Dean John E. Fenton, Jr.

From the Halls of Justice to the Halls of Learning
Suffolk University Law School
the Advocate

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From the Dean:

You may notice that the Advocate looks different. We have decided to celebrate the 25th anniversary of the publication with a new design and format. From now on, the Advocate will be combined with the annual Law School Dean's Report. You will still find the well-researched, thought-provoking articles you have come to associate with the Advocate during the past quarter century. In addition, you will find news about faculty, alumni events, seminars and lectures sponsored by the Law School, and, of course, updates on the progress of our fund-raising campaign and the new Law School building.

Founded in 1968, the Advocate grew out of a student newspaper, called The Briefcase. Suffolk University President David J. Sargent, then Professor of Law, was the first faculty advisor of the publication, succeeded by Professor Charles Kindregan, who served for 20 years. Until five years ago, the Advocate was edited and written by students. The articles were timely, provocative, and designed to be of general interest to faculty and alumni, as well as students.

Several of these articles stand out in my memory. Three of our students went to New York to interview Alger Hiss shortly after his readmission to the bar. The resulting story was a fascinating study of the man and the case and shed new light on one of the leading trials of the twentieth century. In 1980, another group of students went to Ireland to interview Sean MacBride, Senior Barrister in the Irish bar, founder of Amnesty International and winner of the Nobel Peace Prize. Prior to the interview, MacBride had no connection with Suffolk University. But as a result of meeting our students and at the request of Professor Kindregan, he agreed to visit the University and speak at the Law School graduation.

In 1990, the Advocate was transformed from a student-produced publication to a vehicle for faculty and alumni, as well as students, to publish opinion articles. For the last five years, Professor Joseph D. Cronin has served as Editor-in-Chief, guiding the publication to ever-higher levels of professionalism. Despite the different “look” of the publication, and the addition of my annual report of Law School activities, the Advocate will remain faithful to its mission. This issue includes Professor Cronin's in-depth examination of the Board of Education of Kiryas Joel Village School District v. Grumet; an interview with Betty Brody and Alvan Brody, authors of Massachusetts Tort Law; a review by Professor Gerard J. Clark of the laws enacted by the Massachusetts General Court in 1993; and several other articles of interest to the legal community.

Please write and share your reactions to our new format. We look forward to hearing from you.

John E. Fenton, Jr.
Dean, Suffolk University Law School
**Faculty News:**

New Appointments 1994-1995

**Jenny Rivera** joined the Law School as an assistant professor of law. She specializes in the areas of property and administrative law. Rivera, a former administrative law judge, served as law clerk to Judge Sonia Sotomayor of the Southern District of New York. She also served as associate counsel for the Puerto Rican Legal Defense and Education Fund, and as staff attorney for the Homeless Family Rights Project, Legal Aid Society.

On the administrative end, **James P. Whitters III, Esq.** was appointed director of career services. Whitters had most recently served as litigation counsel to the Boston law firm of Peabody & Brown. Previously he had been a partner for 22 years with the firm of Gaston & Snow. "James Whitters's extensive experience and excellent reputation in the legal community should serve Suffolk University Law School well," stated Dean John E. Fenton, Jr. in announcing the appointment.

**David Yamada** was also named assistant professor of law. He will teach in the areas of torts and employment law. Prior to joining the faculty at Suffolk, Yamada was a senior instructor at New York University School of Law, as well as the co-coordinator of its Lawyering Program. He also served as the assistant attorney general for the New York State Department of Law, Labor Bureau, where he engaged in civil and criminal litigation with an emphasis on appellate practice.

On the administrative end, **James P. Whitters III, Esq.** was appointed director of career services. Whitters had most recently served as litigation counsel to the Boston law firm of Peabody & Brown. Previously he had been a partner for 22 years with the firm of Gaston & Snow. "James Whitters's extensive experience and excellent reputation in the legal community should serve Suffolk University Law School well," stated Dean John E. Fenton, Jr. in announcing the appointment.

The Career Services Department also saw the promotion of **Mary Karen Rogers** to associate director. Rogers, a respected member of the Law School administration for over 20 years, had been serving as acting director of the Career Services Department. In announcing her promotion, Dean Fenton stated, "Ms. Rogers has been a valued professional at the Law School for many years and has discharged her responsibilities as acting director during a difficult period with great distinction and skill."
New Legal Practice Skills
Instructors 1994-1995

Colleen Arnott Less, a first-year LPS instructor, graduated from Suffolk University Law School, *cum laude*, in 1989 and received her B.A. degree, *cum laude*, in English from the University of Massachusetts at Boston.

After clerking for the Chief Justice of the Supreme Court of Rhode Island, Ms. Less was an associate for over three years in the litigation department at the Boston law firm of Parker, Coulter, Daley & White. As a litigator, Ms. Less prepared cases for trial in the areas of construction law, sexual abuse, civil rights, and general insurance defense.

While a law student at Suffolk Law School, Ms. Less wrote for the *Law Review* and later served as its managing editor.

Steven Locke, a first-year LPS instructor, graduated from Boston College Law School, *cum laude*, in 1991. He received a B.A. degree in government and law with a minor in education from Lafayette College in 1986.

Before joining Suffolk Law School, Mr. Locke was an associate at the Boston law firm of Morgan, Brown & Joy. He handled all phases of civil practice, with an emphasis on labor and employment law. Mr. Locke also contributed to a variety of publications in the labor and employment law fields.

While a student at Boston College Law School, Mr. Locke taught Civil Procedure as part of the school’s Academic Support Program. He also served as an officer in the Public Interest Law Foundation and participated in the Criminal Defenders Program. As an undergraduate, he served as an intern to Member of Parliament Oonah MacDonald, in London, where he wrote his thesis entitled, “The Proposed Abolition of the Greater London Council.”

Betsy Gould Roberti, a first-year LPS instructor, graduated from Suffolk University Law School, *cum laude*, in 1984 and received her B.A. degree from Wesleyan University in 1979.

Before joining Suffolk Law School, Ms. Roberti practiced law in both large and small firm settings, including Day, Berry & Howard in Hartford and Boston. There, Ms. Roberti concentrated in civil litigation, which required extensive research and writing. She was responsible for all phases of discovery and trial work in commercial, securities, product liability, construction, and insurance defense cases.

While a law student at Suffolk Law School, Ms. Roberti was a note editor on the *Transnational Law Journal* and an active participant in Moot Court Board activities. She was a finalist in the McLaughlin First Year Advocacy Competition; the winner of the Clark Moot Court Competition; and a member of the 1984 Suffolk National Moot Court Team, which became the national semi-finalist that year.

Medb Sichko, a first-year LPS instructor, graduated from Harvard Law School in 1983 and received her A.B. degree, *magna cum laude*, in English and American literature and language from Radcliffe College. Ms. Sichko was elected to Phi Beta Kappa at Radcliffe.

Before joining Suffolk Law School, Ms. Sichko practiced law in firms in Boston and South Carolina. Most recently, she was attorney/marketing manager at U.S. Benefit and Risk Management in Boston where her practice consisted of settling claims in the area of insurance subrogation and the solicitation of new clients. As an associate in Boston and South Carolina firms, her practice included domestic relations, real estate, and general litigation.
Prior to attending law school, Ms. Sichko was a Teaching Intern in English in the Advanced Studies Program at St. Paul’s School in Concord, N.H. There, she worked with the writing skills of students. She was also a volunteer teaching assistant at the Heath School in Brookline where she worked with the reading and writing skills of fourth graders in the Gifted and Talented Program.

Robert Visnick, a first-year LPS instructor, graduated from Suffolk University Law School, cum laude, in 1984 and received a B.A. degree in biology with a minor in oceanography from the University of New Hampshire in 1979.

Before joining Suffolk Law School, Mr. Visnick practiced law in San Diego, California. His practice included professional liability and criminal appellate defense.

Following law school, Mr. Visnick served as a Navy judge advocate for six years. He served tours as prosecutor, defense counsel, and legal assistance counselor.

He was an instructor at the Naval Justice School where he taught criminal law, evidence, and trial advocacy. Mr. Visnick is presently a Lieutenant Commander in the Naval Reserve.

While attending Suffolk Law School, Mr. Visnick taught biology and chemistry at Matignon High School in Cambridge.

Faculty Publications and Activities:

Karen Blum is serving as 1995 chair of the AALS Section on Civil Rights Litigation. She presented papers and lectured at numerous programs, including fall 1994 workshops for federal judges in Washington, D.C., Portland, Maine, and New York City. The Institute of Continuing Legal Education in Atlanta, Georgia, (November 1994), Chicago-Kent College of Law (March 1995), and Georgetown Continuing Legal Education (March and April 1995).

Victoria Dodd recently commented upon the newly enacted Code of Civil Procedure of the Republic of Estonia for the American Bar Association’s project on Central and East European law.


Dwight Golan moderated a program at the winter meeting of the CPR Institute for Dispute Resolution in January 1995. He appeared with professors from Harvard, Georgetown, and UCLA law schools to discuss a survey of major American law firms on their use of Alternative Dispute Resolution. In March, he spoke on “Insurance Redlining Litigation” at the American Bar Association’s National Institute on Fair Lending and Property Insurance in Washington, D.C., and moderated and spoke at the spring meeting of the American Bar Association’s Consumer Financial Services Committee in San Antonio, Texas.

Marc Greenbaum authored “Now What Do I Do With It: The Clarification and Obfuscation of the After Acquired Evidence Rule,” for the newsletter of the Massachusetts Bar Association, and was a speaker at the Association’s Labor and Employment Law Conference in Boston.


Charles Kindregan has been appointed to serve as the co-chair of the Massachusetts Bar Association Committee on the Probate and Family Court. He moderated the program on the court for the mid-year meeting of the M.B.A. He has also been appointed as the reporter for the first Bench/Bar Conference on the Probate and Family Court. This year he is serving on three American Bar Association committees. Professor Kindregan also recently had articles published in the Massachusetts Family Law Journal and the Connecticut Family Law Journal and has recently completed an analysis of the impact of the 1994 amendments to the federal bankruptcy code on family law practice which will be published in an upcoming issue of the Suffolk Law Review.


The O.J. Simpson trial has placed the University faculty and students in the media spotlight. Professors Charles Burnim, Timothy Wilton and Charles Kindregan were quoted or interviewed by local media including the Boston Globe, Boston Herald, WBZ-TV, WCVB-TV and WHDH-TV. Professor Marc Perlin also appeared on WCVB-TV in connection with another high-profile story — the Reggie Lewis case.
The winners/finalists of the Walter H. McLaughlin Appellate Advocacy Competition are shown with Moot Court Board member Susan Church.

(Clockwise from top) Lisa Healy was the winner in the Day Division, and Marcia Hawbolt was the winner in the Evening Division. David Rich was the finalist in the Day Division and Ted Workman was the finalist in the Evening Division.

The Law School ushered in the new school year with a fond — and fitting — tribute to one of its favorite sons, the late Walter H. McLaughlin, Sr. The former Superior Court Chief Justice died last year at the age of 87. A 1931 graduate of the Law School, the late Justice remained devoted to the School for many years, serving as a member of the Board of Trustees and on the Board’s Law School Committee.

On September 9, following the annual Appellate Advocacy Competition that bears his name, a portrait of Justice McLaughlin was unveiled in the Moot Court Room at the Law School. The event was attended by members of the McLaughlin family, President Sargent and Dean Fenton. Following the unveiling, a reception was held in the Pallot Library, with remarks by Atty. Walter H. McLaughlin, Jr.
Donahue Lecture Series

The Donahue Lecture Series was instituted by the *Suffolk University Law Review* in 1980 to commemorate the Honorable Frank J. Donahue, former faculty member, trustee and treasurer of Suffolk University. The series brings respected experts in various fields of law and government to lecture to the Suffolk University community.

The *Law Review* kicked off its Donahue Lecture Series for the 1994-1995 year on November 15, 1994, with the forty-fourth Donahue Lecture entitled "Post-Conviction Review in Canada: Politics v. Law." The lecture was delivered by Rt. Hon. A. Kim Campbell, former Canadian Prime Minister and currently a fellow at the John F. Kennedy School of Government.

On January 26, 1995, George P. Fletcher, Cardozo Professor of Jurisprudence at Columbia University School of Law, and an internationally celebrated expert on ethics, jurisprudence and criminal law, delivered the forty-fifth lecture on "Political Correctness and Jury Selection."

Emma Coleman Jordan, Professor of Law at Georgetown University, was the forty-sixth speaker in the series. She discussed "Race in the Market Domain: The Role of Government in Adjusting for Persistent Economic Inequality" on February 16, 1995. Professor Jordan is an expert on civil rights, financial services and commercial law and was one of Professor Anita Hill's attorneys during the Clarence Thomas confirmation hearings in 1992.

The forty-seventh and final Donahue Lecture for the academic year will be delivered on April 20, 1995 by Paul B. Stephan, III, Percy Brown Jr. Professor of Law and the Hunton & Williams Research Professor at the University of Virginia. His topic will be "Understanding the Fall: What We May Learn From the Collapse of the Soviet System."

All Donahue Lectures are held in the Pallot Library, Archer Building. For more information, please call 617-573-8180.
The Forum — the Speakers Series of the Student Bar Association — hosted two well-attended programs this fall. The first, held October 17th, was a panel discussion, entitled “Sexual Harassment and the First Amendment: Can They Co-Exist?” Members of the panel included Ellen Zucker, president of the Boston chapter of the National Organization for Women; Sarah Wunsch of the Civil Liberties Union of Massachusetts; Professor Marie Ashe of Suffolk University Law School; Robert Chatelle of the National Writer’s Union; Nan Levinson of Feminists for Freedom of Expression; and Sally Greenberg of the Anti-Defamation League.

On November 8th, Morris Dees, a leading civil rights attorney in the country and a man who has been called the “number one enemy of the Ku Klux Klan,” brought his crusade for racial justice to the Law School in a speech entitled “A Passion For Justice,” delivered at the C. Walsh Theater. The co-founder of the nonprofit Southern Poverty Law Center and the author of such books as A Season For Justice and Hate on Trial, Dees has won several major lawsuits against the Klan for its involvement in racially motivated violence.
Each year, for the past six years, the family of Harold B. Goodwin, Jr., JD '80, arrives at the Law School to honor him and to present scholarships in his name. They bring with them an 8 x 10 photo and stories of his life and work. Harold died in an accident in 1987, but his classmates, family and friends did not want his zeal for advocacy work to be forgotten or the stories of his life to go untold. They established a permanent memorial in his name to offer financial assistance to law students with ambitions to enter the field of trial advocacy—the Harold B. Goodwin, Jr. Legal Scholarship Fund.

Each year scholarships are awarded from the fund to the winners of the Mock Trial Competition, who receive the Harold B. Goodwin, Jr. Best Trial Advocate Award. Last fall, third-year day students Debbie C. Isles and Susan Rist-Sbraccia won the 1994 competition. Each was presented with a $2,200 scholarship and a numbered framed print of the Winslow Homer sketch depicting jurors listening to counsel at the New York Supreme Court in 1869. Goodwin's classmate, Paul Keane, who also chairs the scholarship committee, felt that the print paid appropriate homage to his friend.

The fund is nearing its goal of $100,000. If you wish to support the fund this year, contributions can be made to the “Harold B. Goodwin, Jr. Legal Scholarship Fund,” c/o Suffolk University Law School, 41 Temple Street, Boston, MA 02114.

Goodwin Scholarship Fund Nears $100,000

Sexual Harassment panel members (l to r): Robert Chatelle, Marie Ashe, Sarah Wunsch, Nan Levinson, Sally Greenberg, and Ellen Zucker.
Marianne B. Bowler, JD '76, Joins Board of Trustees

Magistrate Judge Marianne B. Bowler has been appointed to a five-year term on the University’s Board of Trustees. Her appointment was announced by Chairman James F. Linnehan following the Board’s November meeting.

Bowler has had a long alliance with the University. A 1976 cum laude graduate of the Law School, she was the first woman to serve as president of the Suffolk University Law Alumni Association, and in 1991 was the first woman to be presented with the Outstanding Alumni Award for “Exceptional Professional Achievements.” Last May, the University awarded her an honorary doctor of laws. She received her undergraduate degree from Regis College.

Judge Bowler has served as U.S. magistrate judge since 1990. Prior to her appointment to the bench, she had a distinguished 12-year career as an assistant U.S. attorney for the District of Massachusetts. Her work as a trial attorney in the civil division won her wide recognition, and in 1986 she was selected by the Attorney General to direct the civil and appellate educational programs for all assistant U.S. attorneys at the Attorney General’s Advocacy Institute in Washington, DC.

“We are honored and delighted to welcome Marianne Bowler to the Board of Trustees,” said Board Chairman Linnehan. “Her deep commitment to Suffolk University Law School, to the courts, the U.S. Attorney’s Office and the legal profession have earned her immeasurable respect from colleagues. We look forward to her service and association with Suffolk University.”

Bowler serves as chairperson on the board of trustees for New England Baptist Hospital in Boston, where she has been a trustee since 1985. She is also a member of Alliance Francaise, Irish Georgian Society, Save Venice, Inc. and the Junior League of Boston.
Police Misconduct Litigation: Recent Developments
Friday, May 12, 1:00 - 6:00 p.m.
Suffolk University Law School,
Donahue 218, Tuition - $129,
Alumni admitted after 7/91 - $105
- The Prima Facie Case Against Individuals
- Review of Recent Cases
- Excessive Force and Individual Liability
- Municipal Liability
- Qualified Immunity

Faculty: Michael Avery, Esq.,
Newton Centre; Professor Karen Blum, Suffolk University Law School;
Howard Friedman, Esq., Boston;
Douglas I. Louison, Esq., Merrick & Louison, Boston;
Professor Sheldon H. Nahmod, Chicago-Kent College of Law,
Chicago, Visiting Professor, Boston College Law School, Newton;
Professor Kathryn R. Urbonya, Georgia State University College of Law.

Sexual Abuse: Memory, Truth & Proof – Clinical and Legal Perspectives
Tuesday, June 20, 5:00 - 7:30 p.m.
Suffolk University Law School,
Donahue 218, Tuition - $129,
Alumni admitted after 7/91 - $105
Leading clinicians, researchers, forensics experts and attorneys discuss current views and perspectives on memories of sexual abuse in the context of legal action.

Faculty: Professor Marie Ashe, Moderator, Suffolk University Law School; Joseph H. de Rivera, PhD, Professor of Psychology, Clark University, Worcester; John G. Fabiano, Esq., Hale and Dorr, Boston; Stuart Grassian, MD, Beth Israel Hospital, Harvard Medical School; Thomas G. Guthell, MD, Mass Mental Health Center, Harvard Medical School; Laurence E. Hardoon, Esq., Hardoon & Ball, Boston; Mary Harvey, PhD, Director, Victims of Violence Program, Cambridge Hospital, Harvard Medical School; Linda Meyer Williams, PhD, Associate Professor, Family Research Laboratory, University of New Hampshire.

Questions or comments?
Contact Carole Wagan or Kim Short, Suffolk University Law School, Advanced Legal Studies Office: Phone (617) 573-8627 or Fax (617) 248-0648
First-year law student Dylan Carson, who organized the Sports Law symposia, questions one of the panelists.

Pro Sports Agents Address Labor Turmoil

Labor disputes between owners and players in professional sports have dominated headlines and vexed fans. This year, the Law School’s Sports and Entertainment Law Society hosted several symposia on sports law.

On November 15, the Society hosted several well-known sports agents: Jack Sands of Sports Advisors Group; Greg Clifton of Bob Woolf Associates; Brad Blank of Brad Blank and Associates; and Jay Fee of Mahoney, Hawkes and Goldings. Sands (’76) and Fee (’86) are Suffolk Law School graduates.

Sands, best known for his representation of major league baseball players, noted that he received his law degree in the same year that the historic Andy Messersmith case was handed down, thus opening the door to free agency in baseball and radically changing the game. Assessing the baseball strike, Sands predicted a settlement in early 1995. As this publication went to press, the 1995 baseball season had been scheduled to start on April 6. Jay Fee’s prediction that the strike would salvage a 50-game season also came to pass.

Noting the overflow audience for the program, Clifton said, “I see a room like this full of students who are interested in entering our profession, it excites me. In 1985, when I graduated from law school, the idea of being a sports lawyer was a foreign concept.” Emphasizing the demands placed on today’s sports lawyer, he warned that part of the job was “to learn what it means to get a phone call at two in the morning from a distraught client who gave up 12 earned runs in three innings and doesn’t understand what’s going to happen in his career.” Despite those demands, Clifton said of his chosen career, “I recommend it very highly.”

"Becoming a Sports Agent," the first in a series of Sports Law symposia featured panelists including (l to r) Jack Sands, JD ’76, Greg Clifton, and Brad Blank.
Gift Creates Tribute to a Life of Service

Attorney John A. Gifford, JD ’36, often advised his clients to simplify the probate process of their estates by making gifts sooner, rather than later. That advice was echoed years later during a discussion between his widow, Leona Gifford, and her lawyer. Mr. Gifford had intended to give Suffolk University Law School a substantial gift and Mrs. Gifford’s lawyer recommended that she make that gift now.

"John had wanted to set up a scholarship fund at the Law School for academically qualified students with financial need," said Mrs. Gifford. "I felt that he would have wanted the School to have the benefit of the gift as soon as possible." The $100,000 municipal bond contributed by Mrs. Gifford in memory of her husband will create an endowed fund, the interest from which will provide annual scholarship grants.

After John Gifford graduated from Suffolk University Law School in 1936, he served in the Air Force during World War II. He then went to the Philippines as a war crimes lawyer. There, he met his wife, an Army librarian. They returned to Boston and Gifford opened his own general law office where he continued to practice until his death in 1985. In his later years he specialized in taxation, estate planning, and probate.

"John felt that he was performing a public service as a lawyer," said Mrs. Gifford. He is described as someone who cared about his clients and treated them with kindness and respect. Through the Gifford endowed scholarship fund, generations of Suffolk University law students will come to understand the generosity, kindness, and caring that characterized John Gifford. He will be providing a public service in perpetuity.

"It is a great feeling to make this gift to Suffolk University now," said Mrs. Gifford. "I'm enjoying it. I hope it will inspire someone else to do the same."
LSAA honors White and Kennedy

This year's Annual Law School Alumni Dinner, hosted by the Law School Alumni Association, was held December 1 at the Park Plaza Hotel in Boston. More than 300 alumni and friends enthusiastically welcomed John E. Fenton, Jr., newly appointed dean of the Law School, who spoke about the future of the School, including plans for construction of a new building.

Highlighting the dinner over the years has been the presentation of alumni awards. This year, W. Paul White and William F. Kennedy, Jr. were honored.

In recognition of his exceptional professional accomplishments, W. Paul White, JD '73, received the Outstanding Alumni Achievement Award. A prominent figure in Massachusetts politics, White began his career in 1972 when he was elected to his first of eight terms in the State House of Representatives. Throughout his career, he has tirelessly championed community-based health care and free health care for the needy. He is now a State Senator for the Second Suffolk and Norfolk District, and was recently re-elected to a third term.

William F. Kennedy, Jr., JD '79, was the recipient of the Outstanding Alumni Service Award for his dedication and constant contributions to the Law School Alumni Association (LSAA). Kennedy is chief counsel to the House Ways and Means Committee and has been an adjunct professor at the Law School since 1982. He had served the LSAA as president for the 1993-94 term as part of his six years' service on its board of directors. He also served as vice president of the University Alumni Council during the 1992 academic year.

