

FOIA MARKER

**This is not a textual record. This is used as an
administrative marker by the William J. Clinton
Presidential Library Staff.**

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Victoria Radd

Subseries:

OA/ID Number: 4961

FolderID:

Folder Title:

Sandra Lynch CA1-MA [Court of Appeals for the 1st Circuit-Massachusetts] Writings [3]

Stack:

S

Row:

116

Section:

2

Shelf:

7

Position:

3

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
C. A. No.
Middlesex Superior
Court No. 89-3266

.
GENE-TRAK SYSTEMS, INC.,

Plaintiff,

v.

JONATHON M. LAWRIE,
ROCHE DIAGNOSTIC SYSTEMS, INC.,

Defendants.
.

.
. ROCHE'S MEMORANDUM IN
. OPPOSITION TO GENE-TRAK'S
. PETITION FOR
. INTERLOCUTORY RELIEF
. UNDER G.L.c.231, §118, ¶1 AND
. MOTION FOR STAY UNDER M.R.A.P. 6(a)

Defendant Roche Diagnostic Systems, Inc. ("Roche") submits this memorandum in opposition to the petition of Gene-Trak Systems, Inc. ("Gene-Trak") for interlocutory relief under G.L.c. 231, §118, ¶1 and motion for a stay under M.R.A.P. 6(a) from the order of the Middlesex Superior Court (White, J.), entered on June 28, 1989,¹ denying Gene-Trak's motion for a preliminary injunction to stop Jonathon M. Lawrie ("Dr. Lawrie"), inter alia, from being employed by Roche as Director of DNA Probe Research. Although Gene-Trak purported to seek to enforce a broad, worldwide non-compete agreement, the Superior Court found that it

¹ The Court orally notified the parties of its decision on June 27, 1989. Nonetheless, Gene-Trak did not notice its appeal until _____. Dr. Lawrie stated working at Roche on June 30, 1989.

had "failed to show that Jonathan Lawrie will use confidential information, gained in his employment at Gene-Trak, in his new position at Roche Diagnostics."

The petition and motion should be denied because, as the Superior Court found, on an unusually ample record, Gene-Trak has utterly failed to prove its likelihood of success on the merits or that it will suffer, irreparable injury. Further, as the Court below found, issuance of the injunction would have caused severe harm to the public interest. "Plaintiff seeks to enjoin a scientist from working in his field of infectious disease research, most notably AIDS. The loss to the individual and the economic loss to society are both greatest when a highly trained specialized person is prevented from employing his special abilities." (citation omitted). Slip. Op. P.1.

Proceedings Below

The record below demonstrates that Gene-Trak had more than a fair opportunity to make its case and still did not do so. Indeed, the bulk of Gene-Trak's affidavits were not filed until after the weakness of its position were pointed out at oral argument. Despite being given three bites at the apple, Gene-Trak did not and has not met its burden. Gene-Trak filed its complaint on May 18, 1989, with a supporting affidavit seeking a preliminary injunction. Gene-Trak sought to enforce a "Nondisclosure and Nonassignment Agreement" signed by Dr. Lawrie in 1987, several months after he relocated his family to Massachusetts to start working for Gene-Trak. Gene-Trak alleged that Lawrie had access to unspecified proprietary information.

Gene-Trak initially sought to enjoin Lawrie until May 12, 1991, from engaging in any "activities or services to any business or organization...which are directly related to any specific product or ongoing project" of Gene-Trak's.

Unable to respond to Gene-Trak's broad and vague allegations of proprietary information claimed to be at risk of disclosure to Roche by Lawrie, defendants jointly moved for an order that Gene-Trak state more particularly the types of information about specific products or ongoing projects that were at issue. On June 1, 1989, in response to defendants' motion for a more definite statement, Gene-Trak told the Court that it "should deny defendants' motion because Gene-Trak's complaint states the specific and precise information which defendants request by their Motion."

On May 18, 1989 the Court allowed Gene-Trak's ex parte motion for short order of notice and set the preliminary injunction hearing for May 25, 1989. Gene-Trak did not, however, serve Roche with any papers until May 22. Upon defendants' joint motion on May 22, the hearing was rescheduled for June 8, 1989.

Despite Gene-Trak's representation that it had provided defendants with all the necessary information, on June 7, 1989 -- one day before the hearing on the preliminary injunction motion -- Gene-Trak filed extensive additional materials, including two further affidavits, which raised new issues. Defendants filed responsive materials on June 8, 1989. At the hearing on June 8,

1989, the Court granted Gene-Trak's request that it be allowed to file additional "pleadings" to assist the Court. The transcript of that hearing is part of the Appendix.

On June 13, 1989, almost a week after the preliminary injunction had been argued, Gene-Trak filed more than 200 pages of additional material consisting of ten affidavits, 9 from new affiants, and a supplementary memorandum of law that reformulated its case. Gene-Trak also proposed a form of preliminary injunction which substantially altered the nature of the injunctive relief it sought and was flatly contrary to representations made to the Court by Gene-Trak.

In response to materials filed by Gene-Trak on June 13, each of the defendants filed a supplemental memorandum of law and additional affidavits on June 21.

On June 28, 1989, the Middlesex Superior Court (White, J.) entered an order denying Gene-Trak's notion for preliminary injunction.

Evidence Below

Gene-Trak's factual contentions are set forth in its complaint; the three affidavits of its President, Patrick J. Connoy; the affidavits of Gene-Trak employees (D.N. Halbert, D.J. Lane, J.C. Richards, G. Toyer, and B. Mazar); the affidavits of F.R. Kramer and D.H. Gillespie, two scientists whose research is funded by Gene-Trak; the affidavit of R. Carpenter, Gene-Trak's C.E.O.; the affidavit of D.C. Ward, a member of Gene-Trak's scientific board; and the affidavit of N. Berry, from an executive search company.

The factual contentions of Roche and Lawrie are set forth in the two affidavits of Jonathon Lawrie; the affidavits of eight outside scientists, including Nobel Laureate Paul Berg; Dr. George Grady, the Chief Physician Scientist and State Epidemiologist of Massachusetts Department of Public Health; Dr. Martin Hirsch of the Infectious Disease Unit of Mass. General Hospital and Harvard Medical School; Dr. Jerome Groopman, Chief of Oncology and Hematology, New England Deaconess Hospital; Dr. Jane Burns of Childrens Hospital; James Mullins of the Harvard School of Public Health and Stanford University Medical School; and Dr. B. Poiesz of SUNY and the V.A. Medical Center; two affidavits of John Sninsky, Ph.D., a scientist employed with Cetus Corporation; the affidavits of three scientists affiliated with Roche, M. Usategui (two affidavits), M. Longiaru, and T. White; the two affidavits of D. McQuilkin, the Director of Licensing for Roche; and the affidavit of I. Ruderfer, the president of an executive search company which has worked for both Gene-Trak and Roche.

Dr. Lawrie worked for Gene-Trak for over 2 years. He became convinced that Gene-Trak's particular technology for nucleic acid probe amplification -- Q-Beta -- would not be successful. Reading that Roche had licensed a different technology -- PCR--, he wrote to Roche. Roche at that time was attempting to hire a Director of DNA Probe Research and had advertised the position. Roche interviewed Dr. Lawrie and offered him the job. He accepted, even though his total compensation would be less than at Gene-Trak because he wanted to work with the more promising

technology - PCR. The relevant facts are summarized as follows: Gene-Trak and Roche are presently in different markets. McQuilken Aff. ¶ 22, 26. Gene-Trak is a company which presently sells products to the food industry to detect food contamination. Lawrie Aff. I, ¶8.

Gene-Trak also sells two conventional non-amplified nucleic acid probe products to research laboratories, which may not be used for human clinical tests. Gene-Trak holds the exclusive license for and hopes to develop amplified nucleic acid clinical diagnostic products, a market it is not now in, using a patented amplification technology known as "Q-Beta." It has no such products available now or in the near future. It has no FDA approved products.

Roche sells FDA approved human clinical diagnostic kits to hospitals, blood banks, etc. Roche has hired Lawrie as Director of DNA Probe Development to begin the development and production, under Roche's exclusive license, of clinical diagnostic kits for human diseases using a different kind of patented amplification technology called polymerase chain reaction ("PCR"). This technology targets a virus such as the HIV or AIDS virus, multiplying ("amplifying") it up to a billion times to permit accurate fast detection and diagnosis. Longiaru Aff. ¶6.

Hastening the availability of PCR-based diagnostic kits is very much in the public interest. Existing AIDS tests identify antibodies, not the HIV virus itself, and it may take the body up to three years to develop antibodies. Id. at ¶10. PCR-based tests can detect the virus immediately, a tremendous advantage in

diagnosing infection and protecting the blood supply. Grady Aff. ¶6; Hirsch ¶8. See also, Burns Aff. ¶¶10-12 (on importance of these products for newborn babies); Mullins Aff. ¶¶5-6 (on importance of PCR for AIDS and leukemia detection and treatment); Hirsch Aff. ¶10 (on importance of PCR in preventing deaths due to bacterial infections). See generally Affidavits of Berg, Grady, Arnheim, Poiesz, Groopman, and Hirsch. The uncontroverted evidence is that the prayed-for injunction would cause a minimum delay of four to six months in the availability of PCR-based diagnostic products to the medical community and this would be contrary to the public interest. See Usategui Aff. II ¶¶6-9; McQuilkin Aff. II ¶5-6; Ruderfer Aff. ¶¶6-11.

Gene-Trak has conceded that its purpose in attempting to restrain Lawrie's employment with Roche is not to protect confidential information and trade secrets. Numerous other companies work on the same products and projects as Gene-Trak, and Gene-Trak has identified them as its competitors. Nonetheless, Gene-Trak has said Lawrie could work for these companies on the same products and projects and, in one case, apparently even using the same Q-Beta technology. Mazar Aff. ¶4; Transcript - By seeking to stop Lawrie from working at Roche, but not other companies where the risk of disclosure is greater, Gene-Trak has revealed that the purpose of this suit is not the protection of its trade secrets.

The injunction sought would bar Dr. Lawrie from his profession for two years, sounding the death knell for his present career and depriving him and society of the benefits of

his expertise in nucleic acid technology. Dr. Lawrie has gained expertise in this field over the last decade, only two plus years of which he was employed by Gene-Trak. Lawrie Aff. I, ¶24 and II, ¶30.

There is no realistic risk of disclosure of Gene-Trak confidential information to Roche. Both PCR technology and Q-Beta technology are patented and thus, as a matter of law, are distinct technologies that have been disclosed to the public. There are well established remedies and procedures to protect patents and licenses. The techniques Gene-Trak has developed for Q-Beta diagnostic tests have no necessary or automatic application to Roche's development of PCR-based diagnostic products. McQuilkin Aff., ¶¶22-24, White Aff., ¶¶10-13, Sninsky Aff. ¶10. Moreover, Roche has made substantial investments and developed its own techniques for PCR. Roche has no interest in abandoning its investment in those technologies in favor of spending more time and money evaluating Gene-Trak's techniques. Longiaru Aff., ¶15, Sninsky Aff. II, ¶8. Further, specific Gene-Trak concerns involve general areas of work, which will not be done by Lawrie or Roche, but by another company, Cetus, which is Roche's partner. See generally Appendix B to Roche's Supplemental Memorandum (outlining scientific evidence). Additionally, work on PCR is far advanced, with many research scientists already having worked out many different techniques, so there is little to learn from Q-Beta work, if any. For

example, the National Institute of Health has established a PCR advisory panel, but no such panel exists for Q-Beta. Mullins Aff. ¶7-10.

Roche and Lawrie have filed a Stipulation, stipulating to Lawrie's non-disclosure to Roche of every category of information raised by Gene-Trak and Roche's refraining from inquiry about these topics, thus providing further assurances.

ARGUMENT

The petition for interlocutory relief and motion for a stay should be denied because the Court below properly denied the preliminary injunction. At the preliminary injunction stage, an appellate court "will not reverse if there is a supportable legal basis for the [trial] court's actions even if, on final analysis it may prove to be mistaken." Westinghouse Broadcasting Co., Inc. v. New England Patriots Football Club, Inc., 10 Mass. App. 70, 75 (1980). Packaging Industries Group, Inc. v. Cheney 380 Mass. 609, 615 (1980). The Court below made reasonable findings of fact and correctly applied the law of the Commonwealth. The Superior Court gave Gene-Trak every opportunity to present its best case. The record before the Superior Court contained ample and completely uncontroverted evidence that the preliminary injunction sought was against the public interest. The Superior Court also found that Gene-Trak failed to prove any real risk of loss of trade secrets; irreparable harm; lack of adequate remedy at law; or likelihood of success on the merits, all findings clearly supported by the extensive record.

I. Any Preliminary Injunction Would Be Contrary to the Public Interest

A. The Harm To Public Health Far Outweighs The Remote Alleged Harm To Gene-Trak.

As a matter of law in Massachusetts, the risk of harm to the public is a key reason to deny injunctive relief. See Town of Brookline v. Goldstein, 388 Mass. 443, 447 (1983). "Public health and public safety concerns have traditionally been considered to be one of the highest of public interest considerations." Transport Workers Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transportation Authority, 863 F. 2d 1110, 1124 (3rd. Cir. 1988). Massachusetts courts have never enforced noncompetition agreements that are against the public interest. See, e.g., All Stainless, Inc. v. Colby, 364 Mass. 773, 778 (1974).

Roche presented ample and uncontroverted evidence that the rapid availability of PCR-based clinical diagnostic kits, available only through Roche, is critical to the public health. The early diagnosis of disease is a matter of deep public concern. Early detection makes possible more effective treatment of a number of diseases such as AIDS [fill in] that cause irreversible damage or death. See Affidavits of Mullins ¶5, Groopman ¶¶9-11, Hirsch ¶10, Poiesz ¶3, Burns ¶¶10-11, and Arnheim ¶10. Early detection of infectious agents is crucial to reduce rates of transmission and protect the nation's blood supply from contamination with the AIDS virus, leukemia virus, and other dangerous viruses. See Affidavits of Groopman ¶¶9-12, Poiesz ¶3, and Burns ¶7.

Medical researchers and other scientists widely recognize that PCR technology offers the best hope of providing effective diagnostic tools that will enable physicians and hospitals to detect dangerous diseases at their earliest stages. Roche submitted six affidavits from distinguished independent doctors who described the importance of the rapid availability of PCR-based diagnostic kits for human diseases.

Dr. Paul Berg -- the Wilson Professor of Biochemistry at Stanford University Medical School and recipient of many scientific honors, including the National Medal of Science (1983), the Albert Lasker Basic Research Award (1980), and the Nobel Prize for Chemistry (1980) -- described PCR as "a revolutionary technology of great importance." Berg Aff. ¶¶8 & 10. According to Dr. Berg, "the PCR method has greatly simplified the detection of genetic defects in minute amounts of tissue, a capability which will revolutionize the diagnosis, prevention and treatment of a wide variety of genetic diseases. Thus, the implications of PCR for basic medical research and diagnostics are enormous." Id. ¶10. ¶9.

George Grady, M.D., the Chief Physician Scientist and State Epidemiologist for the Massachusetts Department of Public Health, is "intimately familiar with the public health consequences of AIDS and [has] had a direct personal involvement in helping to shape the policies adopted by this Commonwealth in response to the AIDS crisis." Grady Aff. ¶1. Dr. Grady's affidavit documents that the state's own laboratories use PCR in work on pediatric diseases. Id. ¶¶4-7. According to Dr. Grady,

"Development of [PCR] is in the public interest, particularly with respect to detection of HIV, the causative agent of AIDS. It is in the public interest that PCR be brought forth quickly for evaluation and application in the detection and prevention of diseases. It is self-evident that if there were a delay in bringing out PCR based diagnostic test kits which had received FDA approval for general use, that would not be in the interest of the public." Id. ¶¶8-10.

Dr. Jane C. Burns -- an Assistant Professor at Harvard Medical School and a board-certified pediatrician actively engaged in research on the causes of pediatric infectious diseases -- stated that, "The rapid development of PCR-based diagnostic tests is a matter of extreme importance in public health. There are a number of diseases for which the etiologic agent is known and an effective therapy is available, but an effective diagnostic test is lacking. The lack of an effective diagnostic test for disease all too often condemns patients to poor health, permanent injury, or death." Burns Aff. ¶¶8-9. Dr. Burns described the importance to pediatric medicine of PCR diagnostic tests for newborn herpes (which, if undetected, may cause herpes meningoencephalitis), Lyme disease, parvovirus B-19 (which causes fetal demise and may be fatal to anemic children), and various opportunistic infections. Id. Aff. ¶¶10-16. Burns concluded that "it is against the public interest" to prevent PCR research in these areas. "The need for these tests is simply too great." Id. ¶17.

According to Dr. James I. Mullins -- a Professor of Microbiology and Immunology at Stanford University Medical School, an Adjunct Professor at the Harvard School of Public Health, and a member of the National Institutes of Health Advisory Panel for Development of PCR Technology -- "The NIH created the PCR Advisory Panel approximately one year ago in recognition of the critical importance of PCR technology to both basic research and medical diagnostics." Mullins Aff. ¶7. As a researcher with years of experience in the field, Dr. Mullins is also familiar with Q-Beta, and states that, to the best of his knowledge, "neither the NIH nor any other major scientific organization has a similar advisory panel on Q-Beta technology." Id. ¶10. Like Drs. Berg and Burns, Dr. Mullins describes potentially life-saving applications of PCR. Id. ¶¶14-18 (discussing AIDS and multiple sclerosis; noting the tremendous value of PCR for detecting infection with the AIDS virus in newborns). See also Supp. Poiesz Aff. ¶¶4-9; Arnheim Aff. ¶¶4-11.

Dr. Martin S. Hirsch -- a Professor of Medicine at the Harvard Medical School, Chairman of the National Institutes of Health AIDS Program Advisory Committee, and a practicing specialist in infectious diseases at the Massachusetts General Hospital -- describes the important applications of PCR-based probe technology and concludes that "PCR technology is an extremely important technology the development of which ought to be hastened and not delayed in any manner." Hirsch Aff. ¶11.

Dr. Jerome E. Groopman, Associate Professor of Medicine at the Harvard Medical School and Chief of Hematology and Oncology at New England Deaconess Hospital, like Dr. Hirsch is "very familiar" with PCR and describes it as "vital" to research on AIDS, multiple sclerosis, leukemia, and aplastic anemia. According to Dr. Groopman, "It goes against the common interest in public health to exclude a scientist from working with PCR in the field of DNA probe technology because he has also worked on a different nucleic acid probe technology." Groopman Aff. ¶14.

None of this evidence was controverted. Instead, Gene-Trak lamely argued that the public interest was not a concern here, except for the "public interest" in protecting private investment in research. See Gene-Trak's Supp., ps. 23-25.

PCR, not Q-Beta, will provide the first practical, diagnostic tests for use in hospitals and clinics. But these tests will be delayed by four to six months if this Court grants Gene-Trak's petition and motion. Supp. McQuilkin Aff. ¶5; see Supp. Usategui Aff. ¶6. It will take at least that long -- and perhaps as long as a year -- to have a replacement for Dr. Lawrie in place and working.² Supp. McQuilkin Aff. ¶5 (estimating six to nine months and perhaps twelve months); Supp. Usategui Aff. ¶6 (estimating six to nine months or longer); Ruderfer Aff. ¶¶1-9.

If this Court denies Gene-Trak's petition and motion, diagnostic tools that will help assure a safe blood supply will be in place four to six months sooner; individuals who are

² Approximately 5 months have elapsed between the initiation of Roche's search for a Director of DNA Probe Development and the date Dr. Lawrie was scheduled to begin work. Usategui Aff. ¶8.

infected with the AIDS virus will be able to begin treatment that may prolong their lives that much sooner, and will know they are infected and not infect others through ignorance; blood banks will be better able to detect AIDS-virus infected blood; and the other benefits of PCR diagnostic probes described by Drs. Berg, Poiesz, Hirsch, Groopman, Burns, and Mullins will be available that much sooner. See also Arnheim Aff. ¶¶9-13 (describing benefits of more rapid development of PCR-based diagnostic kits). The public interest in these beneficial results far outweighs the speculative risk to Gene-Trak's trade secrets, which, should they be misappropriated, would be compensable by money damages.

B. The Relief Sought By Gene-Trak Is Contrary to the Public Interest in the Encouragement of Medical Research.

The impact of this case goes beyond Gene-Trak, Roche, and Dr. Lawrie. Currently most companies engaged in medical research, including Roche, protect their confidential information by requiring employees to sign nondisclosure agreements, but not non-competition agreements. Supp. McQuilkin Aff. ¶10. Employees of such companies are able to change jobs freely. They can choose to go to the companies with the best prospects for success in their chosen field.

Some companies like Gene-Trak require their employees to sign noncompetition covenants. The enforcement of such agreements will permit an employer to prevent a medical researcher from moving to a company with a competing technology merely because the employee was exposed to the employer's confidential information. In that event, companies that require

noncompetition agreements would be able to retain researchers who would otherwise leave and companies that require only nondisclosure agreements would be at a disadvantage and in the long run likely would be forced to switch to noncompetition agreements.

