International Society of Barristers

Volume 23 Number 4

Quarterly

Declassified and Approved For Release 2014/05/27 : CIA-RDP99-00777R000401050001-4

International Society of Barristers

Volume 23 October, 1988 Number 4

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International Society of Barristers Quarterly

Editorial Office

Wayne State University Law School
468 West Ferry Mall
Detroit, Michigan 48202
(313) 577-3933

ISSN 0020-8752

Published quarterly by the International Society of Barristers, 3586 East Huron River Drive, Ann Arbor, Michigan 48104. Second-class postage paid at Ann Arbor, Michigan and additional offices.

Subscription rate: $10.00 per year. Back issues and volumes available from William S. Hein & Co. Inc., 1285 Main Street, Buffalo, New York 14209.

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†Elected to fill the unexpired term of Robert E. Cartwright, of California, deceased.
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BALANCING LIBERTY AND SECURITY†

William H. Webster*

Those of you who have been following the events around the world know that Gorbachev is keeping us very, very busy. He somehow has mastered the art of public relations. As Larry Eagleburger said in his congressional testimony yesterday, Gorbachev is able to control propaganda better than we are, and he's able to get his ideas out more quickly. It's still a challenge for President Bush—as it was for President Reagan—to deal with these constant initiatives which are captivating and hypnotizing a good part of central Europe. I saw an article in this morning's *New York Times* noting that Gorbachev is making new demands for agricultural reforms. These are important issues, and they emphasize the central role that he is playing now on the world screen. The words *perestroika* and *glasnost* are clearly words that have become popular as a result of Gorbachev and his activities. In fact, we have begun collecting stories about both *perestroika* and *glasnost*, and I will tell you one of them.

According to this story, Gorbachev sent a representative out into the Urals to check on the progress of *perestroika*. The man went to a village and asked to see the mayor. He talked about the subject for a while, and then he said, "How is perestroika getting along?" And the mayor said, "We like perestroika; we like it very much." And the representative said, "Tell me, do you have any television sets here in the village?" And the mayor said, "Oh yes, we have television sets here. We have television sets, I believe, in every hut in the hamlet. In fact, in some huts there are two or three television sets." "Tell me about refrigerators." "Oh yes, we have plenty of refrigerators here in this village." The representative said, "By the way, do you know who I am?" And the mayor said, "Of course I know who you are. Who else but a CIA agent would come into a village with no electricity and ask questions like that?"

Need for Balance Between Liberty and Safety

The last time I had the pleasure of talking to you was in Phoenix in 1982, when I was Director of the FBI. In that speech I discussed, from a law enforcement perspective, the balance that must be maintained between each citizen's right to be let alone and the right to be kept safe and free. When I

† Address delivered at the Annual Convention of the International Society of Barristers, Ritz-Carlton, Naples, Florida, March 16, 1989.

* Director, Central Intelligence Agency.

spoke at the American Bar Association's annual meeting in Toronto last August, I addressed this topic from my vantage point at CIA. And today, in the context of recent events, I would like to discuss how the work of intelligence can provide greater safety without unreasonable sacrifice of individual liberty.

The CIA and other components of the Intelligence Community collect information on a host of issues that affect our national security. Two of the issues that most clearly touch on the relationship between safety and liberty—issues that therefore demand special safeguards—are the threats posed by hostile intelligence services operating against this country worldwide, and the threats posed by international terrorists. Our activities in these and other areas are governed by Executive Order 12333, which specifies the duties and responsibilities of the CIA as well as the limitations upon intelligence activities undertaken by the Agency. The Order reflects the requirements of the National Security Act of 1947, the CIA Act of 1949, and other laws, regulations, and directives, as well as intelligence policies.

In addition to observing the Executive Order, the CIA and other agencies within the Intelligence Community are required to develop and have approved by the Attorney General their own guidelines and procedures. The procedures at the CIA were developed to:

- encourage legitimate intelligence activities;
- provide legal protection to employees by providing authority for intelligence activities;
- and—I think this is of major importance—assure the American public and the intelligence oversight committees that all CIA activities involving U.S. persons are lawful and related to legitimate intelligence objectives. For instance, we file an annual report with the House Permanent Select Committee on Intelligence on any involvement with U.S. persons, and we follow up with briefings if necessary. Our activity in this area is closely monitored by the oversight committees, which act as surrogates for the Congress as a whole and, indeed, for the American people.

It may surprise you to know that last year we provided over 1,000 briefings to the Congress. I believe we have formed an effective partnership with Congress that has and will continue to contribute to our national security.

COUNTERINTELLIGENCE

The first of the issues that I mentioned, counterintelligence, is critical to our national security and is clearly a legitimate intelligence objective. Earli-

er this month, I spoke to the Senate Select Committee on Intelligence about the counterintelligence and security issues we now face. An effective and comprehensive counterintelligence program has never been more important to our nation, because the threat against us—despite *perestroika*—has grown. The number of hostile operations against us and our allies has certainly increased, and the number of intelligence services involved in such operations has also grown.

Over the past four years, we have discovered more penetrations of the United States' defense and intelligence communities than at any time in our history. The costs of these compromises are estimated in billions of dollars.

Although many countries engage in intelligence operations against the United States, I think it is no surprise to you that the Soviet intelligence services—the KGB and the military service, the GRU—represent by far the most significant intelligence threats in terms of size, ability, and intent to act against U.S. interests both at home and abroad. And despite the economic and political changes Gorbachev is attempting to make, we have no evidence at all that the force of the Soviet intelligence effort has in any way abated. Just last week, the State Department ordered the expulsion of a Soviet diplomat on charges that he sought illegally to obtain documents showing how our government protects secrets in computer systems. That's a nice way of saying that he was caught spying. You probably read this morning that the Soviets ordered the removal of one of our defense attachés in Moscow. This act was plain retaliation; there was no basis at all for it.

Because we can protect ourselves best if we understand what our adversary wants, I think it's worth considering just what is being collected. This is the important thing for those on the collection side, because counterintelligence tells us what our adversaries believe they need to know, and that tells us something about their strengths and their weaknesses. The highest Soviet collection priority is information on U.S. strategic nuclear forces. Other high-priority subjects are key foreign policy matters, congressional intentions, defense information, U.S. intelligence sources and methods, and advanced dual-use technology—the kind of technology that is civilian in nature but can be adapted to military purposes. The Soviets also target NATO intensively, partly as a means to obtain U.S. foreign policy and military information, and I think also because NATO has historically been more vulnerable and easier to penetrate because of the multinational activities taking place there.

The methods employed by the Soviets to get the information they want are becoming more sophisticated. We expect to see greater Soviet efforts to recruit U.S. personnel abroad, and you've read about some of that already. We expect to see increasing use of third countries for clandestine meetings

with American agents; with its successful counterintelligence work in the United States, the FBI has driven many of those meetings to Mexico and also to Vienna. We also expect to see greater efforts to penetrate allied governments that might be privy to U.S. secrets and greater emphasis on attempting to exploit the intelligence collection capabilities of the Warsaw Pact allies. Many of the cases that you've read about haven't involved the Soviets spying. They have been about Soviet Bloc intelligence services doing the work for the Soviets. That was certainly the case on the West Coast when efforts were being made to penetrate Hughes Aircraft.

Soviet efforts are formidable, but I want to take this opportunity to dispute allegations in a recently published book, also covered extensively in *Time* magazine, that the communications unit of our embassy in Moscow had been subject to electronic eavesdropping by Soviet agents. The Soviets had considerable success in the Moscow embassy, but not in that unit. (There was an implication that somehow the CIA had covered up this information from the State Department.) An interagency group—which included representatives of the State Department, the National Security Agency, the FBI, and the CIA—conducted the investigation and found no evidence of hostile penetration of this very sensitive equipment. It was all taken apart and carefully analyzed. This is not to say that there may not be some microphone hidden somewhere in that room; the Soviets certainly have been successful in doing that in other places. But the equipment itself that transmits the communications showed no evidence at all of penetration. We are currently working with the State Department to protect all of our embassies from technical penetration.

The Soviet Union, of course, is by no means the only country trying to obtain our secrets. Intelligence and security services throughout the world have increased their efforts to penetrate our facilities. We have noted as well that several African states, among others, are cooperating with Soviet, East European, Cuban, and Libyan services, and we are monitoring these activities closely.

I think I should emphasize, though, that the methods the U.S. Intelligence Community uses to counter this threat are also impressive. And the most impressive of those methods is the increased cooperation among the various agencies within the Community. The arrest of former Army Master Sergeant Clyde Lee Conrad in West Germany last August demonstrated the strength of the Community pulling together. The CIA, the FBI, and the Department of Justice worked very closely with the Army during this long and extensive investigation of Conrad. He is now awaiting trial in Germany on charges of spying for the Soviets and the Hungarians.

We had similar cooperation in the case of Army Warrant Officer James

W. Hall, who was just recently sentenced to 40 years in prison for providing information about military operations and technical collection activities to the Soviets and the East Germans.

Here at home, the FBI in recent years has made great strides in countering the intelligence activities of the Soviet Union and Bloc countries. The FBI has improved the quality and sophistication of its capabilities and, as a result, has succeeded in disrupting hostile intelligence operations aimed at critical U.S. targets.

The FBI's main strategy has been to "spiderweb" known or suspected intelligence operatives. And this is an important approach. It's not one of suspecting and following and watching American citizens who have access to secrets, but one of trying to make it difficult enough, if not impossible, for that rare traitor to make contact with a Soviet intelligence officer without our knowing about it. And so we focus on those who would target us. That's called "spiderwebbing." In spinning webs with physical and electronic surveillance—and, incidentally, all electronic surveillance must be court authorized under the Foreign Intelligence Surveillance Act—U.S. intelligence has been able to weave a barrier between the hostile agents and our citizens. Those of you who are familiar with FISA, as we call it, will recall that there's a much higher threshold required to direct electronic surveillance against U.S. persons. The "spiderweb" system is working and that is one of the reasons why so many of the "meets" are now taking place outside of the United States. This puts an extra burden on hostile intelligence services, and it also weakens the resolve of those who want to sell secrets, because they have to go through extra risk and trouble.

To provide the information that will allow enforcement agencies to protect our citizens, we have bolstered counterintelligence efforts both at home and abroad. For the CIA, such efforts include collecting information outside the United States on hostile intelligence activities directed against Americans. We adhere to the laws and regulations for operations outside the United States that involve U.S. citizens.

To improve the effectiveness of counterintelligence activities both within the CIA and the Intelligence Community, I created a new Counterintelligence Center last April. The Center works to protect the Agency's foreign operations and the security of all Agency components against penetration by foreign security or intelligence services. The Counterintelligence Center not only provides analysis of hostile intelligence threats and past espionage cases, it also provides guidance for our people going abroad.

TERRORISM

The CIA is authorized to collect information on another major concern—the activities of international terrorists.

Some fifteen years ago, while I was sitting on the Eighth Circuit Court of Appeals, I had occasion to review a statute which made it unlawful to carry or attempt to carry a firearm aboard a commercial aircraft. In the opinion that I wrote, I discussed the evolution of the airport inspection or checkpoint system—a system that at that time, remarkably enough, had been challenged as a gross intrusion into personal privacy. I think I even ruminated that if under those circumstances Americans should suddenly find that all checkpoints at airports had been taken away, there would probably be a cry of outrage. It's that balancing that we have to deal with in determining the minimum amount of intrusion that is appropriate to accomplish significant security gains. Subsequent to that opinion, a rash of hijackings brought home the reality of the terrorist threat and the need to balance individual privacy interests with legitimate security interests. The bombing of Pan Am Flight 103 last December, which killed 270 people, was a tragic reminder of that threat.

During the past four years, there have been nearly 300 cases in which some form of counterterrorist actions—efforts to prevent terrorism—were taken on the basis of intelligence information collected and disseminated by the Central Intelligence Agency. We can't say, of course, in all of those cases that the information or measures taken were the sole reason for the preventions, but they clearly had a role and this is important to us.

In one of these cases, the Agency received a report that terrorists planned to assassinate a senior American diplomat in a Middle Eastern country when he arrived for a meeting. When we told the diplomat about the report, he confirmed that he was to have such a meeting. At the last minute, he arranged for the meeting to be held elsewhere, a prudent measure that may have saved his life.

On numerous occasions in recent years, the Agency has received reports of planned terrorist attacks on our embassies in several parts of the world, including the Latin American countries of Colombia, Peru, and El Salvador. In each case, the embassy, upon receiving this kind of report, increased its security. On several occasions, we've had source information coming back to us that the increased security persuaded the terrorist group to cancel its plans to attack. I've observed that terrorists want to do these things the easy way. They will back off and wait for another occasion if they think the challenge has become too difficult. So, we want to keep them thinking that it is too difficult.

