Podium

Legal Ethics: Practice What Isn't Preached

By Howard Altschuler
Special to The National Law Journal

A LAW SCHOOL commencement is not only a time of celebration and congratulations but of reflection on the essential spirit of the law.

Today, of all days, the class of '93 should reflect upon the criticism of lawyers that permeates our culture, from biblical passages to comedians' monologues. Too many Americans believe lawyers lack honesty and ethics.

In a letter written in 1927, Supreme Court Justice Felix Frankfurter said: "In the last analysis, the law is what the lawyers are. And . . . the lawyers are what the law schools make them." Law schools are known for their academic facilities and libraries filled with millions of legal volumes. But what about the ethical facilities of our nation's law schools?

I pose this question today because, at commencement, the class of '93 joins our nation's most powerful professional group. As lawyers, we command society's power of freedom or confinement, life or death. With such power over others in our hands, ethics should not be an afterthought or a footnote, but a moral imperative of the first degree. But, writing in the Fordham Law Review in 1973, no less a conservative jurist than former Chief Justice Warren Burger admonished law schools for "[failing] to inculcate . . . the necessity of . . . professional ethics." And in the University of Cincinnati Law Review of 1991, law Prof. James Moliterno said the teaching of legal ethics in law school has been "not merely a weakness . . . but a farce."

Consider what happened last year at the University of Pennsylvania School of Law as an illustration of the ethical dangers that law students face. First-year law students were given explicit written instructions in a moot-court assignment to "[p]lease ignore any ethical ramifications you may, or may not, recall from your professional responsibility training."

Two of the students instructed to ignore ethics happened to be African-American. They were assigned to defend a racist who had burned crosses on a family's lawn.

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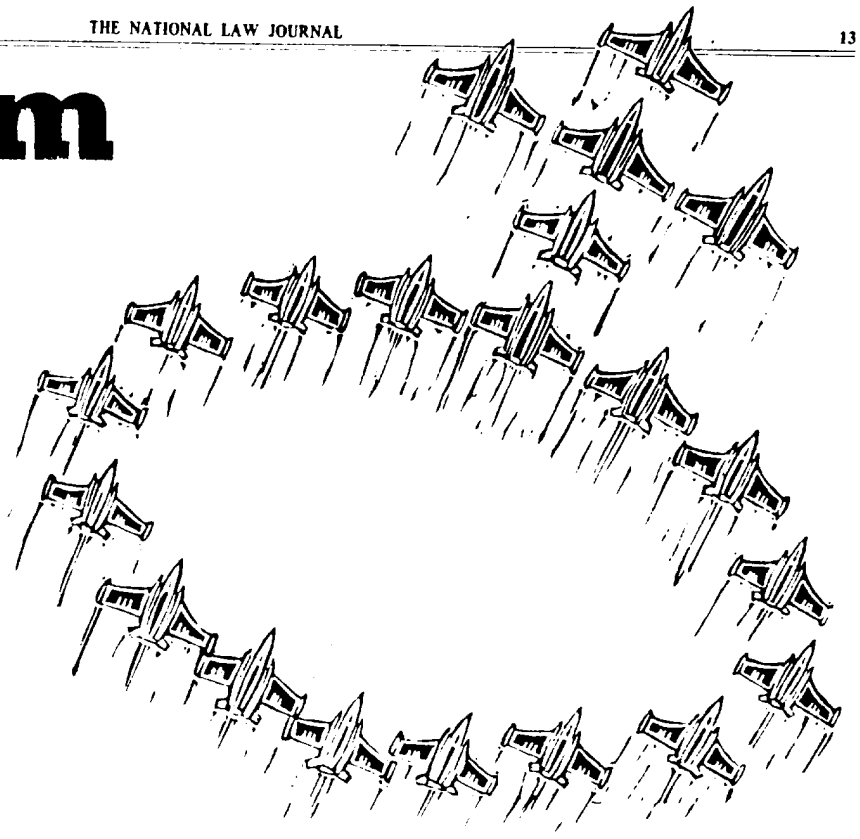
This article is adapted from the May 17 commencement speech given by Mr. Altschuler, president of the graduating class of the University of Pennsylvania School of Law.



Mark Long

Law Backs Women Warriors

By Robert B. Weintraub
Special to The National Law Journal

THE PENTAGON'S unexpected recent decision to lift its long-standing ban and allow women in the military to compete to fly aircraft in combat should not have been surprising from a legal viewpoint.