This is not a theoretical scenario. If Roche cannot employ Dr. Lawrie, it will have difficulty replacing him. But if Roche were precluded from hiring the ex-employees of other companies in the field, it likely would be impossible to hire someone with adequate experience to do the job. Supp. McQuilkin Aff. ¶11; see Ruderfer Aff. ¶¶9-10. In the absence of the free flow of scientists, each company would have to develop its own personnel. In a protectionist scientific world, many of the best minds would be wasted on inferior technologies, and innovative companies would be unable to hire researchers with adequate experience and skill.

In the words of Dr. Paul Berg, recipient of the National Medal of Science in 1983, the Nobel Prize for Chemistry in 1980, and many other scientific honors:

Given the tremendous utility of PCR technology for medical diagnostics, its development should be strongly promoted, not delayed. I am strongly opposed to any attempts at restricting its development or use. Whatever proprietary or confidential information a scientist may obtain in research and development of a particular nucleic acid probe technology is far less important than the analytical skills, general knowledge and experience that a scientist gains in the course of his or her work. A scientist's general skills, knowledge and experience are the most valuable attributes for tackling scientific problems. In my view, the public interest is best served by allowing scientists

the freedom to apply their general scientific skills and knowledge to the important scientific problems of the day.

Berg. Aff. ¶¶11-12.

II. The Superior Court's Findings As to Gene-Trak Were Plainly Correct.

Even had Gene-Trak met its burden of establishing it had trade secrets and confidential information, which it did not, the Superior Court was still plainly correct in denying the injunction for two basic reasons. First, Gene-Trak's own actions belied its allegation that it sought the injunction to protect trade secrets; and second, there is no risk that Dr. Lawrie will disclose to Roche any of Gene-Trak's alleged trade secrets.

Although it purportedly sought the injunction to protect its alleged trade secrets, Gene-Trak represented to the Court that Lawrie was free to work for a number of its competitors on the same "products" and "projects" on which he worked at Gene-Trak, as Gene-Trak defined those terms. Gene-Trak also did not controvert that three of its hands-on bench scientists, with access to the same allegedly proprietary information, had freely gone to work for its competitors. Gene-Trak's alleged proprietary information would be at greater risk of disclosure by bench scientists -- those who perform the actual experiments -- to those companies than by Dr. Lawrie to Roche. Gene-Trak's own conduct plainly indicates that protection of trade secrets and confidential information is not the purpose of the motion for injunctive relief. For over 60 years, however, Massachusetts courts have enforced non-competition agreements only where

necessary to protect trade secrets and confidential information.³

The Superior Court was plainly correct in finding no risk that Dr. Lawrie will disclose Gene-Trak's trade secrets or confidential information to Roche. First, Dr. Lawrie has said that he will not disclose any trade secrets to Roche. He has stipulated that he will not disclose the contents of Gene-Trak's documented manufacturing protocols, memoranda of invention, patent applications, and five-year business plan, whether or not they contain trade secrets. Def. Stip. ¶2; Supp. Lawrie Aff. ¶¶26, 35, 40. As Dr. Lawrie stated and Gene-Trak did not dispute, Dr. Lawrie took no company material with him when he left Gene-Trak. Supp. Lawrie Aff. ¶37; Mazar Aff. ¶10. Gene-Trak did not dispute that Dr. Lawrie could adequately protect Gene-Trak's interests by exercising discretion. Dr. Lawrie exercised such discretion when he left Codon and did not disclose its trade secrets to Amoco. Supp. Lawrie Aff. ¶40. Amoco, Gene-Trak's parent, assumed that Dr. Lawrie's promise not to disclose Amoco's confidential information to Gene-Trak was sufficient. And like Amoco, Roche does not require employees to sign noncompetition agreements because its employees' promises not to disclose Roche's trade secrets has been adequate to protect Roche's interests. Supp. McQuilkin Aff. ¶10.

³ "Goodwill," the only other protectible interest, is not involved in this case.

Second, Roche is not interested in Gene-Trak's trade secrets. Contrary to what Gene-Trak would have the Court believe, most of the specific techniques that work with Q-Beta are simply not applicable to PCR and to the work Dr. Lawrie would be doing at Roche. Supp. Sninsky Aff. ¶¶4-14; Supp. Usategui Aff. ¶¶16-18; White Aff. ¶¶10-22. (An exemplar rebuttal of the claims made by Kramer, Lane, and Gillespie is set forth in Exhibit B, appended to Roche's Supplemental Memorandum, Exhibit ____.)⁴

In fact, Gene-Trak has essentially conceded that point. In his affidavit, Dr. Kramer expressly stated that PCR and Q-Beta are different technologies, and that the differences between them affect the solutions to all the other generic steps in a clinical diagnostic assay. Affidavit of Fred Russell Kramer at ¶14; see also Appendix B at 1-3. Any "tricks" or shortcuts Gene-Trak has developed using Q-Beta would be of minimal value to a company utilizing PCR because PCR technology is well developed. Hundreds of scientists have worked on PCR technology, and a relative handful have worked on Q-Beta. Thus, "solutions for every step in PCR technology are widely available" and "[w]hatever nucleic acid probe technology tricks Gene-Trak has up

⁴ Gene-Trak's list of trade secrets is to a great extent a list of the general areas that encompass the entire field of nucleic acid probe technology. Because the description of those steps includes the use of unfamiliar scientific terminology, Gene-Trak evidently hopes that the Court will assume that trade secrets have been specified. It is as though an automobile manufacturer had listed as its trade secrets: (a) designing the power train; (b) designing the steering; (c) designing the brakes; (d) designing the body; and (e) attaching them together. Supp. McQuilkin Aff. ¶24.

its sleeve, researchers developing PCR probably have uncovered several other ways to skin the same cat." Mullins Aff. ¶¶9 & 13. See also Arnheim Aff. ¶8 (noting that multiple "tricks" are always uncovered to solve a given problem and that Q-Beta tricks would not automatically transfer to PCR).

Roche has no need for Gene-Trak's alleged proprietary information because of the wealth of public information on PCR. In 1988-89 alone there were 227 scientific publications on PCR. Supp. Usategui Aff. ¶20. Scientists have convened two meetings to discuss PCR in the last eight months. In April 1989, 400-500 scientists met at an international meeting on PCR technology in Colorado. Mullins Aff. ¶12. See also Arnheim Aff. ¶¶7-8 (discussing the Keystone, Colorado and Cold Spring Harbor PCR meetings and the "wealth of information on PCR"); White Aff. ¶¶5 & 15 (discussing White's role in organizing the Colorado meeting and the breadth of the topics discussed there). In addition, the NIH PCR Advisory Committee is gathering and disseminating information regarding PCR technology on a worldwide basis. See Mullins Aff. ¶8.

Finally, to the extent that Gene-Trak has specified information that could arguably include trade secrets, Roche specifically disavows any intent to learn of or use this information. Roche stipulated that it will not ask Dr. Lawrie about Gene-Trak's documented manufacturing protocols, memoranda of invention, patent applications, and the five-year business plan. Def. Stip. ¶1.

Moreover, it will be easy for Roche to refrain from asking Dr. Lawrie about Gene-Trak's alleged confidential information. Gene-Trak says it is concerned with trade secrets relating to sample preparation with chaotropic salts, sequence information on probes, and target cycling. But sample preparation with chaotropic salts is patented, and Gene-Trak, not Roche, holds the exclusive license for use of the patented method. Sninsky Aff. ¶9. Moreover, sample preparation and sequence information on probes are being researched by scientists at Cetus and Roche in California, not at Roche in New Jersey where Dr. Lawrie will work. Target cycling is a non-issue at Roche, which uses an independent and unrelated technology. Supp. Sninsky Aff. ¶¶6-12; Supp. Usategui Aff. ¶¶16-19; White Aff. ¶¶11, 16.

CONCLUSION

The public interest in health care is served by the mobility of medical researchers and developers. See Berg Aff. ¶12; Poiesz Aff. ¶12; Groopman Aff. ¶14; White Aff. ¶23; Hirsch Aff. ¶13. The public interest in the protection of inventions is served by the enforcement of nondisclosure agreements and by the patent law.⁵ The injunction sought by Gene-Trak completely sacrifices the former interest in the name of a hypothetical threat to the latter. Regardless of the evidence on any other score, Gene-Trak's petition and motion are contrary to the public interest and should be denied.

⁵ The operation of patent law also reinforces the adequacy of Gene-Trak's remedy at law and its lack of irreparable injury. Gene-Trak has highlighted its pending patent applications and underlying memoranda of invention as worthy of protection. But, for the most part, patent law already provides that protection.

Gene-Trak loses on every other score as well. Roche submitted uncontroverted evidence that not one of Gene-Trak's categories of alleged trade secrets is at risk. Lawrie won't disclose them; Roche doesn't want them. In contrast, Gene-Trak offered only a smokescreen of unsubstantiated allegations of harm. The denial of the injunction was and is required by law. See National Hearing Aid Centers, Inc. v. Avers, 2 Mass. App. Ct. 285, 290 (1974) (vacating injunction where no evidence that defendant had appropriated or used former employer's confidential information); Sentry Insurance v. Firnstein, 14 Mass. App. Ct. 706, 708 (1982) (denying enforceability of confidentiality and non-compete agreements, inter alia on grounds that there was no evidence of use of confidential information).

ROCHE DIAGNOSTIC SYSTEMS, INC.
By its attorneys,

Sandra L. Lynch
BBO #309220
Annemarie Hassett
BBO #546890
Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109
(617) 482-1390

Dated: July __, 1989

DOCUMENT: mm supp petition
FOLDER: pleadings
DRAWER: ROCHE-2
CABINET: HASSETT, A
FILEROOM: CHOCOLATE

USER: Sweeney B
DATE: 07/17/89
TIME: 06:12

ARGUMENT BOOK

FIRST CIRCUIT

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED	i
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
ARGUMENT.	10
I. THE DISTRICT COURT ERRED IN GRANTING A PRELIMINARY INJUNCTION WITHOUT SUBSTANTIAL EVIDENCE OF THREAT- ENED IRREPARABLE INJURY TO THE PLAINTIFF, AND FAILED TO ASSESS THE EFFECT OF THE INJUNCTION ON THE PUBLIC INTEREST.	10
II. ENFORCEMENT OF SECTIONS 3 AND 7 OF THE MASSACHUSETTS ACT AGAINST AGENCY'S FRAUDULENT CONDUCT IS ENTIRELY CONSISTENT WITH THE PROVISIONS AND THE PURPOSES OF THE WILLIAMS ACT.	15
A. Section 7 Is a Valid State Anti-Fraud Provision and Was Validly Applied to Agency.	15
1. The Williams Act Does Not Preempt Coordinate State Efforts To Police Fraud	15
2. The District Court Misconstrued the Findings of the Massachusetts Securities Division	19
3. Federal Law Does Not Oblige The States To Ignore Schedule 13D Filings	23
4. The Williams Act Does Not Preempt States from Requiring Disclosure of "Stick-Up" Plans.	26
B. Section 3 Regulates Non-Conventional Tender Offers and Is Not Preempted by the Williams Act	30
1. The Securities Division Applied Section 3 Based on its Findings That Agency Had an Actual Intent To Gain Control of Spencer and Did Not Disclose That Intent	31

TABLE OF AUTHORITIES CITED

CASES

<u>Allen v. McCurry</u> 449 U.S. 90 (1980)	3
<u>AMCA Int'l Corp. v. Krouse</u> , 482 F.Supp. 929 (S.D. Ohio 1979)	34
<u>American General Ins. Co. v. Equitable General Co.</u> 493 F. Supp. 721 (E.D. Va. 1980)	25, 44
<u>Boothe v. Baker Industries, Inc.</u> , 262 F. Supp. 168 (D. Del. 1966).	25
<u>California v. Zook</u> , 336 U.S. 725 (1949).	15
<u>Canadian Pac. Enterprises (U.S.), Inc. v. Krouse</u> , 506 F.Supp. 1192 (S.D. Ohio 1981).	6, 34
<u>Chris-Craft Industries v. Piper Aircraft Corp.</u> , 480 F.2d 341	39
<u>Chromalloy American Corp. v. Sun Chemical Corp.</u> , 611 F.2d 240 (8th Cir. 1979)	28
<u>City Investing Co. v. Coons</u> , 411 N.E.2d 420 (Ind. App. 1980).	26
<u>Coffee v. Permian Corp.</u> , 474 F.2d 1040 (5th Cir.), <u>cert denied</u> , 412 U.S. 920 (1973).	25
<u>Colorado Anti-Discrimination Comm'n v.</u> <u>Continental Airlines, Inc.</u> , 372 U.S. 714 (1963).	15
<u>Connolly v. Balkwill</u> , 174 F. Supp. 49 (N.D. Ohio 1959), <u>aff'd</u> , 279 F.2d 685 (6th Cir. 1960)	24
<u>Copperweld Corp. v. Imetal</u> , 403 F.Supp. 579 (W.D.Pa. 1975)	35
<u>Dart Industries, Inc. v. Conrad</u> , 462 F.Supp. 1 (S.D. Ind. 1978)	29

<u>Hidell v. International Diversified Investments,</u> 520 F.2d 529 (7th Cir. 1975)	25
<u>Hines v. Davidowitz,</u> 312 U.S. 52 (1941)	17
<u>Hi-Shear Industries, Inc. v. Campbell,</u> [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,804 (D.S.C. 1980).	38
<u>Holmes v. Bateson,</u> 583 F.2d 542 (1st Cir. 1978)	25
<u>In re Transocean Tender Offer Securities Litigation,</u> 455 F. Supp. 999 (N.D. Ill. 1978) 427 F. Supp. 1211 (N.D. Ill. 1977)	24
<u>Jennings v. Roberts Scott & Co.,</u> 113 Ariz. 57, 546 P.2d 343 (1976).	25
<u>Jones v. Rath Packing Co.,</u> 430 U.S. 519 (1977).	17, 27
<u>Joseph E. Seagram & Sons, Inc. v. Marley,</u> Blue Sky Rep. (CCH) ¶71,627 (W.D. Okla. 1981).	14
<u>Kargman v. Sullivan,</u> 552 F.2d 2 (1st Cir. 1977)	17, 28
<u>Kaufman v. Schoenberg,</u> 154 F. Supp. 64 (D. Del. 1954)	25
<u>Kelly ex rel, McLaughlin v. Beta-X Corp.,</u> 103 Mich. App. 51, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,897, Blue Sky Rep. (CCH) ¶71,615 (1981)	15, 37
<u>Kennecott Corp. v. Smith,</u> 507 F.Supp. 1206 (D.N.J. 1981)	15, 18, 38
<u>Kennecott Corp. v. Smith,</u> 637 F.2d 181 (3d Cir. 1980).	16, 17, 38
<u>Kewanee Oil Co. v. Bicron Corp.,</u> 416 U.S. 470 (1974).	21
<u>Kirsch Co. v. Bliss & Laughlin Industries, Inc.,</u> 495 F.Supp. 488 (W.D. Mich. 1980).	42
<u>Klamberg v. Roth</u> 473 F. Supp. 544 (S.D.N.Y. 1979)	21

<u>Telvest, Inc. v. Bradshaw,</u> 618 F.2d 1029 (4th Cir. 1980).	10, 11, 16, 37, 38
<u>Travelers Health Ass'n v. Virginia,</u> 339 U.S. 643 (1950).	16
<u>Treadway Companies, Inc. v. Care Corp.,</u> 638 F.2d 357 (2d Cir. 1980).	42
<u>Twomey v. Mitchum, Jones & Templeton, Inc.,</u> 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968)	25
<u>United States v. Raines,</u> 362 U.S. 17 (1960)	27
<u>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,</u> 50 U.S.L.W. 4267 (March 3, 1982).	27
<u>Wellman v. Dickinson,</u> 497 F.Supp. 824, 832-33 (S.D.N.Y. 1980), <u>aff'd mem.</u> , 647 F.2d 16 (2d Cir. 1981)	42
<u>Yazoo & M.V. R.R. Co. v. Jackson Vinegar Co.,</u> 226 U.S. 217 (1912).	27
<u>Young v. Taylor,</u> 466 F.2d 1329 (10th Cir. 1972)	25

Miscellaneous

<u>Opinion, Findings and Order, Spencer Companies, Inc.,</u> No. T-81-02-A (Mass. Securities Div. March 19, 1982).	Passim
<u>Restatement (Second) of Conflict of Laws §302 (1971).</u>	14
<u>Report of NASAA Tender Offer Committee,</u> 626 Sec. Reg. & L. Rep. (BNA) G-1 (1981)	34
<u>Note, The Constitutionality of State Take-Over Statutes:</u> <u>A Response to Great Western,</u> 53 N.Y.U.L. Rev. 872, 931-34 (1978).	14

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1337
No. 82-1338

AGENCY RENT-A-CAR, INC.,
Plaintiff-Appellee,

v.

MICHAEL J. CONNOLLY, et al.,
Defendants-Appellants,

and

SPENCER COMPANIES, INC.,
Defendant-Appellant

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANT SPENCER COMPANIES, INC.

STATEMENT OF THE ISSUES

(1) Whether federal law relating to tender offers prohibits Massachusetts from enjoining a take-over bid, under Mass. G.L. c.110C §7, when the Massachusetts Securities Division has found that the bidder has engaged in evasive, deceptive, and grossly unfair practices in connection with the bid.

findings of the Division in its Opinion, Findings and Order, Spencer Companies, Inc., No. T-81-02-A (Mass. Securities Div. March 19, 1982), [hereinafter cited as Spencer II].^{1/}

Agency began buying shares of Spencer on February 13, 1981; by March 25, Agency owned more than 5% of Spencer's outstanding shares and therefore became subject to the filing requirements of Section 13(d) of the Securities Exchange Act of 1934. Agency filed its first Schedule 13D on March 31, 1981, announcing that Agency had purchased the shares "in order to acquire an equity investment in the Company." Spencer II at 15. By August 15, Agency held roughly 28% of Spencer's shares. By November 13, Agency had acquired 725,288 shares, or approximately 38.4% of the outstanding Spencer voting stock.

The Division's holding that Agency had violated c. 110C was based on two primary findings of fact. The Division found that, in the early stages of its acquisition campaign, Agency intended to force Spencer or its management to buy back the shares at a profit to Agency, by threatening to take over control of Spencer if it was not bought out. That "stick-up"

^{1/} Agency represented to that District Court that it did not seek to "review any determination which may be made by the Director. Agency seeks here no review of any finding of fact and no review of any interpretation of Massachusetts law." Plaintiff's Memorandum In Opposition To State Defendants' Motion To Dismiss Or Alternatively To Stay Proceedings, p. 10. The District Court held no evidentiary hearing and made no findings of fact. See Memorandum at 1-3. Of course, Agency could not collaterally attack the Division's findings by means of the present action. See Allen v. McCurry, 449 U.S. 90 (1980); Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975).

Spencer's management, however, resisted Agency's attempts to coerce a buy-back. "[A]s early as April, 1981, it was clear that Spencer viewed Agency's acquisitions with some hostility." Id. at 24. By August, Agency owned more than a quarter of Spencer's stock, far more than Agency believed it would be likely to sell profitably to any buyer but Spencer and its management. Id. at 23. In July and August the Securities Division held hearings on Spencer's contention that Agency's purchases constituted a tender offer and thus a "take-over bid" within the meaning of the Act, as it was then worded, and that necessary disclosures were not being made. The Division held, however, that Agency's open market and private purchases did not constitute a tender offer and thus were not a "take-over bid" within the meaning of the Act. Spencer II at 6. The Division retained jurisdiction to take appropriate action if later events so warranted. Id.

Thereupon Agency immediately accelerated the pace of its purchases of Spencer stock. In September, Spencer's principal officers finally agreed to meet Agency's principals. At the meetings, Agency demanded to be bought out at \$15 a share. Spencer did not accede. Spencer II at 24, 25. Agency then prepared to propose its own nominees for election to Spencer's Board and otherwise prepared to seek control of Spencer at Spencer's annual meeting, held on October 15, 1981. Spencer II at 19, 20. Agency did not, however, admit publicly to any intent to gain control of Spencer.

position, and that the attempt to stick up Spencer management at a lucrative price would not succeed.^{3/} Since Agency had purchased Spencer shares as recently as November 13, 1981 without disclosing its actual intent to gain control of Spencer, the Division held that Agency's tender offer violated Section 3 of the Act.^{4/} Spencer II at 25.

^{3/} Spencer II at 25:

Thus, the desire or need for Agency to acquire control of Spencer became more than a standby alternative. It became the only viable option other than being a frozen out minority shareholder. [Agency] evidenced such intent to gain control by its continued purchases on the open market at a time when it could be reasonably certain that Spencer or [Spencer's President] would not buy out its interest.

