with exclusive authority over the trust's administration. Under the terms of the trust as set forth in Franklin's will, the income was to accumulate for two hundred years. At the end of the first one hundred years, however, three quarters of the principal was to be spun off for "public works" which "may be judged of most utility" to the inhabitants of Boston. At the end of the second one hundred year period, June 30, 1991, Boston was to have a right of disposition over one-fourth of the corpus, and the commonwealth over three-fourths.

When the first one hundred years were up, the time came for the fund managers to spin off the portion specified under the terms of the will, about \$400,000 worth of property. There were all kinds of suggestions as to what should be done with it, for example that it should be applied to reduce the city's debt, that it should go towards the construction of a public bath house, that it should be used to build a recreation hall in the public garden. Then in 1904 Andrew Carnegie got involved at the instigation of Dr. Henry S. Pritchett, president of MIT. Mr. Carnegie offered to match the spun off amount on two conditions: (1) that it, together with his proposed matching gift, be used for "the establishment of a school for the industrial training of men and women along the lines of The Mechanics' and Tradesmen's School of New York and the Cooper Union" and (2) that Boston furnish the land upon which the school would be built.

In October of 1904, Carnegie wrote to the fund managers:

I am trustee of both the schools mentioned [The Mechanics' and Tradesmen's School of New York and Cooper Union] and do not hesitate to say that to the best of my knowledge no money has produced more valuable results. I think it is from the class who not only spend laborious days but who also spend laborious nights fitting themselves for hard work, that the most valuable citizens are to come. We are here helping only those who show an intense desire, and strong determination, to help themselves,—the only class worth helping, the only class that it is possible to help to any great extent.

There was initially some resistance to Carnegie's condition that Boston supply the land. Thus in December of 1904, just before Christmas, Mr. Carnegie dashed off the following note to Mayor Patrick Collins:

Now then,—my idea certainly was that the city of Boston should co-operate with The Franklin Fund and with my contribution. Frankly, I should not like to give aid to a city that would remain apart and do nothing. If the growing city of Boston, with such a mayor, cannot give a site for The Franklin School, it must fall somewhat from the pinnacle I have set it upon. We expect great things from Boston...you may have noticed that I rarely give anything for nothing...think it all over, and I believe that you will see that on no consideration must Boston be left out.

In July of 1905, Mayor Collins wrote to Mr. Carnegie who was vacationing in Scotland:

On behalf of the managers of The Franklin Fund, I have the honor to report that all the conditions governing your proposed contribution have been complied with...

Shortly thereafter, the city treasurer received, as had been promised, Mr. Carnegie's matching gift in the form of \$408,000 in U.S. steel bonds and a personal check for \$398.48. And so The Franklin Institute of Boston was born. The next mayor, John F. Fitzgerald, as a token of his support for the institute placed \$1000 in trust for its benefit. As fate would have it, many years later the institute would be Al Cella's final client.

Since 1908 when the institute's doors first opened, it has graduated more than 80,000 students. Its current curriculum offers courses in such varied areas as Construction and Highway Surveying, Automotive Technology, Applied Industrial Photography, Medical Electronics Engineering Technology, Computer Engineering Technology, and Energy Systems. In the 1960's, the institute introduced a one-year preparatory program in Algebra, Geometry, Trigonometry, Physics, Chemistry, and English for high school students planning to enter the institute's two-year degree program. Under the auspices of its school of continuing and community education, the institute has introduced programs intended to open up the technical professions to inner-city youth and recent immigrants. These programs include its career exploratory program for Boston high school students, its Franklin Academy Program for at-risk Boston high school students, its Engineering Preparatory Program for Women, and its English as a Second Language (ESL) program.

But back to The Franklin Trust and the events that lead up to Al's involvement with it. In 1958, the Massachusetts Legislature passed and the governor approved a statute that purported to exercise the commonwealth's right of disposition in favor of the institute. There was a comparable section covering the city's portion that had the approval of the then mayor and city council. In 1959 the institute filed with the court an equity petition seeking an acceleration of the trust's termination date. The court denied the request but in so doing left the fate of the statute up in the air. See *The Franklin Institute v. Attorney General*, 340 Mass. 197 (1961). Thus, thirty or so years later, on the eve of the expiration of the two hundred year period, The Franklin Foundation filed a

complaint for instructions with the supreme judicial court seeking a determination as to whether the statute would be operative were it not repealed before June 30, 1991.

As the attorney general declined to defend the statute and his division of public charities declined to assign someone to present arguments favorable to the institute (itself a public charitable trust), Al Cella was asked to step into the breach. It fell to Al to formulate arguments supporting the proposition that the unrepealed statute remained in full force and effect up to the time of the trust's termination, notwithstanding the failure of the equity petition; and that the institute, pursuant to the terms of Franklin's will, was thus the lawful successor to the beneficial interest in the trust property. As the core issue had more to do with the law of legislation than the law of trusts, it was natural that the institute would turn to Al.

He plunged into the case with his characteristic enthusiasm and gusto. But for all his exuberance, let no one be misled: Al was always and to the very end a careful and meticulous practitioner. Out of his home, in the interludes between innumerable major invasive surgical procedures, with his health rapidly deteriorating, and in the face of great pain, Al marshaled and organized the facts and refined his legal arguments, in his own hand, without benefit of word processor and fax. I was impressed. In good health he must have been truly formidable as I am sure a number of you know from first-hand experience. As time went on, what little strength he could muster between ever-lengthening stays in the hospital he would expend in the cause of the institute. The institute, like Suffolk his pride and joy, was Al's kind of place. This Harvard-educated son of an Italian-born plumber was convinced that the institute was carrying on the spirit and ideals of the self-made printer from Pennsylvania. On balance the challenge of the case, though enormously taxing for him physically, most likely prolonged his life. It kept his mind working.

In the early morning of May 24, 1993 I arrived at his house in Lexington to pick up the final draft of his brief and take it to Bateman and Slade. Immediately thereafter Josephine whisked him off to the hospital for yet another invasive procedure. He was weak and dehydrated and had remained at home well beyond the point when he should have. When the briefs were printed I walked them over to Ellison 22 at the Mass General. As always he talked enthusiastically about the case and optimistically about his prospects for getting back on his feet...and as usual he wanted to know all the latest goings on at Suffolk. It was the last time I ever saw him.

Thereafter we twice talked ever so briefly on the phone but by then it was clear even to him that he was laboring, that he would never argue the case. My wife, Alicia, a nurse at the hospital, would look in on him from time to time. She made sure he knew that he had not been forgotten by his friends at Suffolk and Franklin. David Turner, Brookline's Town Counsel, was brought up to replace Al in the line. Dave prepared the reply brief and made the oral argument. On the day of Al's funeral, the court rendered its decision. It held that the statute was inoperative and that the city and the commonwealth must now exercise their respective rights of disposition over the corpus which was worth about \$5,000,000. *Franklin Foundation v. Attorney General* 416 Mass 483 (1993). The institute had lost once and for all its 30 year battle in the courts.

Immediately the governor, the legislature, and a number of people from all walks of life too numerous to mention rallied to the cause of the institute. A bill was filed providing for an exercise of the commonwealth's right of disposition in favor of the institute. Al, the irrepressible warrior that he was, would have had a great time. There were forces that had been operating in the shadows against the institute that now had to be dealt with politically. They were referred to in a December 27, 1993 *Globe* editorial as "key philanthropists" who "would rather see the funds disbursed to several community foundations, possibly for advancing creative concepts in vocational training or school-to work transition." To this day, none of us associated with the foundation or the institute knows for sure exactly who these people were. The *Globe*, however, joined Senate President Bulger in supporting the cause of the institute. In January of 1994 the institute won the war when Governor Weld signed into law legislation impressing a further trust on the fund for the benefit of the institute. This was the second time the people had spoken. This time it stuck. And so it was that at the closing of the twentieth century The Franklin Institute came to be a living legacy not only of Franklin, Carnegie, Collins and Fitzgerald but also a living legacy of our friend, Al Cella.

BY ASSOCIATE DEAN CHARLES KINDREGAN

When I was asked to co-author a set of volumes in the *Massachusetts Practice Series* I spent time in the library looking at various legal and practice treatises with the idea of determining what would be the best model to follow. My search brought me very close to home when I examined the books on administrative law written by my friend and colleague Professor Alexander J. Cella. The statement which my co-author, Monroe Inker, and myself made in Vol. I of the *Massachusetts Practice Series* states the simple truth. We described professor Cella's writing as a "model of professional and profound legal writing which we tried to emulate in our...Professor Cella has established a standard of excellence which all authors of legal treatises should aspire to achieve." It was Professor Cella's standard of scholarship combined with a practical explanation of the applicable law which we worked to emulate in our books. It was a very high standard, as anyone who is acquainted with professor Cella's work will understand. We will all miss him greatly.

BY JOHN J. NOLAN
ALEXANDER J. CELLA

There seems to be somewhat of a geometric progression in the loss of contemporaries as one's own life accumulates yesterdays. Acceptance of the inevitability of death and the relief of coping mechanisms seem likewise to progress in stride. But from time to time, the autonomous response to the death of a friend falls out of the emerging pattern. The death of Alexander J. Cella was, for me, such an event.

I will not recite the obituary details of his life. In this short space I would rather focus on the character of the man, for he personified an amalgam of exemplary virtues. He proceeded from a basic admixture of curiosity, sensitivity, intelligence, honesty, perseverance and intensity. Schooled at Harvard and its Graduate School of Public Administration and seasoned by years in the state legislature as an elected member and as advisor consecutively to both the President of the Senate and Speaker of the House and then as a practicing lawyer, Al came to the faculty and promptly assumed an outspoken leadership role. Worldly-wise and characteristically imbued with confidence in the merit of his views, his advocacy was ever forcefully persuasive. I cannot say I always agreed with him, but when I did not I knew it was time to carefully rethink my position.

Al truly loved Suffolk students and he was the unfailing champion of their interests and well-being. He was a kind and considerate confidant to all who prudently sought his sage and freely-given advice. His enviable dedication to the task of authoring the three volumes of text that are the definitive word on Massachusetts Administrative Law spread over more than a decade. But it was in the last decade of his life that he demonstrated how indomitable the human spirit can be.

Beset with a rare and increasingly debilitating illness that eventually took him from our midst, there was no complaint, no loss of interest in life, no change in his sociability, or even in his occasional irascibility when the cause was right, despite recurring surgeries and continuing bouts of exacerbation. Maybe he sat rather than stood through his later lectures, but the lectures were given. When I last saw him at the Phillips House of Massachusetts General Hospital a couple of weeks before he died, they had just removed the intravenouses and he was homeward bound after a three months stay. He was in good spirits and we chatted about the law school, the course we both taught and he expressed every intention of returning to teaching when his leave was over. Whether he knew his end was at hand I do not know, but how typical of him in either alternative.

There are a few people in the lives of all of us, who intentionally or otherwise, exert a significant influence that lingers and affects who we are and what we do. Al Cella served that role in more lives than most of us ever will. Knowing him enriched my life and made me a better person. I can give no higher tribute.

GERRY McDONOUGH, J.D., 1991
PROFESSOR CELLA AND THEOPHILUS PARSONS

One of the things that I loved about Professor Cella was his ability to make historical and political figures come alive for us, his students. One of the most interesting of all those figures was Theophilus Parsons. I know that Professor Cella himself was always quite fond of Parsons.

In 1778, while only a twenty-seven year old lawyer from Newburyport, Theophilus Parsons published his analysis of the first proposed constitution for the commonwealth of Massachusetts. This analysis, which has come to be known as "*The Essex Result*," not only detailed the specific defects of the initial constitutional draft that the voters eventually rejected, but also proposed several principles upon which Parsons felt the constitution should have been based. Included among Parsons' principles were proposals that have become the hallmarks of our democratic framework of government — a bill of rights, a bicameral legislature, and the separation of powers.

The Essex Result was a major influence on John Adams' draft of what eventually became the Massachusetts Constitution, which itself was a significant influence on our federal constitution. According to Cella, Parsons deserves much of the credit for our basic rights and freedoms, and our structure of government which has served us so well over two-hundred years. Parsons and his role in our history, however, remained largely unknown and unappreciated until Professor Cella started to give Parsons the credit to which he was entitled.

I can still see Professor Cella's face light up as he starts to talk about Theophilus Parsons and his many overlooked accomplishments.

When I got to know Professor Cella better, I began to appreciate that there may have been a personal as well as an intellectual relationship between Cella and Parsons. There are, it is clear to me now, more than a few similarities between these two great men.

Both Parsons and Cella served only briefly in the State Legislature, but each man continued to have a significant influence on our state's political development even while he was out of the political spotlight. Just as Theophilus Parsons worked behind the scenes at the Massachusetts convention that ratified the United States Constitution, so too did Al Cella work behind the scenes at

the state house for several years. Both men used their influence not for self-aggrandizement but for their high ideals of what government should be about. Just as Parsons' thirst for justice is evident from his efforts on behalf of a bill of rights, so too does Al Cella's hunger for justice shine through from his work for the pardon of Sacco and Vanzetti.

Both men were also powerful intellectuals. Partly due to Cella's efforts, Parsons' influence on our state and federal governments is now widely recognized by scholars. Cella, the author of the heralded treatise on *Administrative Law and Practice in Massachusetts*, and the *Suffolk University Law Review* author most cited by the United States Supreme Court, is truly Parsons' intellectual peer.

We certainly miss Professor Cella, our teacher, counselor, and friend. Like all great teachers, Al Cella's influence, like that of Theophilus Parsons, survives long after he has departed.

BY PROFESSOR BERNARD ORTWEIN

I first met Al Cella when I was a student editor of the *Suffolk University Law School Law Review* and he had just been appointed to the faculty. I'll never forget how warm, caring and generally sincere he was. (actually there aren't enough adjectives to truly describe this man's qualities.) He treated everyone he knew with the same respect and regard whether they were the governor (many of whom he knew) or a custodian or law student. He made my job so much easier and ultimately he was a major influence over my decision to join the Suffolk Law faculty. He became a dear friend and colleague whom I will sincerely miss and whom I often remember with abounding fondness.

A REFLECTION OF PROFESSOR ALEXANDER J. CELLA ROBERT F. FITZPATRICK, JR.

One of professor Cella's pet projects, and an on going subject of study for him, was the speech or debate clause of the United States Constitution. The speech or debate clause, also known as the Doctrine of Legislative Privilege, generally shields legislators from prosecution for speech or debate of a legislative nature. As Professor Cella served as a representative of the people in the Massachusetts legislature, his interest in the subject always seemed quite fitting. Professor Cella wrote two articles on the origins, history, and purpose of the clause, see 8 *Suffolk Univ. l. rev.* 1019 (1974) and 2 *Suffolk Univ. l. rev.* 1 (1968), and testified before congress on the subject. His work has been cited by the United States Supreme Court.

In his course on legislation at Suffolk Law School, Professor Cella lectured at length on the speech or debate clause. As those who enrolled in the course may recall, he introduced the subject with an historical recounting of formative events presaging the constitutional form. The lesson started with the Norman Conquest in 1066 and quickly turned to Peter and Paul Wentworth, who, he said, championed the cause in sixteenth century England.

As I recall, Professor Cella spoke about the brothers Wentworth for nearly two days — it was as if he had known them.

Peter and Paul Wentworth, you see, were engaged in a dispute with Queen Elizabeth that centered around their right, and the right of all Parliamentarians, to speak openly and freely in Parliament on all matters of government. The Queen, on the other hand, believed that the Parliamentarians could say whatever they wanted so long as they did not encroach on the royal prerogative or criticize the crown.

The brothers fought tirelessly against Queen Elizabeth, asserting the independence of Parliament. They argued that restraints on speech in Parliament threatened the proper functioning of government and portended oppressive royal rule. Professor Cella recounted a remarkable speech Peter Wentworth delivered on the rights and liberties of Parliament. In the speech Peter Wentworth recognized that the stability of their government, and thus a free and open society, depended at least in part on the independence of Parliament. He said that liberty would be but a hollow guarantee if the crown encroached on parliament and silenced critics of the crown. Tyranny was lurking.

