

# The Justinian

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## The Justinian

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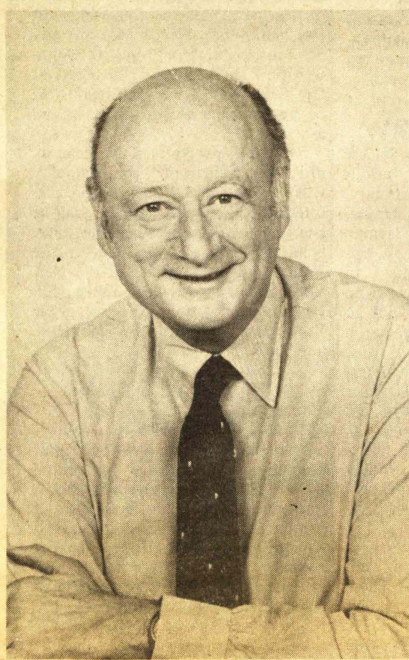
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# THE JUSTINIAN

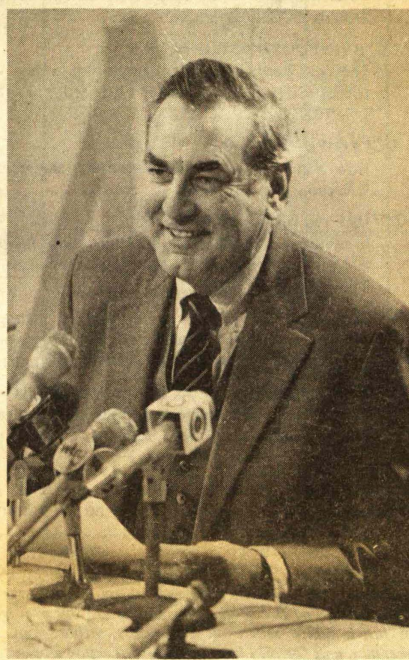
A FORUM FOR THE BROOKLYN LAW SCHOOL COMMUNITY



The Mayor

Over the last several weeks our system for obtaining criminal indictments has been the focus of a great deal of attention, and has become the subject of heated debate in the legal community. A number of incidents have served as catalysts; particularly, the decision of a Manhattan grand jury not to indict Bernhard H. Goetz for his confessed subway shootings, followed by the decisions to indict Police Officer Stephen Sullivan for the death of Eleanor Bumpers, and the six transit officers allegedly involved in the death of Michael Stewart. In subsequent days, the debate that ensued produced skepticism among many judges, legislators and reform groups about whether or not the grand jury system in New York is still functioning properly. This debate was further fueled when Sol Wachtler, the newly appointed Chief Judge of the Court of Appeals, told reporters that grand juries should be eliminated because, in short, prosecutors can get them to indict a "ham sandwich."

THE JUSTINIAN jumped into the fray by asking two prominent public officials to give us, in their own words, their views on: **WHETHER OR NOT THE GRAND JURY SYSTEM SHOULD BE ABOLISHED OR REFORMED IN THIS STATE.**



Senator Marino—Author of the proposed reforms.

## Should N.Y. Scrap the Grand Jury System?

### Goetz Case Heats Up Debate On Issue

**By Mayor Edward I. Koch**

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Recent indictments of Bernhard Goetz, Police Officer Stephen Sullivan, and six transit officers allegedly involved in the death of Michael Stewart have led to much comment on the grand jury system. Some say the system ought to be scrapped.

The grand jury system has served us well. It's allowed average people who represent our neighborhoods and communities to retain the power to decide whether a person should be prosecuted for a felony. Grand juries preserve the fundamental administration of criminal justice in the hands of the people.

Critics say prosecutors control the process and a grand jury merely rubber stamps a prosecutor's desired result. This implies prosecutors are securing indictments where evidence doesn't warrant it. I don't agree. Any time a defendant requests it, state statutes require that a State Supreme Court judge review the legal sufficiency of a grand jury proceeding. Very few indictments have been dismissed when defendants have made use of this right. Clearly, prosecutors are acting properly inside the grand jury room.

Proposed legislation would substitute preliminary hearings in open court

*Continued on page 14*

**By State Senator Ralph J. Marino**

The grand jury system, as presently constituted in New York State, is largely an anachronism which frustrates more often than it furthers its original purpose of protecting citizens from arbitrary criminal charges.

It has become less a bulwark protecting individual rights than a stone wall keeping the press, the public and the accused outside while a prosecutor addresses his captive—and usually receptive—audience.

It is a one-sided, secretive process, all too reminiscent of a Star Chamber proceeding and badly in need of reevaluation and reform.

In Great Britain, where the grand jury concept first developed, the system was abandoned half a century ago. In the United States, reassessment has been slower to occur but, state by state, as changes have been made, all have moved in the direction of necessary limitations on the role of grand juries as part of the judicial process.

California was the first state to adopt a preliminary hearing option to grand jury proceedings back in 1884 and, in 1978, that state's highest court held that all defendants are entitled to a preliminary hearing as a matter of right, whether or not a grand jury indictment is handed down.

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## AGENT ORANGE SYMPOSIUM

### Panel Explores Mass Tort Law

**By Michele Hauser**

A symposium on mass tort litigation in the wake of Agent Orange was held at Brooklyn Law School on February 27. Chief Judge Jack Weinstein of the Eastern District of New York, who presided over the litigation and urged the settlement last year, welcomed a panel of judicial and legal experts, many of whom participated in the recent litigation. Speaking before a crowd of approximately 300 students, alumni and other members of the legal community, the Chief Judge identified

key factors for handling massive lawsuits resulting from cataclysmic events. These included concentration of decision-making; use of a single forum; application of a single known, substantive law; additional support for the trier of facts; flexible but controlled factfinding; a cap on the amount recoverable; and a method of distribution that would require little or no adjudication.

The panel comprised a number of well-known legal experts, among them several who specialize in products

liability. Included were Marjorie Mintzer, an attorney who specializes in the defense of major products liability cases; U.S. Magistrate Shira Sheindlin, who handled discovery and other pretrial issues; attorney Sol Schriber, who served as special master; Brooklyn Law School Professor Paul Sherman, an authority on conflicts of law and products liability; and Professor Aaron Twerski, also an expert on products liability and chairman of the academic component of the law

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**QUOTE OF THE MONTH:** *The trouble with many of us is that at the earlier stages of life we think we know everything—or to put it more usefully, we are often unaware of the scope and structure of our own ignorance. Ignorance is not just a blank space on a person's mental map. It has contours and coherence, and for all I know rules of operation as well.*

Thomas Pynchon

## News Update:

### SBA Elections

Are you interested in becoming the President of the SBA? Elections to fill all offices on the SBA Executive Board will be held on April 15th and 16th, 1985. Students who wish to run for any office must contact the SBA before April 5th, in order to gain a place on the ballot. The nominating period is April 1st to April 5th.

### Natural Resources Law

The Natural Resources Law Society (NRLS) has been hosting various events this semester. In February, NRLS, with the help of Dean Trager, sent first year students David Hyman and Debbie Sit to the ALI-ABA Environmental Law Seminar in Washington, D.C. Practitioners from Florida to Alaska and Sierra Club to Exxon converged on the Washington Hilton where the field's most prominent experts discussed the latest developments in environmental law.

The Society also publishes the Natural Resources Law Bulletin. The Bulletin is composed of short essays and digests of leading cases on virtually any topic related to environmental law. Students and faculty are invited to submit work for publication.

The Society frequently invites area practitioners to speak on environmental issues in their fields. These speakers have represented government and industry, as well as the scholastic community. On March 27 at 4:00 P.M., Peter Marini from Environmental Facilities Corporation will speak about the effect current regulations have on alternatives to hazardous waste dumping. Environmental Facilities Corporation specializes in such alternatives as high temperature incineration and reuse. Cheese, crackers, cider and coffee will be served.

If interested, watch for the signs around school announcing upcoming events and meetings, including a field trip to Gateway National Park.

Judge Mark Constantino is organizing a regional chapter of the American Inns Court at the Eastern District Court. The American Inns Court presents a unique opportunity for qualified students seeking a career in litigation. Modeled after the English system, the Inns Court provides instruction in trial techniques by federal and state judges as well as by prominent trial attorneys. If interested, please leave your name or resume in the Moot Court Office.

### Securities Symposium

Dean David G. Trager and the Brooklyn Journal of International Law will be sponsoring a Symposium entitled: "Policing Trans-Border Fraud in the United States Securities Markets." The Symposium will be held at Federal Hall in Manhattan on Wednesday, March 27. The Symposium will address recent attempts by the Securities and Exchange Commission to expand the enforcement jurisdiction of the U.S. securities laws and the consequent impact on principles of international law. Remarks of the speakers will be published in the Summer, 1985 issue of the Brooklyn Journal of International Law.

### Psychiatric Service Available

Brooklyn Law School has arranged with Dr. Michael Schneck to provide an initial psychiatric consultation for students at no charge. Dr. Schneck is on the faculty of the Department of Psychiatry of the New York University School of Medicine and is Board Certified in Psychiatry. In addition, Dr. Schneck has had substantial experience working with law students and attorneys.

Students may contact Dr. Schneck directly and the utmost confidentiality will be maintained. When appropriate, referrals will be made and fees will be charged on a sliding scale basis. Dr. Schneck's office is located in the Faculty Practice Offices at the New York University Medical Center, 530 First Avenue (at 32nd Street) New York, NY 10016. His telephone number is (212) 340-7475.