^{4/} M.G.L. c.110C, § 3 reads:

No offeror shall make a take-over bid if he and his associates and affiliates are directly or indirectly the beneficial owners of five percent or more of the issued and outstanding equity securities of any class of the target company, any of which were purchased within one year before the proposed take-over bid, and the offeror, before making any such purchase, or before before the thirtieth day following the effective date of this section, whichever is later, failed to publicly announce his intention to gain control of the target company, or otherwise failed to make full, fair, and effective disclosure of such intention to the persons from whom he acquired such securities.

In Spencer II, the Division interpreted Section 3 as imposing a one-year ban after each occasion on which an individual who already owns five percent of the shares buys an additional share without disclosing an actual, existing intent to gain control. Spencer II at 11-14. Agency had attempted to "admit" to a violation of Section 3 based on a failure to announce

(footnote continued)

grounds that the Act was preempted by federal law and imposed an unconstitutionally severe burden on interstate commerce. Agency did not seek a hearing on its request for preliminary relief. The Division, pursuant to its retained jurisdiction, issued a Cease and Desist Order pendente lite on January 28, 1982 and resumed its hearings. Agency made no effort to accelerate the pace of the Division's examination of Agency's compliance with the Act (indeed, it consistently caused delays) despite the issuance of the order pendente lite.^{6/}

Hearings before the Securities Division began on February 1, 1982. The Division received voluminous evidence, including documents, live witnesses, and testimony (both in person and by transcripts of depositions) of Agency's President and of Agency's Chairman and sole stockholder.

The Division's Findings, Opinion and Order was issued on March 19 and Agency immediately moved in the District Court for a preliminary injunction against enforcement of the Order. The District Court held no evidentiary hearing, but heard oral argument on the motion on March 30, 1982. Spencer and the Division had moved to dismiss or to stay Agency's action on grounds of comity, equitable restraint, and abstention. On April 12, 1982, the District Court preliminarily enjoined the

^{6/} The order permitted Agency to disseminate its tender offer materials, but not to commence the offer. Agency agreed to waive the statutory time limits on the Division's adjudication, and delays in the proceedings were made to accommodate Agency's counsel. Spencer II at 3.

Parenthood League v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981), but misapplied them on the record before it.

In its concern to assert federal supremacy, the District Court overlooked the harm its injunction would visit both on Spencer and its shareholders and, more importantly, on the defendant state officials and the public interest they represent. Erroneously viewing "governmental neutrality" as a paramount goal, the District Court ignored the legitimate and serious public interest of the Commonwealth of Massachusetts in both preventing and remedying deception of stockholders of Massachusetts corporations. We will address these errors briefly, before turning to the District Court's most fundamental error -- its misapprehension of Agency's likely degree of success on the merits.

Although this Court has held that the decision whether to grant a preliminary injunction must take into account the public interest, the District Court gave that factor little attention, and virtually ignored the presumption of constitutionality to which Massachusetts' efforts to ensure shareholder protection are entitled.

We also think the public interest is as well served by compliance with a valid State statute as it is by a free securities market. In this case, the public interest must be what has been declared by Congress or by the State legislature or both. Since Congress has not acted in a part of the area, the public interest we think is served by adherence to the State statute unless and until it is declared invalid.

Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1036 (4th Cir.

tion with a take-over bid would unduly favor incumbent management, or that a statute requiring someone who is buying stock in order to seek control to disclose his intention to the stockholders from whom he is buying would interfere with Congress's purpose to protect stockholders.

Similarly, the record before the District Court showed no evidence that any substantial harm to Agency, let alone irreparable injury, might flow from denial of preliminary relief. Agency's dilatory conduct belies any claim that further delay would irreparably injure it: Agency conditioned its offer expressly on the success of its challenge to the Massachusetts law, and clearly anticipated the normal delays of litigation. Furthermore, Agency had been able to acquire Spencer shares freely for ten months before it commenced a formal tender offer. Nor are Spencer's present public stockholders injured by any delay in the tender offer. If they had been interested in selling they could have done so in 1981 at prices higher than the tender offer price. Instead, Spencer's current shareholders are likely to be injured by the tender offer, because Agency's illegal accumulation of over 38% of Spencer's shares limits the size of its tender offer to a small fraction of the outstanding shares, severely watering down the proration rights of the remaining stockholders.

The present litigation is unlike any prior case involving the validity of state take-over regulations. Agency stands before this Court after a neutral administrator's adjudication

here, especially one taking the unprecedented step of enjoining enforcement of a state anti-fraud provision against admitted deception.

II. ENFORCEMENT OF SECTIONS 3 AND 7 OF THE MASSACHUSETTS ACT AGAINST AGENCY'S FRAUDULENT CONDUCT IS ENTIRELY CONSISTENT WITH THE PROVISIONS AND PURPOSES OF THE WILLIAMS ACT.

A. Section 7 Is a Valid State Anti-fraud Provision and Was Validly Applied to Agency.

1. The Williams Act Does Not Preempt Coordinate State Efforts to Police Fraud.

No court, other than the District Court here, has ever found state anti-fraud provisions that, like Section 7, parallel those of federal law to be preempted by the Williams Act.

Even those courts that have invalidated different provisions of other state takeover statutes have nonetheless respected severability clauses of those statutes and have explicitly preserved state anti-fraud provisions. See Empire Inc. v. Ashcroft, 524 F. Supp. 898 (W.D. Mo. 1981); Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1224 (D.N.J. 1981); Kelly ex rel. McLaughlin v. Beta-X Corp., 103 Mich. App. 51, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,897 (1981).^{10/} The congressional purpose underlying the Williams Act is not frustrated by state laws "'aiding' enforcement" of the federal law. See California v. Zook, 336 U.S. 725 (1949); Colorado

^{10/} The Massachusetts Act contains an express severability clause, M.G.L. c. 110C, § 13.

The relevant inquiry in the present case is a far narrower one. In the absence of an express or implied congressional intent to occupy the field, state legislation is preempted only if the "state and federal laws are so inconsistent" that "'under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (emphasis added). To overcome the presumption that a state law is valid, the complaining party must demonstrate actual frustration of the congressional purpose on the facts of the case at bar, through evidence in the record and not hypothetical speculation. Kennecott Corp. v. Smith, 637 F.2d 181, 188 (3d Cir. 1980); Kargman v. Sullivan, 552 F.2d 2, 12-13 (1st Cir. 1977).

To be sure, take-over laws enacted by other states have been held to conflict with the operation of the Williams Act; but the history of those other acts simply underscores the difference between them and the Massachusetts Act at issue here. Before a general awareness of the constitutional problems

(footnote continued)

(1st Cir.), cert. denied, 294 U.S. 730 (1935), and have consistently recognized the legitimacy of States' local interest in preventing fraud, see, e.g., Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 43 (1980); Hall v. Geiger-Jones, Co., 242 U.S. at 557-58; Rousseff v. Dean Witter & Co., 453 F. Supp. 774, 782 (N.D. Ind. 1978).

the Director has found evasive, deceptive and grossly unfair practices in [Agency's] 13D filings. The sufficiency of 13D filings are exclusively a matter of federal law.

Memorandum at 18. This holding is based on an erroneous apprehension of the basis for the Division's findings and is simply wrong as a matter of law.

2. The District Court Misconstrued the Findings of the Massachusetts Securities Division.

Because the District Court misconstrued the Division's findings as to violation of Section 7 and the interests of the Commonwealth involved, its injunction should be vacated. The District Court condemned application of Section 7 in the present case, solely because "the Director's general approach to this case" included a criticism of Agency's Schedule 13D filings with the Securities Exchange Commission. Memorandum at 8. It is difficult to discern from the District Court's memorandum whether that Court believed that Schedule 13D filings were immune from any scrutiny by a state securities agency, or whether the Court believed that state law as interpreted by the Division required greater disclosure of "alternative" plans than federal law demands in 13D filings. See Memorandum at 6-8. In either case, the District Court's analysis ignores the Division's specific findings.

The Division did not hold that Section 7 was violated by

in that they provided no opportunity for anyone reading them to understand what Agency was considering with respect to its interest in Spencer. Id. at 32.

Secondly, the Division found "that Agency engaged in deceptive practices":

The deception was upon Spencer shareholders and those who sold their shares. Agency has said that its conduct in connection with its acquisition of Spencer shares had to be credible in order for Spencer management to believe that Agency desired control. Agency argues that without such credibility, Spencer and its management would not possess the requisite fear and concern which would result in their buying Agency's holdings in the company. Thus, we have a clear situation whereby Agency's conduct, according to its own admission, was designed to deceive Spencer Agency's desire to achieve credibility with Spencer as a threat to gain control, also worked a deception upon Spencer's shareholders.

Id. at 32-33. The Division expressly relied on a federal court's definition of the word "deceptive" as used in Section 10(b) of the Exchange Act.^{16/} Id. at 30.

Third, the Division held that Agency's conduct constituted practices that were grossly unfair to Spencer's shareholders, as well as to Spencer itself.

The gross unfairness to the company was manifested by Agency's deceptive and evasive activities designed to harrass Spencer and its management to further its initial goal of a buy out, while at the same time realizing that it might ultimately have to make a formal tender offer. In so doing, Agency caused Spencer to expend

^{16/} See Klamberg v. Roth, 473 F. Supp. 544, 550 (S.D.N.Y. 1979).

Desist Order because of disagreement with its dicta is clearly an abuse of discretion.

3. Federal Law Does Not Oblige The States to Ignore Schedule 13D Filings.

The District Court's opinion says that the Cease and Desist order encroaches on an area preempted by the Williams Act, because "[t]he sufficiency of 13D filings are exclusively a matter of federal law." Memorandum at 7-8. It is true that Section 27 of the Exchange Act vests the federal courts with exclusive jurisdiction of claims that statements filed with the SEC violate the applicable provisions of the Exchange Act. 15 U.S.C. §78aa. It is clear, however, that the Division was not deciding any claims arising under the Exchange Act, but was determining whether Agency's public statements, which happened to be made in Schedule 13D filings with the SEC, met the disclosure and anti-fraud requirements of the Massachusetts law.

The Division focused solely on the Schedule 13D filings as they related to Section 3 of the Massachusetts Act:

The examination herein of the 13D's filed by Agency with the SEC should not be construed as an attempt to judge their veracity. Rather, they have been scrutinized in order to determine whether Agency: one, evidenced an intent to gain control of Spencer; and, two, in so doing publicly announced such intent or otherwise made fair, full and effective disclosure of such intention.

Spencer II at 21. Agency's Schedule 13D filings were relevant

1977); Boothe v. Baker Industries, Inc., 262 F. Supp. 168 (D. Del. 1966) (proxy); Kaufman v. Shoenberg, 154 F. Supp. 64 (D. Del. 1954) (proxy). They have also routinely entertained pendent state common law and statutory claims that parallel Exchange Act claims, see, e.g., Holmes v. Bateson, 583 F.2d 542 (1st Cir. 1978) (10b-5 and Rhode Island fraud claim); Hidell v. International Diversified Investments, 520 F.2d 529, 536 & n.14 (7th Cir. 1975) (10b-5 and identical Illinois statute); Scott v. Multi-Amp Corp., 386 F. Supp. 44 (D.N.J. 1974) (§13(d) and parallel state claim), and have heard state claims with lesser scienter requirements or more generous damage rules than those permitted under federal laws, Coffee v. Permian Corp., 474 F.2d 1040 (5th Cir. 1973), cert. denied, 412 U.S. 920 (1973) (10b-5 and parallel Texas statute allowing exemplary damages); Young v. Taylor, 466 F.2d 1329 (10th Cir. 1972) (10b-5 and common law fraud allowing exemplary damages); American General Insurance Co. v. Equitable General Co., 493 F. Supp. 721 (E.D.Va. 1980) (10b-5 and parallel state claim without scienter element).

Similarly, state courts have regularly accepted jurisdiction to enforce state laws prohibiting fraudulent conduct despite defendants' claims that the allegations would also state a claim under the Exchange Act. See Jennings v. Roberts Scott & Co., 113 Ariz. 57, 546 P.2d 343 (1976) (Arizona securities law); Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968) (constructive fraud

primary plan fails." Memorandum at 7. But even if the Division's only finding had been that Agency failed to disclose its plan to stick-up Spencer and, if that stick-up failed, to seek control, nothing in the Williams Act would preclude the State from imposing such a disclosure requirement.^{18/}

The District Court's opinion speaks of an "opportunist who enters the market with no intention other than to secure the best advantage to himself that he can as circumstances dictate from time to time." Memorandum at 8. Agency has no standing to raise the rights of a hypothetical opportunist.^{19/} The Director's findings, Agency's own admissions, and abundant evidence demonstrate that Agency initially entered the market for Spencer shares with the settled intent of performing a "stick-up." Agency knew that its plan was to coerce Spencer management into buying back Spencer shares at great profit to Agency, and that Agency intended to create an appearance of control intent to supply coercion. Once Agency had accumulated more than ten percent of Spencer's shares, by the testimony of

^{18/} The District Court appears to have mistakenly concluded that the Division was attempting to require that disclosure of Agency's intent be in Agency's 13D filings. It is clear that both Section 7 and Section 3 might have been satisfied by truthful disclosure in any effective form; but Agency offered no evidence of disclosure to Spencer's stockholders by any means other than its 13D statements.

^{19/} Attacks on economic regulation are subject to strict standing requirements. Agency can only attack the Act as applied to Agency. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 50 U.S.L.W. 4267 (March 3, 1982); United States v. Raines, 362 U.S. 17 (1960); Yazoo & M.V. R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217 (1912).

The purpose of the Williams Act, like that of the Massachusetts Take-Over Act, is protection of the shareholders of a target company.^{21/} Piper v. Chris-Craft Industries, Inc. 430 U.S. 1, 35 (1977). No interest of these shareholders is served by permitting an "opportunist" to engage in a "barracuda attack," "greenmail," or "stick-up" without disclosing his intention to do so. No cognizable burden would be placed on the raider if he were required to disclose any alternative plans to indulge in a stick-up or to seek control if his plan fails, regardless of whether such disclosure is already required by federal law. This case is a far cry from

(footnote continued)

Chemical Corp., 611 F.2d 240, 247 (8th Cir. 1979); Marshall Field & Co. v. Icahn, Fed. Sec. L. Rep. (CCH) ¶98,481 (S.D.N.Y. 1982). Nothing turns, however, on the accuracy of this statement of federal law. Even if Section 13(d) does not extend shareholder protection to require disclosure of these significant items, it certainly does not preclude the States from doing so.

^{21/} It is essential to dispel the myth that the Williams Act is so delicately balanced, so precisely fine-tuned that even the slightest additional burden on the tender offeror would destroy the congressional scheme. One court, for example, observed that provisions of the Williams Act force a tender offeror to keep his offer open for at least seven to ten days; and concluded that any longer minimum period "conflicts" with federal law. Dart Industries, Inc. v. Conrad, 462 F.Supp. 1, 13 (S.D. Ind. 1978) (invalidating twenty day minimum period under Delaware law.) Nevertheless, the SEC has decided that tender offers should be kept open at least twenty business days, and has found authority in the Williams Act to promulgate regulations so requiring. 17 C.F.R. § 240.14e-1(a) (1981). Since Congress has deliberately preserved the States' power to supplement federal securities laws, and the SEC itself has found the Williams Act in need of perfecting, the federal courts should not conclude that additional regulation that protects the shareholders at slight cost to the offeror is necessarily "conflicting."

and that Agency did not disclose that intent. Spencer II at 25-26.

The District Court found Section 3 likely to be preempted by the Williams Act for two reasons. First, the District Court thought that Section 3

imposes disclosure requirements more stringent than those provided by the Williams Act . . . the defendant Director in this case has imposed an additional requirement that in order to satisfy section 3 its federal 13D filings should disclose 'concrete alternative intentions or plans to be used if the primary plan fails.' So far as I know, this has never been required under federal law.

Memorandum at 6-7 (footnote omitted). Second, the court held:

the automatic sanction imposed for violation of these disclosure requirements is in effect a one-year freeze on the proposed take-over . . . Section 3 thus not only imposes more stringent requirements than the Williams Act but actually operates at cross-purposes thereto.

Id. at 7. The District Court not only misapprehended the Division's findings under Section 3, but clearly erred as a matter of law.

1. The Securities Division Applied Section 3 Based on Its Findings That Agency Had an Actual Intent To Gain Control of Spencer and Did Not Disclose That Intent.

As we have argued above, the Massachusetts Securities Division found that Agency concealed from Spencer's stockholders not merely stand-by or alternative plans, but an actual intent to gain control of Spencer. The Division did not attempt to specify when Agency's intent first became settled and definite, because such a determination was

Spencer II at 12. Having articulated this test, the Division held that Agency had violated Section 3.

I hereby find that Agency, in the person of its sole stockholder, Samuel Frankino intended to gain control of Spencer during the period of time when it owned more than five percent of Spencer's issued and outstanding equity securities. . . . [D]uring the course of its acquisition of Spencer shares, Agency possessed the requisite intent to gain control of Spencer, as such intent is contemplated by Section 3 of the Act.

I also find that Agency did not disclose its intent to gain control of Spencer.

Id. at 25-26. This finding was repeated:

I have already found that Agency possessed intent to control Spencer, prior to November 14, 1981.

id. at 31, and was supported by subsidiary findings.^{23/}

Thus, the constitutionality of Section 3 cannot be adjudicated on the basis of its hypothetical application to alternative or fall-back plans, but must be addressed here on the basis of its application to a bidder who had an actual intent to gain control and who did not disclose that intent.

2. Section 3 Does Not Conflict with the Williams Act.

Section 3 of the Massachusetts statute is intended to govern "creeping tender offers." It is modeled on a provision

^{23/} E.g. "Agency's selection of board nominees can be viewed as an attempt to control Spencer." Id. at 20. "There are other events which also lead to a conclusion that Agency had intentions to gain control of Spencer prior to November 13, 1981" Id. at 24. "[The need for Agency to acquire control] became the only viable option other than being a frozen out minority shareholder." Id. at 25.

would eventually be asked to tender, and to general investors in the market. The first group of shareholders would be robbed of the advantages that full disclosure brings, including the opportunity to bargain for a control premium. As the Division observed in its opinion:

Section 3 exists for the protection of target company shareholders who may consider selling their shares to an offeror. Without the protection afforded such shareholders under Section 3, an offeror could begin acquiring a target's shares, all the time harboring an unstated control intent, then having depleted the market, make a formal tender for the remaining shares at a substantial premium. The unwary and uninformed seller who sold at market would thus have sustained a considerable loss by virtue of not knowing the offeror's ultimate intentions.

Spencer II at 26. See also id. at 12 ("the availability of this type of information is an integral part of a fair and efficient securities market"). These shareholders are also deprived of the complex array of protections afforded by the Williams Act once a tender offer has begun, since federal regulation has not yet been extended to most creeping tender offers. See S-G Securities, Inc. v. Fuqua Investment Co., 466 F.Supp. 1114 (D.Mass. 1978); Copperweld Corp. v. Imetal, 403 F.Supp. 579, 598 (W.D. Pa. 1975) and cases cited. The shareholders who eventually become the objects of the formal tender offer are injured at both stages. Initially, they suffer from the general interference with the proper functioning of the market caused by the concealed creeping tender offer. Later, in the formal tender offer stage, the bidder's surreptitiously

No precedent suggests that state regulation of hybrid takeover attempts is preempted by the Williams Act's failure to address them. Rather, both state and federal courts have upheld state power to extend shareholder protection beyond the context of an actual tender offer. See Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980) (reversing preliminary injunction) (no apparent conflict between the Williams Act and Virginia regulation of creeping tender offers); Sharon Steel Corp. v. Whaland, ____ N.H. ____, 433 A.2d 1250 (1980) (no conflict between the Williams Act and state regulation of takeover bid where no tender offer involved); cf. Kelly ex rel. McLaughlin v. Beta-X Corp., 103 Mich. App. 51, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶71,615 (1981) (limitation of Williams Act to targets large enough to trigger federal registration requirements leaves states free to regulate tender offers for smaller targets).^{26/}

The only burden placed on Agency by Section 3 was the requirement that Agency disclose its actual control intent at a time when it owned more than 5% of Spencer's shares. That burden was imposed by federal law as well. No prior precedent has found a state takeover law preempted where its interference with the offeror's activity is triggered solely by the offeror's

^{26/} Cf. Kewanee Oil Co. v. Bicron Corp. 416 U.S. 470, 482-83 (1974) (States free to afford trade secret protection to unpatentable discoveries); Goldstein v. California, 412 U.S. 546 (1973) (absence of federal copyright protection for recorded performances does not preclude state antipiracy statute).

the remedy set forth in Section 3 of the Massachusetts Act -- the "one-year freeze" -- is in conflict with the remedies available under the Williams Act. Where there has been a pattern of aggressive stock accumulation without disclosure of the purchaser's intent to gain control in violation of section 13(d), followed by an actual tender offer, a federal court has full power under the Williams Act to enjoin the tender offer and any other stock acquisition for a period which can, in many circumstances, last a year or more from the date of the last Section 13(d) violation. Such relief has, for all practical purposes, in fact been ordered and contemplated by federal courts for violations of the Williams Act.

