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ESSAYS

The Professional Responsibility of the Law Professor: Three Neglected Questions

Monroe H. Freedman*

Law professors have a great deal to say about the ethics of law practitioners. We write law review articles about lawyers' professional responsibilities, and we have participated in drafting codes of conduct for practicing lawyers.

Many of us bring to that task a significant perspective. We can be both informed about and detached from the pressures of daily practice. We are free of involvement or (worse yet) identification with particular clients. Indeed, in choosing to become law professors, we have made the choice to dissociate ourselves from contact with clients.

Not surprisingly, therefore, most law professors tend to minimize the interests of clients as against those of third parties (who are frequently characterized as "society").¹ The suggestion that a client may be analogized to a friend² has been treated with derision.³ The suggestion that clients "are children of God, infinitely

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I am grateful for the research assistance of Ms. Fern Pruett in the preparation of this Essay.

1. It has been argued, however, that the interests of a free society are best served by lawyers who are dedicated to maximizing the autonomy of the individuals who compose it. See Law, *Afterword: The Purpose of Professional Education*, in LOOKING AT LAW SCHOOL 205, 212-13 (S. Gillers ed. 1977), quoted in Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191, 197 (1978).

2. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

3. See Dauer & Leff, *The Lawyer as Friend*, 86 YALE L.J. 573 (1977).

valuable, more valuable than any government or all governments" and that rules of lawyers' ethics should be derived from that premise,⁴ has been politely ignored, at least in the process of drafting rules of lawyers' ethics.⁵

Since we have chosen not to be involved with clients, it is not surprising that law professors as a group are not champions of clients' interests to the same extent that practitioners are. But what of our students? Since we *have* chosen to be involved with students, do we champion their interests?

Significantly, there is no Model Rules of Professional Conduct for Law Professors in which to seek an answer to that question. That is a partial answer in itself. A codification of professors' professional obligations would necessarily be, to some extent, a codification of correlative student rights. If we were to do that, it certainly would be a significant refutation of Dr. Andrew S. Watson's⁶ diagnosis.

[O]ne of the characteristics of the role of law professor is that it provides a [secure] position from which one can be aggressive. This can be done without much counterattack since the rostrum affords great protection. In contrast with the adversary situation of a courtroom, the professor may carry on an essentially one-sided battle, always able to be the ultimate judge and decision-maker. I believe this to be highly important as a motivating factor to those who become law professors.⁷

Dr. Watson's observations are not so much a diagnosis as an indictment. A "highly important . . . motivating factor" in becoming a law professor is the opportunity to be aggressive with students in "an essentially one-sided battle" in which the professor is always able to be "the ultimate judge and decision-maker."⁸ Take away the psychiatric imputation of motive, if you will; the rest of Dr. Watson's statement remains an accurate description of a significant part of the professor-student relationship.⁹

Undeniably, we have considerable power over our students. This Essay focuses on what I believe to be three areas in which

4. T. SHAFER, ON BEING A CHRISTIAN AND A LAWYER 100 (1981).

5. *But cf.* AMERICAN LAWYERS' CODE OF CONDUCT (Reporter's Draft, 1985).

6. Dr. Watson is a psychiatrist who has spent the major part of his professional life observing law teachers and students. Since 1965 he has been a professor of law at Michigan University.

7. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 CUN. L. REV. 92, 114 (1968).

8. I repeat Watson's words not only for emphasis but because I have the inexplicable habit of skip-reading indented quotes and assume that some other readers do too.

9. See also *infra* text accompanying notes 16-26.

that power can be abused.¹⁰

A. *Sex with Students*

The failure to address sexual relations between professors and students is understandable. One reason is that nobody wants to appear either prudish or prurient.¹¹ Another reason is sexism. Also, we all know of professor-student relationships that have resulted in marriage or the good faith equivalent.

