DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION

VOLUME 8 NUMBER 3

$3.00

PRIOR RESTRAINT AT THE BOX OFFICE

Mr. Craven Consents

IN ANY discussion of the much-discuss[ed] ... now showing at the Edge Moor Thea[tre] ... questions should be asked and answer[ed at the] outset. We set down some that see[m] fundamental:

1. Is there such a thing as an obscen[e] ...

2. If the answer is yes—and we have ...

... that most people will agree that it is y[es] ... there be pre-censorship or should the[re be] a general prohibition and leave the ... the law enforcement agencies and the ...

This last question cannot be answe[red] no. Here it is necessary to make a cl[ear] ... we venture to say that most Americ[ans] prefer the second alternative, provide[d] ... Pre-censorship somehow goes against ...

The second alternative is what ... Delaware. That is, we have a law ... crime to show an "obscene, lewd, filthy, or indecent" film—or other ... and we have had experience under ... been used, in the Scope case, to st[op] ... that was offensive to the people livi[ng] ... theatre showing it and to punish the ... But one swallow does not make a ... it must be recognized th[at] ... raises difficult problems ...

While the responsibility ... rest with the police and ... eral's Office, here's a spec[ific] ... Edge Moor Theatre case, ... sought a ruling from Atto[rney] ...

Brigitte Draws In Spite of Snow

Saturday's six-inch snowfall failed to diminish attendance to any marked degree at the showings of the film, "And God Created Woman," starring the French actress, Brigitte, Bardot, at the Edgemoor Theatre. Crowds were reported at showings yesterday and last night, too.

Meanwhile, a prominent Episcopalian clergyman, the Very Rev. Lloyd E. Gressle, dean of the Cathedral Church of St. John, dispatched a telegram to Atty. Gen. Joseph Donald Craven protesting the official's attempts to halt the showing of the film.

The dean argued in the telegram that his liberty was being invaded by the attorney general's attempts to prevent showing of the motion picture.

The dean also questioned whether it is within the attorney general's province to enter the "field of censorship." Dean Gressle, however, stated, "I know how conscientiously you fulfill your office as attorney general."

...NGTON MORNING NEWS, WILMINGTON, DELAWARE, FRIDAY, FEBRUARY 14, 1958

Plot Is Pretty Thin—But— With Brigitte Who Cares?

By WILLIAM P. FRANK

Brigitte Bardot—as the girl in the controversial film, "And God Made Woman"—isn't the kind of a gal you'd like to have for your kid sister.

And if she was your wife—you'd have to be blinded with love to marry her in the first place.

That's how it is in this picture that has kicked up such a fuss in Wilmington and Philadelphia.

The young man she does marry is deeply in love with her, and even though the whole neighborhood in the French seaport town where the story takes place regards her as a slut, he is willing to forgive her and keep her as his wife.

The picture—the dialogue is in French with English titles—is obviously aimed at sex appeal. It ... the sultry ... sex appeal a... ... The first ... obviously ... shocker. Brig... member her ... is seen stretch... grass, taking a ... naked as the day ... was born.

A wealthy, debonair, yacht-owning man-about-town arrives and talks to her. All there is between them is a sheet hanging on a clothes line. She nonchalantly stands and chats with him.

The story that follows is pretty thin. Brigitte is a girl from an orphanage, bound out to a respectable French family in Toulon. She becomes the talk of the town and the taverns—and the ... She is about to be ... the orphanage ...

unfaithful, abandoned, enticing and feline (of the alley variety). The color of the film is beautiful!

The English titles are very short—and sometim[es] difficult to read as they blend into the color, but who cares?

Public reaction in the theatre? It ranged all the way from pity for Brigitte to some nasty remarks about her lack of character. There were those who said she was to be admired for not having cheated on her husband until she found herself with another man on a lonely beach; and there were there less tol[erant] ... who said she wa[s] ... ture enough for ... first place.

when the constitution[al] statute is involved.

At this point Chan[cellor] said to Mr. Craven, "... contentions of Mr. Mo[rris] he is saying is that y[ou are go]ing beyond the Delaw[are] ... if you take this action."

Mr. Craven then co[ntended he could] see no reason for ... equity to interfere w[ith] enforcement officers ... He went further in ... tion, saying: "If dela[ys] court the thing will ... with. We feel that w[e can] accomplish anything and we feel that the ... The attorney gener[al sug]gested that the ... position ...

... films is a menace to the community. There is entirely too much crime and juvenile delinquency in the world today without the showing of immoral films to aggravate the situation, and I am convinced that a drop in the receipts at the box office is the surest way of showing our disapproval.

Very truly yours,

... presented to ... there had been harassment of Cudone and his business. He said that in the absence of this he had ruled against interfering with possible arrest of Mr. Cudone.

Attorney Morris advised the court early in the hearing of argument that he had reliable advice that the Pennsylvania Supreme Court had yesterday reversed lower court action which had refused to restrain District Attorney of Phil[adel]phia from seizing the ... on similar ...

... banned in Boston does not apply to this film." Mr. Morris told the court, explaining that the film is being shown in that ... always so closely associated ... literature and ...

... kept intact should ... for use as evidenc[e] ... criminal prosecution.

Intent of A[ttorney General]

The question was ... by Mr. Morris as ... of the threatened ... Craven replied: "I ... make an arrest the ... the operator as ... Cudone. This is an ... ness."

Chancellor Seitz ... out that this ... angle ...

... Upon returning ... vened hearing C... reminded that ... case as a suit agai[nst] ... and not as an act... State. He then s... order would inv... against arresting ... ist during the ... film is being sho[wn] ...

COURT RULES FRENCH FILM MAY CONTINUE

Showing of the French film "And God Created Woman" can be continued at the Edge Moor Theatre without danger of confiscation, according to a ruling of the Court of Cancery handed [down] late yesterday afternoon [by Ch]ancellor Collins J. Seitz.

[The] ruling temporarily re[strains] Atty. Gen. Joseph Don[ald Cra]ven from seizure of the [film] ... ling with the same peti[tion] ... by the theatre man[ager Dan]iel Cudone, and his [attorney I]rving Morris, Chan[cellor] ... ruled that he would [not re]strain the attorney general [fr]om arresting the theatre man[ager].

As a result of the same ruling the attorney general is temporarily barred from arresting the projectionist during the hours when the film is being shown at the theatre.

Cudone's attorney filed the petition for a temporary restraining order yesterday when it became known that the attorney general, who visit[ed] ... he show with his ... hard J. Baker ... tive of ... nesday ... ction. ... to the com... decency and mod... the community."

Two Points of Law

Argument yesterday centered about two points of law. It involved the jurisdiction of the Court of Chancery to rule in the case and whether or not the court should grant a restraining order sought against the attorney general.

In his ruling, issued from the bench immediately upon conclusion of argument by both sides, the chancellor said that he would not interfere with the activities [of law en]forcement officers, and ...

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"and God created woman"

Craven Yields In Movie Case

Court Dismisses Ban On Arrest With Agreement That There Will Be None

An order dismissing the ... Moor Theatre ... J. ... Irvi[ng] ... Dani[el C]udone, theatre proprietor. Mr. Cudone had filed a complaint last Thursday to forestall action by Atty. Gen. Joseph Donald Craven to halt current showings of the French film "And God Created Woman," on grounds of obscenity.

The dismissal came after Mr. Craven agreed that Mr. Cudone and his employes would not be arrested for any violation of state laws against alleged obscene and indecent films as long as the movie is shown at the theatre.

Both sides agreed to a dismissal "without prejudice," which means Mr. Cudone is not ...

Wilmington Bars Ban

Wilmington, Del.—Chancellor Collins J. Seitz has signed a Court of Chancery order restraining Atty Gen. Joseph D. Craven from confiscating Kingsley International's release, "And God Created Woman," now at the nearby Edge Moor Theatre. Further hearing is scheduled.

Let the people of Delaware decide for themselves whether or not to see this film.

Very truly,

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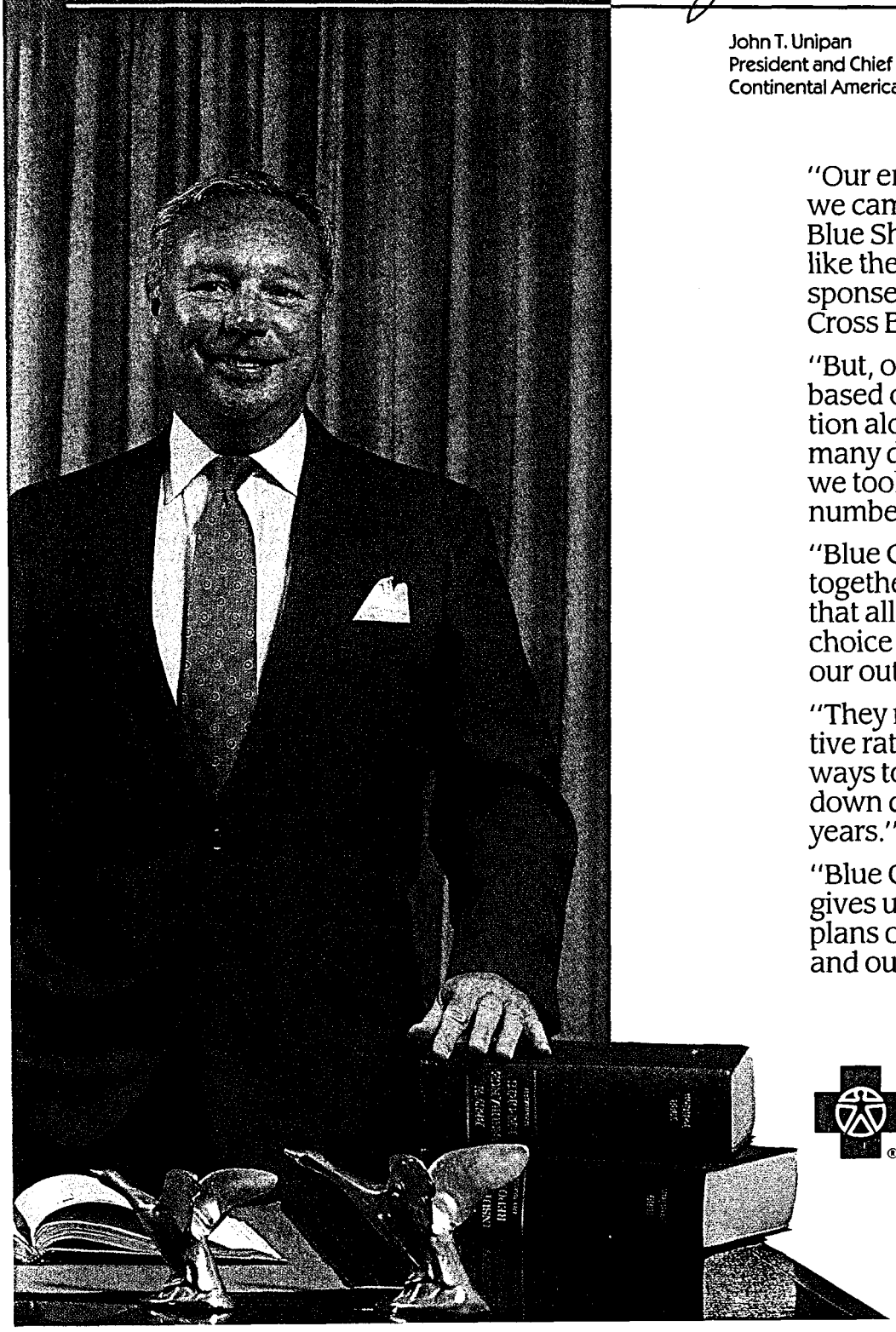

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The Cover: 'Way back in 1958 The Edgemoor Theater, a respected art cinema, stunned local prudes by exhibiting a French film called "And God Created Woman", starring Brigitte Bardot. By today's standards of uncorseted lubricity And God, etc. seems about as dangerous to public morals as the collected works of Frances Hodgson Burnett.*

Attempts to suppress the showing of the film failed, in large measure because of the courage and dedication to First Amendment freedoms of Daniel Cudone, the Manager of The Edgemoor, and his attorney, Irving Morris. Irv's account of the Bardot brouhaha begins at page __ of this issue. The cover, made up principally of articles appearing in the News-Journal papers in February 1958, is the handiwork of Mrs. Sylvia Johns of the Delaware State Bar Association. We thank the News-Journal Company for permission to reproduce these materials.

* The author of that steamy shocker, "Little Lord Fauntleroy".

DELAWARE LAWYER
A publication of
Delaware Bar Foundation
Volume 8 Number 3
708 Market Street Mall
Wilmington, Delaware 19801
(302) 658-5278

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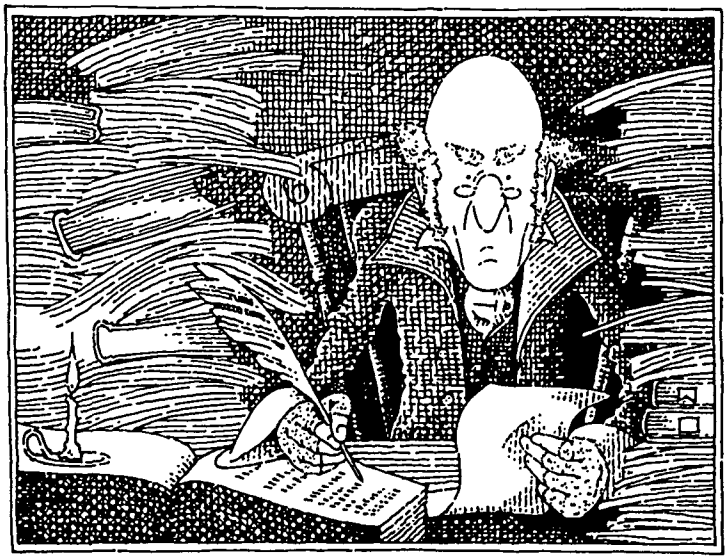

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FROM THE EDITOR

The last two issues of DELAWARE LAWYER dealt first with litigation and most recently corporate law. These topics generated so much interest among authors and the issue editors were so diligent that we received more articles than we could print in the space available. We were faced with a true embarrassment of riches.

The overflow articles appear in the following pages. The remainder of this issue consists of a variety of material, some of which was written two years ago and has languished in our files awaiting publication.

Herewith, the eclecticism we promised when we assumed responsibility for the content of DELAWARE LAWYER. *CFP*

FAREWELL, VOLUME 8!

It is conventional for a quarterly magazine to appear four times a year. For some inscrutable reason connected with sloppy proofreading Volume 7 of this magazine spawned five - count 'em - five issues. Surely you remember the Fall 1989 number "High-Tech in the Profession" or "No-Tech in the Editor's Office", which presented itself as Volume 7, No. 5! Well, the time has come to get back on track, and to restore the symmetry of our editorial arrangements and the severely tested credulity of our advertisers. Accordingly, we curtail Volume 8 at No. 3 (this issue). The March 1991 issue will be known as Volume 9, No. 1. Who knows but what Volume 7, No. 5 will become collectible like those unfortunate postage stamps of understandably limited issue in which - say - the Equadorian flag is inadvertently printed upside down to the delight of greedy philatelists. *WEW*

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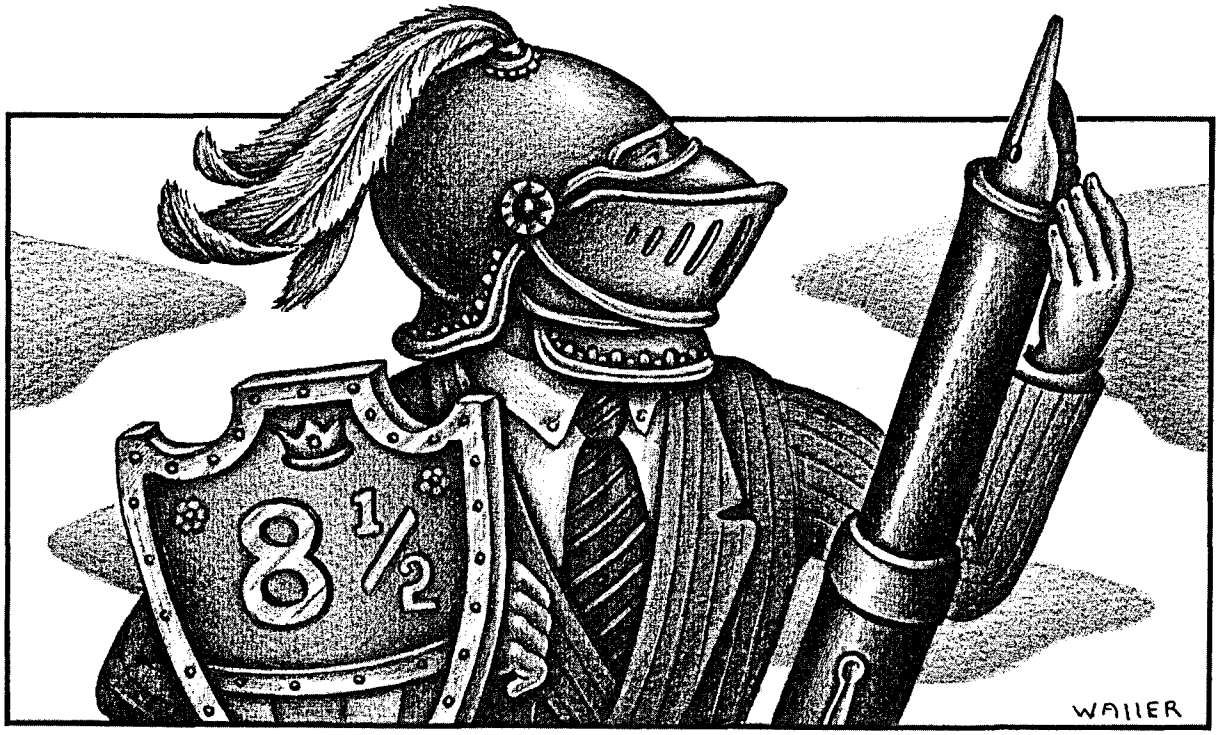

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THE PRICE OF ART (1958)

Irving Morris

Daniel "Dan" Cudone for many years managed motion picture theaters for others. He started as a "trouble shooter" for Warner Brothers in Boston, Massachusetts, and by 1947 had moved to New Jersey to work for Fred Faulkner who operated three movie houses there and one in Delaware. Within the limits of Faulkner's direction, Dan had responsibility for the selection of the films the theaters played. He booked the films through the Brandt Theatre in New York City.

Dan's ambition was to own a theater where he could show films of taste and distinction to reach a market of people he thought existed and who would pay to see so-called "art" films. Through the years Dan Cudone carefully searched for the right location. Without the means either to build a theater or to undertake an expensive overhead, Dan had to find a movie house he could lease at a modest rental in an area where his potential market existed. The modest rental was an essential element. Dan was gambling on his judgment; he could not afford to fail.