In General Aircraft Corp. v. Lampert, 556 F.2d 90 (1st Cir. 1977), this Court upheld a preliminary injunction barring further stock acquisition until an accurate 13D was filed. In Lampert, no contest for control was imminent. Had such a contest been imminent, this Court noted, relief preventing the violator from taking control -- in that case enjoining the voting of shares -- might be appropriate. Id. at 97. In so commenting, this Court noted that a five-year injunction against voting shares illegally obtained through purchases after a Section 14(e) violation was entered in Chris-Craft Industries v. Piper Aircraft Corp., 480 F.2d 341, 380 (2nd Cir.), cert. denied, 414 U.S. 910 (1973).

In General Steel Industries, Inc. v. Walco National Corp., Fed. Sec. L. Rep. (CCH) ¶98,402 (E.D. Mo. 1981), the

tender offer pending rescission on the independent ground that it was necessary "to deter future violations of law and to prohibit Walco from taking advantage of a position it has illegally obtained." Id. On appeal, the SEC, as amicus, supported the district court's order.^{30/}

Similarly, in Financial General Bankshares, Inc. v. Lance, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,403 (D.D.C. 1978), the court enjoined any further acquisitions of the target's stock and any proxy solicitation until a required rescission period was complete, following a section 13(d) violation. It is clear from a subsequent remedial decision by the court that the injunction and the rescission period remained in place for approximately a year after the Court's liability finding. Financial General Bankshares, Inc. v. Lance, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,798 (D.D.C. 1979), or until a date approximately two years after the Section 13 violations took place.

^{30/} In the appeal (since dismissed by agreement) from the injunction in Walco, the SEC moved for leave to file a memorandum as amicus curiae, urging the Court of Appeals to reaffirm that the broad scope of appropriate equitable relief includes both rescission and divestiture of wrongfully accumulated shares when a purchaser comes within striking distance of control through 13(d) violations. The SEC pointed out that its enforcement resources were far too limited to police every 13(d) filing, and warned that reliance on "mere corrective disclosure will fail to deter violations of the statute and will fail to afford shareholders adequate protection against harm following from the violation." SEC Memorandum at 2 (submitted as Appendix to Spencer's Memorandum in Opposition to Plaintiff's Motion for Preliminary Relief).

remedies available under the Exchange Act erroneously narrows the authority that federal courts have actually exercised. Furthermore, even if there had never been a federal court decision imposing a comparable remedy for violation of the Exchange Act, that would not establish that Congress had declared any national policy precluding the states from prescribing other or broader remedies for violations of comparable state laws. Congress, after all, did not enact any comprehensive scheme of remedies under the Exchange Act. It relied instead on the traditional equity power of the federal courts to fashion remedies appropriate to the circumstances of the cases before them. That is a far cry from authorizing the federal courts to second-guess the judgment of state legislatures.^{31/}

The District Court also ignores the State's legitimate interest in trying to deter the conduct prohibited by Section 3. Deterrence is clearly a permissible governmental interest; and the Massachusetts legislature has the constitutional power to fashion prospective remedies with a view to their deterrent effects. See Rondeau v. Mosinee Paper Co., 422 U.S. 49, 61 (1975). The shareholders who sold to Agency without disclosure of Agency's control intent have obviously been harmed. It is surely permissible for the State to attempt to deter such harm to future groups of shareholders. If nothing more than a

^{31/} Section 28 of The Exchange Act, 15 U.S.C. §78bb provides that "[T]he rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity..."

tender offer price. The normal dynamic, indeed the balance between bidder and target company, present in a conventional tender offer situation, which is the true subject of Section 14 of the Williams Act, is badly perverted in the creeping tender offer. Massachusetts has chosen a remedy designed to forestall the problem; and the federal courts should not restrain the state's efforts.

III. THE DISTRICT COURT ERRED IN ENTERING A PRELIMINARY INJUNCTION BECAUSE IT SHOULD HAVE GRANTED THE MOTIONS TO DISMISS.

The District Court committed error in denying the motions to dismiss and therefore, its entry of a preliminary injunction was error. For its argument on this point, Spencer relies on the memoranda filed in the District Court in support of the motions to dismiss.

III. CONCLUSION.

Spencer urges this Court to vacate the preliminary injunction entered below and thus to permit the Cease and Desist Orders against Agency to go back into effect.

SPENCER COMPANIES, INC.
By its attorneys,

David W. Walker

Sandra L. Lynch

David W. Walker
Sandra L. Lynch
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390

Date: April 23, 1982

MASSACHUSETTS COURTS IN CRISIS:

A MODEL FOR REFORM

The Report of the
Boston Bar Association
State Court Study Committee

June, 1991

PREFACE

Responding to the mounting public and professional concern with the operations of the state courts, I appointed the State Court Study Committee in November 1990 to conduct a critical examination of the management and condition of those courts. The Committee, composed of attorneys with extensive trial experience at every level of the judicial system and a certified public accountant, undertook a study of the structure, organization and management of the Massachusetts court system. This Report presents the findings and recommendations of the Committee.

The study and recommendations are directed to institutional arrangements embracing organization, jurisdiction and procedures governing the courts which are prescribed primarily by the Legislature. However, it is to both the Executive and the Legislative branches of government that most of the major recommendations are addressed, although a number of the recommendations can be implemented by actions of the Justices of the Supreme Judicial Court under their general superintendency powers.

The Committee's comprehensive examination of the state court system has yielded information bearing on measures for fundamental reform. In some quarters the Report may be viewed as a call for radical reform of our court system. The Boston Bar Association is prepared to advocate this position because, as the Committee found, it is critical to implement its proposals now in order to salvage a court system in crisis rather than attempt incremental measures of reform. The proposed reforms are essentially structural and managerial. Both approaches are vital. We respectfully urge the three branches of government, the executive, legislative and judicial, and indeed the public at large to whom access to justice is a most precious right, to appraise these proposals on the merits.

All of us who are concerned with the administration of justice owe an immense debt of gratitude to the members of the State Court Study Committee who have contributed so much of their knowledge, experience and time to this important effort. None was more dedicated to this arduous task than the chairman, R. Robert Popeo, who by his leadership and commitment established a standard of excellence invaluable to the work of this Committee. I wish to offer our thanks to his firm, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, for generously providing its support and resources to the Committee. I also wish to specially acknowledge the extraordinary contribution of Sandra L. Lynch, who chaired the drafting subcommittee. Finally, this project could not have been sustained without the unflagging assistance of staff

members, and I acknowledge with deep appreciation the efforts of our Executive Director, Francis S. Moran, Jr.; Sara Romer, Government Relations Director; and Michael F. Connolly and Joseph C. Hegarty of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo.

John P. Driscoll, Jr.
President
Boston Bar Association

Over the past seven months the Boston Bar Association State Court Study Committee has conducted an extensive analysis of the condition and management of the Massachusetts court system. The Committee focused particularly on the administration, authority and governance of the Trial Court. It is a system characterized by antediluvian management resources and serious lack of accountability. We arrived at the inescapable conclusion: the management of the Massachusetts court system is broken and needs to be fixed.

OVERVIEW

We found judges and court personnel demoralized and often working under conditions like those deplored by Charles Dickens more than a century ago. But we believe the situation is not irreparable. We offer this brief overview of the problems we found and the solutions we think are feasible.

THE PROBLEMS

The problems are fundamental:

1. There is almost no accountability.

No single entity or office has responsibility and authority for management of the courts, so no one can be, or is, held accountable. To the question "Who's in charge here?", the answer is "No one."

2. The legislature and the governor intrude excessively into the management of the courts.

Although the courts are one of the three branches of government intended to be co-equal, in fact the courts have not been treated as such. The legislature exerts pervasive control over the courts through line item budget control and a vast array of legislation that reaches deep into the day to day operation of the courts. As a result, patronage rather than need has often dictated the number and identities of personnel hired. Not infrequently, political factors have kept open unneeded court facilities while those crushed with business are ignored. The governor's direct appointment of various non-judicial court personnel means ultimately that the courts do not control those who should be working for them.

3. The present administrative structure of the courts is too complex and diffuse.

The present Kafkaesque system -- seven different trial court departments, each with its own Chief Administrative Justice,

overlaid by the bureaucracy of the Office of Chief Administrative Justice, underpinned by 69 Presiding Justices of the District and Boston Municipal Courts and supported by a cadre of non-judicial staff which is often neither hired by nor accountable to the judges -- can make accomplishing even the most basic task a nightmare.

4. Support personnel do not report to and frequently do not in fact support the courts.

Courts depend on their support personnel -- clerk magistrates and other clerks, probation officers, court officers, stenographers and others -- to get their work done, but these support personnel too often literally do not work for or report to the judges. In some instances the relationship between the courts and support staff resembles guerilla warfare.

5. The needs of children and families are not adequately served by the existing structure and that situation will only get worse.

Except for certain specialized courts available only in certain locales, the particular needs of children and families are ill met by courts neither trained nor equipped to handle their situations.

6. The mechanisms for judicial accountability are unclear.

Judges must, in a manner consistent with judicial independence, be held accountable, and must be given the tools to effectively manage the courts under their responsibility. The Chief Judges of the courts involved must clearly have the power to discipline judges for abuses, such as some of those described in press reports in 1990. Judges must also be subject to some form of qualitative evaluation.

7. The budget process has little relevance to management objectives.

The present budgetary process provides at best a "maintenance" budget based on prior expenditures plus inflation, and not a realistic assessment of how best to run a system with limited resources.

8. The legislature and governor have ignored the impact on the courts of enactment of new laws, thereby exacerbating the court system's problems.

The explosion in the workload of the courts results directly and primarily from the expansion of rights, crimes and penalties through enacted legislation. Yet the courts have not been given a corresponding increase in resources.

RECOMMENDATIONS

The problems identified are not beyond solutions. We recommend the following as realistic, attainable principles for change.

1. The courts must be given the tools to manage themselves and then they can and must be held accountable.

Courts must have the power to transfer funds, transfer positions and personnel and close courts, powers the legislature traditionally has reserved to itself. The courts must have the power to appoint and remove court personnel, including those traditionally appointed by the governor.

2. The legislature must give up its control over the courts by relinquishing its control over the line items in the courts' budget. The governor must give up his power to appoint non-judicial court personnel.

The historic pattern of systematic intrusion into the management of the courts by the legislature through line item budgeting and by the governor through appointment of court support personnel must end.

3. Ultimate oversight of the management of the court system must be lodged in the Supreme Judicial Court.

Responsibility and accountability for management should ultimately rest in the Supreme Judicial Court, which should, however, not be required to exercise line management.

4. Responsibility for day to day management of the court system must be implemented by units closer to the actual operation of the courts involved.

The Chief Justices of the Trial Court should be vested with broad managerial responsibility and charged with accountability for their departments.

5. The present Office of Chief Administrative Justice should be abolished and a new Administrative Office reporting directly to the Supreme Judicial Court should be created.

A new Administrative Office of the Supreme Judicial Court should handle the irreducible minimum of centralized administrative functions.

6. The Trial Court must be streamlined for management, administration and accountability purposes into fewer operating units.

The present seven departments of the Trial Court should be reduced to three: the Superior Court, the District Court and a new Family and Juvenile Court. Responsibility for management of these courts should be in the Chief Justices of those courts.

7. A new statewide Family and Juvenile Court should be created out of a merger of the present Juvenile Court and some functions of the present Probate and Family Court.

The best way to insure that the special and interrelated needs of children and families not get lost in the system and to enhance the delivery of justice to them is to consolidate matters directly involving them into one statewide court with the needed expertise and services.

8. Complete unification of the Trial Court is not desirable.

The specialized functions served by particular courts are valuable and should be retained. Accordingly, the Land Court should become a Division of the Superior Court and the Housing Court a Division of the District Court. At the same time, non-judicial functions and unnecessary historic artifacts should be eliminated or diverted to appropriate administrative agencies. Accordingly, many of those Probate Court functions not assumed by the new Family and Juvenile Court should be absorbed by the Superior Court or given to non-judicial administrators. The anomaly of the Boston Municipal Court existing as a court separate from the District Courts should be eliminated.

9. The court system must have responsibility for and authority over all support personnel within the court system.

The three Chief Justices of the Trial Court must have control -- including the power to hire, fire, discipline and transfer -- over all non-judicial personnel in the system: all clerk-magistrates and other clerks, probation officers, court officers, court reporters, stenographers, law clerks and others.

10. There must be built in mechanisms to insure accountability.

The three Chief Justices of the Trial Court must be given the power to discipline judges and to do so quickly. The courts must implement methods to evaluate qualitative judicial performance.

11. The budget process must be changed so that it becomes a management tool and expresses management objectives.

Especially in an era of tight public resources, the courts must move from an accretion-to-prior-expenditure method of budget

preparation to a budget which reflects defined needs and objectives.

12. Before enacting new laws the legislature and governor should consider the impact of those laws on the courts.

Civic responsibility requires that if more work for the courts is generated by new legislation, an assessment of the impact on the courts be made for each new law and resources be allocated and funds appropriated to the courts accordingly.

There is a major caveat to these recommendations. Unless adequate funding is provided to the courts, nothing, much less these recommendations, will save the system from collapse.

WHY THE SYSTEM IS IN CRISIS

Virtually every Chief Justice, Associate Justice and user of the court system interviewed by the Committee has agreed that the Massachusetts Trial Court is in crisis. For example, Superior Court Chief Justice Robert L. Steadman has stated:

[T]he Massachusetts courts now sit on the brink of crisis By crisis I mean the courts' inability to discharge [the courts'] mandate of affording to the people of the Commonwealth a fair, impartial, speedy, and inexpensive resolution of their disputes, be they criminal or civil.

These sentiments have been echoed throughout all segments of the Massachusetts judiciary, from the Chief Justice of the Supreme Judicial Court to the Chief Justices and Associate Justices of the Juvenile and District Courts, among others.

A common theme running through the Committee's interviews with more than a hundred judges and others is the inability of the court system to manage and govern itself. Although a separate and equal branch of the Massachusetts government, the judiciary has been shackled by legislation which strips it of any effective ability to govern itself and manage its resources. This lack of ability to manage is seen most clearly when applied to the smallest segments of the court system: the individual courtrooms which deliver the services to the public. The following is a sample of some of the management problems which currently plague the courts of the Commonwealth.

First, a number of the Presiding Justices in the various District Courts across the Commonwealth have no authority to coordinate or control their individual courts. The three most

important people in these courthouses are the Presiding Justice, the Clerk and the Chief Probation Officer. Many times all three of these individuals are appointed for life and, after relationships deteriorate, they refuse to work cooperatively with one another again. For example, the Committee was informed that in one county, one out of every four head clerks simply refuses to work. Since these clerks are appointed by the governor, the Presiding Justices have no authority to compel them to work. Thus, the Presiding Justice is in effect precluded from administering justice. An extreme, but revealing, example, which occurred this past year, involved a dispute between a clerk and a Presiding Justice which resulted in a physical confrontation between court officers and the clerk whereby the clerk was removed from the courthouse in handcuffs by the police.

Similar problems arise from the relationships between superior court judges and clerk's staffs. The problems are exacerbated by the fact that superior court judges rotate through the counties on a regular basis and the clerks and administrative personnel of the various courthouses stay in place. Add to this mix the fact that the Chief Justice of the Superior Court does not have any control over the hiring, firing and discipline of the courtroom personnel, and the situation emerges where no one is in control. One Chief Justice describes the position as a "ceremonial ornament." More than one judge interviewed by the Committee expressed concern over the lack of authority over the non-judicial personnel who work for the court system. Given the heavy caseload of the courts, this situation is intolerable.

Although the National Center for State Courts recommends that the maximum caseload in a trial court session not exceed 1000 cases, the Massachusetts Superior Court sessions routinely handle many more cases than that. To give but a few examples, in Lowell, there are 2400 cases per judge; in Essex, the caseload is 2300 cases per judge; in Worcester, it is 2100; in Barnstable it is 2000. In contrast to the burden on the Superior Court, in the U.S. District Court for Massachusetts, the federal judges handle caseloads ranging from 350 to 525 cases per judge. One study has concluded that the Massachusetts judiciary has the least support staff of any state in the nation.

The Chief Justices of the Trial Court at present have not been given functional managerial authority to run their courts. There is limited authority for the Chief Justice of a department to discipline or otherwise control the non-judicial personnel. The Chief Justice cannot even transfer an uncooperative court clerk or other non-judicial staff member to another court to solve these problems, in part due to collective bargaining agreements and other employment arrangements. In fact, the individual judge presiding over the courtroom many times will not even be able to require the employee to perform the appropriate filings or other administrative services required for the administration of justice.

Just as a Presiding Justice is many times unable to control the non-judicial personnel, the Chief Justice is severely limited in the ability to control the presiding and associate justices. For example, one Trial Court Chief Justice has in the past disciplined various judges for minor infractions, but always with the consent of the perpetrating judge. Although these judges accepted the discipline and the problem was solved for the most part, the Chief Justice, in disciplining these judges, was doing so without explicit authority. Therefore, a judge engaged in an improper activity may ignore the reprimand of the Chief Justice and continue as he or she pleases. The only recourse for the Chief Justice is to transfer the judge to another location.

This problem is compounded when the complaint or complaints pertain to a Presiding Justice in a District Court. Because Presiding Justices obtain their positions based on seniority and retain those positions for life, these judges are essentially uncontrollable. In fact, the Chief Justice of the District Court met with one such judge to inquire about that judge's attendance record and the judge responded to the Chief: "Look, you have no right to call me in. Your job is to get the better jury instructions and better forms. I don't see anything else in the statute which gives you any more than that." Without the proper authority of the Chief Justice over judges and non-judges alike, running an efficient and effective department of the court system is virtually impossible.

Chief Justices also have problems in attempting to transfer non-judicial personnel for reasons other than discipline. Because of the collective bargaining agreements entered into between certain unions and the Office of the Chief Administrative Justice ("OCAJ"), a portion of the staff supposedly serving the judiciary cannot be transferred to another county or court where there may be a much greater need for their particular services. This problem reached heightened proportions in February of 1991 when the Presiding Justice of the Brockton District Court, acting in his capacity as a Regional Justice, was forced to close down the Fall River criminal and civil courts due to a shortage of court officers.

The inability of the departmental Chief Justices to run their respective departments is highlighted by the lack of control over the necessary finances. After the Chief Justice prepares the budget for his or her department, it is submitted to the OCAJ. The departmental Chief Justice usually will not see that budget again. The OCAJ submits the budget to the Executive Office of Administration and Finance and it is then forwarded to the House and Senate Committees, which develop line-item recommendations for each department or court. These line items are subsequently voted on by the legislature. The various court departments then receive their funding in the form of line-item budgeting and they are required to adhere to those line-item allocations, with no ability to transfer funds, positions or

personnel between departments or, in some cases, among courts without legislative approval.

This system forces the Chief Justices to adhere strictly to the legislative line-items, which, in turn, promotes serious inefficiencies. For example, if one court house is extremely light on business and has unused resources and personnel, the Chief Justice is unable to close that court or even transfer funds allocated to it by the line-item budget to a neighboring court in distress. This issue is exacerbated by the fact that the relative budget allocations to various courts may have little relationship to the difference in workloads handled by different courts. This legislative control of the courts' purse string is, in effect, crippling the effective and efficient operation of the system.

Another problem arising out of the legislative control of the court budget is the inability of the individual Chief and Presiding Justices to control their own facilities. In fact, under the current management system the judges themselves are many times precluded from working past a certain hour, often 4:30 p.m., and on weekends, because funding is not in the budget. Thus, this lack of financial flexibility clearly adversely diminishes the administration of justice.

The way the court system prepares the budget also creates problems. The budget requests are developed based solely upon the current year's level of activity and expenditure. Personnel costs are estimated by taking currently authorized staffing at currently authorized pay levels plus anticipated increases. Non-personnel expenditures are budgeted based upon the current year level of expenditure, less clearly non-recurring costs, plus an inflation factor. Thus, the budget that is produced is effectively a maintenance budget. The budget projects expenditure levels in the next fiscal year assuming that everything except cost levels will stay the same. It is not clear that any attempt is made to anticipate changes in external factors (such as caseload) which will require changes in expenditure levels, nor does it appear that any meaningful attempt is made to anticipate management actions which will increase efficiency or otherwise affect expenditure levels. This situation may be a result of a belief on the part of managers within the court system that they do not have the ability to make any real impact upon the allocation of the resources available to the courts.

Further, because the court system does not have a clear process by which management objectives are developed, the budget does not reflect those objectives. An effective budgeting process should be not only a vehicle for estimating spending levels but also a tool for management. The overall objectives for the system should be set and communicated to the operating units, which should then set their own specific objectives with which to accomplish the larger objectives of the system. Only then should the budgeting

process begin, as it is the method by which the court's management objectives are translated into the estimate of the resources necessary to achieve the objectives. The managers in the system should then evaluate spending plans in relation to prioritized objectives to reach a final management plan and spending budget. However, little can be done to improve the effectiveness of the Trial Court's budgeting system until the more basic management deficiencies have been addressed.