The confrontation between the Wentworths and Queen Elizabeth lasted more than thirty years. Professor Cella said that the Wentworths fought zealously and fearlessly and at great personal risk and sacrifice to assert and establish the Doctrine of Legislative Privilege. On at least two occasions, the Queen had Peter Wentworth imprisoned in the tower of London for his views. After each term Peter Wentworth returned to the fray to again meet opposition.

Time would side with the Wentworths. The English Bill of Rights of 1689 proclaimed that "the freedom of speech, and debate, and proceedings in parliament ought not be impeached or questioned in any court or place out of parliament." As Professor Cella said, no men occupy a more revered place than the Wentworth brothers in establishing the Doctrine of Legislative Privilege.

When I heard Professor Cella recount the story of the Wentworth brothers, I understood why he dwelt on their struggle: they battled against the spectre of tyranny and fought to preserve the rule of law. They fought for the people.

While, I still see Peter and Paul Wentworth as zealous advocates of the public good, I now also see them reflecting the virtues

of the man who first told me their story. Like the Wentworth brothers, Professor Cella argued and advocated at great personal sacrifice to advance many a cause. He selflessly gave of himself to all who approached him. The causes he advanced are numerous: the vindication of Sacco and Venzetti; Hubert H. Humphrey's campaign for president; the committee on public counsel services; and the education of his students at Suffolk Law School, to name but a few.

The illness that ultimately took Professor Cella's life was his tower of London, from which he would escape for a time to further a cause, only to be returned — but not dispirited. A man revered whom I will miss. Professor Cella taught—I am still learning.

BY BRIAN T. CALLAHAN

When we were about thirty years of age, my wife Laurie introduced me to her long-time neighbor in South Medford, a man who was already a Medford legend. He had been Medford High's valedictorian, successful graduate of Harvard College and a State Representative. He later was the only person who in writing supported my Medford school committee candidacy in 1963.

Al Cella spoke that day very highly of Suffolk University Law School—a school of which I then knew rather little but where we would later serve together on the faculty. Al had lost by about five votes in his re-election campaign as representative. Al was highly motivated, very scrupulous and highly competent. In those days the "politician" would, when asked by constituents to "fix" a parking ticket (which then cost \$2.00), accept the responsibility and then go down to city hall and "fix" the ticket by paying the \$2.00. Al did not do that, whether out of principle or because he was not a "politician." Years later some of my neighbors told me that they had not voted for Al the second time because he didn't "fix" their tickets. It is a tragedy that such a reason may have caused Al's re-election campaign to fail but I have been ever grateful to know Al and Josie as dear friends. Suffolk University will not forget Alexander Cella.

BY DAN DWYER, SUFFOLK LAW SCHOOL STUDENT

Professor Cella was my administrative law professor and faculty advisor to *Law Review* and the *Catholic Lawyers' Guild*.

As a teacher his knowledge was vast. Meticulous preparation allowed him to cover a great deal of material. His enthusiasm had to be experienced to be fully appreciated. He could barely stay in his chair from excitement when answering a probing question. His interest in a student's question exceeded the student's, drawing him up to the teacher's level.

Others have chronicled Professor Cella's great contributions to the *Law Review*. I suspect his dedication to the Catholic Lawyers' Guild, and perhaps much else, grew from a lilting sense of faith permeating all. He has been eulogized as a man for all seasons. In his awareness of god's goodness he particularly resembled the original bearer of that title.

A STOP IN AUSTRIA



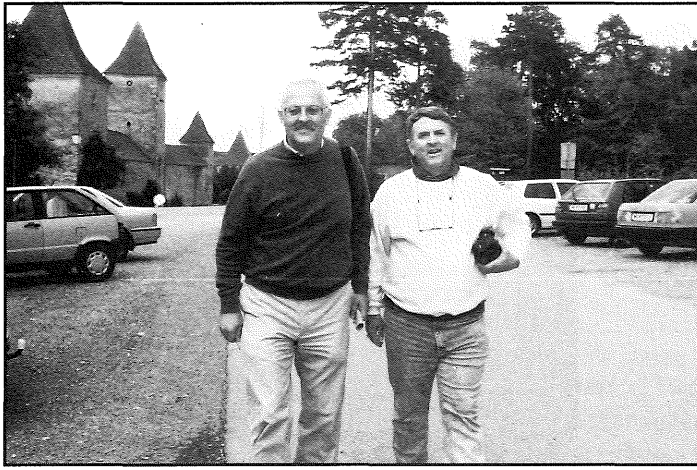
BY PROFESSOR JOHN J. NOLAN

Last summer, my wife Adrienne and our two younger children, ten-year old Alysso and fourteen-year old Evan and I spent some 26 days in Western Europe. Arriving in London from Boston at 8:00 a.m. (3:00 a.m. Boston time) after flying the Atlantic in the dark, we whisked through ten countries in the next twenty days, visiting sites in England, France, Belgium, Holland, Germany, Lichtenstein, Switzerland, Austria, Italy and Greece on an organized tour by bus and by boat. The pace at which realities, some unknown and others known only from pictures and print, were encountered produced a blur of piggy-backing observations, impressions and judgements that were both absorbing and disjointed, if not a little overwhelming. I have yet to put it all in perspective and have the sense my experience is too thin to really allow that to be done anyway.

Our continental odyssey concluded with several days in St. Poulten, Austria, visiting friends, the Maleczeks, Wolfgang and Diane and their son, Markus, which produced some more satisfying memories. My wife and Diane are friends of long standing. They met on another European tour a quarter of a century ago and discovered they not only lived within blocks of one another in Chicago but shared an outrageous sense of humor and common interests that just endured. The tour guide of that mid-sixties excursion was none other than Wolfgang, who made such a lasting impression on Diane she married him four years later. Although we should have not been surprised, our touring was hardly over once we were met at the Vienna airport by a sizeable group of grinning locals wearing T-shirts emblazoned with the logos of Boston's sport teams, but its character certainly changed.

Wolfgang Maleczek is an Austrian and proud of Austria's heritage. He appeared grateful for the occasion to revert to his former role and recount in engaging detail his rather profound under-

standing of the history and culture of Austria as well display its rather awesome topography within a radius of some eighty kilometers of St. Poulten, from Vienna to the east and Krems (currently celebrating its millennium) to the west with an enthusiasm that is amply justified. Our stay in St. Poulten also gave us the pleasure of not only visiting with the Maleczeks but with another family an exchange of sons over the last two summers allowed us to come to know, the Porodkos, Dr. Bohdan, Marguerite and sons Michael, Stefan and Andrew. We were cordially welcomed into their homes and generously provided with sights, sounds and tastes about the countryside that will not soon be forgotten. Better company is not to be found, anywhere. Our end days were thus quite full but their pace was slower and there was more time to query and to digest, which I found quite congenial. One subject of no little interest to me (which provides the major reason for writing this little piece) is legal education anywhere and I had an opportunity to get a glimpse of the Austrian version under this overall tutelage.



In Austria at Rosenberg Castle Falconry Exhibition with Wolfgang Maleczek (left).

Among his many other accomplishments, Dr. Maleczek is a graduate of the University of Vienna's Diplomastudium Rechtswissenschaften and teaches International law at a local business school. His son, Markus, is following in his father's footsteps and is in his second year of law study at the University of Vienna. From intermittent conversations with both of them and a visit to the law school's major building in Vienna, there emerged a picture that is, superficially anyway, very different from the American experience. The picture is hardly comprehensive or definitive, but one that appears worth telling.

Austria itself is a small country, roughly about the size of the state of Maine. It has a total population of about seven and a half million people, approximately twenty percent of whom live in Vienna. Its basic law, like that of many European countries, is a code, promulgated in 1811 and largely derived from the Justinian Code of the sixth century. The Austrian Code has the characteristic "general clauses" for those unanticipated cases for which the Code provides no specific remedy and as with the continental codes generally, there is no counterpart to the Anglo-American concept of *stare decisis*. As a result, each court is at least theoretically free to improvise and interpret Code provisions in accord with the tribunal's conscience. A given construction takes on a kind of presumptive validity measured by the relative number of times such construction is selected by tribunals with no technical obligation to follow it.

On the other hand, there are many generic similarities. Adjudicative power is allocated to both judicial and administrative tribunals by subject matter, the magnitude of the sum in dispute or the sanction involved. The chief executive of the country is a President, elected by popular vote, although other than appointing the Prime Minister, the President plays no significant part in the day to day operation of government and his other duties are primarily formal. There is a bicameral legislature, also popularly elected, but power is not dispersed as in our bicameral legislatures. The national RAT, roughly equivalent to our houses of representatives, is the legislative power. The Senate has little more than advisory power, being unable to even veto legislation of the RAT.

Vienna (WIEN) is the capital of modern Austria (Osterreich) and the seat of the national organs of government. Vienna was also home to the Hapsburg Empire, with power rivaling that of Rome in

an earlier era, whose significance in human history seems neither generally appreciated nor proportionately recognized in the standard American history books I encountered. Vienna also provided residence to such luminaries as Goethe, Mozart, Freud, Strauss and Maria Theresa. It has clean, tree-lined streets, beautiful parks and impressive buildings of ancient as well as modern vintage. A visitor can even find archeological sites going back to the Roman Empire in central Vienna itself.

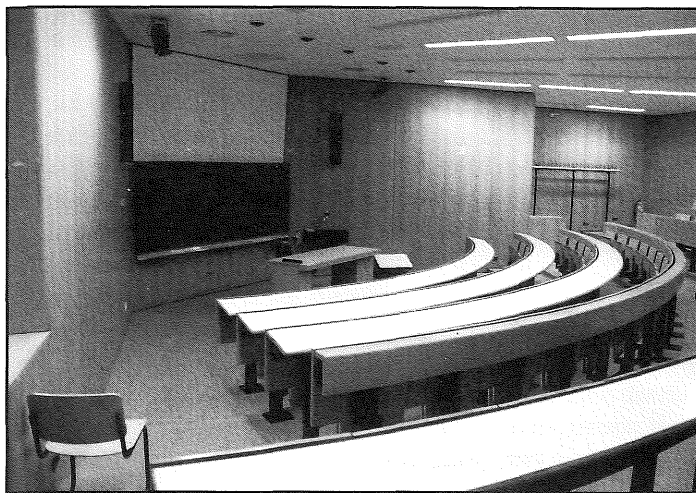
To appreciate the situation of Austrian law students, which differs markedly in many respects from their American counterparts, the basic pattern of the Austrian Educational system has to be understood. Public education in Austria, from elementary school through advanced doctorate programs, is provided free of charge to those who satisfy its standards. Living expenses are not included, but books and ancillary needs are. The price of this is a national income tax of approximately 42%, although parents are given tax breaks for adult children of any age who successfully complete a minimum of eight semester hours of study per year. There are also private schools, usually operated by religious orders, that provide a parallel education for the first twelve years of schooling. They charge tuition, are usually boarding schools and are selective with admissions, although not on a religious basis.

Elementary school consists of four years. Thereafter, at a time when a child is usually ten years-old, a tracking occurs. A student will then take either a program directed to entering the labor market at the end of their twelfth or thirteenth year of schooling, or enter gymnasium in the expectation of going to a tertiary level of schooling. For those in what we would call vocational education, there is at least some basis to conclude that the educational requirements are more demanding than is true of many American high school graduates. Those entering gymnasium undergo a course of study that is notable for being much more language intensive than is the case in America. Latin and Greek are still commonly taught and at least two foreign languages must be taken in addition to German, which is the language of the country. The rest of the curriculum generally has a content very similar to that of our "college course" secondary education. Gymnasium concludes with the successful completion of the student's twelfth year of schooling. At this point, a would-be attorney enters law school directly with no intermediate collegiate education.



University of Vienna major Law School building.

The lack of an undergraduate degree requirement is offset by the existence of a law school curriculum that is divided into two levels. The first level curriculum contains many courses that are traditional collegiate fare in the United States. There are hour requirements that have to be satisfied as well as the passing of examinations in five required subjects, namely, Introduction to Law, Ancient Roman Law, Economics, Legal History and Sociology,



A small classroom.

before a student can advance to the second level. It is fairly obvious that this first level serves a weeding-out function in this tuition-free system that has to accept every formally qualified student. The grading system is five-tiered with grades ranging from 1 ("sehr gut") to 5 ("nicht genugend") and some 60-70% of the first level students earn a 5 on their first try. A second attempt is an option and at least a third of an entry class (about 1600) will not survive the first level examinations. Attrition is further increased by students who simply drop out of their own accord and approximately a quarter of those starting in any one year will survive to receive a law degree.

Attendance at class is not compulsory and in fact is frequently a real challenge. As many as 800 students may register for a course held in a classroom that seats 350. This results in students sharing seats or sitting in the aisles and most just do not attend on any regular basis. Heavy reliance is placed on student lecture notes, which apparently do not much vary from year to year, so that notes from prior years relating to the same professor are much utilized as are current notes. Indeed, some professors actually edit student notes of their prior performances, giving the edited versions enhanced reliability. Outside readings are often suggested and those faculty who have published expect their writings to be read. To get credit for a course, a student need only register and pass the written test. What happens in the interim is up to the student. It is seldom the student is able to satisfy the requirements of the first level in one year and two years is fairly standard for those who go on to the second level, although there appears to be no time limit.

Once out of the first level, the balance of the course of study consists of a number of "core" courses, some of which require a written examination and some of which require an oral examination. A specimen oral is conducted by a single faculty member or a panel of faculty. Five students are examined simultaneously as a unit for a variable period of time that usually consumes two to three hours. These oral examinations are usually conducted in

classrooms where other students may observe and they do so in large numbers. The major areas of study are four in number. Burgerliches Recht (Civil Law), Strafrecht (Criminal Law), Verfassung (Constitutional Law) and Verwaltung (Administrative Law). In addition to the required core courses in each of these areas, there are also what we would call elective offerings, where enrollments may be much smaller, but there remains some of the same enrollment and overcrowding problems in the upper level previously mentioned with respect to the lower level of study. Although the degree requirements can theoretically be completed in four years, the common length of time to complete them is seven years, equivalent to the normal period for the full-time pursuit of a law degree in the United States, taking college and law school into account. The Austrian government has recently become concerned over the length of time consumed by many students in earning a degree.

As in the United States, a law degree does not entitle the graduate to practice law. There is an equivalent of our bar examination, the Rechtsanwalt, that must be passed and, in addition, an extended clerkship is required that runs about five years in length, beginning with one or two years service in the court system, followed by an apprenticeship in a law office. Practicing lawyers in Austria thus typically begin their independent legal careers a little older and more experienced than do those in the United States.

My limited briefing regarding the training of the Austrian lawyers leaves me hesitant about drawing definitive conclusions. There are many more details I would like to know. The pressures of student life appear to be less and allow for a more relaxed social life; but are they really? Country-wide uniformity appears beneficial but there are local variants that rival our fifty state and federal jurisdictions. The availability of a legal education without heavy finan-



Class in session in large classroom.

cial costs would certainly be welcomed by many American students and their families, but my conditioning makes it hard to contemplate accepting the overcrowded classrooms, the indifference to class attendance and the lack of opportunity for student-teacher dialogue that must result. At this point I have to regard my transitory contact with Austrian legal education as thought provoking and worthwhile, but not sufficient to provide a basis for other than tentative judgements.

A CONVERSATION WITH DUNCAN KENNEDY

BY GERARD J. CLARK

ADVOCATE: Duncan, your address at a faculty colloquium was a great success. I thought we might be able to reach a larger audience in this interview. I think we just started by asking you just what is critical legal studies?

KENNEDY: What is it, indeed? I guess critical legal studies has two aspects. It's a scholarly literature and it has also been a network of people who were thinking of themselves as activists in law school politics. Initially, the scholarly literature was produced by the same people who were doing the law school activism. Critical legal studies is not a theory. It's basically this literature produced by this network of people. I think you can identify some themes of the literature, themes that have changed over time.

