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The Suffolk University Law School Journal

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The objectives of The ADVOCATE are to publicize the activities and outstanding achievements of the Law School and to present articles by students, faculty and guest writers on timely subjects pertaining to the law.

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In Memoriam: Judge Frank J. Donahue

Frank J. Donahue, born in Needham, Massachusetts, on August 2, 1881, the son of a Civil War Veteran of Irish Immigrant Stock, died on August 24, 1979, at the age of 98.

Anomalous as it may sound, his death was untimely.

His intellectual, spiritual, and inspirational life was cut far too short for those who had had the enriched experience of having been touched by his wisdom, sagacity, learning, droll wit, dedication to the law and the judicial system.

He was in every sense a Renaissance Man. The fabric of his life was peppered by a concern to acquire more and more information of historical, literary, social and cultural matters.

He was a Catholic with catholic interests. The range of his interests, apart from the law, ran the gamut of a comprehensive study of the British Empire (he was thoroughly versed in the history of Ireland), the names of the Sovereigns, and their families, the dates of their reign, speeches by members of Parliament (much of which he could recite verbatim), the history of the law, of the Inns of the Courts, to a point when he was in his late 80's, a trip through the vineyards of France, and a study of the wines of France.

He was an avid reader. Up to the time immediately prior to his death he read the advance sheet cases, both State and Federal. In his later years, with the aid of a magnifying glass, he read biographies, legal articles, history and historical novels, current events, and he remembered all that he read. To the time of his death, he had total recall. Not the recall of senility where one remembers childhood events, but cannot recall recent events. Rather, the recall of a young brilliant student, which recall was a source of constant amazement to all who knew him.

As one who was an athlete in his youth, his interest in sports was constant. Up to the time of his illness he attended all of the Harvard football games. He never missed a Harvard-Yale Game, and in his 90's sat through foul weather in New Haven to root for his sons' Alma Mater. He knew the names, positions played, and plays made by the teams.

He attended most of the track meets and could tell the names of those who ran the dash, threw the javelin or the discus, and how many feet they threw it.

He knew the batting averages, the fielding averages, the earned run averages of pitchers in the professional leagues, the biographies of most all professional baseball players back to the days of the old Huntington Grounds in Roxbury. He was an aesthete. He loved art, good music, and he loved good food, good drink, and good company. He was an expert not only in the detecting the bad from the good, but without any trace of snobbery, avoiding the bad.

He savoured every new bit of information and stored it in that computer-like mind to be brought forth in a non-offensive and almost apologetic manner when the occasion demanded.

Elected Park Commissioner of Needham at the age of 21, Chairman of the Democratic Town Committee, the youngest Secretary of State (age 31) for two terms in 1913 and 1914, in 1928, he was elected Chairman of the Democratic State Committee after having been appointed as Chairman of the Industrial Accident Board and re-appointed by Governors Walsh, McCall, Coolidge, and Fuller, he never lost interest in the political scene.

No person or issue was immune to his honest and sharp analysis. Having been the confidant of Presidents and would-be Presidents, he knew all too well the frailities of human nature.

Because he was a person who had strong and fixed convictions, he would whenever he believed it to be in the best interests of society, point out the foibles of public officials with the hope that they would act more strongly in the best interests of good government.

On the Superior Court, where he served for over forty years, the longest term in Massachusetts' history, he became a legendary figure.

He was soundly grounded in the common law and abreast of the vast mass of statute law and of appellate court decisions with which a judge must be familiar. He loved the law as an orderly guide for society, but he was also understanding and sympathetic when the circumstances indicated the need for temperance.

His service on the bench had a unique quality. He became a living legend. Stories, many apocryphal, will be handed down from generation to generation of lawyers. Many will be replete with the laughter that he loved to hear and even to excite by way of self-criticism.

Busy as his life was, he was dedicated to and always maintained a deep and devoted interest and concern for Suffolk Law School and later, when it was established, Suffolk University.

It was his astute guidance both financial and academic which was in a large part responsible for the phenomenal rise in the prestige and accreditation of the law school and subsequently of the university. His interest and devotion to Suffolk never diminished even as his life span was ebbing.

There were and are many devoted to the growth and development of Suffolk, but in the final analysis the name of Judge Frank J. Donahue will always be synonymous with "Mr. Suffolk".

Let it be recorded that Suffolk University mourns the loss of Frank J. Donahue, Class of 1924, and especially mourns the loss of Frank J. Donahue, friend, leader, and teacher of all that is best in the human spirit.
A Status Report on Court Reorganization in Massachusetts: Interviews with Three Chief Justices

The interviews were conducted by John Q. Kelly and Donald E. Wynne.

I. Chief Administrative Justice
Arthur M. Mason

Advocate: The Massachusetts Law Review recently quoted Mr. Chief Justice Hennessey as saying "that essential in the purposes of court reorganization is a lessening of the present intolerable delays and dispositions of all litigation, specifically in the Superior Court Department." Are you implementing the act according to this interpretation and if so how effective have you been to date?