But in spite of the success we've had, in 1988 the property and citizens of some seventy nations were the victims or targets of international terrorist attacks, attacks that killed 658 people and wounded more than 1,100. There were 856 attacks in 1988 and 835 in 1987. And I think that we should keep in mind that about one of five terrorist attacks last year was aimed at United States citizens, United States property, or United States institutions around the world.

The CIA collects valuable information about terrorist groups and cooperates with other U.S. government agencies to use that information to check and minimize the capabilities of terrorist organizations. We learned, for example, that the Palestinian terrorist, Abu Nidal, had an extensive international commercial network that dealt in the gray arms market. This network had key offices in Poland, East Germany, and several other countries. We used this information. The State Department delivered a series of diplomatic démarches to the governments of these countries expressing our concern about the presence of these businesses, and, as a result, the companies were shut down and one of the means of financing terrorism was dried up.

It is our job to keep track of the movements of wanted terrorists when we have outstanding warrants for their arrest. The Agency can make any information we have available to judicial authorities so that they can locate and apprehend the terrorist individuals. In some cases, the United States asks for extradition. Sometimes we're successful and sometimes we're not. There's still a political aspect to terrorist law enforcement that keeps some countries, for a variety of reasons, just a little reluctant to be full players in the system. But in a case such as Fawaz Yunis, who was wanted for the June 1985 hijacking of a Jordanian airliner which carried United States citizens, the information the Agency was able to supply enabled the FBI to arrest Yunis in the Mediterranean Ocean and bring him to trial.

We also share information with foreign governments on names of potential terrorists, including the aliases that they use. This is an important and evolving computer base that will be extremely helpful. Information has also been used to deny entry and safe haven to known terrorists and their associates in various parts of the world. Finally, after years of effort in which I have participated on both the law enforcement and the intelligence sides, countries are coming to the view that we have always held, as have the British, that denying sanctuary is one of the keys to reducing the threat of terrorism. It simply doesn't work to offer a "leave us alone and we'll leave you alone" exchange.

LEGAL RESTRAINTS ON INTELLIGENCE ACTIVITIES

I have been trying to make the point that effective counterintelligence and counterterrorism programs are critical to our national security. And they are certainly critical to the safety of our citizens. But I'd like to emphasize as well that how the CIA and the other intelligence agencies carry out their responsibilities is of equal importance to our country. We are subject to specific laws and we operate under internal procedures approved by the Attorney General. In addition, my General Counsel's staff briefs employees, both at home and abroad, to ensure that those who deal with issues that affect the constitutional rights of American citizens know what our laws are and what our procedures are and that full compliance is expected. My Office of General Counsel also works closely with the Office of Intelligence Policy and Review at the Department of Justice in dealing with types of activities that may require Attorney General authorization. They work together to examine relevant issues and obtain the necessary approvals, consistent with applicable requirements of our law.

We want to catch spies and we want to curb terrorism, but we will not circumvent our own laws to do so. We must maintain absolute fidelity to our laws and our rules—rules that are imposed to assure our citizens that we are indeed accountable. I do not think the CIA, or the FBI, or any member of the Intelligence Community is exempt from this principle. In fact, I believe that it is the key to public acceptance of our vitally important work.

We must, in the end, have both safety and liberty. The balance between the right to be let alone and the right to be kept safe and free is central to our profession and to our heritage. And in our ability to strike that balance true, lies our future as a land of ordered liberty. Former Supreme Court Justice Robert Jackson must have had this balance in mind when he observed that the United States Constitution, with its Bill of Rights, was not a suicide pact. The protections it includes and affords to us must be applied rationally if we are to prevail against those who would threaten our national security.

I really believe that we have sufficient legislative restraints and that we should stop looking for legislative solutions to problems as they emerge; such "solutions" can impede necessary work in the interest of national security. Rather, what is needed is a better understanding of the requirements of existing law and the discipline, indeed, the iron determination, to see that our laws are scrupulously followed.

INTEGRITY

I've been at the CIA for nearly two years now, and during that time, I've gotten to know many of our dedicated people, both here and overseas. These are people who are risk takers but not risk seekers, people who are not particularly interested in fame or fortune but who see in our work an opportunity to pursue their highest aspirations for a safer and a better world.

When I consider their commitment and integrity, I often come back to the words of my old friend, Sir William Stephenson, who died earlier this year at the age of 93. In the introduction to the book, *A Man Called Intrepid*, which chronicled his remarkable intelligence accomplishments during the Second World War, Sir William wrote:

> Perhaps a day will dawn when tyrants can no longer threaten the liberty of any people, when the function of all nations, however varied their ideologies, will be to enhance life, not to control it. If such a condition is possible, it is in a future too far distant to foresee. Until that safer, better day, the democracies will avoid disaster, and possibly total destruction, only by maintaining their defenses.
>
> Among the increasingly intricate arsenals across the world, intelligence is an essential weapon, perhaps the most important. But it is, being secret, the most dangerous. Safeguards to prevent its abuse must be devised, revised, and rigidly applied. But, as in all enterprise, the character and wisdom of those to whom it is entrusted will be decisive. In the integrity of that guardianship lies the hope of free people to endure and prevail.

It seems to me that a nation dedicated to the rule of law can protect itself and its heritage in no other way, and that is the way we are trying to serve you.

WHAT HAPPENED TO THE MEN WHO SIGNED THE DECLARATION OF INDEPENDENCE?

R.R. Bostwick*

During the first 213 years of our independence, Americans have many times been put to the test of courage and sacrifice, and they have always come through. I would like to take you back 213 years, to examine the situation on the first Fourth of July and during the several ensuing years, and tell you of the amazing sacrifices made by many of the fifty-six signers of the Declaration of Independence.

Of the fifty-six men who signed the Declaration of Independence, eighteen were of non-English heritage and eight were first generation Americans. As a brief beginning for this chronicle of events, perhaps we should go back to June 7, 1776, when a Virginian by the name of Richard Henry Lee arose to place a resolution before the Second Continental Congress of the United Colonies of North America, meeting in the State House off Chestnut Street in Philadelphia. Lee had received instructions from the Virginia Assembly and he would fulfill them even though his personal belief was that there was still time to compromise with the British government. He proposed the following resolution:

> That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is and ought to be totally dissolved.

This resolution was no longer merely opposition to Parliament. It was revolution against the crown.

It could be said that most of the men assembled in Philadelphia were, at best, reluctant rebels. They were moderates, and most of them were desperately aware of and fearful of the fruits of war. Immediately after Lee's proposal, the majority of Congress stood against it. After four days of the passion and brilliance of the Adamses of Massachusetts and other patriots such as Thomas Jefferson, a South Carolina resolution postponed the matter until the first of July. I suspect that a lot of the delegates hoped that it had been postponed forever, but Adams gave Thomas Jefferson the task of drafting a Declaration of Independence and then set to work with John Hancock and

* Murane & Bostwick, Casper, Wyoming; Past President, International Society of Barristers. The data in this article were compiled from numerous sources over a period of time.

others, which ultimately resulted in unanimous adoption of the document on July 4, 1776. (Unanimity, however, was achieved only when the final four delegates resigned.) On the evening of July 4, John Hancock signed it as President of the Congress, and Charles Thomson, Secretary, attested. Four days later, on July 8, "freedom was proclaimed throughout the land." The Declaration was ordered engrossed on parchment and, on August 2, 1776, was set for its formal signing by the fifty-six members of Congress. Notwithstanding the fact that the signing of such a document was a formal act of treason against the crown, every member eventually signed it, although some were absent on August 2nd.

Let's take a look at the sort of men involved. Perhaps as rebels you could consider them a strange breed. Almost all of them had a great deal of all three things which they pledged—life, fortune, and honor. Ben Franklin was the only really old man among them. Eighteen were still under forty, and three were still in their twenties. Twenty-four were jurists or lawyers. Eleven were merchants and nine were landowners or rich farmers. The rest were doctors, ministers, or politicians, with only a few exceptions. (Samuel Adams, of Massachusetts, obtained a new suit from well-wishers so that he might be presentable at Congress.) All but two of the men had families, and the vast majority were men of education and standing. In general, each came from what would now be called the power structure of his home state, and it might be said that they had security as few men had it in the eighteenth century. Each of these men had far more to lose from revolution than he had to gain from it, except where principle and honor were concerned. It was principle, not property, that brought these men to Philadelphia in the first place, and in no other light can the American Revolution be understood.

John Hancock, who had inherited a great fortune and who already had a price of 500 pounds on his head, signed in enormous letters so that "His Majesty could now read his name without glasses and could now double the reward"; and it has been said that there was more than one reference to the gallows on that August day. Ben Franklin reportedly said: "Indeed, we must all hang together, or most assuredly we shall all hang separately," and the chubby Benjamin Harrison, of Virginia, told tiny Elbridge Gerry, of Massachusetts: "With me it will be over in a minute, but you, you'll be dancing on air for an hour after I'm gone." These men knew what they risked; the penalty for treason was death by hanging.

Whatever else these men did, they formalized what had been a brush-popping revolt and gave it life and meaning. They created a new nation through one supreme act of courage. Everyone knows what came of the nation they set in motion that day. Ironically, not many Americans know

what became of most of these men, or even who they were.

Several of the signers prospered. Tom Jefferson and John Adams went on to become Presidents. Samuel Adams, John Hancock, Josiah Bartlett, Oliver Wolcott, Edward Rutledge, Benjamin Harrison, and Elbridge Gerry lived to become state governors. Gerry died in office as Monroe's Vice-President. Charles Carroll of Carrollton, Maryland, who was the richest man in Congress in 1776, founded the Baltimore and Ohio Railroad in 1828. Most Americans have heard these names, but the other signers were not so fortunate.

While none was actually hanged, many were caught up in the forces of war, and their personal fortunes and families were practically and in many instances actually destroyed. For instance, the four delegates from New York State were all men of vast property, and they signed the Declaration with the British fleet standing only miles from their homes. By August 2, 1776, the government of New York had evacuated New York City for White Plains. When these men put their names to the Declaration, the four from New York must have known that they were in effect signing their property away. On August 27 the British landed three divisions on Long Island. In a bloody battle, Washington's untrained militiamen were driven back to Harlem Heights. British and Hessian soldiers plundered the mansion of signer Francis Lewis at Whitestone. They set it afire and carried his wife away. Mrs. Lewis was treated with great brutality. Though she was exchanged for two British prisoners through the efforts of Congress, she died as a result of what had been done to her.

British troops next occupied the extensive estate of William Floyd, though his wife and children were able to escape across Long Island Sound to Connecticut. There they lived as refugees for seven years without income. They eventually returned home to find a devastated ruin, despoiled of almost everything but the naked soil. Signer Philip Livingston came from a baronial New York family, and Livingston himself had built up an immensely lucrative import business. All his business property in New York City was seized as Washington retreated south, and Livingston's town house on Duke Street and his country estate on Brooklyn Heights were confiscated. Driven out, Livingston's family became homeless refugees, while Livingston continued to sell off his remaining property in an effort to maintain the United States credit. Livingston died in 1778, still working in Congress for the cause. The fourth New Yorker, Lewis Morris, of Westchester County, saw all his timber, crops, and livestock taken, and he was barred from his home for seven years. He continued fighting as a brigadier general in the New York militia.

It was soon necessary for Washington to retreat across New Jersey, and it

seemed that the revolution would fail. American Tories, or loyalists to the crown, began to make themselves known. They helped the advancing British and Hessians ferret out the property and families of the Jersey signers. When John Hart, of Trenton, risked coming to the bedside of his dying wife, he was betrayed. Hessians rode after him. He escaped into the woods but the soldiers rampaged over his large farm, tore down his grist mills, and wrecked his house, while Mrs. Hart lay on her death bed. Accompanied only by a dog, Hart, a man of sixty-five, was hunted down across the countryside and slept in caves and woods. Finally, emaciated by hardship and worry, he was able to sneak home. He found his wife long buried, and his thirteen children had been taken away. He never saw them again; he died in 1779 without having found any of his family.

Another New Jersey signer, Abraham Clark, a self-made man, gave two officer sons to the Revolutionary Army. They were captured and sent to the infamous prison boat in New York harbor, known as "Hellship Jersey," where 11,000 American captives were to die. The younger Clarks were treated with special brutality because of their father. One was put in solitary and given no food. The British authorities offered the elder Clark their lives if he would come out for the king and Parliament. You, as well as I, can contemplate the anguish he must have suffered as he refused.

