SPEECH GIVEN BY THE 
HON. ROGER J. MINER 
BEFORE 
NEW YORK LAW SCHOOL ALUMNI ASSOCIATION 

I appreciate the introduction. It compares favorably with the one I received several weeks ago when the Chairman of a local civic organization back home introduced me by saying: "Ladies and Gentlemen, now we are going to get the latest dope from the federal courts."

It is great to be back in the midst of the New York Law School family - faculty, trustees, administration and alumni. The Dean of Admissions tells me that the new students are getting smarter all the time. One of the application forms contains the question: "Do you believe in the overthrow of the United States Government by force or violence?" Half of the applicants check force and the other half check violence. I understand that the Equal Employment Opportunity Commission requested a list of the faculty broken down by age and sex. Dean Shapiro fired off an indignant letter to the Commission, advising them that some of the faculty members may be broken down by alcohol but not one is broken down by age or sex.
THEY TELL ME THAT, NOT FAR FROM THE LAW SCHOOL, IS THE LABORATORY OF A MAD SCIENTIST WHO SELLS BRAINS FOR TRANSPLANT TO LAW STUDENTS. ONE STUDENT STOPPED IN TO PRICE THESE BRAINS AND FOUND LAWYERS' BRAINS GOING FOR $1000 AN OUNCE, LAW PROFESSORS' BRAINS AT $5000 AN OUNCE AND JUDGES' BRAINS FOR $20,000 AN OUNCE. THE STUDENT INQUIRED ABOUT THE OUTRAGEOUSLY HIGH PRICE LAST QUOTED AND THE SCIENTIST GAVE HIM AN ANSWER AS FOLLOWS: "DO YOU KNOW HOW MANY JUDGES IT TAKES TO GET AN OUNCE OF BRAINS?"

JUDGES ARE MUCH MALIGNED, AND PART OF THE PROBLEM DERIVES FROM THE FACT THAT THE PUBLIC DOES NOT UNDERSTAND WHAT WE ARE SAYING. LIKE THE FELLOW WHO APPEARED IN FAMILY COURT AND WAS ADDRESSED BY THE JUDGE AT THE CONCLUSION OF THE EVIDENCE AS FOLLOWS: "YOUNG MAN, I AM GOING TO GIVE YOUR WIFE $40 A WEEK FOR SUPPORT." THE MAN ANSWERED: "THANK YOU, YOUR HONOR, I'LL THROW IN A FEW DOLLARS MYSELF." HERE IS ANOTHER ILLUSTRATION OF THAT LACK OF UNDERSTANDING: THERE WAS A FELLOW WHO APPEARED IN THE HUDSON CITY COURT AT LEAST ONCE A MONTH FOR SEVERAL YEARS ON CHARGES OF DISORDERLY CONDUCT RELATED TO DRINKING. THE CITY JUDGE FINALLY SAID TO HIM: "YOU HAVE APPEARED BEFORE ME AT LEAST 35 TIMES IN THE LAST THREE YEARS ON CHARGES OF DISORDERLY CONDUCT. WHAT
DO YOU HAVE TO SAY?" THE ANSWER WAS: "YOUR HONOR, I CAN'T HELP IT IF YOU ARE NOT PROMOTED." THE LACK OF UNDERSTANDING CAN EXTEND TO THE JUDGE'S OWN FAMILY.