Outside Wilmington, on Governor Printz Boulevard, a few miles northeast of the center of Wilmington, stood the Edgemoor Shopping Center. Built in 1941, the shopping center was small with room for a half dozen or so stores all in a row. The shopping center had one unusual feature for those days: it had a handsome movie theater named "The Edgemoor Theatre" which quickly became known simply as "The Edgemoor." The Edgemoor's problem was that it needed to attract many more customers than the faithful few who admired and enjoyed its ambience.

The area around The Edgemoor in the late 1950's was almost exclusively a white, middle class neighborhood. Many young couples rented apartments in the Kynlyn and Clifton Park Manor apartment projects erected shortly after World War II. Edgemoor Terrace and Edgemoor Gardens were already developed as individual home projects. The nearby Merchandise Mart was one of the first post-war shopping centers in Delaware and was much larger in size than the Edgemoor Shopping Center. But the Merchandise Mart did not have a movie house.

The Edgemoor was the Delaware theater Faulkner leased and Dan Cudone ran.

In his "Statement to the Press," Attorney General Craven had begun by saying: "I have today directed the Management of the Edgemoor Theater [sic] not to exhibit or permit to be exhibited the motion picture known as "God Created Woman" [sic] featuring Brigitte Bardot."

At the same time Dan sought his ideal site, my mentor at the Bar, Philip Cohen, had joined with another lawyer, Harry Rubenstein, and purchased the Edgemoor Shopping Center. The success of the Edgemoor Shopping Center depended upon the continuous rental of its few stores and the fortune of The Edgemoor, the anchor enterprise in the venture. If the movie house did not do well, Mr. Cohen would sustain his first failure in his real estate investments which increasingly occupied far more of his time and interest than the law.

The opportunity Dan Cudone sought came his way when Fred Faulkner decided to sell his interests in his four theaters. Mr. Cohen and Mr. Rubenstein for their part saw their project at risk with Faulkner's withdrawing. They desperately needed a responsible tenant who would run the movie house and not permit The Edgemoor to become an empty "white elephant." They were in the mood to have someone pay a modest rental -- the only one Dan could afford. Dan agreed with Faulkner to take over Faulkner's lease of The Edgemoor and renegotiate it with Mr. Cohen and Mr. Rubenstein. The parties had no difficulty in striking terms acceptable to each of them. Thus, Delaware acquired its first art movie theater.

Dan Cudone was 37 years old in 1952 when he and Connie, his wife, and their three children, the oldest only five, moved to Delaware. The move to Delaware and the assumption of the responsibility of The Edgemoor were bold steps for Dan. For the first time in his career, Dan was free to run a theater as he saw fit. He could not, of course, ignore economic reality, but he was willing to stretch its limitations. Dan had a solid commitment to providing the public with quality films, including foreign films. He thought there was enough of a market for the product in Delaware, at least enough for him to earn a livelihood. Dan was right on both counts. The market, albeit limited, existed. The livelihood he earned, like his rent, was modest; he never earned a fortune.

One of the problems Dan faced in trying to make a go of his movie operation was a leftover of Delaware's so-called Blue Laws. The Revised Code of Delaware 1935, Section 5253, as had its predecessors, made it a crime to show motion pictures on Sunday anywhere in Delaware:

> Whoever shall perform any worldly employment, labor, or business, on the Sabbath Day (works of necessity and charity excepted) shall be fined four dollars, and on failure to pay such fine and costs shall be imprisoned not exceeding twenty-four hours.

In 1941, under pressure from the owners of motion picture theaters in Wilmington, the General Assembly amended Section 5253 generally and drew a distinction between what could take place in and out of incorporated cities and towns. To maintain the purity of life in rural Delaware, the General Assembly provided (43 *Del. Laws*, Ch. 238, Section 1):

5253. Sec. 4. It shall be unlawful for any person, firm, or corporation to engage in, participate in, or attend, outside the corporate limits of any incorporated city or town of the State of Delaware, any horse racing, public auction, public dance, public theatrical performance or public performances of motion pictures, with or without sound, on Sunday.

The trade-off in the 1941 Act permitting the banned activities to take place on Sundays in Delaware's incorporated cities and towns was that they could not take place "before the hours of twelve noon and between the hours of six P.M. and eight P.M." Thus, those in the community interested in Sunday religious services reduced competition from the banned activities including the showing of motion pictures. The legislators took care to except from the term "theatrical performance" the reception of "broadcast, radio or television programs or any lecture or musical concert."

Apparently in an effort to keep pace with inflation, the General Assembly at the same time increased the fine for a first offense to "not less than Ten Dollars ($10.00), or more than Fifty Dollars ($50.00), or...imprisonment of not more than ten (10) days or both fine and imprisonment in the discretion of the court." For a second and each subsequent offense, the fine ranged from $50 to $250 or imprisonment of not more than two months or both in the discretion of the court.

The General Assembly in 1951 changed Section 5253 yet again, providing that the banned Sunday activities could not take place in incorporated cities and towns with less than 100,000 persons before twelve noon and between the hours of six P.M. and eight P.M. but in those cities and towns with a population of more than 100,000, the permissible time began at two P.M. Since Wilmington was the only city or town which had 100,000 or more in population according to the 1950 United States Census, Wilmington movie houses alone among Delaware's cities and towns could run continuous films on Sunday from two P.M. on, and their competitors in the suburbs outside of incorporated cities and towns could not operate at all on Sunday. 48 *Del. Laws*, Ch. 358, Section 1. The 1951 legislation made no change in the penalties the 1941 Act imposed for violating Section 5253.

When the General Assembly enacted the Delaware Code Annotated in 1953 (the laws of Delaware went from the one volume with its charming but impossible index to fifteen volumes, including two volumes devoted to an index), the codifiers maintained the distinction the legislators had first fashioned in 1941 betwen cities and towns and the rest of the State and continued in 1951 with the added distinction in the continuous showing of films between Wilmington and all other cities and towns in Delaware. 28 *Del. C.*, Section 906. The penalties remained the same.

Thus, at the time Dan Cudone took over The Edgemoor in 1952, his competitors in nearby Wilmington could operate their movie houses with impunity on Sunday but Dan could not operate his without violating the law.

On May 25, 1953, after the Delaware Code Annotated became effective, the General Assembly relented and specifically permitted the showing of motion pictures outside of incorporated cities and towns but as a practical matter made it difficult for suburban theaters to operate profitably. The 1953 amendment to 28 *Del. C.*, Section 906 (the successor to old Section 5253) confined the showing to the period between the hours of twelve noon and six P.M. and then between the hours of eight P.M. and midnight, thus interrupting the operation and preventing the continuous showing of films. Clearly it was discriminatory for the theaters in Wilmington to remain open continuously while The Edgemoor remained dark between six P.M. and eight P.M. on Sunday. Dan determined he would act to end the unfairness. Dan recognized he needed legal help. He called my mentor, Philip Cohen.

Dan did not really "have" a lawyer. He had never needed one. The only lawyers with whom he had done business since coming to Delaware were Mr. Cohen and Mr. Rubenstein with whom he had negotiated the lease for The Edgemoor. It certainly was a compliment to Mr. Cohen that Dan immediately thought of him as "his lawyer," but that was true of most people who met Philip Cohen. Instinctively you knew you could trust him. When he called Mr. Cohen, Dan had no idea that in short order he would find himself depending upon my advice.

Anyone who called Mr. Cohen after he and I formed the partnership of Cohen and Morris effective January 1, 1953, and raised a question which Mr. Cohen thought would or might entail being in a courtroom wound up with me as his lawyer. One of the side advantages to Mr. Cohen in taking me into his practice was to enable him to avoid ever again going to court. He disliked the combat of the courtroom despite the fact he enjoyed marked success when he did go into court. One of the main advantages to me in joining Mr. Cohen was the opportunity to go to court. For us, it was an ideal arrangement. For the clients, it was a mixed bag. I did not win all my cases.

Dan Cudone wanted to sue someone -- perhaps anyone -- to compel the authorities to let him keep open continuously on Sundays. Mr. Cohen turned Dan over to me. I told Dan that litigation was not the path he should travel initially although we might have to do so eventually. My suggestion was that we try to secure another change in the law first. I told Dan I would enlist the support of my friend, Albert J. Stiftel, who was then the attorney for the House of Representatives.

At the Democratic Caucus at the beginning of the session in January, 1955, at which the Democratic legislators agreed to sponsor particular bills, Al Stiftel, who had the responsibility to assign the proposed bills to various classifications, did me the favor of putting the legislation I had drafted to end the discrimination among the "must" bills which the Democrats (who had a majority in the House as a result of the Democratic victory in the 1954 election) should push for passage that session. When the Democrats in solemn caucus came upon the bill, they were understandably surprised to find it given the importance my friend Al had given it to please me. No one among the legislators knew anything about this "must" bill. They thereupon called for Al Stiftel to explain why the movie theater bill was in the "must" classification.

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Al Stiftel appeared promptly and told the members of the Democratic Caucus that Irv Morris wanted the movie theater bill. In those days, the endorsement by a particular individual carried weight for the enactment of a statute. Al Stiftel's pronouncement that Irv Morris wanted the legislation left the legislators impervious to the need for the legislation. Although Al Stiftel knew me well, it appeared that none of the legislators knew me at all. As Al Stiftel recounted the story to me, he recognized that my bill was in trouble. As "must" legislation, the likelihood was great that the General Assembly would enact the bill. Were the bill in a different classification, Al could not guarantee the result. Al thereupon proceeded to explain the legislation to the Democratic Caucus. In the process, he emphasized that the purpose of the bill was to terminate all discrimination between movie houses in the City of Wilmington and those located in New Castle County. Al Stiftel's reference to "discrimination" sparked the necessary support for the bill. Representative Paul Livingston, one of the first black members of the General Assembly, whose district was predominately black and poor, spoke up. "I'm against discrimination of any kind and if that bill will do something about discrimination, I'm for it." Thus, my legislation for Dan Cudone had not only a sponsor but, moreover, a committed advocate.

Dan Cudone tracked the bill as it wound its way through the General Assembly. During the session, Dan regaled me with what was occurring. He experienced all the frustrations which generally accompany a piece of legislation regardless of its merit and its lack of controversy in the tortuous route between introduction and passage in each of the Houses of the General Assembly. The necessary endorsement by the House committee, to which the bill had been assigned, was difficult to obtain, but finally Dan Cudone was successful in securing the approval of the committee chairman. Not infrequently, he found that his bill was held hostage for Representative Livingston's favorable vote on an entirely unrelated matter.

I remember one occasion when Dan told me he had returned from Dover early the preceding evening because a legislator had assured him that his bill would not come up for a vote that night. He read in the *Morning News* the following morning that the House had indeed voted upon his legislation and had defeated it subject to a reconsideration by reason of the sponsor's change of his vote before the official tally was entered. Under a provision of legislative practice in the General Assembly, and in many other state legislatures, only a legislator who was on the prevailing side of the vote may revive for reconsideration a proposed bill initially rejected. Thus, not infrequently, a sponsor of a bill changes his vote to one in opposition to his own legislation and puts himself on the prevailing side in order to keep the proposed legislation alive. Representative Livingston had to be alert to keep Dan Cudone's bill alive.

With Dan Cudone's far more than sideline involvement and persistence (he made numerous trips to Dover to speak to legislators and attend sessions of the General Assembly), Representative Livingston successfully guided the movie theater bill through the General Assembly and into law (50 *Del. Laws*, Ch. 394, Section 1, effective July 7, 1955), thus terminating the discrimination between theaters in Wilmington and those in New Castle County outside of Wilmington. (In later years, I found Representative Livingston a staunch advocate for ending segregation of the races in the public schools of our State.)

Dan Cudone did not do cartwheels about the thought of an arrest let alone incarceration.

Because the matinee business The Edgemoor attracted did not economically justify opening in the afternoon except on Sunday, Dan limited his showings to two evening performances during the week. Even the change in the law could not overcome the harsh economic reality of Dan's business. It was a continual struggle for him to survive and still maintain the standard by which he strove to offer his customers more than Hollywood's product.

Dan Cudone then provided me with an opportunity to strike a blow for civil liberties. I did not seek out such opportunities; they just came along with insistent regularity as part of my practice and made it both interesting and satisfying. In January, 1958, Dan contracted through the Brandt Theatre organization in New York (he booked almost all his films through the Brandt Theatre thereby securing somewhat better terms in a highly competitive business) to exhibit, beginning February 12, 1958, a French film entitled, "And God Created Woman" starring Brigitte Bardot. In her day, Ms. Bardot epitomized sexual suggestiveness and gave rise to what one film critic called, "Bardotmania." On the release in video cassette of three Bardot films made in 1959, 1962 and 1967, Glenn Collins in the Sunday, April 14, 1987 issue of *The New York Times* wrote:

> A quarter-century later, her presence is still arresting: the bee-stung lips, the high halo of blonde hair, the face that launched a thousand paparazzi, and the cleavage that commanded an international reputation.

General Charles de Gaulle in the sixties chose Ms. Bardot to be the model for the Buste de Marianne, the symbol of the French Republic. (The bust of Marianne started to appear in the city halls of French communities after 1877, replacing the busts of Napoleon III, an obvious aesthetic improvement. Marianne was the name taken by a secret society in the time of the Second Republic whose goal was to overthrow the government of Napoleon III and proclaim a republic. The name was adopted in memory of Marie-Anne Mouhat, the wife of one of the republicans in the French Revolution.) Ms. Bardot reigned as Marianne for twenty-five years until in 1986 a jury composed of a group of French journalists and representatives of the Ministry of Culture replaced her with a new Marianne, a bust whose model was another actress, Catherine Deneuve. In comparing the two busts, even the press release announcing the replacement noted:

> Rien a voir, en effect, avec la Marianne-Brigite [*sic*] Bardot réalisée dans les années 60 par Aslan, et dont les charmes orgueilleux ne stimulaient pas seulement l'esprit civique.
>
> [Nothing to do, in fact, with the Marianne Brigite [*sic*] Bardot created in the 60's by Alsan, whose obvious charms did not stimulate only civic pride.]

In my judgment, France, General de Gaulle and Ms. Bardot were all ill-served by the 1986 jury's abandonment of Ms. Bardot.

The opening scene of "And God Created Woman" had a sports car tooling along a winding road on the Riviera interspersed with shots of Ms. Bardot in the altogether lying on her tummy taking a sun bath between white sheets hung out to dry after washing. From time-to-time, the sheets would billow in the breeze and the viewer would catch a glimpse of a substantial part of Ms. Bardot's derriere between the billows. I am told by knowledgeable film critics that the camera work was wonderfully well done. But for the notoriety attendant to the attempt to close the film in various communities throughout the United States, it is likely the film would have been a box office bust even with the comely presence of Ms. Bardot. When he booked "And God Created Woman," Dan knew, given the outcry in several other communities, that he was not merely booking another foreign film for showing. The fact was no community had barred the showing of "And God Created Woman," not even Boston whose censorship practices had given rise to the titillating code words, "banned in Boston." Dan Cudone expected increased attendance; he did not bargain for the "cause celebre" which enveloped him.

On the evening of February 12, 1958, Dan showed "And God Created Woman" for the first time. Because of publicity attendant upon the showing of "And God Created Woman" in Philadelphia, Lieutenant Shmallhoffer of the State Police had called the Attorney General and "asked for instructions." Delaware law then provided in 11 *Del. C.*, Section 711:

> Whoever... exhibits... or has in his possession with intent to... exhibit,... or knowingly advertises... any obscene, lewd, lascivious, filthy, indecent... drawing, photograph, film, figure or image... is guilty of a misdemeanor.

No Board or Commission existed to determine what material ran afoul of the statutory language. As the State's chief prosecutor, it fell to the Attorney General to enforce the statute.

Unbeknownst to Dan, among the viewers at the first screening were three who were there officially in the line of duty: Attorney General Joseph Donald Craven, Deputy Attorney General Richard J. Baker and a State Policeman in plainclothes. Attorney

The adage that ignoring many matters is far more effective than giving them publicity was again proved by Attorney General Craven's effort to censor the showing of "And God Created Woman."

General Craven had no difficulty in seeing and finding the pornography he came to view. In his considered opinion "And God Created Woman" violated the statute. As Delaware's censor, Joe Craven saw his duty clearly: it was his responsibility to stop the showing of "And God Created Woman" in Delaware. (Attorney General Craven's effort to enforce the law as he saw it seemed to me at the time and since a bad judgment call. He was not always wrong. He publicly opposed the United States' involvement in the war in Vietnam long before any other public figure in Delaware had the courage to do so. He even mounted a campaign for election to the Senate on his opposition to the Vietnam War but was denied a place on the ballot, a story he tells in his personally published 1978 book, "All Honorable Men," which carries the subtitle, "The Anti-War Movement in Delaware 1965-1966.")

On the morning of February 13, 1958, after the first screening of "And God Created Woman" the night before, Dan received a call from one of his newspaper friends who told him that Attorney General Craven had delivered to the newspaper for publication a "Statement to the Press by J. Donald Craven" which concluded:

> I have directed the State Police to stop any further showing of the picture and arrest any persons participating in such an attempt.

Immediately after the call, Dan, being an able business person and cautious by nature anyway, took several prudent steps. He first called his booking agent, the Brandt Theatre, to share the problem that confronted him. The Brandt people told Dan to have his lawyer call their lawyer, Ephraim London, an esteemed lawyer who had won a number of celebrated First Amendment cases. The Brandt people assured Dan that Mr. London would tell Dan's lawyer what to do. In addition, Dan arranged to have the Brandt people send immediately a newly released film starring Betty Grable which he could show that evening in the event he could not go forward displaying Brigitte Bardot. (Dan apparently believed that any patron who came to see Ms. Bardot would not consider his trip in vain were he to see Ms. Grable instead. Dan subsequently told me that he thought that the Betty Grable film was far more suggestive sexually than the Brigitte Bardot film. As Ms. Bardot would have said: *chacun a son gout.*) Dan then called me.

When Dan Cudone and I first spoke about his continued showing of "And God Created Woman," he had not yet received Attorney General Craven's writing. (It is not an infrequent occurrence that those who seek publicity, especially elected officials, much prefer to carry on their causes through a newspaper or radio or television before giving the presumed, intended correspondent a chance to know what has exercised the official.) In his "Statement to the Press," Attorney General Craven had begun by saying: "I have today directed the Management of the Edgemoor Theater [*sic*] not to exhibit or permit to be exhibited the motion picture known as "God Created Woman" [*sic*] featuring Brigitte Bardot." The Attorney General had Lieutenant Charles E. "Pete" Hughes of the State Police call Dan and direct him not to show the film. If Dan did show "And God Created Woman," Pete Hughes told Dan he would be arrested and the film confiscated. I asked Dan to come to my office so that when I called Mr. London (Dan had, of course, told me of his conversation with the Brandt people as well as with Pete Hughes), Dan could be present. While waiting for Dan's arrival, I had Harvey Rubenstein, then a young -- and the only -- associate in the firm of Cohen and Morris,

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research whether or not a court of equity would enjoin the Attorney General from interfering with the showing of the film under our circumstances.