When the British occupied Princeton, New Jersey, they billeted troops in the College of New Jersey's Nassau Hall. Signer Dr. John Witherspoon was President of the College, later called Princeton. The soldiers trampled and burned Witherspoon's fine college library, much of which had been brought from Scotland. Witherspoon's good friend, signer Richard Stockton, suffered far worse. Stockton was a State Supreme Court Justice and had rushed back to his estate to evacuate his wife and children. The Stockton family found refuge with friends, but a Tory sympathizer betrayed them. Judge Stockton was pulled from bed in the night and brutally beaten by the arresting soldiers. Then he was thrown into a common jail where he was deliberately starved. A horrified Congress finally arranged for Stockton's parole but not before his health was ruined. Finally, the Judge was released as an invalid who could no longer harm the British cause. He went back home to find the estate looted, his furniture and all his personal possessions burned, and his horses stolen. Even the hiding place of the family's silver had been bullied out of his servants. The house itself still stood. Eventually, it was restored and became the official residence of New Jersey's governors. Richard Stockton, however, did not live to see the triumph of the Revolution. He soon died, and his family had to live off charity.

The signer Robert Morris was known as the Merchant Prince of Philadelphia, and he continued to work for the colonies, even though many of

Philadelphia's people came to express Loyalist sentiments. Morris used all his great personal wealth and prestige to keep the finances of the Revolution going. More than once he was almost solely responsible for keeping Washington in the field, and in December, 1776, Morris raised the arms and provisions that made it possible for Washington to cross the Delaware and surprise the Hessians at Trenton. That first victory and Washington's subsequent success at Princeton were probably all that kept the colonies in business. Morris was to meet Washington's appeals and pleas year after year. In the process he lost 150 ships at sea and bled his own fortune and credit almost dry. The terrible irony is that Congress later refused to honor his claim and he spent more than three years in debtor's prison and died in obscurity.

When the British troops defeated Washington at Brandywine and again at Germantown, Congress fled to Baltimore and Lord Howe took Philadelphia. On the way, his men despoiled the Chester County home of Pennsylvania signer George Clymer. Clymer and his family, however, made good their escape. The family of another signer, Dr. Benjamin Rush, was also forced to flee to Maryland. Signer John Morton, who had long been a Tory in his views, lived in a strongly Loyalist area of the state. When Morton came out for independence, it turned his neighbors, most of his friends, and even his relatives against him, and those who were closest to Morton ostracized him. He was a sensitive, troubled man, and many observers believed this killed him. He died in 1777. His last words to his tormentors were: "Tell them they shall live to see the hour when they shall acknowledge it [the signing] to be the most glorious service I ever rendered my country."

On the same day that Washington took Trenton, the British captured Newport, Rhode Island. There they wantonly destroyed all of William Ellery's property and burned his fine home to the ground.

Like the men from New York, the South Carolina signers were all aristocrats. Further, they were all young (average age 29), and all had studied in England, and they had reflected Carolina's lukewarm attitude toward independence. But in the end they had joined the congressional majority in the interest of solidarity, and after signing they had all entered military service. While serving as a company commander, Thomas Lynch, Jr.'s health broke as a result of privation and exposure. His doctors ordered him to seek a cure in Europe, and on the voyage he and his young wife were drowned at sea. The other three South Carolina signers, Edward Rutledge, Arthur Middleton, and Thomas Heyward, Jr., were taken by the British in the siege of Charleston. They were carried as prisoners of war to St. Augustine, Florida, where they were singled out for indignities until they were exchanged at the end of the war. Meanwhile, the British, roaming through the countryside,

made a point of devastating the vast property and plantations of the Rutledge and Middleton families.

The two years beginning in 1779 were an ugly period of the war, and there was much fighting in the South, which sometimes evolved into skirmishes and mutual atrocities between the Americans who supported independence and the Americans who still stood for the crown. There had always been strong Loyalist sentiment in the South as in the Middle Atlantic states. Plantations and homes on either side were raided and burned, and women, children, and slaves were driven into the swamps and woods to die. After the British captured the thin coastal strip which was eighteenth century Georgia, signer Button Gwinnett was killed in a duel and Colonel George Walton, fighting for Savannah, was severely wounded and captured when the city fell. The home of the third Georgia signer, Lymon Hall, was burned and his rice plantation confiscated, in the name of the crown. One of the North Carolina signers, Joseph Hewes, died in Philadelphia while still in Congress, reportedly from worry and overwork. The home of another, William Hooper, was occupied by the enemy and his family driven into hiding.

Cornwallis, moving into Yorktown, established what he thought was a impregnable base; he felt that no matter what happened on land, he could always be supplied or rescued, if need be, by sea. Apparently, he reckoned without the intervention of the French. (It never occurred to the British that the British Navy might not always rule the waves.) When Admiral de Grasse's French fleet came into the mouth of the Chesapeake, the rebels gained temporary naval superiority off the Virginia coast. By September 1781, Cornwallis and the main British forces in North America found themselves in a trap. French warships were at their rear, and regular forces, not the badly armed and untrained militia the British had pushed around on the battlefield for years, had closed in on them from the front. By October 9th, Washington and Rochambeau's armies had dug extensive breastworks all around Yorktown so that there could be no escape.

When the bombardment commenced, signer Thomas Nelson, of Virginia, was at the front in command of the Virginia military forces. In 1776, Nelson had been an immensely wealthy tobacco planter and merchant in partnership with a man named Reynolds. His home, a stately Georgian mansion, was in Yorktown. When the revolution began, Nelson said, "I am a merchant of Yorktown, but I am a Virginian first. Let my trade perish. I call God to witness that if any British troops are landed in the County of York, of which I am Lieutenant, I will await for no orders but will summon the militia and drive the invaders into the sea." Nelson succeeded Thomas Jefferson as governor of Virginia and was governor in 1781.

As it happened, Lord Cornwallis and his staff had moved their headquarters into Nelson's home. (This was reported by a relative who was allowed to pass through the lines.) While American cannon balls were making a shambles of the town and leaving the mangled bodies of British grenadiers and horses lying bleeding in the streets, the house of Governor Nelson remained untouched. Nelson asked the gunners, "Why do you spare my house?" They answered, "Sir, out of respect to you." "Give me the cannon," Nelson ordered. At his insistence, the cannon roared on his magnificent house and smashed it. After eight days of horrendous bombardment, a British drummer boy and an officer in scarlet coat appeared behind a flag of truce on the British breastworks. The British drum began to beat a "parley."

On October 19 the British regulars marched out of Yorktown and stacked their rifles, and the Revolutionary War was over. But not for Thomas Nelson. The sacrifice was not complete. He had raised two million dollars for the revolutionary cause by pledging his own estates. The loans came due but a newer peacetime Congress refused to honor them and Nelson's property was forfeit. He was never reimbursed. When he died a few years later at the age of fifty, he was living with his large family in a small, modest house. Another Virginia signer, Carter Braxton, was also ruined. His property, mainly consisting of sailing ships, was seized and never recovered.

These were the men who were later to be called "reluctant rebels." Most of them had not wanted trouble with the crown, but when they were caught up in it, they had willingly pledged their lives, their fortunes, and their sacred honor for the sake of the country. This was no idle pledge. Of the fifty-six who signed the Declaration of Independence, nine died of wounds or hardship during the war, and five more were captured and imprisoned and subjected to brutal treatment. Several lost wives, sons or families. One lost his thirteen children. All were at one time or another the victims of manhunts and driven from their homes. Twelve signers had their houses burned. Seventeen lost everything they owned. And not one defected or went back on his pledged word. Their honor and the nation they did so much to create are still intact, but freedom on that first Fourth of July, 213 years ago, came at a very high price.

GUNSHOTS: EXPECTATIONS

A. Kennon Goff, III*

Nothing is more startling and chilling than the sudden and unexpected sound of a gunshot. With the squeal of brakes or even the crunch of glass, the sound does not automatically signal the likelihood of serious injury; accident and injury are merely unintended though expected by-products of vehicle operation. In sharp contrast, with guns and other weapons, killing and maiming fall within even the intended uses of the products—although a particular injury or death may not have been intended by the user and certainly could not have been expected by an unfortunate victim of an unintentional gunshot.

All real guns present real hazards.[1] We can assume that most people recognize that there are certain inherent risks[2] associated with the ownership, possession, use, and handling of firearms or other types of guns.[3] The correlative expectations of those in a position to contribute to the prevention of gunshot accidents are the subject of this comment.[4]

In the pioneer or wild west days, a gun was a necessary tool for the protection and feeding of one's family. Being trained in the use and handling of handguns and long guns was part of a young man's development. Although for other reasons the same might become true for today's young women, a gun is not generally an essential tool in the late twentieth century.

Naturally, a change in attitude toward guns has developed since the turn of the century, a change in consumer awareness and appreciation of man's role in the production of safe guns and the gun's role in keeping life safe for man.[5] With these changing roles has come a reassessment of responsibility, from the standpoint of both the manufacturer and the consumer, and of what each can reasonably expect from the other.[6]

* Goff & Goff, Ruston, Louisiana.

[1] Hazard may be defined as the injury or damage producing capability of a thing or product.

[2] Risk simply means the chance or odds of the hazard manifesting itself in injury or damage.

[3] Not all guns are firearms. Some may be tools or pneumatic airguns employing the same principles and having the same lethal characteristics.

[4] Government regulation is not discussed. Although we can safely say that nonmilitary guns fall into the broad category of consumer products, the Consumer Product Safety Commission has refused to regulate firearms and has left that field to the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department. This government agency has done virtually nothing. Pressure from groups such as the National Rifle Association has blocked legislation and regulations mandating safer guns for the public. Puzzling.

[5] The use of the masculine gender is generic and is by no means indicative of any distinction in expectations or risks between men and women.

[6] *See* RESTATEMENT (SECOND) OF TORTS §402A comment c (1965), which states:

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special respon-

It has been said by some defenders of old style, single action, drop fire weapons that everybody knows that you don't load a six gun with six rounds.[7] The validity of that statement may make a lot of difference in relation to the duty to warn and advise the average consumer about risks associated with the expected and foreseeable use or even misuse of a particular product.[8]

It would be virtually impossible for anyone to appreciate fully the variety of risks associated with the handling or mishandling of guns without some knowledge of some of the various accident circumstances and conditions. Most would probably anticipate some hazards or risks in mishandling a gun, but few really appreciate the particular risks or dangers associated therewith.[9] The not-so-obvious risks must be known and explained to even the not-so-obvious consumer. More importantly, the instructions or warnings, no matter how artfully produced and illustrated by the manufacturer's product liability or legal department, should never be viewed as anything other than an unacceptable substitute for the engineering department's duty to design out all of these risks.[10] The risk of accident and injury must be eliminated from normal and predictable occurrences.[11]

THE GUN

It is difficult at best to recognize and understand a gunshot accident case, much less present or defend one skillfully, without some basic understand-

> sibility toward any member of the consuming public who may be injured by it; that the public has the right to and does *expect*, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products. [Emphasis added.]

[7] The old Western style single actions without accident prevention safety devices such as hammer blocks are extremely dangerous if dropped or bumped. Wyatt Earp is said to have narrowly escaped injury when he dropped one fully loaded.

[8] *See* Cobb v. Insured Lloyds, 387 So. 2d 13 (La. Ct. App. 1980)

[9] For example, most, if not all, would acknowledge that it would be wrong or constitute mishandling ("abuse," to use a favorite defense expert word) to drop or bang around an expensive gun. In fact, most people would probably concede that they would handle a fine gun with greater care than they would one of lower grade. (Grade in fine shotguns usually designates class and degree of finish and engraving but does not refer to the basic design and function.) The risk that these unwary and unsuspecting people obviously have in mind is the possibility of damage to the gun, much the same reason that one would handle a piece of art, fine china, or crystal more carefully than a peanut butter glass or mason jar.

[10] *See generally* Perkins v. Emerson Elec. Co., 482 F. Supp. 1347 (W.D. La. 1980) (applying Louisiana law); Brownlee v. Louisville Varnish Co., 641 F.2d 397 (5th Cir. 1981) (applying Alabama law); H. PHILO, 2 LAWYERS DESK REFERENCE ch. 22 (7th ed. 1987).