Nevertheless, my thesis is that some law professors make a practice of sexually exploiting students and that we should recognize that such conduct is unprofessional and cause for dismissal even of a tenured professor.¹²

There are analogues for such a rule. In recent years psychologists and psychiatrists have expressly recognized the seriousness of the problem in their professions. The American Psychiatric Association announced in 1983: "Sexual relationships between analyst and patient are antithetical to treatment and unacceptable under any circumstances. Any sexual activity with a patient constitutes a violation of this principle of ethics."¹³ Similarly, the *Ethical Principles of Psychologists*, promulgated by the American Psychological Association, provides in Principle 6(a): "Psychologists are con-

10. Since I go to and fro and up and down lecturing at law schools other than my own, and I correspond and talk with colleagues from still more schools, it should not be assumed that any of the instances I discuss have occurred at my own school.

Some reactions to a draft of this initial Essay recall to mind the novelist who, for lack of ideas for a plot, based a contemporary novel on the plot of Shakespeare's *King Lear*. Within weeks of publication the novelist was sued by six families from different parts of the country for defamation and invasion of privacy.

11. This (and sexism) may be why the issue has never been addressed by the established bar in its Canons, Code, or Model Rules. The problem of sexual exploitation exists, however, especially in matrimonial practice. I have heard lawyers boast of "taking it out in trade"—that is, taking sexual advantage of women who are vulnerable because of the humiliating and disorienting effects of divorce and divorce litigation. See also *infra* text accompanying note 27.

The AMERICAN LAWYERS' CODE OF CONDUCT (Reporters' Draft, 1985) provides in § 8.8: "A lawyer shall not commence a sexual relationship with a client during the lawyer-client relationship." I am not aware that the proposal (originally put forth in 1980) has ever been seriously discussed in the literature of lawyers' ethics.

12. See *One in Six Graduate Women Report Sex with Professors*, N.Y. Times, Jan. 28, 1986, at 7, col. 3, reporting a recent survey finding in part:

[C]lose to half of women who had been in such relationships felt they had been coerced—either subtly or overtly. And an overwhelming majority of all women surveyed felt that, in general, such sexual contact or advances are unethical and harmful to the working relationship between teacher and student.

13. Holroyd & Bouhoutsos, *Biased Reporting of Therapist-Patient Sexual Intimacy*, 16 PROF. PSYCH. RESEARCH AND PRAC. 701, 702 (1985).

tinually cognizant of their own needs and of their potentially influential position vis-a-vis persons such as clients, students, and subordinates. They avoid exploiting the trust and dependency of such persons Sexual intimacies with clients are unethical."¹⁴ In upholding a cause of action against a psychiatrist who had engaged in sexual relations with a patient as part of his "treatment" of her, a New York court held that "there is a public policy to protect a patient from the deliberate and malicious abuse of power and breach of trust by a psychiatrist."¹⁵

I do not mean to say that the law professor has the same power and trust relationship with a student that a psychiatrist has with a patient. I believe, however, that the law professor-student relationship is sufficient to establish a similar professional (and legal) duty.

Consider the analysis of Dr. Alan A. Stone, another psychiatrist-in-residence at a law school.¹⁶ Dr. Stone has found that the law professor has "enormous potential to inflict harm on his students."¹⁷ The professor possesses five distinguishable but related bases of power with respect to the law student:

- (a) reward power, based on the professor's ability to disperse rewards in the form of high grades, desirable clerkships, letters of reference, etc.;
- (b) coercive power, based on the professor's ability to give low grades and damage future professional opportunity;^[18]
- (c) legitimate power, based on the normative perception that the professor has a right to prescribe behavior;
- (d) referent power, based on the student's psychological identification with the professor as someone they would like to emulate;
- (e) expert power, based on the perception that the professor has some special

14. *Ethical Principles of Psychologists*, 36 AM. PSYCHOLOGIST 633, 636 (1981).

15. *Roy v. Hartogs*, 81 Misc. 2d 350, 354, 366 N.Y.S.2d 297, 301 (1975).

16. Dr. Stone is the Touroff Glueck Professor of Law at Harvard University, where he has been for 20 years.

17. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 412 (1971).

18. Cf. Kaplan, . . . *Professor Sends a 'Message' After Law Review Rejects Article*, NAT'L. L.J., May 20, 1985, at 4 (reporting a recent abuse of coercive power). A law professor's article was twice rejected for publication by the student law review editors at his school. The professor responded by threatening to hold up letters of recommendation for federal judicial clerkships for four of the student editors. The professor's explanation was that he was trying to "get the message across" that he expected "a more favorable standard for reviewing submissions." The editors then voted unanimously to reconsider his article.