Alumni are welcome to attend the Annual Law School Alumni Dinner, as well as many other events sponsored by the Suffolk University community. Check your mail and the calendar listings in our alumni magazines for upcoming events that may be of interest. We invite you to get involved!
Annual Law School Alumni Dinner attendees included Trustee Dorothy A. Caprera, JD '59, S. Anthony Caprera, and The Honorable Marianne B. Bowler, JD '76, newly elected Trustee.

Barristers Update — Chair Morgan J. Gray, JD '91

The Barristers is a group of Law School alumni who have graduated within the last five years. This all-volunteer group serves the Law School in a number of ways. Its members chair educational programs, serve as Moot Court judges and assist with fundraising.

A reception was held on Tuesday, October 25, 1994 in the Pallot Law Library to kick off the Barristers Mentor Program. This program was designed with the Student Bar Association to enable Law School graduates to share their experiences and knowledge with current Suffolk Law students. More than 100 alumni and students have been paired.

If you are interested in becoming involved with the Barristers, and graduated between 1990-1994, please call the Alumni Relations Office at (617) 573-8457.
Calendar events:

Tuesday, April 25
Connecticut Alumni Luncheon
Gaetano's Restaurant
One Civic Center Plaza
Hartford, Connecticut
12:00 - 1:30 p.m.

Thursday, April 25
Springfield Alumni Reception
Sheraton Springfield
One Springfield Center
Springfield, Massachusetts
6:00 - 7:30 p.m.

Thursday, April 27
Les Miserables
Colonial Theatre
Boston, Massachusetts
8:00 p.m. $65.00

Wednesday, May 3
Lowell Alumni Reception
Sheraton Inn
50 Warren Street
Lowell, Massachusetts
5:30 - 7:00 p.m.

Wednesday, May 10
Arizona Alumni Reception
Marriott's Mountain Shadows
5641 East Lincoln Drive
Scottsdale, Arizona
6:00 - 8:00 p.m.

Thursday, May 11
San Diego Alumni Reception
Location: TBA

Tuesday, May 16
Los Angeles Alumni Reception
Four Seasons Hotel
300 South Doheny Drive
Los Angeles, California
6:00 - 8:00 p.m.

Monday, May 22
Alumni Golf Day
Spring Valley Country Club
Sharon, Massachusetts
11:30 a.m. Lunch
12:30 p.m. Shotgun Start
6:00 p.m. Dinner
$125 per person

Thursday, June 8
Maine Alumni Luncheon
Eastland Plaza
Portland, Maine
12:00 - 2:00 p.m.

Thursday, June 8
New Hampshire Alumni Reception
Manchester Country Club
180 South River Road
Bedford, New Hampshire
6:00 - 8:00 p.m.

Friday, June 16
Evening at Pops
Symphony Hall
Boston, Massachusetts
7:00 p.m. Reception
8:00 p.m. Concert
Ticket prices range from $45-55
Reunion news:

Guest speaker Theodore A. Schwartz '69, Dean Fenton, and Michael K. Gillis '82, president of the LSAA

Cheryl Ann Sbarra, JD '81, Law School Associate Dean John Deliso, and William B. O'Leary, JD '79

Professor Russell Murphy and Joseph Bardouille '79

Save the Date!
Saturday, Sept. 23, 1995

Mark your calendar now and start planning for Reunion '95 for Suffolk University Law School classes ending in "0" and "5".

Boston Marriott Copley Place
110 Huntington Avenue
Boston, MA

5:30 p.m. Individual class receptions
7:00 p.m. Combined reunion dinner
$55.00 per person

Watch your mail for more information!

Law School Reunion Dinner:
October 22, 1994

Stanley R. Cohen, JD '89 and his wife, Lois Cohen.

Classmates Anthony W. Fugate, JD '79, Susan DeLarm-Sandman, JD '79, and Joseph Bardouille, JD '79
From the Halls of Justice
When John Edward Fenton, Jr. left his position as Chief Administrative Justice of the Massachusetts Trial Court to assume the deanship of Suffolk University Law School last year, he described the feeling as that of “a homecoming.” Throughout a distinguished judicial career that spanned more than two decades, Dean Fenton had served as a faculty member at the Law School, continuing a close relationship that began in 1957.

In that year, John E. Fenton, Jr. was looking forward to his discharge from the U.S. Army's Judge Advocate General's Corps, where he was both prosecutor and defense counsel for military courts martial.

"Fred McDermott, then dean of the Law School, asked me to teach courses in Civil Procedure and Equity at the School," recalls Dean Fenton. "I had three weeks notice to move back to Boston and start classes. But I did it." That was nearly forty years ago, and Dean Fenton has been associated with the School in some capacity ever since. Now, as dean, he has the chance to help shape the direction of the School.

"This Law School has a grand and glorious history," said Dean Fenton during a recent interview. "I am privileged to join the administration just as we are poised at the beginning of an exciting new era. We are building a new facility for the School, one that will be designed for legal education in the 21st century. Our mission is to give our students the knowledge, skills, and the solid ethical foundation they will need to serve their communities in a rapidly changing world."

Dean Fenton looks forward to renewing ties with alumni of the School. "We need our alumni now more than ever," he said. "As we move forward with the design of our new building, we want to be sure that we continue to find new ways to serve our alumni and involve them in the life of the School." Current plans for the building include a sophisticated library system with on-line access to worldwide legal research data bases, Moot Court Rooms with sophisticated media systems, a spacious Center for Continuing Legal Education, and a comfortable, private lounge area for alumni and faculty. Alumni will have special access to these as well as other areas of the building.

To help finance the construction of the new building, Suffolk University is preparing to launch the largest fundraising campaign in its history. "We will be turning to alumni and friends of the Law School to help transform drawings and blueprints into bricks and mortar," said Dean Fenton.
A Labor of Love

John E. Fenton did his undergraduate work at the College of the Holy Cross in Worcester. He graduated from Boston College Law School, and received an LLM from Harvard University. Even during his student days, Dean Fenton knew he wanted to teach. “My mother and father were teachers,” he said. “And I decided early on that I wanted to be a law professor.” Dean Fenton did not wait until graduation, but began to teach Americanization classes to recent immigrants while he was still a law student. When he got the call from Dean McDermott to join the Suffolk University faculty, it was a dream come true.

“Teaching at the Law School has always been a labor of love,” said Dean Fenton. “Even now, as dean, I am going to do the best I can to continue to teach. I need that interaction with students in the classroom to truly feel the pulse of the School.”

Dean Fenton’s commitment to teaching is echoed among the faculty of the Law School. “We are fortunate to have a very gifted faculty of men and women who are not only respected scholars, but also committed classroom teachers,” said Dean Fenton. “We all share the belief that the faculty needs to be available to students outside as well as inside the classroom. We try to devote a significant amount of time to counseling and talking to students. We must make this a happy place for students — a thriving community — in addition to a rigorous academic environment.”

Also on Dean Fenton’s agenda is building on the growing reputation of the Law School in the New England region and throughout the United States. “I think that American law schools should place more emphasis on skills training and certainly more emphasis on values training,” he said. “It is extremely important that the young men and women who graduate from a law school understand the full nature of their professional responsibility: They are bound to represent clients with skill and vigor, and to zealously protect their interests. They also have a responsibility to understand the traditions and values of the
to be sure that we continue to find ways
them in the life of the school.’’

legal profession and their oblig-
ations before the judiciary. The
Boston Bar Association has
recently issued guidelines for its
members — a step in the right
direction. At Suffolk Law
School, we emphasize the full
breadth of professional respon-
sibility, and our curriculum
reflects that. We provide funda-
mental training in advocacy,
counseling, alternative dispute
resolution, and litigation.”

Community service has
always been a part of the Law
School tradition. “Suffolk
Law School graduates are influ-
encing public policy not only
in Massachusetts, but nationally
as well,” said Dean Fenton.
“Five of the seven trial court
chief justices in the state are
graduates of our school, and our
alumni serve in the Massa-
chusetts legislature, in Congress,
and in the judiciaries of other
states.”

Building for the Future
The design of the new Law
School building juxtaposes past
and future, reflecting the educa-
tional philosophy of Dean
Fenton and the faculty. Located
in the heart of the city’s
historic district, the building
will be reminiscent of the
courthouses that for 300 years
dispensed justice just a few
hundred yards from the site.
Despite its solid allegiance
to a proud legal tradition —
emphasized by the use of gran-
ite blocks in the facade and
classical lines on the lower
floors — the building is unmis-
takably a part of the future.
Rising around a central skylit
atrium, the building is topped
by clerestory windows that
illuminate the library and the
floors below.

“The building will give us
the space we need to create new
programs for the benefit of
both the bar and the bench,”
said Dean Fenton. “These
might include institutes for trial
advocacy, judicial administra-
tion, or international law. Our
recent symposium on bioethics,
for example, brought legal
and medical professionals from
all over the nation and several
other countries to Suffolk
University.” As a former judge,
Dean Fenton has strong views
on the importance of trial
practice. “A trial advocacy insti-
tute would respond to a
continuously high student
demand for such courses,” said

Dean Fenton. “We would hope
to attract some of the best trial
lawyers in the country as visit-
ing lecturers and mentors to
our students. When we have
more space, we can make such
lectures and seminars available
to our alumni and the larger
legal community.”

Dean Fenton also hopes to
expand the Law School’s
tradition of serving under-repre-
sented groups, based on the
philosophies of its founder,
Gleason Archer. “Many
Americans, particularly in rural
areas, are desperately in need
of legal services,” he said.
“I would hope that our expand-
ed programming, especially
once the new building is
complete, will underscore the
importance of serving the
wider community. Any educa-
tional institution should
find it possible to serve disad-
vantaged people,” he said.
“This can be done by providing
sufficient financial assistance
by way of loans, tuition remis-
sion, and scholarships. The
emphasis should be on finding
people — no matter what their
economic background — who
have the potential to become
outstanding lawyers.”
"We are on the verge of one of the most exciting times in our history"
articles

the Advocate

Volume 25  Spring 1995
To the Advocate:

As a member of the board of the Franklin Foundation and as one of Al Cella’s many admirers, I was pleased to read the series of eulogies to him in the Spring 1994 issue of the Advocate. Your readers may be interested to know that it was I who recommended to my fellow board members that Al be retained as counsel to the Franklin Institute of Boston and that Professor Rounds be retained as counsel to the Foundation. I am pleased to say that my confidence in both was well placed. Suffolk should be proud of their tireless, and in Al’s case heroic, efforts on behalf of a most worthy cause.

Sincerely,
Lawrence S. DiCara JD ’76

To the Advocate:

Al Cella was one of the most special people I have ever met. He had integrity and strong common sense. He was compassionate and cared very deeply about people in the greatest scope of that word. He was concerned on a global scale about human rights and human dignity. He was also concerned about so very many individuals that he knew. Al Cella inspired me in so very many ways. He was the consummate scholar and humanitarian. His influence is part of me and I cherish my memories of him.

Sincerely,
Patricia M. Annino JD ’81

To the Advocate:

I was emotionally touched as I read the many tributes to Al Cella in the Spring 1994 issue of the Advocate. We at the Franklin Institute of Boston knew that we had retained the greatest legal mind there was in legislative law to champion our position on the disposition of the Franklin Trust. However, it became clearer with every article I read that we also had in our corner a person who had the total respect and admiration of thousands of individuals whose lives Professor Cella had touched in some significant and lasting manner.

While the Supreme Judicial Court of Massachusetts may not have agreed with the technical arguments Professor Cella raised in defending the 1958 legislative act we felt controlled the trust distribution, it was clear from the final result that Professor Cella was right on track with respect to the will of the people.

Professor Rounds’s tribute eloquently chronicled the outstanding efforts of the Massachusetts legislature, Senate President Bulger and Governor Weld in returning the state’s interest in the Franklin Trust to the Institute as an endowment in early January. Here it will support the work of the college and its historic benefactor for generations to come.

However, the portion of the Franklin Trust at the disposition of the City of Boston was, at the time of publication, still awaiting final resolution. In bringing Professor Cella’s last case to closure, I am happy to report to your readers that through the outstanding efforts and leadership of Mayor Thomas Menino, City Council President James Kelly, and Education Committee Chair Peggy Davis-Mullen, the City’s portion of the Franklin Trust was also put into an endowment trust for the benefit of the Franklin Institute of Boston and its students. Thanks in large part to the work of Al Cella, the historic 200 year Franklin Trust is once more intact and continuing to benefit the inhabitants of greater Boston.

I thought it would be a fitting end and tribute to the life of Al Cella, and those who knew and loved him for the person he was and the legal battles he fought for society’s less fortunate, to know the final outcome of his last case.

Sincerely,
Richard P. D’Onofrio
President
Franklin Institute of Boston

To the Advocate:

The Spring 1994 issue of the Advocate was the best ever. The day it arrived I was just beginning to read A History of the Supreme Court by Bernard Schwartz with a view to adopting it in my undergraduate course in Constitutional Law. The review of this work by Professor Cronin is excellent as is the book itself. We have a rich and exciting legal tradition and as practicing attorneys often caught up in the minutiae of our daily practice we need to be reminded of the ‘vision’ of others which has framed the development of the law. Reviews of this nature give us needed perspective. I hope you will continue to bring works like this to our attention.

Very truly yours,
Pauline M. Harrington JD ’85

To the Advocate:

I have read with more than passing interest reports in the Advocate of the debate over revision of the Law School curriculum. While I have little understanding of the intricacies of curriculum design or of the impact of the curriculum on a school’s academic reputation, I can offer some anecdotal evidence related to the importance of maintaining a traditional core of basic studies in law school.

While at the Law School I took the usual number of required courses, including the course in the law of trusts. After graduation I received a Masters in Law in Taxation. While studying for my LL.M., I took a course in pension law. It was obvious to me that the retirement of the “baby boom” generation, the enormous size of pension assets in the United States, and the lack of interest in the field shown by my classmates presented an interesting opportunity for a career.

One of the key components of the pension law is the fiduciary obligation owed to pension beneficiaries by those who control pension assets. My training in trust law, received at the Law School, had prepared me well for this aspect of pension law. In short, the fiduciary responsibilities of those who invest pension assets became the basis of a career.

Recently I was asked by a colleague at a Boston law firm to speak as a guest lecturer at his seminar on Collective Investment Funds. The
seminar was given at a renowned Ivy League law school noted for the freedom it gives to students to design their own course studies.

As we were driving to the class, my colleague informed me that he had had great difficulty motivating the class, and that I should not be alarmed if I received little response to my lecture.

His warning proved accurate. The students showed little understanding of collective investments or of the legal structures and obligations upon which they are based — in particular the law of trusts. After about 20 minutes of attempting to elicit some discussion with the class, I asked for a show of hands as to how many of the students had taken a course in the law of trusts. Out of a class of over 20 students only one raised her hand!

It seemed quite remarkable to me that those same students were being offered jobs with prestigious Wall Street law firms and with the policy making arms of national government. Upon what foundation would they build as they were given the task of constructing the future for us all?

My experiences in the world outside of academia have led me to believe that our schools must fulfill a basic social obligation to provide a core of learning for their students. I hope that the Law School will give due consideration to this obligation in its deliberations over changes to the curriculum.

Sincerely yours,
Theodore A. Miller JD '78

To the Advocate:

I have followed with great interest the movement afoot to substantially revise Suffolk Law School's curriculum. I view this development with great alarm, not as a hidebound conservative wary of change, but as one with a unique perspective on highly structured versus loosely structured curricula.

From 1980 to 1985, I attended Brown University in Providence, Rhode Island. Brown is famous (or notorious, depending on your point of view), for its virtually requirements-free curriculum. The rationale for this curriculum, and, as I understand it, for the proposed changes to Suffolk's curriculum, is that freeing students from a considerable core curriculum enables them to tailor their course choices to their own academic needs and desires. Though well-intentioned, this thinking would poorly serve the Suffolk Law School student body and Suffolk's own hard-won academic reputation.

Based upon my undergraduate experience, which I would not trade for anything but which in retrospect could have been far more productive, I firmly believe that students simply lack the clairvoyance to informally ascertain exactly which courses will prove beneficial to them (and their clients) in their eventual practice of law. Just as many great universities are retreating from the experimentation of the '60s and '70s with looser curricula, so too should Suffolk back away from the evisceration of its present core curriculum. The collective wisdom of generations of legal academics is right in that certain courses are simply indispensable to a complete and well-rounded legal education.

While Suffolk is far less likely to produce someone who authors a groundbreaking treatise on space law or on the legal protections afforded to laboratory animals, Suffolk was, is, and hopefully will remain a much likelier source of able legal practitioners with a solid grounding in all major areas of Anglo-American jurisprudence. Although not nearly as sexy as any number of conceivable elective courses, such courses as Wills & Trusts and Business Organizations — currently slated to be axed from or de-emphasized in the core curriculum — are not only vastly more likely to inform an attorney as to the rights, remedies and liabilities of his or her clients in all their variety; they also touch upon and reinforce countless common law and statutory concepts embodied within other courses. Frankly, I do not know whether I would have survived the bar exam had I not been required to take the dull-sounding but in fact quite interesting course of Wills & Trusts, which served to revive and reinforce many difficult property law concepts that had either previously eluded me or simply been forgotten.

Should a student desire to familiarize him - or herself with an esoteric field or sub-specialty within the law, there is ample opportunity to do so within the confines of the present curriculum. He or she may also, as is so often the case when one enters the practice of law, learn the concepts pertaining to this or that specialty "on the fly." I highly doubt, however, that the same can be said for the difficult but far-reaching concepts inherent to Wills & Trusts, Business Organizations and other current core courses. Just as the abolishment of the appellate brief writing portion of the LPS course has eliminated one of Suffolk's curriculum's distinguishing features, so too would be the case if the core curriculum is significantly whittled away. I fervently hope that in their wannabe attempt to emulate Harvard, BU, et al., the proponents of curricular reform do not instead undermine one of Suffolk's greatest strengths and defining characteristics.

Very truly yours,
John S. "Chip" Keating
The Attorneys’
Bar Association of Florida

Can Massachusetts Be Far Behind?

By Professor Charles E. Rounds, Jr.
The Attorneys' Bar Association of Florida (ABAF) is a grassroots organization of Florida attorneys who oppose what they consider the politicization and abuses of "The Florida Bar." The Florida Bar is a creature of the Florida Supreme Court which licenses and regulates Florida attorneys. Among other things, it functions as a board of bar overseers to prosecute infractions of the Court's "Rules Regulating The Florida Bar."

Pursuant to a 1949 judicial order, membership in The Florida Bar became a condition of licensure. See *Petition of Florida State Bar Association*, 40 So. 2d 903 (Fla. 1949). Even then, however, there were those who had some difficulty with the concept of a mandatory or "integrated" bar association. One justice suggested that the court was "without power to compel the members of the bar to become members of a pseudo-organization called the integrated bar, and it is ill-becoming for [the] Court to do anything that would tend to coerce such membership." *Id* at 909 (Barns, J., dissenting).

Before 1956, the authority to regulate Florida attorneys had been lodged in both the legislature and the court. *See, e.g.* Fla. Stat. Ch. 454 (1953); *see also, Petition of Florida State Bar Association*, 186 So. 280, 286 (1938). In 1956, however, the Florida constitution was amended to vest in the court exclusive jurisdiction to regulate the practice of law. The ABAF takes the position that certain initiatives of Florida's highest court, specifically IOLTA, mandatory pro bono, and the integrated bar concept itself, are in the interest of neither attorneys nor their clients. The dissidents are seeking an amendment to the Florida constitution that would transfer regulatory authority over lawyers from the court to an agency created by the Florida legislature. In the opinion of Prof. Little and others, the principle of separation of powers is undermined when the functions of rule making, prosecuting (through The Florida Bar), and adjudication are concentrated in a single entity, namely the court. It is the position of the ABAF that the legislature ought to reenter the picture in order to provide some measure of independent accountability when it comes to regulating attorneys.

The stakes in this matter are enormous. In 1948, the seven-person court regulated 2500 attorneys. Now the court has absolute regulatory authority over 50,500 Florida attorneys, as well as direct or indirect patronage authority over a yearly cash flow estimated to be in excess of $50,000,000 (compulsory dues, IOLTA, and CLE). As one would expect, Florida's bar leadership, which has had particularly close professional and personal connections with the American Bar Association leadership, has not taken kindly to the ABAF which has ballooned in only one year from a four-person steering committee to an organization of 600 strong with a legislative agenda. To date, the leadership of The Florida Bar has employed a number of tactics in an effort to strangle the baby in the cradle.

The ABAF, for example, has been denied free advertising space in *The Florida Bar News* to publicize its events. In a state the size of Florida, such impediments to media access have complicated, but by no means thwarted, ABAF's state-wide recruitment efforts. To the ABAF such censorship is particularly galling because *The Florida Bar News*, which bills itself as "the newspaper of Florida's legal profession," is an organ of The Florida Bar which ABAF members themselves financially support through court-imposed annual mandatory assessments, i.e. "dues." Undaunted, however, the ABAF purchased space in *The Florida Bar News* to advertise its June 24, 1994 meeting at the Sheraton Orlando North and to give advance billing to my keynote address.

Propaganda attacks began in earnest back in December 1993, when Patricia A. Seitz, Esq., President of The Florida Bar, unloaded on the ABAF a heavy dose of disingenuous drivel in the pages of the *The Florida Bar Journal*. She suggested that members of the ABAF are taking the position that attorneys "can and should"
turn their backs on the poor in violation of the oath they took at the beginning of their legal careers, namely “never to reject the cause of the defenseless or oppressed.” According to Ms. Seitz, “these folks” remind her “of the movie Hook, in which Robin Williams plays Peter Pan, as an adult.” Here is why:

“Peter has become a bright, high-powered lawyer — genial, always on the go, always in control, always juggling phones, deals and crises out the kazoo. He's moving and doing a lot, but living little ... Notwithstanding his pronounced rational and legal prowess, he's completely useless, however, when it comes to rescuing his kids from the clutches of Captain Hook. The powers he used to defeat Hook in the past are gone. The fuel which made him soar — his ‘happy thoughts’ — is extinct. His ability to produce them has atrophied completely.”

After all, what is the problem with the ABAF “folks” anyway? Have they forgotten the “wise maxim” that “you cannot give away kindness — it always comes back to you?”

In April 1994, an article appeared in a local Florida bar publication hinting darkly that associating with the ABAF might be grounds for disbarment:

“As attorneys licensed to practice law in the State of Florida, we took an Oath of Admission to The Florida Bar. The willful violation of the principles contained in the oath are grounds for which an attorney may be disbarred; no longer admitted to The Florida Bar, and thus, no longer able to practice law.”

In June of 1994, The Florida Bar News published a letter from a West Palm Beach lawyer excoriating the “new school libertarians” of the ABAF and their “lawless activities” which “defy the structural, organic control and authority which the [Florida] constitution... by vote of the people has vested in the [Florida] Supreme Court...” For the writer it is relevant that no one “has obtained leave of court to contradict that arrangement in any way.” He concludes by drawing a line in the sand:

“I am a veteran of the United States Navy at sea on D-Day. I did not take kindly to mutiny then, and nothing in the Vietnam Generation or since is going to make me change my mind. If the new lawyers want a fight, they will get it.”

To be sure, there are some differences between Florida and Massachusetts when it comes to bar regulation. The Florida court is elected; the Massachusetts court is appointed. In Florida, the bar is “integrated.” In Massachusetts, membership in a bar association is optional. On the other hand, there are some notewor-
Florida is not alone when it comes to grassroots dissatisfaction with the politicization of the organized bar. On the national level, the ABA is coming under increasing attack in this regard.