[11] *See* Cobb v. Insured Lloyds, 387 So. 2d 13 (La. Ct. App. 1980). *See generally* LeBouef v. Goodyear Tire & Rubber Co., 623 F.2d 985 (5th Cir. 1980).

ing of guns, what they do, and how they do it. This section will provide an extremely abridged primer for those who know little or nothing about the subject of guns but are afraid to ask.[12] Those who are brave enough to take on a gunshot case, from either side of the dispute, will need a reference library for basic information as well as the acquaintance of a reasonably unbiased and extremely articulate and experienced gunsmith.

Not all guns are firearms; not all firearms are handguns. Not all handguns are revolvers; not all long guns are shotguns. Not all shotguns are legal, and not all legal guns are subject to any mandatory government standards.

As is obvious, this litany raises a lot of questions as well as negatives. If one engages in product liability litigation, one must acquire detailed knowledge of the product and all its facets. For example, a BB gun is not a firearm but can be as lethal under certain circumstances as a hunting rifle whose only purpose is to kill. To carry this one step further, many purchasers of BB guns know nothing about or even consider the risk potential of these would-be toys. Granted, the entire burden of protecting children from injuries caused by BB guns should not be placed upon the manufacturer or seller. There are corresponding obligations that ought to rest with the parents or others who purchase such guns for children. However, if the seller or manufacturer has good reason to know that the lethal weapon is being purchased for a child or to be used around or exposed to a child, then the question of fault may come full circle back to the party who started it all and made a business venture out of making and selling lethal toys.

The subject of dangerous and lethal toys is a study of its own that cannot be explored fully here, but it has special meaning when applied to toy guns or lethal BB guns sold, bought, or used as playthings. The results and statistics are staggering; too little knowledge about the gun can, and often does, turn out to be dead wrong.

Consumer firearms, generally speaking and with a lot of exceptions, can be divided into handguns and long guns. The majority of handguns produced over the last century can be described as revolvers. The term revolver, simply put, means that the gun has a rotating cylinder for a magazine.[13] The cylinder revolves or rotates, thus lining up a live and unspent cartridge with the barrel so that the gun can be fired repeatedly until empty. It is a repeating firearm. The cylinder usually is rotated in two ways, by pulling the hammer back with the thumb (cocking) or by pulling the trigger.

With some technical exceptions argued by protagonists hired out as expert witnesses in gun accident litigation, single action revolvers are fired

[12] Men, for some inexplicable reason, seem to think that they ought to know about guns. They, perhaps, equate it with knowing how to change a tire.

[13] A magazine is simply a storage place for extra rounds. By way of example, a clip is a removable magazine.

(or at least should be) by two separate and distinct actions—pulling the hammer back and pulling the trigger. A double action revolver, on the other hand, is cocked and fired by simply pulling the trigger. One might even describe the latter as a triple action because not only is the hammer cocked and released by the trigger pull, but also the cylinder is caused to rotate in order to line up the primer[14] of a live round with the firing pin and hammer by the time the hammer falls. Think back to the days of your toy cap pistol when pulling the trigger cocked and released the hammer as well as rotated the roll of caps to get a fresh cap under the hammer. The principles are the same; the engineering is a little different.

Other handguns that are not revolvers may also be single action or double action, or both in the case of some double action pistols with external hammers.[15]

In broad terms, a shotgun is a long gun shooting multiple shot or BBs. It may be a single shot, an automatic, or a double barrel (either superposed or side by side). The shotgun may or may not have exposed hammers, depending on the style and vintage. There are many styles and configurations of shotguns, but one might break them down into those that break (in the middle just behind the barrel and in front of the receiver where the action parts are located) and those that do not and are loaded and unloaded in other ways. The latter usually have separate magazines for the storage of unchambered shells in the gun.[16]

Rifles are called rifles because of the rifling configuration inside the barrel which produces a spinning or axis action of the bullet to make it fly true and straight. (Think of a football thrown or kicked by a good quarterback or punter.) However, in order to remain consistent in separating the particular from the universal, I must point out that not all guns with rifled barrels are known as rifles or even long guns. Most handguns have rifled barrels, too, for the same reason. Not all automatics are true automatics. In many, only the reloading and cocking action, rather than the firing, is automatic. These are more properly termed autoloaders. The energy produced by the firing

[14] A primer is simply a form of cap containing a highly sensitive charge which in turn ignites the main charge of the cartridge.

[15] The old Army model 1911A .45 caliber pistol is a single action semiautomatic but not a revolver. It has a clip for a magazine rather than a cylinder.

[16] Is the gun loaded? This question is seemingly academic but may have great significance. A gun of any description must have ammunition chambered in order to be discharged. If a gun has its magazine or clip loaded but not in its chamber and the gun is pointed at someone or something, has the handler violated the rule that one must never point a loaded gun at anything one doesn't want to kill? In some jurisdictions, it is illegal to carry a loaded gun in a vehicle. This alone may raise an issue. Also, there may be defenses to product liability actions, or other actions for damages, if a criminal statute was being violated at the time of the accident. Suppose the gun falls from a defective gun rack in a pickup truck, goes off, and injures either the driver or passenger. Does the gun maker or the rack maker have a defense and, if so, to whose claim?

action or recoil causes, in various ways depending upon the style and design of the gun, a round to be stripped from the magazine and chambered, ready for firing with a subsequent and separate trigger pull. A bolt action, on the other hand, is manually operated inasmuch as the lever is down and locked during firing. Not all bolts are identified with nonautomatic bolt actions. Some military rifles are full automatic[17] as opposed to semiautomatic.[18]

In general terms, the hammer is released by the disengagement of the hammer-sear connection. The hammer falls, causing the firing pin to strike the primer of the round. The primer contains a highly sensitive material that explodes upon impact, causing the charge of the round to fire. The action and energy of the pressures inside the shell or cartridge cause the bullet or shot to be blown out the front of the cartridge and down the barrel. The reaction is the recoil or kick.

Last, but not least, not all powder actuated guns are firearms. Stud guns used to drive nails instead of bullets operate on much the same principles as many other guns, and they can be just as dangerous. Accordingly, many of the rules and safety systems for firearms can be, and ought to be, utilized in the design and production of safe stud guns (and vice versa).

THE SHOT

The conditions and manner in which gunshots occur are unlimited and usually unexpected. In all cases, some human error or fault is a cause of the gunshot.

If the trigger was pulled during the handling of the gun, then, with few exceptions, we can assume that the fault of the handler contributed in some manner to the injury resulting from the discharge. The gun, in order to discharge, must have been loaded. If it was aimed in the direction of the victim, then obviously the gun handler pointed a loaded gun, in violation of common sense and basic safety rules.

Other gun accident conditions are not quite so simply defined, and the mysteries and questions surrounding the conditions and cause of a gunshot often are forever undetermined. A few common gunshot accident conditions warrant some discussion.

Many people, when told that someone was injured by a defective firearm, jump to the conclusion that the gun must have blown up or ruptured. Actually, that isn't very likely; a rupture or blowup resulting in property damage or personal injury to the handler or those nearby is a less common accident

[17] When the trigger is depressed, the cocking and firing are automatic and repeated for as long as the trigger remains depressed or until the magazine is emptied.

[18] Semiautomatics require the trigger to be pulled each time the gun is fired.

condition than the average person suspects. It does happen, however. Several conditions, including defective metal or metal fatigue, may result in a rupture or blowup, but probably the most common is simply excess pressure, beyond the expected or intended capacity of the product, trapped in the chamber. And lack of maintenance or proper care is probably the most common cause of such pressure problems. Rust, or a bit of dried mud or debris, or a cleaning rag left in the barrel can cause back pressure to increase tremendously. Simply put, the only proper place, with the exception of recoil, that these pressures can escape is out the front of the gun through the barrel and muzzle. If the muzzle is blocked, there is a stack-up of pressure. If the blockage is great, the pressures may build up until they exceed the capacity of the product. The barrel may ripple or rupture, the receiver may burst, or the ejection port may even blow out. The ejection port can be especially dangerous to left-handed shooters inasmuch as most ports of autoloading shotguns are on the right hand side of the gun, adjacent to the eyes and face of the left-handed shooter.

Manufacturers invariably argue that a blowup or rupture type accident was caused by lack of maintenance. On the other hand, the handler usually feels certain that he or she would never have left mud or any debris inside the gun.

Overloaded or defective cartridges or shells are additional causes of blowups or ruptures of firearms, and that possibility must be explored in connection with any product liability claim arising out of a rupture or blowup type accident. If hand loads rather than factory loads are involved, the gunmaker likely will point in the direction of the ammunition as the cause of the rupture, and the hand loading of shells and cartridges may well be a cause. If the shell is overloaded, it may create internal pressures beyond the expected capacity or normal limits of the gun. Sometimes those who hand load shotgun shells or rifle cartridges assume that the more powder or the hotter the load, the better.

Although not at all common and perhaps not as common as the blockage cause, sometimes there is a metallurgical defect or problem in the gun that has caused or at least allowed the firearm to explode or blow up during use. Most manufacturers and many foreign governmental standards require the subjection of the firearm to what is known as proof testing with high powered cartridges or loads ranging from 150 to 200 percent of the normal or standard load to determine the product's ability to withstand such pressures.

The engagement of the hammer-sear interface and the extent of the "hook" or absence of "perching" is an important factor in the safety and integrity of the firearm. Manufacturers must admit that normal or foreseeable handling will include a certain amount of dropping and bumping of the

product. The reliability of a firearm under "field" conditions, not whether it will go off in some laboratory under unrealistic circumstances, is the real test of the integrity of the product. Normal use is not limited to perfect handling conforming exactly to the manufacturer's recommendations or intentions.[19]

Bumping, jarring, or dropping are common accident conditions that can and often do produce unintentional discharges and gunshot injuries. The absence of a positive safety system can explain although certainly not justify an accidental discharge.[20] In keeping with the axiom that any gun that can fire without someone pulling the trigger is a mechanical absurdity and a source of constant danger,[21] the unreasonably dangerous character of such a

[19] In Cobb v. Insured Lloyds, 387 So. 2d 13 (La. Ct. App. 1980), a case involving a single action revolver, the manufacturer argued that the firearm was not in normal use since it was being carried with the hammer in a position other than that recommended by the instructions. The weapon discharged when it received a blow. In rejecting the manufacturer's argument and defining the scope of normal use (and thus the manufacturer's duty), the Louisiana appellate court held as follows:

> Because Bell was carrying the revolver contrary to the instructions, appellants argue the revolver was not in normal use.
>
> We believe appellants have drawn the concept of normal use too narrowly. . . .
>
> Normal use is a matter of foreseeable use and may include something broader than operation exactly in accordance with the manufacturer's instructions. . . . In the present case, the revolver was being used for a purpose reasonably foreseeable by the manufacturer. Revolvers are often carried fully loaded. . . . The only serious question is whether the manufacturer could or should have reasonably foreseen the revolver would be carried fully loaded with the hammer in the full forward position.
>
> First, we note the obvious fact that the revolver has a full forward position. Appellants' own expert, Mr. Edward B. Crossman, recognized full forward as one of four hammer positions for this revolver. The manufacturer's instructions also give directions for placing the hammer full forward "if it is desired. . . ." We also consider the fact established through expert testimony that the full forward position is the safety position on many other commonly used handguns. As a manufacturer and distributor of a variety of guns, Sauer and Hawes knew or should have known this, and they should have reasonably foreseen this revolver would be carried fully loaded with the hammer in the full forward position. Accordingly, we find that the manner of Bell's use of the revolver, though not in accordance with the instructions, was within "normal use" of the product.
>
> We next consider the question of whether the revolver was unreasonably dangerous for normal use, either because the design was defective or the warnings inadequate.

Id. at 17-18; *see also* LeBouef v. Goodyear Tire & Rubber Co., 623 F.2d 985 (5th Cir. 1980) (applying Louisiana law and following the same line of reasoning with respect to an automobile accident caused by tire deterioration).

[20] The definition of "safety system" is broader than the manually operated safety device or button on the firearm itself. It may (or may not) work in various ways to lessen the risk of accidental discharge. See Weeks v. Remington Arms Co., 733 F.2d 1485 (11th Cir. 1984), for a discussion differentiating the manual safety from the safety system on the firearm. The safety system can be equated with the overall design integrity of the product, whereas the manual safety may well be viewed as a "guard" and thus not a substitute for adequate design. *See generally* Brownlee v. Louisville Varnish Co., 641 F.2d 397 (5th Cir. 1981) (Alabama law); Perkins v. Emerson Electric Co., 482 F. Supp. 1347 (W.D. La. 1980) (Louisiana law). *See also* S. BALDWIN, F. HARE, & F. MCGOVERN, THE PREPARATION OF A PRODUCT LIABILITY CASE § 1.2.2 (1981), and H. PHILO, *supra* note 10, for discussions relating to the order of priority in safety systems engineering.