### Intn'l. Law Events

The International Law Society is pleased to announce upcoming speakers and taped lectures on topics in international law. On April 3rd, in conjunction with the Distinguished Alumni Lecture Series, Jay Madigan of Townley Updike will speak on his experience arguing before the United States-Iran Claims Tribunal at The Hague.

Other programs of interest in the near future are the Brooklyn Journal of International Law Symposium, "Policing Trans-Border Fraud in the United States Securities Markets" on March 27; and a joint American University-Georgetown University Symposium on International Trade Law on March 29-30. Detailed information about these symposia is available in Room 304.

The Placement Office is hosting a discussion at 9:00 a.m. on March 27 about the post JD—European Law Internship Program and European summer sessions organized by the Pacific McGeorge Law School. Students are requested to sign up in advance at the front desk in the Placement Office if they plan to attend this discussion.

The I.L.S. invites students to participate in these activities, and to help us plan future programs. Membership in the Society is open to all students, and announcements of upcoming meetings or programs may be found on the bulletin board in the main lobby. Suggestions and/or comments may be left in the I.L.S.'s box in the SBA office on the third floor.

### Party For '85 Grads At Water Club

The party for graduating students will be held on June 10th at the Water Club in Manhattan. Admission to the event will cost \$15 per person and every graduating student is entitled to bring a guest.

The selection of the Water Club followed a general vote which was tallied on February 28th. Of the 212 people who participated, 112 students voted for the Water Club, while 100 others preferred the alternative choice, the Circle Line.

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## JUDICIAL CLERKSHIPS A Job Source For Ambitious BLS Students

By Richard P. Schroeder

The job market for students who want to obtain full-time positions as judicial clerks when they graduate is not as tight as many people seem to think, says Associate Dean Henry Mark Holzer. There are plenty of these jobs out there for students willing to expand their horizons beyond the Southern and Eastern Districts of New York.

Holzer, who is chairman of Brooklyn Law School's Clerkship Committee—a group which screens candidates for clerkships with judges who request screening—and head of the school's highly successful Judicial Clinic program, points out that clerkships are available in state and federal courts throughout the United States.

"I'd like to encourage people to think outside the square," says Holzer, referring to the coveted positions in the federal courts of the Southern and Eastern Districts. While the Southern and Eastern Districts are highly competitive, other courts do not necessarily have as lofty standards.

As to the common perception that students must be in the top 10 percent of the class and on law review to be considered for judicial clerkships, Holzer says, "Nothing can be further from the truth. There are clerkships to be had if people just pursue them."

Brooklyn Law School has done well in the past when it comes to placing students in these positions, says Holzer. "We have had good luck in this school. Qualified people are getting (clerkships)."

Holzer points out that many students are willing to leave the metropolitan area to work for law firms and the like, but for some reason aren't as quick to make a move to take a position as a clerk. "For people who would like to clerk," he says, "it is a sin that they shut themselves out by not persevering."

Several members of the faculty clerked earlier in their careers in various state and federal trial and appellate courts. Among them, Holzer says, are Deans Trager and Johnson, and Professors Berger, Korman, Farrell, Sherman, Jones, Herman, Fullerton, Gora and Schneider. Among the adjunct faculty who clerked are Professors Pell, Shevitz and Sommers.

For students who wish to clerk for a judge who does not require pre-screening, the system of placement is an informal one. The student, says Holzer, should contact one of the listed faculty members and find out what to do.

For those interested in clerking for a judge who requires screening, arrangements should be made through the placement office. Linda Stephens, head of the Placement Office, is a member of the Clerkship Committee, as are Professors Farrell, Sherman, Bentele and Hauptman. Screening by the committee is most often required for positions with the federal courts.

# Study: N.Y. Subways the Worst

## Underground Experience Described as Daily Torment

By Robert Burke

A recent study describes New York City's subways as "Kafkaesque" and "a daily torment." According to the New York Public Interest Research Group's eighth semi-annual straphangers' report, half of all rushhour trains run far behind schedule; one out of four cars has broken doors; three out of ten cars are dimly lit or dark; one out of five cars has missing or misleading signs; three out of ten lack readable maps; and finally, at the very time the subway rebuilding program is increasing delays and re-routing, the Transit Authority fails to make appropriate car announcements sixty-five percent of the time.

The report praises TA president David Gunn for being more accessible than former TA administrators. While the survey admits the new transit administration is still involved in a learning phase, it notes that in the administration's first six months, subways have gotten worse in nearly every category measured. The report urges the general riding public to hold the TA to promises made in its 1985 operating budget, especially the promise to have all doors, maps, lights and signs in working order. The report calls on Mr. Gunn to implement these objectives and make public the reasons for the TA's success or failure in meeting them.

The straphangers' group also alleges that the TA has ignored recommendations of the National Transportation Safety Board, following NTSB's investigation of subway track and platform fires. The study calls on the newly-formed New York State Public Transportation Safety Board to cut off funds if the TA does not comply with proper safety procedures.

The group also recommends that the TA increase the flow of information to passengers by improving car an-

nouncements, issuing a newsletter, installing information centers, and informing riders of the names of the managers responsible for each specific line.

The study presents a detailed proposal for reducing the currently high level of labor-management tensions which resulted from the Gunn administration's removal of 1000 supervisors from union and civil service protection, removals which a

TA spokesperson describes as "laying the groundwork for significant improvement."

Finally noting a proposed \$400 million Federal transit aid cut for 1986, the group asks Governor Cuomo to improve the subway using some of the \$1 billion earmarked for Westway. They note that such a "trade-in" would be permissible under Federal law if obtained before September 30, 1986.

### TRANSIT REPORT CARD

	BROKEN DOORS	POOR LIGHTING	MISSING MAPS	MISLABELLED TRAINS
WEST SIDE IRT (1,2,3)				WORST
EAST SIDE IRT (4,5,6)	BEST	TIED FOR BEST	TIED FOR BEST	BEST
FLUSHING LINE (7)			BEST	BEST
8th AVENUE LINE (A,AA,CC,E)		WORST		
6th AVENUE LINE (B,D,F)				
BROOKLYN/QUEENS CROSSTOWN (GG)	WORST			
CANARSIE LINE (LL)				
NASSAU STREET LINE (J,M)				WORST
BROADWAY LINE (N,QB,RR)				

Photo by Thomas Victor

## STUDENT FINANCES

# Reagan Proposes Massive Loan Cuts

By Jim Diamond

If President Reagan has his way many students at BLS may have to look to sources other than student loans in order to fund their legal education. The President's proposed 1986 budget would eliminate any federal loans to families whose annual income exceeds \$32,500.

Guaranteed Student Loans (GSL), a federal aid program that is administered by New York State, are an important element of the current BLS student's ability to pay tuition. According to Thomas Curtin, financial aid administrator at BLS, about 750 students at the law school received these loans this year, averaging \$5,000 per student and accounting for \$3.6 million of tuition paid. Curtin, who has been meeting with other graduate school financial aid officers to discuss the proposed cuts, says the Reagan administration, "wants to tie in College Work Study, National Direct Student Loans and the Guaranteed Student Loans to a maximum of \$4,000 per year."

All law students would still have access to the expensive "Plus" type of loan, like the \$3,000 ALAS loan now available to BLS students that carries a steep 12% interest rate. That is far

more costly for students than the National Direct Student Loan, which is 5%, or the Guaranteed Student Loan, which is 8%. The expensive ALAS loans, under the proposed changes, would have an increased maximum of \$4,000.

For the average law student, whose family may earn more than \$32,500, but who is technically financially independent, the traditional loan packages and work study programs would simply be unavailable.

The cuts are part of the President's overall efforts to scale down domestic spending. Reagan's newly appointed Education Secretary, William J. Bennett, admits the cuts will affect approximately 1 million students. Speaking about the impact of the cuts, he said some families, "are going to have to tighten the belt even further" to send their children to college. "It may require from some students divestiture of certain sorts, stereo divestiture, automobile divestiture, three weeks-at-the beach divestiture." (*Washington Post*, February 12, 1985).

The proposed cuts in loans, along with Bennett's remarks have precipitated angry responses from leaders in the education field and from student groups. *Newsday* (February 26, 1985) reported Joseph Murphy, Chancellor of the City University of

New York's reaction, "Divestiture of three week vacations in Florida? What's he talking about? This is beginning to sound a little bit like the old welfare Cadillac gimmick. As though everyone on Welfare has a Cadillac and everyone with a Pell (undergraduate) grant goes on vacation for three weeks."

Thomas Curtin, who traveled to Washington D.C. to join other financial aid officers in meetings with Education Committee staffers on Capitol Hill, anticipates Congress fighting the Reagan loan cuts and is skeptical that the proposal will go through "across the board."

## For Nat. Team Season Ends

By Catriana Glazebrook

Brooklyn Law School's National Team consisting of Pat S. Conti, Elizabeth A. Orfan, and David A. Silva advanced to the quarter-final round of the 1985 National Moot Court Competition. Brooklyn was one of 145 schools represented at the 35th annual competition sponsored by the Young Lawyers Committee of the Association of the Bar of the City of New York and the American College

Continued on page 6



## ARTS

## THEATER

## Acting Weird in the Village

By Richard P. Schroeder

If you find yourself walking around the Village anytime in the near future, and you are looking for something interesting to do, try strolling into the Minetta Lane Theater (located on the street that goes by the same name). There, you can witness the spectacle of *Three Guys Naked From the Waist Down*, an energy-packed musical-comedy about three very weird guys just out to have a little fun.