One colleague defended the professor as "too honest;" other professors, he explained, would simply have written weak recommendations to make the point. The dean of the law school, who writes and speaks frequently in support of stricter ethical standards for practitioners, was reported as saying merely that he "disagreed" with the professor and had "so indicated to him" but that he saw no need to do more. Perhaps most disheartening was the lesson carried away by a student editor. To criticize the editors for capitulating, she said, "ignores the real world."

capacity to induce new and useful cognitive structure.¹⁹

These bases of power produce a "subservient demeanor" toward the professor and "gratitude for any personal interest" from the professor. Dr. Stone finds this conduct to be in "startling contrast" to his observations of the conduct of medical students.²⁰

Dr. Watson has discussed at some length his observations of the law student's "sense of helpless vulnerability"²¹ resulting from the "extremely stressful"²² teaching methodology employed in the first year of law school. This plight has led to a significant amount of "neurotic defense response" or "unreasoned adaptation to stress"²³ and ranges even to the extreme of "overt psychotic disturbance," including "suicide threats or, indeed, actual suicide."²⁴

Let me return, however, to some of the less extreme and more common student reactions to the disorienting impact of the first year of law school and to the professor's "enormous potential to inflict harm" on students throughout the law school experience.²⁵ Law students, as observed by Drs. Watson and Stone, display a vulnerability that is manifested in part by unusual subservience and "gratitude for any personal interest" from the professor.²⁶ Referring to the lawyer as counselor, Dr. Watson has written:

Due to the psychological tendency on the part of the client to invest the counselor with all sorts of power, authority, and a nearly magical belief in their [sic] helpfulness, there will also be a powerful tendency to bestow affection. These feelings largely are unrelated to truly personal involvement, and are mostly a function of the relationship itself. Therefore, for a lawyer to take advantage of them, would be quite as unethical as making personal use of the client's money or property which had been entrusted to him in the course of carrying out the professional role.²⁷

Consider, then, the following scene. A young woman, distressed by a poor examination grade in a first-year examination, goes to her professor's office to discuss her grade with him. His critique is severe, and she is sufficiently distraught that she starts to cry. At

19. Stone, *supra* note 17, at 411-12.

20. *Id.* at 412. Dr. Stone adds that "[e]ven law students who claim to be totally at odds with the system display these traits when they interact with their teachers." *Id.*

21. Watson, *supra* note 7, at 121.

22. *Id.* at 124.

23. *Id.* at 125.

24. *Id.* at 130.

25. Stone, *supra* note 17, at 412.

26. *Id.*

27. Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7, 16 (1965); see also Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J.L. REF. 248, 253-54 (1975).

that point the professor begins to comfort her and then to make sexual advances.

Although we all know of healthy sexual relationships between men and women who were formerly in a law professor-student relationship, can we not agree that the conduct just described is an abuse of power and a violation of professional ethics? Can we not also agree that a professor who has a series of liaisons with students over a period of years is also acting unprofessionally?

One response I have encountered is that in some instances the student may be exploiting the professor. A male lawyer who has been in practice now for several years told me (with apparent residual anger) of the woman at his prestigious law school who, it was rumored, made law review by going to bed with most of the first-year faculty.

Assume the story is true. Can we not agree nevertheless that the faculty members acted unprofessionally? Accepting a bribe may not be as serious an offense as extorting a bribe, but it still may be a felony. And, as was said of those convicted in Abscam despite their claims of entrapment, all they had to do was say no. Apart from that, was there not at least a classic conflict of interest, even if the student was in fact graded on the merits by her bedfellows?²⁸

My present focus, however, is on professional ethics regarding the abuse of power by law professors. Is there a consensus that, when we write the Model Rules of Professional Conduct for Law Professors, sexual exploitation of students by professors will be proscribed?