Unlike the issue of women in the infantry, where the physical ability of women to be foot soldiers is in dispute, the question of women as combat pilots did not present a mere policy dispute. It presented a unique fact situation and legal question to which there is a surprisingly clear-cut answer: Because women have served in the military with ever-increasing responsibility in non-combat flying roles, the military itself has developed a substantial body of evidence demonstrating that women can capably fly combat aircraft. The facts are so unequivocal that a continued refusal by the Department of Defense to let women compete for combat aviation billets probably would have violated the equal protection guarantees under the Fifth Amendment.

In 1991 and 1992, high-ranking Defense Department officials and flag-rank officers gave undisputed testimony before the Congressional Armed Services Committee that: DOD has assembled a wealth of evidence that women tend to be promoted more rapidly than men; between 1987 and 1991, both pilot and navigator women in the Air Force were promoted at a higher rate than their male counterparts; in non-combat situations women fly every aircraft in the Navy's inventory; and women have the physical and mental ability to fly combat aircraft. In the Persian Gulf war, DOD found that women did not impair unit

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SUA SPONTE/MARCIA CHAMBERS

IT'S BEEN A long time since we've seen an old-fashioned street fight between the branches of government. But that seems to be the reaction by some members of Congress to the news that some senior federal judges have refused to handle drug cases that carry with them high mandatory minimum prison terms.

These judges now work in a structure that precludes them from having discretion over sentencing. As they see it, they are unwilling participants in a futile and unjust system of overpunishment that has had the effect of tripling the federal prison population at great expense to the taxpayer, without making any dent in the drug war.

House Minority Leader Robert Michel, R-Ill., and seven other Republicans say they stand ready to introduce impeachment proceedings against the two senior judges who have gone public, Jack Weinstein of Brooklyn and Whitman Knapp of Manhattan. These two highly respected jurists say they will no longer sentence drug offenders. Presumably the Republicans will sniff out the other federal judges who might opt out of the drug pool — they view these judges as insubordinate.

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Charles Schumer, a Democrat and the chairman of the House Subcommittee on Crime and Criminal Justice, has stopped short of impeachment but says the judges have engaged in a dereliction of duty. Since Mr. Schumer raises the issue it seems appropriate to ask whether sitting federal senior judges, who have the right to select their own dockets, should be castigated for expressing a viewpoint about dictatorial sentencing when Congress itself has failed to examine the impact of the federal sentencing guidelines and mandatory minimum prison terms on courts, prisons and families.

There are three reasons why the Senate Judiciary Committee, headed by Joseph Biden, D-Del., and Mr. Schumer's committee should finally begin the process of public hearings into the impact of mandatory minimum prison terms and the role of the U.S. Sentencing Guidelines in federal courts.

The first reason is that times change.

In 1986 when the guidelines were being developed and Congress was voting into law new mandatory minimums for drug cases, the use of quantity was seen as "a surrogate for seriousness" of the crime, said Ilene Nagel, one of the sentencing commissioners.

"The truth is that in 1986 quantity wasn't a bad measure," she went on. "You could pretty well assume in 1986 that the guys who were carrying the larger amounts were the more serious traffickers. The problem is that in 1993 that doesn't make any sense, it isn't true anymore because low-level dealers are dealing in huge quantities." Another development is that "mules," often uneducated children and women, are used as carriers to transfer tremendous quantities of drugs for minimum amounts of cash.

In 1986, says Ms. Nagel, "when we drafted the structure of the guidelines and we worried about this problem, we thought we had it handled because drugs was one-third of that of the federal caseload. In 1993, you are whistling another tune — it's 50, 60, 70 percent."

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Ms. Chambers is a regular contributor to The National Law Journal. Her column appears biweekly on this page.

Judges Balk At Using Guidelines

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The United States now has the highest rate of incarceration of any industrialized nation in the world. The average drug sentence in federal prison has gone from 23.1 months in 1987, when the guidelines took effect, to 84.2 months in 1991. The prison population has nearly doubled, from 44,000 to 80,000 today.

The cost of building and maintaining prisons, as well as providing funds for families left behind, has placed a heavy burden on taxpayers, says the Campaign for an Effective Crime Policy, an ad hoc group of 600 criminal justice officials. Through public education, the group is pressing for a public discussion of crime policy and seeks alternatives to prison. One endorser was a former district attorney from Miami named Janet Reno.

Despite the huge amounts of money spent on prosecuting drug dealers of various sorts, the end result is simply taking "minnows out of a pond," said Judge Knapp. "The thousands of dollars and hours spent in processing the particular minnows on trial have absolutely no effect on the life of the pond they used to inhabit."