A JUDGE'S YOUNG SON RAN HOME AFTER WATCHING HIS FATHER IN COURT AND FRANTICALLY BEGAN TO CLEAN HIS ROOM. UPON INQUIRY BY HIS MOTHER, THE BOY SAID THAT HE HAD JUST SEEN HIS FATHER SENTENCE A PERSON TO FIVE YEARS FOR KEEPING A DISORDERLY HOUSE. SOMETIMES THE FAILURE OF COMMUNICATION RUNS THE OTHER WAY, AND THE JUDGE DOES NOT UNDERSTAND WHAT IS SAID TO HIM. FOR EXAMPLE, A DEFENDANT, ASKED BY THE COURT IF HE DESIRED THE ASSIGNMENT OF COUNSEL, SAID: "GOD IS MY LAWYER." THE JUDGE REPLIED: "I THINK YOU SHOULD HAVE SOMEONE LOCALLY." ONE LAWYER SAID TO A JUDGE: "DID YOU HEAR MY LAST SUMMATION?" THE JUDGE SAID "I CERTAINLY HOPE SO." BUT I THINK THE PUBLIC PERCEPTION OF A JUDGE IS BEST ILLUSTRATED BY THE STORY ABOUT THE HUNTING DOG NAMED "LAWYER." LEGEND HAS IT THAT THIS DOG WAS A VERY AGGRESSIVE AND VIGOROUS HUNTING COMPANION. AFTER SOME YEARS, THE DOG'S OWNER CHANGED ITS NAME TO JUDGE, FOR THE REASON THAT, IN HIS LATER LIFE, THE DOG MERELY SAT ON HIS RUMP AND BARKED ALL DAY.

I AM MOST HAPPY TO BE PRESENT ON THE OCCASION OF THE 25TH REUNION OF THE CLASS OF 1956, AND I EXTEND MY CONGRATULATIONS AND BEST WISHES TO ALL THE ALUMNI WHO ARE
HAVING REUNIONS WITH THEIR CLASSMATES HERE TONIGHT. I THINK THAT THE BEST WAY TO MANIFEST OUR PRIDE IN OUR ALMA MATER IS BY ACTIVE MEMBERSHIP IN THE ALUMNI ASSOCIATION. THROUGH THIS ASSOCIATION, WE CAN OFFER GUIDANCE AND ASSISTANCE TO STUDENTS AND RECENT GRADUATES; PARTICIPATE IN PROGRAMS OF CONTINUING LEGAL EDUCATION; PROVIDE ADVICE AND SUPPORT TO THE TRUSTEES AND FACULTY; ADVANCE THE REPUTATION OF THE SCHOOL IN THE LEGAL COMMUNITY; AND CONTRIBUTE NECESSARY FINANCIAL SUPPORT. EVERY GRADUATE OWES SOME TIME AND TREASURE TO THE LAW SCHOOL, AND THE BEST WAY TO PAY THOSE DEBTS IS THROUGH THE ALUMNI ASSOCIATION. NEEDLESS TO SAY, I AM VERY PROUD TO BE A GRADUATE OF NEW YORK LAW SCHOOL AND A MEMBER OF ITS ALUMNI ASSOCIATION.

THE WORLD HAS TURNED MANY TIMES SINCE I RECEIVED MY DIPLOMA IN 1956, AND MY FATHER ASSURES ME THAT IT HAS TURNED MANY MORE TIMES SINCE HE RECEIVED HIS DEGREE IN 1926. 1926 - 55 YEARS AGO - CHIANG-KAI-SHEK SUCCEEDED SUN-YAT-SEN AND BEGAN THE UNIFICATION OF CHINA; JOSEPH STALIN BECAME ABSOLUTE DICTATOR IN THE SOVIET UNION; HIROHITO WAS INSTALLED AS EMPEROR OF JAPAN; U.S. TROOPS LANDED IN NICARAGUA TO PRESERVE ORDER AND PROTECT U.S. INTERESTS; ROBERT GODDARD LAUNCHED THE FIRST LIQUID FUEL ROCKET IN AUBURN, MASSACHUSETTS. IN 1926 THE MODEL T FORD, COMPLETE WITH SELF-STARTER, SOLD FOR $350.
Long Island University was founded in Brooklyn and Sarah Lawrence College was founded in Bronxville; and the National Broadcasting Company was established by David Sarnoff. In sports the St. Louis Cardinals won the World Series, defeating the New York Yankees four games to three; Bill Tilden lost the Davis Cup singles to Renee Lacoste and Helen Wills lost to Suzanne Lenglen; Bobby Jones won the U.S. Open, Gertrude Ederle swam the English Channel, and Gene Tunney won the world's heavyweight boxing championship, held by Jack Dempsey since 1919. In the U.S. Supreme Court, the authority of municipalities to enact zoning ordinances under state authority was upheld under the police powers.