Initially, just about everyone in the network was a white male with some interest in 60s style radical politics or radical sentiment of one kind or another. Some came from Marxist backgrounds — some came from democratic reform. The ex-Marxists tended to be people who were disillusioned by sectarian left politics of the 60s and moved away from seeing themselves as hard liners. The liberal reform people had been disillusioned in a different way: by the failure of the federal government and the "system" as a whole to respond to the social problems of the 60s, the war, the civil rights movement and the women's movement. They had been moved to the left by their experiences of the 60s, whereas the more radical types had been moved to the right, or at least out of the hard militant posture. Then there were people who had missed the 60s or who weren't involved in it at all, but in retrospect a lot of themes of activism and oppositionism and stuff like that looked good to them. They were looking to redo the 60s.

The literature that this produced initially was an attempt to figure out large bodies of legal doctrine, the familiar things that are taught in law school — like contracts, constitutional law, corporate law or municipal government law. The idea was to understand them in a new way, as something more than just the product of legal reasoning and legal logic, something more than just the product of democratic majorities where they were mainly statutory, and something more than reasonable case by case development of sensible pragmatic ways to deal with problems. This literature tended to argue that each one of these areas of doctrine could be understood as political, in a bunch of different ways. The doctrines are political in the

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sense that they are the ground rules for struggle between groups, struggles that have a strong ideological dimension. In some areas, this is obvious. Nobody is going to study landlord/tenant law without seeing the rules as setting boundaries for conflicts between landlords and tenants as groups, as well as ways to amicably or rationally resolve disputes between particular people. What kind of conditions exist in apartment units and what kind of rents tenants pay and how much landlords get from their property are partly a function of what the

ground rules of landlord/tenant law are. One of the ideas was to apply that kind of insight to lots of other doctrinal areas. So a lot of it was just showing what was at stake. You could say that it was an attempt to get at the political element in the core of doctrine that was usually taught not in terms of distributional struggles but in terms of rational dispute resolution. That was one part of it.

Another theme was that historically the political power judges exercise through all these different doctrinal areas has been legitimated, explained, rationalized by saying it's true that judges aren't elected, but they don't need to be elected because the legal process imposes a kind of discipline on them that forbids them from being ideological actors in the system. It's not that everyone's a formalist. In fact, in the world where you and I went to law school, the formalists were few and far between. It wasn't the idea that the law is the law and it all can be logically deduced. But it was the idea that there was a kind of legal method that included precedent, legal reasoning and adherence to the basic principles of the legal order. Even if you acknowledged that the judges were in fact influencing distributive outcomes, and influencing conflict between groups, they weren't really doing it on their own hook, they were doing it as agents of the political process constrained to follow the law in some way.

So a second major theme was to try to work out the ways in which legal reasoning as it's presented in legal opinions, treatises, and articles tended to mask the degree of ideological open texture, the degree of leeway that judges brought to decision-making and how their own politics came into play.

So a second major theme was to try to work out the ways in which legal reasoning as it's presented in legal opinions, treatises, and articles tended to mask the degree of ideological open texture, the degree of leeway that judges brought to decision-making and how their own politics came into play. Often opinions or doctrines or whole areas of law contained contradictions and gaps and ambiguities, and what the judges were doing really couldn't be adequately explained as just consistently following through what the legal materials required them to do. Quite a few early crit articles try to organize this sense of contradiction by identifying opposing visions or moral tendencies — formality vs. informality, for example — that seem to be fighting it out inside the law, making the law inconsistent because sometimes one wins and sometimes the other.

A third theme was analysis of the way the judges tended to exercise their discretion — the way they dealt with the open texture. The realists had long since pointed out that judges weren't just automatized, it wasn't mechanical. Nonetheless there hadn't been much attention to the idea that a lot of the production of legal discourse, legal doctrine, but also legal

scholarship could be understood to have an implicit spin or tendency, a kind of centrist, moderate, legitimate-the-status-quo quality. It was pretty closed to solutions and arguments that favored sharp change in the system on behalf of the people who were being screwed by the system.

The idea is that judges' politics have a massive impact on the law they make, and that has a massive impact on who gets what in the system, but everyone is busy denying that this is so.

This wasn't the earlier marxist idea that the law is a ruling class conspiracy to hoodwink and oppress the masses, though many people think that's what critical legal studies "is." The idea is that judges' politics have a massive impact on the law they make, and that has a massive impact on who gets what in the system, but everyone is busy denying that this is so. Again, it's not that the judges are cheating or breaking the rules by playing a political role — given the open texture, there's nothing else they can do. But it is unfortunate that when they put their centrist politics into the law, they make it look like that's not politics at all.

Another big theme that comes from our initial 60s leftist point of view — which I still very much have myself — is that there's formal politics, the electoral system, the legislative system, the system of administration in the executive branch, and that's incredibly important, but a lot of the political events that people like us care about most happen in the family, the workplace, the schools, and public spaces like shopping malls or the street. Families, schools, workplaces and streets are places where fundamental questions of power and entitlement and welfare get hashed out between groups that are in conflict. People grow up in these institutions and they learn something more than just the utilitarian meat and potatoes of what to do in the family and in school. They also learn attitudes and styles and ways of relating to other people. Law teachers are modeling for their students how partners are expected to treat associates, how bosses are expected to treat secretaries, how the person in the office is expected to treat the maintenance person who comes around and is emptying the trash and vice versa. There's lots of hidden politics in school that influences the equally hidden politics of the workplace.

In the 60s, we tended to see law schools as pretty authoritarian and pretty right wing in their culture, even if most of the professors were vaguely middle-of-the-road or even sort of liberal.

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that was not just authoritarian but also often led lawyers to control and dominate their poor or weak clients and pretty much kow-tow to their powerful institutional clients. A lot of that was taught in law school. It still is.

More than that, the law school curriculum has had as one of its messages a kind of substantive political teaching which is: all you can expect from the system of law and governance in the United States are very small, narrow, little, cosmetic reforms. Law faculties have traditionally taught their students that the system makes an enormous amount of sense and it's very difficult to imagine it being anything other than it is. The kinds of things that you know about and you learn about in law school reinforce the tendency of normal middle class people to be pretty ignorant, pretty out of touch with the more brutal realities of the way our system works. By that I mean

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everything from what it's like to be a minimum wage non-union, no benefits worker in the fast food industry, through the way the law denies protection to women in domestic violence situations, through the way the actual race system in this country works. So the educational system produces this very powerful lawyer class which has a pretty narrow social perspective on what the consequences of the power that they are going to be exercising will be.

ADVOCATE: Duncan, in your description of critical legal studies you seem to have been using the past tense. Has the theory changed? Is it different today?

KENNEDY: Yes it is. I think it's interesting what happened to it. I'm not sure I completely understand why it changed, but it did. Here's the way I'd describe it. The project that I was describing was trying to get a handle on legal doctrine as both rules of the game and as part of the legitimating discourse of the political system. That project still exists and still continues but it's a much smaller component. In the early 80s, there was an enormous increase in the number of women law professors and also the beginning of a more left wing feminist kind of legal scholarship and legal work. In the network, the number of women involved in critical legal studies expanded very rapidly. That is, white women overwhelmingly. And then quite soon after that the number of minority men and women began to increase in legal education, and quite a few of them were interested in CLS as well. The largely white male originators got older, and a new generation of white men came onto the scene.

At this same time, it got to be a lot riskier than it had been to be identified as a crit, because we lost a bunch of tenure

battles around the country. And the quite theoretical project about doctrine attracted lots of people who weren't particularly interested in a left activist project in law school anyway. Which is what a lot of us had been doing.

The result of that was a period in which the network went through one crisis after another. They were the kind of crises that happen when you try to create a mixed-gender anti-hierarchical milieu, and a racially heterogeneous milieu. It wasn't a struggle for control; there was no effort to subordinate everybody in the group to a single idea or line, or even an effort to develop an organization. Most of the people in the network agreed with the 60s idea that women ought to be organized as women and minority men and women should be organized as minorities to the extent they wanted to be. And for that matter, white men should get together and talk as white men. Wouldn't that seem like a relevant grouping?

As the network grew and got more and more socially complex, it fell apart into subnetworks. I regret that we couldn't keep it together as it expanded, but I must admit that I enjoyed participating in just about every kind of conflict that you can get in a multicultural, multigenerational coalition. We lost the sense of a dynamic, ever expanding group that was unified both by its theoretical themes and by activist legal education practice, but for many of us that was more than compensated by the chance to participate in a whole new set of more specific kinds of race or gender or class oriented little groups. Of course, not everyone has such a sanguine view, and maybe I see it all through rose colored glasses.

It's sort of ironic that as the sense of a coherent large group has dissipated, the purely imaginary entity called critical legal studies has come to have a larger and larger space on the map of American legal thought, as measured by things like Lexis. There have been an amazing number of articles written in the last 7 or 8 years about the relationship between feminist theory or black radical theory of one kind or another and critical legal studies.

There were 600 people at the last big conference, which was only eighteen months ago — almost two years ago. It was a kind of diffuse grab bag of every different kind of progressive thought in the large multicultural universe that is going on in legal academia. It was lots of fun, but I don't think there will be another event on that scale until a younger generation comes along and decides to appropriate the name and whatever may be left of the mystique. In the meantime, the subnetworks are flourishing, and some of them, the international one, for example, are positively rocking and rolling along.

Anybody can use the theoretical literature, and somewhat to the amazement of the old timers, quite a few people seem to want to use it. They are constantly reinterpreting the ideas and the history and cannibalizing them and incorporating them into all kinds of left projects. A typical example is there's now lots of writing about sexuality, including but not limited to gay and lesbian issues. The people doing that work incorporate this or that element of early critical legal studies for their own purposes, whatever they may be. I include my own recent work (here comes the plug), in my book called *Sexy Dressing, Etc.*, published in October by the Harvard University Press.

ADVOCATE: Is there an actual critical legal studies organization?

KENNEDY: No. There isn't a critical legal studies organization. The network of people is informal. There are joint secretaries at the moment. They have the mailing lists. Critical legal studies conferences have occurred at regular or irregular intervals since 1977. But they are just organized by someone who decides they want to organize a conference.

ADVOCATE: In your description of Critical Legal Studies, I wondered how it fits into the larger intellectual climate of the 90s which might be characterized as post-modernism or maybe it's best known emanation the literary criticism movement.

KENNEDY: Well, that's a good question and it's not easy to answer. I think in CLS there have always been two identifiable tendencies, which were once called the rationalists and the irrationalists. There's been a strand in CLS, which I represent myself, which tends to emphasize first of all that critique has political value and importance in itself, that there's value in unmasking and tearing apart the kinds of baloney that gets produced to explain why things have to be the way they are. But the choice of an activist's projects must be based on the situational, on being intuitive. It means being very skeptical about the possibility of reconstructing either social theory or legal theory on the basis, say, of rights or communitarian sentiments.

I think my intellectual development was very strongly conditioned by the fact that my parents were liberal democrats and I grew up in a universe where sort of a general left-liberalism was combined with novels, poetry, painting, music, and architecture.

Now many of my closest friends and allies think that is exactly what we should be trying to do. The strand that I represent is different because it has been a kind of parallel right from the beginning to a lot of post-modernism because it's so skeptical about overarching theory. But it's a pretty politicized post-modernism; a lot of the post-modern cultural trend that you are talking about is anti-political and particularly hostile to the whole style of leftism. The type of post-modernism that's a strand in CLS is much more leftist. The rise of post-modernism and the literary theory people as a recognizable part of CLS is one of the developments, like the rise of critical race theory and feminist legal theory and gay legal theory, that has diffused and diversified and opened up the relatively coherent radical project of, say, 1978.

ADVOCATE: Duncan, you've come to this set of notions, I guess, based on your reading and your experience. Who have been influential authors for you over the past 20 years?

KENNEDY: That's an intimidating question. I think my intellectual development was very strongly conditioned by the fact that my parents were liberal democrats and I grew up in a universe

where sort of a general left-liberalism was combined with novels, poetry, painting, music, and architecture. My parents were arty-boho types. I majored in economics, and I still believe in doing left-wing, neo-classical law and economics; I was very influenced by Freud and Nietzsche. I was very influenced by French existentialism. I was one of those people who, when I was 18, wore black turtlenecks and I would have worn a beret if it hadn't been so humiliating and I liked to go to coffee houses and listen to Joan Baez and Bob Dylan type stuff. Then I got interested in structuralism, particularly in people like Levi-Strauss and Piaget.

When I was starting out as a law teacher, I was influenced by close friends of the time, Roberto Unger, Morton Horwitz, Karl Klare, Al Katz. I spent quite a bit of time reading Marx and Marxist theorists, and they had a deep influence. I reject the communist version of Marxism, so I'm not a historical materialist and I don't believe that the base determines the super-structure and I don't believe in state-ownership of the means of production and I don't believe in a vanguard party and I don't believe in the dictatorship of the proletariat and I don't believe in democratic centralism. From Marx I got two things which I think are just great: his critique of the way capitalism works, especially the role of ideology, and his emphasis on the struggle between classes. But we don't have to just say the struggle between classes, it's groups oppressing each other, fighting against each other, dominating each other, all in the context of ideology.

Both black radical writing and radical feminists writing have had a big impact on me and on my work over the years. The black radical writer who has been most important to me would be Harold Cruse, "The Crisis of the Negro Intellectual" and James Baldwin. The kind of feminists who have the strongest influence on me are also the ones I tend to disagree with most, people like Robin Morgan and Shulamith Firestone and Catherine MacKinnon and particularly Andrea Dworkin. I think Dworkin is way off base a lot of the time, but just brilliant too. And then the recent generation of people like Jane Gallop and Judith Butler who are basically pro-sex/post-modern feminists. Very, very interesting position which I have learned a lot from.

I don't want to give the impression that I've got a deep knowledge in any of the areas these books represent. I'm a hit and run reader; I try to skim along and just read what I like, and that's what I've liked.

ADVOCATE: Duncan, I understand that you teach Torts, Contracts, and Property. Taking Torts as an example, how may a critical legal studies approach to the content and the conduct of the classroom differ in your class from a Kingsfield class?

KENNEDY: Let me describe the style first. Our first goal was to be more humane, more humanist teachers than the people we had been most frightened of and reacted most strongly against when we were law students. Most of the people involved went to law school in the 60s or early 70s when the Kingsfield style was far more central to the law student experience than it is today. These authoritarian older men really scared everybody to death; no matter where you were coming from it was very

difficult not to experience them as the avenging father type. The first phase of reaction was an unsuccessful attempt to create a humanist touchy-feely exact counter image to that authoritarian patriarch image. It's not even worth talking about that phase in a sense because things have changed so much, I think partly because of the generational revolt against that style in general, but for lots of other reasons too.

My torts course is just like the more traditional offering in that I teach all the rules you'd get there, and I try to make sure the students learn as much or more black letter law as they learn from my more conventional colleagues. But it's different because it presents the law as ground rules of conflicts and struggles between groups, and presents judicial opinions as examples of how to argue back and forth about how to set those groundrules.

What remains of the old program for me is that I want the classroom to have lots of moments when students are interacting with each other in an egalitarian way, when they are working together not working against each other, cooperative as opposed to competitive exercises. An objective I don't achieve as much as I'd like to is that they should feel that they know what they are learning step by step. I think one thing that's still very authoritarian in law school is that teachers don't see it as either that important or that easy or that possible to allow students to know enough about what they are learning in every class so that they can feel that they're in command of the learning experience. That creates a kind of infantilized dependence on the teacher who is saying right/wrong, skipping from student to student, leaving the student basically feeling helpless. These are liberal humanistic educational goals but no longer in as touchy-feely a way as they might once have been.

ADVOCATE: Can you describe the difference in content between your torts course and the more traditional offering?

KENNEDY: My torts course is just like the more traditional offering in that I teach all the rules you'd get there, and I try to make sure the students learn as much or more black letter law as they learn from my more conventional colleagues. But it's different because it presents the law as ground rules of conflicts and struggles between groups, and presents judicial opinions as examples of how to argue back and forth about how to set those groundrules. The emphasis is on the pro and con argument-bites judges and lawyers use over and over again.