The title is a little misleading; there is actually no nudity in this play so you can even bring Mom if you are so inclined. (The term "naked from the waist down" was the way stand-up comics referred to themselves in the good-old-days of vaudeville.)

The play is about three talented stand-up comedians searching for glory and a spot on the Johnny Carson Show. They get on the Carson Show, are discovered, and sign a long-term contract to do a t.v. sit-com called *Hello, Fellas*, a show about three

under-cover Los Angeles cops in drag. As you can imagine, they become typecast, but their television show is number one and they can't get out from under their contract. This depresses them terribly.

The plot here is not that important. The real strength of the show is the endless stream of stand-up routines. The weakness is the music, which sometimes seemed pointless (although it really wasn't; I just didn't feel like trying to figure out its meaning).

The Three Guys are the only ones who appear on-stage during the performance, but they really didn't need any help. They are Ted (Scott Bakula), the reasonable one who first thought the three would make a great team (You know the scenario: My uncle's got an empty barn, let's put on a show); Kenny (John Kassir), the totally nutty one; and Phil (Jerry Colker, who also wrote the show), the angry New Yorker with a New York sense of humor.



Three Guys Naked From the Waist Down

(I would like to put on record that I believe one of these characters was played by someone else, a man named Peter Samuel. The reason I think this is because there was an insert in the program which said, "Peter Samuel, general understudy." I also think he played Kenny, although I could be wrong. I am led to this conclusion by comparing the press photos with my memory of the faces I saw on stage. In any event, whoever played Kenny gave

a brilliant performance and stole the show.)

The show also has an important message: The quality of television is the pits. So next time you are sitting at home watching some garbage the networks throw at you, get out of your chair, jump on the train and get off at the West 4th Street Station. The quality of entertainment to be found at the *Minetta Lane Theater* is of a much higher caliber.

## LUIGI ON LAW

## A Skeptical Look At History



Steve and Luigi

By Steve Chaikin

An issue of great moment prevents your authors from this week exploring the Agent Orange litigation, as previously promised. Instead, we would like both to share with you a heretofore little known but nevertheless devastating item of information uncovered recently by my colleague during his research on Constitutional history, while at the same time we respond to the proponents of the theory that certain historical events did not, in fact, occur. It appears by irrefutable evidence, in admissible form, that the very Constitution we have come to know and love, came into being not during the latter part of the 18th Century as previously posited, but rather in the year 1906. Moreover, all references to Supreme Court decisions pre-dating this event—in fact all references to anything pre-dating this event and alleged to have been Constitutionally based—are really the products and by-products of the imagination of a turn of the century legal scholar and prankster, known to his public only by the curious pseudonym, "JOHN." Note please that other evidence indicates that "JOHN"

may have been the original "reasonably prudent person" to whom so many jurists refer in their decisions. This, you will see, is no mere coincidence.

In any event, the "JOHN," while on the one hand giving birth to a structure of government and a way of life, on the other hand laid to waste much of what we have long considered recorded history. We now have masses of information to add to the list of events once thought to have occurred, but which in fact did not. Although we might at first be tempted to compare these revelations to the disclosure that the holocaust did not occur, we are on closer examination struck by the dissimilarities of these non-happenings. That the holocaust did not occur is a source of celebration—imagine, all those people alive somewhere, merely hiding out. But the same may not be said of the events which marked the birth of our nation. What is to become of such gala events as the 4th of July and President's day? What will we of the legal persuasion do when we no longer have Chief Justice Marshall to bandy about in our briefs and memoranda? Moreover, was there a Civil War? Were blacks really enslaved? Were they emancipated? Was there really a turn of the century? And if so, why? Were you there? I wasn't. Or at least I think I wasn't. But I think therefore I am. Or was I? This could mean the death of the quotation mark.

The conspiracy will reach many. Still under the highest level of scrutiny are such notables as the West Publication Company, and the notorious "Shepards," a clever ruse their name, while they led us to slaughter.

You must wonder as we did, why 1906? The simple answer is

that "JOHN" didn't think to do it before then. Up to that time he had been satisfied to fill in history by creating such oddities as "the Washington Monument," the game of touch football, an early form of Valium, the Bible, and the whole of Christianity—including the City of Rome.

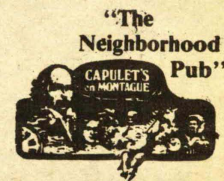
Why then, after such a checkered career, did "JOHN" turn his attention to writing something called a "Constitution," and case books to support his wild fantasy? Were things so unbearable in the Portuguese Colonial Empire, of which we were a part prior to 1906, and which has since been went asunder by a force of unknown origin?

Well, it appears from the few trustworthy tidbits we could grasp, that "JOHN," then a citizen of Hampshire, had been dealt a sore blow by the royal family in London, related by marriage to the Portuguese Royal House. Having applied for a passport to the colonies, hoping to avoid the trouble he had started in Czarist Russia, "JOHN" was confronted with the illegal search and seizure of his wife and two children. Reasonably certain that this was an imprudently high price to pay for a passport (although note that you did get the soft leather wallet with your passport in those days), "JOHN" set out to write a tract he entitled "The Untidy State of Constant Intrusion," which he submitted to the predecessor of the British Social Security Administration for their perusal. After construing the document over and over again, it was returned to "JOHN," postage due. Only the title had been changed. It now read "The United States Constitution" and even this was circled in red and marked "(SIC)." Sans passport, "JOHN" set out for the colonies aboard the tramp steamer Pinifore, determined to invent a "United States" for which his "Constitution" had

been written. That which occurred after his arrival in 1906 is history.

No doubt Harvard will refuse to revise the Blue Book. No doubt we'll continue doing our briefs and memoranda as we did before. No doubt we will continue to use all those thoughts and impressions of a disgruntled man from Hampshire Gardens, as the framework of our system of governance. We do so hate change. And anyway, we have no proof of history. Those who lived it are dead. Those who are alive are liars. And things are so pleasant in a world without holocausts.

Mr. Chaikin co-authored the book entitled "The Lunatic Fringe: Friends of the Family," with Luigi, soon to be released by Universal, starring Mr. Ed, in his last role. Watch your papers for local theatres and playing times. And watch the skies. ■



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By Donna L. Riccobono

In a dingy Chicago recording studio in 1927, four black musicians swap stories of their past, amplifying details in an animated way. The musicians form the back-up band for the popular blues singer, Gertrude "Ma" Rainey, and they wait in the basement for the star to arrive. Occasionally, they play a lyrical tune, and the blues comes alive, providing new meanings to the stories we've just heard, as if the music is harmonizing with the dialogue.

Cutler, played by Joe Seneca, is the leader of the band, a tired trombonist whose response to the injustice surrounding him is a fatalistic attitude and an endless supply of reefer.

Robert Judd plays the pianist named Toledo, the most intellectual and politically astute in the group, who buries his personal aspirations in his books and offers a searing analysis of the exploitations of blacks in America.

Charles S. Dutton is Levee, the erratic, emotional trumpeter who struggles for musical stardom by ingratiating himself to white financial backers. When these ambitions are thwarted, his thinly veiled anger erupts into fury. The rejection of his music and his loss of dignity are translated into irrational violence, the acts of despair.

The characters in this play are developed incrementally, and are so convincing that even meaningless violence is made almost plausible as one person's reaction to the futility of life in a world where dreams are made to be shattered, where things are rigged from the start, where one starts at the bottom and from that point, there's nowhere to go.



Leonard Jackson and Joe Seneca in a scene from August Wilson's "Ma Rainey's Black Bottom."

## THEATER

### "Ma" Rainey Sings The Blues

Dutton is convincing in his role, yet his own life was a fight which he seems to have won. The actor dropped out of school at age 13 and spent nearly ten years of his life in prison for crimes such as manslaughter and possession of a deadly weapon. While in prison, he received a high school equivalency diploma and a two year college degree.

Ultimately Dutton was awarded a scholarship to the Yale School of Drama after an audition which included a soliloquy from "Macbeth" and a speech from Steinbeck's "Of Mice and Men."

But back to the play. In the basement, the musicians ready their instruments, Cutler tilts his head back,

closes his eyes and sings the blues. "If I had my way, I would tear this old building down."

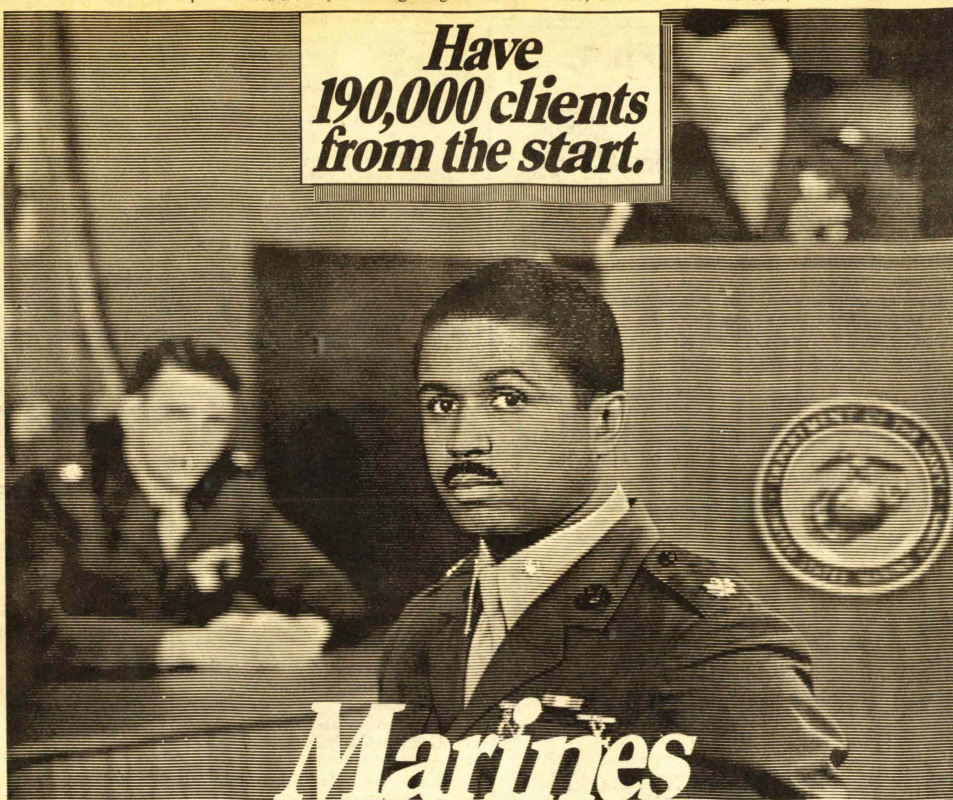
Two floors above them, a couple of white men sit in the sound room, look at their watches, and think about the money that ticks by with the seconds. They are waiting impatiently for the star to arrive.