Here in New York, the Paramount Building and Paramount Theater opened in Times Square. On Broadway, the Garrick Gaieties opened at the Garrick Theater, George White's Scandals opened at the Apollo, and The Girlfriend, by Rogers and Hart, opened at the Vanderbilt Theater. Prohibition was in full cry, but my father assures me that the juice of the grape flowed freely in the Big Apple. New York Law School, with over 1000 students, was located in the Y.M.C.A. building on 23rd Street, and the rugged Robert Petty, he of the bristling goatee, was Dean, having been a member of the faculty since the school's inception. A new professor, Max Reich, had joined the faculty
A short time before, and he would continue teaching until 1970. Both my father and I had the benefit of his lucid presentation of New York Civil Practice. My father says that it is a tribute to the distinguished faculty of the school that he was able to learn the law in spite of the distractions of the bright lights of the city, the same bright lights that were to distract his son 30 years later.

1956 was an important year in world history. Polish workers rioted at Poznan to protest economic conditions under the communist regime. Sometimes, history repeats itself. In the same year, Soviet troops occupied Hungary, after general uprisings there; President Nasser seized the Suez Canal, giving rise to military operations in the Sinai Penninsula by Britain, France and Israel; and President Eisenhower was re-elected against a second challenge from Adlai Stevenson. The Polaris Missile was developed at Woods Hole, Massachusetts; Martin Luther King, Jr. organized a boycott of Montgomery Alabama public transportation to protest racial discrimination, and the University of Alabama expelled Autherine Lucy, its first black student, in defiance of a federal court order. Libya's first oil well came into production, and the Andrea Doria sank after a collision 60 miles off Nantucket Island.
In sports the Brazilian soccer player Pele began his professional career at the age of 15; Floyd Patterson, age 21, knocked out Archie Moore, age 42, to become world heavyweight champion; and the New York Yankees won the World Series by defeating the Dodgers four games to three. The fortunes of those teams had been reversed the previous year. In the United States Supreme Court racial discrimination in intra-state public transportation was outlawed, and in another case the States were excluded from punishing persons for sedition.

Here in New York, the Dow Jones Industrial average peaked at 521, General Motors announced earnings of more than 1 billion dollars after taxes and IBM signed a consent decree agreeing to sell computers as well as lease them. The New York Coliseum opened at Columbus Circle, and it was a great year for new shows opening on Broadway - My Fair Lady at the Mark Hellinger; Mr. Wonderful at the Broadway Theater; The Most Happy Fella at the Imperial and Bells are Ringing at the Shubert. Burlesque was banned in New York but flourished in Union City, New Jersey, and Professor Silverman always notified us when the shows changed there.

In 1956, New York Law School had been in existence for 65 years and was located at the Dwight Building,
244 William Street, later eliminated for the Brooklyn Bridge approach. Alison Reppy, the authority on common law pleading, was dean. I remember Dean Reppy saying that public policy is the wastebasket of legal thinking. In honor of Dean Reppy, I never have written an opinion basing a determination on public policy. 1956 was a vintage year at New York Law School and I remember it with great affection. We of the class of '56 had the benefit of the teaching of those now referred to as senior faculty - Koffler, Dugan and Silverman. Some of the adjunct faculty also has continued for 25 years - Joe Aronson, Sidney Asch, who was my colleague on the State Supreme Court, and Roy Cohn, who stops by now and then. Professor Cohn was a brilliant teacher of criminal law and procedure and has always been an avid supporter of the school. His distinguished father served as a Trustee for many years. Although Bill Kunstler no longer is a member of the adjunct faculty as he was in 1956, he did not seem too startled when I addressed him as "Professor" when we met at the Court of Appeals some years ago. There were other great faculty members who taught the class of '56 - LoLordo, Soubbotich, Oleck, Hamlin, Blaustein and others. I always have borne in mind the teachings of Professor Koch (I don't think he was related to the present Mayor) who said: "A Judge
IS ONLY A LAWYER WHO KNEW A POLITICIAN.” I HAVE PUT THAT TEACHING TO GOOD USE IN RECENT YEARS. AND SPEAKING OF JUDGES AGAIN, I AM REMINDED OF ONE OF MY FATHER’S FAVORITE STORIES. IT CONCERNS THE JUDGE WHO UNDERTOOK TO PUT A NUMBER OF QUESTIONS TO A PLAINTIFF WHO HAD JUST TAKEN THE WITNESS STAND IN A INJURY TRIAL. THE PLAINTIFF’S LAWYER BROKE INTO THE JUDGE’S EXAMINATION WITH THIS REMARK: “I DON’T MIND IF YOU EXAMINE MY CLIENT, YOUR HONOR, BUT DON’T LOSE THE CASE FOR ME.” THIS STORY BRINGS ME TO THE THEME OF MY REMARKS THIS EVENING - THE UNNECESSARY INTRUSION OF THE JUDGE DURING THE TRIAL PROCESS. THIS FORM OF JUDICIAL ACTIVISM SEEMS TO BE ON THE INCREASE AND SHOULD BE A MATTER OF CONCERN TO ALL OF US. ITS NATURAL CONSEQUENCE IS THE EROSION OF THE LAWYER’S ABILITY TO PUT FORWARD PROOFS AND ARGUMENTS ON BEHALF OF CLIENTS IN OUR TRADITIONAL MANNER OF PRESENTING A CONTROVERSY IN COURT.