Let me just illustrate the first point, which is what we've mainly been talking about here. I think tort law after WWII has been taught very differently than it was taught before then. After WWII, a kind of consensus casebook organization emerged in which the overwhelming mass of the torts course is devoted to unintentional torts, to accident law. There is typi-

cally a very short intentional torts section at the beginning that every teacher does, and then longer particular doctrinal areas are dealt with in separate chapters at the end that most teachers never get to or get to only very selectively — a little defamation maybe. The coherence of the course comes in the consideration of the conflict between negligence and strict liability, proximate cause and the problem of duty in all its different variations, all in unintentional torts.

I change the organization by increasing the discussion of intentional torts from maybe a week or at most two weeks to six weeks. I shrink the discussion of accident law and add another four weeks at the end on torts in contractual relationships, including insurance, landlord/tenant, doctor/patient, products liability and wrongful discharge. These two changes in the structure fit into a political program, which is to get the students to focus on the distributional and political functions of doctrine.

I don't preach in class, or indoctrinate students, but they get a sense of the ways that different common law and statutory tort rules about injury structure the relationships between men and women, blacks and whites, between workers and owners, professionals and clients, producers and consumers. The idea is that understanding that tort law structures these conflicts will change the students' understanding of society, make them more aware of the ways in which groups triumph over other groups, control them, dominate them and rebel against them.

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An example is that the six weeks of intentional torts teaches standard doctrine using cases that persistently raise gender issues. The tort of battery is introduced through domestic battery cases and legislation. It's black letter — you learn the elements of the tort — but you also learn about abuse, both in the cases and in background materials which are ideologically balanced. After doing battery we discuss the tort of assault — the conventional next thing to discuss. A large number of the traditional cases in this area involve men threatening women in one way or another. So I teach the elements of the tort through cases that deal with the extent to which the law will take into account the relative sensibilities of men and women as plaintiffs and defendants.

The next class is on the tort of intentional infliction of

emotional harm, where, again, a large part of the case law is focused on gender issues. I've selected the cases to question whether we want "equal treatment" or "special treatment" for women in this context, and also to give students a sense of how the limits on protection from harm reinforce the bargaining power of strong parties versus the weak parties, in situations like low wage non-union fast food work, because the employer, for example, often uses intentional infliction of emotional harm as a way to control workers. The next class is on racial and sexual harassment in the work place, including Title VII and Section 1983. This is doctrinally very tough for them at this stage, but they'll do the work because they're very interested in it.

I don't take sides on any of these issues (though the students know I'm a lefty), but I think the course has some politicizing effect, meaning that some students are radicalized and some become more conservative and some just come to see that they are ideological moderates rather than "apolitical."

So, now skipping ahead, in the discussion of defenses we talk about the duty to act of police and judges, that is, the liability of police and judges for misuse of their authority or for failure to exercise their authority. We use the cases that involve the liability of police departments for failing to assist women in the battery situation. Then we take up self defense, with the focus on the question of when a woman who is being physically abused can kill her abuser in self defense — tort lia-

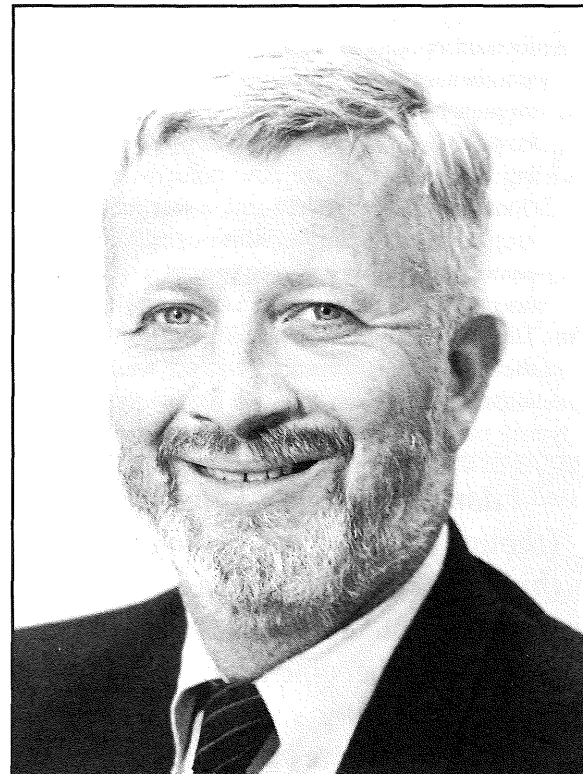
bility in that context. Then we take up the defense of consent, an important doctrinal area but also a basic way in which gender relations in the culture are structured.

All the rules are totally conventional tort law. You can get out your Prosser on Torts and follow day by day and see that you are learning all the rules that are in the hornbook. But you get a sense that the legal system is deeply involved in conflicts between men and women and is constantly setting the boundaries of what they can do to each other. Now there's an exactly parallel sequence woven in here on worker/owner conflict, including cases on the protection of business good will, secondary boycotts, picketing, closed shops. Then I try to bring the two strands together with a class on picketing of abortion clinics.

I don't take sides on any of these issues (though the students know I'm a lefty), but I think the course has some politicizing effect, meaning that some students are radicalized and some become more conservative and some just come to see that they are ideological moderates rather than "apolitical." I think you can politicize the class in this way and still be loyal to the idea of academic freedom and non-indoctrination. The students are learning the real doctrines of tort law that will be on the bar exam two years later. I think they understand them better when they learn them as they apply in a relatively small number of contexts that they are studying through the background reading — domestic abuse, for example. I don't tell them what to think about the social problem: I encourage them (o.k., I force them) to argue among themselves. The classroom politicizes the experience of law because there are lots of arguments between liberal and conservative students about what the doctrine ought to be, with their knowing they are being liberals and knowing they are being conservatives — learning legal reasoning in the context of seeing themselves as advocates for their own underlying political positions.

A CHALLENGE TO LAW SCHOOL ACCREDITATION: MASSACHUSETTS SCHOOL OF LAW V. THE ABA

BY GERARD J. CLARK



INTRODUCTION: On October 23, 1993 Massachusetts School of Law sued the American Bar Association, claiming that its standards for the accreditation of law schools result in combinations in restraint of trade in violation of federal antitrust laws. The case, filed in the U.S. District Court for the Eastern District of Pennsylvania, names as defendants the American Bar Association and its Section on Legal Education and Admission to the Bar, the Law School Admission Services, Inc., and the Law School Admissions Council, who together sponsor the administration of the LSAT exam, the Association of American Law Schools and twenty-two individual defendants, including the officers of the organizational defendants, as well as the site inspection team that visited and reviewed Mass. School of Law and recommended rejection of Mass. School of Law's application for accreditation.

ABA ACCREDITATION

The ABA is, of course, a non-profit organization of the nation's lawyers. It operates with funds raised from the dues of the membership. It reports that about half of the nation's 800,000 lawyers are members. It sponsored the drafting of the Model Code of Professional Responsibility in 1969, which was in large part adopted in Massachusetts in 1972; and also the Model Rules of Professional Conduct in 1983, which responded to calls for reform. The organization holds meetings and conferences and advances the interest of the profession through lobbying and public relations under the authority of the House of Delegates.

Since 1927 the ABA has also inspected and approved law schools for "accreditation." Accreditation gives the law school in question a modicum of prestige, but also, by virtue of the rules governing admission to the bar promulgated individually by the

highest court of most states, makes the law school's graduates eligible to sit for the bar exam and apply for admission. The SJC's rule 3:01 requires bar applicants to have graduated from a law school "approved by the ABA" or "authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor." Admission on motion for out-of-state attorneys is limited to graduates of ABA accredited law schools. Further, by virtue of the U. S. Department of Education's approval of the ABA as an authorized accrediting agency, ABA accreditation makes a law school's students automatically eligible for Pell grants and guaranteed loans under the Stafford Program.

The process of accreditation involves at least two site visits by teams chosen by the ABA consultant to the Council of the Section of Legal Education and Admissions to the Bar, as well as extensive written submissions. The team reports to the Accreditation Committee which in turn reports to the Council of the Section. The

Accreditation Committee has eighteen members including five law school deans, five law professors, and two judges. Schools are advised to hire a consultant who typically has a previous connection with the Council or the AALS. The criteria for accreditation were promulgated in 1973 and include over 100 pages of standards and interpretations. The coverage includes educational program, faculty, admissions, library, physical plant, administration, finance and relations with the parent university.

The MSL case claims that numerous of the American Bar Association standards for accreditation are violative of antitrust laws. Section 503 requires that a school not using the LSAT "should establish that it is using an acceptable test." MSL considers the LSAT "deeply flawed and discriminatory" and substitutes its own essay aptitude test along with an examination of the applicant's life experience through a personal interview. MSL claims that it was informed during its site visit by an inspector who was also a past president of the Law School Admissions Council (the sponsor of the LSAT) that only the LSAT was acceptable.

Standard 405 requires the maintenance of "conditions adequate to attract and maintain competent faculty." This requires salaries that are commensurate with "comparably qualified private practitioners" and with faculty at "approved law schools in the same general geographic area." In the eleven pages of interpretations of this standard, the ABA requires sabbaticals, leaves of absence, secretarial assistance, a tenure system, travel support, computers, paid research support, and also the right to retain the copyright on publications. Faculty should not be asked to teach more than eight hours per week of non-repetitive teaching, nor to do administrative work, nor to work summers.

Standard 403 places the "major responsibility" for the educational program and governance of the law school upon the full-time faculty whose "outside professional commitments" must be limited and who demonstrate "a high degree of competence as demonstrated by education, classroom teaching ability, experience in teaching or practice and scholarly research and writing."

Standard 403 requires that the "major burden" for the "educational program" and "governance of the law school rest upon the full-time faculty." A detailed eight-page interpretation of Standards 403 and 405 concludes that "a [faculty-student] ratio of 30-1 or more is presumably not in compliance" with the standards, while 20-1 presumably is.

Standards 601-603 require "a library adequate for its program." Annex II details that adequate shall mean a "collection of annotated state codes," "the National Reporter System," loose-leaf services, specialized periodicals and computer-assisted research services among many other specific requirements.

An interpretation of Section 301 prohibits the grant of credit for courses designed "specifically for improving student performance on bar examinations."

Standard 305 limits the definition of full-time student to one "who devotes substantially all working hours to the study of law." Full-time students may not be employed more than twenty hours per week "whether inside or outside the law school."

Standard 103 places the burden of persuasion on applicant law schools to demonstrate that it provides "a sound legal education." It "shall do so by establishing that it is being operated in accordance with the Standards."

Standard 802, however, allows for approval for programs

"contrary to the terms of the Standards" upon application to the Council for a "variance," although the "Council may impose such conditions or qualifications as it deems appropriate." On February 8, 1994, the ABA House of Delegates, at its mid-year meeting, rejected, by voice vote, the MSL waiver application.

In addition, the Association of American Law Schools accredits law schools with a set of criteria more demanding than those of the ABA. Suffolk Law School achieved AALS accreditation in 1977.

THE MASSACHUSETTS SCHOOL OF LAW

The achievements of the Massachusetts Law School in six short years have been impressive. It boasts an enrollment of 800 students who can choose among 100 course offerings taught by thirteen full-time faculty members and some sixty adjuncts. It has purchased a new 90,000 square foot building along with a 12 acre campus. Its bar passage rate on the 1992 bar was sixty percent, far ahead of the thirty-eight percent figure for Southern New England School of Law. It is governed by a Board of Trustees composed of six. The complaint describes the trustees: Lawrence Blades, formerly a dean at the University of Kansas and the University of Iowa, formerly editor of "a leading insurance defense journal," and author of a "seminal 1960's article that led to the development of unjust termination law;" Julia Fishelson, a trustee of Wooster College, and "a board member of numerous civic organizations in Ohio, Indiana, and Kentucky;" Alan Rothenberg, "co-founder of a prominent Los Angeles law firm, ...senior partner in the nationally prominent law firm of Latham and Watkins, recently President of the California Bar Association and head of America's World Cup Soccer organization;" Stefan Tucker, "founder of the prominent Washington D.C. law firm of Tucker, Flyer and Lewis," prodigious author, member of the ABA Section of Taxation and "the Chair of or a participant on panels for practicing lawyers all over the country;" Lawrence Velvel, "formerly a law professor at the University of Kansas and Catholic University, formerly a partner in large Washington, D.C. law firms, the founding Chief Counsel of an organization that writes Supreme Court briefs in support of state and local government...;" A. Paul Victor, "a senior partner in the nationally prominent Wall Street law firm of Weil, Gotshal and Manges, a member of the Council of the ABA Antitrust Section, author of numerous legal articles," adjunct professor and regular panelist.

Dean Velvel, with assistance from his staff, has published the School's 493 page long-range plan entitled, *The Deeply Unsatisfactory Nature of Legal Education Today, A Self Study on the Problems of Legal Education and on the Steps the Massachusetts School of Law has Taken to Overcome Them*. In summary, it claims to have innovated legal education by providing law students with a more practical legal education at a lower cost. The law school claims to emphasize discussion teaching and training in analytical techniques. It claims to provide extensive instruction in writing in small closely supervised groups and training in legal and business skills needed in real life law practice. It claims that the full-time faculty was chosen on the basis of practical work in the real world and that faculty members are expected to continue to practice "to keep up to date." The school encourages participation by students on work done by professors on their cases. It also makes prominent mention of its use of adjunct faculty as an aid to practical education, to keep the student-teacher ratio low and to keep costs low. It grants credit for bar review courses which it offers as part of its

normal curriculum. It claims that teachers frequently attend one another's classes, videotape their classes, and discuss and critique their methodologies in small groups. MSL does not utilize the LSAT as an admission criterion, but instead favors an essay test of its own construction and interviews every student prior to admission. The law school has fixed its tuition at nine thousand dollars per year for full time students and seventy five hundred dollars per year for part time, and guarantees that it will not increase its tuition in the foreseeable future. It is licensed by the Board of Regents of the State of Massachusetts, and its students can take the Massachusetts Bar Exam.

THE COMPLAINT

In its complaint, MSL alleges that the accreditation process as well as a number of the standards are violative of antitrust law: that they "force compensation paid to law school faculty members to be raised" to levels at competing schools; that the prohibition against in excess of eight to ten teaching hours per week "results in bloated, inefficient and expensive faculties;" that the ABA's unwillingness to count adjunct faculty members, deans who teach, and faculty members with excessive private practice or faculty with excessive administrative responsibilities misstates their true student faculty ratio; that the use of the LSAT discriminates against people of lower socio-economic backgrounds; that the prohibition against law schools offering bar review courses for credit furthers the interest of the proprietary bar review courses; that the prohibition against working more than twenty hours discriminates against lower income persons; that the requirement that law school libraries buy and keep an excessive number of hardbound copies of books that are rarely used is out of touch with the contemporary ability of students to do computer assisted research.

Treble damages and injunctive relief are sought and jury trial is demanded. Counsel is the Philadelphia firm of Kohn, Nast and Graf with Dean Velvel and other MSL faculty listed Of Counsel. Annexed to the complaint is a fourteen page "Report of the Visiting Committee" signed by, among others, John Fenton, Chief Justice for Administration and Management of the Massachusetts Trial Court, Lois Kanter, a clinician at Harvard Law, Robert W. Meserve, formerly ABA president and Robert H. Quinn, formerly Attorney General of Massachusetts. The "immediate purpose" of the visit and the Report was "to comment upon the appropriateness of the School's seeking accreditation by the American Bar Association at this time." The Report is highly complimentary of the student body, the faculty, and teaching methodology at MSL and concludes that MSL "has deliberately chosen to depart from [ABA] standards in order to accomplish what it sees as a distinctive mission that requires an institution which provides high-quality legal education in alternate ways," and the MSL should challenge the ABA ... to give real substance to Standard 802...." (the waiver standard)

It claims that without ABA certification the students of Massachusetts School of Law are ineligible to take the bar exam in 42 of the 50 states; that they cannot transfer credits from Massachusetts Law School to other law schools, nor apply for advanced degrees.

More recently on January 7, 1994, MSL filed a petition with the United States Department of Education to decertify the ABA as an approved accreditation agency. The 1992 Act created a Committee on Institutional Quality and Integrity to judge and

approve established accreditation entities, whose approval would then be adopted by the Department of Education. The ABA was so approved.