The enactment of legislation which increases the work of the courts without a corresponding increase in resources is a major concern. The legislature has passed and the governor has signed numerous laws of recent vintage which have drastically increased the business of the courts. One example is the expansion of mandatory sentencing. Because of the negative effect of a mandatory sentence on plea bargaining, the number of criminal cases which go through a complete trial has substantially increased. Similar judicial-intense legislation which involved no assessment of or provision for the impact on the courts include the consumer protection statute (G.L. c. 93A), abortion petitions for minors (G.L. c. 112, §12S), and petitions to stop cruel and abusive treatment (G.L. c. 209A). The enactment of legislation -- without input from the courts and without proper planning -- simply creates more work and requires more resources from our overworked, overutilized court system.

A different problem arises from the poor physical condition of many court facilities. The facilities in which the courts must work are often deplorable. One judge told of roaming the halls of the courthouse attempting to find a courtroom with adequate heat. The jury simply could not be attentive to the trial in a freezing cold courtroom. During the winter many judges and court personnel in older courthouses must work with their coats on to keep warm. The Boston Juvenile Court is crammed into the same facilities made available to it in 1906 although the workload has increased many times over. Portions of the Boston Municipal Court still operate on direct current thus preventing the use of many electrical devices.

Administrative support is also lacking. Many courts have no computers and are drowning in a sea of paper. Some judges do not even have ready access to law libraries. Judges tell stories of deciding cases, only to wait weeks before their decisions are typed. In frustration some judges type their own decisions or issue handwritten orders, but then cannot get copies made. Once the decisions are typed and copied, they sometimes sit in the clerk's office because there is no money left in the postal line item in the budget to mail the decisions to the parties in the case. Another example is when judges attempt to hear cases after 4:00 p.m., only to find that the papers are unavailable because the clerk's office locks up the docket and file rooms at 4:00 p.m. Files are often lost and lawyers now routinely bring an extra set of papers to court so the judge can have them.

Many judges and court support personnel use ingenuity and wit to maneuver the system so that they can get their jobs done. They are forced to expend time and energy on things that in any normal working environment would happen automatically. The inadequate resources provided to the courts and the chaotic management directly increase the transaction costs to those who use the judicial system. The costs of litigation are driven upward, thus effectively closing down the courts as a place to obtain justice to the many who cannot afford these costs.

Demoralization of the Massachusetts trial court judiciary is a major issue which has resulted from the deterioration of the judicial system. Massachusetts' judges are clearly among the best qualified and most devoted in the entire country. Our Supreme Judicial Court is the oldest continuously sitting, and certainly one of the most prestigious, state appellate courts in the country. The Superior Court -- the great trial court of the Commonwealth -- is considered to be among the finest in the United States. Notwithstanding such high reputations, Massachusetts trial judges suffer from judicial burnout. For example, one Chief Justice informed the Committee that it was not uncommon for bright, dedicated young judges to completely burn out after 10 years of sitting on a district court bench hearing near identical prostitution, sexual assault, petty larceny and drug cases day after day. These judges, plagued with inadequate or sometimes unhelpful staffs and scarce resources in an antiquated and dilapidated building, are responsible for the delivery of justice to the citizens of Massachusetts. It is no wonder the court system is on the brink of disaster.

RECOMMENDED CHANGES IN ORGANIZATION AND ADMINISTRATION OF THE MASSACHUSETTS TRIAL COURT

Assuming adequate funding¹ for the courts, we believe the problems are capable of solution. The solution must start with the recognition that the present confused and irrational "system" for managing the courts is no system at all. There is no head of the system, in either practice or theory, who has the power to manage and who can be held accountable. The Massachusetts courts have not been given the tools to manage themselves. The single most important step that can be taken is to give the courts the legislative power to operate the system without excessive interference and then hold them accountable for the results.

Certain powers now asserted by the legislature, and especially the power over the purse string in all but the most general way, should be transferred to the judiciary. Other powers, now asserted by the governor, to appoint and remove court support personnel should be transferred to the judiciary. The

¹ Recent appropriations have failed to provide the funding which is necessary to operate a truly effective and responsive court system.

judiciary can neither manage nor be held accountable for what it does not control. This transfer of powers to the courts is the key concept underlying the proposed court reform legislation of the Supreme Judicial Court (Senate 718) and we specifically endorse that concept. Historically the legislature has set budgets and restricted expenditures by rigid line items for each aspect of the operation of the court system. The legislature thereby has controlled the number, location, positions and sometimes the personnel employed by the system, as well as the funds to be spent in different areas. Such powers must be transferred to the judiciary itself. We believe the judiciary should be given a total dollar budget, not a line item budget, should have the powers to transfer personnel and positions within the system, to transfer funds² and to close court facilities. It should have the power to appoint and remove court support personnel.

The transfer of budget and managerial powers and responsibilities from the legislature and governor to the courts is the essential first step. But there must also be established a realistic system of management to insure accountability and the efficient use of limited resources. Five basic principles should guide the allocation of power and responsibilities within the court system:

1. The ultimate oversight of the management of the court system must be lodged in the Supreme Judicial Court.
2. The Trial Court must be streamlined, for management, administration and accountability purposes, into fewer operating units.
3. Responsibility for the day to day management of the court system must be decentralized to units closer to the actual operation of the courts involved.
4. The court system must have responsibility for and authority over all of its support personnel and facilities.
5. There must be built-in mechanisms to insure accountability.

We briefly review these principles.

First, we agree with another concept in the Supreme Judicial Court's proposed court reform legislation (Senate 718): the Supreme Judicial Court should be explicitly recognized as having ultimate managerial authority and control over the judicial system. If a corporate analogy were to be used, the Supreme

² Limited transfer powers were provided in Chapter 341 of the Acts of 1990, but much more flexibility is needed.

Judicial Court should be the parent corporation with ultimate control over the Trial Court operating entity subsidiaries.

Second, the Trial Court should be organized into three operating departments: the Superior Court, the District Court, and a new Family and Juvenile Court of the Commonwealth. This would replace the present seven department Trial Court structure.

Third, responsibility for day to day management of the Trial Court, subject to the overall supervision of the Supreme Judicial Court, should be vested in the three departments. The Supreme Judicial Court is and historically has been, far removed from the day-to-day operations of the trial courts. Accountability is best achieved by requiring that management be accomplished at levels close to the courts involved and that the role of the Supreme Judicial Court be one of ultimate oversight, not line management. The details of how this decentralized management would operate are set forth below. There are, however, certain irreducible minimum support functions to the entire court system which should not be decentralized. Those discrete and limited functions should be allocated to a small administrative support organization which operates as an adjunct to and under the direct authority of the Supreme Judicial Court. The present Office of Chief Administrative Justice of the Trial Court would no longer be needed and should be abolished.

Fourth, it is essential that all support personnel, including clerk-magistrates and other clerks, probation officers, secretaries, court officers, stenographers, maintenance personnel and others come under the direct control of the judiciary, since they are key components of the system.

Fifth, as to accountability, the Chief Justices of the Trial Court must have the power to discipline and to create performance evaluation procedures.

THE SUPREME JUDICIAL COURT

The Supreme Judicial Court should have ultimate authority over and responsibility for management of the courts of inferior jurisdiction. The general superintendence powers inherent in the Supreme Judicial Court should be recognized explicitly by legislation. However, direct managerial authority over the Trial Court departments should be vested in the Chief Justices of these courts, who would be appointed by and could be removed by a majority of the Supreme Judicial Court.

Appointment Powers

The Chief Justices of the Superior Court, the District Court and the Family and Juvenile Court departments should be appointed from the respective courts by a majority of the members of the Supreme Judicial Court. Those appointments should be for a five

year term, which could be renewed. We recommend that those Chief Justices of the Trial Court may be removed from those offices only upon a determination by a majority of the Justices of the Supreme Judicial Court that such removal is in the best interests of the administration of justice. We recommend no change in the appointment of the Chief Justice of the Appeals Court.

The sitting Chief Justices of the Superior Court, the District Court³ and the Juvenile Court should continue to serve out their present appointments up to a maximum of a five year term. They would, however, be subject to the removal powers of the Supreme Judicial Court, described above, upon enactment of the enabling legislation. The present respective Chief Justices of the Juvenile Court and the Probate and Family Court should continue to serve until the Supreme Judicial Court has, by order, as described below, created a unified Family and Juvenile Court. Upon unification, the Chief Justice of the Juvenile Court should become Chief Justice of the unified Family and Juvenile Court for the remainder of his five year term. Thereafter, the Chief Justice of that Court should be selected by a majority of the Supreme Judicial Court Justices.

SJC Budget Powers

The responsibility to propose a budget to the legislature for the operation of the entire Massachusetts court system should be vested in the Supreme Judicial Court. That proposed budget, in turn, should be based upon the budgets for their respective courts submitted to the Supreme Judicial Court by the Chief Justices of the Appeals Court and the three Trial Court departments. Once the legislature has appropriated a budget for the Court system, it would be the responsibility of the Supreme Judicial Court to be the final arbiter of allocation of that budget among the various courts in the system and to see that the system lives within the budget. A fuller description of budget recommendations is set forth below.

Powers to Transfer Funds and Personnel

The Supreme Judicial Court would, from the appropriated budget, establish budgets for each of the three Trial Court departments. In the ordinary course, it would be the responsibility of the departmental Chief Justice to live within that budget and to transfer personnel, positions and funds within the departmental budget in order to do so.

³ Should an amendment to the Massachusetts Constitution, Amend. Art. XCVIII, be necessary in order to alter the term of office of the three Chief Justices given life terms by the 1978 legislation, then the Committee recommends that such amendments be made.

In such extraordinary circumstances as would lead to a severe, adverse impact on the administration of justice or public safety, non-consensual transfers of personnel, positions and funds may be made by a majority of justices of the Supreme Judicial Court from one department of the Trial Court to another. This power would be in addition to the disciplinary powers of the Supreme Judicial Court over court personnel.

Administrative Office of the Supreme Judicial Court

The Supreme Judicial Court should establish and appoint an Administrative Office. Its functions would include: collective bargaining, computerization, purchasing, payroll, budget preparation and analysis and such other functions as deemed appropriate by the Supreme Judicial Court. We concur with the recognition in current law of the benefits to a judicial system of a centralized administrative office, see G.L. c. 211B, § 9, and that the functions of such an office are not necessarily judicial in nature. See G.L. c. 211B, § 6.

As to facilities management, upon a declaration by any of the three Chief Justices of the Trial Court closing a facility in his or her department, the Administrative Office should consult with the other departments concerning whether they need to use the facility. The Supreme Judicial Court should have the power, after determining that a facility is not needed by the court system or too costly to maintain, to declare the facility surplus. If necessary, the Massachusetts Constitution, at Pt. 2, C. 1, § 1, Art. 3, should be amended to recognize explicitly in the Supreme Judicial Court the power to close courts. In the interim, we recommend that the Supreme Judicial Court be empowered to close courts upon notice to and approval by the legislature.

The Administrative Office should also assist the Supreme Judicial Court in exercising its rule making powers to eliminate as judicial functions the many functions now performed by judges which could be performed by non-judicial personnel. We can no longer afford to have judges spend their time doing tasks which do not require judicial skills.

Unlike the present OCAJ, the new Administrative Office should be directly under, and responsive to, the Supreme Judicial Court. To that end, its Administrator ought to be appointed by the Supreme Judicial Court, and he or she should serve at the pleasure of the Court. Further, the role of the Administrator, and the office he or she runs, ought to be strictly administrative and should not, as now, have duties and functions which encroach on the judicial aspects of the operation of the system. In short, the Administrative Office should coordinate, regulate, manage and control those functions which can best be handled by a centralized office serving in a support role to a state-wide judicial system, while at the same time avoiding

encroachment upon the judicial and management functions of the Chief Justices of the various departments.

The Administrator should perform functions that are non-judicial in nature and, as such, she or he need not be a judge. Judges are selected for their skills and abilities of a judicial nature, not because they are accomplished at, or even have a desire to revel in, the administration and management of a large enterprise. Consequently, it is expected that the Administrator will be selected from the ranks of persons trained in the special nuances of court administration, having administrative and political skills appropriate for the task. At the same time, the position will be one of importance and should be endowed with stature and compensation fitting of the task.

Communications Function

We observe that communications among the various levels of the court system need substantial improvement. We recommend that the Justices of the Supreme Judicial Court meet on a monthly basis with the three Chief Justices of the Trial Court. We also strongly recommend that the Supreme Judicial Court regularly convene Judicial Conferences of the court system, to which members of the bar should be invited to participate from time to time. The sense of fragmentation and balkanization already prevalent in the system, the poor morale, and the feeling of disenfranchisement require that there be regular and better communications. The judicial branch as a whole needs to operate and support its operation with a much greater sense of common purpose.

THE TRIAL COURT

Reorganization of The Trial Court

The Trial Court should be reorganized from the present seven departments into three: Superior, District, and Family and Juvenile. We believe that the present Trial Court organization into seven court departments does not best serve the interests of the public and reflects history, rather than the needs of our present society. There are many functions now being performed by judges which need not be, and different methods should be used to address those functions. When the core functions of the Trial Court are analyzed, we think it is most sensible to have only three separate courts.

THE SUPERIOR COURT

The Superior Court, presently composed of 76 judges, is our court of general jurisdiction handling both civil and criminal cases. Criminal cases of a more serious nature are usually tried in the Superior Court, as are most civil cases involving substantial sums or issues. Traditionally its judges have

"ridden circuit", or rotated among the counties. The Superior Court should continue as a court of general jurisdiction.

The Superior Court should also encompass the litigation aspects of the Land Court, now a separate court department, as a specialized Division and should assume some of the litigation functions presently performed by the Probate and Family Court.

Land Court Reorganization into Division of Superior Court

The Land Court has statewide jurisdiction and is presently composed of 4 judges and expert support personnel. It sits only in Boston but handles land registration and cases concerning real estate located throughout the Commonwealth. We recommend that the Land Court be reorganized into the Land Court Division of the Superior Court, and come under the direct administrative control of the Chief Justice of the Superior Court. Many of the cases handled by the Land Court involve the dollar value and complexity of matters handed by the Superior Court, making it appropriate to link it with the Superior Court. In addition the Land Court has a specialized staff of engineers and surveyors and has considerable expertise in specialized areas of law, warranting its becoming a specialized Division of the Superior Court. We recommend that the governor continue to make appointments of judges to the Land Court Division, but that cases in the Division could, when appropriate, be heard by other justices in the Superior Court department.

Probate and Family Court Reorganization

The Probate and Family Court has 43 justices, at least one court in each county, and handles adoptions, divorces, family matters, the probate of wills and related issues.

We recommend that the present family-related jurisdiction of the Probate and Family Court be transferred to a new Family and Juvenile Court, as described below. All contested estate, trust and guardianship matters should be transferred to the Superior Court. Consistent with Pt. 2, C. 3, Art. IV of the Massachusetts Constitution, the Superior Court should by rule or other process set times and places for handling of probate of wills and administration of estates. The disposition of all uncontested probate matters should be assigned to a non-judicial section of the courts. In light of our recommendations, we do not see a need for the Probate and Family Court to continue as a separate entity.

States where the Uniform Probate Code is in force and other jurisdictions, including the United Kingdom, do not treat uncontested "probate" matters such as the allowance of wills, appointment of fiduciaries, allowance of their accounts and the like as matters requiring the intervention of a judge. All of these matters can be dealt with by what the Uniform Probate Code

(which the Committee neither endorses nor opposes as such) calls a Registrar. In fact, present Registries of Probate would need to change only in their organization to effectively transition into this role. The Registrar would be an official, preferably appointed in the manner of the clerks of the Superior Court, authorized to perform routine quasi-judicial acts. When a proffered will or account is contested, or when a fiduciary is sought to be removed, or a trustee seeks instructions, to give a few examples, the matter would be assigned for trial in the Superior Court. Eventually, with the expenditure of adequate funds this system can be made to provide for centralized repositories of documents and other information, accessible by electronic means from remote locations as well as on site.

We recommend that the Supreme Judicial Court request the present Chief Justice of the Probate Court to prepare a plan, in consultation with the Chief Justice of the Superior Court, for the transition of these probate functions to the Superior Court and non-judicial officials within a two-year period (to be contemporaneous with the transition period for a new Family and Juvenile Court).

THE DISTRICT COURT

The District Courts are the community based courts of the Commonwealth, and hear criminal cases and smaller dollar value civil cases, care and protection and other cases affecting families, traffic and driving under the influence cases, among others. At present there are 168 district court judges, located in 68 district courts in different communities. Each community district court has a Presiding Justice.

We recommend that the District Court be one of the three Trial Court departments and that it encompass within it both the Boston Municipal Court and, as a specialized Division, the Housing Courts. The District Courts should be explicitly vested with full equity jurisdiction, to resolve any issues which may now exist as to the extent of that jurisdiction. Because the Housing Court has such equity jurisdiction, the merger of the Housing Court into the District Court also requires such empowerment.

Merger of Boston Municipal Court Into District Courts

The Boston Municipal Court functions like a district court but has a territorial jurisdiction limited to a portion of the City of Boston. It has 12 judges. We believe, along with Suffolk University Dean Paul R. Sugarman, that there is no justification for maintenance of the Boston Municipal Court as a court independent of the other district courts and the Boston Municipal Court should be merged into the District Court.

Housing Court Reorganization

The Housing Court is presently composed of 6 judges and various support personnel. It was created in 1972. Its three divisions are located in Boston, Worcester, and Springfield. New divisions of the Housing Court, to open in July 1991, will be located in Taunton and Lawrence. It should become the Housing Court Division of the District Court. As such, it would be subject to the direct administrative control of the Chief Justice of the District Court. The Presiding Justice of the Housing Court Division would be selected by the Chief Justice of the District Court as of the effective date of the reorganization legislation.⁴ Because the Housing Court serves continuing specialized needs, it should continue as a specialized court and judicial appointments to the Housing Court Division would be made by the Governor. The Chief Justice of the District Court would have authority, inter alia, to transfer judges into or out of the Housing Court Division as the needs of justice required.

THE NEW FAMILY AND JUVENILE COURT

Massachusetts was extremely progressive in 1906 when it established the Boston Juvenile Court, recognizing that neither children nor society are well served by treating family and children's issues as indistinct from other matters handled by the court system. Today, the Juvenile Court Department, with 12 judges, has courts in Boston, Worcester, Springfield and Bristol County. Where it does not have territorial jurisdiction, its functions are performed by the District Courts. Since 1906 the laws concerning children and families have increased geometrically, as have the strains on families and children. The number of children who are before the courts -- because they are abused, because they need care, because they have become delinquent, and because their family units have dissolved -- has, sadly, increased. Moreover, we have just begun to realize the profound impact the drug crisis has had on this system.

We strongly recommend that the Commonwealth once again recognize that the needs of children and their families are special and reorganize its courts to address those needs in today's society. We cannot, as a society, afford to lose children in the maze of cases handled by an already over-burdened court system.

The Juvenile Court and certain aspects of the Probate and Family Courts should be merged into a new statewide Family and Juvenile Court. The Supreme Judicial Court should have responsibility for the transition of these courts to a unified court, and that transition should be completed within two years. The present Chief Justices of the Juvenile Court and the Probate and Family Court should continue to serve during the transition

⁴ See footnote 6.

period; thereafter, the Chief Justice of the Juvenile Court should become the Chief Justice of the new unified court for the remainder of a term of five years from the date of enactment of court reform legislation.

The new Family and Juvenile Court would hear the matters which occupy most of the time of the present Probate and Family Court judges, all of the time of the Juvenile Court judges and some of the time of the District Court judges. The new Family and Juvenile Court would have full civil and criminal jurisdiction. This proposed new court would centralize and maximize utilization of the expertise of these specialized judges, and to a considerable extent, that of non-judicial personnel.

Moreover, the many diverse aspects of a matter affecting all members of a family would be addressed within one specialized forum, a forum where the most relevant talent, expertise and connection to extra-judicial resources is available. This would provide greater focus and, therefore, efficiency to the services brought to bear in support of family issues; reduce the problem of conflicting approaches and results in related family matters pending, under the present system, before different courts and judges; permit the Family Service Office mechanism the greatest latitude in assisting in family resolutions, investigation and evaluation, and delivery of extra-judicial services; and result, we hope, in less expensive litigation for parties. The merged court should use clinics and other support services of the type presently used by the Juvenile Court.

The matters⁵ which the Committee would recommend fall into the jurisdiction of the new Family and Juvenile Court would include, but not necessarily be limited to:

- Divorce and related matters (G.L. c. 208)
- Separate Support and related matters (G.L. c. 209)
- Adoption and related matters (G.L. c. 210)
- Abuse prevention and related matters (G.L. c. 209A not exclusive)
- Interstate custody and related matters (G.L. c. 209B)
- Paternity and related matters (G.L. c. 209C)
- Abuse and neglect of children, children in need of services and related matters (G.L. c. 119)
- Juvenile Delinquency (G.L. c. 119)
- Matters relating to special education (G.L. c. 71)
- Guardianship of minors (G.L. c. 201)

⁵ Those areas of the present Probate and Family Court subject matter jurisdiction which the Committee would recommend being transferred elsewhere, include, but are not necessarily limited to: uncontested estate administration matters, will contests, account contests, removal of fiduciaries (except guardians of persons), change of name, non-family land disputes.