In walks Theresa Merritt as the legendary Gertrude "Ma" Rainey, queen of the blues. Accompanied by several attendants and a kept female lover, she is a massive, domineering figure in a glittering red dress, holding an ostrich-feather fan in one hand, with the other outstretched demanding a Coca-cola before she could begin the session. As the temperamental and outrageous star, Merritt's performance is at once engrossing.

Again, the transformation begins to take place. At first overbearing and arrogant, Ma Rainey's character begins to gradually unfold and deepen for the audience. Her incessant unreasonable demands within the confines of the studio become comprehensible when juxtaposed against her inability to hail a cab in the white city outside. Her emphatic reluctance to sign the final contract with the record company underscores the recognition of her limited bargaining power. She mentions that her white manager for years has catered to her every whim while in the recording studio, but has never invited her to his home. The extent of her influence is the marketability of her music. She says, "When I've finished recording, it's just like I'd been some whore, and they roll over and put their pants on."

The show was directed by Lloyd Richards.

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# National Moot Court Team

Continued from page 3

of Trial Lawyers.

Before advancing to the National Rounds, the team had to succeed at the regional level from which only 2 out of 10 schools were chosen. Brooklyn Law and Fordham University were selected to represent our local region. There are 14 regions across the country and 30 teams ultimately competed at the national level.

At the national competition, Brooklyn advanced to the quarter-final round by defeating the University of Puget Sound and Wayne State University. With only 8 teams remaining, Brooklyn was defeated by Syracuse University. Fordham was eliminated in the previous round. The winning team of the 1985 competition was the University of California at Davis.

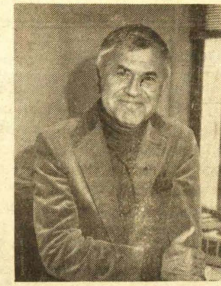
The case in this year's competition involved the rights of excludable aliens. The petitioners, citizens of the hypothetical island country of Suri, fled to escape economic and political repression and sought admission into the United States as refugees. Upon their arrival they were detained in a federal facility as excludable aliens. Since Suri refused to accept them back and the U.S. Attorney General had issued a memorandum denying parole to any Surinese subject to exclusion proceedings, the petitioners were imprisoned indefinitely.

The side argued was determined by a coin toss before each round. As representatives for the petitioners, the team argued that their denial of parole constituted cruel and unusual punishment in violation of the 8th and

5th Amendments' due process and equal protection clauses. Mr. Silva stressed that the Surinese had committed no crime yet were being punished simply for being Surinese. Ms. Orfan attacked the Attorney General's memorandum claiming that the executive official abused her discretion by basing her parole policy solely on national origin. In response to the Judges' attacks, Ms. Orfan distinguished the petitioners' case from that of the Haitian Boat People. The Haitians had challenged the United States' admission policy whereas here only the Attorney General's parole policy was being challenged.

As respondents, the team argued that the Attorney General's power to make admission decisions was conferred upon her by Congress and not reviewable by the Supreme Court. This implicated the power struggle between the executive and the judiciary branches of government. The team further claimed that the United States was acting within its sovereign power to protect its borders from an uncontrollable onslaught of immigrants. Mr. Conti put forth the argument that as excludable aliens, the petitioners were limited to those rights granted by Congress and they were not entitled to the full protection conferred by the Constitution. He went on to stress that there are no tenets of international law guaranteeing excludable aliens further rights, and every sovereign must maintain complete flexibility over its immigration policy.

Prof. Maryellen Fullerton coached the teams.



Brooklyn Law School faculty members Richard Farrell (left) and Jerome Leitner each received the Charles C. Pinckney Award last month at an honorary dinner sponsored by the Defense Association of New York, an organization comprised of personal injury trial lawyers who represent insurance companies. Over 250 people attended the award ceremony, which was held at the Downtown Athletic Club.

## Judge Lowe Discusses Takeovers

In the evening of Thursday, February 21, Judge Mary Johnson Lowe of the Southern District of New York spoke before the Brooklyn Law School Corporate Law Society about business mergers and acquisitions. Judge Lowe is an alumna of BLS, where she was editor-in-chief of *Law Review*. She received an LL.M. from Columbia University and served on the New York State Supreme Court before her recent appointment to the Southern District.

Judge Lowe's talk focused on the effects of corporate takeovers on the American economy. The goal of the *Magna Carta* of our nation's economic system, the Sherman Act, she said, is to assure a fair, open and competitive market. It was enacted in response to the monopolistic practices of the railroads and "Robber Barons."

However, she said, approximately ten years ago a new phenomenon again began to stifle competition. At that time a number of corporations began cannibalizing smaller corporations holding substantial assets. Later developments, such as takeover offers

that promised corporate directors a position with the newly formed company or else a huge amount in severance pay, have sped up the process of cannibalization. Today, even more money is devoted to these takeovers, while less is used to produce goods and services. The effect has been devastating to the national economy: reduced productive capacity and, contrary to the objectives of the Sherman Act, a decrease in competitiveness.

These problems, she said, have led the courts to look more closely at the decisions by boards of directors to acquiesce to takeover offers. The rule has evolved that if directors, who had no conflicting loyalties, were present at the time the decision to acquiesce was made, then the courts will not substitute their own judgment for that of the directors. Nevertheless, problems persist as to the extent of the directors' fiduciary duty to the corporation and to its shareholders during a takeover battle. It remains to be seen whether this issue will be resolved by directors, shareholders, the Congress or the courts.

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## DEVELOPMENTS IN THE LAW

## THE PRESS

BY LYLE DENNISTON

## In the Shadow of Sharon

*Time* magazine's "victory" at the end of the Ariel Sharon libel trial was put in the best perspective in the first sentence of *Time*'s subsequent press release. "This libel suit is over," it read, "and *Time* has won it."

At the end of the trial, the verdict for *Time* was not so much a triumph as an escape. And that may be true not just for *Time* Inc. but for the press in general. Along the way, some rather bad law was made: perhaps the most important, the judge's initial decision to let the case to trial.

Whatever the trial of *Time* revealed about journalistic practice—and the story that unfolded in the courtroom made legions of new critics of *Time*'s methods—the case has produced legal precedents that may haunt the press for some time to come.

The first is that the American reputation of high officials of foreign governments is sufficiently important to them to make them welcome in U.S. libel courts. Never before has an official celebrity been allowed to sue here in an attempt to vindicate his conduct in office abroad. The fact that Sharon did not ultimately win may deter others from following his lead, but not necessarily. Sharon won enough to have made it worthwhile for him to have sued. Surely others will be tempted to think the same.

There is as yet no sign, for example, that Hammer De Roburt, the president of the Pacific island republic of Nauru, is dropping his \$40 million libel lawsuit against the Gannett Co. because of the Sharon verdict. De Roburt is already the beneficiary of Sharon's initial victory in being allowed to sue. The U.S. courthouse door clearly now is open for such figures; the Sharon case opened it.

There is an expanding notion in libel law that reputations of public figures should be more protected by U.S. courts, and the Sharon case makes it clear that that notion can include foreign celebrities, too. As a result, libel lawyers are concerned that other controversial foreign figures will look to libel lawsuits here as a potential means of silencing their critics.

Although Sharon's reputation may have been challenged seriously by criticism back home after the official Israeli investigation of the Lebanese massacres, he felt enough further injury by *Time* that he set off a multi-million-dollar legal struggle in federal court.

Another unfortunate aspect of this case is that the federal judge who tried it, Abraham D. Sofaer, made it clear when he allowed the case to go forward that he was irritated at *Time*'s proud and hard-headed determination to defend itself.

He remarked: "That this process has proved enormously expensive, and

painfully contentious, is as much the product of *Time*'s all-out litigation strategy as of any plan by plaintiff [Sharon] to intimidate the press."

When the case went to trial, the judge boxed himself in by promising to the Israeli government that official secrets of the government associated with the massacre investigation would be protected. *Time* complained vigorously (and with what appeared to be some exaggeration) that its ability to defend itself had been compromised by those promises.

Whatever the merits of that complaint, it became clear that the odd alliance between a U.S. trial judge and the keepers of foreign state secrets would set an unhealthy precedent. It did so.

And, one day near the end of the trial, reporters covering it found themselves confronted with an astonishing development: Judge Sofaer closed the courtroom to hear a part of the case so as to keep his promises of secrecy to Israeli officials.