On his way to my office, Dan Cudone picked up a copy of Attorney General Craven's Statement to the Press from his friend at the News Journal Office. (Dan did receive a hand delivered copy of the Attorney General's Statement to the Press later on February 13, 1958.) By the time Dan Cudone arrived, I had some support for my theory (thanks to Harvey Rubenstein's research) which I thought could thwart Attorney General Craven in his frontal assault on a First Amendment right. The theory depended entirely upon Dan Cudone's willingness to stand up and be counted since even my theory would not prevent Attorney General Craven from directing Dan's arrest.

The theory was relatively simple. I knew from my Curran, Jones and McGuire case that our Court of Chancery, in keeping with traditional equity practice, would not interfere with the criminal process. *Curran v. Craven*, Del. Ch., 125 A.2d 375 (1956). Nonetheless, among the oddities of the law is its emphasis upon property rights in contradistinction to its somewhat cavalier attitude toward personal rights. Thus, the law will insist upon all sorts of protective steps to ensure that a Will is the free and unfettered statement by a decedent, unassociated with any coercion whatsoever. At the same time, the law will permit confessions to come into evidence in a criminal trial despite the fact that the document could only have resulted from intimidation of the signer and, moreover, the words in the document were ones which the signer was not likely ever to have freely uttered. In the factual context of Dan Cudone's problem, although I could not stop Attorney General Craven from directing his arrest, I thought I could stop the State from seizing the film itself on the ground it would interfere with Dan Cudone's and the film owner's property right to show the film which no disinterested person had yet determined violated the statute. My goal was to have the Court order that Attorney General Craven could not take the film, a ruling which would mean that Dan could continue to show the film, even though he might do so from the local bastille.

When I explained my plan to him, Dan Cudone did not do cartwheels about the thought of an arrest let alone incarceration. He made it quite clear that he was unwilling to visit upon his wife, Connie, and their five children (Connie and Dan had two more children after they moved to Delaware), the disgrace of an arrested and incarcerated husband and father. Dan's position made eminent good sense to me but, I told him, we were not yet at the point of his having to make the critical decision between showing the film or experiencing durance vile. I told Dan we should call Mr. London as the Brandt people had suggested. I needed to secure authority from the film's owner to represent it in the litigation I contemplated (which Mr. London could give) and to learn what Mr. London would have to say. In Dan's presence, I called Mr. London and engaged in one of the more esoteric conversations I have had in my practice of law.

Having been alerted by the Brandt people, Mr. London was waiting for my call. I described briefly Attorney General Craven's threat and Mr. London assured me that everything was fine. He quickly told me what I must do. First of all, I should have Dan go forward with the showing of "And God Created Woman." I should also arrange for a bondsman prepared to post bail immediately to secure Dan's release from custody upon his arrest which surely would follow. Mr. London told me that were it necessary, he would carry the case to the United States Supreme Court to secure Dan's vindication. Thereafter, when Dan brought back "And God Created Woman" for showing at The Edgemoor (Mr. London expressed no doubt to me that Dan would win), he would show it to a public thirsting to see it, an event that would generate the financial reward Dan would well have earned by standing up for what was right. Mr London did not make any reference to the financial reward which Kingsley International Pictures Corporation and the Brandt Theatre would earn by Dan's fight for freedom. Kingsley International was the ostensible owner of the film. (I did not learn until later that Columbia Pictures owned Kingsley International. I believe the arrangement at that time was that Columbia Pictures masked its participation behind Kingsley International when it wanted to avoid criticism from the Legion of Decency and others who considered it important to impose their narrower view of moral conduct for the greater good of everyone.)

In response to Mr. London's "go forth and have your client arrested" policy, I told him what was, indeed, the fact: Dan Cudone did not want to be arrested. I told him of Dan's unwillingness to expose his family to the shame of an arrested husband and father. Dan had no desire to become a martyr. Mr. London told me that the arrest could not be avoided. I thereupon told Mr. London that I thought there was another tack we could take. I shared with him my theory. Even Mr. London thought that the theory might carry the day. He authorized me to represent Kingsley International. Mr. London's endorsement of the theory, of course, pleased me. Knowing I was giving sound advice to my client has always provided me with that professional satisfaction which I would readily trade for the fee but for the need of income.

Mr. London thereupon turned to other practical considerations which apparently loomed large in his thinking. He asked whether his assumption that Attorney General Craven was Catholic was a correct one. I told him that Attorney General Craven was, indeed, a practicing Catholic. "What about the judge?" he asked. If we are fortunate, I told Mr. London, our petition would come before Chancellor Collins J. Seitz, who was also a practicing Catholic. Silence greeted me at the other end as Mr. London tried to absorb what I had told him. It was obvious Mr. London labored under the impression that justice was far more difficult to obtain from a judge who was a Catholic once the Legion of Decency had spoken. He did not know Collins Seitz whose commitment to fairness and justice was legendary even then. Recognizing that Mr. London needed help, I broke the silence by telling Mr. London that he should not worry since Dan Cudone was also a practicing Catholic.

We were fortunate, as I had hoped we would be, and Chancellor Seitz sat late that afternoon at the hearing of the petition for an injunction I had promptly prepared and served. The relief I sought in the petition was an order, temporarily during the pendency of the case and then permanently

after trial, restraining "the Attorney General..., members of his staff, and law enforcement authorities..., from carrying out their threats to arrest [Dan Cudone] and from hindering in any manner, shape or form the exhibiting of the film 'And God Created Woman,' by petitioner." Dan came to court with me.

Attorney General Craven presented the State's case assisted by Dick Baker. Attorney General Craven made the argument that the State had the duty to protect the public from the pornography the film, "And God Created Woman," thrust upon the citizens of Delaware. (I did not argue that the film was not pornographic since, putting to one side the well-known cleavage in Ms. Bardot's bosom, there was no cleavage apparent in the bottom of Ms. Bardot in the glimpses the viewer saw of her as she lay on her tummy on the table between the billowing sheets. I did not learn until later that under then applicable precedents, only if the film displayed the cleavage in Ms. Bardot's bottom would pornography come to the fore. Without bottom cleavage, the audience viewed art.) Throughout the argument, Dan Cudone sat in the small courtroom (the Court of Chancery then had its single courtroom on the second floor on the Eleventh Street side of the Public Building) and listened intently to the proceedings.

In answer to my charges in the petition and my contention in oral argument as to the intent of the threatened arrests, Attorney General Craven finally uttered the magic words which I hoped he would. He told the Chancellor that the State did, indeed, intend not only to arrest Dan and the projectionist but also to seize the film. Were the Attorney General to carry out his threats, the film "And God Created Woman" could not be shown, a blow to property rights. The Chancellor thereupon took a short recess. Upon his return to the Bench, he read his brief opinion which held he would not stop the State from arresting Dan Cudone were Dan to go forward with the showing of "And God Created Woman" but he would enjoin the State from seizing the film and from arresting Dan's employees, including projectionists, which "would interfere with the exhibiting of the ...film." I had thus delivered at my end.

The critical decision of risking arrest and incarceration with its attendant shame or withdrawing the film and letting the censors win was now at hand. Dan had to make the decision which would test his convictions and his courage. From our prior conversations, I thought the decision Dan would now have to make would tear him apart. If I had been a betting man, I would have bet that Dan Cudone, my cautious, gentle, mild-mannered client, who never sought the limelight for himself, would not risk the disgrace of arrest. After all, but a few years before Dan sought to change the law rather than violate it and show films continuously on Sunday. I would have lost my bet. As he listened to the arguments, Dan had become incensed. He regarded the principle of freedom from censorship so important that he had determined that he would not bow to the benighted nonsense Attorney General Craven wanted to visit upon his fellow citizens. Dan's response to my question as to what he wanted to do was immediate. He did not seek my opinion. He told me his decision. To Dan Cudone's credit, he would bare Bardot rather than display Grable.

Regrettably, I had a commitment that prevented me from being with Dan at The Edgemoor until late that evening. Dan and I agreed that Mr. Cohen would attend the showings of "And God Created Woman" and be at the theater with Dan. We still expected that Attorney General Craven would go forward and make an arrest and milk whatever acclaim might come his way. Attorney General Craven did not tell us what he intended to do. At the time I thought it was mean not to tell us, leaving Dan and me to fret. Perhaps he thought Dan would not risk arrest and would not show the film thus achieving the victory Attorney General Craven had not won in the courtroom . After all, even I had doubted Dan's courage and I was closer by far to

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Dan than the prosecutor who had threatened him with arrest.

By the time I arrived at The Edgemoor, the hour was almost eleven P.M. Dan Cudone had shown the film twice that evening. When it was quite apparent that no police were going to arrive to arrest Dan, Mr. Cohen had departed for home. Dan was in his tiny, open area which served as Dan's office on the second floor of the theater. Also on the second floor was a small room, called "the lounge," where one could smoke and view the film through a thick window that sealed off the lounge from the main theater while sitting on a comfortable chair or on the single couch. The film's sound was piped into the lounge. To get to the lounge one had to pass by Dan's open office area. His desk was immediately to the left of the direct path to the door of the lounge with its comfortable seats. This night Dan's desk was completely covered with money. And God Created Woman" produced Dan Cudone's most financially rewarding evening since he had arrived in Delaware.

I impishly suggested to Dan that he should call the State Police and ask for a guard to accompany him to his bank while he made the night deposit which he customarily made on his way home. Before he could respond to the first suggestion, I followed with a second that he also call the local newspapers to have a filmed shot of his depositing the money in the presence of the State Policeman. Dan immediately rejected both suggestions as showmanship with which he would not associate himself. He held the view that Attorney General Craven and the State were terribly in error since what they were about was the restriction of the freedom each of us enjoyed in the United States and for which we had to be ever willing to put ourselves on the line. He did not want the principle sullied by show-business antics. The show business person had properly put the defender of civil liberties in his place.

I never saw the film before arguing about it in court. When I finally went to see it at The Edgemoor, the night I had selected to go six inches of snow fell and drifts piled high against the front of the theater. Despite the storm, more than 600 people went to The Edgemoor that evening. The adage that ignoring many matters is far more effective than giving them publicity was again proved by Attorney General Craven's effort to censor the showing of "And God Created Woman." Dan showed the film for some six weeks. To meet the demand to see it, Dan opened The Edgemoor earlier to show the film three times a night. "And God Created Woman" was Dan's largest box office success and the longest run of any film during his years of operating The Edgemoor. Throughout the entire run Dan never raised the price of admission to see the film. Dan Cudone was that kind of guy.

In the end, it was Dan Cudone who paid the price for his principled stand. Years later I learned the facts directly from Dan who told me in a voice that still reflected the hurt. Once Dan had taken over The Edgemoor, Dan invited the nuns at St. Helena's Church (at the top of Penny Hill on Philadelphia Pike) to come periodically to The Edgemoor to see films of their choosing which Dan booked at his expense. He showed the films, of course, without charge as his way of expressing his love and respect. He neither sought nor received any public recognition for his good deed; to Dan the simple "thank you" of the nuns was ample reward. Dan's refusal to knuckle under to Attorney General Craven's censorship and cancel "And God Created Woman" caused the nuns, or the Mother Superior for them, to decline to visit The Edgemoor ever again. At the end of the school year, Dan and Connie took their children out of St. Helena's School. It had not been pleasant for them after their father showed Ms. Bardot at The Edgemoor.

Dan Cudone died a relatively young man in 1974 at the age of 59, two years after he had sold The Edgemoor operation to the Budco Theater chain. By the time of his death only three movie theaters remained in Wilmington, the Rialto on Market Street between Second and Third Streets, the Warner at 210 West 10th Street, and the Towne in the 500 block of Market Street. Less than ten years later, not a single movie theater remained open in Wilmington with the Rialto the last to close in 1982. The banned activities of Section 5253 of the 1935 Code and 28 *Del. C.*, Section 906 had disappeared except for a ban throughout the State on "horse racing of any kind on Good Friday or Easter Sunday" (59 *Del. Laws*, Ch. 25, Section 1, approved April 19, 1973), a pallid leftover which still exists today. 28 *Del. C.*, Section 906. The 100,000 population 1951 statutory condition lost meaning by the time of the 1960 Census with its report of Wilmington's population at 95,827, as it spiraled downward to 70,363 in 1980.

Dan had a host of friends. The family asked one of them, Dr. Paul Dolan, by then the senior political science professor at the University of Delaware, to deliver the eulogy. Paul Dolan's tribute to Dan at the well attended funeral (the crowd filled the Chandler funeral facility on Concord Pike) was to talk of Dan's courage in showing "And God Created Woman" and resisting censorship in the interest of all of us. Dr. Dolan did not speak of the nuns and the price Dan paid. I doubt that Dan told many people. Dan Cudone was a special man.

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Irving Morris, a former president of the Delaware State Bar Association, has a distinguished record in the preservation of civil liberties. He is a recipient of the Jerry Kandler Award given by the American Civil Liberties Union of Delaware, its highest recognition of service. Mr. Morris is the senior partner of the firm of Morris, Rosenthal, Monhait & Gross. This contribution may become part of a larger memoir composed for the eventual enlightenment of his grandchildren.

"MAY IT PLEASE THE COURT?"

William Prickett

There simply could not possibly be a single Delaware lawyer or judge who is not familiar with the seminal Delaware case on the effect and scope of general releases, *Hockem v. Rising Sun Trucking Company*, Del.Supr., 199 A.2d 1471 (1956). *Hockem* has been cited by the Courts and appears regularly in bar exams in connection with questions about general and special releases. There is no use shepardizing *Hockem* or running it through Lexis: it has been repeatedly cited, never questioned and, of course, never overruled. Serious legal scholars will, of course, check the foregoing assertion but rest assured that is correct.

This little article will, however, provide some fresh insight on how that great landmark decision came into being. On the one hand, those who are interested in the law of general releases should consult that scholarly, unanimous opinion by the three great justices who made up the new Supreme Court of Delaware when it was first formed in 1951. On the other hand, for those who like to peek behind the judicial curtain (sort of like Dorothy in the Wizard of Oz), and see how such a decision really came to be, can read on. Of course, if you do, you should be mindful of the remark of Bismarck who is reported to have said: "One should neither watch sausage or the law being made: if one does, one would never, under any circumstances, indulge in either one". This account is addressed, of course, only to members of the legal fraternity. It would never do -- no, not at all -- for the laity to profane the sacred mysteries of the law: they simply would not understand, among other things.

This article is titled "May It Please the Court?" It is with this archaic mumbo-jumbo phrase that Delaware lawyers (and indeed lawyers in all English systems of law) commence their legal arguments addressed to Courts. (Of course, the phrase is nonsense when one really thinks about it but so is a good deal of the law and no one ever does really think about such matters. However, no harm is really done nor any good for that matter). But you will soon discover, if you do read on, that my first argument to the Delaware Supreme Court did not please the Court one damn bit, to put it plainly. Nevertheless, I won the *Hockem* case. The result, as we all know, was a landmark opinion. The reasons why my oratory did not please the Court are plainly set out, but on the other hand, neither did the arguments of my so-called "worthy friend" (to use another phrase that lawyers, since the time of Hogarth and Daumier have mouthed about one another) please the Court. In other words, neither argument pleased the Court but yet the Court came up with the definitive opinion on the scope and effect of general releases. How did this happen?

My first argument to the Delaware Supreme Court did not please the Court one damn bit, to put it plainly.

However, enough of this rambling prologue. Let those who have nothing better to do read on. Let's get started and thus finished.

My first argument before the Supreme Court of Delaware was in about 1956. The Supreme Court of Delaware had only come into being in 1951. At the time of its creation, the Supreme Court consisted of only three justices, but the three originally appointed were the most distinguished Delaware lawyers: Chief Justice Clarence Southerland, Justice Daniel Wolcott, and Justice James Tunnell. These lawyers had been specially selected to launch the new Supreme Court, it being agreed that their intellect and energy would preserve and enhance the already deservedly high reputation of the Delaware judiciary.

I had recently been admitted to the Bar. I had no business whatsoever coming before such an august group of legal scholars. Of course, I was not there by choice. Somehow, I had won a jury verdict for a trucking company against a nasty old school teacher, Miss Hockem. The brakes of the truck owned by the defendant, Rising Sun Trucking Company, had somehow failed and it rear-ended the last of a series of stopped cars. There was a domino effect that rippled all the way right up to the head of the line. In the first car was the nasty old school teacher. The bump, she claimed gave her a permanent whiplash and aggravated her already testy disposition. However, unfortunately for her, she signed a general release in favor of the driver of the car directly behind her. We pleaded what in "kick the can" used to be called "allee, allee in-free". In the law, that homely phrase embodies the principle that a general release releases everyone. The jury, I think, did not like the old school teacher and rather did like our nice truck driver, especially as he was accompanied by a worried, attractive, young, blond woman with three adorable little toddlers. The blond and the infants could have been the defendant's wife and children. In fact, our genial defendant had just divorced his second wife. The lady was the defendant's sister. The children were neighbors' children whom she was babysitting. Thus, the jury decided against the old harridan and in favor of the cute blond, the toddlers, the genial divorcee, the rising Sun Trucking Company, its insurance company and incidentally, me.

An older lawyer, whose name I will have the delicacy not to state, represented the school teacher. In a fit of temper, he took an appeal. His appeal was confined to some nice questions on the Byzantine intricacies of general releases. I read it: it was Greek to me. After I had written what I thought was a reasonably presentable answering brief, saying in effect that I had won fair and square in front of a jury of twelve good

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men and thus that should have been the end of the case, I submitted the draft to my father. He was aghast. He spent the next two days and nights reworking the brief to put it in presentable form. From my simple, little effort, the brief had grown to a fifty page opus with citations to thirty-three cases and four Law Review articles. I scanned it, but I lost interest halfway through, about where there was a long discussion of the legal history and meaning of the phrase "but except" running all the way back to the Magna Carta. When the brief was filed, my father asked me if I knew how to shepardize cases. (Shepardizing means looking the case up in a publication called Shepard in order to make sure that the case in question has not been overruled or questioned by another Court in a later opinion). I told him that I knew how and would be glad to shepardize the cases in our brief. "Good", said my father. "There are two important cases we rely on that state the minority view which we, of course, need to persuade the Court to adopt. These two particular cases could have been overruled, questioned or limited by later decisions. I do not need to stress the importance of shepardizing these cases, do I?" I replied "Of course not -- done!"

My father went on to say that the scope and effect of general releases was a legal subject of abiding interest to him. Thus, he said that if it was all right with me, he would argue the case to the Supreme Court. For my own part, I could take or leave the intricacies of the law of general releases (still can). I was just as pleased to leave this highly technical appeal to my father, especially since it appeared to be a matter of professional interest to him and none whatsoever to me. Also, I had no burning desire or indeed any desire at all to appear before the three fearsome justices of the Supreme Court just yet. My father did add that if there was time, he would do a practice argument with me acting as his adversary so I should make myself thoroughly familiar with the briefs, the issues and the cases. I assured him I would do so and promptly put the argument out of my head.

My father then looked at my attire. He said that my suit looked like I had slept in it. (As usual my father was dead right.) He said that my suits generally not only needed pressing but were apt to be dirty. He told me to get my suit cleaned and pressed before we went to Dover. He also said that I should wear a newly laundered white shirt for the argument. I replied that, at least in my generation, white shirts were thought as sort of "square". My father, in exasperation, said that was all very well: perhaps our new supreme Court consisted of three "squares" but that I should understand that my generation's preference for dirty linen was not the matter in issue: our client's cause was. He said the Supreme Court preferred to have officers of the Court in fresh white shirts rather than looking like roofers after a rough day.