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To be sure, there are some differences between Florida and Massachusetts when it comes to bar regulation. The Florida court is elected; the Massachusetts court is appointed. In Florida, the bar is "integrated." In Massachusetts, membership in a bar association is optional.

Here in Massachusetts, IOLTA thrives. Mandatory pro bono gestates. Her bar associations and foundations take positions on such hot button issues as the death penalty. The bar leadership unabashedly fetes and gives awards to legislators\(^1\) and sitting judges. An army of lobbyists feeds off the IOLTA income stream.\(^6\) One IOLTA "grantee" has even been caught advising those who win big in the lottery, or receive substantial inheritances, on how to stay on welfare. One could go on and on. Perhaps the time has come for Massachusetts lawyers concerned about the general unseemliness of the current state of things here at home to consider forging alliances with their disaffected brothers and sisters in Florida and elsewhere.

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1 Harvey M. Alper, Esq., successfully struck a blow for property rights in the landmark case of *Webbs Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 150 (1980). The case involved a determination as to who was entitled to interest accruing on an interpleader fund deposited in the registry of a county court. ("To put it another way: a State, by ipse dixit, may not transform private property into public property without compensation, even for the limited duration of the deposit in court."


3 The *Florida Bar News* / June 1, 1994, pg. 19, col 3.

4 Individuals who are interested in obtaining a copy of the monograph may contact the Washington office of the Federalist Society at (202) 822-8138.

5 On January 13, 1995, the Massachusetts Bar Association presented a state senator with the Legislator of the Year Award in part for his opposition to the death penalty. See *Massachusetts Lawyers Weekly*, Dec. 26, 1994, at B4 (23 M.L.W. 764).

6 The Massachusetts Law Reform Institute, which over the years has received millions of dollars in IOLTA funds, has eighteen registered lobbyists on its payroll.
Trusts in the National News

By Professor Charles E. Rounds, Jr.

Will the Institution of the Trust Survive the Clinton Presidency?
On November 16, 1994 in the Pallot Library, Professor Charles E. Rounds, Jr. concluded the Law Library Speaker Series for 1994 with a lecture on how the common law trust has become the subject of political exploitation at the national level. The following is the text of Prof. Rounds's lecture for those of our readers who were unable to attend the Speaker Series.

Professor Maitland considered the common law trust — a refinement in the concept of private property — to be the greatest achievement of English jurisprudence, the "largest and most important of equity's exploits." The public instinctively understands this and bestows on the institution, as well as the office of trustee, its respect and its trust. It believes the trust to have almost magical properties capable of warding off all manner of unpleasantness. "Put it into a trust and everything will be alright." This store of private sector good will, carefully cultivated over the centuries by enlightened judiciaries and scrupulous fiduciaries, has not gone unnoticed by our politicians and others in the discredited public sector. They have discovered that merely by employing the language of the private trust, they can plunder its good will and further the cause of the regulatory state all at the same time. We have here a politician's dream.

The store was first broken into in the 1930's with the so-called Social Security Trust Fund. Despite the term "trust," the social security system contains nothing that remotely resembles the common law trust. There is no segregation of assets, no equitable property rights, no private right of enforcement (all characteristics of the common law trust). It is merely a system of taxation and appropriation sprinkled with trust terms to hide its true nature. Since then a number of other bogus trusts have found their way into the Internal Revenue Code. In the last year or so, however, the process of abusing the trust vocabulary has gathered a good head of steam. We now have the Clinton Deficit Reduction Trust Fund, the Violent Crime Reduction Trust Fund, and a related outrage, the Presidential Legal Expense Trust. The first two are trusts only in name. The last is a trust in form but not in substance. Each is designed to tap the good will of the private trust in order to fool the public into doing something that it would not otherwise do. Such sowings of semantic confusion cannot but further erode an institution already under assault in the halls of academia.

Clinton Deficit Reduction Trust Fund

The Clinton Deficit Reduction Trust Fund has none of the elements of a common law trust. In particular it contains no "property" — segregated or otherwise — nor does the thing impose any enforceable duties on anyone. It is essentially an accounting gimmick dreamed up by Senator DeConcini (D-Ariz.) to provide political cover for his support of the President's budget. The President obliged on August 4, 1993 by issuing Executive Order 12858 purporting to "guarantee" that the net deficit reduction achieved by the Omnibus Budget Reconciliation Act (OBRA) of 1993 be dedicated to reducing the deficit. Each year, "amounts" are to to be "credited" to the fund on a daily basis equal to the net deficit reduction achieved by OBRA. The order purports to "require" that the "fund balances" be used exclusively to redeem maturing debt obligations of the Treasury held by foreign governments. In other words, there is no build up of property, only credit entries. Thus there is nothing in the arrangement that would prevent the Treasury from creating debt to pay off debt that it must pay off in any case. Nothing is segregated, nothing is guaranteed, and nothing is to happen that will not happen in any case with or without the order. The Clinton Deficit Reduction Trust Fund is a complete and utter sham.
The store was first broken into in the 1930’s with the so-called Social Security Trust Fund. Despite the term “trust,” the social security system contains nothing that remotely resembles the common law trust.

We now have the Clinton Deficit Reduction Trust Fund, the Violent Crime Reduction Trust Fund and a related outrage, the Presidential Legal Expense Trust. The first two are trusts only in name. The last is a trust in form but not substance.

Violent Crime Reduction Trust Fund

The recently enacted Federal “crime bill” makes provision for the establishment of a “crime reduction” trust to be funded with “savings” derived from reducing the federal workforce by 272,900. No provision is made, however, for segregating out and investing the compensation that would have been paid to these phantom employees so that, once again, we have a trust neither in form nor in substance.

Presidential Legal Expense Trust

On June 28, 1994, President and Mrs. Clinton, transferred $2,000 in trust to John Brademas, Michael H. Cardozo, Theodore M. Hesburgh, Barbara Jordan, Nicholas de B. Katzenbach, Ronald Olson, Elliot Richardson, Michael Sovern, and John Whitehead. The 10 page trust indenture, drafted by M. Bernard Aidinoff, Esq., of Sullivan & Cromwell, provides that the trustees shall solicit additional contributions from U.S. citizens who are not Federal employees. The fund, as augmented, shall then be used to reimburse the President and Mrs. Clinton (the grantors) for their “personal legal fees and related expenses incurred after January 20, 1993.” The instrument limits individual gifts to $1,000 per year. While Federal employees are excluded by its terms from participating in this scheme, there is no such exclusion for lobbyists.

A careful review of the governing document reveals some interesting features. The Clintons have the unrestricted right to hire and fire the trustees; to appoint themselves as trustees; and, together with the trustees, to amend or revoke the trust. In other words it is a garden variety, fully revocable living trust. Moreover, upon accomplishment of the trust’s purpose (which can change at any time at the whim of the Clintons) the fund shall pass outright and free of trust to the Clintons or the survivor of them. If they both die before termination, the estate of the last to die gets the windfall. The income earned on the fund is fully taxable to the Clintons. A “contribution” is not tax deductible; it is, however, eligible for the Federal gift tax exclusion.

There is an attachment to the trust document which also makes interesting reading. It is a non-binding letter, dated June 28, 1994, from President and Mrs. Clinton to the trustees:

"...This letter will confirm our respective intentions (emphasis added), if any part of the corpus is paid over to either of us or our personal representative, to donate any such surplus to one or more non-profit institutions or the United States Government, without claiming any incidental income tax deductions for ourselves or our estates."

When all is said and done, the whole thing is nothing more than a scheme for generating unrestricted
personal gifts to the President and his wife. The format of the trust has been employed to create an illusion of respectability and accountability. On September 4, 1994, Judicial Watch, Inc. filed an action in the U.S. District Court for the District of Columbia alleging among other things that "persons donating money to the Trust, the Trustees, and those acting in concert with the Trustees...do so with the expectation that they will receive in return influence, political favors or something of equal value from the executive branch, the President and/ or Mrs. Clinton." The Plaintiff alleges that the arrangement is in violation of numerous Federal statutes including the Federal Advisory Committee Act, 5 U.S.C. App 2 and seeks among other things that the "donations" be returned to the donors. Since the filing, the National Legal and Policy Center has joined Judicial Watch, Inc. as a plaintiff.

Economically Targeted Investments ("ETIs")

But the administration is not only abusing the institution of the trust by sowing semantic confusion, it is also proposing to tap into the economic value itself of the nation's $3.6 trillion system of private pension trusts which, unlike the Social Security System, is financially and actuarially sound. In the 1992 campaign piece "Putting People First: A National Economic Strategy", candidate Clinton called for the creation of a "Rebuild America Fund" with a $20 billion Federal "investment" annually for five years, leveraged in part with private pension funds. Revenues from road tolls, solid waste disposal fees and public housing rents would "guarantee" a return from such investments (known as "economically targeted investments" or ETIs). Labor Secretary Reich has issued an ERISA regulatory bulletin "encouraging" fund managers to invest in ETIs.

Rep. Jim Saxton (R-N.J.), in a September 29, 1994 Wall Street Journal opinion piece, suggested that ETIs were really PTIs — politically targeted investments — and that the track record for such investments in the public sector has been dismal. In the late 1980's, for example, the Kansas Public Employees Retirement System had to write off about $200 million in ETI investments. Out of Alaska, Connecticut, and Missouri have come similar horror stories. According to Rep. Saxton, "[n]ot all ETIs have been disastrous, but most have yielded subpar results." The Saxton opinion piece evoked an outraged response from Secretary Reich. In an October 26, 1994 letter to the Wall Street Journal, Reich asserted that investing in ETIs would not amount to "social investing." He then proceeded to undermine his own assertion:

"As owners of a considerable portion of America's capital markets — with more than $4.8 trillion in assets — pension funds depend on the success of not only their investments, but of the entire economy. By making investments that increase the economy's capacity to lift living standards, pension funds bolster the current prospects of workers — and therefore the retirement income security of those who participate in pension plans.

Is the Clinton/Reich ETI scheme a step in the direction of social securitizing the national system of private pension trusts? That is a subject beyond the scope of this lecture. Suffice it to say that to the extent economic value is actually sucked out of a system for public political initiatives, as happened in Kansas, someone absorbs the resulting economic loss, be it the employee, the employer's stock holders, or the taxpayer (or some combination of the three). Wealth does not exist in a vacuum.

Any socialization or nationalization of the wealth in the national private pension system would be an unfortunate turn of events. Enormous additional patronage and political power would accrue to the Secretary of Labor in his capacity as the system's ERISA mandated regulator. The institution of the common law private trust, of course, would take yet another hit. And then there is the human component to the fundamental legal relationship that is the trust. The workers' beneficial or equitable interests in their pension trusts are private property interests. It is their property; it belongs to them, not to Secretary Reich or President Clinton. This wealth has a difficult enough and important enough social mission, namely to provide private economic support to retirees and their families. It does not need the additional burden of having to participate in Secretary Reich's social experiments.
The author extends thanks to Madeleine Wright, Sonia Ensins and Elizabeth Gereitano of the Suffolk University Law Library for their assistance in the gathering of reference materials.
“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”

Thus begins the first amendment to the Constitution, applicable against the states as a result of interpretations of the Fourteenth Amendment. The Constitution says this and little else on the subject of religion. These few and cryptic words, which in recent decades have generated such a vast body of case law, contain a twin command: government will neither establish religion nor interfere with its exercise.

On the surface this language poses no contradiction. In practice it may be otherwise, particularly when governmental efforts to accommodate religion give rise to claims that the establishment clause has been violated. This in turn suggests the question that continues to vex the Supreme Court: what does establishment of religion mean? At the end of its most recent term the Court confronted this question once again in the context of a separate public school district for a small, ultra-orthodox religious sect. Board of Education of Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481 (1994).

About forty miles north of New York City in the town of Monroe there is the incorporated village of Kiryas Joel. Kiryas Joel is distinctive to say the least, being exclusively inhabited by the Satmar Hasidim, an exceptionally strict Jewish sect. The Satmar came from the Romanian city of Satu-Mare to the Williamsburg section of Brooklyn and in the 1970s, after conditions in Brooklyn became unsatisfactory, to Kiryas Joel. Kiryas Joel, which means “Village of Joel,” is named for Grand Rabbi Joel Teitelbaum, who led the Satmars, already decimated by the Holocaust, from Europe to America. See Los Angeles Times, December 19, 1993, Part E, page 1; The San Francisco Chronicle, March 25, 1994, page A1.

The Satmars set themselves apart in many ways: dress; use of Yiddish as the common language; separation of the sexes; no radio or television, although they do use electricity, phones and automobiles. Also, Satmars generally have large families, eight or ten children being normal. “We are proud of our way of life, even if it looks strange to mainstream Americans,” said Rabbi Aaron Teitelbaum, the spiritual leader of Kiryas Joel, and the son of Satmar Grand Rabbi Moses Teitelbaum. “We have no drugs. The children and teenagers haven’t even seen how drugs look. There are no weapons, knives, guns or metal detectors in our schools. Everybody is happy. Everybody helps one another.”


It was the large families that caused the first problem, a zoning problem. That was solved with comparative ease. New York’s Village Law facilitates separate village incorporation within townships. The Satmars set up Kiryas Joel in compliance with statutory requirements. Effectively, it was a separate community for members of their religious group but the incorporation was pursuant to a pre-existing neutral law of general applicability.

The new village coincided with the boundaries of the Satmar community but that was in part because non-Satmars in the area had no desire to join Kiryas Joel. The point was explored in the oral argument in the Supreme Court in a colloquy between Justice Souter and Nathan Lewin, the attorney for the Kiryas Joel Village School District:

Justice Souter asked whether the record showed that the village district on which the school district was superimposed was defined specifically to correspond to the Satmar community. Lewin answered that the record in fact showed the converse. When the original village boundaries were proposed, he explained, they were considerably broader. It was a zoning dispute, prompted by the Satmar community’s need for homes big enough to house their large families, that generated the current village configuration, he said. In the end, those who had been included in the larger plan didn’t want to be a part of the village, he added. U.S. Law Week - Daily Edition, April 12, 1994, page 13 at 15.

Kiryas Joel remained a part of the Monroe-Woodbury Central School District. For the most part this did not pose a problem because the Satmars run religious schools, attended by almost all the students, although the Satmars did unsuccessfully object to having female bus drivers take students to the all-male religious school. See Bollenbach v. Board of Education of Monroe-Woodbury Central School District, 659 F. Supp. 1450 (S.D. N.Y. 1987); Grumet v. Board of Education, 618 N.E.2d 94, 96 n.2 (Ct. App. N.Y. 1993).

Kiryas Joel has about 8,500 residents, according to the Supreme Court opinion, and perhaps 3,000 students, although different sources give different figures. “The new municipality grew rapidly, mostly because Hasidic families tend to be large: eight to 10 children is common, although many families, like Sarah Danzinger’s, have as many as eighteen…” The one-
square-mile village has 5,000 students in its parochial schools; by comparison the local public school district has the same number of students from a 100-square-mile area. Los Angeles Times, December 19, 1993, Part E, page 1.

A problem did arise, however, with a small number of handicapped children with special education needs. It was not financially feasible for the religious schools to provide these services. For a while the Monroe-Woodbury School District provided special education services at an annex to one of the religious schools but discontinued this after the Supreme Court's decision in Aguilar v. Felton, 473 U.S. 402 (1985). It was the Felton decision that led to the next stage of the Kiryas Joel saga and as will be discussed, infra, based on the opinions in Kiryas Joel a majority of the Supreme Court now seems poised to overrule Felton. After Felton some Satmar children received special education services in the Monroe-Woodbury public schools outside the village.

Unsurprisingly, this did not prove satisfactory to the parents. Even if all the Satmar children had gone to public schools there probably would have been culture shock on all sides. As it was, only a few Satmar children went to public schools and they were further isolated by their special needs status, such as hearing problems, Down's Syndrome, etc.

When other attempts to find a solution failed, the compromise that led to the Kiryas Joel case was adopted. In 1989 the New York legislature adopted a special act making Kiryas Joel a separate school district. On the surface this does not seem like a big deal. A separately incorporated village then also became a separate school district and, as expected, set up a small public school for about 200 handicapped Satmar students from the village and the surrounding area. As before the vast majority of students from Kiryas Joel continued to go to the religious schools in the village.

What was this school like? It was a public school, not a religious school. "We've done everything possible to ensure that our public school is totally secular," said Abraham Wieder, president of the Kiryas Joel School Board and a Satmar Hasidic community leader. "We understand that that is the law of the state." Newsday, May 16, 1993, Section: News, page 6. Wieder is also president of the village's religious congregation. The San Francisco Chronicle, March 25, 1994, page A1. The idea was to take advantage of educational opportunities that are made available by federal and state law but cannot be duplicated by the religious schools for financial reasons. Because of Felton the state could not provide the education in the religious schools and was not willing or legally required to provide it at a neutral site in the village. Board of Education v. Wieder, 527 N.E.2d 767 (Ct. App. N.Y. 1988). At the same time the Satmars understandably found it unsatisfactory to send their handicapped youngsters to the public schools outside the village. Their dissatisfaction was no doubt especially acute because they really don't want their children attending public school at all.

The press has reported on certain aspects of the running of the Kiryas Joel public school.

The school district, with a budget of $6 million a year, has made vigorous efforts to avoid violating the church-state wall, eschewing discussions of religion in classrooms and avoiding holiday decorations. The teachers are not from the Satmar community, since the sect discourages college education, but most are from nearby Orthodox Jewish communities like Monsey so they can converse with the children in Yiddish and be sensitive to their religious needs. The New York Times, June 28, 1994, Section D, page 21.

School superintendent Steven Benardo, a former special education superintendent in the Bronx, said the school lets the children speak Yiddish because that is what they speak at home and, as in any of the state's bilingual programs, teachers cultivate both English and a native tongue.

He says the school respects the students' customs within the bounds of a public school program: The lunch kitchen is kosher and older children are separated by sex in certain classes. The Washington Post, March 28, 1994, page A4.

While most teachers' aides are villagers, none of the 18 licensed teachers and 30 therapists come from Kiryas Joel. Satmar residents could not qualify because the Satmar prohibit college education as too great an immersion in the profane. Many teachers are from more lenient Orthodox communities in nearby Monsey. Mr. Bernardo, the former head of special education programs in the Bronx, is Jewish, though not Orthodox ...

There are also 350 yeshiva students who receive instruction from the public school district in English as a second language, a program almost all younger Satmar students can qualify for because they enter school barely speaking English. As required by law, the instruction is not given in the Yeshiva, but in trailers outside. The New York Times, January 3, 1994, Section A, page 15.

Some have concluded that the separation of church and state in this arrangement is purely nominal, that beneath a thin veneer there is religious control of the Kiryas Joel public school. See Jeffrey Rosen, Village People, the New Republic, April 11, 1994, page 11.

This includes a dissident faction in Kiryas Joel itself that filed an amicus brief in the Supreme Court opposing the Village. See Brief Of The Committee For The Well-Being Of
Kiryas Joel As Amicus Curiae Supporting Respondents, purporting to represent over 500 members of the Satmar community of Kiryas Joel.

At any rate a legal challenge followed in the state courts of New York. Louis Grumet, the Executive Director of the New York State School Boards Association, Inc. and others challenged the constitutionality of the new village school district. Three layers of New York courts, Supreme Court; Supreme Court, Appellate Division; and finally the Court of Appeals, all struggling to apply the Supreme Court's meandering establishment clause jurisprudence, concluded that the statute creating the new school district was unconstitutional. Grumet v. Board of Education of the Kiryas Joel Village School District, 618 N.E. 2d 94 (Ct. App. N.Y. 1993). On June 27, 1994 by a vote of six to three, in opinions that will be explored below, the United States Supreme Court affirmed the ruling that the creation of the Kiryas Joel School District violated the establishment clause.

That was by no means the end of the matter. "Abraham Wieder, president of the Kiryas Joel Board of Education, said in a statement, 'We have no choice but to continue our search for a suitable way to provide a quality education for the most vulnerable of our children. The Supreme Court decision is a setback, not the end of this most important pursuit.'" The Legal Intelligencer, June 28, 1994, page 3. This statement was vindicated soon thereafter.

Within a few days political leaders agreed on a new legislative formula to preserve the Kiryas Joel school. On June 30, 1994 new legislation was filed: 1993 New York Assembly Bills No. 12229 and 12230 215th General Assembly - Second Regular Session (1994). By July 2 the bills had been passed in the Assembly and Senate. On July 5 they were sent to Governor Cuomo who signed them the following day.

No. 12230 provides for the creation of new school districts and provides neutral criteria. While it was obviously enacted with Kiryas Joel in mind it does not mention Kiryas Joel. No. 12229 is an interim measure designed to deal with the immediate situation in Kiryas Joel as a result of the Supreme Court decision. No. 12230 is excerpted the Appendix to this article.

Because the new legislation is written in general language, rather than as a special act, the hope is that it satisfies the constitutional concerns expressed by the Supreme Court in its recent ruling. Nevertheless, further litigation is expected. The New York Times, July 19, 1994, Section A, page 2 reported:

The state school boards association, which persuaded the Supreme Court to abolish a school district that was created specifically to accommodate ultra-Orthodox Jews, announced today that it would return to court to challenge a new state law that was designed to circumvent the court ruling.

Trying to bolster its case, the group said it had discovered that the new law, which allows municipalities that meet certain criteria to establish their own school districts, actually would apply only to the Kiryas Joel Village School District. Legislative aides denied the claim.

On the same day Newsday elaborated on the position of the School Boards Association. Newsday, page A20:

The New York State School Board Association said it would again seek to have legislation affecting Kiryas Joel declared unconstitutional, but predicted the court case could take as long as five years. ... The school boards group, using information supplied by the U.S. Census Bureau, the state Education Department and the comptroller's office, said only Kiryas Joel meets all five of the conditions set by the new law. The analysis was disputed by a spokeswoman for Assembly Speaker Sheldon Silver.

A recurring theme in the criticism of the 1989 act originally creating the Kiryas Joel School District and the new legislation is that they do not represent legislative solicitude for a religious sect because it is so tiny but are the product of "clout" because the group is believed to vote and give political contributions in a bloc.

But critics of the legislation said it addressed the concerns of only one justice and not necessarily the court's majority. And they charged that the Governor and Legislature had rushed to help the 12,000+ resident Satmar community because they are thought to vote and give political contributions in a bloc.

"I'm personally disappointed in the utter disrespect and disregard the Governor and Legislature have for the Supreme Court," said Louis Grumet, executive director of the New York State School Boards Association. "This law would encourage the very balkanization I thought everyone was moving against." The New York Times, July 2, 1994, Section 1, page 1.

Professor Ralph Michael Stein, writing in the National Law Journal, observed:

The reality is that in many instances, and certainly with reference to the Kiryas Joel case, a small group is proportionately over-represented in terms of political and legislative concern for the group's claimed interests. The challenged New York statute could not have been enacted for a group occupying a very little part of the state's great expanse if it had been undesirable for legislators, concerned with their own partisan interests, to heed the Satmars' demands. Indeed, in New York City, the Hasidic faction, which generally votes as a bloc, has become
Different Decision Makers
A large part of the problem in the Kiryas Joel debate is that there have been so many different decision makers with limited competency. In a sense the Supreme Court caused the problem itself with the Felton decision that ended the practice of having public employees give special ed on the premises of religious schools. Felton was decided in 1985 by a five to four vote. Based on the opinions in Kiryas Joel at least five Justices would likely agree to overrule Felton. That did not help the Satmars, however, because the creation of the new school district as a result of the Felton decision posed a different constitutional issue. Thus, if Felton had not been decided the village school district would have been unnecessary. But even if the Court had overruled Felton outright in dicta in Kiryas Joel — which it did not — that would not have validated the new village school district.