There are some libel cases that simply should not be in the courts, as U.S. Circuit Judge Robert H. Bork reminded us recently. When those who willingly take part in public controversy—particularly, controversy that surrounds government policy or performance—sue for libel, it is time to exercise considerable judicial caution.

There is, finally, one other aspect of the Sharon case that will make it a troubling memory for the press. It demonstrated anew one of the serious problems that now routinely attend libel litigation: the difficulty that jurors have in figuring out what "actual malice" means. (In public official or public figure libel cases, there must be proof not only that a story was false, but that it was published with knowledge that it was false or with serious doubts of its truth.)

Although the verdict on that aspect of the case ultimately was in *Time*'s favor, it took the jury a full week of deliberation to deal with it. Judge Sofaer's six-page verdict form for the jury was more than half devoted to that issue; the jury, he wrote, had to ponder three separate questions before it could resolve the "malice" issue.

That the jury could decide the malice question *Time*'s way, even after finding the magazine story false and defamatory, may be more a tribute to the intelligence of that particular jury than to the workability of "actual malice" as a standard by which to measure press performance.

Lyle Denniston covers the Supreme Court for the Baltimore Sun.

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JDs v. MDs:  
Redistributing  
the Wealth

In recent days the fighting that normally goes on between doctors and lawyers has become increasingly intense. The issue, predictably, is that of the rapidly increasing awards to medical malpractice plaintiffs and the corresponding increase in malpractice insurance costs for doctors. The State Superintendent of Insurance in New York, James P. Corcoran, gave his department's approval to a 79% rate increase for one of the state's major medical malpractice insurers, and indicated that similar increases might be in store for the other insurers throughout the state. The new rates weren't very pleasing to the doctors and on February 27 the *New York Law Journal* reported that three Bronx physicians went to court to prevent the rate-hike, claiming that the insurer in question had a \$17.3 million surplus in 1983.

The rate-hike announcement was followed by a February declaration by the American Medical Association that the medical malpractice problem has reached "crisis proportions" and a call

for a number of legislative reforms, including a cap on "pain and suffering" awards, and, pointing a finger of blame at lawyers, limits on legal fees.

Some states, like California, have already begun placing limits on malpractice awards. In New York, Governor Cuomo and spokespersons for both houses of the Legislature have announced that they are working on legislation to address the issue during this legislative session. In fact the State Senate, on February 20, passed its version of a bill that would, among other things, allow judges to assess up to \$10,000 fines against plaintiffs who bring suits that are ruled frivolous, and would require that all but the first \$100,000 of any "pain and suffering" awards be paid to a successful plaintiff over their lifetime instead of being paid in one lump sum. The legislation has not yet been considered by the Assembly.

Some lawyers and law professors are supporting a system of fixed damages for particular injuries. The attitude of many lawyers, however, was summed up by one New York plaintiff's attorney who said, "the way to solve the 'crisis' is for doctors to practice better medicine, not to reduce the rights of their victims."

## Justice for the Poor

On February 27, 1985, the Supreme Court held in *Ake v. Oklahoma*, No. 83-5424, that a state must provide an indigent criminal defendant with a psychiatrist if the defendant demonstrated that her or his mental state at the time of the offense will be a significant factor at trial. In expounding upon the due process guarantee of the 14th Amendment, Justice Marshall wrote for the court that "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."

In determining whether a state must provide an indigent defendant with any form of assistance, the court balanced the state's costs in providing assistance against the gravity of the harm to the defendant and the likelihood of the

harm occurring without state assistance. The court, noting how many states have already provided psychiatric assistance to indigent defendants, dismissed the state's argument that it would be financially overburdened by a similar program. Further, the court held that where the defendant's state of mind was an issue, the likelihood and gravity of harm to defendant's life or liberty outweighed the state's economic burden.

While the concurrence of Chief Justice Burger expressed a desire to see the holding limited to capital cases like *Ake*, the court's opinion makes explicit that states must provide psychiatric assistance in non-capital cases as well. Undoubtedly, the test formulated by the court will be used to increase the forms of expert assistance that a state must provide to indigent criminal defendants.

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Cheating on  
the Bar Exams

It seems one Minnesota judge had gotten a little too used to turning to his law books to help him make a correct judgment. According to *The National Law Journal* (March 4, 1985) a three judge panel has recommended that Minnesota Supreme Court Justice John J. Todd be removed from the bench for cheating on the Multistate Bar Examination he took in 1983. Todd claimed the test administrators led him to believe, of all things, that

the test was an open book test.

Some of his colleagues were mystified by the judge's actions since, as a judge, he was a supervisor of the state's bar exam system, and during the seventies he had chaired an American Bar Association Professional Responsibility subcommittee on judicial discipline.

The panel's ruling to remove Todd from the bench will be reviewed by the Minnesota State Court of Appeals.



# EDITORIAL

## Is the Commitment Symbolic or Real? Day Care is the Cutting Edge

The time for day care is now. For over a year the administration has surveyed, re-surveyed and even hired an expert to study the issue. Now it shows signs of wavering because of an alleged lack of need. There is no lack of need. The administration should move swiftly to implement the recommendations of its own consultant.

A study of the feasibility of in-house child care at BLS reported that an "ideal" program could accommodate 20 preschoolers. Start up expenses would run BLS \$23 thousand. Parents would pay under \$3200 per annum to cover the program's yearly operating cost.

The Day Care Center Advisory Committee will make its recommendation to Dean Trager based partly upon the study's assessment of the need for childcare as measured in a survey of the BLS community. Dean Haverstick and the consultant who prepared the study noted that "the response to the survey was poor and indicated lack of interest."

The response to the survey was *not* poor nor did it indicate a lack of interest. In fact, the data are being incorrectly interpreted. The pre-school program can only accommodate 20 children; the study showed 31 are eligible. In short, even though there are more enrollable children than places to put them, the program's opponents still insist there is no need for child care! The consultant, however, concerned about the number of enrollable children, recommended that BLS sponsor a program.

Out of 325 people surveyed, 27 are parents with pre-school aged children. Since the administration does not know the total number of parents in the BLS community, it follows that even if those 27 respondents represented 100 percent of those able to use the program, the administration would not know it. Hence, the administration may be unaware of a potentially significant factor in favor of the program. That is, every last potential user of the service may have been accounted for and be in favor of the plan.

It is ludicrous to say that day care should be determined solely by the number of

people who returned questionnaires containing favorable responses. For example, if all 1300 questionnaires were returned with favorable responses, should BLS sponsor a program, if no child was eligible?

The true measure of the need for day care is the presence of those 31 eligible preschoolers. (A number consistent with Professor Minda's survey which revealed 36 eligible children.)

Whether 75 percent of 1300 questionnaires were not returned is absolutely meaningless, because that statistic means 75 percent would be happy regardless of how the administration decides—it does not mean 75 percent are opposed to daycare. Essentially, this means the administration is being given *carte blanche*, in which case it is the decision maker's understanding of the big picture, the social significance of day care, which will determine whether the statistics will be considered in the light most favorable to the proposal. These statistics should pose no difficulty for an administration committed to equal opportunity.

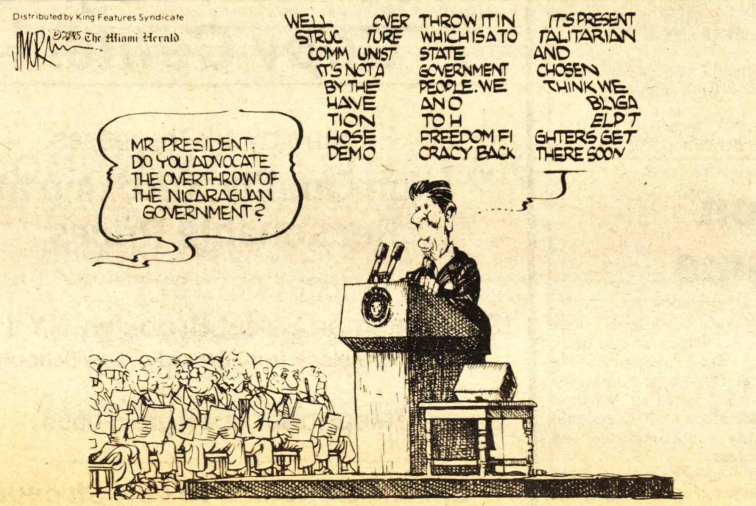
The administration has made some very sizeable efforts directed at attracting top quality faculty and students to the law school, including the recent purchase of a harbor-view Heights apartment building. Now that all of the surveys are finally complete, we think the administration should seize the opportunity to demonstrate that BLS is a forward looking institution, and that its recent actions reflect nothing short of a long term commitment toward a more progressive learning environment.

Seeing that there are between 31 and 36 children waiting for 20 available openings, does it make any sense to say that there isn't any interest or need for this program?

For those wishing to lobby the Day Care Center Advisory Committee, its members are students, Theresa Begley and Cynthia Dachowitz, Professors Fullerton and Minda and administrators, Dean Haverstick and Robin Siskin.

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# AXFORD

By Robert Axford

Sometimes, more than others, I feel ahead of my time. This semester, for example, my educational expatriation due to financial insufficiency will likely be one of many in the coming years. If our current leader has his way, that is. Then, academia can return to what the CAPITALISTS always desired it to be before the LIBERALS ruined it with notions of equal access; namely, elitist bastions which serve to weed out the riff-raff.