[21] This is a quotation from an old Iver Johnson advertisement describing the quality and safety characteristics of its firearm at the turn of the century.

gun would seem to be patent, but the precise cause of its dangerous character may not be so obvious.

Most bumping, jarring, or dropping accidents are allowed if not caused by the lack of a positive manual safety or adequate safety system. Often, only the trigger, rather than the hammer, firing pin, or sears, is blocked by the manual safety, and such a safety is of no consequence if the gun is discharged as a result of a hammer fall without the trigger being pulled. Abuse, modification, and tampering are often the manufacturer's excuses for the malfunction or bump firing under such conditions. The manufacturer tries to lay the blame on the handler for the foolishness in allowing the gun to be bumped, dropped, or jarred. The question is not that simple.

Seldom, but sometimes, a misfire or hangfire is the cause of an unexpected gunshot. Many think a misfire is a condition wherein the gun fires itself when it ought not do so. To the contrary, it is a condition wherein the gun should have fired but did not or the discharge was delayed beyond the normal split-second timing. This can result from several conditions, including improper head space, but perhaps the most common is defective ammunition, slow burning charges and powders.[22] The risks produced are similar to those attending a seemingly defective or dud firecracker which does not explode when tossed but then blows up in the hand of a child who picks it up to see what went wrong. The risks and foreseeable injuries are obvious and unlimited, although not extremely common with today's modern powders and more reliable ammunition.

Frequently, and far too often, the gun's overall design and built-in safety system are simply inadequate to protect under predictable circumstances. Although the so-called safety devices may function as designed or intended, they may not get the job done.[23]

[22] *See* Riggin v. Federal Cartridge Corp., 204 S.W.2d 94 (Mo. 1947), involving delayed explosion of a rifle shell alleged to have been caused by defective primer and the manufacturer's failure to employ proper quality control in its manufacturing and testing processes.

[23] *See* Weeks v. Remington Arms Co., 733 F.2d 1485 (11th Cir. 1984). The court very astutely and correctly discussed the basic distinctions between a safety system as opposed to a manual safety or safety button:

> In reality, then, the alleged defect did not lie in the safety mechanism itself because this particular safety was only designed to immobilize the trigger. Weeks does not allege that the safety failed to lock the trigger. Rather, the alleged defect consists of the insufficiency of the safety system designed by Remington. In other words, the gun can fire with the safety on, or with the safety off but without pulling the trigger, because the sear and hammer can be made to operate independently of the trigger. For this reason, it seems inaccurate to characterize the safety itself as defective. It is perhaps more correct to say that the gun's safety features are defectively designed, if defective at all, because users are led to believe that the gun will not fire with the safety on, when in fact such is not the case.

Id. at 1489 n.4

THE TARGET

Asking who can be a viable defendant in the gunshot injury case is like asking how high is up.

There are no rules of tort law specific to the field of gunshot litigation. However, some theories or concepts seem particularly applicable, by reason of the nature of the circumstances and perhaps the emotions and attitudes surrounding guns. By way of simple example, consider negligent entrustment. The principles of negligent entrustment have many places in tort law but black letter meaning in gun-related situations. For example, although it is easy to conceive a cause of action for entrusting a high-powered motorcycle to a young child, a grey area develops as the power decreases or the age of the child increases. With a dangerous object such as a gun, whose raison d'être is to kill, the concept is somewhat broadened and pronounced.

Basic concepts of reasonable care under the circumstances apply in gunshot litigation. However, because of the inherent risks, some courts have taken steps to modify the standard of care that must be exercised with a firearm.[24] The duty of extraordinary care has been imposed across the board from the designer to the handler, and any other standard would seem shallow. Imposing such a standard upon the manufacturer and not the handler, and certainly vice versa, would seem lopsided.

In jurisdictions where strict liability is part of general product liability law, strict liability easily applies to the production and distribution of unreasonably dangerous guns.[25] Strict liability concepts may also be advanced against the handler or custodian of a defective firearm on behalf of an innocent victim or bystander, in some jurisdictions and under certain circumstances.[26]

The gun handler who makes a basic mistake is obviously the easiest litigation target for an innocent bystander seeking compensation. A simple and inadvertent trigger pull by a handler who is carelessly pointing the gun in the direction of a victim is invariably too easy. More often than not, a judgment against such a defendant is comparable in worth to the paper it is written upon. In years of handling gunshot litigation, I have had only a handful of such cases that reached my desk before a homeowner's insurance company had coughed up its limits. Usually those cases come in post-insurance, with forwarding counsel requesting help in recovering lagniappe from the

[24] *See* Johnson v. Colt Indus. Operating Corp., 797 F.2d 1530 (10th Cir. 1986); Shields v. Sturm, Ruger & Co., 864 F.2d 379 (5th Cir. 1989).

[25] *See* Philippe v. Browning Arms Co., 395 So. 2d 310 (La. 1981) (opinion on rehearing); Coburn v. Browning Arms Co., 565 F. Supp. 742 (W.D. La. 1983).

[26] *See* Cobb v. Insured Lloyds, 387 So. 2d 13 (La. Ct. App. 1980).

leftover defendants. At that point, the hard issues are generally not those of fault but rather those of coverage or vicarious responsibility.[27]

The leftover defendants may be just as responsible and guilty in some cases. The basic difference is that they litigate harder. These defendants may include the designer, the manufacturer, the importer, the distributor, the retailer, the repairer, or even the donor of a defective gun.

The producer of a holster or scabbard may have also played a part in causing the accident. If the scabbard did not protect the gun or did not keep it holstered and allowed it to fall out and discharge, it may have failed to live up to reasonable expectations. The retail seller may have responsibility if he has mismatched the gun with the holster. This would seem especially likely if the seller, such as a specialized or sporting goods dealer, either professes expertise or has implied expertise upon which the purchaser relied—and there is rarely a situation to the contrary. It does not seem at all farfetched to assume that almost any clerk designated to sell lethal weapons in a sporting goods department has special knowledge and some expertise about such products. The duty to explain fully the foreseeable risks of such a product is or ought to be automatic with the sale of deadly weapons. Unless the sales clerk does inquire about the degree of skill, knowledge, and expertise of the intended user of the product, the clerk may have breached his duty of reasonable care.

It goes without saying that gunshot injuries are far easier to prevent than to fix, and the prevention possibilities arise at all stages from the design to the handling. If the gun is fired without the trigger being pulled, one might reasonably conclude that something is wrong with the gun, even if the reason or causes remain to be determined. If the fault lies with the design quality of the gun, then so should the responsibility lie with the designer and manufacturer.

THE EXPECTATION

If we get back to basic product liability law and employ the reasonable consumer expectation standard, the fault question becomes more clearly focused. Most people, if asked how a gun is made to fire, will quickly answer, "You pull the trigger." The question seems easy enough and the response almost kneejerk. A request for further explanation or elaboration might render the following dialogue:

[27] The exception to this statement may well be found in the area of negligent entrustment such as the selling of a gun to one of limited judgment and capacity (such as a child) or the selling of a gun to a convicted felon.

A: Well, I guess maybe you would have to cock it first, if it is not already cocked.
Q: Can you think of anything else that might have to be done to make it go off?
A: Are we talking about a loaded gun?
Q: Well, you do the talking and I'll do the listening; you tell me.
A: Well, I don't think you can fire it without bullets.
Q: Without bullets where?
A: You know, where you keep the bullets in the gun. What do you call it?
Q: Depends on what you are talking about.
A: Now you are confusing me. Do you keep the bullets in more than one place?
Q: Depends.
A: Depends on what?
Q: It depends upon whether you are talking about extra bullets for storage or for shooting.
A: We are talking about shooting, aren't we?
Q: Yes.
A: Then bullets for shooting!
Q: In the barrel?
A: Yes.
Q: Or the chamber?
A: I knew that, I just couldn't think of what you call it.
Q: Go ahead. . . .
A: So you would have to put a bullet in the chamber, cock it and pull the trigger.
Q: Does this gun have a safety on it?
A: Sure. Well, don't they all?
Q: Was this gun "on safe"?
A: Well, if it is, it couldn't fire, so you would also have to put if off safe.
Q: Do you mean in the "fire" position?
A: Sure.
Q: Could you leave out any of the steps that you've listed?
A: I can't think of one that could be omitted unless, of course, the gun is already loaded or already cocked or maybe the safety is already off, but you will still have to pull the trigger.
Q: So you would not expect the gun to fire if those steps were not carried out one by one, by you or by somebody?
A: No, I certainly would hope not.
Q: Why?
A: Well, you wouldn't expect a gun to fire without someone pulling the trigger. That's what the trigger is for.

Q: And what about the safety?
A: Isn't that what the safety does?
Q: What?
A: Keeps the gun from going off.
Q: When?
A: When it is not supposed to.
Q: When is it supposed to?
A: When you do what I just explained to you.
Q: And when is it not supposed to?
A: When you don't do what I just explained to you.
Q: And if one of those steps is left out, you wouldn't expect it to fire?
A: No, not unless it's defective or something's wrong with it. You wouldn't think they would sell it to the public, brand name and all that, if it could go off on safe or without someone pulling the trigger. If it could, I would want to know about it before I bought it.
Q: What would you do if the sporting goods store explained to you that you didn't have to pull the trigger or flip the safety off and that it could fire if bumped or jarred?
A: Would they do that? I'd want the one that wouldn't. You must be talking about Saturday night specials or something like that. Can they still sell those things?
Q: Are you saying that if the gun went off like that, it would not have lived up to your expectations?
A: Of course not.
Q: Let's explore another thought. If you came upon an accident victim and found only the body, the gun, and the fired case, what would your immediate reaction be, insofar as what you thought happened?
A: What's a fired case?
Q: A spent cartridge case, the hull without the bullet in the end of it.
A: I would think either somebody shot him or he shot himself.
Q: How?
A: Somebody would have pulled the trigger. I guess we could check fingerprints to see if he did it himself or somebody else did it.
Q: And if you were handling a gun, perhaps putting it in a car or on the shelf, and it suddenly went off, would you suspect that you had pulled the trigger?
A: Well, unless I knew for sure that I didn't, I would think I had done it by accident. Maybe it had hair trigger or some unexpected condition.
Q: And if you were questioned right after the accident by somebody who asked you for the facts and nothing but the facts, what would you say?
A: Well, assuming I could talk, I'd have to tell them that I shot myself

and what I figured happened—that somehow the trigger was pulled and the gun was cocked and loaded and the safety was somehow off.

Q: And would you stick by your story?

A: Sure, I'd have to. You know, I wouldn't want to mislead anybody.

To lawyers, this fictitious dialogue suggests an outcropping of issues such as the failure to warn, contributory negligence, design and even packaging faults,[28] but it also exemplifies the all too common trust and expectations of consumers, including those who choose or use guns of various descriptions. The gun that "Mr. A" was putting in a car or on a shelf would be defective if it fired.[29] However, as is all too often the case, the dangerously little knowledge of "Mr. A." may well result in distortion of the facts in a way that shoots holes in an otherwise just and credible product liability case.

Lethal BB guns purchased for children by unsuspecting parents fit solidly within this theme. The parent, under pressure from a child who is under peer pressure, is among the most vulnerable of consumers. There are great variations among BB guns, but to many parents a BB gun is a BB gun, especially if it is the kind and the brand name associated with fond childhood memories. The cosmetics are different today. The high powered BB gun that will go through a door or a steel garbage can looks like an assault rifle instead of one of the guns that won the West, but what does that mean? Does that tell us that the gun is as lethal as an assault rifle or does it just tell us that kids today would rather play G.I. Joe than cowboys and Indians? Does the change in appearance convey safety-related information to purchasers, users, or bystanders, or is the change merely a marketing and manufacturing scheme? The subtle and overwhelming expectations of unsuspecting parents are unfulfilled by the dangers and lethal characteristics of these guns. These parents may accept the slight chance of a child being shot in the eye by a BB gun that could cause some injury but not the risk of a shot in the head by one that could pierce the skull and brain.[30]

[28] RESTATEMENT (SECOND) OF TORTS §402A comment c (1965) is the focal point of the dialogue.

[29] This simply accords with the truism advanced by Iver Johnson at the turn of the century. *See* text at note 21 *supra*.