Further, the Monroe school authorities could have provided education for the handicapped at a neutral site in the village but would not. They had the legal power but not the legal obligation to do so. Board of Education of Monroe Central School District v. Wieder, 527 N.E. 2d 767 (Ct. App. N.Y. 1988). The legislature couldn't do anything about that but it could, subject to federal constitutional constraints, create a new school district. Professor Michael W. McConnell, of the University of Chicago Law School writes as follows:

The Satmar parents requested the school district to provide special education at a "neutral site" in the village, as would have been permitted under the law; but the district refused. The parents sought relief in the state courts, but the court held that the district had discretion to decide how and where to provide the special education.

So the Satmar community turned to the legislature for help. Under the state constitution, the legislature could not tell the school district how to exercise its educational functions. But it could determine the boundaries of the district. And so the legislature voted to carve out a new school district coterminous with the boundaries of the village of Kiryas Joel. This enabled the people of Kiryas Joel to establish a public school in the village that would provide appropriate education for their handicapped children.

It seemed the perfect solution. No one else was affected. Even the school district was pleased, for it was freed of responsibility to deal with people whose customs it did not understand and who seemed obstreperous and difficult. Chicago Tribune, July 6, 1994, Perspective Section, page 15.

Thus the Supreme Court now seems willing to accept the Felton solution but that program is no longer in place because a Supreme Court with different membership invalidated it on constitutional grounds. The legislature, Governor, Town of Monroe and the Satmars accepted a new village school district but the current Supreme Court says that is an establishment of religion. The Satmars would accept public education for the handicapped at a neutral site in the village but the Monroe School District would not provide it. This seems to be a form of political gridlock rather than a constitutional problem.

State Constitutional Law
For these reasons Kiryas Joel can be thought of as an unnecessary case, one that should have been worked out through the political process. There is another sense in which it was an unnecessary case at least at the level of the Supreme Court of the United States and that is state constitutional law. In the trial court, Supreme Court, Albany County the plaintiffs claimed a violation not only of the establishment clause of the first amendment but also the cognate provision of the state constitution. 579 N.Y.S.2d 1004, 1006 (1992). Indeed, that court
based its ruling for the plaintiffs on state grounds as well as federal. The Appellate Division affirmed on both
grounds. “Turning to the merits, we agree with Su-
preme Court that chapter 748 violates the Establish-
ment Clause of the U.S. Constitution and N.Y.
Constitution, article XI, §3.” 592 N.Y.S. 2d 123, 126

The Court of Appeals affirmed but only on the fed-
eral ground. Concerning the state constitutional
ground the court noted:

Without any separate analysis, the trial court de-
clared the statute unconstitutional under article XI, §3 of the State Constitution, suggesting that the
provision is a “counterpart” to the Establishment
Clause. The Appellate Division affirmed on both
State and Federal constitutional grounds, although
its discussion, like the trial court’s, was limited to
the Establishment Clause. Moreover, in this Court
the First Amendment is the subject of the parties’
focus. In these circumstances, we do not reach the
State constitutional issue, which is based on a pro-
vision significantly different from the Establish-
ment Clause, both in text and history (see, Judd v.
Board of Educ., 278 N.Y. 200, 15 N.E.2d 576) and we
modify the Appellate Division order accordingly.

The Court of Appeals handling of the state law issue
seems correct for the reason it stated, namely the lower
courts and even the parties made only pro forma refer-
ence to the state constitution. This illustrates, however,
that the renewed importance in recent years of state
constitutional law depends on truly separate advocacy
and analysis of state constitutional law provisions.
Some state courts like New Hampshire will consider
the state constitution first, reaching the federal question
only if necessary. Other state courts may be willing to
decide cases alternatively on state grounds, even with
minimal state law analysis. As long as the requirements
of the adequate and independent state ground doctrine
are complied with, see Michigan v. Long, 463 U.S. 1032
(1983), the case is insulated from review in the Supreme
Court of the United States.

If Kiryas Joel had been litigated and decided as a
state constitutional case as well as federal there would
have been nothing for the Supreme Court to review.
That is, if the founding of the Kiryas Joel School District was an establish-
ment of religion under the state constitu-
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A large part of the problem in the Kiryas
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There is yet another way in which Kiryas Joel
was an unnecessary case at the Supreme Court level. There is
no longer appeal as of right to the Supreme Court in
state cases, so Kiryas Joel was a certiorari case — no
review unless at least four Justices voted to grant the
petition. Why did the Court grant the petition? Since
the Supreme Court reverses a lot more than it affirms in
cases it chooses to review, presumably an important fac-
tor in case selection is that the Court disagrees with the
result below. See Stern, Gressman, Shapiro and Geller,
Supreme Court Practice 195, The Bureau of National Af-
fairs (7th ed. 1993). That rationale hardly explains
Kiryas Joel, which was an affirmation. Another motive
for granting review could have been to introduce clarity
and coherence to the Court’s establishment clause juris-
prudence, qualities that have been conspicuously absent
up to now, as even many of the Justices themselves ac-
knowledge. But as will be detailed in the discussion of the
Kiryas Joel opinions, infra, little has changed after
Kiryas Joel.

Of course, these observations are after the fact.
Some Justices may have voted to grant certiorari mistak-
only expecting a reversal. (Most likely they would not
vote to grant cert if they merely favored but did not expect reversal if the case were reviewed.) Also, some Justices might have voted to grant cert in the mistaken expectation that at least the Supreme Court would clarify its understanding of the religion clauses.

These are possible but not likely explanations. As to the result, three New York courts had found a constitutional violation and it was widely believed that there would be an affirmation unless there was an abrupt doctrinal shift in the Supreme Court. Most of the Justices are committed as to their understanding of the establishment clause. This is certainly best known to the Justices themselves.

As regards the possibility that Kiryas Joel would be the occasion for a major restructuring of establishment clause law, that case would have been an odd vehicle for such a rethinking. It is a rare, highly fact specific case with all kinds of background that the Court didn’t even pretend to get into. Occasionally, the Court dismisses a writ as improvidently granted after it familiarizes itself with the intricacies of a case. This might have been an appropriate case for such a dismissal. In any event the Court seems unwilling to engage in any grand rethinking of the establishment clause. There is a fuzziness to its jurisprudence in that area but for now it seems a calculated fuzziness. Be that as it may, the Supreme Court did not have to get involved in the Kiryas Joel mess to remind us.

Some Background Cases

One year ago the Supreme Court decided three religion cases, two concerning the establishment clause. These three cases were analyzed in the Advocate, “The Supreme Court And Religion,” 24 the Advocate 31 (Fall 1993). For those subscribers who do not spend their weekends rereading back issues of the Advocate a modest précis of the two establishment clause cases may be in order. Zobrest v. Catalina Foothills School District, 113 S. Ct. 2462 (1993) concerned a deaf student at a Roman Catholic High School who requested a sign-language interpreter from the local public school district. The issue was whether complying with the request would violate the establishment clause. The Court held that it would not. There were four dissenters but only two of the dissenters reached the constitutional issue. The majority stressed that the aid would be provided under a neutral, general program and that the aid would go to the student, not the school. Also, the sign-language interpreter merely transmits what is said. Note, however, that the public employee would be in the parochial school classroom on a regular basis. The Court found no constitutional problem.

The other establishment clause case decided by the Supreme Court in 1993, Lamb’s Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 was handed down eleven days before Zobrest. In Lamb’s Chapel the pastor of an evangelical church wished to use public school property for a lecture series with a religious perspective. The school district recognized that it had a general obligation to observe viewpoint neutrality if it chose to make its property available for non-school uses but claimed that the desired use in this case was impermissible because of the establishment clause. The Supreme Court concluded that the free speech clause of the first amendment required viewpoint neutrality, i.e., in this case no discrimination against a religious viewpoint. This would pose no establishment clause problem because it would not constitute endorsement of religion by government and would not violate the famous Lemon test (of which more, infra, in connection with the Kiryas Joel opinions).

The Court in Lamb’s Chapel was unanimous, so one might expect that the case would be free of acrimony. But this would not take into account the tenacious vigilance of Justice Scalia. Justice Kennedy wrote a brief opinion dissociating himself from the establishment clause reasoning (but not result) of the Court. Justice Scalia in strong terms denounced the Lemon test and the notion that endorsement of religion violates the establishment clause. In particular, he complained that a majority of the Justices individually have repudiated the Lemon test at one time or another but the Court as a whole erratically invokes or ignores Lemon based on transient considerations of convenience.

Justice White wrote the opinion of the Court in Lamb’s Chapel. He was replaced by Justice Ruth Bader Ginsburg. During her confirmation hearings the Senate Committee on the Judiciary took interest in now Justice Ginsburg’s views on the establishment clause. The Committee Report, referring to the Lemon test, noted: “although a majority has not voted to depart from this approach, it sometimes appears to be hanging by a thread. See e.g., Lamb’s Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141 (1993).” (Report, page 26).

The Report continues at 28-30:

II. The Establishment Clause

Judge Ginsburg’s views on the establishment clause are somewhat difficult to gauge, in part because she has written no opinions on this subject, in part because her testimony on this matter bordered on the elliptic. Most of what she did say in testimony, however, suggests that she would follow the core tenets and traditional standards of modern establishment clause jurisprudence.
In any event the Court seems unwilling to engage in any grand rethinking of the establishment clause. There is a fuzziness to its jurisprudence in that area but for now it seems a calculated fuzziness.


Eventually, however, the wall of separation seemed more like the left field wall at Fenway Park, high but hardly impregnable. And, as at Fenway, a lot depends on how the wind is blowing.

The most troubling portion of Judge Ginsburg's testimony on the establishment clause occurred late in the hearings, when she and Senator Specter engaged in the following exchange:

**Senator Specter:** On the establishment clause, the dictum of Jefferson has been quoted repeatedly and *** I would be interested, if you would care to respond, to whether you agree with the Jefferson doctrine that the clause against establishment of religion was intended to erect a wall of separation between church and state.

**Judge Ginsburg:** Senator Specter, I think that the first amendment prohibits the establishment of religion and protects the free exercise thereof. How that line between those two is drawn in particular cases is going to depend upon the facts of the specific case. I am not going to expound at large and answer an abstract question. I think I have said what I feel comfortable saying on that subject. (Transcript, July 22, at 217-18).

An understanding of the establishment clause as erecting "a wall of separation" between church and state has provided the foundation of establishment clause jurisprudence of many decades. See, e.g., Everson v. Board of Education, 330 U.S. 1 (1947). If we believed that Judge Ginsburg rejected — or even questioned — this most general interpretation of the meaning and purpose of the establishment clause, we would have some real concern about her appointment.

But in light of Judge Ginsburg's answers to other questions concerning the establishment clause, including those detailed below, we do not read Judge Ginsburg's answer in this manner. Rather, we take Judge Ginsburg to be saying only that a too-rigid wall of separation would prevent government from accommodating religious practice, as the free exercise clause at times requires. This observation falls well within mainstream thinking on the meaning of the establishment clause; it does not cast doubt on Judge Ginsburg's commitment to that clause's underlying principles.

Several Senators asked Judge Ginsburg about the reigning test for determining establishment clause violations, established in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under this test, used to implement the more general notion that the establishment clause erects a wall of separation between church and state, government action violates the establishment clause if it has a religious purpose, its principal or primary effect is to advance or inhibit religion, or it fosters an excessive government entanglement with religion. In recent years, a number of Justices have criticized this test on a wide variety of grounds.

Judge Ginsburg's testimony indicates that she has no current intention to join the group of Justices clamoring for Lemon's reversal. She stated that notwithstanding recent attacks on Lemon, the three-part test of that opinion remains prevailing law — "and my approach is the law stays the law unless and until there is a reason to displace it." (Transcript, July 21, at 117.) She responded to the recent criticism of the Lemon test by asking: "What is the alternative? It is very easy to tear down, to say that — to deconstruct. It is not so easy to construct." (Transcript, July 20, at 197.) In later explanation of this testimony, she responded to a question of Senator Simon as follows:

**Senator Simon:** Is it misreading what you are saying to say you have not had a chance to dig into this as thoroughly as you eventually will obviously have to, but that on the basis of your limited knowledge of it, you have no difficulty with the Lemon test now? Is that incorrect?

**Judge Ginsburg:** I think that is an accurate description. (Transcript, July 21, at 118.)

Judge Ginsburg thus seems likely to accept and work within the prevailing principles and standards for determining when government action violates the establishment clause of the first amendment.

The Opinions in Kiryas Joel

It used to be that if you wanted to know what happened in a Supreme Court case you could take a peek at the end of the first opinion and see something like "affirmed" or "reversed." If one is simply interested in the result, literally the bottom-line, that still works often enough. Indeed, the prevailing opinion in Kiryas Joel ends with the word "affirmed."

If, however, you are interested in knowing what you are going to be up against in reading the opinions in a Supreme Court case it is often best to look not at what comes after the prevailing opinion but the breakdown of Justices, the little scorecard that comes before the first opinion. In Kiryas Joel this was as follows:

SOUTER, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts, I, II-B, II-C, and III, in which BLACKMUN,
STEVENS, O'CONNOR, and GINSBURG, JJ., joined and an opinion with respect to Parts II introduction and II-A, in which BLACKMUN, STEVENS, and GINSBURG, JJ., joined. BLACKMUN, J., filed a concurring opinion. STEVENS, J., filed a concurring opinion, in which BLACKMUN and GINSBURG, J.J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment. KENNEDY, J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined.

The nuances of the various opinions will be examined below. Basically the Court decided by a vote of six to three that the special Kiryas Joel school district legislation was unconstitutional but divided on the rationale. On the general issue of how to interpret the establishment clause some members of the majority were more aligned philosophically with the dissenters than with their colleagues in the majority.


The issue concerns "the wall of separation," a metaphor that has fallen somewhat out of favor in recent years, and its current implementation, the so-called "Lemon test." In 1947 the Supreme Court decided Everson v. Board of Education, 330 U.S. 1, the parochial school bus case. Everson marked what was essentially the beginning of the Court's establishment clause jurisprudence and in it the Court unanimously adopted a starkly separationist line, although it divided five to four as to the result.

In an oft-quoted passage Justice Black wrote for the Court as follows:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." Reynolds v. United States, supra at 164.

At the end of the opinion, despite its holding that publicly financed bus rides comported with the Constitution, the Court stated:

"The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."

Eventually, however, the wall of separation seemed more like the left field wall at Fenway Park, high but hardly impregnable. And, as at Fenway, a lot depends on how the wind is blowing.

In 1971 came the controversial "Lemon Test" in an opinion of the Court by Chief Justice Burger. Lemon v. Kurtzman, 403 U.S. 602. In Lemon, among other things, the Court backed off the wall of separation metaphor. "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." At 614. First, however, the Court introduced the now famous Lemon test, with its three components — purpose, effect and entanglement.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 US 236, 243, (1968); finally, the statute must not foster "an excessive government entanglement with religion." (emphasis supplied).

A constitutional violation can be predicated on any one of the three prongs.

This three part-test has proved controversial, to say the least. At Justice Breyer's confirmation hearing Senator Hatch described the test as "abstract, arid and ahistorical." The dispute may be overdrawn, however, because there is ample evidence that the Court has generally not regarded it as a "test" in a mechanical sense. This is suggested even by the language in Lemon quoted above. More specifically, in Meek v. Pittenger, 421 U.S. 349, 358-59 (1975), referring to Lemon, the Court stated: "It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives
of the Establishment Clause have been impaired." The Court wrote to the same effect in *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984):

> In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon*, supra. *But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area* (Emphasis supplied).

The facts are then that many Justices are openly disenchanted with the *Lemon* formula, the Court ignores it from time to time and it seems not to have been intended to be a "test" in the strict sense anyway. The issue is not whether *Lemon* provides a "test" but whether it sets forth three criteria that are useful indicators of an establishment clause violation. Religion did not intrude into the public school or at least the case was not decided on the basis of any allegation that it did. Far better to have this arrangement than to have public school personnel teaching in parochial schools monitored by supervisors to make sure that they do not surreptitiously advance the religious mission of the school.

The Opinion of Justice Souter

As the "scorecard" quoted above indicates Justice Souter's opinion was, apart from portions of Part II, the opinion of the Court. Three other Justices joined the entire opinion. Justice O'Connor, joined most but not all of Justice Souter's opinion. Justice Kennedy concurred only in the judgment.

The introduction and part one of Justice Souter's opinion set out the facts and prior litigation history of the *Kiryas Joel* case. In the introduction and section A of Part II, the portions of the opinion that had only four votes, Justice Souter discussed in detail *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). In *Larkin* the Court invalidated on establishment clause grounds a Massachusetts statute granting "the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a five hundred foot radius of the church or school ... " At 117. Decided over the single dissent of now Chief Justice Rehnquist, *Larkin* is not a particularly controversial case. Its close relevance to *Kiryas Joel* was not obvious, however, and that aspect of Justice Souter's opinion made an easy target for Justice Scalia's dissent. Apart from the misguided emphasis on *Larkin* this part of Justice Souter's opinion seems to flail away, piling up different tendentious observations in the hope that they will eventually amount to an argument. We learn that whereas Kiryas Joel was carved out of an existing school district the trend in New York is to consolidate school districts, not create new, small ones. The opinion also emphasizes that the school district, unlike the village itself, arose out of special legislation. One senses that the Justices had an intuition that the creation of the Kiryas Joel School District was unconstitutional but couldn't quite articulate why. This section of the opinion came closest to pay dirt in a footnote:

> When Chapter 748 was passed, the understanding was that if a non-Hasidic child were to move into the Village, the district would pay tuition to send the child to one of the neighboring school districts, since Kiryas Joel would have no regular education program. Although the need for such a transfer has not yet arisen, there are 20 Hasidic children with handicapping conditions who transfer into Kiryas Joel's school district from the nearby East Ramapo and Monroe-Woodbury school districts. 114 S. Ct. at 2490 n.5.

This shows that Kiryas Joel was only a shell school district. It had no regular public schools. There was only one special ed school and that was populated by handicapped children whose connection to the village was religious rather than geographical. Justice Stevens emphasized this point in his concurring opinion: "It is telling, in this regard, that two thirds of the school's full time students are Hasidic handicapped students from outside the village: the Kiryas Joel school thus serves a population far wider than the village — one defined less by geography than by religion." 114 S.Ct. at 2495. (emphasis in original). In effect the state created a school for handicapped Hasidic children from the general area for whom going to public school would be traumatic.
The Kiryas Joel School District therefore was a sham. (Some have been calling the new statute "Son of Sham.") This really should have been the core argument in this section of the opinion.

The analogy to Larkin, the fact that the creation of the small district ran against a general trend to consolidating school districts, the fact that the district was created by a special act — these were all little more than distractions in the opinion. What occurred is that the state provided a separate school for children whose combination of handicap and culture shock made it unfeasible for them to go to public school. It was not precisely a religious objection to public school because the Satmar did not claim a religious obligation not to intermingle. Indeed, at first they attempted to send their handicapped children to the public schools. Understandably those children encountered problems, not for religious reasons precisely, but for cultural reasons rooted in religion, exacerbated by the fact that only the handicapped Satmar children were attending the public schools.

The real issue then is whether the state could respond to this situation by providing a separate public school for handicapped Satmar children. The creation of the school district and the Court's analysis of its creation may have been simply a distraction from that issue.

Section II B of Justice Souter's opinion rested on an argument that was straightforward but certainly controversial. The Court said that there was no assurance that other groups seeking similar preference would get favorable treatment from the legislature and if they did not the courts would be powerless to intervene. "... we have no assurance that the next similarly situated group seeking a school district of its own will receive one; unlike an administrative agency's denial of an exemption from a generally applicable law, which 'would be entitled to a judicial audience,' ... a legislature's failure to enact a special law is itself unreviewable." 114 S. Ct. at 2491.

Justice O'Connor repeated the essence of that argument in her separate opinion.

Justice Scalia's opinion for the dissenting Justices, as well as Justice Kennedy's opinion concurring in the judgment, rejected this rationale. They maintained that there was no need to have advance guarantees, "up front," in Justice Scalia's phrase, that other groups with comparable claims would receive equal consideration from the legislature nor would the courts be powerless to provide a remedy if they did not. The Court replied with an argument so weak that it is surprising that Justice Scalia did not rush back to his word processor for a rejoinder.

Indeed, under the dissent's theory, if New York were to pass a law providing school buses only for children attending Christian days schools, we would be constrained to uphold the statute against Establishment Clause attack until faced by a request from a non-Christian family for equal treatment under the patently unequal law. Cf. Everson v. Board of Ed. of Ewing, 330 U.S., at 17 (upholding school bus service provided all pupils).

This is a strange argument for two reasons. First, on its face there is no comparison between the Kiryas Joel situation and publicly financed buses for parochial school students as concerns the "up front" issue. The Kiryas Joel problem was virtually unique because, while other religious sects might want a separate school district, few, if any, would duplicate the Satmars' situation where only a few handicapped students would be attending public school and the culture clash would be so extreme. With regard to the school buses, on the other hand, it is quite foreseeable that all private school students will be in equal need of transportation and that therefore any law touching the matter should make "up front" provision for all.

Secondly, the response to the dissent quoted above seems to proceed on the assumption that the enactment in Everson providing buses for parochial school students was written in neutral, general terms. Such is not the case. In his dissenting opinion in Everson Justice Rutledge wrote as follows:

I have chosen to place my dissent upon the broad ground I think decisive, though strictly speaking the case might be decided on narrower issues. The New Jersey statute might be held invalid on its face for the exclusion of children who attend private, profit-making schools. I cannot assume, as does the majority, that the New Jersey courts would write off this explicit limitation from the statute. Moreover, the resolution by which the statute was applied expressly limits its benefits to students of public and Catholic schools. There is no showing that there are no other private or religious schools in this populous district. I do not think it can be assumed there were none. But in the view I have taken, it is unnecessary to limit grounding to these matters. 330 U.S. 61-62 (emphasis added).

The resolution was as follows, according to the school board's minutes read in proof: "The transportation committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French the same was adopted." (Emphasis added.) The New Jersey court's holding that the resolution was within the authority conferred by the state statute is binding on us. 330 U.S. at 62n.59.
Apart from the Court’s admission that New Jersey’s present action approaches the verge of her power, it would seem that a statute, ordinance or resolution which on its face singles out one sect only by name for enjoyment of the same advantages as public schools or their students, should be held discriminatory on its face by virtue of that fact alone, unless it were positively shown that no other sects sought or were available to receive the same advantages. 330 U.S. at 62-63n.61.

Justice Jackson’s dissenting opinion is to a similar effect:

Thus, under the Act and resolution brought to us by this case, children are classified according to the schools they attend and are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths. 330 U.S. at 20-21.

Nor did the opinion of the Court in Everson, authored by Justice Black, dispute that those were the facts. It is simply that the Court in Everson did not insist on up front guarantees.

Appellant does not challenge the New Jersey statute or the resolution on the ground that either violates the equal protection clause of the Fourteenth Amendment by excluding payment for the transportation of any pupil who attends a “private school run for profit.” Although the township resolution authorized reimbursement only for parents of public and Catholic school pupils, appellant does not allege, nor is there anything in the record which would offer the slightest support to an allegation, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools. It will be appropriate to consider the exclusion of students of private schools operated for profit when and if it is proved to have occurred, is made the basis of a suit by one in a position to challenge it, and New Jersey’s highest court has ruled adversely to the challenger. Striking down a state law is not a matter of such light moment that it should be done by a federal court ex mero motu on a postulate neither charged nor proved, but which rests on nothing but a possibility. 330 U.S. at 4n2.