One study disclosed that as many as 40% of all those now attending secondary schools would be forced to drop-out as a result of Reagan's scheme. For those unaware, his proposal is to preclude all those whose family income exceeds \$30,000 from receiving any guaranteed student loans (GSL). Moreover, Reagan seeks to limit the total amount any student could receive to a maximum of \$4,000 per year. How one without assets is supposed to matriculate at an \$8,000-per-year institution (about average for private schools) escapes me. But, then, the logic behind much of the current administration's policies escapes me as well.

Secretary of Education William J. Bennett, demonstrating the sensitivity that is the hallmark of Reagan's regime, has justified the cuts by concluding that higher education is not a good buy anyway. (The market value of knowledge was never clarified.) He asserted that American students are getting "ripped off." While this may have some validity to it, it is beside the point. It's like consoling someone who has been mugged by relating that the mugger will likely waste the twenty dollars that was stolen, so not to be bothered.

Bennett further explained that if his son (presumably he has no daughter, I hope) opted to use the \$50,000 dad had set aside for a "Harvard education" (where else?) for an investment in a small business, then the Secretary might not think that a bad idea. Bully for him, I say. Me, I'd take the fifty grand and travel with it, but, again, that is not the point. Most potential students are not

JEFFREY HART

## An Anti-Sex League?

Until recently, the argument over abortion had seemed fairly straight-forward. The "Right-to-Life" people believe that the fetus is a human being and that abortion, the "taking of innocent life," is therefore wrong. Of course there are variations. Some argue that the genetic formation of the fetus is incomplete until about 15 days have passed. Many make exceptions in the case of rape or incest and so forth, but the broad outlines of the position are clear. Indeed, it has recently acquired a

## THE JUSTINIAN

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# OH BROTHER, CAN YOU SPARE EIGHT GRAND?

ered that \$50,000, unless mom and dad have  
ity up the kazoo. A dictator from South  
erica would have an easier time, but that's  
ther subject. Uncle Sam must co-sign to make  
banks feel secure. Even with a free-market loan,  
interest rates with immediate payment would  
y the would-be student before she or he even  
duates.

When asked how the non-wealthy were supposed  
afford secondary education, Bennett recom-  
ended that students sell their stereos or skip their  
two-week vacation at the beach. The flippancy of  
response aside, Bennett's rhetoric is quite inane.  
ile I have not taken the alleged two-week  
ation since entering school, I do plead guilty to  
ining a stereo. It cost \$500 five years ago while I  
a PRODUCTIVE member of society; i.e., a  
-time wage slave. With luck, I could get \$250 for  
For argument's sake, I'll deduct a two-week  
urn to the shore, which saves me \$700. That  
akes \$950. Am I close yet, Dean Trager?

Of course, Bennett means we must divest our-  
selves of all unnecessary material goods and ex-  
cesses, not unlike Siddhartha, I guess. I own a 15-  
h black and white television—perhaps \$20 at a  
age sale. I could sell my extra pairs of shoes,  
ugh sneakers are a necessity. I have a pet dog, I  
mit it; she was adopted through the A.S.P.C.A.,  
she eats regularly, which is more than many  
mericans can say these days, sadly enough. But,  
t Nixon before me, I will not give up my  
eckers.

Surely, this administration believes that the poor  
middle class do not belong in institutions of  
her education. They should be out in the work-  
ce providing Corporate America with its cheap  
or force. An education past reading and writing  
ght encourage the proletariat to aspire to heights  
idedly outside their particular station in life.  
I've all heard "Let Reagan Be Reagan." His  
dent-aid proposal only expands that concept: let  
rich be rich; let the poor and middle class  
pete for the privilege of being indentured  
ants. Now that's good old capitalism at work.  
family farmers are also taking a beating, I un-  
stand. Apparently, food and knowledge are not  
dgetary priorities. Weapons and tax-cuts for the

verful weapon in the movie "Silent Scream,"  
ch uses new photographic techniques to show a  
etus being aborted. After seeing the movie,  
sident Reagan commented that the shocking  
ures render all other considerations irrelevant.  
he other side, "Pro-Choice," maintains that,  
ether or not the fetus is a human being, a woman  
the right to control her own reproductive process.  
o far, so good. Things seem clear enough. But  
e are increasingly frequent signs that many in the  
ght-to-Life" movement have a secret agenda,  
ch is nothing less than to counter-revolutionize  
emporary sexual behavior. Many "Right-to-  
ers" are against both abortion and birth-control.  
hus, in a recent interview, Joseph Scheidler, who  
ead of the Pro-Life Action League in Chicago,  
his cards on the table. "I think contraception is  
usting," he said, "people using each other for  
asure." Mr. Scheidler is of course a major  
moter of the "Silent Scream" movie, but his view  
things goes far beyond the pain suffered by the  
is or the principled protection of innocent life.  
lost people in the pro-life movement," he says,  
ave a certain morality and believe sex is not for  
and games. So we wouldn't condone con-  
ception."

Mr. Scheidler is also opposed to sex education in  
schools. "There are some things kids should  
ow, but we would disapprove of giving them  
aphernalia and pills and things so they can have a  
tly active sex life. People aren't dogs."

Mr. Scheidler clearly believes that sex should be  
efined to marriage, and that even within marriage  
h control is ruled out. Sex is for procreation and  
as he puts it, "fun and games."

he trouble with that view is that it has never been  
d by any substantial number of people, and is  
tainly not held by any significant number of  
ple in the Western world today. All of literature  
art testifies to the fact that sex has meant many  
ings and has scarcely been confined to procreation.  
an express love, it can be an art form and express  
ativity, it can be pleasurable; indeed in some  
ges of Western culture, as in ancient Greece, it has



rich, now we're talking about the necessities of an  
ordered and just society. Even if a new study shows  
that 20 million Americans are starving, we know  
right from wrong. (Or is that right from left?) It all  
makes sense, really. The MONEY people know that  
a well-fed lower class only expects more from their  
society. Remember the 70s? As any doctor will  
attest, malnourished students are bad students,  
mentally slower than their satiated upper-class  
counterparts. Thus, to stimulate the economy, to  
make it really trickle-down, children—and some  
adults—must starve, or, at least, be clinically  
malnourished.

But, I keep forgetting, AMERICA is back.  
There's a new optimism in our land. I guess the  
hungry are a necessary by-product of a healthy  
economy, right Mr. Stockman? The homeless a  
result of a FREE market at work, making America  
better for everyone. And higher education for the  
rich alone is simply sound educational and fiscal  
policy-making, and let's not hear those spoiled  
middle-class kids with their stereotypes and two weeks  
at Point Pleasant bitch. I know. I know. But, still, I  
can't help thinking that America is being run by a  
bunch of greedy bastards who love to tell you it's  
good for you as they screw you. ■

had an aspect of Dionysian religious ritual.

A couple of years ago I was on a call-in radio talk-  
show in Boston, and a man on the panel made the  
observation that pornography "trivializes sex." A  
few moments later the phone rang and a woman  
listener was on the other end. "I like trivial sex," she  
said.

In Washington, D.C., there is a pro-life coun-  
selling service named Birthright, which provides  
pregnancy tests, medical services, and encourages  
pregnant women to give birth. When asked whether  
Birthright provides birth-control advice, one of the  
counselors at Birthright replied, "Oh, no. We don't  
give out information about birth control. It's in our  
charter not to tell them things like that."

Well, for those of us who have been taking the  
Right-to-Life movement at face value, there is an  
obvious contradiction here. If you oppose the taking  
of innocent life and if you are deeply concerned  
about fetal suffering, well, logically, you ought to be  
for birth control.

But for some Right-to-Lifers there seems to be a  
quite different agenda. Their target is nothing less  
than widespread contemporary sexual practice. It  
would be easy to say that they have in mind a  
counter-revolution against the "sexual revolution"  
of the 1960s, but I have always thought the Sixties  
sexual revolution was over-rated. Sex got into the  
media, porno magazines sold widely, people were  
generally franker about sex and homosexuals became  
more open. But I doubt that actual sexual behavior  
changed much from that studied in the 1948 Kinsey  
Report. Or that studied by Peter Gay in his recent  
work on Victorian sexual morality. Or that depicted  
by Chaucer and Shakespeare.

From that perspective, what at least some Right-  
to-Lifers have in mind is anything but conservative.  
It is nothing less than a revolution against actual  
human behavior, and as such it cannot but be  
damaging to their overt agenda, the campaign  
against abortion.

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VINTAGE BROOKLYN, USA:  
A picture of the BLS  
neighborhood at the turn of  
the century. In the fore-  
ground stands Borough  
Hall, then known as City  
Hall. In the background, a  
courthouse once stood on  
the lot now occupied by  
Brooklyn Law School. The  
postcard, postmarked 1905,  
was supplied by Marcel  
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# LETTERS

## Taking Notice Of An Injustice

To the Editors:

There are many daily occurrences that go relatively unnoticed at BLS. The unwarranted removal of an executive board member from the *Brooklyn Journal of International Law* on February 1 is one such event which must not be "swept under the rug" simply because it illustrates the often unpleasant realities of the "politics" of daily life. It was I who was removed as Symposium Editor by the *Journal's* executive board, and because no one else (including the Administration) saw fit to do something tangible about this situation, I alone must act, albeit limitedly, with regard to this abuse of authority—that is, inform the BLS community of the event, in the hope that the same fate will never befall one of my peers.