[30] The subject of the sale of lethal guns for use by children is of particular interest and concern to this writer, if not to the Consumer Product Safety Commission. I once sent my ten-year-old son into a well-known chain discount store to see if he could buy a particular pump air rifle by himself. He did so, easily, with no questions asked. Ironically, he could not have purchased a "firearm" because of his age. If a customer is of full age to purchase a gun, he must answer a battery of questions. Before the sale can take place, the clerk must make a serious evaluation of whether the purchaser has the ability, including rational judgment, to handle the gun safely. The lack of judgment and maturity of a child to handle a lethal weapon without strict supervision is patent. I have seen far too many children with brain injuries from modern, high powered BB guns. (If I had seen only one, I would have seen too many.)

There are nearly 25,000 BB gun injuries, on average, each year. About sixty percent of those injuries are serious and require emergency room treatment and/or hospitalization.

PREPARATION AND PRESENTATION

It goes without saying, but it must be said anyway, that a thorough working knowledge of the law on the subject is the essential starting point in case preparation. It is difficult at best to investigate and develop facts to support a cause of action or defense in a gunshot accident case without knowing what you're looking for. In working a jigsaw puzzle, it helps to know what the picture is so that you can look for and select the pieces rather than merely shuffle them until one accidentally, and against the odds, falls into place.

A competent firearms expert is necessary. He does not have to be your expert witness at trial as long as he has enough expertise, and experience in forensic investigation, to head you and your team in the right direction. It is important to impress upon each witness, including and especially your experts, that they must tell you the bad along with the good. It is difficult to change a biased witness into an unbiased witness simply by asking him or her to be unbiased. But you can and should stress that no gaps should be filled in by reasoning or rationalization.

Hospital records are vital at the early stages of investigation and preparation. The gun, the fired case, and even the bullet are important. These items must be gathered and kept safe as soon as possible so that the chain of evidence does not become a problem. And it is extremely important to trace the ownership, possession, and repair history of the gun.

Witnesses who didn't see or hear, but only surmise, must be committed to that position before supposition is changed into sworn fact. Generally, a more accurate statement can be obtained if taken before the witness knows the significance of what he says or whom he is helping. Defense counsel, experienced and skilled in gunshot litigation, prefer to get a plaintiff on cross-examination as early in the pretrial discovery process as possible so the plaintiff can be led in the right direction before he and his lawyer know what is happening. While the same holds true for the plaintiff's counsel vis-à-vis the defendant, rarely does one encounter an inexperienced manufacturer's representative. Anyone designated for the purpose of a corporate deposition is, by definition, qualified and experienced at derailing a plaintiff's case.

> Any air, spring, or CO_2 actuated pellet gun capable of developing a muzzle velocity in excess of 350 to 400 fps (107 to 122 m/s) has a lethal potential at close range . . . . [N]o more than three pump strokes of the pellet gun tested would be required to achieve a potentially lethal impact velocity at a distance of 5 ft. (1.5 m). This number of pump strokes is within the physical capability of the average 7-year-old child.

Barnes, M.S. Helson, & R.A. Helson, *A Death from an Air Gun*, 1976 J. OF FORENSIC SCI. 653, 657-58.

TRENDS AND THOUGHTS

If there is any trend developing in the field of gunshot litigation, it is the fact that such cases are becoming easier and easier to lose and harder to win. To suggest that this proposition applies as much to the defense as it does to the plaintiff's side of the case sounds like a contradiction, but it is not. I simply mean that gunshot litigation is becoming more and more complex, especially when it involves seller's responsibility. Manufacturers have become much more aware of product liability exposure. Rather than remaining isolated, they have joined forces to resist product liability claims. Their engineers are trained and by now quite experienced at articulating defense testimony. They also select, train, and employ central trial counsel in most, if not all, product claims and use local counsel only as necessary to handle motion practice and other similar local matters.

Manufacturers circulate and centralize expert depositions, especially those of rather frequently used plaintiffs' firearm experts. An expert in firearm product liability litigation can expect defense counsel to come to a deposition or trial with a truckload of prior depositions, all carefully marked and tabbed at special places. Unfortunately for the expert, he must remember virtually every statement and opinion given in years gone by. The trend seems to be an ad hominem attack on the plaintiff, his best witness and expert, to shift the emphasis away from the product and to put the plaintiff, his witness and experts on trial. (A correlative trend exists on the plaintiffs' side of the bar, but this effort is not nearly as well organized, staffed, or funded.) In some cases, the tactic works and in others it may become distasteful and blow up in counsel's face.

Pretrial discovery has become tremendously more complex. Look before you leap is the rule. Experienced counsel know the questions and the answers to them before they are even asked. So do the good experts.

Many recently enacted product liability statutes provide defenses to cases involving injury during the commission of a crime. They often provide for state of the art defenses and at the same time establish strict liability—an irreconcilable inconsistency. These recent statutes are often passed by legislators who understand politics far better than they do tort law and its purposes, much less the *ratio decidendi* of the landmark cases. Just when the United States seems to have led the other western world nations to *caveat venditor* (safety or else) through tort law, we seem to be retreating.

The nations of the European Economic Community have adopted a uniform product liability accord providing for strict liability for injuries related to defective products. The accord resulted from extensive research and careful study of the American system, including statutory and case law. A spe-

cial section of the study committee with expertise in the field of insurance was charged with determining the cost and effect of the reform upon insurance. The results showed that the pure cost increases were negligible. After meeting with their counterparts from the American insurance industry, the committee found and reported that much of the cry of crisis on this side of the Atlantic was aimed at higher profits resulting from changes in tort law under the guise of reform. The initial projection was that under the new European system the same coverage could be written for about one-tenth of the premiums charged in the United States. The study showed that the high American rates helped to make up losses in other areas, including stock market ventures and other business activities. In short, the consensus of this objective group was that the American product liability "crisis" was really an insurance or profit crisis. Calling it product liability took the focus off the insurance industry's internal problems and automatically enlisted the blind support of American business for tort reform.

It would be interesting to find out what the average consumer thinks about his or her rights under existing product liability law. If he received an unexpected injury from a hazardous product, would his recovery expectations be consonant with *caveat venditor* or *caveat emptor* (handle with care)?

THE FOREST AND THE TREES

Eugene Wollan*

There are very few fields of human endeavor or activity in which it is not a good idea to step back from time to time, survey the landscape, and try very hard to ignore the trees and focus on the forest. The insurance industry may not exactly represent the ultimate in mankind's achievements, but it is certainly an important part of contemporary life, and the foregoing observation undoubtedly applies to it.

The thought comes to mind particularly in the context of the recent and continuing explosion of litigation in the area of contamination and pollution coverage. Our courts have been busily construing policy language, by and large just as busily finding ambiguities they can happily construe against the insurers, and in the process frequently—or so it seem to me—ignoring the essence of what insurance is supposed to be all about.

Liability Insurance Decisions

This tendency is exemplified by the recent decision of Judge Ira A. Brown in the Asbestos Insurance Coverage Cases in the Superior Court, County of San Francisco, in California (where else?) on August 29, 1988. Among many other points decided, Judge Brown found that physical injury to tangible property took place when asbestos was placed within a structure. He went on to rule that incorporation of a defective material into a structure is considered property damage for insurance coverage purposes if it results in a diminution in value of the property. Moreover, he said, all that needs to be shown to establish property damage coverage is a diminution in value.

Judge Brown was not the first to reach such a conclusion. In *Bowman Steel Corp. v. Lumbermens Mutual Casualty Co.*,[1] the court ruled that when defective siding was installed in a building, the entire structure suffered a diminution in market value and was therefore damaged to that extent. In *Pittsburgh Corning Corp. v. Travelers Indemnity Co.*,[2] the *Bowman* decision was cited in support of the proposition that the damages sustained in an underlying asbestos action constituted "property damage" to the insured.

Along very similar lines is the 1965 decision by a California District Court of Appeal in *Gogerty v. General Accident, Fire and Life Assurance*

* Mound, Cotton & Wollan, New York, New York; Fellow, International Society of Barristers.

[1] 364 F.2d 246 (3d Cir. 1966).

[2] No. 84-3985 (E.D. Pa. Jan. 20, 1988).

Corp.,[3] which dealt with the obligation of an architect's liability insurer to defend him against a claim of having been responsible for the incorporation of defective concrete into a school building. One of the major issues addressed by the court was whether the use of inferior concrete caused injury to the property and whether it was a consequence of the insured's negligence "resulting in accident." The court easily concluded, without much discussion, that there had been an accident, and went on to address the more troublesome part of the issue in the following words:

> Whether a building has been injured by the use in its construction of defective material is ordinarily a question of fact, but it is a question of law if the fault is unquestionably so great as to materially depreciate the value of the building or create a condition which demands correction. And we cannot doubt that in the present case the incorporation into the school building of the defective bents caused injury and damage to the structure through the creation of an intolerable condition. It is a matter of common knowledge that for many years it has been recognized that public buildings, especially school buildings, must be able to withstand earthquake shocks, and the invariable practice has been to require construction that will provide such security. The specifications for concrete construction in the government contract were intended to accomplish that purpose. It was the judgment of the men who had the responsibility of seeing that the contract was fully performed to determine whether the defective bents should be allowed to remain as a part of the building or must be brought into conformity with the requirements of the contract. Their determination that the bents must be replaced or repaired was evidence that allowing them to remain without repair would have resulted in injury to the building. The injury occurred when the bents were made a part of the building, and the condition could be corrected only by their repair or replacement. The measures that were taken to correct an unsatisfactory and possibly hazardous condition were at the expense of the contractor and represented a loss that was due to the damage to the building.[4]

It is worth noting that, in addition to concluding that the use of defective concrete constituted property damage to the building, the court also held

[3] 238 Cal. App. 2d 574, 48 Cal. Rptr. 37 (1965)
[4] *Id.* at 578-79, 48 Cal. Rptr. at 40.

that the existence of property damage could be established by the decision to replace the defective material—in other words, the insured's conclusion that there was a defect requiring correction constituted the evidence that a defect existed. There would appear to be something of the bootstrap in this analysis.

The *Gogerty* court relied heavily on an earlier California decision, *Geddes & Smith, Inc. v. Saint Paul Mercury Indemnity Co.*,[5] in which it was held that the installation of defective aluminum doors into a building constituted an "accident" for purposes of liability coverage because it was "unexpected, undesigned, and unforeseen" on the part of the insured. The court in that case went on to say, however:

> It bears emphasis that we are concerned, not with a series of imperceptible events that finally culminated in a single tangible harm (*cf. Canadian Radium and Uranium Corp. v. Indemnity Ins. Co.*, 342 Ill.App. 456, [97 N.E.2d 132, 139-140]), but with a series of specific events each of which manifested itself at an identifiable time and each of which caused identifiable harm at the time it occurred.[6]

This language at least raises some question as to whether the court that decided *Geddes & Smith* would have reached the same conclusion if confronted by a situation involving continuous but "imperceptible" pollution over a period of many years or even decades.

These and other cases dealing with the issue of what constitutes property damage are, to be sure, liability insurance cases rather than first party property insurance cases, and there is very little case law that presents the question in anything like a pure form. Thus, many of the liability cases focus on the question of what constitutes an occurrence, and they often get bogged down in the specific language utilized by underwriters in an effort, frequently vain, to define that term. The decisions are myriad, for example, in which the courts discuss the meaning of such phrases as "sudden and accidental" and "repeated or continuous exposure." Likewise, the very principles that underlie liability insurance virtually foreclose a valid theoretical analysis of what constitutes property damage, because it is fundamental that the applicability of liability coverage depends not on the actual facts but on the allegations made against the insured. Thus, whether or not a contaminated condition really does constitute property damage in the insurance sense,

[5] 51 Cal. 2d 558, 334 P.2d 881 (1959).
[6] *Id.* at 564, 334 P.2d at 884.

once a claim is made against the insured for creating such a condition, it does not necessarily exceed the bounds of reason to conclude that a liability policy should respond to that claim.

PROPERTY INSURANCE

But property insurance is, or I think should be, a different story. Does the mere existence of a condition, whether that condition be characterized as "defective" or "contaminated" or "polluted" or whatever, constitute loss or damage to the insured property?

Even in the property insurance field itself, sparse as the case law is, there is virtually nothing in the way of jurisprudential analysis of this question. Most of the cases that do appear in the books turn on other issues, such as the applicability or interpretation of a contamination exclusion.[7]

But suppose there is no such exclusion; suppose we have an all-risk property insurance policy, pure and simple, with no arguably applicable exclusion, covering all risks of physical loss or damage to the insured property. Suppose further that during the policy period it is discovered that a condition exists which requires the expenditure of large sums of money to correct—excavation of a polluted landfill on the insured property, for example, or reconstruction of a building found to contain asbestos, or replacement of a generator rotor which is found to fall short of complying with the design specifications. Is the expense of correcting that condition covered, or should it be covered, under a property insurance policy?