THOSE WHO SUPPORT AN EXPANDING ROLE FOR TRIAL JUDGES CONTEND THAT THE SO-CALLED SEARCH FOR TRUTH IS PROMOTED BY ACTIVE JUDICIAL PARTICIPATION. THEY ARGUE THAT THE INCOMPETENCE OF THE TRIAL BAR AND THE NEED FOR JUDGES TO KEEP THEIR CALENDARS MOVING NECESSITATES JUDICIAL INTERVENTION. I BELIEVE THAT THESE ARGUMENTS ARE WITHOUT SUBSTANCE. IN SPITE OF WHAT THE CHIEF JUSTICE OF THE UNITED STATES HAS SAID, MOST JUDGES BELIEVE THAT LAWYERS GENERALLY CONDUCT THEIR TRIALS IN A COMPETENT AND PROFESSIONAL MANNER.
As for case load management, there are some fundamental problems that must be addressed, and judicial intervention at trials is not one of the solutions.

No one doubts the obligation of the Trial Judge to work towards the improvement of the quality of justice in the court room. However, this should not be done at the expense of our traditional adversary system. The system has worked well for us in the past and is part of our common law heritage. The continental method is, of course, much different. But here litigants always have been afforded great leeway in defining their own self-interest. Personal autonomy - freedom of choice - these have always been matters of high priority in our litigation process. Excessive judicial participation in trials also diminishes the right of trial by jury. Justice Black said this: "Either the Judge or the jury must decide facts and, to the extent we [the Judges] take this responsibility, we lessen the jury function."

Where do we find this expanding judicial role? First - in the earliest stage of trial - the selection of the jury. Although the trend is toward voir dire examination of prospective jurors by the Judge, and this seems acceptable to the Bar, there is no reason why the lawyers should not have great input during jury selection. It is my practice to submit to the jurors almost every question
AN ATTORNEY WANTS TO ASK ON VOIR DIRE. IN CHOOSING A JURY, AS MUCH AS IN ANYTHING ELSE DURING TRIAL, LITIGANTS MUST HAVE THE MAXIMUM FREEDOM OF CHOICE.

AN EXPANDING JUDICIAL ROLE ALSO STEM FROM THE USE OF THE JUDICIAL POWER TO CALL AND QUESTION WITNESSES. THE FEDERAL RULES OF EVIDENCE SPECIFICALLY CONFER THESE POWERS UPON THE JUDGE. THERE IS NO DOUBT THAT A WITNESS SHOULD BE SUBJECT TO JUDICIAL INTERROGATION TO REPEAT AN IN-AUDIBLE ANSWER OR TO CLARIFY AND EXPLAIN TESTIMONY. SUCH QUESTIONING DOES NOT INTERFERE WITH THE ATTORNEY'S ROLE OR SUGGEST THE JUDGE'S OPINION TO THE JURY. BUT ACTIVE INTERROGATION, DEVELOPING NEW LINES OF INQUIRY, INTRODUCES MATTERS THE PARTIES MAY HAVE PREFERRED NOT TO PURSUE. ATTORNEYS MAY FIND IT DIFFICULT TO OBJECT TO THIS TYPE OF QUESTIONING, FOR FEAR OF ANTAGONIZING THE JURY OR THE JUDGE. HOWEVER, THE ARGUMENT IS MADE THAT THE TRIAL IS ACCELERATED AND THE PERCEIVED INEQUALITY OF COUNSEL IS BROUGHT INTO BALANCE BY QUESTIONS PUT TO A WITNESS FROM THE BENCH.