I was just as pleased to leave this highly technical appeal to my father, especially since it appeared to be a matter of professional interest to him and none whatsoever to me.

I then went about my own legal business and indeed my pleasures. I did manage to remember to shepardize the cases as instructed except for the two most important cases: the pages referring to these cases had been torn out of the books. I had meant to go around to the DuPont Company Library to finish the job but just had not gotten around to this last little detail. I also fully intended to scan the plaintiff's reply brief.

Just why my father thought I could handle the argument, I still do not know but paternal pride at times interferes with objective judgment.

In due course, the Monday morning rolled around on which the argument was scheduled. I had had a tumultuous weekend culminating in a party most of Sunday night and the predawn part of Monday morning. Thus, I came to the office at 8:30 a.m. with a sort of a dry taste in my mouth and a crashing headache. However, I was young and knew that with a couple of jolts of strong, black coffee and an alka seltzer or an aspirin or two, I would be right as rain probably by noon. I had quite forgotten that this was the day that I was to accompany my father to Dover for the argument in *Hockem.* thus, my suit that particular day was definitely rumpled and not a little soiled.

My father's secretary, Eva Ryan, was waiting for me with a grave look on her face: my father had telephoned from the house Sunday night: he had had a sudden attack of what he referred to as "lumbago". Actually, it was a pinched nerve in his back as a result of an airplane crash during World War I. When it happened, my father was totally incapacitated and writhed in his bed until the pain subsided.

I replied to her that I guess that meant that the *Hockem* argument would have to be continued. She smiled grimly and said: "Your father wants to speak to you". I gulped quite audibly (maybe it was a frightened burp).

I telephoned my father. I could tell from his tone that he was indeed in great pain and had taken the rather strong painkillers that he needed when these attacks came on. He told me flatly that I was to handle the argument in *Hockem.* I remonstrated briefly. He replied sternly that I had tried the case and written the answering brief on appeal, or at least the first draft. He assured me I could and should do the argument. However, he admonished me to leave immediately for Dover so as not to take any chances on being late. He then gravely wished me good luck in this my first Supreme Court argument and hung up. Just why my father thought I could handle the argument, I still do not know but paternal pride at times interferes with objective judgment. Perhaps it was the painkillers.

Thus, in addition to all my other problems was the fact that my father, on whom I depended so much at this stage in my career, was again totally incapacitated by his recurrent back injury. Thus, I felt very lonely indeed as I hung up and faced the grim reality of having to handle a serious appeal, which I had not really considered at all entirely on my own.

As I said, when I came into the office, I had quite forgotten the *Hockem* argument. Thus, I did not have a clean, starched, white shirt on at all: rather, I had had a somewhat tired blue Oxford buttoned-down shirt that had withstood the rigors of my vigorous weekend. My first task, therefore, was to run up to Mansure & Prettyman in the DuPont Building as fast as my legs would carry me and buy a white shirt right off the

rack. The fussy old clerk simply could not understand why I did not want to discuss the niceties of haberdashery but simply wanted to buy and put on the first white buttoned-down that was my size as soon as I could pull out the hundreds of pins that the shirtmaker had for some reason put in. I was visibly annoyed as his shaky fingers slowly wrote out a spidery sales slip. Then he started to launch into what promised to be a lengthy discourse on my grandfather's proclivity for starched, detachable, white collars in the fashion of men of the bar prior to World War I. I left him, mouth open, quite in the midst of his rambling reminiscences, saying that I was due in the Supreme Court in Dover in fifty minutes, as indeed I was.

I thought, as I raced back to the office to pick up my old car, that I would have time on the way down to Dover to collect my wits. I had a twinge of fright as I remembered that I had not followed my father's admonition that I shepardize all the cases and that I had not read the plaintiff's reply brief at all, much less carefully since my father had not been able to schedule a practice argument. Perhaps I could read the plaintiff's reply brief as I drove down to Dover. My problems were compounded when the claims manager for the insurance company covering the trucking company breezed into our office. He said that he had decided to accompany my father to Dover for the argument. I told him that my father was laid up: I was going to make the argument. He did a massive unconcealed doubletake but it was altogether too late to do anything. Thus, we went on off together in my car. As I say, I had hoped that I would have time in the drive down to Dover to assembly my thoughts and prepare a brilliant oral argument. Just why I imagined that I could put anything together that would be even faintly of any assistance to the Supreme Court in deciding this case while driving down in excess of the speed limit, now baffles me. However, having heard a good many arguments, I think that some of my brethren at the bar still believe that the reason the Delaware Supreme Court sits in Dover is to give certain Wilmington and New York lawyers some time to prepare their thoughts and speeches.

Now, as I said, I had the insurance company claims manager with me. He was a frustrated lawyer: he liked nothing better than to wrestle with intricate legal problems. thus, he at least had read all the briefs. He tried to engage me in a learned discussion on the niceties of the legal points and cases. Of course, he had an advantage or two over me. First, I was desperately hung over. Secondly, I just had a nodding acquaintance with the plaintiff's opening brief and answering brief and no acquaintance at all with the reply brief of our opponent. I tried to drive, pay attention to his questions and nurse my hangover. It was a juggling act that was compounded by the fact that we were going well in excess of the speed limit, mindful of my father's exhortation that under no circumstances should I be late. At one point, I was forced to tell my passenger that, while I was of course fully prepared to make the argument, I had been out a bit later than I would have if I had known my father was not going to make the argument. One thing led to another and I was forced to admit I was slightly hung over (a gross understatement). My passenger reached in his briefcase, pulled out a bottle, unscrewed the cap on a pint of Schenley's. The last thing in the world I needed at that point was a belt of hot blended whiskey. But my passenger insisted and, after all, an attorney must do his client's bidding. I gagged down a mouthful. He followed my forced example by taking a triple swig remarking jovially that it was just the thing "To get the old engine going".

We drew up at the beautiful Green in the center of Dover. Miraculously, I found a parking place. We walked across the Green at a brisk pace and arrived at the awe-inspiring Courtroom at two minutes of 10:00. I was afraid that the first argument might have been continued for some reason and that I would be up to the judicial plate rather than being "on deck", so to speak. That did not happen. At the stroke of 10:00, the bell in the adjoining Courthouse tower began to toll lugubriously. A small door opened and the three justices solemnly and majestically padded toward their chairs. They stood while the clerk solemnly intoned the usual opening concluding with: "God save this honorable Court: all those wishing to be heard may now draw nigh and they shall be heard". As I say, there was another case before ours. Unfortunately, a

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One only has to look at the newspaper headlines from the past year to realize that our boundaries are shaped not only by events within our well defined locus of activities, but those of the great globe itself. In reaction to the somewhat fluid situation presented by changes in Eastern Europe; the solidification of European Community; the upheaval in China; and, the growing influence of Japan on all segments of business, those persons who advise corporations must renew their knowledge of international law and its effects on the conduct of business, domestically as well as internationally.

On February 22, 1991 the International Law Committee, the World Trade Center Delaware and the Delaware Development Office will present a full day seminar in which attorneys and experts in international trade will explore the opportunities and pitfalls of this rapidly growing field of commercial activity. The seminar is designed for those persons engaged in international business, those contemplating such activity, and those who provide services to such a clientele. The seminar will provide 5.8 hours MCLE Credit. Topics to be covered during the day include: Delaware's Corporate Law; the Delaware International Incentive; International Contracts; International Taxation and Tax Treaties; Joint Ventures in International Business; and Introduction to GATT; Countertrade in Non-Market Economies; the Eastern European Opportunity; Japanese Regulations and Business Relationships.

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lawyer (whose name shall also remain unstated, at least in this little account) was not present as the Justices sat down. The Chief Justice looked up over his glasses and then asked the missing lawyer's opponent if he knew where his colleague was. The response was in the negative. The Chief Justice then told the Clerk, Jack Messick, to get on the phone to the delinquent attorney's office and determine just where this luckless lawyer might be. In the meanwhile, the members of the Court sat up reading the stacks of briefs before them and quietly discussing some of the points of law amongst themselves. In about five minutes, Jack came back. He said that the attorney's secretary had said that the attorney had been delayed in leaving his office and had only left for Dover about 9:25. However, the secretary added that he boss was a fast drive and thus he should be at the Supreme Court "in a jiffy". At just about that time, the lawyer in question came barging into the back of the courtroom. he bustled genially up to the podium, offering profuse apologies breathlessly to the Court. Of course, not knowing that the Clerk had just telephone his own office, he said:

> "I left Wilmington at 8:30 sharp this morning so as to be here right on time. As luck would have it, I had a flat tire just south of Odessa and thus have been unavoidably delayed, so sorry Your Honors. Now I will begin my argument, if it pleases the Court."

The Chief Justice interrupted:

> "Just a moment, counsel, not so fast if you please."

The Chief Justice and other members of the Court then said nothing for what seemed even to me to be a long time. The stony silence was grim and appalling. Then the Chief Justice gravely looked from left to right at his judicial colleagues and asked in a flat tone: "Which tire went flat?" The surprised attorney replied with fear and trembling in his voice: "Why do you ask?" the Chief Justice replied: "This Court is interested in all the details on matters that affect the performance of officers of this Court". the attorney said: "The right". The Chief Justice said: "Front or back?" The attorney blanched and then said: "Front" and then added: "I think".

The Chief Justice and the other two on the bench savored this flat lie in total silence for an awesome length of time. Finally the Chief Justice said with deliberation: "Very well. For the present at least, let us proceed with the argument in this case, lest we delay those attorneys who have managed to avoid having flats south of Odessa". The ominous way in which he pronounced these words struck fear and trembling into my own wicked little heart. I decided right then and there to make a new beginning since it was plain that at least here, the full unvarnished truth was all that would pass muster. (Little did I know that very shortly I was going to have occasion to carry out that recently acquired precept and discard some of the more liberal approaches to veracity that had been my style at times in school, at home and elsewhere).

Actually in view of the above horrible little curtain-raiser, I have entirely forgotten what the first appeal itself was all about. I do remember that the attorney who had been there on time and tried unsuccessfully to wipe a certain smirk off his face arising from the quiet satisfaction of knowing that he and the Court were sharing a secret. Thus, the unfortunate liar launched into his argument, trying by his sincerity, legal knowledge, and wit to convince the Court of the merit of his client's case. However, I recall that the attorney who was late did not get his client penalized. The Court decided in favor of the client, though I later heard it whispered about that the Court administered the liar a blistering private reprimand.

As the first argument drew to a close, I looked over at my opponent. He did not have a starched, white shirt: instead, he was wearing a sort of a ratty gray-blue shirt, the collar tips of which curled up. By this time, I had begun to feel just a tad better. The Chief Justice courteously apologized to me and my colleague for the delay; he said that, if it was agreeable to us, the Court would feel more comfortable with a five minute recess. After the Court had filed out, my opponent leered over at me the way a wolf does at a lone sheep when he discovers the shepherd is away. He said snidely "Well, sonny boy, and just where is your learned parent?" When I disclosed that my father was flat on his back and that I would be making the argument, his grin broadened; he could taste blood. This annoyed me considerably so I decided to have a little sport of my own with my opponent. Just as the Court was about to come back on the bench again, I slid alongside him as he stood waiting at the podium ready to begin his argument. I said quietly: "Excuse me, but I think you fly is ever so slightly open". He never even looked down. Instead, he looked venemously at me and hissed back: "Young fells, you can't catch me with the oldest trick in the book. But just for that, I am going to call the Court's attention to the fact that you could not have shepardized the citations to your two main cases. I might otherwise have overlooked that filing but this for dirty little trick you tried to play on me". Further exchanges were cut short as the three members of the Court again regally trooped back through the door and sat down. Of course, my opponent had put his legal rapier at exactly the place where I was most vulnerable: I had not indeed shepardized our two most important cases. But how did that old wolf know that? The Chief Justice duly asked if counsel was ready for the argument. We both replied "Ready". I must say that what my opponent had just said made me so nervous that I did consider for an instant whether I should blurt out that I was not ready (indeed not at all ready).

Well, my worthy opponent launched into his argument with a half-bow to the Court. He said cringingly: "May it please the Court?" He then recited all of the usual reasons why the Court might hold that this general release was not a general release at all. To my secret pleasure, the members of the Court looked uninterested. However, just before my opponent was about to sit down, his tone and manner turned as unctuous as Uriah Heap. Looking slyly at me in a brief sidelong glance, he said in most deferential tones: "Now I know that my young colleague is a graduate of the great and well-known Harvard Law School and not an old graduate of a humble night law school like myself. Thus, I am sure that he shepardized each and every one of the cases cited in his brief. But for his distinguished legal pedigree, I would have thought that one of the principal cases or perhaps two that he has cited in his brief

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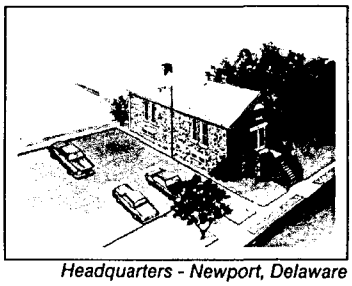

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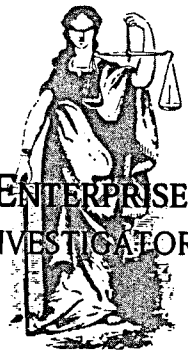

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just might have been overruled. Perhaps they were just questioned in later decisions. but am sure my brilliant young friend would not offer cases to this, the highest Court of this State, if in fact there were later authorities that overruled or questioned a case". As he went back to sit down, he gave me a wicked half smile.

I am sure that I blushed or went pale. Now did I not wish that I had shepardized *all* of the cases carefully as I had been instructed to do! I did not, of course, know if one or two of the unshepardized cases might have been overruled or questioned by later decisions. They both seemed sound enough to me though I knew nothing about the law of releases.

Of course, I didn't have too long to stew or fret over this legal quandary that my opponent had put me in. All too soon, far too soon, it was my turn to stand up and approach the lectern. However, as I was about to get up and to to the lectern, I saw that the insurance manager was already at the podium. I was horrified at first but quickly saw that fate perhaps intervened and saved me from disgrace. Perhaps he was inspired by our cause or perhaps fired up by Schenley, or at long last he saw his one opportunity to show the world his wasted gifts as an appellate advocate; in any case, he began:

> "Learned Judges of the highest Court of the State of Delaware, I am going to make the argument since our lawyer, William Prickett, Sr., is flat on his back with a war wound and this youngster does not know a general release from a hold harmless agreement. Why --"

At this point, the Chief Justice interrupted and inquired if this would-be Daniel Webster was a duly authorized member of the Bar of the State of Delaware.

When the insurance manager ruefully admitted that he was not a member of the Bar, the Chief Justice said:

> "Well in that case, you do not have the right to appear and be heard. We will hear from the young Mr. Prickett and hear what he has to say that will shed some helpful light and learning on the murky subject at hand -- the scope and effect of a general release."

Sadly, my savior relinquished the podium and (sadly) I took his place. My client whispered: "Go get 'em tiger" and slapped me on the back as we traded places. Whatever thoughts I had on the subject of releases had been quite scattered by all that had thus far gone on. However, there was nothing to do but launch bravely into the argument. In point of fact, my argument at that point consisted principally of reiterating various legal platitudes that I had picked up out of legal garbage cans. For example, I told the Court: "A litigant who comes to the appellate court armed with a jury verdict is in the strongest position known to the law". The Chief Justice listened to me repeat that nonsense about three times. He then remarked with just a touch of sarcasm: "Yes, Mr. Prickett, we have heard you run through that old nostrum three times by my count, though I may have missed some. We get your point, minor though it is, the phrase, I believe, was originally that of Stephen Decatur. You might have had the courtesy at least of acknowledging the source. I am something of a student of that American hero. Mr. Decatur was known for his patriotism rather than his legal brilliance, particularly on the rather dry subject of the scope of general releases which is all we are considering today. Stephen Decatur also said: 'My country right or wrong'. Incidentally, since we have gotten off on Stephen Decatur, you may also be interested in another of the sayings of Stephen Decatur: 'The law is that which is stoutly asserted and boldly maintained'. It's a pity you didn't throw that into your argument since it seems to be one of the principal bases of your argument".

"Young man, here in Delaware when reference is made to 'the Supreme Court', we assume that whoever is using the phrase is referring to this Court and not some other Court that is said to sit in the District of Columbia".

At one point, referring to a recently decided case, I said: "The Supreme Court has recently held in *Spalding v. Central Railroad*---" The Chief Justice held up his hand and leaned over the bench. He peered owlishly over his glasses, raised his eyebrows and said with feigned astonishment and incredulity: "My goodness Mr. Prickett, for the life of me, I do not recall that this Court has ever decided a case by that name. Do any other members of the Court recall such a case?" The Justices duly shook their heads (clearly, they had participated in this sort of judicial snipe hunt before).

"Oh", I said hastily, "I'm referring to the Supreme Court of the United States." The Chief Justice paused and said: "Young man, here in Delaware when reference is made to 'the Supreme Court', we assume that whoever is using the phrase is referring to this Court and not some other Court that is said to sit in the District of Columbia". Letting that sink in, he added: "The Court in the district of Columbia is a court in a collateral system of justice. What that Court says is at times legally significant and at other times not at all significant, particularly when that Court issues nine different opinions. Nevertheless, we now understand what Court you were trying to refer to and will accord the decision of that Court just the weight that it merits in view of the source".

Then Justice Wolcott said: "Mr. Prickett your colleague seems to suggest that there just might be one or two of the cases cited in your brief that has been overruled or at least questioned. However, he assures us that he at least relied on you. In fact, he doesn't even say flatly that some of your cases have been overruled or questioned. Would you please assure the Court that each and every one of the cases cited in your brief has in fact been shepardized and that none of the decisions have been overruled or questioned."

Now was when my recent lesson in candor came to my immediate rescue. Overcoming a propensity of my youth to fib, I said as manfully as I could: "Your Honors, to my great embarrassment, I have to admit to this Court that I neglected to carry out my father's direction to shepardize all cases cited in our brief. There were two cases I could not shepardize: some of the pages from Shepard's had been removed from the County Law Library's volumes. Now I know I should have gone to the DuPont

Law Library, but I did not take the time to do so".

The Chief Justice having heard my pitiful account said with a mock mournful sigh: "Oh dear, that just means that we overworked judges must now do the attorney's work. Young man, we must now shepardize your cases as you could and should have done". I was close to tears.

However, Justice Tunnell,who I think had been enjoying the game, now spoke up and said: "Now, now, Chief Justice, I do not think that will be necessary at all. I have in fact already shepardized *all* the cases cited by both parties including the two cases as to which the pages in Shepard's were torn out by someone last week. I can assure the worried young attorney for the appellee who neglected to shepardize those two cases that none of the cases cited in his brief have been questioned or overruled: on the other hand, I did find that there are two cases cited by the attorney for the appellant, one of which is miscited and one of which was overruled some ten years ago:. Quite suddenly, the sun came out. The tables had been turned and the hunter was now the hunted.