Most U.S. courts, taking their lead from the liability cases, would probably answer that question in the affirmative. And I respectfully submit that most U.S. courts would be wrong. They would, I think, be looking at the trees and not the forest—and by the forest I mean the fundamental concept of what insurance is supposed to protect against.

That concept is perhaps impossible to articulate precisely, but it seems to me that somewhere in any such definition must appear the notion of a particular event or occurrence or trauma to the property insured. A condition that simply exists, or that comes into being gradually over an extended period of time, is not such a happening. I think most insurance experts would agree, for example, that even in the absence of a specific exclusion for "gradual deterioration" or "wear and tear" in the typical inland marine policy, that kind of damage is not intended to be covered no matter how broad

[7] *See, e.g.*, Falcon Products, Inc. v. Insurance Co., 615 F. Supp. 37 (E.D. Mo. 1985); McQuade v. Nationwide Mut. Fire Ins. Co., 587 F. Supp. 67 (D. Mass. 1984); Hi-G Inc. v. St. Paul Fire & Marine Ins. Co., 283 F. Supp. 211 (D. Mass. 1967), *aff'd*, 391 F.2d 924 (1st Cir. 1968); American Casualty Co. v. Myrick, 304 F.2d 179 (5th Cir. 1962); Arkwright-Boston Mfrs. Mut. Ins. Co. v. Wausau Paper Mills Co., 818 F.2d 591 (7th Cir. 1987).

the all-risk language may be. Why is that? The property has certainly suffered a diminution of value if it has deteriorated, gradually or otherwise, or if it is worn and torn; but those things have taken place in the normal course of activity, and the property has not sustained any traumatic injury.

Consider another example from everyday experience. Suppose my new automobile turns out to be a lemon with a knock in the engine and a maximum rate of acceleration measurable in feet rather than miles per hour. I do not rush to submit a claim under my automobile physical damage policy; I rush instead to the dealer from whom I purchased the car, where I complain loudly and invoke every warranty known to the mind of man. Why is that? Certainly there is something wrong with the lemon, and certainly it is worth less than it would be if it were in proper condition. Instinctively, however, I recognize that the car has simply not sustained an insurable kind of damage. My common sense tells me that this is not what my insurance policy is supposed to protect me against, and that to assert a claim under my policy would be silly.

I am of course referring only to the limited kind of situation where the existence of the defective condition constitutes the solitary basis for an insurance claim. If the steering mechanism were defective on my lemon, and as a result I ran into a tree, the damage to the grillwork would certainly be covered by my policy. But would correction of the underlying defect in the steering mechanism? Close question.

Are we really to conclude that any time a piece of insured property suffers a diminution in value, it has sustained property damage for insurance purposes? Suppose the market value of my home plummets because of a general economic recession. No one would seriously argue that I have an insurance claim as a result. But suppose the same thing happens not because of general economic conditions but because it is discovered that my home sits a half mile from Love Canal. Closer question yet.

Thus far, I have not seen any court decisions in this area that address the broader subject of the philosophy of insurance along with interpretation of specific policy language. Perhaps a careful and thoughtful analysis of this nature, by responsible judicial authorities, is overdue.

THE INNS OF COURT†

Richard H.W. Maloy*

In the heart of London, history relives itself every day.

Just steps away from the hustle and verve of this teeming city lies a treasure trove worthy of the inquiry of layman and lawyer alike. For such are the ancient, yet little known, Inns of Court.

Located in the area of London where Chancery Lane connects High Holborn with the Strand and Fleet Street, the four Inns, Lincoln's Inn, Inner Temple, Middle Temple and Gray's Inn, are within a short walk of each other as well as the Law Society (to which most English solicitors belong), the Public Record Office (where The Domesday Book of 1086, and the Magna Carta of 1215 repose), and the Royal Courts of Justice. Until recently at 116 Chancery Lane Hammick, Sweet and Maxwell sold law books in a shop that has been there since 1799. At 93 Chancery Lane, Ede & Ravenscroft have been making wigs and robes to order since 1693. On the Strand at Number 229, the Wig and Pen Club serves mutton chops in a building that has existed since 1625. There is a pub on High Holborn, the Cittie of Yorke, which was founded in 1430.

The antiquity of the area, however, and the underpinnings of the English adversarial system can be savored only by leaving the hustle of London and entering one of the Inn quads that have become enveloped by buildings constructed post World War II. Walking under the archway that Christopher Wren designed in 1684, down Middle Temple Lane, one enters upon another world.

"Nothing else in London," wrote Nathaniel Hawthorne, "is so like the effect of a spell as to pass under one of these archways and find yourself transported from the jumble, rush, tumult and uproar into what seems an eternal Sabbath."

A century ago Frederic William Maitland declared, "No English institutions are more distinctively English than the Inns of Court . . . . Unchartered, unprivileged, unendowed, without remembered founders, these groups of lawyers formed themselves and in the course of time evolved a scheme of legal education, an academic scheme of the medieval sort, oral and disputatious . . . . We shall hardly find their likes elsewhere." History has not altered his appraisal.

The Inns today offer a post graduate course in the art of advocacy, for no

† This article is reprinted, with permission, from the November 1986 issue of *The Florida Bar Journal*. Illustrations have been omitted.

* Papy, Weissenborn & Papy, Miami, Florida.

one may argue a case in "the law courts" of England or Wales unless he or she has been "Called to the Bar" by one of the four Inns. A law degree from an accredited university is a normal requirement of admission. Students must attend the School of Law, which serves all of the Inns, and take a compulsory examination, upon completion of one year's study. Usually a thousand or so young men and women are enrolled here. Although mostly English or Welsh, they hail from around the world.

The vast majority intend to spend their life in court; a few endure the vigorous training for other pursuits. The student body of the Inns of Court resembles the student body of any stateside school of law. They have their students' unions, magazines, and intramural athletic teams. Hardly any of the students live in the Inns any more, however, and many commute from places outside London. The former student quarters are now rented as professional offices (chambers) and residences. Much of the Inns' income is derived from these sources.

Though time has somewhat modified the Inns, they adhere to their founding principle that a barrister is molded by exposing him or her to daily contact with the active practitioners of the profession. "Keeping Terms," compulsory dining over a two-year period in one of the Inns' great halls, facilitates this process. The stamp is indelible. Once Called to the Bar, a barrister remains a member of his or her Inn for life, even if later elevated to the bench.

The Inns trace their origin almost to the beginnings of the common law, 1066 A.D., the Battle of Hastings, which marked the successful culmination of the Norman invasion of Britain. Thenceforth, rather than depending upon a written code as the source of governing law, disputes were resolved by judges deciding the issues based upon the facts of each case. Accounts of those decisions were transcribed in Norman French and used as precedents for subsequent cases with similar fact patterns. Laymen became lawyers by acquiring a knowledge of this noncode oriented "common" law. The clergy, being men of learning, constituted the largest segment of those who argued cases in court.

In 1292 to bring a semblance of order to what was becoming a chaotic situation, the King ordered the Lord Chief Justice and certain other judges to select a limited number of lawyers for service in their courts. A knowledge of the law, particularly the common law of the realm, was no longer to be self-taught, but acquired through the assistance and guidance of those experienced in that discipline. Men who wished to pursue the study of law grouped around judges and practitioners and lived together in hostels or "inns."

Since records from those days are fragmentary, a certain amount of con-

jecture is required to trace the origins of the Inns. There is sufficient history, however, to document some broad outlines of the Inns' development.

In the year 1118 A.D., a few Crusaders formed, in Jerusalem, the religious Order of the Holy Sepulchre of Knights Templar, for the protection of pilgrims on their way to the Holy City. Shortly after their organization the Knights opened a house in London, relocating in 1162 to a meadow which sloped gradually, from what is now Fleet Street to the Thames. The area became known as the New Temple. The Templars remained there until the order was suppressed by the crown in 1312 and occupancy of the lands given to the Knights Hospitallers of St. John of Jerusalem, a religious order which likewise had its genesis in the Crusades.

A group of students rented space from the Knights Hospitallers sometime around 1338 and acquired the name, Inn of the Temple, from the New Temple area in which they were situated. It may be only surmised that the burgeoning growth of the student body caused The Temple's schism into two inns. We know from an extant last will and testament executed in August of 1404 that on that date there was a Middle Temple. A letter of October 1, 1440, has established that as of that time there existed an Inner Temple. More exact dates are unavailable. Inner Temple is situated closest to the City of London. Adjacent to it is Middle Temple. The records do not reflect that an "outer" temple ever existed as an Inn of Court.

In the 14th century about a half mile north of the River Thames, along what is now Chancery Lane, Henry de Lacy, Earl of Lincoln, possessed sizable holdings. The Earl, being interested in the law, gathered a group of lawyers and students about him, and thus Lincoln's Inn was founded. Lacy made provision for the lawyers to remain after his demise; they have never left.

Off to the north of Lincoln's Inn, Reginald de Grey, a judge, sublet to students of the law a portion of his premises sometime prior to 1370. Gray's (not Grey's due to an 18th century conversion for reasons unknown) Inn, therefore, at age 600 plus, is the junior of the Inns of Court.

From their earliest times the Inns have been organized on a three-tier hierarchy. The students (called "inner barristers" due to the place they occupied during lectures) are in the lowest stratum. Next are the barristers, those who have been Called to the Bar. The third tier is composed of the senior barristers, called Masters of the Bench—or "Benchers." They form the governing body of the Inn. The Inns sometimes elect honorary benchers. Winston Churchill was an honorary bencher of Gray's Inn. In 1943 Queen Mary became the first lady bencher when she was honored by Lincoln's Inn, and Princess Margaret was subsequently elected a bencher. Americans too have been named honorary benchers. William Howard Taft and Chief Justice

Warren E. Burger were so honored by Middle Temple. Dwight Eisenhower and Dean Acheson were honorary benchers of Lincoln's Inn. Gray's Inn has bestowed the honor on Justice Sandra Day O'Connor.

The chief executive officer of an Inn is the treasurer, chosen from the ranks of the benchers, usually on seniority basis. Some famous persons have occupied this position. The first King's counsel, Francis Bacon, was treasurer of Gray's Inn in 1608; William Pitt was treasurer of Lincoln's Inn in 1794; Queen Elizabeth was treasurer of Middle Temple in 1949. In time, a paid official, the under-treasurer, became the chief administrative officer. Cooks, gardeners, porters, chambermaids (called laundresses) and stewards (called manciples) as well as office staff make up the retained personnel. In 1387 Geoffrey Chaucer immortalized the manciple in *The Canterbury Tales*:

> There was a manciple from an inn of court,
> To whom all buyers might well resort
> To learn the art of buying food and drink;
> For whether he paid cash or not, I think
> That he so knew the markets, when to buy,
> He never found himself left high and dry.

In the early days of the Inns many literate laymen desired to learn merely the drafting of writs and other legal documents, rather than the art of advocacy. As a result, in the 14th century there sprang up some 10 or 11 separate inns, called Inns of Chancery. Thus began the distinction in the English legal system between barristers and solicitors. By the end of the century many of the Inns of Chancery came under the control of one of the Inns of Court. As the legal profession increased in size, the functions of the Inns of Chancery were taken over by other professional associations throughout the country. During the 19th century those inns were disbanded and their premises sold. What few of their buildings remain are occupied by businesses or other private interests.

In the 15th and 16th centuries, despite the severity of the studies, many students enrolled merely for the purpose of securing a general education; the curriculum of the universities was for the most part limited to ecclesiastics. Men such as Sir Francis Drake and Sir Walter Raleigh joined Middle Temple more for social refreshment and general education than they did for legal training.

The great English poet Edmund Spenser, though not a lawyer, was a habitue of the Temples, and in 1559 rendered a description of Middle Temple buildings in his epic poem "Prothalamion." Poet Laureate Ben Jonson in

1616 observed that the Inns were "the noblest nurseries of humanity and liberty in the Kingdom." Izaak Walton, a contemporary and friend of Jonson, had a shop on Fleet Street and lived on Chancery Lane. Jonson, Walton and the great poet and Dean of St. Paul's, John Donne (of Lincoln's Inn), formed the nucleus of the literary world of that time.