AS A PRACTICAL MATTER, THIS TYPE OF INTERROGATION ACTUALLY MAY PROLONG THE TRIAL, AS COUNSEL ATTEMPT TO FOLLOW UP IN THE NEW AREAS OF INQUIRY OPENED BY THE JUDGE. WITH RESPECT TO INEQUALITY OF COUNSEL, THERE ARE GRAVE DANGERS IN ALLOWING THE JUDGE TO MEASURE INEQUALITY, TO INTERVENE IN AN ATTEMPT TO BRING IT INTO BALANCE AND
TO MAINTAIN HIS JUDICIAL NEUTRALITY, ALL AT THE SAME TIME. WORKING WITH COUNSEL IN THE TRADITIONAL MODE, THE JUDGE MAY SUGGEST LINES OF INQUIRY OR PARTICULAR QUESTIONS OUTSIDE THE PRESENCE OF THE JURY AND THE WITNESS. IN APPROPRIATE CASES, THE JUDGE MAY GRANT A CONTINUANCE TO ALLOW FOR FURTHER PREPARATION OR REFLECTION BY COUNSEL.

THE JUDICIAL POWER TO CALL WITNESSES SHOULD ALSO BE EXERCISED SPARINGLY. IN THE CASE OF EXPERT WITNESSES, THE EXERCISE OF THIS AUTHORITY MAY SOMETIMES BE NECESSARY. IN SUCH A CASE, HOWEVER, GREAT CARE MUST BE TAKEN OR THE JURY MAY IGNORE THE EXPERT WITNESS PRODUCED BY THE PARTIES IN FAVOR OF THE EXPERT CALLED BY THE JUDGE. ALTERNATE METHODS SHOULD BE EXPLORED WITH COUNSEL WHERE IT APPEARS THAT AN INDEPENDENT EXPERT OPINION IS NEEDED OR DESIRABLE.

THERE SEEMS TO BE LITTLE NEED FOR THE COURT TO CALL A LAY WITNESS WHERE COUNSEL IS PERMITTED TO LEAD OR IMPEACH HIS OWN WITNESS. EVEN WHERE THIS IS NOT PERMITTED, HOWEVER, THE DANGERS OF THE PRACTICE OUTWEIGH ITS ADVANTAGES, SINCE JURIES WILL ALWAYS GIVE UNDUE WEIGHT TO A COURT-CALLED WITNESS. WHERE THE JUDGE PERCEIVES THE NEED FOR THE TESTIMONY OF A PARTICULAR WITNESS, A SUGGESTION TO THE PARTIES SHOULD CONSTITUTE SUFFICIENT JUDICIAL PARTICIPATION.

As Bacon said in his essay of Judicature, "... an overspeaking Judge is no well-tuned cymbal." The undue intrusion of an overspeaking Judge during trial is a threat to the adversary system and to the right of trial by jury. The roles of trial judge and trial attorney have been fairly well defined over the years. There is no real need for any major change in these roles. The Bar should resist any revision of statutes
OR RULES DESIGNED TO EFFECT SUCH CHANGES. WE OF THE TRIAL BENCH SHOULD EXERCISE CONSIDERABLE RESTRAINT SO AS TO AVOID UNNECESSARY INVOLVEMENT IN THE LAWYERS' PRESENTATION. AFTER ALL, WE DON'T WANT TO BE RESPONSIBLE FOR LOSING ANYBODY'S CASE.

THANK YOU.