The second reason for congressional hearings is that Congress, which has ultimate authority over sentencing, asked the Sentencing Commission to investigate. That is part of the background of this street fight that somehow got lost in the commotion. Congress made the request almost three years ago. In that year, Congress formally directed the U.S. Sentencing Commission to examine mandatory minimums and their impact on the federal sentencing guidelines.

Perhaps Judge Knapp, who led the New York City investigation into police corruption in 1972, and Judge Weinstein, one of the pre-eminent criminal law scholars, simply got tired of waiting. After all, the sentencing commission, on behalf of all federal judges, delivered its harsh report on mandatory minimums to Congress in the summer of 1991. Among other things, it found that in 35 percent of the cases in which a sentence warranted a mandatory minimum, defendants pleaded guilty to offenses carrying non-mandatory or reduced prison terms, thus creating the kind of disparity the commission wanted to overcome. The commission gladly undertook the study because mandatory minimums were clashing with the idea of a carefully calibrated guidelines system, Ms. Nagel said. To date neither Mr. Biden nor Mr. Schumer has held a public hearing.

IF THESE TWO factors aren't enough, there now comes a study by Ms. Nagel and Stephen J. Schulhofer, professor of law at the University of Chicago School of Law, showing how judicial discretion has turned into prosecutorial abuse, specifically how federal prosecutors are circumventing the guidelines.

The study examines the post-guidelines plea bargaining practices in a group of U.S. attorneys' offices and finds that in 20 percent to 25 percent of the cases resolved through a guilty plea -- and guilty pleas account for 90 percent of all federal cases -- there is circumvention of the sentencing guidelines and mandatory minimums, especially in drug and weapons cases.

Prosecutors, the study says, engage in fact bargaining, meaning they change the amount or the nature of the drug -- say, substituting cocaine for crack -- in order to reduce the predetermined guidelines sentence to make a plea attractive to a defendant. Guidelines-factor bargaining also has emerged -- the prosecutor reduces the possible sentence by ignoring or reducing the defendant's role in the crime.

And gun charges, often tied to drug cases, are sometimes dismissed on the ground that "the guns used in the course of a violent crimes were broken, or were only for sport." The authors say there is sufficient data to suggest that prosecutors drop gun counts "to avoid the mandatory minimum consecutive five-year plea."

When the guidelines first were introduced in 1987, the commission danced around the plea problem and paid scant attention to how prosecutorial discretion might displace judicial discretion in sentencing -- thus prompting the same disparity it sought to end. Now it finds that prosecutors are indeed making *sentencing* decisions. What's more, the business of the plea is almost entirely hidden from view.

Knowledgeable experts fear that the federal court and prison systems are becoming unworkable. Attorney General Reno already has taken steps to review mandatory sentences. But change there depends upon Congress. Within her own realm, she has the power to find out why prosecutors seem forced to manipulate the law through charge and fact and guideline bargaining and to tell us about it at a hearing: a congressional hearing.

Women Flying Combat: Law Is Their Co-Pilot

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cohesion, concluding in its final report to Congress on the war that women "were fully integrated into their assigned units" and performed their duties "magnificently."

In the 1978 case of *Owens v. Brown*, 455 F. Supp. 291, involving a similar fact pattern, U.S. District Judge John Sirica of Washington, D.C., struck down as unconstitutional the then-absolute ban on the assignment of Navy women to permanent sea duty on non-combat ships. Judge Sirica held that any blanket exclusion of women must be factually related to military effectiveness and not cultural perceptions. He conducted an analysis of the sea duty exclusion considering its congressional intent; whether its purpose was to increase combat effectiveness; whether women can capably perform those duties; whether increasing the range of women's assignments would enhance operational flexibility; and whether budget needs would increase if the positions were opened to women.

Judge Sirica found that the military itself considered women qualified for these positions and had concluded that the assignment of women to non-combat permanent sea duty would not impair combat effectiveness, would enhance operational effectiveness and flexibility, and would not increase budgetary requirements. In holding the ban unconstitutional under the Fifth Amendment's equal protection guarantees, he concluded that the ban "was premised on the notion that duty at sea is part of an essentially masculine tradition...more related to the traditional way of thinking about women than to the demands of military preparedness."

Still More Opposition

More than a decade after *Owens*, many of those opposed to women in combat aviation have expressed comparable sentiments based on what Judge Sirica described as traditional ways of thinking about women. In the 1991 congressional hearings Air Force Chief of Staff General Merrill A. McPeak candidly stated his personal opinion that even if a particular woman clearly was superior as a combat pilot to a particular man he would not want the woman to fly in combat even though grounding her would result in a "militarily less effective situation."