MSL is also seeking legislative relief. Representative Martin Meehan has drafted a bill which would prevent states from refusing "to permit a person of good moral character to take its bar examination" if the person is a graduate of a law school which "is approved by the accrediting or certifying agency of the state in which the law school is located."

THE BROWN UNIVERSITY CASE

In the Brown University case, the Third Circuit held that education is commerce, and that combinations to set price are subject to antitrust scrutiny. In *Brown*, the Justice Department challenged the method by which the Ivy League universities along with MIT awarded financial aid to student admittees. The schools established an Ivy Overlap Group to assure that students admitted to more than one of the member schools, would "choose among the ... institutions for non-financial reasons." They achieved this goal by jointly establishing criteria by which financial aid applications would be evaluated and by meeting together in the spring of each year to compare and equalize the financial aid packages offered to students admitted to more than one institution. All of the defendant schools settled the case with the exception of MIT.

The district court held against MIT after a bench trial. It rejected the MIT argument for a wholesale exemption from antitrust for charitable and educational associations, citing the application of antitrust principles to bar associations, the NCAA, dentist associations and a non-profit trade association that promulgated standards for professional engineers. The court stated that education is an "exchange of money for services" and thus commerce and that the Overlap Group's activities were thus price-fixing plain and simple.

It "created a horizontal restraint which interfered with the natural functioning of the marketplace by eliminating student's ability to receive financial incentives which competition between the schools may have generated." Although a non-profit university has no incentives to increase dividends, it can "consume these increases in other ways such as greater travel funds, higher faculty salaries, improved facilities, etc."

The Third Circuit, with one judge dissenting, reversed and remanded. On appeal, MIT, after conceding that "the exchange of money for services, even by a non-profit organization" is a quintessential commercial transaction argued that financial aid is exempt as "charity." But the court characterized financial aid as merely a discount from the average total annual charge of \$25,000 per year. As such, it "determines the amount that a needy student must pay to receive an education at MIT," and thus "part of the commercial process of setting tuition." After agreeing with MIT and the district court that a *per se* determination of illegality was inappropriate, because professions "may have greater incentives to pursue ethical, charitable, or other non-economic objectives," the court held that a rule of reason analysis, which takes more fully into account the "adverse effect on price, output or quality," was appropriate. It reversed because the district court's use of an abbreviated rule of reason restricted MIT's ability to prove the pro-competitive aspects of the Overlap Agreement and the lack of viable alternatives. These defenses were to be heard on remand. Judge Weis, in dissent, found the practice in question a charitable exercise by an educa-

tional institution, and thus outside of the ambit of activities sought to be regulated by the Sherman Act.

In December of 1993, the Justice Department and MIT entered into a settlement that will allow joint development of financial aid guidelines and sharing of award data, but will prohibit the spring meeting where the schools meet, share data, and make adjustments to individual awards.

In another case that raises the MSL claim more directly, the Court dismissed. A group of third-year law students enrolled in the ABA-non-accredited CBN (Christian Broadcasting Network) University Law School in Virginia sued the ABA in *Zavaletta v. ABA* in 1989 claiming antitrust violations. But the District Court held, per curiam, that in accrediting a law school, the ABA "merely expresses its opinion- at the school's own request- about the quality of the school's program," and that states are free to adopt the requirements as their own. The court cited a presumption in favor of "enhanced education and training requirements." Further, the court found "a First Amendment right [in the ABA] to communicate its views on law schools to governmental bodies and others."

In the MSL case, the district court in Philadelphia may view its own Circuit's *Brown* case as inconsistent with *Zavaletta*, requiring a district court to do a rule of reason analysis. Brandeis's 1918 articulation of the rule of reason in the *Chicago Board of Trade* case is still authoritative. It requires a broad ranging inquiry into the "facts peculiar" to the enterprise, "its condition before and after the restraint was imposed," the nature, history and effect of the restraint, "the evil believed to exist," particularized reason for the adoption of each remedy, the purpose and the "end sought to be attained." Should such an inquiry be required, one could predict a trial that would last for many months.

A BRIEF HISTORY

A major strand of the rule of reason analysis examines history, including the perceived evils and the intent behind the imposition of restraints. One hundred years ago, clerkships and apprenticeships were real alternatives to a legal education as preparation for practice. In 1890, for instance, only one-third of bar admittees attended law school. Before this period, even the university law schools followed the apprenticeship model so successfully pioneered at Litchfield. This was quite different from British legal education at the Inns of Court, which, by now, was becoming less and less relevant to aspiring American lawyers. The first professorship in law was offered to the Yale Corporation by the Connecticut legislature. Yale refused, seeing it as "not an addition and enlargement but abolition of the original constitution of the college." In 1873 James Barr Ames became the first Harvard Law School faculty appointment without experience in practice, causing President Eliot to comment twenty years later that the appointment signalled "one of the most far-reaching changes in the organization of the profession that has ever been made in our country" because it created "a body of men learned in the law, who have never been on the bench or at the bar, but who nevertheless hold positions of great weight and influence as teachers of the law, expounders, systematizers and historians." Soon thereafter, Langdell introduced the casebook (and West Publishing followed with the American Casebook Series) and the form of legal education throughout the twentieth century was firmly established. The triumph of university legal education was welcomed by the profession, now being domi-

nated by firms which sought control over the provision of professional services to the emerging corporate giants. The fact that the law school pursued the development and the application of expert knowledge through scientific neutrality with a dedication to public service helped solidify the place of the profession in twentieth century America.

Soon after its founding in 1878, the ABA created a Section on Legal Education and Admission to the Bar, dedicated to the improvement in the quality of legal education. Somewhat dissatisfied with their status in the ABA, the professors at thirty-five "reputable" law schools established the Association of American Law Schools in 1900 with the blessing of the ABA. The following twenty years saw calls for increased standards against emerging night law schools that catered more to the working class and the immigrant population. In time the ABA-approved program of study was expanded to three years and a college degree requirement for admission was introduced, although as recently as 1922 no state required more than a high school degree for admission to the bar and almost half had no educational requirement at all. In 1921, under the leadership of Elihu Root, who in 1916 had called for the expulsion from the bar of "alien influences" wrought by the fifteen percent of the bar that were foreign-born and the additional one-third of the bar that had foreign-born parents, the ABA endorsed: as a pre-condition to admission to the bar, graduation from a law school that required at least two years college for admission, full-time attendance at schools staffed by full-time faculty in "sufficient number" with adequate libraries, the institution of bar exams and the inception of a process for the adoption of these standards by the individual states.

By 1930 most jurisdictions had instituted a bar exam (which however was "oral and casual"), but fewer required any legal training and the vast majority of those that did require training treated law school and law office training as equivalent.

In the 1929 meeting of the ABA Section of Legal Education the classic confrontation between Lewis Draper, its chairman and Gleason Archer, Dean of Suffolk Law School, the largest part-time law school in the nation, occurred. Draper boasted about the progress of compliance with the 1921 ABA regulations and Archer attacked the ABA monopoly. ABA accreditation was called a boycott and a blacklist and the Dean of Marshall Law School in Chicago called the "deans and professors in certain endowed and university law schools of the country" "a group of educational racketeers."

By the end of the thirties the triumvirate of: teacher-scholar like Ames, the case-method, and 1921 ABA law school requirements were dogma. The history since then has been the effectuation of the three. Today, the process is complete with almost no dissenting votes: all states require law school and the large majority require graduation, the law office practice substitute is all but abolished and law schools need ABA accreditation in order for their students to qualify for bar exam admission.

LEGAL EDUCATION TODAY

The rule of reason further requires the examination of effects. The effects of the 1921 standards have been predictable. The law schools of the nation are essentially the same. They offer the same courses, using the same method, taught by professors with similar backgrounds and credentials. See Clark, *The Harvardization of*

Suffolk, the Advocate, 75th Anniversary Ed., 35 (1981)

Likewise tuitions and costs have had a fairly uniform rate of increase. As recently as 1975 the national average law school tuition was just \$2,459. The ten year period between 1975 and 1985 witnessed a 259 percent increase. Full-time tuitions at the Massachusetts law schools and elsewhere have continued to escalate into the nineties. The latest compilation of law school tuitions for 1992 show significant increases over 1990, as follows: B.C., \$13,715 to \$16,640, B.U., \$15,120 to \$16,640, Harvard, \$15,115 to 17,309, New England, \$8,750 to \$10,370, Northeastern, \$13,890 to \$15,750, Western New England, \$9,420 to \$11,140, and Suffolk, \$11,015 to \$13,180 (which will again rise to \$15,490 in 1994-5). The 1993-4 tuition at the Southern New England school of Law in New Bedford (also not approved by the ABA) is \$10,780. This pattern holds true throughout the country (Cal. Western, \$12,180 to \$14,400, Golden State, \$11,704 to \$12,794, Stanford, \$14,964 to \$18,646). The in-state residential rate at state schools also rose: Berkeley, \$1,960 to \$3,689, Ohio State, \$3,836 to \$4,609, UConn, \$4,966 to \$8,008). The 1994 price tag for a legal education with room and board thus approaches \$75,000, causing a large part of the student body to take on debt which may be added to debt for undergraduate education. At Suffolk Law School, for instance, eighty percent of the student body receives federal financial aid, graduating with an average law school indebtedness of \$50,000.

On the supply side, the ABA interpretations of the requirements for law school libraries state that "putting the basic collection together for a decent law library would probably cost between \$3.5 and \$7 million depending on the quality of the library. Subsequently, there would be additional collection development costs as the treatise collection expands over a number of years." The national mean operating cost for the university-based law library for 1993 is \$1,463,534. The computer data bases are considered as a supplement rather than a substitute because it is "very inconvenient" to read full cases on computer. Likewise, networking among law school libraries to share collections has "not been a great success." The library must have seating sufficient to accommodate sixty percent of the students enrolled, generally about "34,000 net square feet." Faculty salaries are required to be commensurate with "comparably qualified practitioners," and with other local law schools. The typical current faculty applicant has the highest possible credentials, including top of the class at the best schools with a prestigious clerkship and a number of years of high quality experience. Such candidates can command high salaries in the private sector. The ABA requirement has never been fully enforced but has kept law faculty salaries substantially above those of the other university faculties, ranging between \$65,000 and \$125,000 per year.

Ironically, in spite of this homogeneity, there is a rigid hierarchy of law schools and the graduates of elite schools can command far greater professional opportunity than those at the bottom. The case-method has not only dominated the classroom but the scholarship as well: the law reviews of the 175 law schools contain discussions of decided cases, using as a basis of critique, the success with which the court in question has carried out the analogical reasoning process with precedent in reaching its result. The occasional forays by law schools into the use of liberal arts as a basis of critique, such as the law and economics movement, or into skills

training, are only the exceptions that prove the rule. Ironically, the ABA's recent MacCrate Report has been critical of legal education as too narrow in failing to offer instruction in skills and in failing to instill values and thus producing technicians of the case-method and little else.

Indeed this continued fascination with the case proceeds into the profession as well. Law firms charge clients large fees to have young associates comb the libraries in search of the magic case that will win the client's cause. Likewise, judges who want to make a name for themselves know that the publication of a number of well written opinions will attract the attention of the legal community and may lead to promotion.

As a result, legal educators have always been isolated from their brethren in other departments of the university because the dominant doctrine not only makes the learning of sociology, psychology and literature irrelevant, but also causes an alienation from other scholars who cannot penetrate the terminology and the method of case analysis. As a result, legal scholars rarely penetrate or influence more mainstream intellectual trends. The law school superstars of the last fifty years like Hart, Gilmore, Dworkin and Prosser are almost unknown outside of law school circles. The lesser known stars, claiming an interest in public policy, will self-define a narrow area of expertise and elaborate upon it in the law reviews and conferences. Journalists and media people will seek their expert opinion when it is relevant to an issue of current public interest, as will lawyers when the needs of their clients dictate it.

The major exception to all of this is, of course, California, which, in addition to its sixteen ABA-approved law schools, has thirty-five unapproved schools about half of which have state approval, including at least two correspondence schools. With annual tuitions ranging between \$800 and \$4,000 per year and class sizes as low as thirteen, some are profit-making sole proprietorships; one is owned and operated by a law firm. Cal Northern, with faculty members chosen from "the County Court Systems of Butte, Yuba, Sutter and Colusa counties," offers a "special law program without frills or fanfare." Simon Greenleaf offers a "dynamic and variety of personal relationships" with a faculty committed to "Jesus Christ and historic Christianity."

As a protection for the students in the state non-approved schools, the state has introduced the "baby bar," administered after first year to students; students cannot proceed into the second year until they have successfully passed this test. The state has steadfastly resisted attempts to eliminate these schools by making their graduates ineligible to take the California bar exam.

ADDITIONAL CONSIDERATIONS

The rule of reason also dictates consideration of more amorphous factors including facts particular to the industry, the nature of the restraint, the purpose, the effects and the end sought. Concerning the nature of the restraint, the court in *Zavaletta* found the accreditation requirements to be mere expressions of opinion. However, the reliance that state admitting authorities place upon them belies this characterization. The ABA is a de facto agent for the highest court of every state and a de jure agent of the U.S. Department of Education. The requirements are detailed and appear to be inflexibly applied.

The inquiry into the "facts particular" to the industry may

somehow require an analysis of the legal profession as a whole. The inquiry might ask whether, in light of the role of the profession in today's society, the accreditation standards create better social servants. However, the roles that modern lawyers play are so varied as to defy description. The image of lawyer-generalist shaped by prototypes like Lincoln and Darrow, toiling away in their solo offices as avuncular social workers and business advisors to individual clients (See Clark, *Lawyer as Hero, the Advocate*, Spring, 1991), must give way to demographics revealing that today's lawyer is most often facilitator to a narrowly defined clientele, including, for instance, their government and corporate employers. However, assuming one can develop a generalized description of today's lawyer, the inquiry becomes whether requirements of scholar-teachers, case method, and expensive libraries are clear prerequisites to professional training.

The "facts particular" of the unique place of the legal profession in today's society may also merit analysis. The society's respect for the profession is due, in no small part, to the perceived rigor of law school and bar exams. A lawyer is assumed to be intelligent and well-educated, and perhaps therefore entitled to entry into more elite circles. Antitrust law, however, tends to dismiss social justifications for restraints, especially those that themselves are anti-competitive. Certainly, any justification for limiting the size of the profession beyond its current size of 800,000 (a lawyer for every 320 Americans) or maintenance of billings rates that currently make the profession a \$91 billion service industry would be rejected out of hand. These arguments are further undercut by the existence of bar examiners and bar exams, whose function is to protect the public from the unqualified, and those lacking in the requisite "good moral character."

The "facts particular" inquiry would also allow the ABA to argue that the standards advance the ethics of the profession. The standards require instruction in professional responsibility. Most law schools satisfy the standard by requiring a course in professional responsibility, which typically covers the ABA codes. The ABA Code of Professional Responsibility is supposedly the repository of our professional ideals of service, fiduciary duty, and advancement of justice. But, in his critique of the Code, Charles Frankel has suggested that "of its nine canons, five are directly related to the

defense of the profession against competitors and detractors and to the establishment of its claim to be accorded special rights and powers." He cites Canon 1 (the maintenance of the integrity and competence of the profession), Canon 2 (making legal counsel available), Canon 3 (unauthorized practice), Canon 8 (improving the legal system), and Canon 9 (appearance of impropriety). Further, Canon 5 (conflict of interest) increases demand; Canon 4 (confidentiality) insulates lawyers from scrutiny; and Canon 7 (zealous advocacy) encourages strife over peace. Unfortunately, there is a dearth of idealism, ethics, morality and justice in the Code. (See Clark, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*. 17 *Suf. L. Rev.* 79 (1983))

A FINAL COMMENT

In at least some sense, any judge hearing this case, has a conflict of interest because his or her own success is probably, in no small measure, as result of the system that the case attacks. But if MSL were successful and the accreditation standards were invalidated, it is interesting to ruminate about what might result from such a situation. Diversity and experimentation outside the Harvard model would prove interesting. The California experience would almost certainly spread. I wonder if a return to internships and clerkships might occur. Might law offices that do especially good training establish in-house training along the lines of Litchfield? The MacCrate Report is only the latest critique of the lack of skills training in the law schools; but the MacCrate Report was issued by the same section of the ABA that has issued the accreditation standards. See Clark, *Narrowing The Gap Between The Law School And The Profession*, 20 *the Advocate* 23 (Spring, 1993) But skills training may best be taught by practitioners with an adjunct faculty status who are excluded from the ABA faculty-student ratios, a claim made by MSL. Perhaps the college degree requirement might also give way, since many undergraduate degree program add little to the student's professional development. Indeed, it might be interesting to experiment with an undergraduate law programs, along the lines of European law schools. See Nolan, *A Stop in Austria*. Finally it might add the factor of price competition to spiralling law school tuitions.