This presented a situation that was more difficult than Kiryas Joel because Everson gratuitously singled out a particular religion. The problem was not with the state statute, which was neutral, apart from the exclusion of private schools operated for profit. The problem was with the local implementing resolution, which singled out not only religious private schools but more specifically Catholic schools. Presumably, this was because there were no other private schools similarly situated. It is hard to believe that in a case as zealously litigated as Everson discrimination in application would not have been alleged and proven had it existed. Thus, the position of the Court seems more sensible than that of the dissenters on this issue. Nevertheless, Everson is a case in which the irritant could easily have been removed by expressing the implementing resolution in terms that were neutral not only among religions but neutral between sectarian and secular private schools (putting to one side the problem of non-profits). The majority in Everson did not require that, however. Thus, it seems that Everson cuts in favor of the Kiryas Joel dissenters, not the majority.

Everson is pertinent to Kiryas Joel in another way. Everson is famous for the exposition in the opinions, particularly Justice Rutledge’s dissent, of the separationist philosophy of Madison and Jefferson. The idea is that the views expressed by Madison and Jefferson in connection with the struggle to end state funding of religion in Virginia give meaning to the religion clauses of the first amendment, of which Madison is the principal author. This is not the place to explore whether this is an accurate example of original intent. See Derek Davis, Original Intent, Chief Justice Rehnquist and the Course of American Church/State Relations, especially 45-62 (1991). Nor is this the occasion to add to the general discussion of such questions as how original intent is to be defined, whether original intent is ascertainable and whether in any event original intent should be the last word in interpreting a document that is centuries old.

This much, however, may be said about the interrelationship between the state and private, church related schools. The religion clauses were not drafted with such church-state problems in mind because our public school system originated in the 1840s. Everson at 23 (Jackson, J., dissenting). The Supreme Court noted a similar problem in the racial context regarding the meaning of the fourteenth amendment, adopted in 1868, in Brown v. Board of Education, 347 U.S. 483, 489-90 (1954): “An additional reason for the inconclusive nature of the Amendment’s history, with respect to segregated schools, is the status of public education at the time. In the south, the movement toward free common schools, supported by general taxation, had not yet taken hold.”

“Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North.” Id. at 489n.4.

On the surface it may seem easy enough to apply church-state principles to the unforeseen problem of church schools that are in competition with public schools. If you want to run a religious school, fine, do so, but don’t expect public funds. The added factor in
recent years has been the explosion of school expenditures, particularly as a result of federal funding. This has not always resulted in an improvement in or even stabilizing of school quality. Nevertheless, it has produced a climate that expects increased expenditures by private schools, which are often impossible for those schools. In *Kiryas Joel* the Satmars would have far preferred to send all their children to religious school but they couldn’t afford the special ed for the handicapped provided by federal and state law. They had no objection as a general matter to funding their own religious schools. They had no objection to the special ed for their handicapped children. They greatly desired it. They just couldn’t afford it. So long as religions were being told in effect, “If you want your own little red school house the free exercise clause says you can have one but the establishment clause says you have to pay for it for yourself," there was a certain pragmatic symmetry to the law. Now, however, public schools have become so expensive that parents who desire a religious education for their children have an increasingly difficult time being taxed for public schools and paying separately for parochial schools. Church schools up to now have done a good job of doing more with less but that has largely been because of the subsidy resulting from having teachers who are members of religious orders, a subsidy that is increasingly unavailable.

**Nino Agonistes**

In *Kiryas Joel* Justice Scalia wrote a lengthy dissenting opinion, joined by the Chief Justice and Justice Thomas. The opinion, as is usual with Justice Scalia, displays relentlessly vigorous rhetoric, more calculated perhaps to bring comfort to those who agree with him than to win over those who do not. It is tempting to catalogue Justice Scalia’s descriptions of the majority opinion but that has been done. *See the New Republic*, July 18 - 25 (1994), page 8: “he called Souter’s opinion ‘astounding’; ‘unprecedented’; ‘facile’; ‘presumptuous’; and ‘unheard of’; and said it was created (his italics) ‘out of nowhere.” Also, Justice Stevens’ concurring opinion was denounced as “a manifesto of secularism.”

Substantially, Justice Scalia scored the strong point that the legislative decision to accommodate the Satmars was because of their cultural, not theological, distinctiveness. Further, he reiterated his expansive view of the government’s authority to accommodate religion. Recall Justice Scalia’s complaint in *Lamb’s Chapel*: “What a strange notion, that a constitution which itself gives ‘religion in general’ preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.”


As to *Lemon*, it seems that the jury or, more accurately the Justices in this case, are still out. Justice Souter’s prevailing opinion did not repudiate *Lemon* but also did not rely on it. Justice Blackmun, who was one of the Justices who joined Justice Souter’s opinion in its entirety, wrote a brief concurring opinion to disavow “any suggestion that today’s decision signals a departure from the principles described in *Lemon* ...” The statement rang a little hollow, however, because in fact Justice Souter’s opinion studiously distanced itself from *Lemon* and as Justice O’Connor put it in her concurring opinion, “As the Court’s opinion today shows, the slide away from *Lemon’s* unitary approach is well under way.”

All of this did not bank the indignation of Justice Scalia, however, even though he described Justice Souter’s opinion as a “snub of Lemon.” He didn’t want a snub he wanted a burial. Indeed, in his *Lamb’s Chapel* concurrence, Justice Scalia famously described *Lemon’s* status in the Court’s cases as “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” In *Kiryas Joel*, in a departure from his aggressive, tauntingly iconoclastic style, Justice Scalia seemed in effect resigned that for now all he can expect for the ghoul is certain episodes of dormancy rather than the definitive slaying he would prefer.

**The Status of the 1985 Cases**

As noted above, in 1985 the Supreme Court decided two cases that have reassumed prominence after *Kiryas Joel*, *School District of Grand Rapids v. Ball* and *Aguilar v. Felton*. *Felton* is especially pertinent to *Kiryas Joel*. *Felton*, a five to four, decision, involved the use of “federal funds to pay the salaries of public employees who teach in parochial schools” pursuant to Title I of the Elementary and Secondary Education Act of 1965. This program was for “educationally deprived children from low-income families.”

The Court invalidated this because of the entanglement prong of the *Lemon* test. The pervasive supervisory monitoring utilized to prevent a religious effect resulted in “excessive entanglement of church and state.” Therefore, the state unsuccessfully attempted to steer between the Scylla of religious effect and the Charybdis of excessive entanglement. As now Chief Justice Rehnquist put it in his *Felton* dissent: “In this case the Court takes advantage of the ‘Catch-22’ paradox of
its own creation ... whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement.”

The reason why Felton assumes center stage once again is that Justice Scalia in his Kiryas Joel dissent expressed agreement with the statement in Justice O'Connor's opinion that Felton should be overruled. Justice Kennedy, the one Justice in the majority in Kiryas Joel who did not join any part of Justice Souter's opinion, wrote that Grand Rapids and Felton “may have been erroneous,” and “it may be necessary for us to reconsider them at a later date.” Thus, there could be five votes to overrule; six, if Justice Breyer who has now replaced Justice Blackmun would join such a majority.

The ambiguity is the position of Justice Kennedy. Justice O'Connor and the three dissenters flatly would overrule Felton. Justice Kennedy's opinion contains more than a heavy hint that that is his position also but, strictly, all he said is that maybe Felton was erroneous and maybe should be reconsidered. Perhaps this is a purely formal reservation but Justice Kennedy's establishment clause jurisprudence appears more nuanced than that of any of the other Justices and he has surprised before. In any event there is enough of an invitation there from a majority of the Supreme Court to reinstate Felton-like programs and to have them tested before the Court again.

Part of the reaction to Kiryas Joel, both on and off the Court, is that the result was correct but that the Court largely caused the problem by its Felton decision. That is, only because of Felton the handicapped Satmar children were sent to public schools outside the village and only when that worked out poorly was the Kiryas Joel School District created. The thought is that although the decision in Kiryas Joel was right the Court had boxed itself in by deciding Felton incorrectly. As Justice Kennedy put it in Kiryas Joel: “One misjudgment is no excuse, however, for compounding it with another.”

The premise of all of this is that the arrangement in Kiryas Joel is constitutionally more problematic than that in Felton. It is not clear that that is the case. In Felton public school employees were present in the parochial schools with strict measures to separate religion from the activities of the public employees. This intensive in-class monitoring was noted above. Also, “the administrators of the public schools are required to clear the classrooms used by the public school personnel of all religious symbols.” This would be quite unseemly if permitted. Moreover, if the principle were once accepted that public school employees could come into parochial schools to teach secular subjects, calls for more extended programs would be inevitable. As Justice Brennan observed in Ball: “To let the genie out of the bottle in this case would be to permit ever larger segments of the religious school curriculum to be turned over to the public school system ...”

Even if such a goal were permissible it would be far better both for the state and religion to achieve it by, e.g., voucher grants, rather than have public employees in parochial schools. Felton is not an obvious candidate for overruling.

In this respect the Kiryas Joel arrangement is less troublesome. A village was created and the constitutionality of that was not challenged. The village then became a school district and ran a real public school. Religion did not intrude into the public school or at least the case was not decided on the basis of any allegation that it did. Far better to have this arrangement than to have public school personnel teaching in parochial schools monitored by supervisors to make sure that they do not surreptitiously advance the religious mission of the school.

Conclusion

The following summary thoughts are suggested by Kiryas Joel.

1. The new statute

Is the new statute enacted in response to the Supreme Court's decision (Appendix, infra) constitutional? If it is, the Kiryas Joel litigation essentially involved a drafting error. The 1994 statute, although written in general terms, was enacted solely to deal with the Kiryas Joel situation and has requirements that perhaps can be satisfied by few if any other villages.

2. Was the creation of the village itself constitutional?

Strictly, this was not before the Court in Kiryas Joel but the question inevitably lurks in the background. There is common sense to the idea that if the Satmars can have their own village there can’t be anything so awful about their having a separate school district. Jeffrey Rosen writing on the Washington Diarist page of the New Republic spotlighted the village itself in a brief but polemical commentary on the new statute:

Similarly over-the-top is the recent performance of Governor Mario Cuomo, who deserves the Orval Faubus award for unblushing efforts to thwart the Supreme Court...

Cuomo’s strategy of massive resistance is ultimately doomed; but he has succeeded in delaying a legal challenge to the real constitutional scandal, which is not the school district of Kiryas Joel but the vil-
lage of Kiryas Joel. As The Wall Street Journal confirmed last month, the village is thriving as a municipal theocracy in which federal funds are laundered for religious uses. The New Republic, August 8, 1994, page 42.

The Court, it will be remembered, thought it crucial that the village was created pursuant to general legislation whereas the school district was created by special act. The question then is the "Son of Sham" issue. Is the 1994 Act one of general applicability or is it a special act masquerading as a general act? One must also remember that in Kiryas Joel only the constitutionality of the school district was challenged, not the village itself.

3. Why not a neutral site?
After Felton made it impossible to provide special ed at the religious schools why did not the existing school district provide special ed at a neutral site in the village, thus obviating the need to create a special school district? Recall the discussion, above, of the earlier state court litigation, Board of Education v. Wieder, concluding that this solution was legally permissible but not legally required. The New York Court of Appeals in Wieder adverted to what may be the explanation.

Considerable doubt has been voiced by the Appellate Division (132 A.D.2d 409, 416, 522 N.Y.S.2d 878, supra), by plaintiffs and by the New York State School Boards Association as amicus, that the alternate setting contemplated by defendants could ever be a genuinely neutral, public site, free of identification with defendants' beliefs. The point is made that the fear and trauma of leaving the language, life-style and environment of Kiryas Joel and mixing with others — defendants' stated grounds for refusing to attend the public schools — of necessity mean that any acceptable alternate site designated to address those concerns could never be truly neutral. 527 N.E.2d at 774.

To the extent that the concerns noted by the Court of Appeals are credited, it seems to be a separate reason why the Kiryas Joel School District, created the following year, was unconstitutional.

4. Should Felton be overruled?
As noted above, the Kiryas Joel School District was created only because Felton made it impossible for the existing school district to continue providing special ed at an annex to the religious school. Now a majority of the Court seems ready to overrule Felton. They shouldn't do it. If parochial school students need the services of public school teachers they should go, full-time or part-time, to public schools or at least a neutral site. As to the more or less unique problem of the Satmars, perhaps the 1994 Act will be upheld, especially if further exploration of the facts reveals that it is not a disguised spe-

5. The Lemon test.
The Lemon formula will probably survive in the same way the Roe v. Wade formula did — altered but not repudiated. The Court is unenthusiastic about Lemon as a "test" but accepts the three elements of Lemon as important analytical factors.

Drawing on an analysis from Justice O'Connor's opinions the Court has also emphasized whether governmental action might reasonably be perceived as endorsing religion.

Our subsequent decisions further have refined the definition of governmental action that constitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 592 (1989).

The problem with an "endorsement" standard is that endorsement is subjective. Did New York "endorse" the Satmars in Kiryas Joel? In regard to the endorsement issue the argument is often made in cases like Kiryas Joel that it is far fetched to suppose that government action aiding a tiny minority religion is an "endorsement" of that religion by the dominant political forces. On its own terms the argument seems logical enough. It is dangerous, however, because it leads to the conclusion that government action accommodating some religions would be constitutional while the same accommodation on behalf of other religions would be unconstitutional. Establishment clause law should not discriminate against minority religions but it should not discriminate in their favor either.

Recently there have been four "separationists" on the Court Justices Blackmun, Stevens, Souter, Ginsburg. Justice Breyer's replacing Justice Blackmun probably does not alter this. Chief Justice Rehnquist, Justices Scalia and Thomas are the "accommodationists." Justices O'Connor and Kennedy, although somewhat accommodationist are the swing votes. Justice O'Connor rejects the idea of an easy test. In Kiryas Joel she wrote: "it is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause. ... But the same constitutional principle may operate very dif-
differently in different contexts. ... Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test." 114 S.Ct at 2498-99.

Nevertheless, as Justice Scalia has grudgingly acknowledged, Lemon is surprisingly durable considering what the Justices individually have written about it.

6. Why wasn't Kiryas Joel a free exercise case rather than an establishment clause case?
The Satmars claim was litigated as a permissible accommodation rather than something required as a matter of free exercise. If it were a free exercise case the Religious Freedom Restoration Act of 1993 would have to be taken into account. Concerning this Act see 24 the Advocate 31, 40-41 (fall 1993); Attorney General v. Desilets, 418 Mass. 316, 322 n. 5 (1994). There is a question whether the Act is within the constitutional authority of Congress, as to which the Justice Breyer confirmation hearing is once again instructive.

Senator Simpson: Then this Religious Freedom Restoration Act mandated that all free exercise claims be considered under one standard then — the compelling state interest and the least restrictive means back to the previous cases.

My question: To what extent is it constitutionally permissible for Congress to provide the courts with a substantive standard for free exercise of religion claims or to what extent is it constitutionally permissible for Congress to overrule the Supreme Court's own substantive standards for review of free exercise of religion claims?

Judge Breyer: The reason that I smiled, Senator, was because you've articulated the question exactly that I would imagine is likely to be before the Supreme Court. And if I'm confirmed, and you decide to confirm me, then I would be a member of that Court, and therefore, I have to exercise caution on that particular question. That's going to be right there. It's going to be right there. Federal News Service, July 12, 1994, page 51.

Stay tuned.

Appendix
1994 REGULAR SESSION
ASSEMBLY BILL NO. 12230
1994 N.Y. ALS 241; 1994 N.Y. LAWS 241; 1994 N.Y. A.N. 12230 SYNOPSIS: AN ACT to amend the education law, in relation to the creation of school districts.
The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1504 of the education law is amended by adding a new subdivision 3 to read as follows:

3. ANY MUNICIPALITY SITUATED WHOLLY WITHIN A SINGLE CENTRAL OR UNION FREE SCHOOL DISTRICT, BUT WHOSE BOUNDARIES ARE NOT COTERMINOUS WITH THE BOUNDARIES OF SUCH SCHOOL DISTRICT, MAY ORGANIZE A NEW UNION FREE SCHOOL DISTRICT, PURSUANT TO THE PROVISIONS OF THIS SUBDIVISION, CONSISTING OF THE ENTIRE TERRITORY OF SUCH MUNICIPALITY, WHENEVER THE EDUCATIONAL INTERESTS OF THE COMMUNITY REQUIRE IT.

A. NO SUCH NEW SCHOOL DISTRICT MAY BE ORGANIZED UNLESS: (I) THE ENROLLMENT OF THE MUNICIPALITY SEEKING TO ORGANIZE SUCH NEW SCHOOL DISTRICT EQUALS AT LEAST TWO THOUSAND CHILDREN, AND IS NO GREATER THAN SIXTY PERCENT OF THE ENROLLMENT OF THE EXISTING SCHOOL DISTRICT FROM WHICH SUCH NEW SCHOOL DISTRICT WILL BE ORGANIZED; (II) SUCH NEW SCHOOL DISTRICT WOULD HAVE AN ACTUAL VALUATION PER TOTAL WEALTH PUPIL UNIT AT LEAST EQUAL TO THE STATEWIDE AVERAGE; (III) THE ENROLLMENT OF THE EXISTING SCHOOL DISTRICT FROM WHICH SUCH NEW SCHOOL DISTRICT WILL BE ORGANIZED EQUALS AT LEAST TWO THOUSAND CHILDREN, EXCLUDING THE RESIDENTS OF SUCH MUNICIPALITY; AND (IV) THE ACTUAL VALUATION PER TOTAL WEALTH PUPIL UNIT OF SUCH EXISTING SCHOOL DISTRICT WILL NOT INCREASE OR DECREASE BY MORE THAN TEN PERCENT FOLLOWING THE ORGANIZATION OF THE NEW SCHOOL DISTRICT BY SUCH MUNICIPALITY.

The Product of the General Court

By Professor Gerard J. Clark
A Summary and Critique

Speaker of the House of Representatives Charles Flaherty has called the Massachusetts General Court "one of the greatest deliberative bodies in the world." It is certainly one of the oldest, beginning in 1630, and if history counts in the equation, the Speaker is surely correct. The body has produced three presidents: John Adams, John Quincy Adams, and Calvin Coolidge. Its august membership has included John Hancock, James Otis, Benjamin Franklin, Daniel Webster, Horace Mann, Henry Cabot Lodge, James M. Curley, John McCormack and Thomas P. O'Neill. It possesses, as Oliver Wendell Holmes saw it, the power of Parliament—i.e., absolute power. Its power reaches both horizontally, giving it the power to dominate its coordinate branches, the executive, and the judiciary, and vertically, allowing it to dictate the minute details of municipal government.

Since the Speaker's comment makes a qualitative statement about the body, conclusions about its present day quality can be drawn fairly by reviewing its output. In the 1993 regular session, the General Court of the Commonwealth of Massachusetts enacted 498 laws. This piece will attempt to survey this product, excluding only the insignificant ones, and then attempt a few generalizations.

Home Rule Petitions

More than half of the 1993 legislative product or 291 acts were in response to home rule petitions from municipalities of the Commonwealth. The pervasive power of the General Court is clearest here because in authorizing municipal home rule, the General Court has strictly limited municipal power, requiring petitions for authority which most would assume are within the competence of any municipality. This somewhat rarefied question received a good deal of public attention concerning the November 1994 ballot question nine. Question nine enacted a state-wide law which had the effect of abolishing the extant home rule authority in Boston, Brookline and Cambridge, which had been previously petitioned for and allowed by the General Court and prohibiting future grants of home rule authority to institute rent control systems.

More typically home rule petitions concern minutia. For instance, the town of Rockport was granted the right "to use a certain parcel of park land for the purpose of constructing, operating, and maintaining a water supply standpipe" in Chapter 292. The traffic commissioner in the city of New Bedford was granted the right to "designate one or more districts in which resident only parking shall be in effect" and also to "include provisions for visitor parking, delivery vehicles, service repair vehicles, and other temporary parking categories" in Chapter 317. Chapter 463 authorized the town of Methuen "to make payment to John Jennings, Inc. for repairs made to the East End fire station... in an amount not to exceed four thousand two hundred and twelve dollars." The Town of Watertown received the authority to appoint an "acting town manager" for a term "not to exceed four months; provided; however, one renewal, not to exceed a second four months, may be permitted," in Chapter 435.

Chapter 378 granted the chairman of the Methuen historical commission the right to name alternate members. Chapter 41 dictated who can be named as town meeting members at large in the town of Fairhaven. Chapter 144 required the town of Warren to establish two polling places for state and municipal elections, notwithstanding the different practice for elections for "congressional, state representative, state senatorial or councillor districts."

Conveyances

Another major category of enactments by the General Court in 1993 involved the conveyance of interests in real property. Most of these ninety-one chapters were in the form of home rule petitions, but a significant number involved conveyances involving the Commonwealth. For instance, Chapter 23 authorizes the Commonwealth to grant "emergency access and utility easements" across a parcel in Holbrook for a two year period. Chapter 43...
To this point, one might ask where the law is. Over four hundred and twenty of the legislature’s four hundred ninety-eight enactments involved home rule, conveyances, terms of government employment, or awards to individuals.

The legislature also named buildings and highways and made official designations twenty-one times in 1993.

town of Plymouth to sign the instruments necessary “to lease or extend existing leases and options to purchase certain parcels of land located at the Plymouth Town Wharf” to the current tenants, “notwithstanding ... any other general or special law pertaining to bidding to the contrary and without seeking any further bids or proposals.”

The legislature also named buildings and highways and made official designations twenty-one times in 1993. Chapter 135, for instance, dedicates the probate court house in Taunton in the memory of Justice Ernest I. Rotenberg. Chapter 311 designated the rotary on Route 3A in Hingham in honor of the Honorable Nathaniel M. Hurwitz, “who served as a state representative from nineteen hundred and fifty-three to nineteen hundred and fifty-five and who was commissioner of veteran’s affairs.” Chapter 171 amended Chapter 6 of the General Laws “by inserting after section 1SSSS section 1SSSS which designates the second Sunday of May as Massachusetts Emergency Responders Memorial Day “to honor all paramedics, emergency medical and public safety personnel, national guard personnel on state active duty, disaster assistance volunteers and emergency management personnel killed in the line of duty.”

Section 1SSSS then declared that “the baked navy bean shall be the official bean of the commonwealth.”

Public Employees
Chapter 31 of the General Laws establishes the civil service system which protects covered state and municipal workers from arbitrary termination and establishes a set of procedural protections. Each year, however, the legislature may add or subtract positions or individuals from the system. Chapter 5 declared that “inspectors of plumbing, sealers and deputy sealers of weights and measures and inspectors and deputy inspectors of weights and measures in the town of Wrentham shall be exempt from the provisions of Chapter 31 of the General Laws.” There were 13 similar acts in the 1993 term. In Chapter 311, over the governor’s veto, the legislature declared that the civil service commission may restore and protect rights lost through procedural default “notwithstanding the failure of such person to comply with any requirement of said Chapter 31 or any such rule as a condition precedent to the restoration or protection of such rights,” which will surely create a legal quagmire.