Henry Fielding, a member of Middle Temple, upon completion of his monumental work, *The History of Tom Jones*, in 1749, abandoned the law to follow a career of social reform. The renowned English poet William Cowper was a member of Inner Temple in 1754. The lexicographer and poet Dr. Samuel Johnson lived at Number 1 Inner Temple Lane from 1760 to 1765. The house has been razed but "Dr. Johnson's Buildings" today stand on the site. The poet, playwright, novelist Oliver Goldsmith, after he wrote *The Vicar of Wakefield* on Fleet Street, lived in Gray's Inn and Middle Temple. He is buried just inside the Temple grounds. James Boswell, the biographer of Dr. Johnson, in the April 6, 1763, entry of his *London Journal* describes a day at the Temple:

> We then walked into the City, and then strolled about the Temple, which is a most agreeable place. You quit all the hurry and bustle of the City in Fleet Street and the Strand, and all at once find yourself in a pleasant academical retreat. You see good convenient buildings, handsome walls, you view the silver Thames. You are shaded by venerable trees. Crows are cawing above your head. Here and there you see a solitary bencher sauntering about.

Charles Lamb was born in Inner Temple and lived there at varying periods throughout his life. In the gardens of Inner Temple a plinth contains a notable quotation from Lamb to the effect that "Lawyers were children once . . . ."

From May of 1827 to November in the following year Charles Dickens, then a lad of some 16 years, worked as a clerk in the chambers of an attorney in Gray's Inn. Abandoning the law to journalism and the world of literature which he created, Dickens never forgot his early training ground. In *Bleak House* he recounts a day in the life of Richard:

> Richard . . . walks thoughtfully on, and turns into Lincoln's Inn, and passes under the shadow of the Lincoln's Inn trees. On many such loungers have the speckled shadows of those trees often fallen; on the like bent head, the bitten nail, the lowering eye, the lingering step, the purposeless and dreamy air, the good consuming and consumed, the life turned sour.

The great English novelist, William Makepeace Thackeray, who was called to the Bar by Middle Temple in 1834, and who once had chambers in Gray's Inn, described, in "Pendennis," a typical Sunday evening at Middle Temple:

> On the Sunday evening the Temple is commonly calm. The chambers are for the most part vacant. The great lawyers are giving grand dinner-parties at their houses in the Belgravian or Tyburnian districts; the agreeable young barristers are absent attending those parties. . . .

The names of those members of the Inns who have contributed to the law are legion. Edward Coke (of Inner Temple), Sir Francis Bacon (of Gray's Inn), and William Blackstone (of Middle Temple) are but a few. William Howard Taft in 1922 wrote: "I feel strangely moved, finding myself sitting here in the home of Blackstone, in the very cradle of the common law of England and of America."

For years the Temples have had strong ties with America. That great defender of the liberties of the colonists, Edmund Burke, lived just within Inner Temple Gateway in 1750. The Articles of Confederation were drafted by a Middle Templar. Peyton Randolph, the first President of the Continental Congress, was Called to the Bar by Middle Temple. Of the signatories to the Declaration of Independence five were from Middle Temple and one was from Inner Temple. Three Middle Templars were signatories to the U.S. Constitution. John Rutledge, before he became the second Chief Justice of the United States Supreme Court, was a barrister of Middle Temple. The Middle Temple library contains one of the largest collections of American law books of any library outside the continental limits of the United States.

Lincoln's Inn has produced a number of statesmen on both sides of the Atlantic: Sir Thomas More, Oliver Cromwell, Benjamin Disraeli, William Penn, and William Pitt. Prime Minister Margaret Thatcher read for the Bar in Lincoln's Inn Library in the early 1950's.

By the 16th century the swelling of their student ranks necessitated construction of new and larger facilities. When in 1610 certain Inner Temple construction used timber, lath and plaster, instead of the usual brick, the result was referred to as "the paper buildings." Their replacements, which appeared in 1838, and stand there today, still bear that appellation. The "stone buildings" of Lincoln's Inn, largely completed by 1780, remain to this day quite functional.

Of primary concern to the original architects of the Inns was the hall. Usually referred to without the definite article, "hall" was then, and is now, the focal point of every Inn of the Court.

Three years before Columbus sailed for the New World Lincoln's Inn completed its "replacement" hall. Though refurbished and changed somewhat over the years, that same building, designated as "Old Hall," remains in service. "New Hall," in which many of the main functions are now held, was opened by Queen Victoria on October 30, 1845. Gray's Inn hall was "re-edified" in 1556. The entire building was destroyed by the air raids of 1941; only its 16th century walls remained. The restoration is a splendid example of Tudor architecture. The magnificent screen, installed in 1588, is constructed of Spanish chestnut, taken from a galleon of the Spanish Armada. The commander of the English fleet which destroyed the Armada was a member of Gray's Inn.

Middle Temple's Hall was completed in 1576. Its hammerbeam ceiling rises 47 feet and is considered one of the most stately examples anywhere of Elizabethan architecture. Complementing Gothic windows, the screen represents a rare example of renaissance artistry. In a prominent place stands the "Cupboard," a table upon which students Called to the Bar by Middle Temple sign the roll of barristers. It was made from the wood of the *Golden Hind*, on which Middle Templar Sir Francis Drake circumnavigated the world in the 16th century. It is uncertain when Inner Temple built its first hall. One constructed in 1868 was destroyed by bombing in 1941. Its successor was built in 1958, on the original site, with a ceiling rising to a height of 40 feet. A 15th century fireplace is put to use each winter.

Though instruction is now for the most part conducted in the School of Law, the hall was formerly the classroom and dining room for each Inn. It still has many important functions, not the least of which is the serving of lunch each day, except during vacation time, as well as dinner during the four terms of the legal year—Michaelmas (October and November), Hilary (January and February), Easter (March, April and May) and Trinity (June and July)—and on certain special occasions.

One of the most celebrated uses of hall occurs on Call Day when successful candidates are "Called to the Bar" by his or her Inn. It is here that barristers who become benchers are "Called to the Bench." Moots and lectures are also conducted there. In earlier days court was held in several of the Inns' halls. On occasion hall has been the scene of affairs of state—Sir Winston Churchill first met President Franklin Roosevelt in Gray's Inn Hall. On the lighter side, concerts, parties (Christmas is a particularly popular season) and even wedding receptions are held there. Plays have always been an important feature. Shakespeare's *Comedy of Errors* was first given in

Gray's Inn Hall in 1594. Shakespeare acted in his *Twelfth Night* when Middle Temple produced it during Christmas 1601.

After hall, the most prominent feature of an Inn of Court is its chapel.

The oldest and most interesting of all the Inns' chapels is St. Mary's, the Temples' church. When the Knights Templars settled in the area, they constructed a round church on the model of the Church of the Holy Sepulchre in Jerusalem. It was completed in 1185. The church and its underground passages have been used for centuries as a burial ground. When a stone coffin was opened in 1810 the bones of a child believed to be William Plantagenet were found at the foot of its adult occupant. William's father, Henry III, was buried there in 1256. The work of cataloging the graves proceeds to this day; underground workmen must be careful to avoid stepping on exposed skeletons as they traverse the dimly lit passages. There are only five other round churches in England dating back to this period—Cambridge, Clerkenwell, Little Maplestead, Ludlow Castle and Northampton—but the Temple Church is the largest and reputed to be the finest.

The chapel at Lincoln's Inn was completed in 1623. Most of the pews in use today are original. Designed by the gifted 17th century architect Inigo Jones, its exterior is Gothic. Reginald Heber was preacher here in 1822. The most unusual feature of this building is an open air "undercroft" at ground level, formed by the pillars on which the structure stands. It is a kind of cloister which, in past days, prompted unwed mothers to leave their unwanted infants within the protection of its columns, so that the Inn would provide for them. Many were so cared for and grew up with the surname "Lincoln." *Tom Jones* was filmed here.

A place of worship has stood on the site of Gray's Inn Chapel since 1315. In 1941 the chapel was completely destroyed by air attack but has been rebuilt. The center panel of the east window depicts Thomas à Becket, whose image was removed from the chapel's window in 1539, under orders from Henry VIII.

The Inns are no longer tenants. Each owns its situs' freehold. Lincoln's Inn acquired its land in 1580, the Temples in 1608 and Gray's in 1734.

The grounds of the Inns are so truly lovely that focusing on a few areas for comment is difficult. There is, of course, Lincoln's Inn Fields. Historian W.J. Loftie states: "The view out towards Lincoln's Inn Fields from within the western boundary wall is not exceeded by any other in London." Francis Bacon laid out Gray's Inn gardens (called "The Walks") in 1606. He referred to them as his "purest pleasure." Charles Lamb stated, "They are still the best gardens of any of the Inns of Court." Dickens describes Middle Temple's gardens in *Martin Chuzzlewit*:

> The day was exquisite; and stopping at all, it was quite natural—nothing could be more so—that they should glance down Garden Court; because Garden Court ends in the River, and that glimpse is very bright and fresh and shining on a summer's day.

And still, on most any summer's day nothing seems more natural than to see workers from the business offices nearby enjoying their lunch under the shade of the trees within sight of the river.

Shakespeare in *King Henry VI* immortalized Middle Temple's gardens as the place in which the War of the Roses began. The Earl of Warwick says:

> I love no colours, and without all colour
> Of base insinuating flattery
> I pluck this white rose with Plantagenet.

to which the Earl of Suffolk replied:

> I pluck this red rose with young Somerset
> And say withal I think he held the right.

The roses still bloom in Temple Gardens.

With the development of the printing press the importance of the Inns of Court began to diminish. Students realized that they could learn the law faster by reading books than by attending "readings" (lectures) and moots. The system of legal education which had been offered by the Inns broke down almost completely when, in 1677, readings ceased. For the next 200 years the Inns remained in a state of quiescence.

It was during this period that "keeping terms," a custom which still prevails, had its beginnings. "Keeping terms" is simply a requirement that before being Called to the Bar as a barrister of the Inn one must have eaten a certain number of dinners in hall; and such was considered equivalent to having attended readings. What was commenced probably as a blandishment to sagging enrollment became a didactic institution.

Under modern rules the Inns require each student to partake of a certain number of dinners in each six terms over a two-period. Though the requirement of a bar examination means that today's student may not simply "eat his way into court," dining is still considered a very essential part of the educational process. Rather rigid rules have been set down to ensure that conversation takes place. As an example, in Middle Temple members and their guests dine in "messes" of four, seated in order of seniority; the most senior being designated "the captain." No member of a "mess" may speak to a

member of another "mess," except "for one Captain asking another Captain to pass the salt." Hall is closed 10 minutes before dinner, and thereafter permission from the treasurer must be secured before leaving. Food is served in order of seniority. In addition to the "messes" there is an "Ancients'" Table, reserved for the most senior of the benchers. They are given certain perquisites, such as an issue of free beer and toast to eat with their soup.

The 19th century saw a rebounding of the Inns, spurred by the enormous increase in activity of the law courts. The Council of Legal Education, established in 1852, promulgated a formal curriculum for students aspiring to be called to the bar. In 1872 the bar examination, which had previously been voluntary, became compulsory. Ten years later the law courts moved from Westminster Palace, where they had sat from time immemorial, to the place on Strand across from where Temple Bar once marked the entrance to the City of London. In June of 1964 a school of law was built at Number 4 Gray's Inn Place. Students from all of the Inns attend joint classes there. The curriculum and method of instruction are not unlike those found in any accredited American law school. In 1974 a senate of the Inns of Court and the bar was established as the governing body of the legal profession, and among other things, for the purpose of disciplining all barristers of the land. By 1977 the number of practicing barristers had increased to 4,000. The 1980's has seen a steady rise in the number of barristers, and considerably more women entering the profession.

After being Called to the Bar the barrister must put in a year's pupilage with a senior barrister. Then there is the search for often overcrowded "chambers" of his own, usually shared with 10 to 20 other barristers. While in time the barrister will probably earn a comfortable living, the chance of becoming rich is quite problematic. The students are not insensitive to these factors, and yet they pursue. The satisfaction achieved in having properly presented one side of an issue of fact in a court of law must be experienced, for it cannot be described. Observing these young people pursuing their calling with an almost religious fervor, one would never even consider asking why they do it.

As the world races toward the 21st century the Inns of Court will continue to meet the unknown challenges that lie ahead and cherish their traditions, but they do not cling to them. Though the Temple grounds and Lincoln's Inn may be the only places in London still illuminated by gas lights, it is not unusual these days to find a computer in a 15th century library.

In Middle Temple's Essex Court, a reminder proclaims: "Vestigia nulla retrorsum"—the downhill path is easy, but there is no turning back. Those words seem to exemplify what the Inns of Court are all about.

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Declassified and Approved For Release 2014/05/27 : CIA-RDP99-00777R000401050001-4