The world will never know that the genesis of the law on general releases here in Delaware at least does not stem from my scholarly efforts or my oral advocacy. I am quite content to leave it just that way.

Well, this little horror story eventually came to an end. The Court had not been strict in its rule on time. I guess that the three of them had decided amongst themselves quite tacitly that they were not going to get much help from the two attorneys appearing in front of them. They proceeded to throw the legal ball about general releases back and forth among themselves occasionally asking me or my colleague whether we agreed on a particular point. Thus, they had a lively discussion among themselves almost ignoring us, there being no one else in the courtroom other than the Clerk and my client.

The Chief Justice then thanked both of us for the argument saying that it had been a help to the Court in several different ways. He concluded the Court would in due course render its decision.

When I came home, I drove immediately to my father's house. To my great relief, I found that the acute episode was over. the nerve spasm had passed and in a day or so he would be back in legal harness again. That was a great relief, of course, to me. He questioned me closely with professional interest in the argument. I told him the whole unvarnished truth. He was amused at all that had happened to me and all that I had learned. When I told him about why I had not shepardized the two important cases -- because the pages were missing -- he said, "I always suspected that ___ ___ took pages out of library books but your experience confirms it".

Suddenly I realized what my opponent had done. I said, "that's how he knew I had been unable to shepardize them".

My father replied, "Of course, and Justice Tunnell realized that as well".

In due course, the Supreme Court handed down its landmark opinion in *Hockem v. Rising Sun Trucking Co.* My father read it with great professional interest (and paternal pride) since the Court had adopted our views on the scope and effect of general releases. Of course, I knew very well that I had precious little to do with the result or with the opinion. However, aside from those who read this little account, the world will never know that the genesis of the law on general releases here in Delaware at least does not stem from my scholarly efforts or my oral advocacy. I am quite content to leave it just that way.

However, I did learn a great deal from this initial argument, including the importance of white shirts, shepardizing cases, becoming familiar with all of the briefs, practicing an oral argument, getting a good night's sleep the night before and not drinking rye whiskey on the way down to an argument. I also learned that candor

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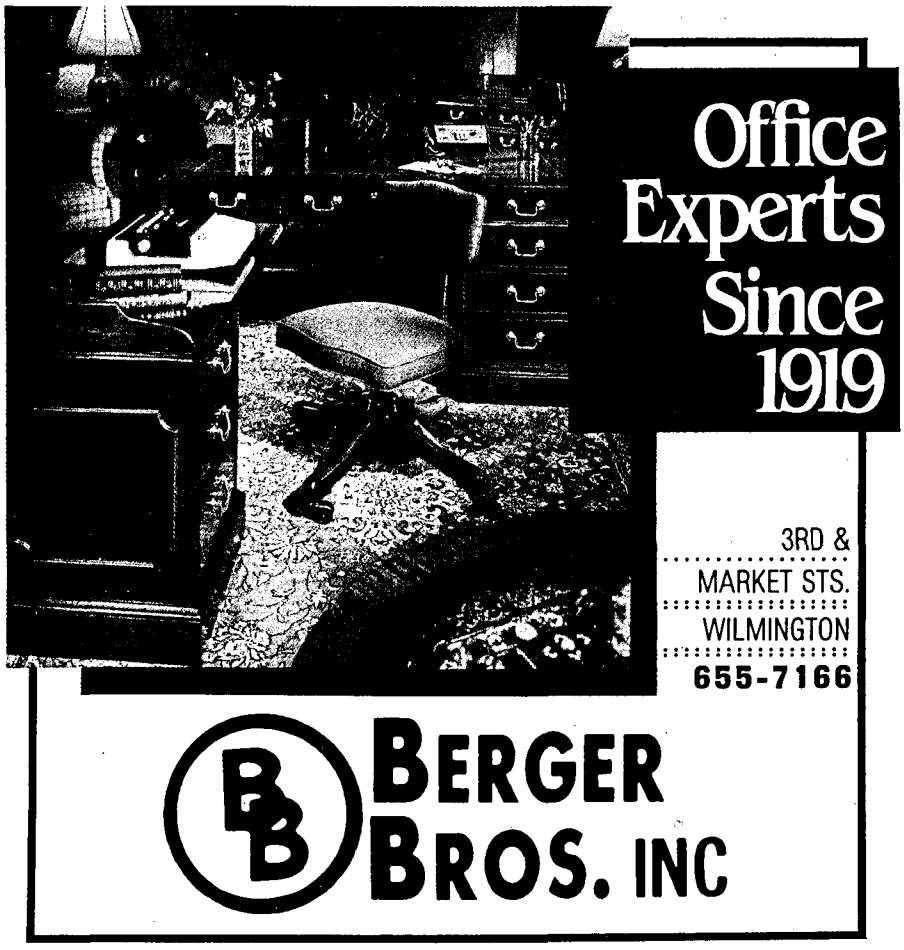

pays off and that the function of an attorney in an oral argument is to try really to provide the judges hearing the argument with some further insight into the issues and questions which they have to decide correctly. I also learned that decisions in appellate cases necessarily at times transcend the interests of the individual litigant and the scholarship and advocacy of the attorneys for the parties. Perhaps what I learned so painfully may be of service to younger colleagues.

William Prickett, a frequent contributor to this magazine, is a former President of the Delaware State Bar Association and currently a Director of the Bar Foundation. He practices law as a senior member of the firm of Prickett, Jones, Elliott, Kristol & Schnee.

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Gregory A. Inskip

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Intellectually honest lawyers should agree that an individual, personal right to bear arms is set forth in plain English in the Second Amendment:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Gun control advocates, however, are not intellectually honest. The American Civil Liberties Union, which purports to have the Bill of Rights as its "client," has asserted that the Second Amendment does not guarantee an individual right at all: "The setting in which the Second Amendment was proposed and adopted demonstrates that the right to bear arms is a collective one existing only in the collective population of each state for maintaining an effective state militia."[1] In fairness, the ACLU's position is not ironclad: while it "will affirmatively support gun control legislation" to disarm honest citizens[2], it opposes the use of metal detectors in airports.[3] According to the ACLU, the Constitution protects the opportunity to terrorize airplane passengers with a gun, but not the hope of defending a home or family with one.

The men who framed the Second Amendment did not share the ACLU's vision of a meek and disarmed citizenry caught between the armed State on the one hand, and armed criminals on the other. The Founding Fathers were heirs to an Anglo-Norman legal tradition, which required free men to keep arms for the defense of the realm and the suppression of crime.[4] They were heirs as well to a philosophical tradition -- from Aristotle through Machiavelli to Locke -- which saw the possession of arms as what distinguished a free man from a slave, and which saw the disarming of the people as an essential device of tyranny.[5] The Framers relied upon an upstanding, independent, and armed citizenry as the bulwark of public order and liberty.

According to the ACLU, the Constitution protects the opportunity to terrorize airplane passengers with a gun, but not the hope of defending a home or family with one

The notion that Second Amendment does not protect the right of individuals to bear arms is based upon a mistaken interpretation of the term "Militia." Colonials esteemed the "Militia" not as a formal military body apart from the people, but as the armed citizenry itself. An independent militia movement swept the colonies in 1774 and 1775 -- on the eve of Revolution -- as an *alternative* to the hated British standing army.[6] Here in Delaware the New Castle County committee resolved that "a well regulated Militia, composed of the gentlemen, freeholders and other freemen, is the natural strength and stable security of a free Government."[7] Thirteen years later, as the constitution was debated in Virginia, Richard Henry Lee argued eloquently against ratification without a bill of rights. On the subject of the militia and the right to bear arms, he wrote as follows:

A militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary.

> [T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, expecially when young, how to use them; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it.[8]

Thus the Framers would have found the ACLU viewpoint that the right to bear arms is a "collective" one, inhering only in organized military bodies, to be the precise opposite of the truth. For the Founding Fathers, "militia" meant not a select group of specialized warriors but "all males physically capable of acting in concert for the common defense" who when called for service "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[9]

Nor can a collective or statist view of the Second Amendment be grounded upon the fact that keeping arms is proclaimed to be a right of the "people." The "people" and the "States" are expressly distinguished in the 10th Amendment. Moreover, when the Framers wanted to protect *individual* right in the First and Fourth Amendments they did so by referring, as they did in the Second Amendment, to rights of the "people." If the ACLU's collectivist inter-

(Continued on page 22)

pretation of the Second Amendment is true, then the only speech protected by the First Amendment is government propaganda, and the only secrets protected by the Fourth Amendment are those of the government.

In the debate over the new Constitution, neither the Federalists nor the Anti-Federalists doubted that Americans as individuals enjoyed the right to bear arms. In *The Federalist* No. 46 James Madison stated that the new federal government would not be like those European despotisms "afraid to trust the people with arms." Americans, said Madison, need not fear the government because of "the advantage of being armed, which the Americans possess over the people of almost every other nation....."[10] Similarly in No. 29 Alexander Hamilton asserted that the "people at large" should be "properly armed and equipped." and that any standing army raised by Congress "can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens.[11]

Assault rifles are paradigm militia weapons. For this reason, Swiss and Israeli citizens are required to keep them at home.

Patrick Henry, in the Virginia ratification convention, opposed the Constitution because it did not explicitly protect the individual right to bear arms. "The great object is that every man be armed . . . . Everyone who is able may have a gun."[12] George Mason supported Henry with the observation that British sympathizers wanted "to disarm the people; that it was the best and most effectual way to enslave them. . . ."[13]

In the Massachusetts convention Samuel Adams proposed an amendment guaranteeing the right to bear arms, so that "the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms."[14]

The Federalists responded to criticisms raised by Adams, Henry, Mason, Lee and others with a commitment to "further guards for private rights" should the Constitution be ratified. The Bill of Rights ensued. The Second Amendment was discussed in a contemporaneous written interpretation by Madison's ally, Tench Coxe, as follows:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article in their right to keep and bear their private arms.[16]

Other Founding Fathers, including George Washington, John Adams, Thomas Jefferson, and James Monroe, likewise recognized a private right to bear arms.[17] Today their successors in the Administration, and Congress are pushing various initiatives to ban so-called "assault weapons," including many widely used rifles, pistols and shotguns. The premise of these initiatives -- that "assault weapons" have no useful sporting purpose -- would be irrelevant even if it were true. The reason that we have a constitutional right to bear arms is not so that we can go deer hunting or skeet shooting. It is so that the general militia -- the armed citizenry -- will be ready at need to repel foreign invasion, to rise against domestic tyranny, and to suppress insurrection or crime.

Assault rifles are paradigm militia weapons. For this reason, Swiss and Israeli citizens are required to keep them at home. For the same reason, our government cannot constitutionally prevent any law-abiding citizen from owning one.18

Gun Prohibition Does Not Inhibit Violent Crime

Until this year the target of choice for the gun control movement had been the handgun. Assault weapons are the new subject of media hysteria for two reasons: drug dealers have used them on the police and each other, and a madman -- Patrick Purdy -- used one to murder some school children. But to blame the weapon for the crime of the man is superstitious. Criminals in "gun controlled" jurisdictions like Northern Ireland, Mexico, Washington D.C., or New York City kill or maim people every day with chains, knives, lead pipes, crow bars, rocks, broken glass, fists, feet, *etc.* -- in the unlikely event that they can't get guns. On the other hand, the possession of assault weapons does not transform the Swiss, Israelis, or National Rifle Association members into dangerous criminals.

The most complete empirical study of the relationship between guns and crime was performed by two professors at the University of Massachusetts, J. Wright and P. Rossi, under a three-year grant from the U.S. Dept. of Justice: National Institute of Justice, U.S. Department of Justice, *Weapons, Crime and Violence in America* (1981). Wright and Rossi surveyed all of the studies and criminological data that had been developed as of 1980. Their conclusions included the following at pages 1-2 of the Abstract:

> There appear to be no strong causal connections between private gun ownership and the crime rate. . . . There is no compelling evidence that private weaponry is an important cause of, or a deterrent to, violent criminality. It is commonly hypothesized that much criminal violence, especially homicide,occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur were firearms generally less available.There is no persuasive evidence that supports this view.

The work of Philip J. Cook indicates that robbers armed with guns are less likely to physically attack their victims than robbers armed with other weapons or no weapons at all.[19] Moreover, greater or lesser availability of guns has no effect on the robbery rates in large cities -- although criminal access to guns apparently shifts

the burden from the weak (women, the very young, and the very old) to stronger but more lucrative targets (commercial establishments, and men in their prime).[20]

Other empirical data indicate that law-abiding civilians effectively use firearms to suppress crime (armed civilians shoot more criminals and break up more crimes than the police do),[21] and that criminals, notably burglars, tend to avoid occupied premises out of fear that the occupants might be armed.[22]

People who are seriously violent in the present -- including Patrick Purdy, who shot California schoolchildren with an assault rifle, and Charles Whitman, who shot several people at the University of Texas with a long-range sporting rifle -- usually have a record of serious violence in the past.[23] Accordingly, any "gun control laws should be aimed at restricting gun possession among persons with prior records of violence rather than among the general public. Otherwise, loss of deterrent effect on crime exerted by widespread civilian gun ownership could outweigh the benefit of a slight reduction in gun possession among the violence-prone."[24]

Any effort to disarm dangerous criminals by disarming the public at large will prove to be a failure. Hardened criminals responding to a prison survey by Wright and Rossi overwhelmingly agreed with the statement that "Gun laws affect only law-abiding citizens; criminals will always be able to get guns."[25] And a *Washington Post* article, reprinted in the *Wilmington News Journal* on May 9, 1989, reports that as many as 500,000 Chinese-made AK-47 "assault rifles" have been *smuggled* into the country since 1986.

Gun control laws should be aimed at restricting gun possession among persons with prior records of violence rather than among the general public.

The statement that "when guns are outlawed only outlaws will have guns" is not merely a tautology or gun lover's cliche. It crystallizes an insight that the Enlightenment philosopher Beccaria stated in 1764, but which applies equally to the current furor about assault rifles:

> The laws that forbid the carrying of arms . . . disarm those only who are neither inclined nor determined to commit crimes Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designed as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantage of a universal decree.[26]

The Right to Bear Arms Is Essential to the Freedom and Well-Being of the People

The Founding Fathers perceived that arms control in England and Europe had served to subjugate the poor and other disfavored groups to tyrants and the privileged classes.[27] They would have seen nothing new in the brutal suppression of unarmed democrats by armed despots in China and Panama. Nor would the Framers have been surprised by the hypocrisy of today's media and political figures like Carl Rowan and others who keep weapons themselves while seeking to deny the same right to their fellow citizens. Kates looked at the list of the few people privileged in New York City to carry a firearm at all times and found that "the list of permit holders is composed of people noted more for their political influence, wealth and social prominence than for their residence in high-crime areas. Along with Arthur Ochs Sulzberger, the list has included such other well-known gun prohibition advocates as Nelson Rockefeller and John Lindsay. Psychologist Joyce Brothers, whose public position is that men possess handguns in order to compensate for sexual dysfunction, was not on the list. Her husband was."[28]

Today it is the honest but disarmed poor who suffer first and most, as the government is proving to be incompetent to protect its citizens from crimes of violence which "are proliferating in an unprecedented manner in American cities, fueled largely by narcotics."[29] 1988 was a record year for homicides in New York City (1,840) and Washington D.C. (372), and the public does not feel safe in either place.[30] Seaford, Delaware is plagued with its own "crack alley" and drug-related crime.[31]

A gun in the hands of a responsible citizen does not endanger the rights of others. Irresponsible people are dangerous whether they have guns or not. If guns are banned big male criminals still will brutalize smaller men and women. Gangs still will rob, torture, or beat solitary citizens on the street. Drug pushers still will have more than enough guns to dominate neighborhoods and challenge the police. they will have more than enough money to corrupt public servants from bad cops and Washington D. C. mayors to Congressmen. The rest of us ought to be buying guns and learning how to use them -- not trying to give a monopoly of force to the Manuel Noriegas and Li Pengs of the future.

The best form of government -- a government of freedom under law -- cannot be maintained by law, lawyers, or policemen alone. It cannot be maintained at all by "public interest" lawyers who would legalize drugs, prostitution, and child pornography.32 Our free republic presupposes citizens with the character and self-restraint to avoid doing evil, and with the courage and means to put an end to evil begun by others. For this reason, the Founding Fathers bequeathed to each of us the right to bear arms.

I should like to thank Dan M. Peterson, Esquire, John J. Thompson, Esquire and Michael M. Ledyard, Esquire for helping to educate me about a subject that is essential to the development and persistence of our free institutions. My debt to Halbrook's book and Kates' article is obvious from the footnotes. Readers wanting to know more about the right to bear arms would do well to begin with those sources.

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1 Policy adopted at June 14-15, 1980 meeting of ACLU National board, quoted in Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 207-08, ftn. 15 (1983).

2 *Id.*

3 *ACLU Policy Guide*, Policy No. 270, quoted at William A. Donahue, *Where Does the ACLU Stand on the Issues?*, HUMAN EVENTS, July 16, 1988 at 17.

4 Stephen P. Halbrook, *That Every Man Be Armed -- The Evolution of a Constitutional Right*, Albuquerque: U. of New Mexico Press (1984) at 37-54; David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARVARD J. OF LAW & PUBLIC POLICY 559, 562-71 (1986).

5 Halbrook, *op. cit.* at 7-35; Kates, *op. cit.* at 230-35.

6 Halbrook, *op. cit.* at 61.

7 1 P. Force, *American Archives* 1022 (1837-53), quoted at Halbrook, *op. cit.* at 61.

8 R. Lee, *Additional Letters From the Federal Farmer* (1788) at 169-170, quoted in Halbrook, *op. cit.* at 71-72.

9 *United States v. Miller*, 307 U.S. 174, 179 (1939). To this day, the "unorganized militia" of the United States is defined as "all able-bodied males" between 17 and 45 who are not members of the National Guard or Naval Militia. 10 U.S.C. Section 311(a) and (b).

10 Quoted in Halbrook, *op. cit.* at 67.

11 *Id.*

12 3 J. Elliott, *Debates in the Several State Conventions* 386 (2d ed. 1836), *quoted* in Halbrook, *op. cit.* at 74.

13 3 Elliott at 380, quoted in Halbrook, *op. cit.* at 74.

14 B. Schwartz, *The Bill of Rights: A Documentary History* 675 (1971), quoted in Kates, *op. cit.* at 224.

15 11 Papers of James Madison 307 (R. Rutland & C. Hobson ed. 1977) (letter of October 20, 1788 from Madison to Edmund Pendleton), quoted in Kates, *op. cit.* at 223.

16 "A Pennsylvanian," Remarks on the First Part of the Amendments to the Federal Constitution, *Philadelphia Federal Gazette*, June 18, 1789 at 2, col. 1; reprinted *New York Packet*, June 23, 1789 at 2, cols. 1-2, and by the *Boston Centennial*, July 4, 1789 at 1, col. 2; quoted at Kates *op. cit.* at 224.