POEMS

BY STACEY HARRIS
A STUDENT AT SUFFOLK UNIVERSITY LAW
SCHOOL



RAPID RESPONSE AND THE CRUST OF REALITY

it's when the corner
of the ghetto
creeps into the bottom
of your mind.
it's when heredity,
economy, pregnancy
and bigotry,
own
your every move.
it's when you realize,
that illegal
search and seizure
oddity or difference,
could land you
head first,
blind, deaf, dumb,
and unable to breathe,
in no mans land.
color is no object,
no help, no deterrent.
Not if you're carrying a large bag
look lost
young
old.

Not if you limp,
have a tattoo
old car
or playin' loud music.
Not if you look it
or picked the wrong day
when the cops
were just tirin'
or pushin' for a promotion.
Not if you picked
the wrong street to travel
alone
or at dusk.

Between poverty and severe starvation
Between jobless and almost living
Between wasted and just dealing
lies the point of no return.
What would you do for survival?
to keep on running free
leaning over the jagged edge,
of no man's land
but not yet touching its magnetic sludge-
What would you do?
to keep their bellies from rumblin'
ribs from showin'
syringes full,
or for personal protection
from your brother
from your family
from the weather
from yourself.
Until you have no choices
left
no room
for chance,
and you fall
you fly
you jump
you cry
you crack your skull
on the crust of reality
leaving you history
running
dripping
oozing down
onto the gutter
the alleys
and onto the jaded streets
of
no man's land.

THE MYTH OF THE MELTING POT

We were born
in the promised land
with the heavy promises
crushing our shoulders
as a reminder of
normality
of sadness
of hypocrisy.

We were born
learning equality
we pledged together
to serve, honor
and gleefully
took on the commandments.

We were born
friends
who shared equal opportunities
of education,
employment and daydreams.

We were born
into a fallacy
which deleted the small
chose the majority
and praised the strong.

We were born
in a bind
causing you to hate me
for my difference to you
my friend, my brother
who has been taught
to strike me, your sister
with an American made brick
to punish my weak soul
for staying true
to myself.

We were born
to be tools
to recapitulate hate
refuel fear and
recreate the moral majority.

We were born
to be tested
trained and then tried
to be the elite.
I failed the test
and now
my termination has begun.

I was born
in exile
in the land of the free
home of the brave
I will die a slave.

Hierarchy
I was taught
did not exist.
The silence
I was told
could never touch me here
will silence me
to death.

TECHNOLOGY AND THE ROLE OF THE LAW LIBRARY

BY PROFESSOR MICHAEL J. SLINGER
LAW LIBRARY DIRECTOR



It is clear that methods of conducting legal research have been enhanced by the widespread use of *Westlaw* and *Lexis*. It is now possible to have instant access from a PC to these databases. This means that each individual has the capability, without leaving his or her desk, to search the equivalent of a large law library containing statutory, case, and administrative precedent from every U.S. jurisdiction. Legal researchers can also retrieve significant non-law information through the *Nexis* component of *Lexis* and the *Dialog* component of *Westlaw*. Ten years ago it was almost unheard of for attorneys to track news items of interest. Utilizing *Nexis* and *Dialog* it is now routinely done.

As *Westlaw* and *Lexis* have prospered, they have begun to face increasing competition. Interestingly, this competition has not come from other on-line databases, but is instead resulting from a new form of technology, the *CD-ROM*. Like the on-line services, *CD-ROM* titles provide large "libraries" of information useful to the legal researcher. *CD-ROM*'s are designed to replicate the user friendly searching techniques of the on-line services. However, *CD-ROM* titles may cost less because unlike on-line databases they require no telephone connections and therefore no communications charge. While cost is often a plus in favor of *CD-ROM* products, they cannot provide researchers with the up to date information which is available from the on-line services. This lack of timeliness can be a significant drawback for a legal researcher.

Further complicating the research scene is the arrival of the *Internet* information superhighway. *Internet* has given researchers access to vast amounts of information at faster speeds than was ever

possible before. The potential of *Internet* to revolutionize research was brought home to me on the first day I used it. A lawyer in Nebraska asked via electronic mail whether anyone could help him obtain a statute recently promulgated in Australia. Within one hour a Law Librarian in Hong Kong sent a copy of the statute to his PC. *Internet* truly provides the capability to make research a global experience.

Another development that bears watching are the efforts by the law libraries at Columbia University and at Chicago-Kent University to place portions of their collection in machine readable form. These materials, which commercial services will never put on-line because it would not be financially profitable, will be made available via PC's instantaneously to researchers far beyond the walls of the two libraries. Some commentators have forecasted that these "virtual libraries," as they are known, will lead to the death of the book and the elimination of the large library collections that

have long been a significant part of legal education. I do not agree that the end of the book or the large law library collection is even remotely near, but I do think the *virtual library* should add yet another weapon to the arsenal of information available to the researcher.

Faced with this dazzling array of research options, Suffolk Law Library has made significant efforts to see that our students have the opportunity to work with the latest in technological innovations. For example:

In 1989, Suffolk students had four computer assisted legal research terminals (*Westlaw* and *Lexis*) available for their use. Today, the Law Library provides twenty-two dedicated terminals, with additional access available through the Law School's Computer Resource Center. Twenty of the dedicated terminals are housed in our two Permanent Learning Centers to facilitate both classroom instruction and independent research. As a result of the increased availability of terminals and a corresponding growth in our program of Computer Assisted Legal Research (CALR) instruction, *Westlaw* and *Lexis* use has skyrocketed. In 1989, CALR connect time at the Law School amounted to 4,053 hours. In 1993 connect time rose to 21,963 hours, an increase of 442%.

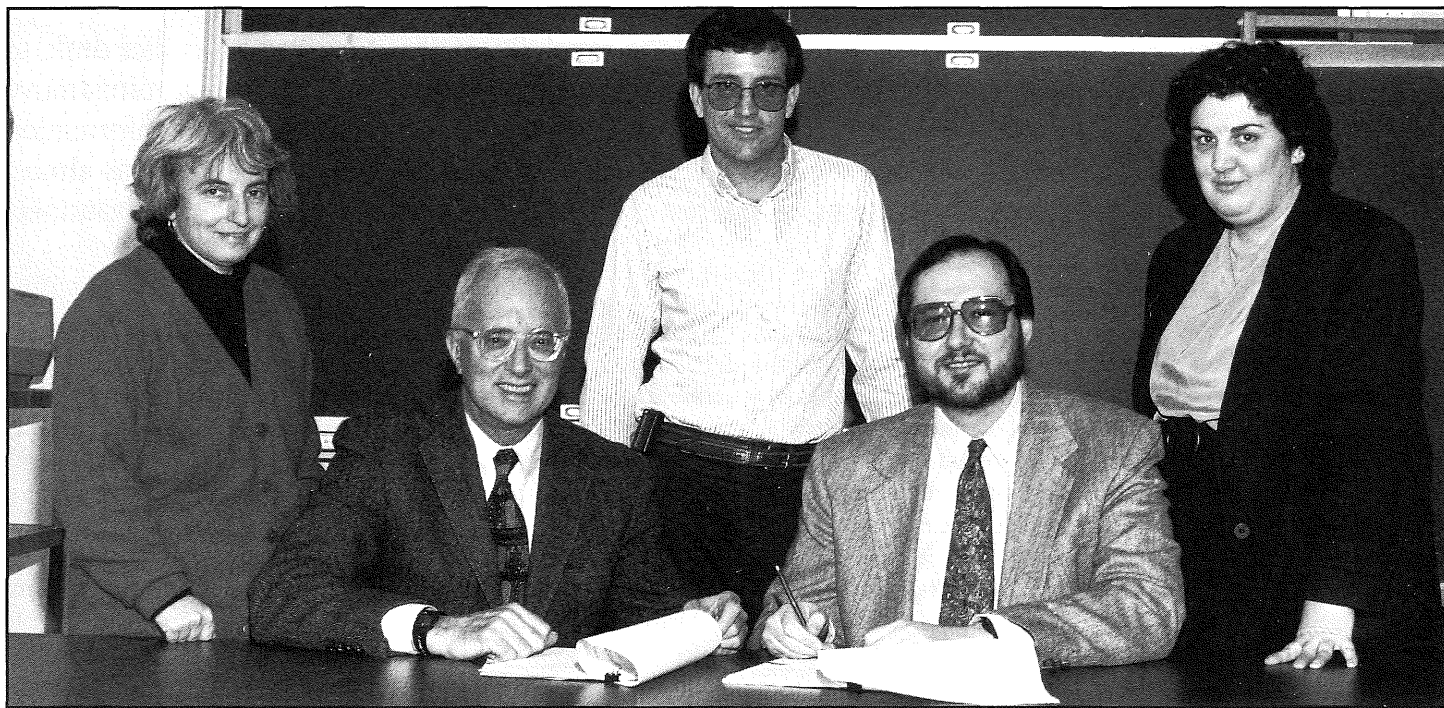
The Law Library is subscribing to a variety of CD-ROM libraries. Among the most popular are the *LEGALTRAC* and *WILSONLINE* legal periodical indexes; the *Massachusetts Administrative Regulations and Decisions*; the *Silver Platter U.S. Government Documents Index*; and the *New England Law Library Consortium (NELLCO) Union Catalog*. The NELLCO catalog is particularly interesting because it permits Suffolk Law Library patrons to search the collections of member libraries, including Harvard Law Library, Social Law Library, and the Rhode Island State Law Library. Future plans include making all CD-ROM libraries more easily accessible via a Local Area Network (LAN). Alumni and stu-

dents are welcome to use any of our CD-ROM products. Our Reference Librarians will be glad to assist you; please inquire at the Reference Desk on the fourth floor of Mugar Library.

Internet and the *virtual library* projects are examples of the rapid technological developments that are becoming commonplace in the information age. The Suffolk Law Library is working to take advantage of any technology that will help us train our students and serve the future information needs of the Suffolk Law School community. For example, we are now in the process of converting our card catalog, which represents the technology of the nineteenth century, into an on-line catalog, which will represent the technology of the twenty-first century.

As important as our new on-line catalog is for the future of the Law School, its arrival is only part of our future technological plans. By creating the position of Computer and Electronic Services Librarian, which is now ably filled by Mr. John Nann, we now possess the expertise to keep current of new developments in information technology. Already, John Nann has been actively working with students and faculty to help them to integrate technology into their educational and research experiences. With Mr. Nann's help several courses are now making use of *Internet*, and one professor has developed an electronic textbook which his students use instead of a traditional printed book.

The growth of technology represents a significant challenge for legal educators and practitioners. The Law School building on Tremont Street offers us a unique opportunity to include within its walls the latest in technology. The new Law Library will be designed with technology at the forefront of our planning. The Law Library staff is committed to helping the Suffolk graduate of tomorrow prepare for legal practice in the next century. We intend to make certain we are among the law schools which prepare their students to take advantage of all technology offers.



Signing the contract to bring the INNOVATIVE Automated Library System to Suffolk University. From left: Margaret Lourie, Assistant Director for Technical and Computer Services, Sawyer Library; Ted Hamann, Sawyer Library Director; Peter Porcello, MIS Director; Michael J. Slinger, Law Library Director and Professor of Law; Cecelia Tavares, Assistant Director for Technical Services, Law Library.

SUFFOLK UNIVERSITY LAW LIBRARY RECENT PRACTICE ORIENTED ACQUISITIONS

BY SUSAN D. SWEETGALL, ASSISTANT DIRECTOR FOR PUBLIC SERVICES; SONIA ENSINS, REFERENCE LIBRARIAN; AND ELIZABETH GEMELLARO, REFERENCE LIBRARIAN.

The titles listed below are a selection of the practice oriented materials recently acquired by the Suffolk University Law Library. The titles are arranged alphabetically by subject, with the call number, which indicates the location of the material within the library, in bold type 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).

ANTITRUST LAW

ANTITRUST COMPLIANCE MANUAL: A GUIDE FOR COUNSEL AND EXECUTIVES OF BUSINESSES AND PROFESSIONS. Walker B. Comegys. 2nd ed. New York: Practising Law Institute, 1992. **KF 1649 .C65 1992**

Discusses the need for antitrust compliance programs for organizations of all sizes and presents a guide to constructing a plan. Includes some model written antitrust compliance statements.

PRIVATE LITIGATION UNDER SECTION 7 OF THE CLAYTON ACT: LAW AND POLICY. Private Merger Litigation Task Force, Ronald W. Davis, chairman, Ronald G. Carr, ... et. al. Chicago: American Bar Association, Section of Antitrust Law, 1989. **KF 1657 .P74 P76 1989**

This monograph describes the current law and policy issues in private litigation in antitrust merger enforcement.

ATTORNEY AND CLIENT

YOU AND YOUR CLIENTS: A GUIDE TO A MORE SUCCESSFUL LAW PRACTICE THROUGH BEHAVIOR MANAGEMENT. Stanley S. Clawar. Chicago: Section of General Practice, American Bar Association, 1988. **KF 311 .Z9 C53 1988**

The premise of this book is that improved lawyer/client relationships will lead to a more successful law practice. This book discusses how to communicate more effectively with clients, how to deal with problem clients and how to improve the law firm staff's interactions with clients.

CHILDREN

THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION AND PROTECTION CASES. Ann M. Haralambie. Chicago: Section of Family Law, American Bar Association, 1993. **KF 540 .H37 1993**

Chapters in this book include: the types of representation of children, ethical and malpractice issues, pretrial preparation of a case, trying the case, child development and child custody, child abuse issues, permanency planning issues and organizations, journals and treatises on these issues.

COMMERCIAL LAW

INTERNATIONAL TRADE FOR THE NONSPECIALIST. Paul H. Vishny, editor. Philadelphia, Pa: American Law Institute-American Bar Association, Committee for Continuing Professional Education, 1992. 2 volumes. **K 1005.4 I587 1992**

Some of the subjects discussed include legal problems in the international sale of goods, governmental and international economic activity, contracts, international licensing, export issues, local law and antitrust law considerations, regulation of foreign trade, international lending and United States taxation.

COMPUTERS

STATE COMPUTER LAW: COMMENTARY, CASES AND STATUTES. Virginia V. Shue, James Vergari. Deerfield, IL: Clark Boardman Callahan, 1992-. (looseleaf).

This looseleaf covers these eight substantive areas in computer law: contracts, tort and negligence liability, trade secrets and protection of software, personal information privacy, taxation, electronic banking services, computer crime and enforcement, and computer based evidence. Each chapter begins with an examination of the area and then lists cases and statutes from all fifty states which correspond to the topics of the chapter.

CONVEYANCING

REAL ESTATE TRANSACTIONS. George Lefcoe. Charlottesville, Va: Michie, 1993. **RESERVE KF 665 .L39 1993**

This volume, part of the Contemporary Legal Education Series, provides basic information on real estate acquisition, development, and finance.

COURTS—MARTIAL AND COURTS OF INQUIRY

MANUAL FOR COURTS – MARTIAL, UNITED STATES
Washington, DC: Dept. of Defense, 1984– (loose-leaf).
RESERVE KF 7625 .M36 1984

This government document contains the Rules for Courts–Martial, Military Rules of Evidence, Punitive Articles and Non–Judicial Punishment.

MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE.
David A. Schlueter. 3rd ed. Charlottesville, Va: Michie Co., 1992. **RESERVE KF 7620 .S34 1993**

This handbook was designed for both civilian and military counsel. It focuses on procedural and substantive rules and related practices unique to military criminal law.