Chapter 296, after finding that “using private contractors to provide public services formerly provided by state employees does not always promote the public interest,” goes on to prohibit such privatization contracts unless the private contractor pays wages and benefits comparable to what the displaced state workers were earning, offers jobs to displaced
state workers, "provides adequate resources" to assist displaced state workers to organize into a company that could submit a bid for the work themselves and unless the agency doing the privatization contracting submits detailed documentation to the department of administration and finance justifying its action.

Another issue that seemed to receive extensive attention in 1993 is the sick bank. Workers may have an entitlement arising out of a collective bargaining agreement or elsewhere to a given number of sick days each year. Unused sick days are normally lost. The sick bank allows the worker to save all or part of a year's unused sick leave in a subsequent year, or, depending upon the individual plan to transfer sick leave to another. Chapter 231 thus declared that "notwithstanding the provisions of any general or special law to the contrary, the trial court is hereby authorized and directed to establish a sick leave bank for probation officer Henry P. Burke of the Taunton division of the district court department of the trial court." Employees of the trial court could thereby contribute their own "sick, personal or vacation days" to Mr. Burke. Eleven other individual sick banks were enacted in 1993.

The legislature granted other individual employment benefits as well. For instance, Chapter 197 declared that "the length of service in the police department of the city known as the town of Methuen for David San Antonio shall be computed from May second, nineteen hundred and eighty-nine." Chapter 261 authorized the payment to Katherine E. Flannery of "an annuity in the amount of three-fourths of the annual amount of pension" payable to her husband. Chapter 271 authorizes "the payment of an amount not to exceed five thousand dollars for the reasonable funeral and burial expenses" of any employee of Templeton killed in the line of duty. Chapter 321 directs the board of registration of sanitarians "to retire registration number 001 in honor of Otis M. Peluso who held such number since the establishment of said board."

**Awards to Individuals**

The extension of payments or benefits to named individuals is common. Chapter 448 authorizes the town of New Marlborough to "abate real estate taxes assessed in the name of David W. Jacquier in the amount of seven thousand five hundred fifty-six dollars and twenty-four cents for fiscal years nineteen hundred and eighty-eight to nineteen hundred and ninety-three, inclusive and to refund to said David W. Jacquier the sum of seven thousand five hundred fifty-six dollars and twenty-four cents."

Chapter 225 authorizes payment of two thousand dollars to Gerald Coppola as salary for the position of selectman for the town of Richmond. Chapter 469 frees the Berkshire Hills Motel in Pittsfield from the obligation of enclosing its inground swimming pool. Chapter 177 exempts Peter Kolson from the state conflict of interest law and allows him to draw a salary from the Quincy Housing Authority and to receive compensation as a city councilor in Quincy.

Chapter 153 authorizes the issuance of a liquor license to Russell Baker and Co., Inc., dba Route #20 Sports Bar. Indeed legislative grants of liquor licenses appear quite common. Others who received them in 1993 include the Saugus Italian-American Club, Inc., Carmen's Taco and Burger Hut in Abington and the Malden Emergency Center.

**Criminal Law**

To this point, one might ask where the law is. Over four hundred and twenty of the legislature's four hundred ninety-eight enactments involved home rule, conveyances, terms of government employment, or awards to individuals. The 1993 legislature did enact twenty different measures that respond to the public's demand for law and order. Chapter 218 made criminal the knowing obstruction of "entry to or departure from any medical facility" or the entrance therein "to impede the provision of medical services," in order to protect abortion clinics and their patients from the more aggressive opposition of abortion opponents. Chapter 303 amends the child abuse statute that had required the department of social services to notify the district attorney's office of cases of abuse by allowing the report to be immediate, instead of after investigation and report and also by defining "serious physical abuse or injury," previously in the statute to include "fracture of any bone, severe burn, impairment of any organ or other serious injury." Chapter 340 amends the statute prohibiting indecent assault and battery on a child under fourteen, by adding a crime directed at those who have "care and custody of a child" who "recklessly or wantonly permit substantial bodily harm to such child." In cases charging use of criminal force, Chapter 477 allows introduction of evidence that the defendant "is or has been the victim of acts of physical, sexual, or psychological harm or abuse." Chapter 489 establishes the Nemansket Correctional Center for sexually dangerous persons and dictates criteria for admission and
Given the public's dissatisfaction with government and governmental solutions and the campaign promises of candidates for office to cut the fat out of governmental spending and to trim the bureaucracies, one would expect to find extensive legislative attention paid to the two hundred odd departments, divisions, commissions, bureaus, agencies registries and executive offices that make up state government.

release. Concerning the obligation of doctors, police, elder service workers and many others to report elder abuse to the department of elder services, Chapter 339 adds “physician’s assistants” to the list. Chapter 429 authorizes disclosure to the Disabled Persons Protection Commission of reports of an “abuse or neglect of a disabled person.”

Chapter 417 allows the taking of testimony of mentally retarded persons in different settings or by videotape, should the atmosphere of the courtroom be detrimental to the witness. Chapter 478 establishes in the attorney general’s office an office to process and pay victims of violent crimes compensation for their medical expenses and lost wages to a maximum of 25,000 dollars.

Chapter 432 creates a sentencing commission with a mandate to “provide certainty and fairness in sentencing, avoiding unwarranted sentencing disparities ... while maintaining judicial discretion and sufficient flexibility to permit individualized sentences warranted by mitigating or aggravating factors.”

Chapter 333 makes home invasion, defined as armed entry into a home causing harm or threatening harm, a twenty-year felony. Chapter 335 extends the mandatory two-year term for drug dealing in schools to “within one hundred feet of a park or playground.” Chapter 326 criminalizes trespass at “any correctional institution.” Chapter 376 makes escape from a courthouse a ten-year felony. Chapter 217 bans hunting with “any type of full automatic firearm, machine gun or submachine gun, or any crossbow,” or with tracers or incendiary ammunition. Chapter 491 requires gun permit applicants in the city of Boston to be twenty-one years of age and prohibits sales of firearms to minors. Chapter 380 allows public schools to suspend students who are charged with a felony or felony delinquency and to expel after conviction. Chapter 387 imposes a twenty-five dollar fine for failure to wear seat belts and Chapter 404 raises the speed limit on parts of the Mass. Turnpike and routes 91 and 95 to sixty-five miles per hour.

Chapter 275 requires the taking of a blood sample from deceased motor vehicle drivers to determine the presence of alcohol or a controlled substance. Chapter 279 repeals the crime of conducting marathons or walkathons in excess of ten hours in duration.

Common Law Changes
The legislature can expand and limit common law rights and remedies. Chapter 9 authorizes a lien against airplanes on behalf of mechanics who perform work and repairs upon them. Chapter 319 authorizes civil actions against deceased persons where no executor or administrator has been appointed. Chapter 407 asserts that guardians ad litem for incompetent persons have the power to settle civil claims on their behalf. Chapter 382 clarifies the methods by which a mortgagee shall take possession. Chapter 420 provides that balloon mortgages on certain residential property shall be renewed upon maturity. Chapter
434 enacts the uniform custodial trust act which attempts to simplify and codify the establishment of the common law trust. Chapter 460 expands the tools vested in the probate courts to enforce child support decrees in order to insure that responsible adults make the maximal contributions possible to the support and well-being of children. Chapter 442 makes state pensions and retirement allowances subject to judicial process to satisfy a support order. Chapter 486 vests grandparental visitation rights to children placed in foster homes pursuant to care and protection proceedings. Chapter 307 places a three year statute of limitation on civil actions for sexual abuse, which shall begin to run from the time of abuse or discovery thereof and shall also be tolled until a child reaches age eighteen. Chapter 446 exempts good samaritan doctors from suits for damages for their acts or omissions. Chapter 471 prohibits "retaliatory action" against an employee for the disclosure of a policy or practice engaged in by an employer that the employee "reasonably believes to be in violation of a law."

Environmental Regulation
Chapter 179 authorizes municipalities to establish "intergovernmental revolving funds for the purpose of operating a multi-community yard waste processing or recycling program." Chapter 124 limits the amount of phosphorous allowed in dishwashing cleansers to eight and seven-tenths percent. Chapter 482 allows a tax credit of 1,500 dollars to owners who expend that amount in the abatement of lead paint. The chapter goes on to establish a comprehensive lead paint abatement and education program. Chapter 490 creates the Motor Vehicle Emissions Inspection Compliance Trust Fund to be funded by inspection fees. It licenses inspectors and creates a comprehensive program for the abatement of emissions that pollute the atmosphere. Chapter 175 empowers certain personnel employed by common carriers to enforce no smoking bans.

Administrative Law
State government is by and large made up of administrative agencies. Except for the constitutionally created offices, the legislature creates them, dictates their function and power and decides their budgetary allocation. Given the public's dissatisfaction with government and governmental solutions and the campaign promises of candidates for office to cut the fat out of governmental spending and to trim the bureaucracies, one would expect to find extensive legislative attention paid to the two hundred odd departments, divisions, commissions, bureaus, agencies registries and executive offices that make up state government.

Quite the opposite was true in 1993. Chapter 161 reorganized the department of public welfare and expanded the function of the Division of Medical Assistance and designated it as "the single state agency responsible for administering the programs of medical assistance." Chapters 52 and 132 provide for the consolidation of Executive Office of Health and Human Services. Chapter 447 changes the composition of the Economic Assistance Coordinating Council. Chapter 145 created a new Manufactured Home Commission and charged it to "develop proposals for specific zoning standards to be applicable to new manufactured housing communities in order to ensure that such new communities are well designed and suited to meeting the needs of manufactured home owners." Chapter 498 creates the Devens Enterprise Commission with the following "overall goal statement": "the Devens reuse challenge demands a visionary planning effort grounded in environmental, social, and economic reality. It must be realistic, pragmatic, market-driven, flexible, and future oriented and shall be based upon a group of eighteen after-mentioned "goals and objectives." Chapter 19 creates the Rapid Economic Response Team and grants it over ten million dollars to "aggressively market the commonwealth to attract prospective business and to intervene in situations where there exists a possibility of job loss" to "disseminate promotional information concerning available economic assistance programs offered through any state, quasi-public, public, non-profit corporation or other entity as deemed necessary."

Licensing
The legislature also expanded the state's licensing requirements. Chapter 385 requires a license for the practice of forestry. Chapter 308 requires a license for check cashing. Chapter 492 for investment advisors; Chapter 309 for chiropractors; the powers of the Board of registration in Nursing were revised and expanded in Chapter 459; fines for unlicensed electrical work were raised in Chapter 325; Chapter 327 expands eligibility for transporters of handicapped persons; Chapter 182 strengthens and expands the regulation of shellfish beds; Chapter 316 requires testing about driving under the influence in examinations for a driver's license; Chapter 313 provides for temporary liquor licenses at wine auctions; Chapter 481 allows holders of beer and wine
licenses to sell "liqueur or cordial;" Chapter 416 expands the licensing required of transporters of alcoholic beverages; Chapter 324 allows building inspectors to contract out their services to third parties. Chapter 473 allows dog racing licensees to simulcast their events except in Suffolk County.

Chapter 226 expands the investigatory powers of the Commissioner of Insurance to assure coverage of risks assumed by companies, limit the kind of investments that such companies can make, and to regulate out-of-state insurance companies and broker-company relationships. It dictates procedures to be followed for insolvent insurance companies and allows for the creation of risk purchasing groups.

On the other hand the legislature immunized certain activity from liability and scrutiny. Chapter 388 prohibits the maintenance of records by video rental stores of "the title or category of any video leased or rented by a borrower." Likewise Chapter 331 immunizes from liability one who "renders service to a sailing program of a non-profit association." Chapter 409 limits the liability of municipalities in "household hazardous waste collection." Chapter 466 exempts disability benefits up to four hundred dollars per week from collection procedures.

Health

In 1992 the president ran on a platform of expanded health care eligibility. State law dictates the terms of Medicaid coverage and also requires health and worker's compensation insurance coverage for government and certain other workers. It also regulates the industry through the licensing of hospitals and other health care providers.

Chapter 266 requires at least one nurse for each three patients in analysis units; Chapter 237 provides reciprocity for Canadian nurses; Chapter 47 allows the dispensing of free samples provided by drug companies to indigent patients; Chapter 224 allows for oral transmission of prescriptions between doctor and pharmacist. Chapter 350 requires health facilities to notify the Department of Public Health prior to purchasing innovative services and new technologies. Chapter 458 requires that group blanket policies of accident and sickness insurance "shall provide coverage for a bone marrow transplant" consistent with protocols reviewed and approved by the National Cancer Institute.

Chapter 375 creates joint underwriting authority for malpractice insurance on behalf of dentists who have been unable to obtain malpractice insurance. Chapter 384 requires that covered health policies cover the treatment a long list of specific intestinal diseases, including "inherited diseases of amino acids and organic acids." Chapter 332 requires payment from health insurers for the services of nurse anesthetists. Chapter 495, the large supplemental appropriation passed at the end of the session, contains a detailed statute regulating the providers of Medicare supplemental insurance plans.

Chapter 283 protects a psychotherapist's record from disclosure. Chapter 306 immunizes a "counselor or coordinator in serving health information needs of elders programs" from criminal or civil liability. Chapter 467 treats foster care givers in similar fashion.

Other Enactments

Numerous other enactments cover such diverse topics as to defy categorization. Chapter 273 redrew district lines for the state house of representatives and Chapter 274 for the senate and governor's council. Chapter 475 imposes detailed requirements upon local voter registration boards to expand opportunities to register and to vote. Chapter 328 authorizes the incorporation of state committees of political parties.

In Chapter 12 the legislature revisited the comprehensive court reform act of 1992 by adding myriad sections; allowing one year leave for judges to pursue study, research or teaching, reorganizing the probation department; addressing procedures in juvenile courts when confronted with juveniles who present a "significant danger" to the public; and encouraging alternative dispute resolution. Chapter 142 allows municipal golf courses to accept credit cards for greens fees. Chapter 278 requires that children under the age of twelve wear bicycle helmets. Chapter 484 recognized sign language as a "full and legitimate language" for purposes of foreign language and course credit. Chapter 150 established pilotage rates in the port of Boston and Chapter 211 requires every foreign vessel of three hundred and fifty gross tons or over to employ a pilot commissioned in accordance with the general laws. Chapter 474 prohibits the investment of state pension fund monies in companies of South Africa that do not subscribe to a "platform of guiding principles," which include worker rights, training and education and empowering black business; section 8 then exempts Boston, Watertown and Newton from major provisions of the act. Chapter 334 prohibits the sale of California Reformulated Gasoline. Chapter 369, after finding that "farms preserve open spaces, sculpt the landscape and provide the land base for a diversity of recreational pursuits" and that dairy farms are "
major draw for our tourist industries," creates the Northeast Interstate Dairy Compact which is empowered to "establish the minimum price for milk to be paid by pool plants." Chapter 406 prohibits the sale, breeding or release of wild canid hybrids or wild felid hybrids. Chapter 450 expands the definition of horticulture in the state's zoning enabling act to include "the growing and keeping of nursery stock and the sale thereof" and thereby excludes it from most local controls. Credit unions received legislative attention four times; Chapter 488 limits the total obligation of members to ten thousand dollars.

Liberalism's Demise

Massachusetts has a well-deserved reputation for being a liberal state. The legislature has been dominated by liberal democrats since World War II. Liberals believe in governmental programs to assist the disadvantaged. The government should play a positive role in assuring the well-being of the citizenry by ensuring jobs, housing, food, medical care, and education.

Nationally, the Reagan revolution attacked this notion: Micheal Dukakis's attempt to salvage the idea in the 1988 election failed and the congressional elections of 1994 seem to confirm the death of liberalism as a national political idea. Likewise, the 1993 session produced very little truly liberal legislation. A few exceptions: Chapter 282 prohibits exclusion from public schools because of sexual orientation; Chapter 88 affords unemployment compensation for employees who are victims of employer lock-outs; Chapter 405 requires the Board of Education to establish an outreach program to increase participation in school breakfast programs; Chapter 393 establishes a program of primary health care for children under the age of twelve; and Chapter 263 clarifies employee rights to unemployment compensation in cases where there is also severance pay.

Educational Reform

The most important bill of the term was the school reform law in Chapter 71. The bill restructured local school committees by giving broad powers over personnel to the superintendent; it established local councils representing teachers, parents and other groups such as business and labor to work with principals in setting educational goals, reviewing annual budgets and formulating school improvement plans. It expanded the duties of the Commissioner of Education, including testing of fourth, eighth, and tenth graders and assessments of all schools and districts in the state. It established a goal of providing free pre-school programs for all low income 3- and 4-year olds and all-day kindergartens. The law expanded the state's open enrollment or school choice program to allow students to attend school in any district in the state with available space, with a system of reimbursements to assist districts to pay for increased costs. Teacher certification must be renewed every five years and local school districts are required to adopt a plan for the professional development of teachers and other school staff.

The Budget and Appropriations

Certainly the most time-consuming task that the legislature performs each year is the enactment of the budget. The fiscal 1994 budget, enacted in 1993 in Chapter 110, appropriated some twenty billion dollars to over one hundred and fifty agencies of the Commonwealth, employing some 63,000 workers and also to the three hundred and fifty cities and towns of the Commonwealth through the so-called cherry sheets. Some of the line items are huge, such as an appropriation of over nine hundred million dollars to the pension liability fund for the retirement benefits of retired state employees. Some are quite small, such as an appropriation of $4,887 for a crop survey report. Some provide great detail such as a grant from the municipal assistance program of two million dollars, "not less than thirty thousand dollars [of which] shall be expended for the purposes of retaining professional services to create a plan to assist the community task force appointed by the board of selectmen to determine the future use of the Foxborough state hospital campus..." It is also interesting to note the narrowness, the specificity and detail of many appropriations: each specific court has its own appropriation; for example, the district court for western Worcester (Spenser) receives 436,843 dollars to fund "not more than twelve positions;" or an appropriation for the State Boxing Commission of 30,000 dollars for eye exams for amateur boxers although professionals must pay for their own exams, provided further that the fees for such eye exams "performed during overtime hours be not less than one hundred dollars."

At the very end of the session there are typically a number of supplementary appropriations: Chapter 493 was a bonding authorization to fund capital emergencies, including for instance improvements to the MDC's Ulin Memorial rink in Milton and software to replace the lottery commission's mainframe computer. Chapter 494 allocated over 400
That legislative session cost the taxpayers forty million dollars. That number will rise with the fifty-five percent pay raise the legislature awarded itself on December 9, 1994.

With the exception of the educational reform bill, the 1993 legislative product was thin indeed. Most measures filled small gaps in the law or concerned detail.

million dollars neighborhood development, including, for instance, provision for the former residents of the Belchertown state school. Chapter 495 was a supplemental appropriation of over 100 million dollars for a hodge-podge of purposes, including ten million dollars to settle sex-based wage discrimination claims, four hundred and twenty thousand dollars for "A Hero's Welcome Trust Fund" for Persian Gulf war veterans and eighteen million dollars to county corrections operations and maintenance. Year-end riders on this bill are myriad and numerous: Pamela Maine Cavanaugh, a nursery school teacher in Brookline is granted a certificate as a lead teacher; the MDC is instructed to build a crosswalk for Highland Avenue in Medford; notwithstanding other provisions of the general laws, "Don Bosco High School ... shall not be required to install automatic sprinklers; a retirement incentive program for "certain higher education employees" is established. Sprinkled throughout the year's statutes are other free standing appropriations. Chapter 151 is a supplemental appropriation of over one hundred million dollars for the previous fiscal year that supplements a supplemental appropriation enacted by the 1992 session. Chapter 26 is a supplemental appropriation of eight hundred forty five thousand dollars for the State Racing Commission. Chapter 78 appropriates five hundred thousand dollars for the "massjobs youth at risk summer jobs pro-

gram." The newly created Rapid Economic Response Team (Chapter 19) at a cost of ten million dollars has already been mentioned. Similarly the year-end supplemental appropriation in Chapter 495 created the "Technology 2000" program to provide "technical assistance" for the "diversification of defense-dependent firms."

Public Choice - Narrow Focus

With the exception of the educational reform bill, the 1993 legislative product was thin indeed. Most measures filled small gaps in the law or concerned detail. For instance, the newly-created crimes of home invasion, escape from a courthouse, or trespass in a state prison were already crimes, but their occurrence may have presented district attorneys with definitional difficulties which the enactments solved. With many others, it is hard to discern how the new enactment changes what already exists. Guardians ad litem could always settle cases in which they were involved, grandparents could usually secure visitation rights, custodial trusts have always been valid, civil actions against decedents are commonplace.

The theory of public choice explains as well as any theory that I have found the product of the 1993 General Court. A vast majority of the product is narrowly focussed legislation. A small well defined group will be the beneficiary of the enactment. Public choice theory draws on economic theory. The public demands legislation and the legislature
supplies it. But both the demander and the supplier may be characterized as the homo economicus or the wealth-maximizing egoist. The interest group organizes itself around its need for legislation. The principle is that groups who can organize for less than one dollar in order to obtain one dollar of benefits from legislation will be the effective demanders of laws. However, the dollar gained must come from somewhere and one would expect the natural opponent of the interest group to organize in opposition; unless the opposition group is so diffuse and the injury will be spread across so broad a class that no single opponent will find it economically beneficial to put great energy into the opposition effort. In such a case the supplier-legislator comes to view the interest group as powerful or wealthy and thus in a position to advance or undermine the re-election aspirations of the legislature. Thus a deal is struck. The legislature supports the measure in question in return for the interest group’s support for the re-election of the legislator.

The reason that this theory is so attractive in explaining the 1993 product is because virtually every measure contains a thinly veiled attempt by a narrow constituency to advance its interests. With respect to the home rule petitions, the conveyances, the awards to individuals and the awards to public employees, I doubt we can consider the efforts even thinly veiled. But even in the common law, administrative or licensing statutes, the lobbying efforts are all too apparent, whether the lobby be the chiropractors, the dairy farmers, the nursery owners, the aircraft repairmen, the credit unions, the Boston Harbor pilots, the Canadian nurses, the sailing programs, the nurse anesthetists, the building inspectors, the investment advisors, the dog track owners, the South Africa apartheid opponents or the sign language advocates.

The critics of public choice claim that it denigrates the democratic process, by transforming social harmony, and mutual benefit into private greed and pursuit of advantage. The eighteenth-century notion was that it was through the creation of the republican state that mankind could reach its true potential. In *The Morality of Law*, Lon Fuller tells the parable of King Rex who, after abolishing all law in his kingdom, becomes the judge of all cases himself. His efforts failed. His efforts “to give articulate reasons for any conclusion strained his capacities to the breaking point.” His subjects could not detect “in those decisions any pattern whatsoever.” Thus for law to achieve Fuller’s definition of morality in law, it must have eight attributes, the first of which is generality. Issues decided on an ad hoc basis are, for Fuller, mere exercises of power, but lack morality and are thus illegitimate. By this standard, a majority of the legislature’s 1993 product is illegitimate.

However, historically the Massachusetts legislature, as well as the Congress, have passed special acts. Nineteenth century legislatures awarded corporate charters to individuals and groups and before the legislative waivers of sovereign immunity all civil claims against the state went before the legislature. Fuller suggests that they are still troublesome and ought to be avoided. These difficulties led to the vesting of these powers in the administrative state. Once these powers are vested in agencies, it is troublesome to see the legislature retake the power in a particular case by granting a liquor license, a teaching certificate or civil service relief.

Further, historically, because the colonial predecessor of the General Court was the original colonial government, subject of course to the royal charter, and thus chartered municipal government, a tradition of state legislative control over local government arose. This has led to state legislative control of local school committees, which was in part remedied by the education reform in 1993.