17 Halbrook, *op. cit.* at 66-67; Kates, *op. cit.* at 228-29.

18 *United States v. Miller*, 307 U.S. at 178 (recognizing that the Second Amendment protects the right to own ordinary military weapons, but finding no evidence in the record that a sawed-off shotgun was such a weapon).

19 Summarized in Gary Kleck, *Policy Lessons From Recent Gun Control Research*, 49 LAW AND CONTEMPORARY PROBLEMS 35, 37 (1986).

20 *Idem.*

21 *Id.* at 43-45.

22 *Id.* at 46-47.

23 *Id.* at 40; Allan C. Brownfeld, *How Our Criminal Justice System Serves Convicts*, HUMAN EVENTS, April 22, 1989 at 12.

24 Kleck, *op. cit.* at 59.

25 *Id.* at 41.

26 C. Beccaria, ON CRIMES AND PUNISHMENT 145 (1819), quoted in Kates, *op. cit.* at 234.

27 Halbrook, *op. cit.* at 55, 67-68.

28 See Kates, *op. cit.* at 208, ftn. 17.

29 Brownfeld, *op. cit.* at 12.

30 *Id.*

31 *Sunday News Journal*, May 7, 1989.

32 *Op. Ct.*, Note 3, Supra

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THE FAMILY COURT OF DELAWARE CASA PROGRAM

Emmett M. Partin and Lynn Shreve

CASA (Court Appointed Special Advocate) programs, the fastest growing child advocacy movement in the United States today provide carefully selected and trained citizen volunteers to represent the best interests of abused and neglected children in court proceedings.

The Family Court of Delaware CASA program, one of 412 projects of this kind in the country has been one of the national leaders in the development of the CASA concept. In 1987, the Delaware Family Court CASA project was awarded the National CASA Association's award of excellence for research, and last year the program completed a U.S. Department of Health and Human Services sponsored research study which proposed the first national model for a CASA program. In the spring of 1989, the Delaware CASA program received the Governor's Outstanding Volunteer Award.

The National CASA movement had its origin in 1977 in King County, Washington with Supreme Court Judge David Soukup who concluded that in child abuse/neglect cases there was no adequate way of obtaining objective information and recommendations which focused on the best interests of the child. In the courtroom, parents expressed their positions and were often represented by counsel while agency representatives submitted their cases and recommendations. The child's stance was theoretically represented by a guardian ad litem - a lawyer appointed to carry out this function. What Judge Soukup realized was that the child needed a "social" voice rather than a "legal" one since the social factors were those which most affected the child. Consequently, the Court in King County started replacing lawyer guardians ad litem with trained volunteers who made investigations and advised the court regarding the best interests of abused and neglected children. This use of volunteers was a tremendous success, and the concept was soon adopted in every part of the country.

The Delaware Family Court CASA program was begun in the spring of 1981 as a pilot project in New Castle County with the support of several public agencies and the Family Court judiciary. The assistance of private organizations such as the Junior League of Wilmington and the Wilmington section of the National Council of Jewish Women was also most helpful. The project was expanded to Sussex County in 1982 and to Kent County in 1983.

In child abuse/neglect cases there was no adequate way of obtaining objective information and recommendations which focused on the best interests of the child.

An important milestone in the development of this State's CASA Program was the 1985 enactment of the statute (31 *Del. C.* §§3601-3613) authorizing the Delaware CASA program and defining the roles and responsibilities of the staff and volunteers. The legislature overwhelmingly expressed its support for the CASA concept by passing unanimously this legislation drafted by Patricia Tate Stewart, Esquire, counsel to the CASA program at the time. The CASA statute mandates that the program be administered by a Director charged with overseeing the CASA Coordinators who in turn are responsible for the day to day operation of the program in each county and the direct supervision of CASA volunteers. The law requires that a program attorney provide legal representation and advice for the Court Appointed Special Advocates. The CASA serves as guardian ad litem and is charged with representing the best interest of the child "whether or not that reflects the wishes of the child" [13 *Del. C.* §3603(e)]. In conformity to the statute, CASAs gather factual information to assist judges in their decision making; report their findings to the court; serve as advocates for the children they represent; and monitor cases to see that the terms of the court orders are fulfilled. The ultimate goal of the CASA is to ensure a safe and permanent home for the child.

A CASA is assigned to a case by an order from a Family Court judge. The CASA conducts interviews with the child, family, professionals, and others who have knowledge of the child's circumstances. The volunteer often observes the child first hand in the school setting as well as the child's interactions with the biological parents or other caregivers. The CASA reviews records and attends meetings concerning the youth's medical, educational, and phychological needs. In short, the CASA becomes an "expert" on the child. For abused/neglected children awaiting permanent placement, teachers therapists, social workers, and caregivers may change. Thus, the volunteer is frequently the only constant adult in a youth's life.

As the date for a Court hearing approaches the CASA prepares a written report for the Judge which incorporates the information gathered about the child's circumstances. It also presents dispositional recommendations for providing a safe and permanent home for the child as quickly as possible.

The coordinator, the CASA volunteer, and the CASA attorney meet to review the case; discuss legal issues and strategies; and identify witnesses to be called. At this state, the CASA attorney may be able to negotiate settlements on behalf of the CASA which may lead to reunification of the child with his/her family or an alternative plan for the child's placement. In the courtroom the CASA attorney presents information and evidence collected by the volunteer, calls and examines witnesses, and presents legal argument in support of the volunteer's recommendations concerning the child.

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Once the Court has entered an order concerning the abused/neglected child, the CASA serves as a catalyst to ensure the Court's plan is carried out. In this capacity, the CASA encourages the cooperation of parents, foster parents, and agencies. The CASA may monitor the child's progress in school or therapy, make visitations with relatives, and encourage the natural parents to utilize the services which can rectify the problems faced by the family. An additional objective is to provide emotional support to the child, foster parents or other caregivers during this critical period.

The Court in King County started replacing lawyer guardians ad litem with trained volunteers who made investigations and advised the court regarding the best interests of abused and neglected children.

Abuse and neglect cases often result in a series of hearings-emergency, probable cause, adjudicatory, and review. An important function of the CASA volunteer in this complex judicial process is to keep the case moving and promote sensitivity of the parents, caregivers, service providers, attorneys, and the Court to the child's sense of time and need for permanent placement.

RECRUITMENT, SCREENING, AND TRAINING

A key factor in the success of the Delaware CASA program has been the effective process for recruiting and screening individuals to serve as CASA volunteers. Recruitment has a two-fold purpose: to obtain qualified volunteers to represent abused/neglected children and to promote awareness of and support for the program. Newspaper feature articles, brochures, posters, radio and TV public service announcements talk shows, and public presentations by program staff and volunteers are used in recruiting volunteers. Many CASAs are attracted to the program through hearing of the experiences of current volunteers.

Public interest in the CASA project has been dramatically increased by the public service efforts of local cable media. In the fall of 1989, Heritage Cablevision ran a public service video on CASA and carried a three part news report on the program by Gail Stallings. Local radio stations have presented talk shows and public service announcements about the CASA effort.

The Delaware CASA program and its counterparts throughout the country face some obstacles in recruiting volunteers. Like other professional and volunteer programs, CASA would like to attract more minorities. It is also a challenge to find volunteers capable of coping with the high stress level and other problems encountered in dealing with abused and neglected children and with schedules flexible enough to carry out the responsibilities of a CASA volunteer.

Individuals interested in becoming CASA volunteers may contact the program office in the Family Court in one of the three counties. After people have been initially screened by the program staff, they complete a formal application designed to provide information about their experience, education, attitudes, and skills. Background and reference checks are conducted on the applicant, and an interview is held with the program coordinator and an active volunteer. Criteria used in selecting volunteers include objectivity; communication skills; ability to work with a variety of people; schedules flexible enough to allow adequate time for the performance of their duties; no conflict of interest; a basic understanding of children and their families; and the ability to provide their own transportation.

Successful applicants must attend a forty hour initial training program conducted by program staff, judges, attorneys, agency representatives, and other professionals. Topics covered are: the Family Court process; dynamics of abuse and neglect; the roles and responsibilities of CASA volunteers and their relationships to the program attorney, service providers, and families; investigation/interviewing/advocacy techniques; pertinent laws and legal issues; permanency planning for children; and community services. On the first day of this training program, volunteers are required to sign an oath of confidentiality. Upon completing the training, an oath of office is administered to the

Speak up for a child.

Speak up for America's abused, neglected and abandoned children.
Be a child's voice in court.
Volunteer *your* help.

For more information on how you can help, contact: National Court Appointed Special Advocate Association, 909 N.E. 43rd St., Suite 202, Seattle, WA 98105-6020 (206) 547-1059

casa
A child's voice in court.

Court Appointed Special Advocates by a Family Court judge. Before CASAs are assigned their first case, they must observe at least one court hearing involving an abused or neglected child.

Few experts on CASA programs would argue with the contention that an essential element of a successful program is the continuing training received by the volunteers. In monthly in-service sessions the Delaware volunteers learn about local and national CASA developments. There is also instruction on such subjects as sexual and substance abuse, negotiating skills, changes in the legal and child welfare systems, and educational issues. In addition, they have the opportunity to share their experiences and engage in problem solving.

While CASAs in the Family Court program are required to make a one-year commitment, the majority of these volunteers have served for more than three years. Three volunteers in New Castle County - Fay Whittle, Patricia Levins, and Mary DeVries - have been CASAs since the program began nine years ago. The research study conducted by the Family Court CASA program last year, showed that the volunteers in Delaware list the following reasons in descending order to serving as CASAs: to help children; to meet a community need; for personal growth; and to be an agent of change.

For abused/neglected children awaiting permanent placement, teachers, therapists, social workers, and caregivers may change. Thus, the volunteer is frequently the only constant adult in a youth's life.

The enthusiasm of the volunteers toward their work is reflected in the comments of several CASAs in Delaware. Ellen McKinney, a four year veteran feels that she helps the Court and agencies which work with families "begin to move from self-interest to cooperation in the search for solutions that would be in the best interest of a child". For Lynn Glaze, a four-year CASA and Linda Johnson in her first year, the greatest reward is knowing that their involvement has made a difference in a child's life. Sylvia Leven gets satisfaction knowing that "a child's voice which is usually lost (in the complex legal arena) now can and will be heard".

The research project resulted in a profile of the CASA volunteers from six representative states in which surveys have been conducted. Like the other five projects, the majority of Delaware CASAs are white females although recently more men and minorities are becoming volunteers. Most of these CASAs are over forty years old and have grown children. Seventy-two percent have at least a college degree, and most have previously served as volunteers and are currently engaged in other volunteer activities.

Like other professional and volunteer programs, CASA would like to attract more minorities.

CASA AS VIEWED BY OTHERS

The opinions of judges, attorneys, and public child welfare agency representatives are reported in Family Court's research study. Significantly, the strongest support for CASAs comes from judges hearing abuse/neglect cases. All of the judges responding to the survey as well as 84% of the attorneys and 50% of the social workers agreed that CASA programs provide valuable advocacy for abused neglected, and dependent children. When asked if more abused, neglected, and dependent children need CASA volunteer representation, 91% of the judges, 86% of the attorneys, and 59% of the social workers agreed that they do.

The Delaware judiciary identified the lack of accurate, objective, up-to-date information as one of the greatest obstacles in deciding cases involving abused, neglected, and dependent children and stated that the involvement of CASA volunteers provides a remedy for this dilemma. The judges in all six states in which CASA programs were reviewed valued them for providing useful information, getting agencies to act on a minor's behalf, and providing an independent voice for a child. Attorneys concurred that CASA volunteers should be independent and objective advocates for the child and not rely too heavily on the positions of either the attorney or the social service agencies.

Public child welfare agency representatives held that CASA volunteers provide valuable additional support for the child and may be less threatening to the family than the social worker. The volunteer has more time to devote to an individual case, can tap information not available to the social worker, and this input can help the agency plan for the child. The CASA's independent point of view tends to be heavily weighed by the Court and can strengthen the recommendation of the social worker. As private citizens, CASA volunteers can influence the community on behalf of children.

Social service agency representatives in the study expressed some concern about the role of the CASA. For instance, social workers felt that having an additional person involved with a case can be confusing for the child and family and result in more work for the already overburdened and undercompensated social worker. Some social workers viewed CASA volunteers as "watchdogs" over the public child welfare agency who lacked realistic expectations for what social workers can accomplish.

A finding of the study was that communication between the CASA volunteer and the social worker may break down when recommendations of the two individuals differ. Nevertheless both CASA programs and public child welfare agencies agreed that adversarial relationships between these organizations reduce the likelihood that the child will receive effective assistance. CASAs and social workers should respect each other, work together in a professional manner, and keep communication open.

AN ASSESSMENT OF THE CASA MOVEMENT - Locally and Nationally

The 80's represented a period of phenomenal growth for the CASA movement. In 1982, only a year after the Family Court CASA program was initiated in New Castle County, the National CASA As-

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sociation (NCASAA) came into existence. This organization promotes the development and expansion of CASA programs, provides training and technical assistance to, and serves as a clearinghouse for CASA programs throughout the country. Largely due to the strong leadership role of the National CASA Association, the CASA movement has been endorsed or recognized by numerous organizations. In 1985, the National CASA Association received the Presidential Volunteer Action Award. A year later the Metropolitan Court Judges Committee of the National Council of Juvenile and Family Court Judges[1] recommended that CASAs "should be utilized by the Court at the earliest stage of the Court process, where necessary, to communicate the best interest of abused and neglected children." A 1988 research study by CSR, Inc.[2] funded by the U.S. Department of health and Human Services to evaluate the impact of five guardian ad litem models concluded that the CASA volunteer form was the most effective method of representing abused and neglected children before Courts. In the summer of 1989, the American Bar Association officially endorsed the use of CASA volunteers and encouraged its members to support the development of CASA programs in their communities. A year later, the National Council of Juvenile and Family Court Judges named CASA the outstanding volunteer program in America's Juvenile and Family Courts. In recent years, the support of civic and fraternal organizations has been a boon to the CASA programs. Since 1987, Kiwanis International has encouraged its chapters to support local CASA programs. In 1989, Kappa Alpha Theta Foundation adopted CASA as its national philanthropy and is providing funds for specific CASA projects with a national significance.

Some social workers viewed CASA volunteers as "watchdogs" over the public child welfare agency who lacked realistic expectations for what social workers can accomplish.

In early 1990, the National CASA Association established standards for its member programs. Delaware can take pride that many of the standards were recommended by the Family Court of Delaware research report.

More than a decade and a half ago, the Child Abuse Prevention and Treatment Act of 1974 (P.L. 93-247) provided that a guardian ad litem should be appointed to represent every abused and neglected child in judicial proceedings if states were to receive certain federal funds through the U.S. Department of Health and Human Services. In reality, the terms of this law have not been enforced. The U.S. Department of Health ad Human Services relies on self reporting by states and conducts no independent verification or audits. The result is that in Delaware and many other states a large portion of the abused/neglected children are without guardians ad litem. Now before the President is a bill proposed by Delaware Senator Joseph R. Biden, Jr. and overwhelmingly passed by Congress, which would provide funding to expand the appointment of CASAs throughout the country with the aim that by 1995 all abused/neglected children would have CASA volunteers assigned to them.

Emmett Partin is Director of Planning, Family Court of the State of Delaware. He holds a Ph.D. from the University of Pennsylvania in Comparative and International Education. His wide writing and editorial experience, reflected in this article, includes his editorship of the Family Court Newsletter and other family law publications.

On the local level, the Family Court of Delaware's 79 CASA volunteers served 207 of the estimated 700 children in foster care in 1989. The program is now campaigning to obtain the additional CASA coordinators and support staff needed to expand its pool of CASA volunteers and thereby ensure a voice in Court for every abused and neglected child.

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1 *Metropolitan Court Judges Committee Report: Deprived Children: A Judicial Response* (Reno, Nevada: National Council of Juvenile and Family Court Judges, (1986), p. 15.

2 *Larry Condelli, National Evaluation of the Impact of Guardian Ad Litem in Child Abuse or Neglect Proceedings* (Washington, D.C.: CSR, Inc., 1988).

Lynn Shreve is the statewide coordinator of the CASA program for the Family Court. She has been Program Director since 1981. Her highly applauded work in the CASA program has earned her national visibility as Vice President/Member of the Board of Directors of the National CASA Association. Lynn is a graduate of Gettysburg College, Gettysburg, Pennsylvania, and has engaged in graduate studies at the University of Delaware.

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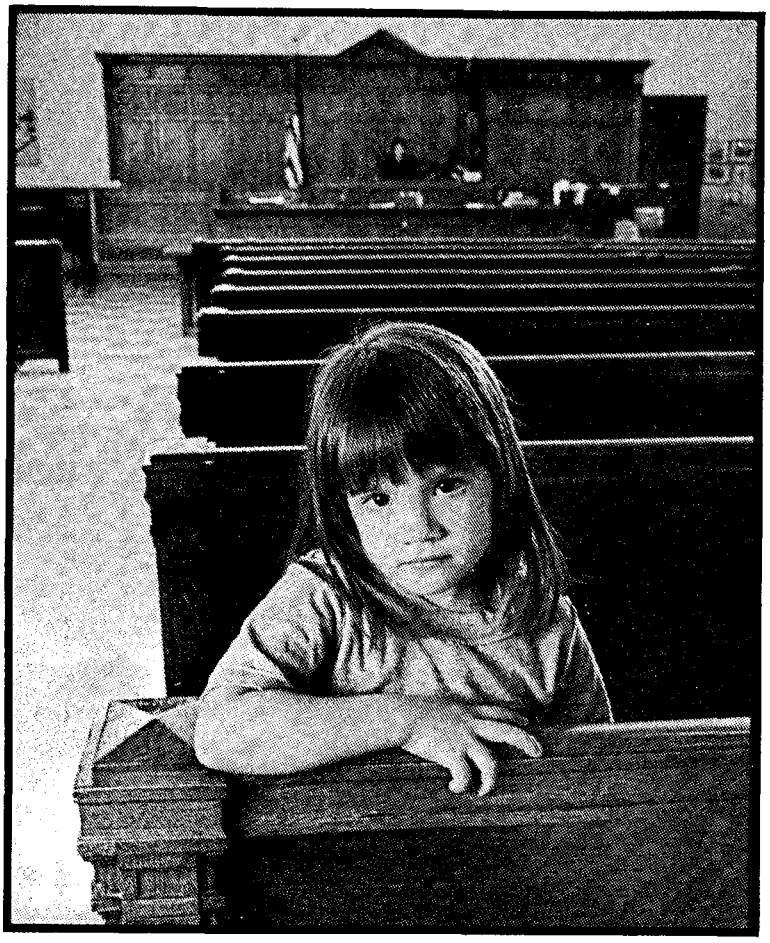

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THE DUTY TO ACHIEVE THE HIGHEST PRICE IN THE SALE OF THE COMPANY: Auctions and Alternatives

Kenneth J. Nachbar, Robert J. Valihura, Jr., and Alan J. Stone

The 1980's saw a remarkable growth of hostile takeovers and other change-of-control transactions. Stories about "hostile raiders" and "poison pills" appeared not only on business pages, but on the front pages as well. The refinements in the law that have resulted from litigation concerning "defenses" to such acquisition efforts have been well chronicled and are continuing. A related, but equally important, area of the law is the duty of corporate directors to achieve the highest price in the sale of the company. In particular, questions remain regarding the time when the duty to sell the company arises, what steps a board may take in attempting to achieve the highest value in the sale of a company and the standard by which courts will review the directors' determination of the means of achieving the best price in the sale of the company. This article will address the latter two questions, focusing on directors' duties in negotiating and proposing to the stockholders a sale of the company.