Guardianship of the person, including medical emergencies (G.L. c. 201)
Civil commitment proceedings (G.L. c. 201)
General equity (G.L. c. 215, § 6)
Non-support (G.L. c. 119A not inclusive) (excluding criminal)
Uniform Reciprocal Enforcement of Support Act (URESAs) (G.L. c. 273A, §§ 6, 9)

Implementation of this proposal will take time, because of the variety and complexity of the subject matters and because of the typical lengthy life of cases in this area. Certain matters will be relatively easily handled, but others will be more difficult and will try the ingenuity of all concerned. For that reason we believe that a two-year transition period will be necessary.

The location of the Family and Juvenile Courts would be in the present location of the Probate and Family Courts and the Juvenile Courts and as established by the Supreme Judicial Court. However, we recognize the importance of community services as well as the desirability of maximizing local access to the courts, particularly in matters relating to abuse, care and protection of children, and children in need of services. Therefore, we recommend that the Supreme Judicial Court be granted the power to designate portions of District Court buildings to be made available to the Family and Juvenile Court for the purpose of periodic sittings for specifically identified matters. This would also permit non-judicial personnel such as family service officers to travel to District Courts for the purpose of providing services to litigants.

POWERS AND RESPONSIBILITIES OF THE CHIEF JUSTICES OF THE TRIAL COURT

Hand in glove with the need to streamline the Trial Court into fewer and more sensible administrative and managerial units is the need to provide the tools to manage those units. We view the Chief Justices of each of the three Trial Court departments as strong executives whose job it will be to manage that court and who will be held accountable for the results. That person cannot do the job unless control is given to her or him over court support personnel such as clerks, court officers, and others. We have attempted to identify those specific powers which should be vested in the Chief Justices of the Trial Court, subject always to the ultimate oversight of the Supreme Judicial Court.

Each Chief Justice of a Trial Court, under the ultimate authority of the Supreme Judicial Court, must be given the line authority to make all relevant decisions for his or her court. There must be a system where an individual is responsible for all activities of that court. Responsibility necessarily involves

the power to control the court. This is the key to both the problem and the solution. The Chief Justices of the Superior Court, the District Court and the Family and Juvenile Courts should have at least the following powers over their respective courts and personnel.

1. The power to hire, fire, discipline, evaluate and transfer non-judicial personnel, including all clerk-magistrates, clerks, probation officers, court officers, court reporters, law clerks and other support personnel. The Massachusetts Constitution should be amended as needed to eliminate the election and gubernatorial appointment of clerk-magistrates.
2. The power to transfer judges within their respective courts, subject to the judge's right to appeal that transfer to the Supreme Judicial Court.
3. The power to discipline judges within their respective courts as described below.
4. The power to set the days and hours during which their respective courts will be open for business.
5. The power to determine that certain court facilities are not needed by their courts or cannot be operated within the budget, to declare those facilities surplus and turn them over to the authority of the Administrative Office of the Supreme Judicial Court.
6. The power to recommend budgets for their courts to the Supreme Judicial Court.
7. Upon receipt of an appropriated budget sum from the Supreme Judicial Court, the power to administer that budget, including transferring funds and positions among various line items.
8. The power to establish geographic, venue and legal jurisdictional lines for courts within their departments in consultation with the other Chief Justices. This will permit more even and efficient distribution of the workload of the courts.
9. The power to recommend to the Supreme Judicial Court a performance evaluation system for judges and other personnel within their departments.
10. The Chief Justice of the District Court should have the power to appoint the Presiding Justices of the various courts in the District Court and of the specialized Housing Court

Division,⁶ after the expiration of the terms of those Justices. The Chief Justice of the District Court should have the power to remove all such Presiding Justices as of the date of enactment of enabling legislation. All such justices shall serve at the pleasure of the Chief Justice. The Chief Justice shall have the power to define the jobs of the District and Housing Court Presiding Justices.

11. The Chief Justice of the Superior Court should have the power to define administrative regions and to appoint Regional Administrative Justices and the Presiding Justice of the Land Court Division, to serve at her or his pleasure. The present Presiding Justice of the Land Court shall serve out his term, subject to the power of the Chief Justice of the Superior Court to remove him in the best interests of the administration of justice.

12. The Chief Justice should have the responsibility to make comprehensive annual reports to the Supreme Judicial Court, which should be made public, concerning the operation of her or his court.

THE BUDGET PROCESS

A brief description of the present budgetary process may be helpful. Responsibility for the preparation of the Trial Court's annual budget now rests with the OCAJ, which prepares the guidelines and instructions for the individual budgetary units, reviews their submissions, and ensures that the submissions are made in a timely fashion. The OCAJ then consolidates the individual unit budget submissions and adds items for certain centrally controlled functions and services. In the process, trial departmental Chief Justices and the Administrator of Courts may confer with the budgetary unit and cause an amendment of its initial budget requests. However, departmental Chief Justices are not usually consulted again on the budget after the initial submission. In a mechanical sense, the budget system administered by the OCAJ appears to be appropriate from a monetary control aspect.

⁶ The present Chief Justice of the Boston Housing Court, should serve a five year term in that position, subject to the powers of the Chief Justice of the District Court to remove him in the best interests of the administration of justice.

⁷ A flaw that was noted in the existing system centered on the budgeting for services controlled centrally, such as facilities, utilities, capital expenditures, etc. These items are not budgeted by the individual budgetary units, but are budgeted by OCAJ based upon input from the budgetary units as to amounts and types needed.

The budgeting process is designed to fit into the state budget appropriation process in two ways. All budgeting is done on a standard, state-wide chart of accounts. The timing of the process is designed to provide to the governor's office a fully reviewed and reconciled budget by late November, so that the governor can include it with his budget recommendations to the legislature.

For fiscal year 1991-92 the governor has submitted to the legislature a single amount for the Massachusetts court system. In prior years, amounts were submitted for each of the individual spending categories. This year's budget request was for an amount substantially less than the summarized budget prepared by the Administrator of Courts. Historically, the legislature has tended to micro-manage the court system budget process in that it enacts a state budget which may contain amounts for individual spending categories different than those requested. However, in the current fiscal year the Trial Court has received temporary legislative approval to transfer funds among appropriated line items.

Perhaps the most important improvement in the budget process would be the development of a clear set of objectives for the system. These can be both subjectively and objectively measurable criteria, and they should derive from a clear "mission statement" for the system as a whole. That mission statement is best defined by the courts themselves.

Other management steps which need to be taken include the development of a clear organizational structure (each level of which would have its own measurable objectives), and the establishment of clear lines of authority over management matters with true accountability at appropriate levels of the organization. Once these steps have been taken, the budget system can then become the means by which management decides how to allocate resources (i.e., money and people) available to it in a manner that most efficiently meets the court system's overall objectives of fairly administered justice.

It is strongly recommended that the objectives of the system be clearly articulated in the budget submission to the legislature, thus encouraging review of the objectives in conjunction with allocation of the Commonwealth's monetary resources. This would also help the legislature to focus on the fact that changing levels of monetary resources allocated to the court system implies that the achievement of the objectives must be changed as well. Furthermore, the court system management must recognize that, if the legislature changes the level of resources allocated, that must trigger a further management review of the system's objectives to make explicit the change in objectives needed to accommodate the altered level of funding.

Certain basic principles would need to be observed. These include:

1. Each budgetary unit (i.e., each of the three Trial Courts) should have control over all line items in its budget. Central services, such as facilities, personnel, case management, and the like should be charged to each budgetary unit using an internal pricing mechanism so that each budgetary unit will have the capability to make intelligent allocations of its resources in the light of its objectives.

2. The process should have some iterative capability built into it. While this currently appears to exist in the budget process, it should also include the setting of objectives, as the two should be integral parts of the same process. Additionally, the iterative process must be driven by the increasing levels of authority and responsibility culminating in a final budget for the system. The process must focus not only on monetary aspects but also on the objectives which the monetary resources can support (i.e., a high priority for one budgetary unit's objectives may require additional funding, and since funds available to the court system are not infinite, a lower priority objective in another budgetary unit may force a reduction in that unit's budgeted resources).

3. The departmental Chief Justice, who has overall management authority for the unit, should have as much flexibility as possible over transfer and utilization of resources available to allow her or him to meet the needs of his unit as efficiently as possible.

4. There should be a separate planning, budgeting and evaluation capability, reporting to each departmental Chief Justice, responsible for managing the budget process and advising the Chief Justice on the evaluation of the effectiveness and efficiency of each manager in the system in meeting his or her operational and economic objectives. This function should be managerially separate from the central support service functions in order to maintain an appropriate independence of performance evaluation. Ultimately, however, the responsibility for all functions belongs to the Chief Justice who then reports to the line management his findings so that remedial action or rewards for performance can be implemented.

JUDICIAL DISCIPLINE

Important to the principle of accountability and sound management is the need to provide each Chief Justice of a department with limited summary power to discipline judges within that department. Such limited power should be exercised in response to certain incidents of judicial conduct, in or out of court, which require immediate and effective action but do not justify energizing the lengthy and expensive administrative

process of the Commission on Judicial Conduct ("Commission"). It is in the public interest and that of the judiciary that the Chief Justices of the departments have such disciplinary powers so that they may act swiftly and responsively and thereby not only deter any future similar conduct but bolster the image of a sound well-managed judiciary.

The difficulties inherent in providing the Chief Justice of each department with disciplinary powers lie both in defining and limiting the powers given, and in meeting the contentions of favoritism or leniency that invariably arise in the public mind whenever judges discipline other judges. Nonetheless if the Chief Justice is to be held accountable for the management of his or her department, the judges in that department must remain accountable for their conduct to the Chief and be subject to his or her summary disciplinary power.

We therefore recommend that the Chief Justices of each department be given limited summary power to impose immediate discipline on judges in their department, including the power to fine, suspend, transfer, and take other disciplinary action, in certain instances of judicial misconduct which bring the judiciary into disrepute or lowers the public confidence in the judiciary. The precise nature of the conduct for which this summary disciplinary power should be utilized must be developed on a case by case basis in conjunction with the Commission, which has been empowered by statute to act in this area and whose jurisdiction should remain as presently constituted.

This grant of disciplinary power is intended to supplement, not supplant, the power and jurisdiction of the Commission. In general, the institution of proceedings by the Judicial Conduct Commission should involve more serious, substantial or repeated instances of misconduct than those intended to be dealt with by the proposed summary disciplinary power.

The disciplined judge should have the right to appeal the discipline to the Supreme Judicial Court and the actions of the Supreme Judicial Court should be binding upon the Commission. All such departmental disciplines, whether consensual or not, must be reported to the Supreme Judicial Court. Consistent with the provisions of G.L. c. 211C, any such discipline should remain confidential unless the disciplined judge agrees it shall not be confidential or unless the Supreme Judicial Court decides it is in the public interest that it be made public.

JUDICIAL EVALUATION

For judges to be truly accountable, there must be a program by which quality of judicial performance may be evaluated. This program should not focus on statistics or quantitative measures, but on the overall quality of judicial performance and overall excellence in the execution of judicial duties.

In 1989 the Advisory Committee on Judicial Performance Evaluation, appointed by the Supreme Judicial Court and chaired by Justice Wilkins, issued its report and recommendation as to whether a program of judicial performance evaluation should be adopted in Massachusetts. The Advisory Committee, with some dissenting judges, recommended "the adoption of a program for the enhancement of judicial performance in Massachusetts if it can be operated with absolute confidentiality".

The Advisory Committee recommended that a program be developed in each Trial Court department and approved and supervised by a committee of the Supreme Judicial Court. The Advisory Committee recommended that the Chief Justices of each department be instructed to prepare a program for judicial performance enhancement within their department and submit the program to the supervisory committee. That committee was then to report its conclusions about the various programs to the Supreme Judicial Court.

While we endorse these recommendations of the Advisory Committee, we believe that the judiciary must go beyond a program of judicial enhancement to a program of qualitative judicial performance evaluation. We recommend that the Supreme Judicial Court require the Chief Justices of each department to submit a program for qualitative judicial performance evaluation and that the Supreme Judicial Court decide upon and implement an evaluation program.

JUDICIAL IMPACT STATEMENT

The Committee observes that over the last several decades, without correspondingly increasing the number of judges and support to the court system, the legislature and governor have, through the enactment of various laws, including but not limited to expanded mandatory sentencing, greatly increased the workload of the courts. Unlike a private sector corporation, the court system has virtually no control over the amount of work it is required to perform. We believe it is critical, therefore, that before any new law is enacted which will increase the workload of the courts, that that law should include a judicial impact statement to make clear whether that legislation increases the need for resources to the court system, so that appropriate funding may be included.

CENTRALIZED CRIMINAL COURTS

The Committee recommends, as did the Boston Bar Association Task Force on Drugs And The Courts, that the Supreme Judicial Court require creation of a centralized criminal court for Suffolk County. We believe that should this court prove successful it would then become the model for centralized criminal courts in other major urban areas.

In order to understand the reason for the recommendation, a brief description of what is involved is in order. Every year thousands of arrests are made in Suffolk County, particularly in the City of Boston. Each arrest leads to multiple court appearances before the matter is resolved. At each court appearance the accused has a right to be present, and prosecution and defense counsel are necessary. In addition, quite often needed in court will be the police, the victim and other witnesses, reports from the laboratory, probation officers and all of those other officials necessary to make the system run.

Most criminal cases start and end their journey through the court system in the District Court. Some move from District Court probable cause hearings to the Superior Court or arrive at the Superior Court initially because of direct indictments. Additionally, if there is a review of bail set in the District Court, that review proceeding is held in the Superior Court.

In Suffolk County, which encompasses Boston, Chelsea, Revere and Winthrop, there are eight District Courts, as well as the Boston Municipal Court, the Boston Juvenile Court and the Suffolk Superior Court, all of which are located in various buildings sprinkled throughout the County. There are a number of different police agencies as well. The District Attorney's office must send its lawyers to 11 different courts. Similar logistical problems exist for the defense lawyers, the police, other witnesses -- and, most significantly, for the accused, who unlike the others, often cannot travel freely to court. The accused, in the custody of the Sheriff's Department, must be delivered under controlled circumstances from the jail to the particular court, kept under guard, and returned to the appropriate jail after the proceeding is concluded. The logistical problems for the Sheriff's Office, and the costs involved, are immense.

The location of the Public Health Drug Analysis Laboratory which serves most of the drug related cases in Suffolk County causes problems. Situated in Jamaica Plain, it is not near any of the busiest courts. All too frequently, after all of the participants -- police, prosecutors, defense counsel, probation officers and the defendant -- are assembled in court, it is learned that the report from the laboratory is not ready or not available. Everyone is then sent home or back to jail, only to be reassembled on another day.

Another cause for continuances is the lack of availability of judges or support personnel in the particular court on a particular day. Yet another, and all too common, reason for continuance is that busy police officers are often needed in more than one District Court on different cases on the same day. These numerous continuances greatly undermine public confidence in the system, as victims and ordinary citizen witnesses are burdened by returning to court again and again and again on the same case.

A solution to this chaotic, inefficient, and wasteful process is the creation in Suffolk County of a single centralized criminal court in one building in a location convenient to the jail for pre-trial detainees. The soon-to-be vacated Registry of Motor Vehicles building on Nashua Street, next to the new jail and just a few short blocks from the District Attorney's office in Pemberton Square, seems an ideal site. An enclosed ramp can be built from the jail to the new courthouse so that the Sheriff's Department can simply walk the prisoners to court, thus saving immense costs for transportation, personnel and safety.

The courthouse should include sessions from the full array of courts -- Superior, District and Family and Juvenile -- complete with judges, clerks, stenographers, probation officers and other support staff who can be moved about the building on an as-needed basis. Probation records could be located in the same facility. Additionally, it would be advantageous to have the Drug Analysis Laboratory located in the same building so that the necessary scientific evidence, and the witnesses who accompany it, would be readily available.

With such a centralized facility the coordination of all aspects of the criminal justice process would be maximized at a significant monetary savings and, of even more importance, a much greater ability to provide swift, fair and certain justice to all involved.

THE STATE COURT STUDY COMMITTEE ITSELF

In December, 1990, Boston Bar Association President John P. Driscoll, Jr. appointed twelve experienced attorneys and one certified public accountant to serve as members of the Boston Bar Association State Court Study Committee. Additionally, six attorneys were asked to serve ex-officio on the Committee.

The Committee is chaired by R. Robert Popeo, of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. The other members of the Committee are: BBA past-President Edward J. Barshak of Sugarman, Rogers, Barshak & Cohen; Ruth R. Budd of Hemenway & Barnes; Thomas E. Cargill, Jr. of Cargill & Associates; Harvey A. Creem of Coopers & Lybrand; Thomas E. Dwyer, Jr., of Dwyer, Collora & Gertner; Jerome P. Facher of Hale and Dorr; John M. Harrington, Jr. of Ropes & Gray; BBA Vice-President Sandra L. Lynch of Foley, Hoag and Eliot; BBA past-President Rudolph F. Pierce of Goulston & Storrs; BBA past-President Richard W. Renahan of Hill & Barlow; Martin R. Rosenthal of the Criminal Justice Institute of Harvard Law School; and Edward A. Schwartz, President of the New England Law Foundation and former General Counsel to Digital Equipment Corporation.

Appointed ex-officio to the Committee were Joan A. Lukey of Hale and Dorr, Chair of the BBA Litigation Section; William M. Levine of Lee, Levine & Bowser, Chair of the BBA Family Law

Section; John K. Markey of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., Chair of the BBA Criminal Law Section; Allan van Gestel of Goodwin, Procter & Hoar, Chair of the BBA Administration of Justice Section; and Leslee Klein of Cambridgeport Problem Center and Nicholas U. Sommerfeld of Gaston and Snow, Co-Chairs of the BBA Delivery of Legal Services Section. The Committee members collectively have more than 500 years of first hand experience with the Massachusetts court system. The Committee also gratefully acknowledges the assistance of Francis S. Moran, Jr., BBA Executive Director; Sara Romer, BBA Government Relations Director; Michael F. Connolly and Joseph C. Hegarty of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; and William B. Ford of Coopers & Lybrand.

Together, the members of the Committee have contributed the resources of their respective law and accounting firms on behalf of the study. Moreover, the Committee members individually have expended approximately 3,000 volunteer hours on Committee work, including research, analysis and actual interviews with numerous Massachusetts state court judges, attorneys and other users of the court system.

The Committee has had the benefit of numerous reports and studies on court administration as well as the recent reports relating to the court systems in other states including New York, Arizona, Alabama, and Connecticut. These sources include materials prepared by the National Center for State Courts, National Judicial College and American Bar Association. In addition, the Committee has reviewed numerous law review articles and other materials relating to the efficient management and organization of court systems.

Of special note, the Committee is particularly grateful for the analyses and findings set forth in a number of studies specifically relating to the Massachusetts court system: "Report on the State of the Massachusetts Courts," by the Governor's Select Committee on Judicial Needs (December 1976); "An Analysis of the Suffolk County Civil Clerical Support System" by the National Center for the State Courts (December 1989); "Record Management Practices in the Suffolk County Civil Clerk-Magistrate's Office," by The National Center for State Courts (September 1990); the reports of the Boston Bar Association Task Force on Drugs and the Courts (May 1989 and March 1990); the reports on the Massachusetts Trial Court (1976-1990); "Agenda 90: Modernizing the Judiciary" by the Senate Committee on Ways and Means (1987); the "Report of the Governor's/Massachusetts Bar Association's Commission on The Unmet Needs of Children" (1987); and "Justice Endangered: A Management Study of the Massachusetts Trial Court," prepared for the Coalition for the Courts by Harbridge House, Inc. (April 1991).

Finally, the most significant contributions to this study came from the written reports and interviews with the judicial

and non-judicial personnel of the Massachusetts Trial Court. The Committee has conducted extensive interviews with the Chief Justices of the Supreme Judicial Court, Appeals Court and many of the Trial Court departments, as well as with a number of the associate justices from the various trial court departments. The Committee has interviewed in excess of 100 judges and received written materials from many more. In addition, the Committee has contacted and interviewed numerous non-judicial personnel, attorneys and other users of the court system. Primarily through the information gleaned through these interviews and written materials, as well as the extensive personal experiences of the Committee members, the Committee has unanimously come to the findings and recommendations set forth in this report.

The Committee is also preparing legislation embodying the recommendations contained in this report.