All in all, not a great deal was accomplished in the 1993 session. Educational reform, lead paint and auto emission regulation, and extending protections and services to juveniles were important. Most of the rest seems like tinkering where the impetus came from some narrow constituency. Not a product that one of the world’s greatest deliberative bodies should be proud of. That legislative session cost the taxpayers forty million dollars. That number will rise with the fifty-five percent pay raise the legislature awarded itself on December 9, 1994.

This, of course, is in sharp contrast to campaign rhetoric which usually promises change, reform, less bureaucracy, less crime, and at times jobs and housing. Perhaps the inertia arises from the inability of government to supply these things.
An Interview with the Brodys

By Professor Emeritus Ed Bander

BANDER: Is this book a statement on what the law is or do you attempt to nudge the law in a particular direction, say, in your treatment of automobile torts? Who should buy your book?

Betty: As to your first question, the book states what the law is, but occasionally indicates what direction it is likely to take.

Alvan: It is an encyclopedia of Massachusetts tort law, a research tool, and is of interest to general practitioners and tort lawyers.

BANDER: Did you find it difficult to work together on the book and stay married?

Betty: Al and I abide by THE RULE, that is, we put criticism of the other’s work in writing. By the seventh edit, either one of us becomes convinced by the other’s logic or becomes too fatigued to argue further.

Alvan: This way, we save a lot of time. We use oral argument only for really important issues, such as whose turn it is to go to the grocery.

BANDER: Why did you write this book?

Alvan: I’ve been teaching torts for thirty years, squirreling away Massachusetts torts cases and even thinking about them. I wanted to take advantage of that experience.

Betty: I’ve been writing briefs for tort lawyers for more than twenty years, and know what issues are important to them.
BANDER: Since you, Alvan, teach tort law, and you, Betty, are an appellate attorney, how did you find time to write this book?

Alvan: We spent countless weekends and holidays at the Suffolk library.

BANDER: What do you think is the book’s best feature?

Alvan: Its thoroughness. My fierce tenacity and penchant for hoarding have finally paid off.

Betty: Since we completed this book in March, I have used it to research tort issues, and, as to torts covered, only once have I found it did not discuss the issue and never did I find it lacking a relevant case.

BANDER: I think authors should consider putting their material online rather than in book form, particularly where the book is about law, since many law books are outdated the minute they are published. Do you agree?

Betty: Yes, I think you are right, and this is especially true when the book is a research tool. If a book is on line it can easily be updated, and researching attorneys could easily find the particular topics they are looking for.

BANDER: Let’s talk tort reform. A cap on pain and suffering? Why not a good health care plan that would pay for medical care for everyone irrespective of negligence?

Alvan: Caps on pain and suffering are not reform; they’re arbitrary. An insurance plan for wage, medical and other out-of pocket losses is essentially the New Zealand system, and I suppose there could be optional coverage for pain and suffering. But two party insurance is no panacea; it doesn’t eliminate litigation.

Betty: Tort law has always had a strong moral overtone, and I’m not sure the public is ready for a system which would eliminate fault-based liability.

BANDER: What are the “cutting edge” tort issues in Massachusetts?

Betty: The new limitations on recovering under the Massachusetts Tort Claims Act are high on the agenda.

Alvan: Yes, it’s unfortunate that the “cutting edge” means “cutting back” on recoveries by persons injured by the Commonwealth’s negligence. Also, the recent re-enactment of the “public duty” exception to municipal tort liability is a step back from reform. It resurrects discredited distinctions between nonfeasance and misfeasance. If the driver of a fire truck negligently strikes a parked vehicle and sets it afire, the municipality may be liable for negligently setting the fire, but not for negligently failing to contain it.

BANDER: Do you have a “favorite” Massachusetts tort case?

Betty: Some “palming off” cases are interesting, such as the use by Problem Pregnancy of Worcester, Inc., an organization opposed to abortion, of the mark “PP,” which just happened to be the mark of Planned Parenthood Federation of America, Inc., an organization providing information about birth control and abortion. A liquor store which used the slogan, “This is the Place,” enjoined a nearby liquor store from using the slogan, “This is the New Place.”

Alvan: Well, I like the premises liability cases in which plaintiffs who have been injured by slipping on organic matter are able to come up with exquisite descriptions to show that the fruit or vegetable must have been on the floor for a very long time indeed, such as the description of a banana peel as “black,” “dry,” “gritty” “as if it had been trampled over a good deal.”

BANDER: Is there anything you’d like to add?

Betty: I would like to add that when I started Suffolk Law School in 1967, our children were three and four years old. But for Suffolk’s evening division, I would not have been able to go to law school, so I would like to thank Suffolk University for the opportunity it gave me.

Managing Profitable Growth While Elevating Service Quality

By Christine S. Filip, Esq. JD '82
Louis Pasteur is reputed to have said that “Success favors the prepared mind.” In the practice of law, as in all other enterprises, preparedness presages better outcomes. But prepared for what? Balancing the demands of client matters with the need to stay abreast of substantive changes is difficult preparation in its own right. Being unprepared for the task of marketing, however, will seriously undermine your ability to practice law because its economic ramifications are pervasive; getting the job you want, making partner, or building a profitable practice that you enjoy while serving up high quality legal services are fundamentally marketing tasks.

This article explores three issues that I see as central to preparedness for the practice of law whether you are starting out or have practiced for many years:

1. The practice of law is a professional business,
2. Business development, a/k/a marketing, and high quality, ethical client service are not competing interests, but synergistic, and
3. Focusing on managing client loyalty, not continually finding net new clients, will allow you to build a solid practice while minimizing the time impact of marketing.

This article stems from my work in running a marketing company for professionals, mostly law firms, and from anecdotal data accumulated through interviews with clients of those firms.

The Implications of “Professional Business”

Practicing law is both a profession and a business. By including the term “business” I do not mean to batheticize the profession, nor do I wish to imply any lowering of professional responsibilities. Rather, business is a description of an economic reality, to wit, that practicing law is an enterprise for profit, in most cases. Like any other enterprise, be it commercial or professional, law practice is subject to the economic realities of the marketplace — competitive forces, supply and demand, cyclicality, etc.

As a result of the recent recession, these economic realities are probably freshly etched in your mind. But how do these realities inform us at the level of practice development? A number of insights are important in both good times and bad.

Markets are evolutionary, not regressive. While we may wish subconsciously for things to be the way they were before the recession, they are not. Nor are the buyers in the market; they learned to make buying decisions in ways that probably made you uncomfortable. They learned to negotiate harder,
SAMPLE QUESTIONNAIRE

I would appreciate your assistance in filling this out so that I can be of better service to you this year. Thanks!

Your name: __________________________

1. Would you like more information on:
   (check as many as you wish)?
   ____ Debtor/Creditor issues
   ____ Real Estate
   ____ Bankruptcy issues
   ____ Personal Injury
   ____ Business advisement
   ____ Wills and Trusts
   ____ Estate and Tax Planning
   ____ Elder Law
   ____ Another topic ______________________

2. Over the next twelve months, is there a specific time that you wish me to be in contact with you? If so, when?
   Month: ____________________________

3. A major change in your life like births, death, illness, separation, divorce, marriage, disability, the purchase or sale of a home or business, bankruptcy, or unemployment, are usually appropriate times to check with your attorney. Are any of these changes about to occur in your life? Yes ___ No ___

4. Many times clients wait till the last minute before consulting with their lawyer because they fear the expense. Are you aware that you can call or visit the first time free at my office?
   ____ Yes ___ No ___

5. Over the next six months I am going to hold seminars which address critical legal issues. What topics would you like me to develop?
   ____________________________________________________________________________

Mail back in the enclosed envelope or fax to: Fax Number: ________________________

To include different issues, to shop comparatively, to evaluate your efficiency, and to ask for more for less. This recession has brought the weight of consumerism to bear on the marketplace of the law.

The main point for you on a practical level is that having garnered this buyer leverage, they are not likely to regress. They may ease up a bit, and you may be able to mitigate buyer leverage by being able to be more selective, but they will not revert to old expectations.

Changes in buyer behavior, though, even in less dynamic environments, require adaptations in seller (read, “my”) behavior. Ask yourself: what changes have you made in your practice concerning what you offer to clients, to meet your prospects’ and clients’ expectations? Or more specifically, do you know what your clients and prospects want from you in terms of service enhancements?

In many client interviews, “good” clients have remarked that, while they were not currently planning to switch firms, if they thought a competitor provided more services, in addition to the expected core competency, they would switch, price being equal. Taken as a statement of buying criteria, i.e., more services to help me, it behooves the practicing lawyer to know what clients want. You can get answers by asking questions informally, and using a more formal instrument: a short survey that goes out with an invoice, a response position on a newsletter, an evaluation form used after a seminar or executive briefing. The more information you have from clients, the better you can decide what types of services you should offer.

Here are some samples of how solo practitioners adapted their service by paying attention to evolving client information. A lawyer doing mostly personal bankruptcy work sent the following survey to his clients from the previous three years. He had assumed there would be no more work from the client base. Fortunately, he was wrong; a third of the clients responded, many with referrals, and a surprising number with needs for more services.

A real estate practitioner in upstate New York started asking every prospective client what the hardest part of their relocation experience was. Many said they wanted more information about communities. As a result, the lawyer now visits clients and prospects with her notebook computer and taps into databases that profile communities through detailed census information. Her practice flourished even during the recession.
The more feedback loops you create for clients, the more valid business development information you'll have. Remember, markets are evolutionary and buyer needs change. Here are some other considerations in getting more information about your clients:

- **Ask for information and evaluation regularly** — How are we doing? What else do you need? Who else can we serve?
- **Give consultative information** — a newsletter, a briefing, a speech, a client function, or publishing an article; all of these expand the horizon of relationships with present and prospective clients.
- **Ensure an easy to use feedback loop to each communication**, whether face to face or in writing. Feedback loops can be: surveys, questionnaires, fax back/mail back portions on newsletters, a pre-set time when a client is able to reach you by phone, responding quickly to complaints, informal focus groups, a “suggestion box” that staff can use to improve client services or operations, a follow up phone call to a client. The ways to establish loops are endless, but they are rarely adapted to the level of institutionalization so that they then become unique selling benefits for a firm.

The Marketing and Quality Connection: Managing Client Loyalty

The search for professional and ethical ways to build a practice are best served by understanding the economic impact of managing client loyalty. This method of marketing builds a profitable client base while serving to enhance the perceived quality of client services, since quality essentially means consistently delivering the service attributes that a firm’s best clients value.

Managing client loyalty pulls new clients, new matters and referrals through the top segment of one’s client base by the establishment of interactive communications and consultative interactions. This method of business development also decreases the defection of good clients thereby protecting the reputation of the attorney or firm. Marketing investments are focused on best clients or best target populations, and therefore get the highest payback in terms of profitability and perceived quality.

The documented research1 and my experience in the field of managing client loyalty demonstrate that there are four main findings that are critical:

1. **Client loyalty or retention drives profitable growth, not sales volume, market share and other gaufveges of new client acquisition.** A 5% improvement in client retention can affect profits from 15 to 50%.2 Client loyalty or retention means getting referrals, repurchases, cross-selling opportunities, and decreasing defections among top level clients. Referrals from present clients have a 92% loyalty rate versus a 68% rate for clients generated from advertising.

2. It is six times more expensive to get a new client than to retain an existing client, and new client acquisition will take you three times as long. Focusing your marketing dollars on continually finding new clients is a very expensive, inefficient proposition. Twenty percent of your clients typically generate 80% of your fees.

3. A dissatisfied client will tell eight to ten other colleagues and friends about his unhappiness, and one in five will tell twenty.3 As a result, your investments in marketing cannot overcome this impact.

4. Most clients will leave your practice because of perceived indifference, not fees. Sources of “indifference” are usually inattention by you or a staff member: a question that lingers unanswered, a slow response to a phone call, slow response solving a problem that the client perceives as important, or brusque treatment from anyone at your firm.
The Structural Implications of Client Retention

Taken seriously for their financial and quality implications, the economic principles should cause you to spend time and money in new ways. To put our intellectual arms around this process, it’s easiest to discuss the structural implications of managing retention. They are:

- Divide your client base into three groups (Levels 1, 2, and 3, described on this page);
- Spend your time and money on your top clients, their clones and analogues;
- Stop spending time and money on your least profitable clients.

Analyzing Your Client Base: Boring but Necessary

Have you ever listened to a dynamic speaker and felt alone in the room — that speaker was talking directly to you? Analyzing your client base has the same effect: understanding the needs and attributes of clients allows you to communicate efficiently and persuasively. The analysis can induce narcolepsy even in compulsive learners, but once done, you will have a motherlode of information to speed marketing results.

Your client base, that is, the clients you now serve and have served in the last two or three years, should be divided, or segmented into three working groups using profitability and some other defining criteria:

- Level One clients are profitable, pay on time, and bring work you enjoy.
- Level Two clients are marginally profitable, but some are susceptible to expansion or are fertile referral sources. Level Three clients who (by popular vote) don’t want to repeat because they are not profitable, pay slowly, bring you the wrong type of work, or demand too much. The issue is to identify them before they become clients.

In doing this analysis, you should note two generalities, which are that your Level Ones are approximately 20% of your base, but generate close to 80% of your fees, and secondly that you probably spend a lot of your time with unproductive Level Twos and Threes. They call on you even when they haven’t paid their bills.

If your next excellent clients come from the ranks of your Level One base, marketing choices defined as a good “investment” assume different priorities.

Client Levels

Marketing Tactics

- **Level One** Spend your marketing dollars here by creating opportunities to cross-sell and get referrals: client functions, interactive communications, enhanced service offerings. Ask for their advice and evaluation, and become enmeshed in their networks.

- **Level Two** Select a small number of these clients whom you feel are expandable or who are gatekeepers to fertile networks of peers. Treat them like Level Ones.

- **Level Three** Note how you got these clients and do not repeat this pattern. The pattern may have to do with some status, such as being members of a particular industry, or some other personal status which bodes poorly for a good working relationship.

Stopping Defections Among Level One Clients

As I noted earlier, stopping defections is equally as important to profitable growth as assertively managing client retention or loyalty. Having one of your best clients exit your practice will provide you with a bad day in Black Rock.

Here are some tips:

- Clients don’t leave because of fees. They leave because of indifference by you or someone on your staff. Since these experiences are entirely controllable, it’s critical to understand why clients leave. If you ask, you will get some very concrete examples. Most times, clients will leave without complaining, so unless you inquire, you can’t remediate.

- When clients complain, fix it fast. Your response time to client dissent is very important. If you
can reach a solution that solves the basis for complaint within 24 hours, the client will remain loyal (and profitable). Your staff should be able to launch a Problem Alert form and get the attention and action of the most senior person involved.

• What do clients complain about? Usually slow response times, and misconceptions about the requirements of your work. The work process of professionals is “transparent” — clients see the end product, not the hours of research, learning, and thought. Frequently clients think you have breached your ethical responsibilities when you’ve missed deadlines or not explained delays. Be clear about your time commitments with clients, and explain what goes into your work in plain terms.

Conclusion

Understanding the relationship between the law as a professional business, managing client loyalty, and quality will allow you to build a profitable practice in any economic environment. In the marketplace that the practice of law exists in today, the conscientious execution of client loyalty management practices can overcome lower priced competitors and other negative factors.

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2 Reicheld and Sasser, pp. 105-7.

Power of Attorney

Legal Writing for the Practitioner

By Dr. Martha Siegel
Many lawyers find it helpful to step back periodically to review what they know. Most attorneys do at least some advocacy writing in their practices. Advocacy, or “persuasive” writing, differs in many ways from the more “objective” or purely “analytical” writing of an Office Memo, for example.

A lawyer is, after all, an advocate. An attorney takes sides, seeking to represent his or her client zealously. Many practitioners remain inspired by visions of Perry Mason and L.A. Law: the battle of wits, the strategy, the ability to persuade and convince. Oddly enough, advocacy writing challenges us with both the Scylla of under-zealousness and the Charybdis of over-zealousness.

When an attorney is under-zealous, the brief may come across as apologetic, tentative, and hesitant. No court wants to hear a weak advocate. On the other hand, when an advocate is over-zealous, the brief may come across as sarcastic, arrogant, and heavy-handed. No court wants to hear a zealot, just zealous advocacy.

Legal Analysis: A Focus on Advocacy

Good advocacy writing rests on insightful case, statutory, and regulatory analysis, impeccable organization, and clear, forceful drafting. Advocacy writing requires a special focus, however. Writers must slant, but not distort, both their facts and their argument. A “zealous advocate” must make every good faith effort to present his or her client’s case in a favorable light. While an attorney may not omit any legally relevant fact or controlling case, he or she may try to minimize their impact, for example, by placing them in the middle of a long paragraph or in an obscure spot in the brief. Here are some pointers we all know—or knew at one time—to refresh your recollection.

1. Start off with your strongest dispositive point. If you win the case by establishing (x), do it immediately. Remember to discuss (y) and (z) even if only to distinguish them. Remember, too, legal writing is not mystery writing. Edgar Allen Poe may hide the identity of the culprit until the end of the story, but in legal writing the writer must announce the conclusion first.

2. After you have started off with your strongest, dispositive point (or sometimes points), group similar arguments (both strong and weak ones) and deal with groups-ofIssues in descending order. As you group issues, remember to keep paragraph structure in mind: you may still need to minimize some of your case’s weaknesses by placing them in the middle of a paragraph. If you do structure the text to minimize a weakness, save up at least one “winning” point with which to end the paragraph.

3. Make your best and complete case on each issue before distinguishing or refuting your opponent’s position on that point. Group any remaining opposing issues, if possible, and finish them off in one fell swoop.

4. Argue as if your client were living inside you. Get in touch with your client’s anger, sense of injury, pain, outrage, or frustration. Use that emotional edge to craft arguments from your client’s perspective. For my students who cannot get into “advocacy,” I often advise them to think about something—anything—in their own lives that provokes anger. Once the adrenalin is flowing, I ask them to refocus on their client’s argument. Often the energy carries over and gives their writing the immediacy and drama necessary to write persuasively and win the case. Those who use this technique of “displaced anger” need to check their first drafts, however, for signs of over-zealousness!

In any event, take scrupulous care at all time with “tone.” Do not let your writing become a therapy session. Never use “my client feels.” Focus on the argument. A second caution: do not slip over the edge into name calling or sarcasm. Both are dangerous because they are unprofessional and usually anger the very judge you are trying to persuade.

5. Argue everything you need to win—or to avoid losing.

6. Your point headings should read like proverbs: they should be forceful, focused, and memorable. Waste no words and always, always, always use the active voice. Avoid or limit any use of the verb “to be.” The only exception is, for example, in a criminal case where you have a possible reason to shield your client with the passive voice and render him or her invisible.

7. Be realistic. Often our clients can salvage a small victory in a certain defeat. Think about creative arguments, for example, to spread out payments likely to be ruled owed.

In sum, advocacy writing should challenge us as much as oral advocacy. In oral advocacy, however, we can do much with tone of voice and volume. In advocacy writing, we must ensure that our words and phrases can carry the freight.

Dr. Martha Siegel is director of the Legal Practice Skills Program at Suffolk University Law School
Recent Practice-Oriented Acquisitions

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, 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 new online catalog, which can be accessed from terminals in the library or by dialing into the catalog. For more information on dialing into the Law Library catalog, please call the Reference Department at 573-8199.

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 9:00 p.m. Mondays through Thursdays, from 9:00 a.m. to 6:00 p.m. Fridays, from 9:00 a.m. to 5:00 p.m. on Saturdays, and from 11:00 a.m. to 7:00 p.m. on Sundays. On most holidays reference assistance is available from 9:00 a.m. to 5:00 p.m. You may reach the Reference Department at 573-8516 (Reference Desk) or 573-8199 (Reference Office).

AIDS (DISEASE)


The purpose of this book is to familiarize the reader with selected legal issues related to AIDS, to describe the court decisions and legislative framework that define the legal resolutions, and to propose processes for avoiding liability in the areas of HIV testing and confidentiality, discrimination, and transmission of HIV.

ANTENUPTIAL CONTRACTS


The six chapters in this guide are: Premarital Agreements: an Overview, The Role of Substantive Fairness in Premarital Agreements, Practical Considerations for Premarital Agreements, Premarital Agreements and Postmarital Agreements Enforced at Death, Same-Sex Cohabitation Agreements, Psychological Consideration in Negotiating Premarital Contracts.

CORPORATION LAW


This handbook from Massachusetts Continuing Legal Education covers various aspects of corporations in transition such as directors duties, accounting and financial issues, restructuring human resources, strategic alliances, and debtor and creditor issues and strategies.

CRIMINAL PROCEDURE

FEDERAL CRIMINAL PRACTICE IN THE FIRST CIRCUIT. A program jointly sponsored with the Federal Criminal Justice Act Board; Thomas E. Dwyer, Jr... et al. Boston, MCLE, 1994. RESERVE KF 9619.3 F434 1994

Topics covered include federal rules of evidence, sentencing guidelines, federal corrections, plea agreements, negotiation, and probation.

DELEGATED LEGISLATION


This directory provides information on the administrative codes and registers of each state, the District of Columbia and United States territories. An outline of each code is included along with the an address and telephone number for each state code publisher, search tips, and Bluebook abbreviation.
DISCRIMINATION IN EMPLOYMENT
This volume includes several chapters discussing various aspects of the Civil Rights Act of 1991, a copy of the text of the law and legislative materials.

This MCLE covers circumstantial evidence, motion for summary judgment, damages, alternative dispute resolution, managing conflicts between the Americans with Disabilities Act and other employment laws, and a checklist of laws relevant to discrimination claims.

DIVORCE SETTLEMENTS
The first section presents a scenario in which a valuation of a law firm is analyzed. This is followed by a chapter on sample pleadings and a chapter on valuation of assets in matrimonial litigation. The appendices are comprised of several articles and IRS publications.

EMIGRATION AND IMMIGRATION LAW
Contents: How to get into the country, immigrant and non-immigrant status – Lynne Hans; U.S. taxation of foreign nationals – Paula N. Singer; Employment of a foreign national: a primer for the general practitioner – Gerald C. Rovner; Criminal law issues – Linda A. Critello; Finding the answers to all your immigration law questions – Brian Harkins.

EXECUTIVES
This update discusses changes in the executive compensation rules.

FRANCHISES (RETAIL TRADE)
This bibliography describes 1,783 books, articles and other publications covering 243 topics of franchising law. Title, author and subject indexes are provided.

FREE TRADE
NAFTA WATCH Chicago: CCH, 1994 -. RESERVE – PERIODICALS
This periodical is published twice a month and contains news about North American business and legal developments.

INTELLECTUAL PROPERTY
Table of Contents: Trademarks and licensing in the United States; A general practitioner's guide to copyright; Trade secrets; Conducting an intellectual property audit; and Licensing intellectual property.

JURY
This loose-leaf provides information on personal injury verdicts. It also contains a medical dictionary and a section on current award trends in personal injury.

LAW OFFICES
The materials in this book were prepared for distribution at the Automating the Small Law Office and Solo Practice Program held in New York City on August 20, 1992. The topics covered are electronic communications, WordPerfect, local area networks, hypertext, and a chapter on the law office of the future.

LAWYERS
The Model Rules for Lawyer Disciplinary Enforcement were approved by the American Bar Association House of Delegate on August 11, 1993. This edition includes a subject index to the rules.
LEGAL ETHICS
This volume contains the Model Rules of Professional Conduct including Preamble, Scope, Terminology, and Comment. A synopsis of recent amendments is included in the appendix.