THE DIRECTORS' OBLIGATION IN SELLING THE COMPANY

The starting point for any discussion of directors' duties in the sale of the company is *Revlon, Inc. v. MacAndrews & Forbes Holding, Inc.*[1]. There, the Delaware Supreme Court held improper the Revlon board's decision to enter into a lock-up option agreement with one bidder, despite a nearly equivalent bid from a hostile bidder. In such circumstances, the Court found that "the result of the lock-up was not to foster bidding, but to destroy it."[2] The Court held that once the company was for sale, "[t]he duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. . .[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[3].

Questions remain regarding the time when the duty to sell the company arises, what steps a board may take in attempting to achieve the highest value in the sale of a company and the standard by which courts will review the directors' determination of the means of achieving the best price in the sale of the company.

Since *Revlon*, there has been considerable debate questioning whether a corporate board may ever depart from the "auction" model seemingly required by that case, and the standard of review if the board does depart from that model. It is clear, however, that the directors' duty in negotiating and approving the sale of the company is to attempt to achieve the highest price for stockholders.

LOCK-UPS, LEG-UPS, AND BREAK-UPS

At first blush, a common-sense approach to the sale of a company is to have a free, open and unfettered auction in which all bidders compete equally. In a less complex world, such a model might have merit. However, in order to make a bid to acquire a public company, a bidder must expend hundreds of hours of time and millions of dollars: regulatory approvals must be obtained, merger agreements must be negotiated, tender offers or proxy statements must be printed, financing commitments must be obtained. Few bidders are willing to expend such efforts if, at the end of the day, the bid which they have worked so carefully to put together may be used as a "stalking horse" to obtain a marginally higher offer from someone else.

The danger that a bid for a public company will be marginally topped is very real. Unlike a transaction involving a private company, where a signed contract is generally not subject to defeasance, the sale of a public company is necessarily subject to stockholder approval; such approval is unlikely if a superior bid emerges. Thus, if the transaction is in the form of a tender offer, stockholders are free to tender into any higher offer that is made. If the transaction takes the form of a merger requiring a stockholder vote, stockholders may simply vote against it in order to accept a higher transaction.[4]

Accordingly, most bidders seek to obtain some protection against marginally higher offers before they make a bid. The simplest protection, and one frequently used by hostile bidders, is to buy a large position in the target company usually at market prices below the price of the subsequent bid. This technique, known as a "leg-up", reduces the overall acquisition cost for the acquiror and allows the acquiror to make a profit on the shares it owns should a higher bid materialize.

A second way that bidders seek protection is through "break-up" fees. While such fees have a variety of nuances, they generally provide that if the acquiror does not complete its acquisition because a higher offer

Most bidders seek to obtain some protection against marginally higher offers before they make a bid.

is made or because the target company otherwise fails to meet the conditions of the sale, the target company must pay the acquiror some fixed payment, usually equal to a small percentage of the transaction value. The size of break-up fees and the events which will trigger them are usually subject to extensive negotiation. It has generally been found that fees equal to two to three percent of the transaction value do not materially deter higher bids; indeed, some cases have upheld higher break-up fees.[5]

Finally, potential acquirors may seek greater protection through the use of a so-called "lock-up" option. Under this technique, the bidder will seek an option to pur-

chase, at favorable prices, significant assets or a large block of stock (frequently 10% or more) of the target corporation. If a higher bid emerges the acquiror is able to exercise its option and walk away from the bidding contest with important strategic assets which it has acquired at a favorable price, or with a significant profit as a result of exercising its stock option. Frequently, the purpose of a "lock-up" option is to "lock-up" the transaction for the first bidder - *i.e.*, make it prohibitively expensive or strategically undesirable for any subsequent bidder to acquire the company. Lock-ups, leg-ups, and break-ups all have the effect of facilitating the bid of the initial bidder while making subsequent bids more difficult. As such, all may be bidding deterrents. Such deterrents plainly have the potential to conflict with the duty of corporate directors to achieve the highest price for the sale of the company. Thus, there is a legal question as to when, if ever, it is permissible for corporate directors to agree to such potential bidding deterrents.

An important advantage of the "closed" auction is that it can be effective even if there is only one bidder: since the bidder does not know whether or not there are additional bidders, it is forced to put its best bid forward or risk losing the transaction.

AUCTIONS, MARKET CHECKS AND "NO SHOPS"

In addition to wanting protection which will give them a "consolation prize" should they lose the bidding contest, many bidders are reluctant to enter into bidding contests at all, and most want at least some direct protection against the bid being "shopped": *i.e.*, disclosed to other bidders who are then solicited to make marginally higher offers. From the board's prospective however, depending on particular circumstances, a bidding contest may be the best means of achieving the highest price for the company. As the courts have recognized, how much a company fetches in the market is often the best indicator of the value of the company.[6]

Since the circumstances of every target corporation are unique, there is no one blueprint for selling a company. Nonetheless, a number of models have developed for the sale of a public company. One model is an open auction. Under this model, bidders compete against each other by making ever-increasing public bids to acquire the company much as any other piece of property would be auctioned. The drawbacks of this procedure are numerous. First many bidders are unwilling to participate in an open auction. Second, bids have many parameters other than price, such as the fair value of consideration other than cash, risks of nonconsummation, availability of financing, and related matters. Thus, almost any offer will require extensive negotiation, and it is very difficult to choose an offer solely on the basis of stated price. Third, an open auction is only available where there are two or more active bidders. Finally, an open auction allows all the bidders to know where the other bidders stand and invites a form of collusion in which bidders join forces to make a joint bid which frequently yields a lower price than would be available if bidders were competing with one another.

An alternative to the "open" auction is a "closed" auction. Under this method, prospective acquirors are asked to make sealed bids for the company by a fixed deadline. Following receipt of such bids, there may be negotiations with prospective acquirors, and there may also be additional rounds of bidding.

An important advantage of the "closed" auction is that it can be effective even if there is only one bidder: since the bidder does not know whether or not there are additional bidders, it is forced to put its best bid forward or risk losing the transaction. In addition, the "closed" auction allows the target to negotiate with all bidders to clarify and perhaps improve their offers. A disadvantage of the "closed" auction is that its procedures can be manipulated in ways that do not treat all bidders fairly, particularly if one bidder is affiliated with management.

A third model for sale of public corporations is the "market check". Under this

(Continued on page 32)

model, there generally is no auction or extensive shopping of the company before a merger agreement is signed. Instead, a transaction is agreed to, subject to public announcement of the transaction and a fair opportunity for other bidders to making competing bids. The advantage of a "market check" is that it ensures the company of achieving the price offered by the first bidder while leaving it free to pursue higher offers. The disadvantage is that some bidders may be unwilling to compete with a publicly announced transaction. Additionally, the efficacy of a market check is dependent upon potential bidders having a truly fair opportunity to making topping bids. Thus, for a market check to be effective, bidders must (i) know of the opportunity to bid, (ii) have sufficient information to make a bid, (iii) have sufficient time to make a bid and (iv) not be deterred by large break-up fees or lock-ups given to the first bidder.

Faced with the obligation to achieve the highest price for stockholders' and bidders' demands for lock-ups, no-shops and other bidding deterrents, what is a director to do? No clear standards have yet emerged from the courts, and the directors are thus in an unenviable position.

Finally, where there has been shopping or an auction before an agreement is entered into, bidders will frequently negotiate provisions which limit the solicitation of competing bids. A "no shop" provision typically prohibits the target company from actively soliciting higher bids. It is not unusual, however, for an acquisition agreement to contain a provision allowing the company to furnish information to and to negotiate with, any person making an unsolicited offer for the company, Indeed some contracts have a "window shop" clause which requires the target to furnish such information should a third party express an interest in the company. Some acquisition agreements even require that the target company issue a press release informing prospective buyers that the company is free to, intends to, or is required to entertain higher bids should such bids be forthcoming.

WHAT'S A DIRECTOR TO DO?

Faced with the obligation to achieve the highest price for stockholders' and bidders' demands for lock-ups, no-shops and other bidding deterrents, what is a director to do? No fixed rule has emerged from the courts, and the directors are thus in an unenviable position. If they refuse to negotiate with a bidder who demands such favored treatment they may be sued for failing to sell the company; if the company is later sold at a lower price than that offered by the first bidder, they may be sued for failing to enter into a transaction with the first bidder. If, on the other hand, they approve a transaction with the first bidder, directors are likely to be sued for deterring other bids or failing properly to sell the company. The directors' plight becomes especially apparent if a second potential acquiror makes a higher bid conditioned upon invalidation of the contract between the company and the first bidder.

Early cases, perhaps because of their fact patterns, set forth broad principles -- notably, that the directors' overarching duty in selling the company is to maximize the value received by stockholders -- but offered little specific guidance.

Subsequent cases have helped define directors' duties. First, it is now clear that there is no single blueprint for selling a company. The courts have accepted that the sale of a public company is necessarily quite complex, and have recognized that directors must have discretion in determining how to achieve the objective of enhancing stockholder value.[7] Second, certain general rules have emerged. For example, absent some extraordinary facts, modest break-up fees (two to three percent of the transaction value) are permissible; slightly higher break-up fees may be justified in particular circumstances. Similarly, some sort of market canvass -- either in the form of a solicitation of offers before a transaction is announced, or a post-announcement "market check" is viewed by the courts as the best method for determining whether a particular offer is fair.[8] Thus, while directors may approve a transaction without conducting an auction or other market check, the directors are likely to have, as a legal or practical matter, some burden of explaining why such a transaction is appropriate in the circumstances. Conversely, where the board conducts an auction or market check and accepts the highest bid, it is likely to be quite difficult to overcome the board's decision or to enjoin any resulting transaction.

Thus, when faced with the question of how to conduct the sale of a company, a board and its advisors should carefully weigh any request by a bidder for favored treatment -- lock-ups, break-up fees, no-shops and the like. The board should balance the effects of granting the bidder's request (*i.e.*, the benefit of the transaction proposed by the bidder and the effect of the requested provision on other bidders) against the likely effects of not granting it (*i.e.*, the risk that the first bidder will walk away, and the likely consequences of such an action). If it objectively appears that the directors' action is reasonably calculated to enhance stockholder value, it is likely to be upheld by the Delaware courts.

Where the board conducts an auction or market check and accepts the highest bid, it is likely to be quite difficult to overcome the board's decision or to enjoin any resulting transaction.

UNRESOLVED ISSUES

Nonetheless, many unresolved issues remain, including the degree of discretion which directors will be accorded in determining how to pursue the sale of a company, the standard by which directors' actions will be reviewed, and the circumstances in which particular deices will be allowed.

The most critical unresolved issue at present is the standard of review of directors' actions. In *Mills Acquisition Co. v. Macmillan Inc.*, the Supreme Court held:

> In the absence of self-interest, and upon meeting the enhanced duty mandated by *Unocal*, the actions of an independent board are protected by the business judgment rule.[9]

The Court went on to contrast the "enhanced *Unocal* standards" with "ordinary business judgment rule analysis." Under the *Unocal* test, unequal treatment of bidders will be permitted only where (i) directors properly perceived that stockholder interests were enhanced by such treatment and (ii) the board's actions were reasonable in relation to the advantage sought to be achieved.[10] In contrast, the recent case of *Barkan v. Amsted Industries Inc.*, the Court, after citing *Mills*, held that:

> [A] board's actions must be evaluated in light of relevant circumstances to determine if they were undertaken with due diligence and in good faith. If no breach of duty is found, *the board's actions are entitled to the protections of the business judgment rule.*[11]

The next several years are likely to see continued litigation challenging directors' actions in selling companies. Further elaboration of the standards by which the directors' decisions in the area are to be judged thus appears inevitable; the greater certainty likely to result from such guidance will be welcome by all parties who become involved in the sale of a public company.

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1 Del. Supr., 506 A.2d 173 (1986).

2 *Id.* at 183.

3 *Id.* at 182.

4 *See, e.g., In re Holly Farms Corp. Shareholders Litigation*, Del. Ch., C.A. No. 10350, Hartnett V.C. (May 19, 1989).

5 *E.g., In re J. P. Stevens & Co., Inc. Shareholders Litigation*, Del. Ch. 542 A.2d 770, 782 (1988); *In re KDI Shareholders Litigation*, Del. Ch. C.A. No. 10278, Berger, V.C. (Nov. 1, 1988); *Roberts v. General Instrument Corp.*, Del. Ch. C.A. No. 11639, Allen, C. (Aug. 13, 1990).

6 *E.g., Barkan v. Amsted Industries, Inc.*, Del.Ch. C.A. No. 8224, Allen, C. (Aug. 24, 1988), *aff'd*, Del.Supr., 567 A.2d 1279 (1989).

7 *E.g., Barkan*, 567 A.2d at 1286; *Mills Acquisition Co. v. Macmillan, Inc.*, Del. Supr., 559 A.2d 1261, 1286-88 (1988).

8 *Barkan*, 567 A.2d at 1287.

9 *Mills*, 599 A.2d at 1287.

10 *Id.*, at 1288.

11 *Barkan*, 567 A.2d at 1286 (emphasis added).

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WATERGATE, IRAN-GATE AND THE RULE OF LAW

Archibald Cox

Law Day Address before the
Delaware Bar Association
May 1, 1990

It is a great pleasure to join you on Law Day not only because lawyers are wonderfully good company but because your Law Day activities by involving other parts of the community emphasize that law belongs to the people -- that the only proper role of law is to serve the needs of people and that in the end the rule of law as a check upon power, including the power of government, depends upon the free support of all the people.

This year, as we celebrate Law Day, we also watch the gallant struggle of the peoples of Eastern Europe to replace the centuries of despotic rule with free societies and democratic institutions observing the rule of law. I find myself marveling at their courage but also wondering at the difficulty of starting from scratch with no experience with self-government in smaller, simpler times, and no deep-rooted popular tradition giving vitality to the rule of law.

With us the tradition is ancient, going back at least to the last hours of Socrates, just before he drank the hemlock cup. You will recall that Socrates steadfastly refused even to walk out through the door deliberately left open by his jailor. "The Athenians have thought fit to condemn me and I have thought it better and more right to remain here and undergo my sentence," even though "these muscles and bones of mine would have gone off long ago . . . if they had been moved only by their own idea of what was best, and if I had not chosen . . . the better and nobler part." The civilized man, the duty to the community, prevailed over the urge of "these bones and muscles," the baser and acquisitiver powers. The civilized man would not cheat the law for personal advantage, even to preserve his own life, because, if Athens were to be governed and Athenians were to be free, the government must be by citizens whose better natures prevailed and who put the law above their own welfare.

Now, twice within twenty years the rule of law has been deliberately challenged by individuals at or very near to the highest levels of government - once in the Watergate years and later in the Iran-Contra affair.

Socrates spoke expressly of the citizen, but surely it was implicit that the duty not to evade the law rests the more heavily upon those chosen to rule.

Another great scene occurred in 1215 at Runneymede, when the Barons wrested from King John the Magna Carta pledging himself not to set upon any man save by the law of the land.

Freedom cannot exist in a society which has to have a policeman for every citizen to enforce the law.

Four centuries later when King James I, fresh down from Scotland with his theory of the divine right of Kings, summoned before him all the judges of the common law courts before him to scold them for interfering with the decisions of his royal prerogative courts, when Chief Justice Coke sought to explain that the judges must follow the law. King James broke in: "That is to say that *I* am subject to the courts! That's treason." Coke's words have echoed down through the centuries to become a vital part of the faith of our American Revolution:

The King should not be under any man, but under God and the law.

Justice Jackson summarized both the history and the principle in holding that President Truman had acted unconstitutionally in seizing control of the country's steel mills in order to terminate a strike during the Korean War:With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the law be made by parliamentary deliberation and that the executive be under law.

President Truman bowed to the Court and returned the steel mills to the owners despite personal resentment and a deep-seated conviction that the decision was wrong.

The rule that the Executive is under the law was long a vital and I think essential part of our constitutionalism.

Now, twice within twenty years the rule of law has been deliberately challenged by individuals at or very near to the highest levels of government -- once in the Watergate years and later in the Iran-Contra affair. The first time our public leaders and the people rose up in defense of decency, morality, and the rule of law. On the second occasion the prevailing response seems to me to have been very different, despite the work of Lawrence Walsh and the successful criminal prosecutions. The violations and the difference in the two responses worry me. Worry me enough to ask whether, as we watch the gallant struggle in Eastern Europe to build from scratch new democratic institutions founded on the rule of law, we are not ourselves lagging in our own understanding and commitment.

I

The Watergate affair was a grab bag of misdeeds. Perhaps the worst were the burglary of the offices of a Dr. Fielding in Los Angeles in an effort to steal psychiatric files on Daniel Ellsberg, then a hero of the anti-war in Viet Nam movement, the burglary at the Watergate offices of the Democratic National Committee, and the effort to "cover up" the responsibility for

that wrongdoing. Clearly such conduct at the highest levels of government not only violates but weakens the rule of law. President Nixon apparently believed that he was above the law, for he said in a television interview with David Frost --

The citizens' view of law and law and policy is shaped in part, I think, by the picture they draw from the Supreme Court's constitutional decisions and public debate about the Court.

If the President does it, it can't be against the law. The *President* does it.

President Nixon claimed immunity from judicial process, but lost in the courts. He raised the most critical challenge -- and the one which I remember most poignantly -- by declaring that he would disobey the court order requiring him to produce the nine taped recordings of conversations believed to reveal whether he and top aides had engaged in a conspiracy to obstruct justice by covering up the President's responsibility for the Watergate break in. In effect, he would defy the law.

I say that I remember it most poignantly. I wish that I had the ability to make laymen and lawyers think about the meaning of the law as I did then. How do you force a President to comply with the law? What could I do as Special Prosecutor? What could Judge Sirica do:? Or even the Supreme Court? One of my staff suggested that the court might impose a coercive fine of $X00 a day to be collected by attaching Richard Nixon's bank account. It seemed to me that that would cheapen the issue by reducing it to money. "Send a posse of U.S. Marshals to seize the tapes," another lawyer suggested. "They'd be turned away by the White House guards," a third replied. "No," said another voice, "he'd send the Marines in their fancy dress uniforms." Scenes from Gilbert and Sullivan operettas danced through my mind.

But again -- what would you do? What could you do? The simple truth is that one once (sic) can *force* a President to comply with the law. American constitutionalism has worked, our liberties have been protected, and our society is free because our officials, most citizens, and the people as a whole have realized, consciously or by habit, that freedom and decency for the weak and the pursuit of justice for all depend upon the rule of law, and that the rule of law depends upon voluntary compliance. When the test comes, that realization must be strong enough for the people to rise up and morally and politically overwhelm the offender.