B. Plagiarism of Student Work

Here too the psychologists are ahead of us. Principle 7(f) of the "Ethical Principles of Psychologists" reads in part:

Publication credit is assigned to those who have contributed to a publication in proportion to their professional contributions. Major contributions of a professional character made by several persons to a common project are recognized by joint authorship, with the individual who made the principal contribution listed first. Minor contributions of a professional character and extensive clerical or similar nonprofessional assistance may be acknowledged in footnotes or in an introductory statement . . .²⁹

28. A lawyer has commented in a letter about "the irreparable and immeasurable demoralizing effect on the entire student body . . . when such an affair [occurs] All sorts of conclusions of unfair advantage are drawn, and inaction by the administration tells the students that such conduct is sanctioned."

29. *Ethical Principles of Psychologists*, 36 AM. PSYCHOLOGIST 633, 637 (1981).

It is impossible to know the extent to which law professors fail to give credit "in proportion to their professional contributions" to students who serve as "research assistants." There is reason to believe, however, that students sometimes are deprived of appropriate professional credit and are compensated instead with grades, letters of recommendation, or money from a research fund.³⁰

A startling example was provided several years ago in a short newspaper item. A senior professor at a prestigious law school published a book in his own name. He had been Assistant Legal Advisor to the Department of State and chairman of a federal agency. After publication of the book, the author of an article previously published in a scholarly journal complained that extensive portions of the book had been taken verbatim and without attribution from his article. The professor, however, was unfazed: *he* hadn't committed the plagiarism, he explained; it had all been done by his student research assistant, who was too young and inexperienced to know any better. To the best of my knowledge, the explanation was accepted. The professor today has emeritus status at the same law school. I do not know what might have happened to the student.

It should be superfluous to say more, but I am not confident that it is. The student might not have known any better (although I have known of cases in which students have been expelled from law school for doing that very thing in a seminar paper or law review note).³¹ Surely, however, the professor should have known better. He obviously had plagiarized the work of his "research assistant" without credit or qualm and, apparently, without any sanction after the facts became known.

At another well-regarded law school, a professor whose publications were rather thin submitted to a tenure committee a memorandum of law that he had prepared for a public interest organization. In a footnote the professor acknowledged two high-ranking students for their research assistance on the memorandum. When a member of the committee asked the students what their contribution had been, they replied that the professor simply had passed on the memorandum as they had written it, except for the addition of his own name at the top and the footnote of appreciation to

30. See *supra* text accompanying note 19. This is what Dr. Stone refers to as "reward power," but elements of the other categories may be involved as well.

31. See, e.g., Berreby, *Student Withdraws in Plagiarism Uproar*, NAT'L L.J., May 9, 1983, at 4, col. 2, cited in Comment, *Plagiarism in Legal Scholarship*, 15 U. Tol. L. Rev. 233, 233 n.2 (1983).

them at the bottom.

There were two remarkable aspects of that episode. First, the students had accepted what had happened with neither surprise nor resentment. Second, the professor received tenure and is now Associate Dean of Students at the same law school (with supervisory authority over, among other things, student plagiarism and other forms of dishonesty).

When we write our Model Rules of Professional Conduct for Law Professors, should we not include a provision similar to that adopted by the American Psychological Association regarding publication credit?³²

C. *Due Process in Grading*

Justice Brandeis once observed that, for the citizen, the government is "the potent, the omnipresent teacher."³³ For the student, however, the teacher is the potent and omnipresent government. More than that, the teacher—including the law professor—is one of the few remaining American autocrats. We are unreviewable. Thereby, we fulfill what Dr. Stone calls a "need to be invulnerable to criticism," which, according to Dr. Stone, is "a norm of social conduct" among law professors.³⁴

We should remember, therefore, Justice Jackson's comment about the Supreme Court. "We are not final because we are infallible," he said; rather, "we are infallible only because we are final."³⁵ Like members of the Supreme Court, some law professors—perhaps even a majority of us—are capable of making an occasional error.

Our procedures relating to the grading of examinations do not reflect our capacity for error. Most (some?) law professors will discuss students' exams with them individually. Very few professors, however, are willing, ever, to admit to an error and to change the grade. For those of us who teach the value of due process, therefore, another lesson we teach our students is hypocrisy.