LIABILITY FOR HAZARDOUS SUBSTANCES
POLLUTION DAMAGES
Chapters included are: Evaluating Liability in Private Actions for Environmental Response Costs and Damages; Recovering Damages for Contaminated Property: Private Cost Recovery Investigation; Damages to Real Property under G.L. c. 21E s. 5; Special Value Considerations for Contaminated Property; Mediation of Environmental Disputes; Examples of Environmental ADR; and Settlement of Private Costs Recovery Disputes.

MEDICAL CARE

PATENT LAWS AND LEGISLATION
The chapters included in this MCLE are Basic Strategic Considerations for Patenting Technology, The Employee Inventor, Developing a Patent Portfolio, and Patent Litigation.

PRACTICE OF LAW
ALTMAN WEIL PENSA'S INTRODUCTION TO LAW PRACTICE MANAGEMENT. Marjorie A. Miller, Patricia B. Slavick. 3rd ed. New York: M. Bender, 1993. KF 300 .A756 1993
This handbook discusses many aspects of law practice management such as law firm organization, legal fees, compensation, marketing, administrative and financial management, and technology. There is also a chapter on advancing in the legal profession.

PUBLIC DEFENDERS
These standards are a project of the American Bar Association, Criminal Justice Standards Committee, Criminal Justice Section.

SECURITIES
This Massachusetts Continuing Legal Education publication covers securities law for venture-backed companies, public companies, employee stock plans, and capital raising.

TAX ADMINISTRATION AND PROCEDURE
This guide provides information on many tax practices and procedures including practice before the IRS, ethical responsibilities, international procedure, criminal tax procedure and examples of forms.

WILLS
This book is designed to provide attorneys with a synopsis of the basic principles of wills and estate planning and with a single-volume reference to the will and intestacy laws of the 50 states, District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

WOMEN LAWYERS
Topics covered are: gender issues in negotiation, negotiating power, ethical limitation on lying in negotiation, expectancy effects and negotiation, social components of bargaining structure, negotiator judgment, quantitative analysis in settlement negotiations.

WOMEN LAWYERS AT WORK. Cosponsored with the Women's Bar Association of Massachusetts; Janis M. Berry... et al. Boston: MCLE, 1993. RESERVE KF 299 .W6 W683 1993
Articles in this MCLE publication discuss feminist jurisprudence, gender differences, networking, gender equality in the courts, and the entry of women into the Massachusetts legal profession.

MASSACHUSETTS CIVIL PROCEDURE
CIVIL TRIAL ADVOCACY BASICS.
RESERVE KFM 2938 .C58 1991
Topics include pre-trial memorandum, opening statements, direct examination, cross-examination, closing arguments and recent laws relating to opening statements and closing arguments.

CONSUMER PROTECTION
RESERVE KFM 2630 .Z9 M85 1993
The contents are: Standards of Conduct under Chapter 93A by Professor Dwight Golann; Section 11 of C.93A by Edward P. Leibensperger and Glenn E. Deegan; An Overview of Civil Rico by Rosemary M. Allen; and Standing, Enterprise and Pattern Requirements Under RICO by Diane M. Kottmyer and James C. McGrath.

CRIMINAL LAW
RESERVE KFM 2961 .Z9 C66 1993
This compendium includes the bulk of Massachusetts criminal law, with selected statutes, case law, Rules of Criminal Procedure, relevant Rules of the superior Court, “Elements and Penalties of Selected Crimes” and “Rule 29 Sentencing Standards”.

Among the topics covered in this MCLE are recent developments in criminal law, procedure and evidence, diminished capacity, opening statements, cross-examination, closing arguments, uncooperative clients, co-defendant statements and Massachusetts grand jury practice.

CRIMINAL PROCEDURE
SUCCESSFUL PRE-TRIAL STRATEGIES: INNOVATIVE TECHNIQUES IN CRIMINAL CASES.
RESERVE KFM 2975 .Z9 S82 1993
This MCLE contains a brief outline of pre-trial preparation and over fifty examples of prosecution and defense discovery motions.

EVIDENCE
EVIDENTIARY ISSUES IN DIVORCE CASES:
A PRACTICAL GUIDE BY AN EXPERT PRACTITIONER.
RESERVE KFM 2500 .Z9 K36 1993
Paul M. Kane is a partner in the law firm of McGrath & Kane in Boston where he specializes in family law and he is a part-time faculty member at Boston College Law School. He serves on MCLE's Family Law Curriculum Advisory Committee.

EVIDENCE, DEMONSTRATIVE
DEMONSTRATIVE EVIDENCE CONFERENCE:
RESERVE KFM 2941 .D45 D4 1993
This Massachusetts Continuing Legal Education publication includes sections on strategy and tactics in the use of demonstrative evidence, the effective use of demonstrative evidence, and documentary evidence.

GUARDIAN AND WARD
GUARDIANSHIP AND CONSERVATORSHIP:
RESERVE KFM 2506 .Z9 G835 1994
Litigation strategy and evidentiary matters, disposition and appeals, sample motions and forms, clinical assessment of competency, representing the petitioner, and ethical issues are some of the topics covered by this MCLE.

LANDLORD AND TENANT
RESIDENTIAL LANDLORD AND TENANT PRACTICE:
A COMPREHENSIVE COURSE INCLUDING BASIC LAW, PRACTICAL FORMS AND INSIDER TIPS.
RESERVE KFM 2517 .Z9 R47 1994
Table of Contents: Summary Process Actions; Tenant Civil Actions for Damages and Other Relief; Advising the Client in the '90s; Drug and Other Problem Evictions: Dealers, Squatters and Troublemakers.

LIENS
RESERVE KFM 581 .Z9 E46 1993
Chapters are: The Anatomy of a Condominium Lien Foreclosure Action: Commentary and Forms; The Impact of the Massachusetts Fraudulent Conveyance Statute on Condominium Lien Foreclosures, A Discussion of the Impact of Ruebeck and its Progeny on Condominium Lien Foreclosures.
REAL ESTATE LIENS: RECOGNIZING THE TITLE IMPLICATIONS OF LIENS WHICH AFFECT REAL PROPERTY: ENFORCING AND releASING.
RESERVE KFM 2576.L5 R42 1994

Table of Contents: Liens on Building and Land under Massachusetts General Laws Chapter 254; Real Estate Tax Liens; Pre-judgment Remedies; Title by Forfeiture; Forfeiture under Massachusetts Controlled Substances Act; Real Estate Liens.

MALPRACTICE
RESERVE KFM 2939.M34 M43 1993

Chapters include: Statute of Limitations in Medical Malpractice Cases; How to Evaluate and Prepare Medical Malpractice Cases; Effective Discovery through Examination of Original Documents; Medical Malpractice Update; Causation: Loss of Chance; Experts – Information and Depositions.

PERSONAL INJURIES

Topics covered are: case evaluation, settlement, discovery, mediation, anticipating the defense, and an overview of recent case law.

POLLUTION

Contents: Massachusetts Clean Air Act – Kenneth A. Reich; State implementation plan, revisions and strategies and emissions banking and trading – Barbara Kwetz; Massachusetts operating permit program – Diane A. Langley; DEP Clean Air Act regulation: the permit process – Cornelius Milmoe.

PREMISES LIABILITY
RESERVE KF 1287.P74 1993

This MCLE includes chapters on the law of premises liability, preparing for and filing suit and discovery, proving foreseeability of crime in the premises liability case, demonstrative evidence, a defendant's case, slip and fall overview, and premises liability cases involving governmental entities.

REAL PROPERTY
RESIDENTIAL REAL ESTATE BASICS.
RESERVE KFM 2541.A1 R43 1994

Volume I of this two volume set contains: The offer to purchase through the purchase and sale agreement and purchasing at a foreclosure sale; Title problems and title insurance. Volume II contains: The note, the mortgage, the lender and foreclosure; The closing attorney's role; The sixteen questions most commonly asked by residential real estate clients; How to handle a condominium unit purchase or sale.

RESTRAINT OF TRADE

Included in this MCLE are chapters on: Massachusetts Law on trade secrets, non-competition agreements, and employee preparation to compete; Trade secret misappropriation: a review and analysis of Massachusetts law; Employee non-competition agreements and related restrictive covenants; A primer on advising departing employees.

TOXICOLOGY

Contributors to this MCLE are from the legal and medical professions. Topics include mechanisms of lead neurotoxicity: neurologic concepts of lead poisoning in children; plaintiff's perspective; defending lead poisoning litigation; examination of experts; and rights, duties and remedies under the 1993 amendments to the lead paint law.


Part I of this book describes the EC infrastructure within which the legal professions in all member states must now operate. Part II describes on a state-by-state basis the present stage of development of the professions in each member state. Part III deals with the world dimension.
Law Librarianship:

A Satisfying Alternative Career After Law School

by Professor
Michael J. Slinger,
Law Library Director
During the past year, I have been contacted by at least a dozen attorneys interested in exploring a possible career switch from legal practice to law librarian. I have had similar discussions with a number of students on the same topic. Suffolk has a proud tradition of educating law librarians. Currently the directors of the Northeastern University Law Library, Reference Services at the Harvard University Law Library, Public Services at the Social Law Library, the Head of Legal & Governmental Reference Services at the State Library of Massachusetts, and the assistant director for Public Services at the Suffolk University Law Library are among at least fifteen practicing law librarians who hold Suffolk Law degrees. In addition, Suffolk's own Associate Law Librarian Emeriti, Pat Brown, as well as the late George Strait, who served as the long-time director of the University of Iowa Law Library, are graduates of Suffolk University Law School.

There are many reasons why an attorney might consider a career as a law school librarian, but perhaps the most compelling is that law librarianship allows individuals to continue to use many of the skills they learned as law students and/or attorneys while enjoying the unique environment provided by an academic institution.

A key to becoming a successful law librarian is to possess the strong desire to help students and faculty. The role of the law librarian in working with students is largely one of a teacher. A law librarian does not usually provide a student with the answer to his or her query but instead endeavors to help train students to learn how to accomplish various research tasks on their own.

The law librarian assumes a different role when working with faculty members. Here the law librarian becomes a detective, attempting to uncover sources and other information that will provide the raw material that will support the faculty member's teaching or research inquiry.

Suffolk's law librarians also work with alumni, serving as a continuing resource. All alumni should feel free to call on our librarians for assistance in using the collection. Working with students, faculty, and alumni is satisfying, exciting, challenging, and provides great personal and professional satisfaction.

What educational requirements are needed? Most law school libraries require a reference librarian candidate to possess both a Juris Doctor (JD) and a Master of Library Science (MLS) degree (although a small number of schools do hire reference librarians who have only one of these degrees). In New England, an MLS degree can be earned at Simmons College in Boston, at the University of Rhode Island in Kingston, or at Southern Connecticut University in New Haven. In addition, there are currently forty-seven other universities in the United States, and seven in Canada, that award American Library Association accredited MLS degrees. It takes approximately three semesters of full-time study to obtain an MLS degree. However, many individuals obtain their degree on a part-time basis while continuing to work as an attorney or while employed in another field.

What is the job outlook is going to be like after obtaining an MLS? Generally law librarianship is an expanding field. The growing complexity of today's multidisciplinary and international research responsibilities together with major innovations arising from the application of technology to legal research has created a demand for more law librarians in the academic, public, and private sectors. Nonetheless, it greatly assists the job search if a new law librarian can be geographically mobile.

Advancement within law libraries is often initially to the position of department head, assistant director or associate director. Ultimately, many individuals advance to the position of law library director. Salaries vary from institution to institution, but can generally be expected to begin in the low thirty thousand dollar range for a reference librarian who possesses both an MLS and a JD but no prior experience as a law librarian. Salaries for law library directors (most of whom are concurrently members of the law faculty) are equivalent to that of other members of the law faculty based on rank and seniority.

If you investigate law librarianship as a potential career, you will find that most law librarians love their jobs and would not choose to do anything else. Although the vast number of individuals reading this article are or will soon be practicing attorneys, it is important to bear in mind that your Suffolk education helps prepare you for a wide variety of alternative careers.

BIBLIOGRAPHY


Houdek, Frank G. "Career Development in Law Librarianship: Thoughts on the Occasion of Becoming a Law Library Director," Legal Reference Services Quarterly 6 no. 3-4 (Fall-Winter 1986): 81-94


Paul R. Cox, a senior partner in the law firm of Burns, Bryant, Hinchey, Cox & Rockefeller, was selected as one of New Hampshire's Lawyer's Lawyers in a recent issue of New Hampshire Editions Magazine. He was honored for excellence in the field of personal injury law.

Robert A. Mulligan has been appointed chief justice of the Massachusetts Superior Court, where he has served since 1982.

Richard M. Sharkansky, former patent counsel of Raytheon Company, has joined the law firm of Fish & Richardson as a partner. He has been associated with Raytheon for 32 years.

Paul McCann, executive assistant to the director of the Boston Redevelopment Authority, is one of the 1994 recipients of the Henry Lee Shattuck Award for excellence in public service.

Thomas B. Concannon, Jr. was elected mayor of the city of Newton. He is the first democrat to be mayor in the history of that city.

Joseph M. DiGianfilippo has become associated with the firm of Wynn & Wynn in Providence, Rhode Island. He will concentrate his practice in real estate, commercial and banking law.

Richard Kaplan of Cranston, Rhode Island has been named president of Jewish Family Service. A certified public accountant, he is president of Kaplan Moran & Associates, Ltd.

Stephen E. Cicilline has retired as a colonel from the Rhode Island Air National Guard after 30 years of distinguished service. He was decorated with the Air Force Commendation Medal, National Defense Service Medal and the Judge Advocate Badge.

Lawrence E. Cohen received the Ecumenical Award of the St. Thomas More Society of Worcester. He is affiliated with the Worcester law firm of Wolfson, Dodson, Keenan & Cotton.

Paul L. Ettenberg was recently elected to serve as president of the Massachusetts Association of Criminal Defense Lawyers (MACDL). Ettenberg has previously served on the MACDL board of directors and has chaired its Committee on Continuing Legal Education and Programs. He is a founding partner in the Worcester law firm of Gould & Ettenberg.

The Honorable Judd J. Carhart, a Massachusetts Superior Court judge, is currently teaching a civil rights course, “Individual Rights and the Legal Profession,” at the University of Massachusetts at Amherst.

Mark E. Tully has been named a partner in the law firm of Goodwin, Proctor & Hoar.

Michael F. Sullivan, associate justice of the Concord, New Hampshire District Court, has been selected as a member of the Executive Committee of the American Bar Association National Conference of Special Court Judges.

Robert W. Gardner, Jr. was appointed to the Massachusetts Government Land Bank’s Board of Directors. Gardner, a senior partner in the Ayer law firm of Gardner, Brown and Williams, also serves as the Ayer Town Counsel.
1976

Charles F. Barr has been named vice president, general counsel and corporate secretary at General Reinsurance Corp., where he previously served as vice president and assistant general counsel.

Marilyn Beck has been elected treasurer of the Massachusetts Bar Association.

Gerard W. Howland has been named Massachusetts Teacher of the Year by the State Department of Education. A law and mathematics teacher at English High School in Jamaica Plain, he is the first Boston public school teacher since 1980 to win the State's Teacher of the Year Award and only the fourth to receive it in 31 years. For two years straight, Howland's team has won the Massachusetts Mock Trial Tournament, besting city, suburban and private schools.

1977

David M. Burns, an attorney with Burns & Levinson in Boston, was one of 15 lawyers from the Massachusetts Bar Association to staff the six-hour Dial-A-Lawyer telephone program, which gives free legal advice to Boston Herald readers.

Carol A.G. DiMento has been appointed to the Board of Bar Overseers for the Supreme Judicial Court Historical Society. A partner in the law firm of DiMento & DiMento, she is currently president of the Essex County Bar Association.

Gregory C. Flynn has been named first justice of Waltham District Court where he has served as a judge since July 1993.

Kathleen A. Voccola, associate justice of the Rhode Island Family Court, was honored by the Italo-American Club of Rhode Island. She received the Christopher Columbus Award for her dedication and devotion to the criminal justice system, with emphasis on the family and children.

1978

Elizabeth D. Weber has joined the law firm of Gordon, Moore, Primason and Bradley in Lynn.

Marcia Damon-Rey has joined the National Academy of Elder Law Attorneys, Inc. She has a law office in Methuen.

Richard D. Fox has been promoted to president of CDM International Inc., one of five main operating units of Camp Dresser & McKee, Inc., of Cambridge. He has been leading the firm's program management efforts for large scale municipal projects since 1992.

Patricia M. McGrath is serving as co-chair of the professional division of the United Way campaign in eastern Niagara, New York. She is an attorney in Lockport, NY.

1980

Virginia Hoefling, a Massachusetts assistant attorney general, recently lectured to the Nipmuc Chapter 501 of AARP in Southbridge. She spoke on consumer scams and insurance fraud and cited cases where older citizens were favorite targets.

Raymond A. Pacia has been appointed a commissioner to the Uniform State Laws Commission of Rhode Island.

Robert N. Werlin has been named a partner in the firm of Keohane and Keogh in Boston.

Do you have a will?
Is it up to date?
Would you consider including Suffolk University?

For information, please contact Diane Y. Spence, Director of Special Gifts, 8 Ashburton Place, Boston, MA 02108-2770; 617-573-8444
1981

Harold B. Murphy, a partner at the Boston law firm of Hanify & King, has been selected as one of the nation's top bankruptcy attorneys. Murphy was named by The Best Lawyers in America, 1995-1996, an annual reference guide.

Darrell S. Nichols has opened a law firm in Wiscasset, Maine.

1982

Christine Burke has been elected a selectman in Hopedale. She practices tax and general law in Hopkinton.

1983

Thomas J. Curley, Jr. has been named co-chairman of the major donors division of the 1994 Berkshire United Way campaign. He is a partner in the law firm of Campoli & Curley, P.C.

Patricia Dowling has been elected to the Massachusetts Governor's Council from the 5th District. She has a law practice in Lawrence.

Patricia McCorry was appointed alumni representative of Cape Cod Community College's board of trustees.

Scott Sandstrom, associate professor of economics at the College of the Holy Cross, has been appointed pre-law advisor at the College.

Janis B. Schiff has joined the Washington, D.C. law firm of David & Hagnes as a partner, where she will concentrate her practice in the area of commercial real estate.

1985

Joel Grant Cohen has established a law practice within the law offices of Gerald A. Flanzbaum, P.A. in Warren, New Jersey.

Richard S. Creem was appointed a member of the pamphlet review and revision committee of the Commercial Law League of America. He is with the firm of Smith, Levinson & Cullen, P.C. in Boston.

Patrea L. Pabst has joined the Atlanta, Georgia law firm of Arnall Golden & Gregory as a partner and head of that firm's new patent practice.

Ina Resnikoff is an eighth grade social studies teacher in the Peabody School System.

1986

Ann E. Downes is director of the Civil Conciliation Program for the Lawrence District Court.

Joseph P. Geaber has been appointed captain of the South Kingstown Police Department in Rhode Island. A member of the department for 19 years, he most recently was in charge of its Bureau of Prosecution.

Francis O'Brien, director of issues management and counsel for the Life Insurance Association of Massachusetts in Boston, has been appointed a member of the town of Milton's Housing Authority.

Eric J. Parker has been elected a shareholder and director of the law firm of Sarrouf, Tarricone & Fleming, P.C. in Boston.

1987

Daren F. Corrente, an associate with Coia & Lepore of Providence, Rhode Island, has been appointed to the board of directors of the Depositors Economic Protection Corp.

Dana E. Casher has been elected to the Executive Council of the Young Members Section of the Commercial Law League of America.

Linda Foulsham has been appointed coordinator of judicial programs at the University of New Hampshire.

Brian C. Goudas has joined the Concord, New Hampshire law firm of Gallagher, Callahan and Gartrell. He will concentrate in civil litigation.

Cheryl Jacques, a Massachusetts state senator, received the Needham High School Distinguished Career Award, given to notable alumni of the high school.

Eric R. Stanco has joined the law firm of Ober, Kaler, Grimes & Shriver in Washington, D.C. as an associate practicing in the areas of construction law, suretyship, government contracts and general civil litigation.

Susan Underwood has joined the Boston law firm of Finnegan, Underwood, Ryan & Tierney, after having served for seven years as an assistant district attorney in the Suffolk County District Attorney's Office in Boston. Her practice will include the handling of criminal and appellate cases. While an assistant D.A., she served as director of the Suffolk County Grand Jury and as a trial attorney in the Boston Municipal Court and the Suffolk County Drug Unit.
1989

John Bosen has opened a law firm, Watson, Lyons and Bosen, in Portsmouth, New Hampshire.

Eric R. Crane received the Hazel Hughes Award for Volunteer Service from the Somerville Community Corp. He is with the law firm of Bagley & Bagley P.C. in Charlestown.

Charles P. Kindregan has been named a junior partner in the Boston law firm of Hale and Dorr, where he practices litigation.

1991

Harold P. Naughton has been elected Massachusetts state representative from the 12th District.

1992

Scott A. Ambler has opened a law firm with his father, Attorney Lee G. Ambler, in Bellingham.

Orestes G. Brown has joined the firm of Brown & Brown in Manchester as an associate attorney.

Jeffrey Huebschmann was named an associate attorney in the law firm of Bowditch & Dewey’s Worcester office. He will concentrate his practice in real estate law.

Lisa M. MacMillan has joined the law offices of Carozza & Gillen in North Andover as an associate. She will concentrate her practice in domestic relations, personal injury and general civil litigation.

1993

Daniel J. Bennett has joined the firm of Stanzler, Levine & Joyce with offices in Boston, Methuen and Buzzards Bay. He will concentrate on civil litigation and criminal defense.

Paul V. Calandrella has been appointed director of financial services for the (New Hampshire) Lakes Region Community Services Council. Most recently he was with the law firm of Atwood and Cherny in Boston.

Elizabeth A. Gibbons has become an associate in the litigation department of the Boston law firm Rackemann, Sawyer & Brewster.

Shaela A. McNulty is a law clerk in the Superior Court of New Hampshire in Manchester.

Thomas M. Sullivan is an advisor with the Office of Congressional and Legislative Affairs, U.S. Environmental Protection Agency in Washington, D.C.

1994

Patricia A. Kindregan has joined the Boston law firm of White, Inker & Aronson as an associate.

John P. LaRochelle is a prosecutor assigned to the district court unit of the Rhode Island Attorney General’s Office.

Mary Pomer O’Donnell has been named district representative at Blue Cross-Blue Shield of Massachusetts.

Ellen B. Shanos is a prosecutor assigned to the Juvenile Unit of the Rhode Island Attorney General’s Office.
We want to hear about you! If you recently began a new job, earned a degree, married or celebrated the birth of a child, or have any news to share with your fellow alumni, please fill out this form and send it in. We'll include your news in the Class Notes section of the next issue of Suffolk, the magazine of the Suffolk University Community.

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State

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Phone

Title

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You may also e-mail letters to alumni@admin.suffolk.edu
(When corresponding by e-mail, please include your name and phone number so that we can confirm this information with you.)

In Memoriam

Donald E. Allcock, JD '77
Eugene Cuneo, JD '25
James F.X. Donahue, JD '31
John W. Guinee, JD '30
Charles J. Keller, JD '50
William B. Lamprey, JD '41
John T. Lane, JD '26
Louis H. Letvak, JD '31
James A. Longolucco, JD '61
Patrick J. Mullins, JD '65
John E. Murphy, JD '26
John O'Donoghue, JD '39
William A. Probst, JD '78
Eugene F. Proctor, Jr., JD '33
Maxwell Zelman, JD '41

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