The idea was clear enough. The anguishing question was -- Did the idea reflect the reality? Would the people consciously perceive or unconsciously sense what was at stake? A Harvard professor seemed a puny antagonist for the President of the United States.

There was further cause for worry. Suppose that we pressed for compliance and President Nixon succeeded in his defiance of the courts. Might not he or a later President encouraged by the example go still further in setting himself above the law and the courts. Would not that be the end of our constitutionalism backed by judicial supremacy? Winston Churchill once observed that a democracy must never expose its weakness. Perhaps we should try to duck the confrontation. I kept thinking of the little child who dispelled the myth of the Emperor's magnificent raiment by pointing out that the Emperor wears no clothes.

On the other hand, what good is the rule of law in a crunch if one dares not invoke it.

As you know, the worry and anguish were needless. The President announced his defiance on a Friday. A firestorm developed. On Tuesday the President sent his lawyer before Judge Sirica to say that he would produce the nine tapes. The people did rise up. The rule of law emerged much stronger than before.

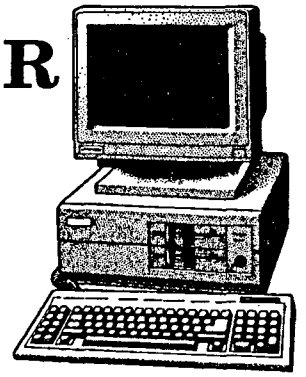
I recall a dramatic instance at the highest level of the dependence of law upon voluntary public acceptance and support. But on Law Day we should not forget that the principle applies no less importantly in millions of smaller day to day instances. Freedom cannot exist in a society which has to have a policeman for every citizen to enforce the law.

II

The Iran-Contra affair was essentially similar in its most fundamental respect. Here

(Continued on page 36)

COMPUTER SOLUTIONS



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again the fundamental constitutional principle that the Executive be under the law was deliberately violated near or at the highest level of government: failures to make required reports to the intelligence committees of Congress; false statements to Congress, diversion of the proceeds of the sale of arms to Israel and Iran into unauthorized channels and violations of the spirit of the Boland Amendment. Overall, the Iran-Contra violation of the rule of law bulks larger than Watergate; it not only involved massive deception of the American people about an important aspect of national policy but it surely must have impaired the United States' credibility in the chancellories of the world.

Yet the country's predominant reaction to Iran-Contra has been very different from the reaction to Watergate. Where the Watergate investigations and prosecutions came to be seen as a defense of decency and constitutional government with little partisan rancor, the dominant political and public reaction to the Iran-Contra violations have been to treat criticism as at best a difference of policy and at worst as a partisan Liberal attack upon a popular President.

Constitutionalism as practiced in the past could hardly survive if, as a result of a succession of carefully chosen Presidential appointments, the sentiment of the majority of the Justices shifted back and forth at five or ten year intervals.

Why the difference? Does it result from a weakening of our appreciation of the importance of the rule of law at the very time people who lack the tradition are asking us to teach them its meaning? I worry about this enough to press you to think about it even though George Will and Daniel Schorr tell me on national television that we should all forget it.

III

A number of circumstances go far to explain the difference in the country's reactions even though they do not dispel my concern. The Senate Select Committee that held the Watergate hearings was far more effective instrument than the large and unwieldy Joint Senate-House Committee of the Iran-Contra affair, whose minority members did everything possible to politicize the question and whose majority, according to Sunday *New York Times*, may have lacked the will. In 1987 there was no Senator Sam Ervin with his country-boy manner coupled with manifest love and deep understanding of the applicable constitutional principles. Conversely, no Watergate wrongdoer had the remarkable television personality of Lt. Col. North. The Watergate offenses were quickly seen to be wrong. Everyone knows that burglary is wrong but misspending government funds seems pretty technical unless the person charged lined his or her own pocket. As for lying to Congress -- who trusts the word of a politician.

The Iran-Contra prosecutions were made extraordinarily complex by two factors not operative in Watergate; first, the constant invocation of secrecy said to be required by national security to block the use of important evidence; second the unseemly rush of the Congressional Committee to get on national television by calling the wrongdoers to testify and prematurely promising them immunity in any criminal prosecution against any use of anything they said and anything linked to what they said.

After Watergate Jeb Magruder explained the wrong-doing:

We thought the ordinary rules did not apply to us. We were engaged in a mission. The mission was the important thing not the rules.

He had been engaged in self-deception, as he acknowledged, but even pleading the importance of their mission did not come very persuasively from those whose immediate purpose was to win an election and, later, to hide responsibility for the crimes they committed. On the other hand, Lt. Col. North and other actors in Iran-Contra were equally wrong, but they could conscientiously say that they were serving what both the President and they themselves saw as the vital interests of the United States. It takes harder thinking to perceive that for Executive officials to violate the law in order to implement heir own views of policy is to undermine the most fundamental precept of a free democratic society -- that the Executive be under the law. For the perception requires distinguishing between law, on the one side, and policy and politics upon the other.

Off-hand, one might suppose that recognition of the distinction between law, and policy and politics would come quickly when dealing with Executive violations of laws enacted by a representative Congress even though there are many forces at work that make the distinction harder to observe in other areas of law, such as constitutional law. But apparently the same forces were and are at work. It is even more apparent that I would wear out your patience if I tried to speak of all of them. Let me touch upon two.

IV

The citizens' view of law and law and policy is shaped in part, I think, by the picture they draw from the Supreme Court's constitutional decisions and public debate about the Court. In what degree do they see them as "law," receiving the free acceptance that President Truman gave to the steel seizure decision and the support that the people gave to court order to President Nixon to produce the Watergate tapes? In what degree are the decisions seen as just five individual's views of policy and thus politics? Surely a critical element of "law" is that it bind everyone, including the judges.

Here my thoughts are irresistibly drawn back half a century to the chambers of Judge Learned Hand in the federal courthouse in New York. The Judge was quietly working at one desk and I, as his law clerk, at another. His voice broke the silence: "Sonny, to whom am I responsible?" I looked blank. "No one can fire me. No one can dock my pay. Not even those nine bozos in Washington who sometimes reverse me. Everyone should be responsible to someone. To whom am I responsible?" More silence. Then the Judge pointed slowly to the shelves of books lining the walls. "To these books about us. That's to whom I'm responsible."

The Judge explained the reason upon a more formal occasion:

[The judge's] authority and immunity depend upon the assumption that he speaks with the mouth of others: . . . He must pose as a kind of oracle, voicing the dictates of a vague divinity -- a communion which reaches beyond the memory of any now living, and [which] has gathered up a prestige beyond that of a single man.

But Judge Hand was never bound by arid verbal concepts. He quickly went on to emphasize that -

The customary law of English speaking people stands, a structure indubitably made by the hands of generations of judges . . .

And concluded that -

A judge must manage to escape both horns of this dilemma. He must preserve his authority by cloaking himself in the majesty of an overshadowing past:
in other words he must show that he too is bound by law

but he must discover some composition with the dominant needs of his time . . .

Some law in books and some policy. The two are usually reconcilable if one looks to the long range ideals of the community rather than her personal wishes and reads the written words mindful of the ideals and societal conditions behind them.But as absolutes the two obligations are inconsistent and a judge sensitive to the need for change must face the dilemma and decide: how much law, how much policy; how far, how fast.

After 1950, and especially under Chief Justice Warren, the Supreme Court, dominated by Justices with a "Liberal" political outlook, geatly increased the judicial role actively to use constitutional adjudication as an instrument of reform, repeatedly overruling settled ways in society and departing from settled law. Critics of a strong "Conservative" political disposition,, both on and off the Court, hotly attacked both the results and the judicial activism.

In my view the decisions made ours a vastly more humane society, free, more equal, and more respectful of the human dignity of every individual, all very much in keeping with the main currents of the American history. but I worry that the Court may have gone so very far, so very fast, so very often as to weaken the idea of law. The future will decide. The damage -- if there was damage was greatly increased by the counter-reform movement led by the Reagan administration when it presented the constitutional decisions to the people as just the social preferences of a numerical majority of the Justices which the Administration would change by careful attention to the political ideology of new nominees for federal judgeships.

Now Justices of a strong "Conservative" political bent seem to have or to be about to have a majority. The result-oriented, right-wing counter-reform agenda includes overturning not only *Roe v. Wade* but the School Prayer cases, the exclusionary rule barring the use in criminal prosecutions of evidence obtained by unlawful searches and seizures, many other decisions increasing other constitutional rights of the accused, some civil rights cases, and perhaps even the interpretations of Article II limiting the power of the President to dismiss at will Independent Counsel and the members of administrative agencies. The decisions they attack are now woven into "these books about us." Which of the two courses advocated by some of them in dissent will the new majority follow? Follow their political bent and truly sweep aside the "wrong-headed" decisions of the Warren Court at the expense of embracing judicial activism scarcely different from what they once condemned? Or embrace a more restrained judicial role and adhere to existing law?

It is too soon to say. I add only that constitutionalism as practiced in the past could hardly survive if, as a result of a succession of carefully chosen Presidential appointments, the sentiment of the majority of the Justices shifted back and forth at five or ten year intervals so that rights like "freedom and choice" freedom from State-mandated prayer, and the use of unconstitutionally-seized evidence were alternately recognized and denied. And can we expect Presidents, Congressmen, and citizens to be bound by law if judges deny its force?

V

I am not unaware of the realist movement -- the strong and growing tendency in academic circles and perhaps throughout the legal profession to decry the very idea of "law" as an independent force, and to view the judges simply as the makers and remakers of social policy. It is tempting to poke fun at the notion of law as a "brooding omnipresence in the sky." It is easy to demonstrate that the law books have always left, indeed must leave, the judges important opportunities for choice, as I myself have said. In my view these easy and convincing proofs fall short of demonstrating that Judges are in nowise bound by law. They can feel and therefore be, limited by an ever-constant ever-changing body of law even though there is room for choice. That the basic antinomy, the tension between continuity and creativity, law and policy, cannot be resolved nor the balance struck with certainty does not disprove the value of the effort.

Similarly I would not dispute the realists' assertions that law is social policy and that the policies chosen are shaped by the distribution of power in society. Both are true but woefully incomplete because, at least in the case of judge-made law, including constitutional law, the policies are a distillation of wisdom, experience and gradual revision, made by men and women committed to putting behind them insofar as humanly possible the interests of self or group or class and to reaching for a kind of justice not achievable by force or economic power nor by votes. The dedicated pursuit of the ideal is a reality, even though the reach exceed the grasp, provided the people know that the effort is undertaken. The value of the ideal is not diminished by acknowledging that its conscientious pursuit serves the utilitarian and policy function of providing the constraints upon power necessary to the freedom of each of us to seek the best he can discern.

Surely that is the law which we honor on Law Day and to the realization of which we as lawyers renew our commitment, not only to the principles I have mentioned but to the nuts and bolts making the principles a reality for all the people.

MISS GRAMMAR

Karen Larsen

With this issue we present an innovation. For the first time DELAWARE LAWYER will introduce a serial limited to one subject.

Provided that if . . .

By "Miss Grammar"

Most instances of "provided that" can be written simply with "if" or "but":

"Chapter 11 of the Code allows for an orderly liquidation of assets of the debtor, provided that [if] the debtor complies with the requirements of Chapter 11."

"No claimant shall be allowed to reapply provided that [,but] if the Referee finds that the first application was inherently invalid, a claimant may submit a fresh application."

Ordinarily "provided" means "as long as" or "if" or "except." Sometimes writers use it to mean "it is provided," in the sense that this is how things will be:

"Provided further that borrowers may not elect any interest period ending later than the conversion date."

Such employment of "provided" creates a sentence fragment and should be stricken; the plain facts are enough: "Borrowers may not elect * * *."

In this sentence, "provided that" is appropriate because another "if" is already present:

"Secured claims may be restructured, provided that if such claims are restructured, they are paid within the term of the plan."

Placement of Modifiers

Miss Grammar hopes her readers can sense the difference between *moldy rolls of carpet* and *rolls of moldy carpet.*

In Miss G's opinion the first phrase indicates carpet that was fine when it was rolled up but that has lain around gathering mold. The second phrase indicates carpet that was allowed to mold and was then rolled up.

In case anyone is impudently wondering whether Miss Grammar has a point,she has two of them: (1) there are few exact equivalents in language; and (2) placement of modifiers is more important than you think.

Briefly

The next time you're tempted to write preventive as *preventative,* remember: An ounce of preventation is worth a pound of cure.

Copyright 1990, Karen Larsen

Fellow Editor Bill Wiggin discovered the writings of Karen Larsen in a publication of the Oregon Bar. Bill sought Karen's permission to reprint and their common sensitivity for the proper use of language quickly established a rapport. It is through his good offices that these articles have been made available.

Karen spent 13 years as an English professor at Hartnell College in Salinas, California, and George Fox College in Newberg, Oregon; she taught literature as well as business writing and composition.

Since 1981, Karen has been associated with Miller, Nash, Wiener, Hager & Carlsen, first as legal editor and now as writing consultant. In addition, Karen teaches seminars for the firm, serves as adviser for local businesses, and writes a monthly column, entitled "Miss Grammar," which appears in the Oregon State Bar Bulletin and other publications. She is a popular speaker before such groups as The Public Utility Commission, the Clark County Bar Association, and The Oregon Appellate Court Judges Association.

Cheers!

chērz [L] | 1. to salute with shouts of congratulation.

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Delaware Bar Foundation is pleased to announce that Suburban Marketing Associates, Inc. of Delaware, an affiliated company of Delaware Today Magazine, has agreed to conduct on behalf of the Foundation the publication of this magazine, commencing with the next issue.

INTERNATIONAL TRADE AND THE DELAWARE ADVANTAGE

8:00 a.m. **REGISTRATION**

8:50 a.m. **WELCOME**
The Honorable Dale E. Wolf (Invited)
Lt. Governor of the State of Delaware

James D. Dinnage, Moderator
Co-Chair, International Law Committee
Delaware State Bar Association

Carla S. Stone, Moderator
Director, World Trade
Center Institute Delaware

9:00 a.m. **A SUPERIOR CORPORATE STATUTE EXPERTLY CONSTRUED**
The Honorable Grover C. Brown
Morris, James, Hitchens & Williams
Andrew M. Johnston, Esquire
Morris, Nichols, Arsht & Tunnell

9:30 a.m. **DELAWARE INTERNATIONAL BANKING INCENTIVE**
(Foreign Bank Agency Act of 1985, International Bank Transactions Act of 1983, and Delaware Laws for Domestication and Transfer of Non-U.S. Corporations.)
David S. Swayze, Esquire
Duane, Morris & Heckscher

9:55 a.m. **DELAWARE INVESTMENT HOLDING COMPANIES**
(Investment Holding Companies and other Delaware Incentives for International Business)
Gordon W. Stewart, Esquire
Duane, Morris & Heckscher

10:15 a.m. **BREAK**

10:30 a.m. **INTERNATIONAL CONTRACTS**
Dr. Leon Ciporin
and
James L. Jersild, Esquire
E.I. duPont de Nemours & Co. Inc.

11:15 a.m. **INTERNATIONAL TAXATION AND TAX TREATIES (Advising the U.S. Company)**
Robert T. Cole, Esquire
Cole, Corette & Abrutyn
Washington, D.C.

11:45 a.m. **JOINT VENTURES IN INTERNATIONAL BUSINESS**
(A panel discussion)
Vanessa Ruiz, Esquire,
Pepper, Hamilton & Scheetz
Washington, D.C.
Richard L. Easton, Esquire
Skadden, Arps, Slate, Meagher & Flom
Israel J. Floyd, Esquire
Aqualon Company
Jack A. Barbanel, Esquire
The East-West Trade & Commerce Group, Inc.
Princeton, New Jersey

12:30 p.m. **LUNCHEON**
Introduction:
The Honorable William V. Roth
Senior United States Senator, Delaware

Special Guest Speaker,
Hagen Count Lambsdorff
Economic Minister
Embassy of the Federal Republic of Germany
Washington, D. C.

2:00 p.m. **AN INTRODUCTION TO GATT**
(How the Harmonized System and GATT* Will Affect Trade and Those Who Counsel the Trader)
Ben L. Irvin, Esquire
Irvin, Ellis & Diedring
Washington, D.C.

2:45 p.m. **COUNTERTRADE IN NON-MARKET ECONOMIES**
Gary R. Marcus
Phibro Energy, Inc.
Greenwich, Connecticut

3:15 p.m., **BREAK**

3:30 p.m. **THE EASTERN EUROPEAN OPPORTUNITY**
(Change and Challenge in an Unfamiliar Business Environment - The Commercial and Legal Response)
Michael C. Diedring, Esquire
Irvin, Ellis & Diedring
Washington, D.C.

4:15 p.m. **JAPANESE REGULATIONS AND BUSINESS RELATIONSHIPS**
John W. Schreck, Esquire
Prickett, Jones, Elliott, Kristol & Schnee
and
Sharon Kobayashi
S.F.K. International Consulting

4:45 p.m. **ADJOURNMENT**

5.8 HOURS MCLE CREDIT

*** General Agreement on Tariffs and Trade**

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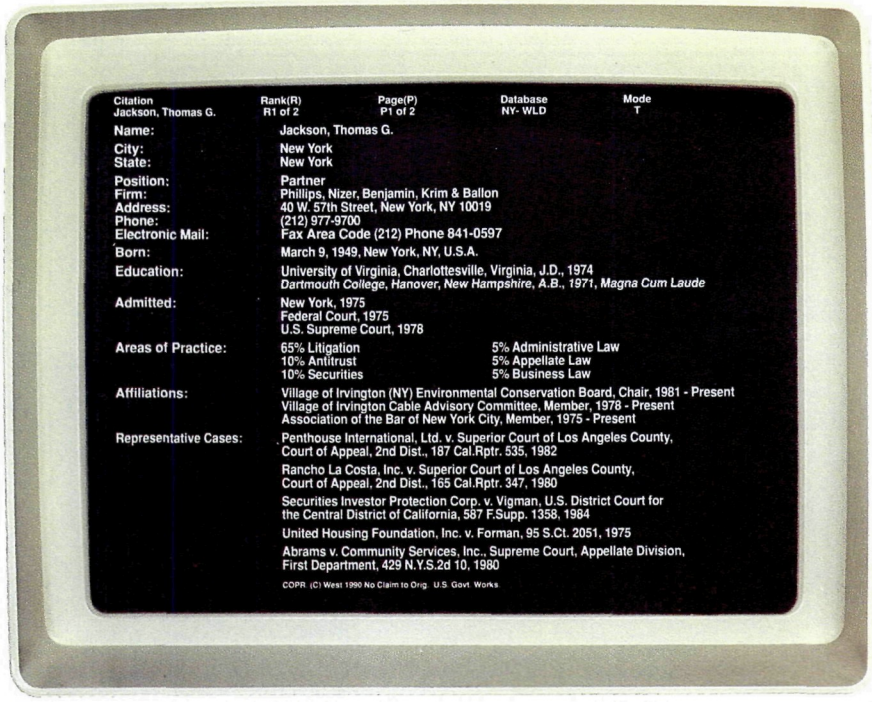

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