One common professorial response is disingenuous: we are unable to change any grade, even a patently erroneous one, because the rules forbid us to do so. The answer to that is obvious. We make the rules. We are bound to them no more than Hobbes' Levi-

32. See *supra* text accompanying note 29.

33. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

34. Stone, *supra* note 17, at 404.

35. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

athan is bound by the rules that it unilaterally makes and enforces.

Another professorial response to grade review is even less worthy: students are too grade conscious. That is another lesson, though, that the students have learned from us. Grades are an essential part of the system that we have imposed upon them. We give students honors and job recommendations based upon the grades that we give out. Grades determine a student's job opportunities—even whether a student will become a lawyer at all. Students would have to be irrational indeed to give grades less weight than we ourselves do.

Another response is that grade review is time consuming, and that is certainly true. Due process always takes longer than decision by fiat. But grade review is not really as burdensome as it might seem. During a recent ten-year period, I gave twenty final and mid-year examinations in Contracts. There were about ninety students in each class. Over this period, I raised between zero and three grades per exam, for a total of eighteen changes, or about one percent. Most of the changes in grades happened because, in discussing the exam with the student, I realized that I previously had made a mistake in judgment. Some of the grade changes came about, however, through a grade review procedure.

The review procedure works as follows. If the student is not persuaded that the grade I gave was a fair one, he or she can elect to have the grade reviewed by a committee of three students from the same class. I pick one of the three committee members, the student picks the second, and those two pick a third. I then explain to the committee how I arrived at the grade I gave. The student then explains to the committee why the grade should be higher. The committee then chooses between my grade and the one the student considers appropriate. The committee must choose one of the two; it is not permitted, for example, to split the difference between the two grades.

The committee uses whatever standards its members consider fair. I impose no criteria. The committees, however, have tended fairly consistently to review the challenged grade in the context of other grades given in the same exam. (I make it clear to them that I cannot lose: either they affirm my grade, or they validate my review procedure.) The process has taken an average of two or three hours of my time a year.

Cynics have predicted two results. One is that the students will always affirm my grade. The other is that the students always will increase their fellow student's grade. Neither has happened. Of

the twelve appeals requested during the ten-year period, the student committee has raised two grades: a C- was raised to a C, and a D- (which is recorded as an F) was raised to a D. On at least three other occasions, however, the students could not have been motivated by a desire to please the professor. They affirmed the grade, but, at the same time, they wrote an opinion criticizing my grade as unfairly low, but affirming because they considered my grade to be more nearly accurate than the grade sought by the student.

Two opinions by members of grade review committees show the high degree of conscientiousness, fairness, and intelligence that the students have exercised. The first is an opinion affirming the grade I had given.³⁶

Mr. R. in order to boost his overall grade from D to C-, appeals his grade on the first question only. He received a C-/69 on that question and seeks a C/73. In deciding this case, we are free to evaluate his answer using Professor Freedman's grading standard, or any other standard we may prefer. After hearing oral argument on both sides and analyzing this and other exam answers, we have decided to deny Mr. R.'s appeal and to affirm the original grade.

Under Professor Freedman's grading standard, as I understand it, the original grade of 69 is fair; it might even be "generous" as Professor Freedman has characterized it. A grade of C represents the minimum degree of competency necessary to practice law. This answer fails to meet that standard. As a memorandum of law it would be useless in representing this client. The principal issues are barely mentioned, the main arguments in his client's favor are not made, and misstatements of the law abound. In fact, it would tend to mislead more than advise the partner in charge of the case. For example, on page two of the exam book, Mr. R. states that his client, Ingram, had no right to rely on the oral statements of Chrysler's representative. Aside from the fact that this is not a question of right, this is incorrect, and it betrays a misunderstanding of a central argument in his favor. Beyond this, there is no mention of equitable remedies such as reformation or specific performance and no meaningful discussion of possible causes of action in tort.

In order to reinforce my understanding of Professor Freedman's grading standard, I compared this answer to others receiving similar grades as well as the one offered by Mr. R. This confirmed my original impression that 69 is a fair grade.

We are, however, free to apply a different standard if we so desire. Much has been said on the subject of Professor Freedman's grading, and in fairness any alternative should not be ignored.