CRIME

A SELECTIVE BIBLIOGRAPHY ON THE ECONOMIC COSTS OF CRIME. Michael J. Slinger, Monticello, IL: Vance Bibliographies, 1989. **REFERENCE HV 6791 .S65 1989**

A selection of “books and articles which represent both economic analyses of crime, along with those whose primary purpose is to illustrate the economic costs of crime by pointing out particular examples and data.”

CRIMINAL PROCEDURE

COMPLETE MANUAL OF CRIMINAL FORMS. F. Lee Bailey and Kenneth J. Fishman. 3rd ed. Deerfield, IL: Clark Boardman Callaghan, 1993– (loose-leaf). **L-LEAF KF 9616 .B3 1993**

This third edition contains federal and state forms and has new sections in the areas of discovery, suppression motions, motions in limine, trial motions and appeals.

DIVORCE

REPRESENTING THE OLDER CLIENT IN DIVORCE: WHAT THE LAWYER NEEDS TO KNOW. Constance R. Putzel. Chicago: Section of General Practice, American Bar Association, 1992.

The issues facing clients in divorces with no minor children are examined in this treatise. Some of the issues covered include: property disposition, spousal support, security for support payments, continuation of medical insurance, retirement benefits, and death or disability of either party. It also contains sample forms related to the chapter topics.

INSURANCE LAW

PROPERTY INSURANCE COVERAGE DISPUTES: ISSUES AND TECHNIQUES FOR MANAGING FIRST PARTY CLAIMS.
Chicago: Tort and Insurance Practice Section, American Bar Association, 1992. **KF 1190 .P7 1992**

The articles in this book cover these aspects of first party insurance claims: the role of counsel, examinations under oath, the fraud defense, rights of the innocent co–insured, property insurance appraisal, denial letters, declaratory judgements, waiver and estoppel in coverage disputes and discovery.

INSURANCE, TITLE

LAW OF TITLE INSURANCE. D. Barlow Burke, Jr. 2nd ed. Boston: Little Brown, 1993–. (loose-leaf). **KF 1234 .B87 1993**

This loose-leaf covers policies, regulations and procedures and includes forms.

LAW PARTNERSHIP

MAKING PARTNER: A GUIDE FOR LAW FIRM ASSOCIATES.
Robert Michael Greene. Chicago: American Bar Association, Section of Law Practice Management, 1992. **KF 300 .Z9 G74 1992**

This book is written for law students and new associates and discusses what an associate needs to do to become a partner. It highlights both the professional and personal qualities that partners will look at when deciding to make a new partner.

LAWYERS

THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE. Chicago: American Bar Association, Standing Committee on Lawyer's Professional Responsibility, 1992. **RESERVE KF 313 .L393 1992**

This handbook covers what legal malpractice is and how to avoid it. It also has a section on malpractice insurance and liability insurance companies.

LAWYERS PROFESSIONAL LIABILITY UPDATE. Chicago: American Bar Association, Standing Committee on Lawyers' Professional Liability, 1985– (loose-leaf). **L-LEAF KF 313 .A6 L39 1985**

“The purpose of this publication is to provide up-to-date information on professional liability issues to lawyers and others concerned about preventing legal malpractice.” Continues a serials format publication with the same title.

LEGAL ASSISTANCE TO THE AGED

ELDERLAW: ADVOCACY FOR THE AGING. Joan M. Krauskopf...et al. 2nd St. Paul, MN: West Publishing Co, 1993. 2 volumes

KF 390 .A4 E44 1993

This book provides legal information to attorneys to assist older persons on issues of extended living.

PERSONAL INJURIES

PROVING OR DISPUTING DAMAGES IN P.I. CASES. Boston, MA: Suffolk University Law School, Center for Advanced Legal Studies, 1993.

SPECIAL COLLECTION KF 8925 .P4 P76 1993

An in-depth and practical discussion of damages in personal injury cases.

RETIREMENT

ADVISING CLIENTS ABOUT RETIREMENT. Boston, MA: Suffolk University Law School, Center for Advanced Legal Studies, 1993. **SPECIAL COLLECTION KF 3510 .Z9 A38 1993**

Covers various aspects of investment planning, Social Security benefits, estate planning, and taxation.

SUB CHAPTER S CORPORATIONS

THE COMPLETE GUIDE TO "S" CORPORATIONS. Ted Nicholas. Newly. rev. ed. Chicago: Enterprise-Dearborn, 1993.

KF 6419 .N53 1993

This handbook covers the steps to forming an "S" corporation, the tax considerations for an "S" corporation, compensation and benefits in an "S" corporation and issues concerning selling and exchanging stock in an "S" corporation. Sample forms are included in each chapter.

SUMMATION

CLOSING ARGUMENT. James H. Seckinger, Notre Dame, IN: National Institute for Trial Advocacy, 1992.

KF 8924 .S42 1992

A guide to preparing a closing argument.

TAX COURT

TAX COURT PRACTICE. Marshall Taylor...et al. 8th ed. Philadelphia:

American Law Institute-American Bar Association Committee on Continuing Legal Education, 1993. **KF 6324 .Z9 T39 1993**

The authors are former Internal Revenue Service tax litigators and this book is intended to be a comprehensive manual for litigation in Tax Court. The appendices include sample pleadings and forms.

TRIAL PRACTICE

GOING TO TRIAL: A STEP-BY-STEP GUIDE TO TRIAL PRACTICE AND PROCEDURE. Karl Beckmeyer...et al. Chicago, IL :

Litigation Committee, Sole Practitioners and Small Firms Committee, Section of General Practice, American Bar Association, 1989. **KF 8915 .Z9 G58 1989**

MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE. Steven Lubet. Notre Dame, IN: National Institute for Trial Advocacy, 1993. **KF 8915 .L84 1993**

Topics covered include case analysis, examining witnesses, expert testimony, opening statement, jury selection, final argument.

THE TRIAL PRACTICE GUIDE: STRATEGIES, SYSTEMS, AND PROCEDURES FOR THE ATTORNEY. Joan M. Brovines, Thomas Oehmke. Chicago, IL: Section of General Practice, American Bar Association, 1992. **KF 8915 .Z9 B76 1992**

FLORIDA

LEGAL RESEARCH

GUIDE TO FLORIDA LEGAL RESEARCH. Mark E. Kaplan, Gail G.Reinertsen Richard L. Brown. 3rd ed. Tallahassee: Florida Bar, Continuing Legal Education, 1992.

STATE MATERIAL KFF 75 .K36 1992

This guide gives a brief introduction to the government of Florida and describes how to find both primary and secondary source material for Florida.

MASSACHUSETTS

ENVIRONMENTAL POLICY

MASSACHUSETTS ENVIRONMENTAL COMPLIANCE UPDATE. McGregor and Shea, P.C. Nashville: M. Lee Smith Printers and Publishers, 1992-

RESERVE PERIODICAL

This newsletter provides "a monthly survey of environmental law developments in Massachusetts". Both state and federal legislative and administrative actions are discussed in each issue.

GUARDIAN AND WARD

THE HANDBOOK OF GUARDIANSHIP AND THE ALTERNATIVES: AN EXPLANATION IN SIMPLE TERMS OF CONSERVATORSHIP, GUARDIANSHIP, AND OTHER OPTIONS. Mental Health Legal Advisors Committee. Boston, MA: The Committee, 1993. **RESERVE KFM 2506 .H36 1993**

This book contains chapters on guardianship and conservatorship, alternatives to them, health care proxies, and technical information.

NUTS AND BOLTS OF SETTING UP A GUARDIANSHIP. Presented by the Massachusetts Bar Association's Probate Law Section. Boston: The Association, 1993.

RESERVE KFM 2506 .Z9 N88 1993

This handbook was written by the Mental Health Legal Advisors Committee, a state agency within the Supreme Judicial

Court. It provides an explanation of guardianships, conservatorships, trusts, durable powers of attorney and health care proxies. It also includes sample forms.

INDUSTRIAL LAWS AND LEGISLATION

HOT TOPICS IN GOVERNMENT REGULATION. Boston, MA: Suffolk University Law School, Center for Advanced Legal Studies, 1993.
SPECIAL COLLECTION KF 1600 .A75 H68 1993

Some of the sections included in this volume are Licensed site professionals and the Massachusetts contingency plan, Implications of the Americans with Disabilities Act in Massachusetts, Municipal regulation of real property, The power market, economics, tax aspects, and development strategy of independent power and demand-side management, Exploring the clauses of Section 6 of the Zoning Act, and The Environmental, safety & health audit.

JUSTICE, ADMINISTRATION OF

IN THE MATTER OF THE BOSTON MUNICIPAL COURT DEPARTMENT OF THE TRIAL COURT. Report of the Special Master and Commissioner, Paul R. Sugarman. Boston: Supreme Judicial Court, 1991.
RESERVE KFM 2962 .A8 S84 1991

STATEMENT RELATIVE TO THE REPORT OF THE SPECIAL MASTER AND COMMISSIONER ON THE BOSTON MUNICIPAL COURT AND SUPREME JUDICIAL COURTS ACTIONS IN RESPONSE TO IT. Supreme Judicial Court. Boston: The Court, 1991.
RESERVE KFM 2962 .Z9 M37 1991

In 1990, the Supreme Judicial Court appointed "a Special Master and Commissioner to conduct a prompt and thorough administrative inquiry into alleged improprieties with respect to preferential treatment of attorneys by certain Justices of the Boston Municipal Court." These reports describe his investigation and give his recommendations on the operation of the BMC and findings of misconduct by Justices of the BMC.

LAND USE

HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW: ZONING, SUBDIVISION CONTROL, AND ALTERNATIVES. Mark Bobrowski. Boston: Little, Brown, 1993.
RESERVE KFM 2858 .B63 1993

This handbook includes an analysis of decisions in land use regulation, zoning, variances, administration and enforcement.

LAW REPORTS, DIGESTS, ETC.

MASSACHUSETTS LAW REPORTER. Brighton, MA: Massachusetts Law Book Co., Vol.1, no.1 (Sept. 13, 1993)-.
RESERVE KFM 2445 .A2 M37

A weekly publication reporting the full text of selected opinions of the Massachusetts Superior Court. Focuses on discovery and procedural issues and issues that are generally not treated in higher courts.

LAWYERS

MASSACHUSETTS ATTORNEY DISCIPLINE REPORTS: DECISIONS OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. Compiled by the Board of Bar Overseers. Boston: Bateman & Slade, 1981-
RESERVE KFM 2476.5 .A2 A497

These volumes include SJC opinions and orders and summaries of private reprimands administered by the Bar of Overseers.

NEW RULES ON PUBLIC DISCIPLINARY HEARINGS FOR LAWYERS. Massachusetts Bar Association's Small Firm Management Section. Boston: Massachusetts Bar Association, 1993.
RESERVE KFM 2925.5 .D5 N49 1993

Includes SJC Rule 4.:01, Rules of the Board of Bar Overseers, Board letter to Supreme Judicial Court explaining proposed rules changes and an example of Bar Counsel's Proposed Findings of Fact, Conclusions of Law and Recommendation for Discipline.

LEGISLATORS

THE MASSACHUSETTS POLITICAL ALMANAC. Boston: Almanac Research Services. Annual. (2 volumes)
REFERENCE JK 3130 .A6

Volume one contains the profiles of all Massachusetts state and federal legislators. Volume two contains profiles of high level state executive branch officials.

SENTENCES (CRIMINAL PROCEDURE)

STANDARDS OF JUDICIAL PRACTICE: SENTENCING AND OTHER DISPOSITIONS. District Court Department of the Trial Court, the Committee on Standards. Salem, Mass: Administrative Office of the District Court, 1984. (Administrative reg.no. 3-84).
RESERVE KFM 2983.2 .M37 1984

Massachusetts Administrative Regulation 3-84 has the provisions of the Standards of Judicial Practice applicable to Sentencing and Other Dispositions for use in the District Court.

NEW HAMPSHIRE

LABOR LAWS AND LEGISLATION

LABOR AND EMPLOYMENT IN NEW HAMPSHIRE: A GUIDE TO EMPLOYMENT LAWS, REGULATIONS, AND PRACTICES. Jeffrey L. Hirsch and Carol Ann Conboy. Austin, TX: Butterworth Legal Publishers, 1992-. (loose-leaf)
STATE MATERIALS KFN 1531 .A6 H57 1992

This handbook is useful for both attorneys and managers of small and medium size businesses. Topics covered include: hiring, hours and wages, health and safety standards, employment discrimination laws, employee privacy, labor relations, benefits and termination.

POWER OF ATTORNEY: LEGAL WRITING FOR THE PRACTITIONER

DR. MARTHA SIEGEL, ESQUIRE



Every legal writing teacher develops over time a series of intense stylistic preferences. More than mere eccentricity, these preferences usually represent significant stylistic, grammatical, or structural concerns. An Instructor's "pet peeves" really serve as shorthand for frequently encountered (and repeatedly corrected) writing problems.

During my experience as a teacher of high school English and now legal writing, I have collected a set of "pet peeves" that identify many of the common problems arising weekly in my legal writing classes. Always in the process of "becoming," the list is not complete. Rather, this current list of "Siegel's Pet Peeves" represents only the most recent formulation.

Each "pet peeve" has a substantial reason behind it—grounded in style, grammar, or persuasion. Those interested in the underlying reasons may write their questions in care of *The Advocate*, and I will explain.

SIEGEL'S PET PEEVES[®]

1. "I think" (writing in the first person). Under most circumstances, the court will ask you for your personal opinion if it wants it. Rest assured this request is rare.
2. Fancy footwork: "heretofore," "albeit," "wherefore," "whereas," "aforesaid," "herein," and other similar phrases.
3. One sentence paragraphs!
4. Beginning a sentence with a conjunction: "And," "But," or "Because."
5. CONTRACTIONS !! Don't, can't, won't, didn't. Yes. You

shouldn't.

6. Semi-colons (sorry, folks). The beginning of each new sentence is an *opportunity* to grab your reader. Do not squander your opportunities by deferring to the "semi-colon shuffle."

7. *Split Infinitives!* ("To boldly go where no man [sic] has gone before.")

8. "Very." Go through your document substituting for "very" the word "damn"—as in the "the day was damn hot" or "the boxes were damn heavy." Now, simply remove all the profanity from your writing because profanity does not belong in formal discourse.

9. "Thus," "hence," "clearly," "surely," "certainly," "such," and "so." Also "said" as in "said product" and "said statement." Appalling. Ghastly. Dreadful. Disgusting. Offensive. Period. In addition, these empty words add nothing to your writing.

10. "There is" and "there are" and "it is." *What is? What's it or there?* Avoid ambiguous pronouns for crystalline prose.

11. Beginning a sentence with "However." "However" must relate to something other than itself. Example: "However, Jones called in sick again." "Jones, however, called in sick again." (Check *The Elements of Style*, Strunk and White, on pages 48-49.)

12. Misusing commas, or, using them, whenever the urge, or the impulse, or inclination, arises.

13. PARENTHESES. (If the information is significant, then include it in straight text. If the information is irrelevant, leave it out altogether!)

14. Sentences that run-on and sentences that jumble together odd thoughts are particularly loathsome and sentences that never know when to just take a break and use a period and end the reader's agony are things that really drive me crazy and cause great consternation among others who also teach writing.

15. The generic passive: "It is well-established." Oh? Lawyers take little on faith. Rather, they ask "by whom is 'it' (whatever 'it' is) 'established'?" By the way, the culprit is usually "the courts," an institution often in the business of "establishing," but "it" may well be a statute or ordinance, for example.

16. "Ducking" — "It was apparently snowing." Yes or no. It cannot be that difficult to decide.

17. "Where" means *place*. "When" means *time*. Stealing is not "where company materials are removed from the shop." Stealing occurs "when someone removes company materials from the shop."

18. And/or. Which is it: "and" or "or"? These words mean dif-

ferent things. Write different sentences.

19. Verbal redundancies: "past memories" and "true facts."

20. Since/Because. "Since" means time: since one o'clock. "Because" denotes a causal relationship: "I ate lunch because I was hungry." NOT: "I ate lunch since I was hungry."