Similar opposition recently came from the Presidential Commission on the Assignment of Women in the Armed Forces, which Congress created at the end of 1991 to "assess the laws and policies restricting the assignment of female service members."

In one of its key votes, an 8-7 commission majority recommended that women not be assigned to combat aviation positions.

The commission took this position despite its admission that the combat aviation "issue more than any other raised the question of 'can versus should'" and its conclusion that "the evidence presented indicates that women are capable of flying and competing with men in combat aviation assignments." Ignoring its own conclusion that the one-sided evidence demonstrated that women could equal men as combat pilots, the commission voted to prohibit women from competing for these positions, based upon concerns over unit "cohesion" and women as prisoners of war. In its fact-finding, the flak over cohesion "came overwhelmingly from young inexperienced pilots and was based on the fear of the unknown."

Experienced combat pilots took a different view, however. The three Vietnam combat veterans who appeared before the commission, with over 500 combat missions among them, agreed that women should be permitted to compete on the merits. Navy Commander Bob McLane, commanding officer of Top Gun training, testified before the commission: "I don't have any heartburn at all with putting a woman out on my wing and flying up to Iraq or anywhere else we happen to go and blowing somebody away." Commission member Marine Corps Brig. Gen. Thomas V. Draude, whose daughter was training to be a Navy jet pilot, said, "I'm asked, would you let your daughter fly in combat with the possibility of her becoming a POW? And my answer is, yes, because I believe we should send in the best."

Because the factual findings of both DOD and the commission unequivocally supported the conclusion that women are as qualified as men to serve in combat aviation assignments, and given the legal requirement that any blanket prohibition precluding women must relate to military effectiveness, a continued DOD prohibition on women as combat aviators probably would not have flown.

Law Schools Give Little Emphasis to Legal Ethics

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The two students were repulsed by that assignment. They both risked academic failure by disobeying the teacher's order to ignore ethics.

It is a myth, even among lawyers, that we are obligated to represent everyone. Rule 1.16 of the Model Rules of Professional Conduct specifically permits lawyers to refuse clients based on ethical objections. Lawyers are allowed to do that without penalty, but unfortunately the rule appears not to apply to lawyers-in-training.

In reality, law professors have the unreviewable power to require law students to represent anyone -- no matter how offensive it may be. Though professors have the power to implement procedural safeguards for students, law students at most private universities are denied basic rights and due process by the same professors who teach basic rights and due process.

In the competitive world of law practice, there is always economic pressure to cut ethical corners. After all, pointing out to a client that he or she seeks unethical ends may cost a law firm that client.

Just a few weeks ago, the megafirm Jones, Day, Reavis & Pogue settled charges it participated in the savings and loan scandal. The firm was slapped with one of the largest fines in history, $51 million, for its role in questionable Lincoln Savings & Loan investments. Meanwhile, other law firms are under federal investigation for similar violations. Some of us will be working at those firms.

Why are so many of the best and brightest lawyers engaging in activities that may be unethical? Part of the answer may be found in our legal education. In a 1985 law review article, noted Stanford law professor Deborah Rhode described legal education as "a socialization experience that erodes conviction at every turn."

As law students, we learn, at every turn of our legal education that the rules do not apply to those who teach them. We also learn, at every turn, that law students who question the status quo risk being publicly chastised by law school administrators.

A few weeks ago, one of my classmates wrote an opinion column for the university newspaper criticizing the law school. The dean responded with a published letter to the editor that characterized our classmate's opinion as "a sophomoric diatribe whose publication abuses...editorial freedom."

This heavy handling of dissent is typical of the way law schools, legal institutions and law firms respond to ethical criticisms.

The Reform Spirit

There is a brighter side.

As alumni, we can remain committed to influencing the future course of our law school. As members of the bar, we now have the power to fight for the reform of law school ethics curriculums. As new lawyers, we must insist that lawyers be held accountable for their actions. And as practicing attorneys, we may use the power of the law itself to fight injustice wherever it appears, even in law schools. Commitment, reform, accountability and justice are essential components of the spirit of the law.

We are the new generation of lawyers. We do not have to accept the double standards practiced by too many law schools and too many law firms. If we, the class of '93, maintain the commitment, creativity, energy and idealism that we brought with us to law school three years ago, we will inspire others to follow our good example.

Though this commencement marks the end of law school, the truer spirit of commencement is found in its dictionary meaning: a new beginning.

Let us commence to practice law from our hearts as well as our minds. We owe this to our families, to our friends, to our children, to our own evolving legal consciences.