In formulating a different grading standard, it might be useful to evaluate the answer in terms of five factors: 1) completeness or the number of issues spotted, 2) statement of the applicable law, 3) application of the law to the facts of the case, 4) interpretation of the law and advising suit, 5) clarity and force of argument.

First, Mr. R. seems to recognize many, though not all, of the relevant issues of the case. His entire oral argument [to the committee] focused on

36. The opinion was written by Marc S. Wenger.

this factor. Unfortunately for Mr. R. this is not the only factor to be considered in a fair appraisal of his answer.

Second, Mr. R. repeatedly misstates relevant legal doctrines. For example, he argues that Chrysler defrauded Ingram by promising him a five-year deal, overlooking the fact that such a promise cannot be construed [in the context of the facts] as a misrepresentation of past or existing fact.

Third, although Mr. R. often attempts to apply the law to the facts of the case, his general misunderstanding of the relevant principles makes these efforts futile.

Fourth, the question is posed as a problem of advising suit. Mr. R.'s answer is completely unresponsive. He constantly addresses issues without drawing conclusions.

Fifth, Mr. R.'s answer contains inordinate superfluous material. His rambling style and frequent misstatements of the law render it incomprehensible at some points.

Reviewing this analysis in a holistic manner, as was suggested by a member of the judges' panel, the question then becomes whether this answer warrants a grade of C. My response is that even if it could be considered a C by some stretch of the imagination, it could not be the highest C represented by a 73 [which the student needed to change the grade].

Accordingly, Mr. R.'s appeal must be denied based on either grading standard.

The second opinion is one reversing my grade.³⁷

I granted the grade that Ms. M. requested on the basis of several really difficult factors. Ms. M. needed 2 points on her final cumulative average in order to pass. This was the first factor I considered; her grade was not 5 points away but only 2 points away.

The second factor was that I felt the second question warranted more points than it received. The other two members of the group also agreed that the second question deserved more points; however, one member believed that there were not enough points to pass Ms. M. More specifically, I believe Ms. M.'s discussion of estoppel was good enough to generate some points.

The second factor alone was not enough for me to decide in Ms. M.'s favor. The real question—and one of the most difficult I ever had to wrestle with was, should Ms. M. be graded on a different grading scale than the rest of the class. The overall class average was a 1.97, below a 2.0 C, perhaps the lowest average in the entire school. Against the other 2 Contracts classes, Contracts Section A was much lower. I am almost certain neither class (Sec. B or C) gave out grades below D. Neither Contracts class gave out nearly as many Ds. Is this because the people in Sec. A were not as smart—the law of averages would suggest not, and the fact that Sec. A has as many people on Law Review helps to verify that—of course, not conclusively.

But, how could I fairly give Ms. M. a passing grade, when graded against the class average, her grade was really not so—strange. How could I fairly give her a D when so many students received the same grade? How could I take her from the stricter standards of Contracts A and grade her against the easier standards of Contracts B and C. This was a big problem.

I gave her the grade taking all 3 factors into consideration, even though it was unfair to Sec. A, including myself; because in another Section Ms. M. probably would have received a D [or better]. Giving her the F in law school is so grave a consequence that I was able to justify granting Ms. M.'s request.

37. The opinion was written by Howard M. Rudolph.

In short, it seems clear to me that grade review works, that it is not unduly burdensome, and that the reviewing students take their responsibilities seriously and carry them out conscientiously. In addition, the students who participate have a significant learning experience. They learn, among other things, how tedious and difficult it is to grade exams.

Strangely, though, this is the proposal that I have the least hope of getting into the Model Code of Professional Conduct for Law Professors. Is it because, as Dr. Stone says, we law professors have a "need to be invulnerable to criticism"?³⁸ Or is Dr. Watson right in suggesting that we have self-selected ourselves as law professors to engage aggressively in "an essentially one-sided battle," in which the professor is "always able to be the ultimate judge and decision-maker"?³⁹

I leave this and the other questions raised in this Essay to my fellow law professors, who will be the ultimate judges and decisionmakers.

38. Stone, *supra* note 17, at 404.

39. Watson, *supra* note 7, at 114.