I was selected Symposium Editor by the outgoing editorial board of the *Journal* last spring. This newly created executive board position was to be an independent post; independent, meaning that I was to be in charge of developing, organizing, and orchestrating a symposium. Last spring, I developed the topic, entitled "The Extraterritorial Enforcement of U.S. Securities Laws." The date was set for March 27, 1985. After countless hours of research, writing letters and telephoning academicians, practitioners, and other prominent lawyers, by mid-November, I obtained a commitment from persons who were to act as moderator, principal speaker, and three out of the four panelists. By the end of November I had also developed an invitation list of close to 2000 names.

Throughout the organizational stage, which continued through the end of January, I was never informed by James Meade, the Editor-in-Chief, or Richard Goldstein, the Managing Editor (the only two *Journal* members who held positions of higher rank than mine), that my performance had been unsatisfactory. In fact, with the Symposium only seven weeks away, everything was in order; only nominal tasks remained (post-Symposium duties would involve mainly the publication of the Symposium volume).

Notwithstanding the fact that I had performed admirably as the *Journal's* first Symposium Editor, Meade called me at my home on January 29, informed me that he could no longer "get along with me," and asked for my resignation. Stunned and outraged, I went to school the next day to speak with Meade, in order to discuss the problem he was having. Nothing came of the meeting; I am convinced that Meade never intended to resolve anything. The following day I returned to once again try to have a discussion with Meade. Instead of compromise, I was confronted with an ultimatum: I had the options of being demoted to a primary notes editor position, resigning, or facing removal by a two-thirds vote of the executive board in accordance with the *Journal* by-laws.

I decided that I would not resign nor agree to demotion, as I had done nothing wrong. I was enraged by the covert manner in which this whole matter was being handled (to date, many *Journal* members remain uninformed of this outrage).

Most of the board felt that if I really cared about the *Journal*, I should resign or agree to demotion, and not defend my rights.

The board proceeded to offer a compromise. They would vote for

### LETTER POLICY

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removal, but then vote to reinstate me as Symposium Editor, but the position would now be relegated from the executive to the editorial board. My responsibilities and authority would be reduced. I did not want to agree to a demotion, because I felt it was compromising my position; but, trying to be the "team player," I agreed to accept the offer. It seemed that with the exception of me and two other board members, no one else had enough gumption to stand up to Meade. After all, how could they vote to remove someone who had not been derelict in her duties, just because the Editor-in-Chief wanted them to?

I decided not to accept their compromise. I wanted a full reinstatement and an apology. If that was refused, I wanted a letter stating that I had been removed without cause, but rather, for a personality conflict between Meade and myself, which he deemed unresolvable. Further, I

wanted proper acknowledgement of my work on the Symposium in the program for the event.

It was not until three weeks later that I received any response, albeit a totally unacceptable one, from Meade, despite constant visits to Dean Johnson, and correspondence with the *Journal*. Dean Johnson assured me on several occasions that he would look into my problem. This February 21 letter, signed by Meade, stated that I had been removed as Symposium Editor "in the best interests of the *Journal*." The letter also contained the following, which was supposed to meet my request for acknowledgement in the program: "The *Journal* would also like to recognize the efforts of Jan Sigmon in the preliminary organization of the Symposium." The letter made no mention of the real reason for my removal—a personality conflict, with which the Editor-in-Chief refused to deal. Moreover, without my endeavors, there would have been nothing closely resembling a soon-to-be-put-on Symposium. I strongly resented the lack of appreciation which the supposed "acknowledgement" showed.

I now find myself in a terrible bind. I do not expect the Administration to be

my "champion," but there has been inaction in every sense of the word, since my wrongful removal over four weeks ago. Absolutely no due process was followed. But for the ability of the BLS community to be informed of this travesty, I have, in effect, lost the battle and the war. I have worked hard during my three years at BLS, in my studies, my work for Moot Court, and, until my removal, for the *Journal*. Despite the fact that the *Journal* is a student-run publication, when there has been an abuse of authority which results in the violation of a student's due process rights, the Administration must intervene.

My intention herein was not to cast aspersions. Rather, I believe that certain principles, i.e. those of adhering to rules of procedural due process, must be supported and enforced by the Administration, despite the Administration's "hands-off" policy with regard to student-run organizations. If a student-run publication, like the *Journal*, cannot properly conduct its affairs, it is unequivocally the responsibility of the Administration to intervene.

Jan Alison Sigmon  
March 6, 1985

# Once is enough!

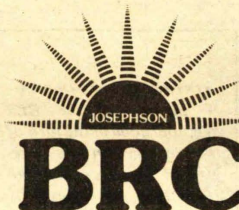
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# Journal's Response to Sigmon Letter

To the Editor:

Contrary to Jan Sigmon's statement, her removal as Symposium Editor was not undertaken lightly or for personal reasons. As the Journal's Executive Board, we found the task both difficult and unpleasant, but felt that our action was necessary for the good of the *Journal*.

This is not, in our opinion, an appropriate place to discuss the events leading to Jan's dismissal. We would like to note for the record, however, that our memory of what occurred differs substantially from Jan's account.

Finally, although we feel it is unwise to invite or expect the administration to involve itself with the staffing decisions of student publications, the *Journal's* faculty adviser was contacted both before and after Jan's removal, and we would be happy to meet with representatives of the administration at

any time to discuss the reasons for our action.

The Executive Board  
Brooklyn Journal  
of International Law

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et al.: The Justinian

## LETTERS

## In Praise of Elderly Clinic

To the Editors:

As graduating students, before we go we wish to convey a few words of wisdom to our first and second-year colleagues about an opportunity Brooklyn Law School offers that should not be overlooked. Specifically, we write to highlight the one law school experience which will serve us in our personal as well as professional lives: our year at the BLS Legal Services Corp./The Senior Citizen Law Office, known locally as the Elderly Clinic.

The Elderly Clinic is a rare commodity. It is one of the only in-house clinical programs that the school offers; this takes on significance because Brooklyn Law School students become involved in a creative and supportive atmosphere, undiluted by the typical law office alienation that too often

passes for professionalism in most work environments. At the Elderly Clinic we were neither human cogs in a legal machine nor were we temporary guests in someone else's office. To the contrary, BLS student interns are part of a Brooklyn Law School tradition that began in 1977 and which has since evolved into a kind of extended family of lawyers and law students (the annual Christmas party, which brings together current and former interns, is symbolic of the importance of the on-going tradition and dedication that the interns feel as a result of their experience in the clinic).

The staff attorneys in the Elderly Clinic, as employees of Brooklyn Law School, spend extra time with the BLS student interns, coaching them as to the technical and personal points one needs to operate a full service law office. Weekly seminars which stress interviewing and negotiating skills, while covering the substantive areas of housing law and government benefits, supplement the day to day work. Such personal attention provided us with a perfect transition from classroom theory to practical knowledge that most of us will require when we leave BLS.

The Elderly Clinic is also a challenge. One has to develop skills in the context of dealing with the lives of older Americans living in New York City. Interns with foreign language skills or social service backgrounds are able to use their prior experiences in their newly chosen career. In terms of experience in learning the law, the Elderly Clinic provides BLS students with the opportunity to work with substantive and procedural law in both state and federal courts, as well as in administrative agencies. In terms of learning about human relationships which give rise to legal problems, an experience at the Elderly Clinic leaves no student unmoved. For the first time in our professional lives, actual clients looked towards us to resolve disputes which they themselves were unable to resolve. After one year of conducting intake interviews, fair hearings, negotiating with opposing counsel, landlords, or just weeding through government bureaucracies, we now feel a sense of accomplishment and maturity as professionals that cannot be equalled.

The point of this quasi-personal, quasi-newsworthy missive is to give recognition to a program which served us well. Our sense is that many students at BLS know very little about how the Elderly Clinic works, and we would like to encourage more of you to inquire into the possibility of becoming student interns in this program. If you are interested in developing skills for lawyering which will bring you into contact with real people in the real world, you will discover treasure trove in Brooklyn Law School's Elderly Clinic.

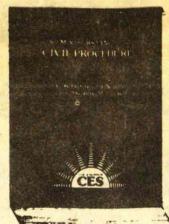
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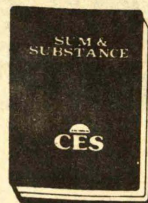
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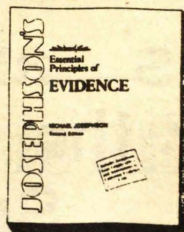
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## Koch on Grand Jury

Continued from page 1

for grand jury proceedings that now take place behind closed doors. This would further burden court dockets already crowded by repeated adjournments which lead to dismissals because witnesses and complainants just don't have the time or energy to return to court, adjournment after adjournment. The current court backlog is so extensive that only one-half of one percent of misdemeanor cases go to trial. New York City district attorneys prosecuted almost 26,000 felony cases in 1983. The courts would be swamped if asked to take the place of grand juries and hold 26,000 preliminary hearings as well.

Others complain about the secrecy of grand juries. Secrecy, however, is a grand jury's most important feature because it protects witnesses who are testifying against those charged with felonies. If preliminary hearings replace grand juries, fewer complaints may be brought because witnesses fear intimidation or reprisals. Families, friends, and cohorts of the accused will be able to see, hear, and identify complainants and witnesses much earlier in the criminal justice process. This increases the opportunities for and likelihood of threats and intimidation. The only beneficiaries of making complainants and witnesses vulnerable earlier in the process are those charged with crimes.

Requiring earlier appearances in open court would also heighten the already traumatic effect of being the victim of or witness to a crime, particularly for the elderly, the handicapped, or the young. Publicly facing the accused and being cross-examined just days after being victimized will exacerbate their fear and trepidation.