R. Robert Popeo
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.

Edward J. Barshak
Sugarman, Rogers, Barshak &
Cohen

Ruth R. Budd
Hemenway & Barnes

Thomas E. Cargill, Jr.
Cargill & Associates

Harvey A. Creem
Coopers & Lybrand

Thomas E. Dwyer, Jr.
Dwyer, Collora & Gertner

John P. Driscoll, Jr.
Nutter, McClennen & Fish

Jerome P. Facher
Hale and Dorr

John M. Harrington, Jr.
Ropes & Gray

Leslee Klein
Cambridgeport Problem Center

William M. Levine
Lee, Levine & Bowser

Joan A. Lukey
Hale and Dorr

Sandra L. Lynch
Foley, Hoag & Eliot

John K. Markey
Mintz, Levin, Cohn, Ferris, Glovsky
& Popeo, P.C.

Rudolph F. Pierce
Goulston & Storrs

Richard W. Renehan
Hill & Barlow

Martin R. Rosenthal
Criminal Justice Institute
Harvard Law School

Edward A. Schwartz, President
New England Law Foundation

Nicholas U. Sommerfeld
Gaston and Snow

Allan van Gestel
Goodwin, Procter & Hoar

Public Institution Litigation in the First Circuit

BY SANDRA L. LYNCH†

Introduction

From busing in Boston to the building of new jails to cleaning up Boston Harbor, federal courts have shaped the lives of Massachusetts citizens in significant ways. How and why did our federal courts become so involved? This article discusses these two questions and describes some of the major cases.

A prophetic footnote in a Depression-era Supreme Court opinion foretold greater involvement by federal courts when normal political processes had failed to protect certain groups:

[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.¹

Increasingly, the federal courts have protected the rights of individuals against government institutions and have forced the government to comply with the law.

Numerous commentators have attempted to characterize the involvement of federal courts in institutional change. It has been said that until the 1960s, the federal courts had rarely told either federal or state governmental bodies what they must do.²

In the past two decades, however, civil litigation increasingly has involved new procedural and remedial characteristics. It is said that litigation has shifted from a private, two-sided, remedially restricted system to a public, multi-polar, flexible forum for resolving issues of public law and social grievance.³

Courts now issue affirmative injunctions requiring structural changes in government institutions. "[A]n ab-

lication in one branch impels a correlative performance in another.... Here is a new, affirmative conception of checks and balances." "When the other branches of government do not act, and when rights have been found to be violated, the courts have "no alternative but to take a more active role in formulating appropriate relief." "Rights without remedies are hollow rights."⁴

Critics have branded this correlative duty of action "judicial activism," a purported usurping of powers that are constitutionally reserved to the democratically elected branches. In truth, public sector litigation at times has required courts to exercise what have traditionally been viewed as executive or legislative functions. In promulgating a decree, the court makes a "legislative" choice to expend funds on the particular remedy, and not on competing concerns.⁵ Similarly, a court may become involved in administrative details: Where, for example, should the tainted sludge from the harbor be put?

However, these criticisms insufficiently appreciate the fact that other branches of government may defer, either intentionally or ineptly, hard or unpopular choices to the courts. For example, the Legislature may have believed that there was no constituency for funding prisons and jails, and so confinement conditions were allowed to deteriorate until they offended constitutional standards. Boston Harbor became the toilet for greater Boston's sewage because of the inability of local communities and the state to work out alternatives. The failure of the legislative and executive branches to address public problems often causes public sector litigation to be brought.

†Ms. Lynch is a partner at Foley, Hoag & Eliot. From 1973 to 1978 she was General Counsel of the Massachusetts Department of Education and a counsel in the Boston school desegregation case. Grateful acknowledgment is given to Victoria Silbey and Bradford Swing for their assistance with this article.

1. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

2. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266 (1983) (hereinafter, Horowitz, *Institutions*).

3. Eisenberg and Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980). The article notes that decrees are often administrative, affirmative and prospective, and reduce considerably the defendant's discretion in managing the institution. This necessitates continued judicial involvement in the running of an institution, and the implementing or, if necessary, modifying of a decree. The court also monitors compliance with a decree and issues warnings to and sanctions against recalcitrant government bodies. Thus, adjudication becomes part of the larger sys-

tem of public regulation, and the judge becomes an administrator of remedial compliance. *Id.*

4. Horowitz, *Institutions*, *supra* note 2, at 1286. There are, of course, cases which defendants, intransigent institutions or government officials, would like to lose. For example, a judicial decree may be a weapon used against the legislature to augment financial appropriations in a certain area. *Id.* at 1294.

5. Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 274 (1981).

6. *Id.*

7. Blurring of the lines of demarcation between judicial and legislative responsibilities does not occur only in the context discussed in this article. The United States Supreme Court decision in *City of Richmond v. Croson*, 109 S.Ct. 706 (1989), may be viewed as having an underlying premise that a legislative body may enact otherwise impermissible race-based remedial laws provided it acts in a judicial fashion by making specific evidentiary findings of discrimination and narrowly tailors the remedy. Ironically, the judicial model has thus become the model for legislative action.

The onset of public institution litigation has spawned complex concerns. Critics have decried judicial activism. Some critics have sought to impose judicial restraint through searches for the "original intent" of the Constitution. But charges of judicial overreaching often are unfair. Indeed, the decisions of the courts of the First Circuit provide lessons of a different sort: of abdication of responsibility by other branches of government; of hard decisions being forced onto the courts because elected officials preferred it that way; and of the difficulty facing any court in trying to achieve an effective remedy that can overcome bureaucratic resistance or inertia.

During the last several decades, federal courts have been integrally involved in the public institutions of the Commonwealth of Massachusetts and of the City of Boston. They have been called upon to resolve disputes about the hiring of minority police and firefighters; to improve deplorable conditions in mental health facilities; to relieve overcrowded jails; to desegregate the Boston public schools; to ensure fair housing; and to clean up the open sewer that was Boston Harbor.⁸ Reluctant at times to intervene before the public institutions have been given every chance to resolve these problems, federal judges, both trial and appellate, have acted in these cases with restraint and courage, with ingenuity and savvy, and have created a legacy, not only of expanded federal remedial law, but also of better conditions for the citizens of Massachusetts. The following areas illustrate how the federal courts have improved the quality of life in this Commonwealth.

Public Employment

Federal court orders have significantly shaped the hiring practices for both police and firefighters in Massachusetts communities. As Judge Coffin noted in the police-hiring case, "[T]his case epitomizes the classic, clumsy and yet unavoidable attempt to rectify, through the courts, long standing though not consciously intended discriminatory selection policies in public employment in a northern community."⁹

The plaintiffs in *Castro v. Beecher* challenged under 42 U.S.C. § 1981 and § 1983 the police hiring and recruiting practices of the Boston Police Department, the Directors of Civil Service and the Massachusetts Civil Service Commission. The plaintiffs were six black and two Hispanic-surnamed Boston residents who alleged discrimination in the dissemination of information about

employment opportunities, in the use of an irrelevant education requirement, in the one-hundred yard swimming requirement, in a five-foot seven-inch minimum height requirement, and in the imposition of a discriminatory written examination.¹⁰

United States District Judge Charles E. Wyzanski, Jr., found that of those applicants taking the 1970 civil service entrance examination, the pass rate was 65% for whites, 25% for blacks and 10% for Hispanics.¹¹ The court found that the 1970 examinations were not significantly job related and gave a discriminatory advantage to white persons whose primary language was English and who had been trained and educated in the mainstream of American society.¹² Judge Wyzanski ruled that the entrance examination was not "rationally or empirically significantly related to the capacity of applicants to be trained for or to perform a policeman's job."¹³ Although Judge Wyzanski did not find any evidence of discriminatory intent, he held that evidence of intent was not necessary to prove an equal protection violation.¹⁴ The court enjoined issuance of certificates of eligibility based on these examinations or any examination which was not significantly job-related. Finally, the court laid down guidelines which would prima facie accredit new entrance examinations as non-discriminatory and job-related. The district court did not, however, order preferential hiring for Hispanic-surnamed and black applicants.

On appeal, the First Circuit affirmed the district court's ruling that there was an equal protection violation, noting that there was a significant discrepancy between the black population of Boston in 1970 (16.3%) and the black population on the police force (2.3%).¹⁵ It upheld the order to develop a new examination and remanded the case, instructing the district court to create a preferential hiring plan in order to remedy the continuing effects of past discrimination.

On remand, the district court voiced its frustration with the public agencies. When the Massachusetts Civil Service Commission, despite the plain warning from the district and appellate courts, persisted in over-emphasizing "paper and pencil capacities," Judge Wyzanski wrote that the problem in Massachusetts was obvious. When faced by an "obdurate" agency,

[t]he only practical alternative, as a last resort, is for this court to act in this situation the way courts have acted with respect to obdurate local school boards which would not in the spirit and letter of the Constitution carry out the Constitutional

8. The roles of the state judiciary in such public institution cases, as well as the federal judges elsewhere in the First Circuit, are worthy of comment, but those topics lie beyond the scope of this article.

9. *Castro v. Beecher*, 459 F.2d 725, 727 (1st Cir. 1972).

10. *Castro v. Beecher*, 334 F. Supp. 930, 934-35 (D. Mass. 1971), *aff'd*, 459 F.2d 725 (1st Cir. 1972).

11. *Id.*, 334 F. Supp. at 942.

12. *Id.* at 943-44.

13. *Id.* at 942. The court upheld as significantly job related the five-

foot seven-inch minimum height requirement, the use of a one-hundred yard swimming test and the requirement of a high school diploma or equivalent. It also ruled that the recruiting had been conducted adequately. *Id.* at 938-41.

14. *Id.* at 935. This case preceded *Washington v. Davis*, 426 U.S. 229 (1976), which, in circumstances similar to *Castro*, held that the use of a police entrance exam with a discriminatory impact could not be held to violate equal protection absent a showing of discriminatory intent.

15. 459 F.2d at 728.

command to give due process and equal protection to children who were on racial grounds denied educational opportunity. In those cases courts have appointed receivers.... But, after all, that is what federal courts have often done when other forms of administering justice under law have failed.... Enough, and more than enough, time has been allowed to the local authorities to set their houses in order.¹⁶

The district court ultimately went beyond the scope of its original decision and enforced a consent decree which called for the preferential hiring of minorities and the maintenance of separate civil service lists.¹⁷ The consent decree has retained its basic structure, and is still in force under the supervision of United States District Judge Andrew A. Caffrey.

In December 1975, the decree specified only two groups from which future certifications of eligibility would be made. These groups provided for a one-to-one (minority to non-minority) ratio in Boston and Springfield and a one-to-three (minority to non-minority) ratio elsewhere.¹⁸ In 1981, Judge Caffrey amended the decree for the police force and the fire department because of a new and unforeseen condition, that is, the approval of Proposition 2½, which was expected to entail a significant number of firings in both forces.¹⁹ The court held that it possessed the power to amend the decree where a refusal to do so would eradicate progress made with respect to minority hiring. The amended decree forbids the Police Commissioner from reducing the number of minorities below a certain percentage.²⁰ This amendment overrode a state statute which provides for a strict seniority system in layoffs.²¹ The court of appeals affirmed.²²

The federal court's involvement has not ended. In September 1989, white plaintiffs who had passed examinations and had been passed over for Boston police and Boston firefighter positions in favor of black and Hispanic-surnamed candidates sued city officials in fed-

eral court, asserting that the consent decree impermissibly discriminated against white persons by making selection decisions based on race.²³

Institutions for the Mentally Retarded

In 1972, a class action suit was brought on behalf of mentally retarded residents of the Belchertown State School. The plaintiffs alleged that conditions at the school were so inadequate that they violated the residents' constitutional right of due process and statutory right to treatment.²⁴ As in the hiring cases, federal court involvement in this lawsuit challenging the conditions at an institution for the mentally retarded included the enforcement of a consent decree. But unlike the hiring cases, the consent decree in the mental retardation cases was not preceded by a finding of liability. At least initially, the public institution litigation in this case fostered a cooperative effort among the legislative, executive and judicial branches of government.

Soon after the suit was brought, United States District Court Judge Joseph L. Tauro, accompanied by various state and federal officials, took a view of conditions at Belchertown.²⁵ As a result of what officials saw, Governor Dukakis and then Attorney General Francis X. Bellotti "made a judgment that the level of care did not reach [a] constitutional level of care; and, as a result, concluded that 'the case would be indefensible.'"²⁶

The state defendants worked hard with the plaintiffs and the court to fashion comprehensive remedial programs for the institutions. In July 1977, at an open court hearing, various state officials, including Governor Dukakis and then Attorney General Bellotti, signed interim consent decrees. At that hearing, then-Speaker of the Massachusetts House of Representatives, Thomas McGee, responded to the court's invitation to speak by stating, "[W]e are committed to the job that you want done; the people involved want done, and we'll do it."²⁷

16. Opinion of March 22, 1973, printed in *Castro v. Beecher*, 365 F. Supp. 655, 666 (D. Mass. 1973).

17. A similar remedial decree was imposed after a liability finding with respect to hiring practices in the fire departments of Boston and other cities and towns. *NAACP v. Beecher*, 371 F. Supp. 507 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). United States District Judge Frank H. Freedman held that the use of a civil service entrance examination in the hiring process violated title VII rather than the fourteenth amendment. 371 F. Supp. at 509.

18. *Castro v. Beecher*, Consent Decree, December 1975, ¶¶21-23.

19. *Castro v. Beecher*, 522 F. Supp. 873, 877 (D. Mass. 1981), *aff'd sub nom.*, *NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *vacated as moot*, 461 U.S. 477 (1983).

20. *Id.*

21. G.L.M. c.31, §99.

22. *NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982) [subsequent history omitted].

23. *Fagan v. City of Boston*, No. 89-1076-N (D. Mass.), and *Mackin v. City of Boston*, No. 89-2025-N (D. Mass.). These suits may have been prompted by the recent United States Supreme Court ruling that white firefighters in Birmingham, Alabama, could challenge the al-

legedly discriminatory promotional practices of that city despite the fact that the city's promotional decisions were made in accordance with, and in reliance on, a consent decree entered in United States District Court, and even though the white firefighters had failed to intervene in this earlier employment discrimination action. *Martin v. Wilks*, 109 S. Ct. 2180, 2188 (1989).

24. The complaints alleged deprivation of the plaintiffs' due process rights to minimally adequate care and treatment, and their rights under certain federal and state statutes, including §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, and G.L.M. c.19 and c.123. During the next three years, actions were brought on behalf of residents at four other state institutions. In each suit, various state officials with responsibility for the operations of institutions for the retarded were named as defendants. By an order of the court, the cases were consolidated. The history of the cases is set forth in *Ricci v. Okin*, 537 F. Supp. 817 (D. Mass. 1982).

25. Views were later taken at the other institutions as well.

26. *Massachusetts Ass'n for Retarded Citizens v. King*, 668 F.2d 602, 604 (1st Cir. 1981) [quoting then Attorney General Francis X. Bellotti].

27. *Ricci v. Okin*, 537 F. Supp. at 820.

However, it was not until 1978—after a year of “prolonged negotiations,” “innumerable meetings” and skillful steps by the trial judge—that the final personnel decree setting an acceptable level of staffing was signed.²⁸ According to Judge Tauro, “The final version of the decree was the culmination of a thorough, complex, and cooperative process.”²⁹ In the decree, approved by the court in August 1978,³⁰ the defendants agreed to comply with the personnel standards for care and treatment set forth in title XIX of the Social Security Act.³¹

With the change in administration from Governor Dukakis to Governor King, it became necessary for the court to become involved in enforcing the terms of the decree. In June 1981, the defendants notified the court that they intended to decrease the staffing level at the state schools by 408 positions. The plaintiffs would not agree to the planned reductions. Although the personnel decree provided that the parties bring such disagreement to the court’s attention for resolution, the defendants stated that they did not believe the court’s approval was required before the adjustments could be instituted. The court rejected this contention, however, and denied the defendants’ requested staff cut. It stated that such a cut would violate the “clear and unambiguous” requirement of the personnel decree that the defendants comply with federal statutory and regulatory standards.³² The court did, however, permit a cut of 84.5 positions, and specified exactly which positions could be cut.³³ In doing so, the court affirmed the role it had assumed in protecting the mentally retarded against the failings of the political process:

Today’s fiscal problems do not alter the fact that these decrees are essential to insure that there will be no return to the “indefensible” conditions of the past. The retarded have no potent political constituency. They must rely on the good will of those of us more fortunate than they, and the Constitution which controls the manner in which all of us must meet our varied responsibilities.³⁴

Finally, in 1986, the court observed that “[t]he filth, squalor and unsafe conditions that once characterized these institutions no longer exists,”³⁵ and it concluded that it could withdraw from extended involvement with institutions for the mentally retarded.

As a condition of the withdrawal, it ordered the governor to establish an Office of Quality Assurance to “en-

sure that all class members receive the services to which they are entitled under the consent decrees, and that the Commonwealth comply with all federal and state laws, rules, regulations and standards that are applicable to these class members.”³⁶

Charles Street Jail

In 1973, the federal court was drawn into remedying conditions at the Charles Street Jail.³⁷ Charles Street Jail inmates sued the Sheriff of Suffolk County, the master of the jail, the Commissioner of Correction, the mayor, and Boston City Council members, contending that the conditions of the jail contravened the eighth and fourteenth amendments to the Constitution.³⁸

The Charles Street Jail has been used continuously since 1848.³⁹ It originally was built to house one inmate per cell, but by the mid-1970s two inmates were regularly housed per cell.⁴⁰ Most inmates at the time of the suit (85%) were pretrial detainees who had not been convicted of the crime for which they had been arrested.⁴¹ After viewing the jail during an overnight stay, United States District Judge W. Arthur Garrity, Jr., called the conditions in the jail a “soul-chilling inhumanity.”⁴² Judge Garrity ruled that conditions at the Charles Street Jail were unconstitutional, in that they violated the presumption of innocence and the detainees’ right of due process.⁴³

Judge Garrity’s decision confronted directly the traditional “hands-off” doctrine which had prohibited federal courts from interfering with the operation of state and county correctional institutions.⁴⁴ The court permanently enjoined the defendants from housing two inmates in a cell after November 30, 1973 and from housing any inmate awaiting trial at the Charles Street Jail after June 30, 1976.⁴⁵ The court also ordered that visiting hours be expanded, that detainees be allowed out of the cell for four hours each day, that physical examinations be available, and that progress reports be filed by the defendants.⁴⁶

The defendants did not appeal. However, the district court postponed the order prohibiting incarceration of pretrial detainees at Charles Street Jail, first until July 1, 1977, and then until November 1, 1977, because the defendants could not arrange replacement facilities.⁴⁷ On November 2, 1977, the district court ordered the City

28. *Id.* at 821.

29. *Id.*

30. *Id.*

31. 42 U.S.C. §1396a.

32. 537 F. Supp. at 829.

33. *Id.* at 837–38.

34. *Id.* at 836.

35. *Ricci v. Callahan*, 646 F. Supp. 378, 379 (D. Mass. 1986).

36. *Id.* at 381.

37. *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 685 (D. Mass. 1973), *aff’d*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974).

38. 360 F. Supp. 676.

39. *Id.* at 679.

40. *Id.*

41. *Id.* at 685.

42. *Id.* at 684.

43. *Id.* at 686.

44. In 1972, the Supreme Court had highlighted a new principle: “[F]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all ‘persons’ which include prisoners.” *Cruz v. Beto*, 405 U.S. 319, 321 (1972), *quoted in Inmates of Suffolk County*, 360 F. Supp. at 684.

45. 360 F. Supp. at 691.

46. *Id.*

47. See *Inmates of Suffolk County Jail v. Kearney*, 573 F.2d 98, 99 (1st Cir. 1978).

Council to appropriate funds to establish a "constitutionally adequate pretrial detention center" and delayed closing Charles Street Jail until five weeks after the appropriation by the Council.⁴⁸ The City Council appealed and the court of appeals stayed the order.⁴⁹

The City Council finally voted on March 1, 1978, to appropriate \$10 million to correct constitutional deficiencies at the Charles Street Jail,⁵⁰ but by then it was too late. The Sheriff of Suffolk County, the master of the jail and the Commissioner of Correction had already filed a joint report declaring that a new jail should be constructed, and they had established a process for designing a new facility which would regularly report to and receive reports from the plaintiffs. The court of appeals called the City Council's vote to appropriate \$10 million "an ostrich-like wish that the necessity to settle on a site and make available adequate funds would disappear."⁵¹ The court termed the Council's five-year delay to secure basic constitutional rights "unconscionable" and affirmed the order prohibiting the incarceration of pretrial detainees at Charles Street Jail.⁵² The court held that after October 2, 1978, the Charles Street Jail would be closed to any pretrial detainee.⁵³ The court left open the possibility that it would withdraw the order if the City Council outlined a full plan for development of a new facility, including the site, the funding and the target dates for completion of construction, which plan was to be consistent with constitutional standards.⁵⁴

Such a plan was developed and the old jail remained open while a new one was built. Evidently, it was the court's threat of actually closing the jail that spurred the government, after five years of litigation, to take unpopular action.⁵⁵

In the years it took to build the new jail, scheduled to open in early 1990, Charles Street became more and

more crowded, perhaps a result of the mandatory sentencing laws.⁵⁶ Under a "no double-bunking" order, the sheriff has been forced to transport extra Charles Street prisoners to other county jails, often hours away, where they are double-bunked. At times, using an emergency procedure, a superior court judge has been required to decide which inmates to release. Some have thought that the lack of space at the jail has had an adverse effect on law enforcement, particularly in Boston's war against drugs.⁵⁷

Construction of the new jail facility has not ended the federal court's involvement.⁵⁸ As of the date of this article, the new jail is not even completed, but predictions are that it may be too small, and that the parties may have to return to court to determine if the no double-bunking order will govern the new jail.⁵⁹

Boston School Desegregation

The Boston school desegregation case may be the most visible example of both the deficiencies of political processes and the federal court's deep involvement in a public institution. In 1972, parents of black school children, appalled by the conditions of their inner-city schools, sought to remedy violations of their constitutional right of equal protection by bringing suit in federal court. The defendants were the Boston School Committee, the Superintendent of Schools and the Massachusetts Board of Education. Later, the Home and School Association and the Massachusetts Teachers Association intervened.⁶⁰

United States District Judge W. Arthur Garrity, Jr., found that the Boston School Committee had "knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and [had] intentionally brought about and

48. *Id.* at 99.