21. Because/Due to. "Because" denotes a causal relationship. "Due to" refers to money. Accidents do not happen *due to* someone's negligence. Accidents happen because someone was negligent.

22. IMPACT is not a verb. IMPACT is a noun. The "impact of the meteor," but not the "meteor impacts the earth."

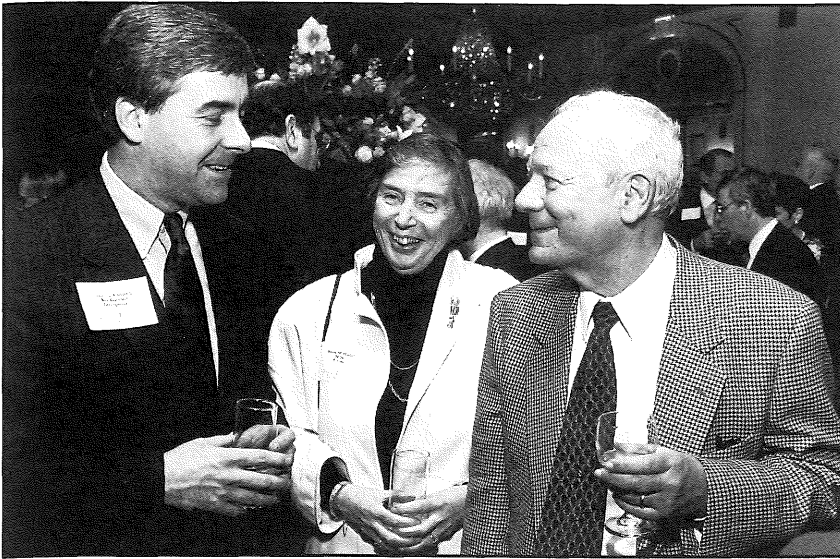
23. Courts do not rely "heavily," even in weighty matters. They rely "primarily" or "exclusively."

24. Although one may believe that a particular judge is callous or unfeeling, courts do not "feel." Courts "rule," "hold," "conclude," "note" or some similar intellectual process. Courts do not "argue" either. Lawyers do.

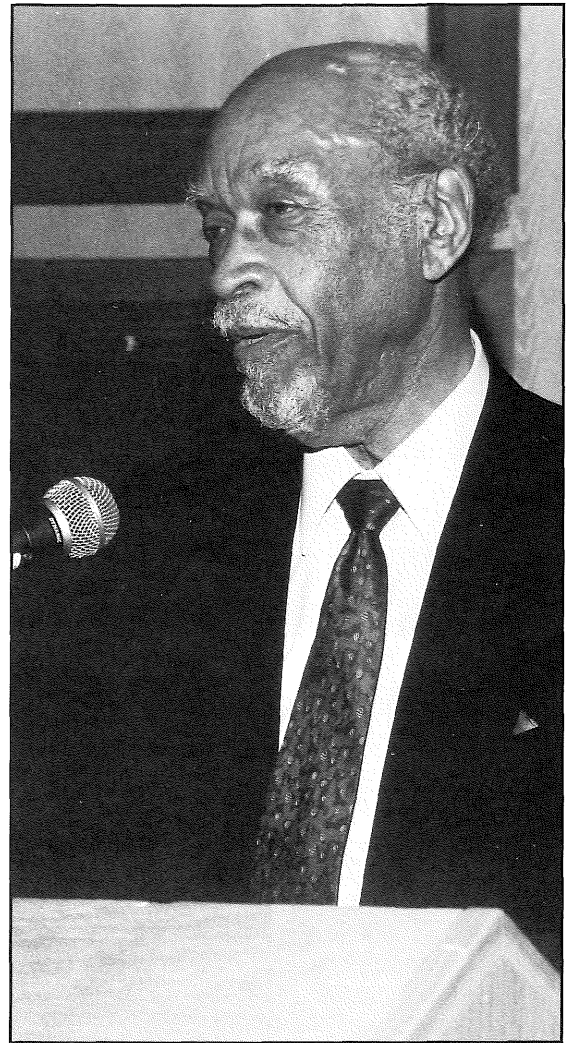
25. Law is neither good nor bad. Precedent is not "good" law or "bad" law. Rather, the law is "sound precedent."

25. Wryters who fail to prufreed!

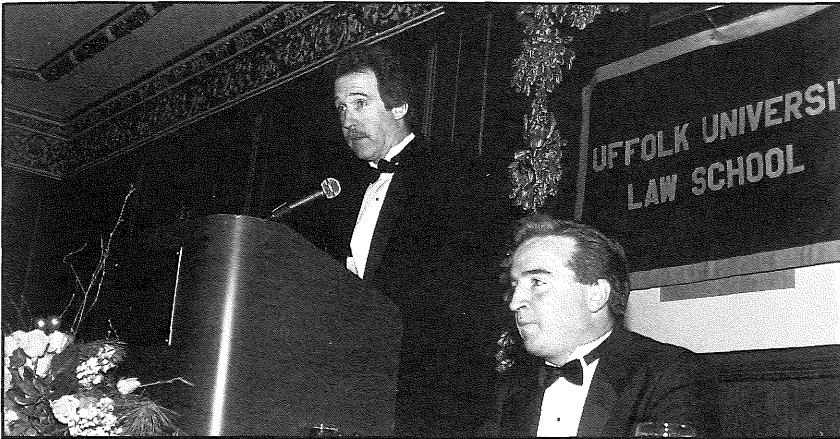
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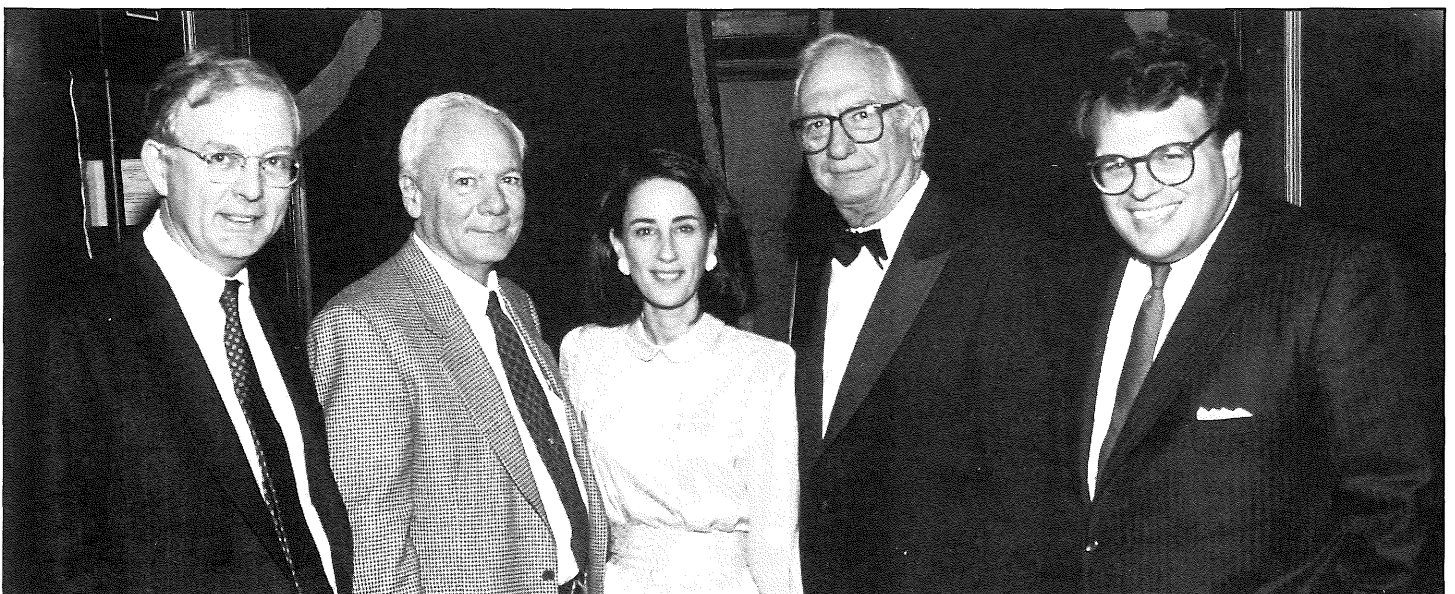
James Campbell, Vice President for Development, shown with Trustees Jeanne M. Hession, '56, and Richard Trifiro, '57.



Hon. Theodore McMillian of the United States Court of Appeals for the Eighth Circuit delivered an inspiring and humorous talk at the Moot Court Banquet on March 10, 1994.



Trustee Dennis M. Duggan, Jr., '78, of the law firm of Peabody and Brown, has been awarded the Outstanding Alumni Service Award. He is shown addressing the annual Alumni Dinner. Seated is Michael Gillis, '82.

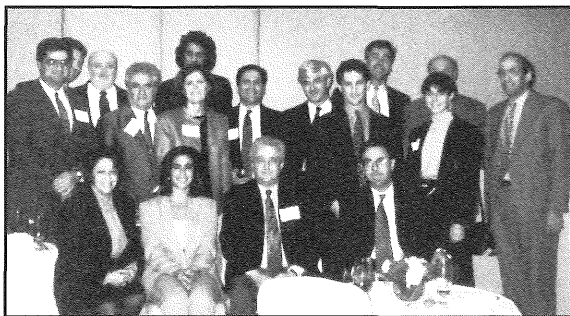


Nearly 500 people attended the recent Law Alumni Dinner at the Park Plaza Hotel, including Dean John C. Deliso, '73, Trustee Richard Trifiro, '57, Martha Siegel (Director of the Legal Practice Skills Program), Dean Paul R. Sugarman and Trustee Richard Leon, '74.



Laureen D'Ambra, '80, Child Advocate of Rhode Island, was awarded the Outstanding Alumni Achievement Award by the Suffolk Law Alumni Association. She is shown with her husband, Michael, Associate Dean Charles P. Kindregan, Jr., and Professor Thomas Finn.

1994 Clark Competition finalists Donald Pitman and Michael Quintal are congratulated by two of the final bench judges, Hon. Victoria Lederberg, '76, of the Supreme Court of Rhode Island and Hon. Theodore McMillian of the United States Court of Appeals for the Eighth Circuit. Other judges on the final bench were Hon. Joseph R. Nolan of the Supreme Judicial Court of Massachusetts and Chief Justice Mary C. Fitzpatrick of the Massachusetts Probate and Family Court.



The Los Angeles (California) Suffolk Law alumni recently met at a reception hosted by Donald Wynne, '80, and Judge Ellen McGrath Koldeway, '82. Associate Deans Charles Kindregan and Russell Murphy addressed the group and discussed developments at Suffolk and matters of interest to the Law School's growing Southern California alumni.



Judge Ellen McGrath Koldeway, '82, hosted a reception for San Diego (California) area Suffolk Law alumni in March, 1994. Vice President James Campbell and Associate Dean Charles Kindregan led a discussion of the new law school building and the success of the current moot court program.



Suffolk Law is sharing some of its duplicate library books with the International Juridical Institute in Moscow, Russia. Shown with part of a recent shipment of 36 cartons of law books prior to shipment are (l. to r.) Associate Dean Russell Murphy, Dean Paul R. Sugarman, Professor Michael Slinger (Law Librarian) and Associate Dean Charles Kindregan. Also working with Suffolk to assist the library development of the Institute are Professor Sarah Reynolds of Harvard Law School and attorney Maurice J. Fitzgerald of Boston '85.

Associate Dean Charles P. Kindregan congratulated Mia Frabotta and Christine Lynch on winning the final round of the 1994 Justice Tom C. Clark Moot Court Competition. The final argument was held in the courtroom of the Supreme Judicial Court of Massachusetts.



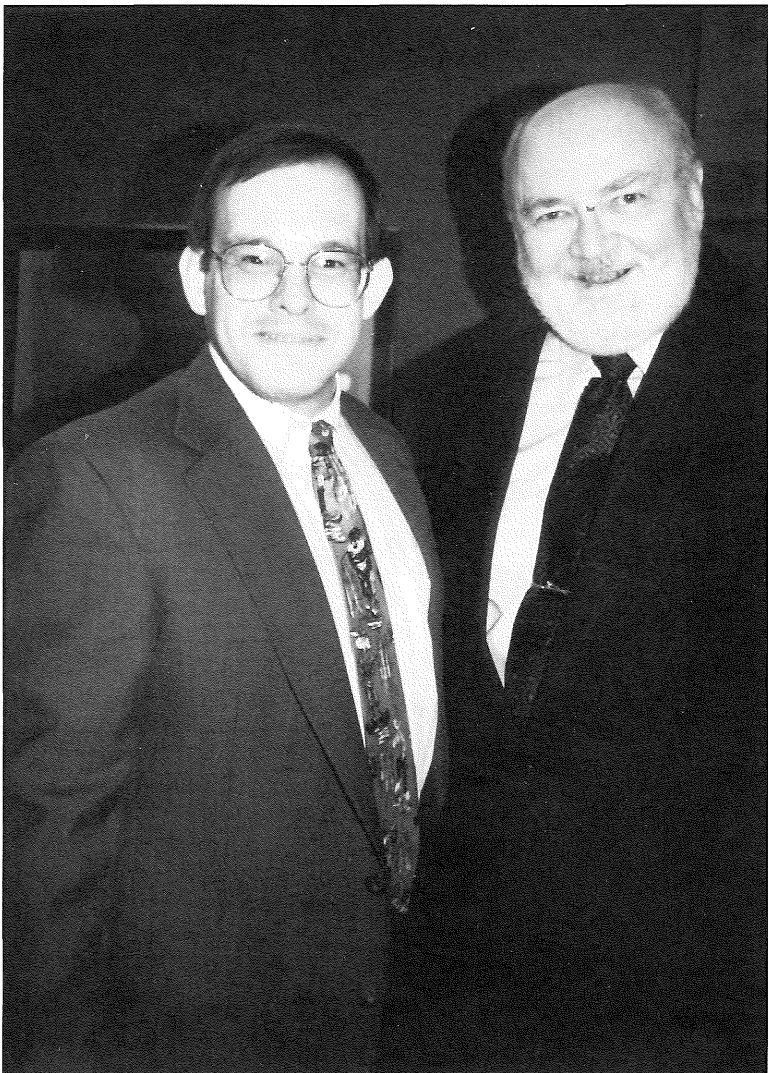
Professors from the Institute for Legislation and Comparative Law in Moscow, Russia, visited Suffolk University Law School in the Fall, 1993, and exchanged ideas with Suffolk administrators and faculty. Dean Sugarman presented the distinguished visitors with Suffolk athletic shirts prior to their return to Moscow. Shown, left to right: Igor Romanov (Director General for Foreign Affairs), Professor Barry Brown, Associate Dean Charles P. Kindregan, Dr. Lev Okunkov (Director of the Institute), Professor Michael Slinger, Dean Paul R. Sugarman, Professor R. Lisle Baker, Alexander E. Postnikov (Chief of the Constitutional Law Department), Professor Robert Wasson, Professor Jeffrey Atik, Associate Dean Russell Murphy and Professor Alfred I. Maleson.



Among those attending the meeting of the Philadelphia alumni in February 1994 were Ted Schwartz, '69 (President-elect of the Pennsylvania Trial Lawyer's Ass'n.), Chris Pakuris, '79 (partner at Margolis, Edelstein and Scherlis, which hosted the reception), Associate Dean Charles Kindregan, and Marian Kornilowicz, '80 (of Lightman & Associates, Philadelphia).



Dean Charles Kindregan greets some members of the Chicago, Illinois, Suffolk Law Alumni at the February 1994 meeting, including Michael Applegate, '93, Shari Forsythe, '81, and Anthony B. Shull, '90.



Christopher Pakuris, '79, Chair of the Philadelphia area Suffolk Law School alumni, welcomes Associate Dean Kindregan to the annual meeting of the Pennsylvania alumni.



Over thirty Arizona Suffolk alumni attended a reception in Phoenix hosted by Steven M. Guttell, '74. Vice President James Campbell and Associate Dean Kindregan addressed the alumni, some of whom are shown in these photos.

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