The proposed legislation would also substantially increase the burden of proof at preliminary hearings by requiring the prosecution to establish each charge in the court of public opinion. Under present law, a prosecutor need only demonstrate that there's reasonable cause to believe the defendant committed a felony. With additional burdens upon the prosecutor, the time it would take to conduct felony hearings would increase dramatically, from the 15 to 20 minutes it generally takes under present law to at least an hour, as indicated by California's experience under a similar law. Can we afford even longer delays in bringing the accused to trial? I don't think so.

At a time when all criminal justice agencies and the Legislature are working to reduce court backlogs and adjournments and to control jail populations by shortening the periods necessary for pre-trial incarceration, the proposed changes in the grand jury system would be steps in the wrong direction.

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# Marino on Grand Jury

Continued from page 1

One hundred years after California took its initial step toward grand jury reform, we find that half of the 50 states have now instituted systems under which it is optional whether a case goes before a grand jury or proceeds upon a prosecutor's written accusation and a finding of reasonable cause after a preliminary hearing.

Even among the remaining states which still require a grand jury presentment, six do so only in cases in which the charge could result in the death penalty. Fourteen states, including New York, require indictments in all felony cases and only four require grand jury indictments for all crimes, including misdemeanors.

New York has thus become a pivotal state in the on-going reconsideration of the appropriate role of grand juries. Enactment of reforms in New York at this point would not only greatly improve our own judicial system but also tip the numerical balance of reform states to expedite similar reevaluation and open debate in the remaining states which have not as yet seriously addressed this issue.

To speak more specifically, the reforms I recommend in our own state are embodied in a proposed state constitutional amendment which I and Assemblyman Ralph Goldstein of Queens have introduced in the New York State Legislature.

Our proposal would limit and more clearly define, though not wholly eliminate, the function of a grand jury within the judicial process. The need for a grand jury to convene and return an indictment would be replaced by a judicial hearing for all felonies other than homicides. Judges would still be allowed to have a matter presented to a grand jury if the need exists to protect the identity of a witness, such as an undercover investigator, or if a prosecutor argues successfully that a courtroom appearance might prove too traumatic for a witness. Grand juries would also be retained to investigate and return indictments prior to the arrest of suspects as they now do in cases such as inquiries into organized crime activity or official misconduct.

In 1973, a state constitutional amendment was passed allowing a defendant to waive the right of grand jury consideration of his or her case and to plead guilty to a prosecutor's information. That waiver provision would be retained under the Marino-Goldstein amendment as would the right of either the defense or prosecution to request a grand jury.

A major collateral benefit of the shift to a preliminary hearing system is that such a change would significantly address the problems raised by grand jury immunity and its abuse. At the present time, the Legislature is preparing to grapple with the issue of transactional versus use immunity but, under a preliminary hearing system, the question would not arise in most instances because a majority of felony cases would not go before a grand jury. District attorneys who sometimes face an irate public in the wake of broad immunity given or claimed by witnesses before a grand jury should consider this advantage very carefully before leaping to the defense of the status quo.

The amendment would also require greater professional discipline for those prosecutors now content to bring a weak case and a fistful of possible charges before a grand jury in the expectation, usually justified, of almost routine acquiescence by that panel. This amendment offers the chance for grand jury proceedings to lose the onus of being viewed as little more than a "rubber stamp" for prosecutors, a reformation of mission and reputation long overdue.

Supreme Court Justice William O. Douglas noted this very deficiency in the grand jury system in 1972. Quoting the opinion of a lower court, he said, "Any experienced prosecutor will admit that he can indict anybody, at any time, for almost anything, before a grand jury." If that statement is even partially true, then clearly the grand jury system is in desperate need of reform.

The other side of the coin is that grand jury indictments are often regarded as tantamount to a criminal conviction by the general public, to the immediate and serious detriment of the career and reputation of persons who have yet to face an accuser in open court.

In a grand jury proceeding, no impartial judge presides, no press or public is invited to witness the proceedings, no representation is accorded the accused and no counter argument or cross examination of a prosecutor's assertions or witnesses is heard.

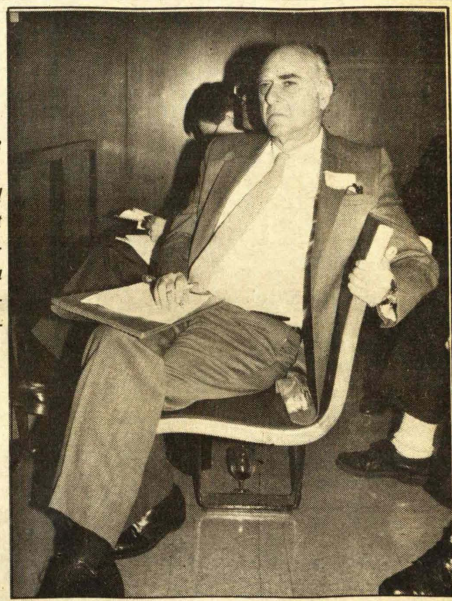
In a preliminary hearing situation, an impartial judge presides, an opportunity to cross examine witnesses is accorded the defense, and the whole of the proceeding is open to public scrutiny.

The modifications I am proposing have now garnered the support of an impressive array of organizations and individuals knowledgeable in the area of criminal justice. Included are the Committee for Modern Courts, the New York State Federation of Police, the Citizens Union of New York City, the New York Civil Liberties Union and, in support of the basic concept, such distinguished jurists as the newly appointed Chief Judge of the Court of Appeals, Sol Wachtler.

The case for reform was also summed up rather succinctly in 1982 in a letter to the Committee for Modern Courts written by then-gubernatorial candidate Mario Cuomo: "From experience in other states, we know this reform works. It is less expensive and time consuming. It will speed up the processing of felonies. It will increase the productivity and efficiency of the criminal justice system."

That strikes me as one of the soundest opinions the Governor has expressed on criminal justice matters and I welcome him, as well as the students and alumni of Brooklyn Law School, to the cause of reform of this state's grand jury system. ■

Chief Judge Jack Weinstein, who presided over the Agent Orange litigation, in a thoughtful moment at symposium.



## Agent Orange

Continued from page 1

committee organized by the Plaintiffs' Management Committee.

The Agent Orange litigation began in 1979 with the filing of more than 600 cases involving some 15,000 plaintiff veterans and their families. The cases were consolidated into a single class action. In essence, the plaintiffs blamed a host of physical and mental injuries—among them, a high incidence of cancer and deformities in offspring—on exposure to a chemical known as Agent Orange. They named as defendants seven of the world's largest chemical manufacturers, companies that produced and marketed the product during the 1960s.

"Agent Orange" is the code name for a defoliant used by the U.S. army in Vietnam in an unprecedented spray campaign aimed at destroying the camouflage cover provided by that country's lush vegetation. The name derives from the orange-striped barrels in which the chemical was shipped overseas. "What is devastating about dioxin," says Bill Looney, a public policy analyst in New York City, "is that it is virtually indestructible. It is released into the environment; if it gets into the ground water it stays there, killing who knows what."

Nearly 20 years have passed since the opposition to the Vietnam War reached its peak. A whole generation of teenagers has grown up with little knowledge of that divisive conflict that scarred a decade of American history, and for most of the rest the war is little more than a bad memory. But for the veterans and their families who are plaintiffs in the Agent Orange suits, the subject is far from closed. And for lawyers and other professionals concerned with mass injury, the unresolved issues and implications of the recent litigation may signal significant changes for the future in terms of how courts—and society in general—handle this class of dispute.

One of the most interesting presentations of the evening concerned defendant identification and conflicts of law. Addressing these issues from the plaintiffs' point of view, Professor Twerski argued for the creation of a new duty that would impose upon the corporate defendants an obligation to warn the government not only about their own products, but about those of competitors as well. Twerski's theory stemmed from the idea that each

defendant knew its product would be mixed with the others, making identification of any individual defendant impossible for purposes of fixing liability. His argument, admittedly a novel one, provoked murmurings on the panel and an objection from defense attorney Mintzer. Twerski acknowledged that he had been forced to abandon this approach for the more traditional theory that a manufacturer has a duty to warn the public about its own product.

Twerski also addressed the conflict of laws issues raised by the litigation. The Second Circuit had held federal common law inapplicable, a ruling Judge Weinstein limited to jurisdictional matters in applying what he called "federal consensus law." Applauding his decision, Twerski commented that "Equity would demand a single rule. This theory of soldiers who stood shoulder to shoulder in the foxhole getting different treatment plagued the conscience of the court." At least in complex and mass disaster litigation, he added, domicile is not an adequate basis for assessing recovery.

On the other side of the dispute were problems of plaintiff identification. Speaking of these, Professor Sherman noted that causation is the traditional link between plaintiff and defendant classes. Whatever the policy arguments that favor fixing liability in the absence of direct proof of causation, he noted, this erosion of the central principle of tort liability could force a wider application of absolute liability—the end-run around traditional causation.

The evening wound up with Schreiber's presentation on emerging litigation. Schreiber identified several potential sources of mass tort suits, most notably video display terminals. "According to the Alliance for American Insurers," he said, "the exposure to asbestos is just a drop in the bucket compared to what we are seeing now."

Schreiber also forecasted gloomy developments in insurance. Tremendous losses in the insurance industry have forced a rewriting of policies to reduce exposure and coverage. The prospect of major companies with limited coverage is "an impending crisis in mass torts" that led Schreiber to counsel, "Mass torts may be a good field to explore, but bankruptcy is a sure bet." ■

Justinian • Page Fifteen



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