49. *Id.* at 98-99.

50. *Id.* at 99.

51. *Id.* at 100.

52. *Id.*

53. *Id.*

54. *Id.* at 101.

55. See generally Coffin, *The Frontier of Remedies: A Call For Exploration*, 67 CALIF. L. REV. 983 (1979).

56. See, e.g., G.L.M. c.94C, §32E.

57. *Drugs and Justice. A System Abandoned*, Boston Bar Association Report of Task Force on Drugs and the Courts, p. 6 (1989). "The result was bizarre. People charged with trafficking cocaine, an illegal drug, were eligible for release to halfway houses, and in some instances to the street, because there wasn't enough room at the Charles Street Jail, while people charged with operating under the influence of an illegal drug were kept locked up." *Id.*

58. Enforcement of the order to construct a new jail has not been the exclusive province of the federal courts. Since 1984, the Supreme Judicial Court for Suffolk County, through Justice (now Chief Justice) Paul J. Liacos, sitting as a single justice, also has exercised jurisdiction over actions concerning the Charles Street Jail. In October, 1984, with double-bunking continuing, the Attorney General of the Commonwealth sued the sheriff. The sheriff then sued the Mayor, the City Council, and the Commissioner of Corrections. All parties be-

fore the single justice agreed that a new jail had to be built. The City Council had espoused a plan for building a thirteen-story structure to house the 309 prisoners provided for in the consent decree, and for rehabilitating at least part of the existing jail. All other parties favored a seventeen-story plan with 435 cells. Justice Liacos concluded that the thirteen-story plan could be modified to include additional stories, and ordered that the plaintiffs in the federal litigation seek modification of the pertinent federal orders. The Supreme Judicial Court affirmed Justice Liacos's order. *Attorney General v. Sheriff of Suffolk County*, 394 Mass. 624 (1985). After the full bench of the Supreme Judicial Court upheld the single justice's order, Justice Liacos retained jurisdiction over the case. He has continued to monitor problems of overcrowding at the Charles Street Jail, approved a change in construction sites, and monitored the planning and construction of the new jail on Nashua Street in Boston.

59. The federal court in Massachusetts also has been involved in remedying conditions at county jails other than the Charles Street Jail. For example, in 1984, prisoners of the Norfolk County Jail brought an action alleging that conditions there violated their constitutional rights. United States District Court Judge Walter Jay Skinner found that certain conditions violated the plaintiffs' constitutional rights and granted a preliminary injunction that set a population cap at the jail. See *Libby v. Marshall*, 653 F. Supp. 359, 360 (D. Mass. 1986).

60. *Morgan v. Hennigan*, 379 F. Supp. 410, 482 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580, 588 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). For further description, see Lynch, *The Boston School Desegregation Case*, 62 MASS. L. Q. 137 (1977).

maintained a dual school system."⁶¹ Having found a violation of the fourteenth amendment, the court was obligated by Supreme Court precedent to order an "effective" remedy.⁶² The normal pattern in school desegregation cases was to require the local school authorities, who have the most knowledge of the demographics, facilities and other aspects of the school system, to propose a desegregation plan and Judge Garrity so ordered.⁶³ However, the Boston School Committee's response was to refuse to provide a plan to the court, preferring to be found in contempt.⁶⁴

As a result, the court then appointed a panel of four distinguished masters to conduct hearings and to attempt to devise a plan. But the masters' efforts at a plan were undercut by the school authorities' provision of inaccurate demographic data. The court modified the masters' plan and adopted it as its desegregation order. The First Circuit repeatedly affirmed the orders of the district court.⁶⁵

The desegregation plan adopted by the court was unique and innovative in its efforts to improve the quality of education. Many of the features of the plan laid the groundwork for the better aspects of the school system of the 1980s. Under the desegregation plan, for the first time the Boston business community became involved in the schools, and business leaders such as Edward G. Phillips of New England Mutual Life Insurance Company devised specific programs of support. Universities were paired with individual Boston schools, and parents became more involved in the operation of the schools.

The School Committee's defalcations did not end with its refusal to submit a desegregation plan. Violence and threats to the students' safety marred the desegregation of particular schools, especially South Boston High School.⁶⁶ After the School Committee refused to take any steps to guarantee the safety of students and rock-throwing mobs surrounded school buses, the federal court intervened and placed South Boston High School into receivership, most likely preventing deaths by doing so. After reviewing the pattern of obstruction, the U.S. Commission on Civil Rights recommended that the entire school system be placed into receivership.⁶⁷

Although the degree of involvement of the federal court in the administration of the Boston schools was unusual, so was the obduracy of the local officials. This

stubbornness posed a singularly difficult remedial problem for the district court: that is, how to disengage from the receivership and return control of the schools to local authorities without permitting these authorities to subvert and circumvent the desegregation plan. The court used a variety of devices. Two experts, appointed to assist the court and given access to school system personnel, provided information about compliance. In late 1982, the court shifted to the Massachusetts Board of Education the responsibility of monitoring compliance and making periodic reports.

On September 3, 1985, the district court issued final orders closing the case⁶⁸ and in September 1987, the First Circuit returned control over student assignments to the Boston School Committee, finding a unitary system had been achieved to the extent possible.⁶⁹ Changes in the method of electing Boston School Committee members, changes in the superintendency, and changes in the political climate in Boston eventually made it possible, more than a decade after the original plan, to return control to the local authorities. Fittingly, the same district court judge who had initiated desegregation was the one who pushed the parties towards disengagement.

Housing

The Boston housing cases,⁷⁰ like the prison and school cases, show that obtaining judicial relief, at times, may be a painfully slow process. They also prove once again that when public officials repeatedly fail to meet their obligations, resort to the lengthy judicial process may be necessary.

Beginning at the end of the 19th century, racial segregation and discrimination in public and private housing was firmly entrenched in Boston. In the 1970s, the black population of Boston was 22% and, by 1980, it increased to 30%.⁷¹ During the same period, the available housing for low-income families with children decreased significantly, leaving only a 3.7% vacancy rate.⁷² The shrinkage in the low income housing market may have been due to "gentrification" of previously marginal housing and to the condemnation of 4,000 units of public housing administered by the Boston Housing Authority.⁷³ Those conditions led United States District Judge Walter Jay Skinner to conclude in 1983, "There is a housing emergency in Boston."⁷⁴

61. 379 F. Supp. at 482.

62. *Id.* at 482.

63. *Id.* at 410 and Lynch, *supra* note 60.

64. For a description of the school committee's actions and of the remedial plan ordered by the court, see Morgan v. Kerrigan, 401 F. Supp. 216, 226 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

65. See Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976), and Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). See generally Coffin, *supra* note 55.

66. U.S. Commission on Civil Rights, *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility* (August, 1975).

67. *Id.*

68. Morgan v. Nucci, 617 F. Supp. 1316 (D. Mass. 1985).

69. Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987).

70. There have been numerous housing cases instituted in federal court, not all of which will be discussed here. For example, in May, 1988, the NAACP filed a class action suit against the Boston Housing Authority alleging racial discrimination in the selection of tenants for particular projects. Judge Tauro was actively involved in the parties' efforts to work out a settlement, which was reached after lengthy negotiations on October 4, 1989. Boston Globe, October 8, 1989, p. 29.

71. NAACP v. Harris, 567 F. Supp. 637, 640 (D. Mass. 1983).

72. *Id.*

73. *Id.*

74. *Id.*

Despite laws prohibiting discrimination, the neighborhoods of Boston remained racially and ethnically discrete. The racial and ethnic make-up of public housing projects reflected the composition of their neighborhoods. Boston city government had not created a monitoring system to implement fair housing practices.⁷⁵

In 1977, Congress established a new program under the Housing and Community Development Act⁷⁶ for the funding of urban housing. The Act earmarked \$400 million per year for three years for cities to "take advantage of unique opportunities to attract private investment, stimulate investment in restoration of deteriorated or abandoned housing stock, or solve critical problems resulting from loss of employment or chronic unemployment in the community."⁷⁷ Only cities which had shown a commitment to housing low- and moderate-income citizens and to fund equal opportunities for minority groups could receive Urban Development Action Grant (UDAG) funds. The Act further designated specific state agencies to conduct reviews of applications. The Massachusetts Commission Against Discrimination (MCAD) was designated to review any UDAG applications for compliance with applicable civil rights law.

The City of Boston applied to the Department of Housing and Urban Development (HUD) for \$27.46 million to cover four projects: the Charlestown shipyard, Blue Hill Avenue in Roxbury, the South Boston industrial park and Lafayette Place in downtown Boston. MCAD recommended in February, 1978 that HUD not fund the proposals for UDAG funds without imposing fair housing and employment conditions. HUD, however, ignored this recommendation and approved \$10.48 million grants to the city for the Charlestown and Lafayette Place projects.⁷⁸

In March 1978, two public interest groups filed an administrative complaint against HUD. The complaint disputed HUD's determination that Boston had provided opportunities to minorities and was therefore eligible for a UDAG grant. Alleging that, with respect to the grant of UDAG funding to the Charlestown and Lafayette Place projects, HUD had failed to enforce constitutional and statutory proscriptions against discrimination,⁷⁹ the plaintiffs sought a temporary restraining order and a permanent injunction against disbursement of the UDAG funds. Judge Skinner dismissed the claim, ruling that neither the individual plaintiffs nor the NAACP had standing to challenge the disbursement of

UDAG funds. The First Circuit affirmed in part and vacated in part, holding that individuals who had sought "decent low-cost housing in an integrated neighborhood" without success had standing to sue HUD, and remanded the case to the district court.⁸⁰

On remand, the district court decided the case on the merits.⁸¹ The court took judicial notice that Boston's neighborhoods were racially separate and that Boston had a history of racial discrimination in housing.⁸² The court found that the low-income housing shortage impacted more heavily on black families than on white, and that the city, aware of these facts, had not effectively enforced fair housing requirements.⁸³ The court found further that HUD had not required the city to provide an assessment of special needs of low-income families, in violation of title VIII of the Civil Rights Act of 1968.⁸⁴ Judge Skinner instructed the parties to submit proposed forms of remedy.⁸⁵

The City of Boston gave HUD a minority needs assessment plan and in 1985 the district court found that the filing of the assessment plan cured HUD's violation of its own regulation. The court ruled that the award of further relief under the complaint was not appropriate because Congress had committed agency compliance to agency discretion.⁸⁶ The NAACP appealed to the First Circuit. The court reversed and remanded, holding that a pattern of inaction was not exempted from judicial review under the Administrative Procedure Act.⁸⁷

On remand, the court, attempting a creative remedial approach, ordered mediation under the auspices of the Community Relations Service of the Department of Justice. The parties, however, reported in December 1988 that all attempts to reach a resolution had failed. The district court issued its own remedial order in June 1989.⁸⁸

The court found that there had been no showing that conditions had substantially improved over the previous decade. In fashioning a remedy, the court candidly articulated certain practical constraints:

Prudence requires the acknowledgment of certain political imperatives. The appropriation of funds for urban development is committed to Congress, and the allocation of such funds among the various sections of the country is committed to the discretion of the defendant. Imposition of restrictions that made Boston an unattractive candidate for federal funding may ultimately defeat the laudable purposes which plaintiff seeks to achieve.⁸⁹

75. *Id.* at 641.

76. 42 U.S.C. §§5301 *et seq.*

77. H.R. Rep. No. 95-236, 95th Cong., 1st Sess. 9 (1977), reprinted in (1977) U.S. Code Cong. & Admin. News, 2884, 2892.

78. NAACP v. Harris, 607 F.2d 514, 517 (1st Cir. 1979).

79. Title I of the Housing and Community Development Act, 42 U.S.C. §5301 *et seq.* and 24 C.F.R. §570.601; title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, the regulations at 24 C.F.R. §§1.1-1.12; title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.*, and the fifth amendment due process clause.

80. 607 F.2d at 524.

81. 567 F.Supp. 637 (D. Mass. 1983).

82. *Id.* at 641.

83. *Id.*

84. *Id.* at 644.

85. *Id.*

86. NAACP v. Pierce, 624 F. Supp. 1083, 1084-85 (D. Mass. 1985), vacated *sub nom.* NAACP v. HUD, 817 F.2d 149 (1st Cir. 1987), limited by 880 F.2d 603 (1st Cir. 1989).

87. NAACP v. HUD, 817 F.2d 149 (1st Cir. 1987).

88. NAACP v. Kemp, C.A. No. 78-850-S, slip op. at 4 (D. Mass. June 23, 1989).

89. *Id.* at 13.

While the court declined to order HUD to fund particular projects, it did order significant relief. Although there had been no specific findings about suburban opportunities, there had been findings about the lack of safe housing for persons of color in white areas of Boston, and findings that HUD had failed to encourage construction of integrated housing in the city. These findings led to an order compelling HUD to require private landlords of HUD-assisted housing throughout the metropolitan area to market their housing affirmatively to low-income persons in Boston. The court also ordered HUD to impose on the city and state a series of fair housing conditions, designed to enhance access to low-income housing by black households and to remedy housing discrimination. The plaintiffs were thus successful in forcing HUD to impose fair housing obligations on the City of Boston prior to granting the city federal assistance.

Boston Harbor

The Boston Harbor case is another example of a federal court forcing a city and, initially, a federal agency to comply with federal law. The environment, rather than low-income persons or minorities, was the victim in this case. The battle over Boston Harbor has involved the state legislature, the federal government, conservation groups and inhabitants of bayside towns.⁹⁰

In 1983, the Conservation Law Foundation (CLF) charged the Metropolitan District Commission (MDC) and the Environmental Protection Agency (EPA) with violating the Federal Water Pollution Control Act⁹¹ (FWPCA), the discharge permit issued by the EPA to the MDC under the FWPCA, and several EPA compliance orders. The CLF alleged that the MDC, the regional agency responsible for sewage disposal in Massachusetts, was violating the FWPCA and its own permit by dumping improperly treated and raw sewage into the harbor.⁹² In 1985, the United States, at the request of the administrator of the EPA, filed a separate suit against the Commonwealth of Massachusetts, the MDC, the Massachusetts Water Resources Authority (MWRA)⁹³ and the Boston Water and Sewage Commission. This further

litigation may have resulted from a growing perception that the defendants would not voluntarily cooperate in the cleaning of the harbor.⁹⁴ The district court consolidated the CLF and United States cases and granted a motion by the City of Quincy to intervene.⁹⁵ The Town of Winthrop intervened a few months later.⁹⁶

In September 1985, United States District Court Judge A. David Mazzone found the MDC and MWRA to be in violation of the FWPCA, the permit issued by the EPA, and the 1980 administrative order.⁹⁷ The plaintiffs worked with the MWRA to create a long-term, enforceable scheduling order to make sewage discharge comply with the FWPCA. In 1986, the court issued target dates and a scheduling order for construction of a secondary sewage treatment plant.⁹⁸ Under the schedule, the MWRA would build a primary treatment facility on Deer Island. This treatment plant would provide minimal sewage treatment, including removal of solids and chlorination. The remaining sewage would then be pumped into the bay. The facility is scheduled to provide treatment by 1994.⁹⁹

The MWRA provides monthly progress reports which a compliance monitor reviews. The federal court issues a monthly order assessing the progress or lack of progress and directing further steps. If the MWRA cannot comply with an order during a particular month, the MWRA outlines the problem and steps it will take to conform to the schedule as rapidly as possible.

Occasionally, the court has had to apply additional pressure to the state. For example, in the spring of 1989, the MWRA sought to relocate its headquarters from Charlestown to Roxbury. The City of Quincy, however, objected to this siting, arguing that if it were required to house a landfill for the solid sewage, it should also have the benefit of housing the headquarters of the MWRA. Judge Mazzone responded that he was watching carefully the delays caused by the legislative fighting: "I told the Authority when I established the schedules that they would not hear from me as long as the deadlines are met.... I would not hesitate to use the inherent powers of the court to enforce its judgment."¹⁰⁰ Michael Deland, chief of the EPA's New England office, suggested the

90. *United States v. Metropolitan District Commission*, 16 ENVTL. L. REP. 20621, 20622 (D. Mass. 1985).

91. 33 U.S.C. §1251 *et seq.*

92. In 1979, the MDC filed an application for a waiver of secondary treatment requirements in sewage disposal, under 33 U.S.C. §1311(h). In 1980, the EPA issued an administrative order finding that the MDC had violated its permit from the EPA by not completing a secondary treatment and sludge management facility. Despite a pending waiver, the MDC was ordered to implement a schedule for proceeding with the treatment facilities. The administrative order also allowed a third person to enforce the permit's requirement. In 1983, the EPA tentatively denied the MDC's waiver application, and the MDC filed an amended application for waiver the following year. In 1984, the EPA issued another administrative order citing violation of the permit and the 1980 administrative order. The 1984 administrative order requires the MDC to comply with the 1980 administrative order limits until it constructs facilities and can thereby comply with the permit limits. 16 ENVTL. L. REP. at 20623.

93. The Massachusetts Water Resources Authority succeeded the MDC as an autonomous body in control of the metropolitan sewage system in 1985. The district court held in 1985 that the MWRA would be liable for the MDC's acts despite the MWRA enabling legislation which limited its pollution liability. The court held that the FWPCA preempted the enabling provision, and that due to similarity in purpose the MWRA is subject to successor liability. 16 ENVTL. L. REP. at 20621.

94. *Id.* at 20622.

95. The City of Quincy had previously sued the MDC in Massachusetts superior court but failed to reach an agreement on a schedule to clean up the harbor. 16 ENVTL. L. REP. 20622.

96. *Id.*

97. *Id.* at 20623.

98. *Id.*

99. *Id.*

100. Boston Globe, July 11, 1989, p.8.

MWRA be fined up to \$180,000 a day if cleanup deadlines are missed.¹⁰¹

The delay in implementation of the harbor cleanup has been costly to Massachusetts. The cost of the cleanup is estimated at \$6.1 billion.¹⁰² In 1976, the federal government had offered to pay 75% of the cost of a secondary treatment plant. Fifteen percent more would have come from state funds, leaving only 10% of the total bill to the city to pay. However, that federal grant had a sunset provision and ended in 1987. Since then, the MWRA has been seeking additional federal funding to finance its cleanup efforts.

Conclusion

The cases discussed above lead to some modest observations. First, in these cases there is no evidence of judicial overreaching. In each of the cases, the judiciary at first deferred to the state and local authorities in order to give them the opportunity to remedy the problem identified. In some cases, the district courts, although finding the institutions liable for constitutional violations, were reluctant to issue intrusive remedial decrees until instructed to do so by the First Circuit.

Second, the cases show that public officials have repeatedly been unable or unwilling to address problems, and quite willing to hand the problems back to the courts. Even in the mental retardation cases, where public officials agreed that conditions at the state hospitals

were unconstitutional and unconscionable, public officials did not remedy conditions until shamed into doing so by a court which skillfully focused media attention on the issues and on the parties. The reverse is also true: public officials at times have viewed litigation against them as an opportunity to use the added clout of the court, and its accompanying media attention, to reach results perhaps not otherwise attainable. The Boston Harbor case may be an example of this dynamic.

Third, public institution cases place the courts into difficult situations not only politically but also jurisprudentially. It is not only that federal judges face intransigence from public officials and that the judges do not want to administer public institutions. It is also that, despite the enormous public impact of rulings, the courts are dependent on the information developed through the traditional methods of the judicial process. The traditional methods of case adjudication have significant limits. The success of that litigation often depends on the competence of the parties and counsel and on whether the parties perceive it to be in their interests to present certain facts to the court. The court may be frustrated by the limited information presented to it. The frustration felt by the trial judges is often palpable in their opinions. It has, in some cases, led courts to seek and to use more creative methods of case adjudication, such as special experts and masters.

In the end, and despite these problems, the courts are doing what the Constitution envisioned: acting as "a check" on other branches of government to constrain them from violating the constitutional rights of individuals.

101. *Id.*

102. *Id.*