Mason: As the Chief Justice observed, a primary objective of the Court Reorganization Act is to establish a procedural framework within which to eliminate the backlog of cases pending in the Trial Court. It is generally acknowledged that during the past several years there have been a relatively limited number of Justices available to the Superior Court Department of the Trial Court. This has been considered to be a major contributing factor to the development of the civil case backlog. To achieve any progress in the area of case backlog, it is essential to implement those provisions of the Court Reorganization Act which will permit the transfer of judicial person power between the seven Departments of the Trial Court while not adversely effecting the operations of any particular Court Department. We have determined that it is necessary to transfer Justices to the Superior Court Department to increase the number of potential trial sessions from 55 to 73. These additional sessions will continue at least until we are able to reduce the backlog to a point of reasonable "pre-trial delay."

Unfortunately, the Court does not lack business and the definition of reasonable pre-trial delay is yet to be established.

Advocate: Do you feel that eventually you will be able to reach a balance between the number of sessions you have and the amount of time the lawyer needs before a case proceeds to trial?

Mason: Yes, we feel that at some point we can reach this balance. However, at this time we have not been able to definitively ascertain the number of legitimately active cases pending in the Superior Court Department. Currently our statistics show a backlog of approximately 76,000 civil cases in the Superior Court Department.

Advocate: Mr. Chief Justice, do you see the hiring of a more career-oriented-type person for support staff positions in the judicial department, for instance, in the Clerk's office?

Mason: The Court Reorganization Act does not specifically amend the process by which persons may be appointed to positions in the Trial Court. As a result, the Justices, Clerk-Magistrates, Registers of Probate and Chief Probation Officers retained their respective authority to hire employees.

However, the Act created an Advisory Committee on Personnel Standards comprised of the seven Administrative Justices, the Commissioner of Probation, a representative of the Clerk-Magistrates of the Superior and District Court Departments and Registers of Probate. The Committee assists the Chief Administrative Justice to formulate personnel policies and procedures for the Trial Court.

Chief Justice Arthur M. Mason graduated from Boston University in 1943. After serving for three years in the United States Army, he entered Boston University Law School in 1947. He received his law degree in 1950, and was admitted into the Massachusetts Bar in 1951. After serving for two more years in the Army, at the rank of Captain, he engaged in the general practice of law until 1957, when he was appointed to the bench. In 1973, he was appointed Chief Administrative Justice of the Massachusetts Trial Court.
Court. These include job descriptions containing minimum qualifications for a position as well as an Equal Employment Opportunity/Affirmative Action Plan.

Advocate: Mr. Chief Justice, what type of staff do you have available to deal with this enormous task of interpreting the Court Reorganization Act?

Mason: The Act provided that the Office of the Chief Administrative Justice was to become effective 90 days after the enactment of the Court Reorganization legislation. In the interim, the previously existing Office of the Executive Secretary to the Supreme Judicial Court was to provide staff support. At the expiration of the 90 days, the staff of the Executive Secretary was partially absorbed into the newly created Administrative Office for the Supreme Judicial Court with the remainder becoming a part of the Office of the Chief Administrative Justice. The Act provided further for the appointment of an Administrator of Courts for the Trial Court by the Chief Administrative Justice with the approval of the Supreme Judicial Court. Henry L. Barr, Esquire, was appointed to the position. We endeavored to structure an office that reflected the various management requirements of the Act. This included the development of personnel, fiscal, legal, facilities and research and planning departments. In addition, we absorbed from the Office of the Executive Secretary a data processing department. Although these departments are viewed as necessary to accomplish the objectives of the Act, we are required to perform our responsibilities with a limited staff. We currently have 32 State employees with more than half devoted to the areas of fiscal and data processing.

Advocate: Mr. Chief Justice, we are dealing with roughly a 128 million dollar budget for the Judiciary in light of the Act and the administrative proposals and changes, do you think that the budget is realistic?

Mason: The first unified budget submitted by Chief Justice Edward F. Hennessey on behalf of the Judicial Branch contained requests totaling 128 million for Fiscal Year 1980. Of that amount 110 million was requested for the Trial Court.

The budget request reflected an even line budget policy. That is, the funding level was similar to that of the previous fiscal year. There was no expansion for any purpose including new positions. The appropriation for the Trial Court was approximately 98 million of which several million were placed in reserve accounts under the direct control of the Secretary of Administration and Finance and the Chairman of the Ways and Means Committees.

In view of the severe fiscal constraints of the 1980 budget, we find that at this time basic clerical functions are being adversely affected. We will attempt to operate within our appropriations, but our task of successfully implementing certain provisions of the Act are severely hampered.

Advocate: Do you feel that with the number of Justices that you have, plus the number from recall and transfers, you will be able to implement the purposes of the Reorganization Act?

Mason: Yes, this will help. However, we cannot definitively represent, at this time, that the availability of recall Justices or transferability will eliminate the need for additional full-time Justices in the future to fully carry out the Act.

With respect to the current compliment of Justices, we have endeavored to allocate these resources to Trial Court Departments with the more serious caseload problems. As I expressed earlier, our resources under recall and transferability are being concentrated in the Superior Court Department. This cannot continue indefinitely if it is at the expense of the other Departments. We are carefully watching the jury-of-six statistics which relate the ability of the District Court Department to absorb its new jurisdiction pursuant to the Act. There are currently 19 jury-of-six locations among the 69 Divisions of the District Court Department. If a backlog begins to develop at a jury-of-six location, it will necessitate increasing the number of jury-of-six locations. This will minimize our ability to transfer Justices from the District Court Department to the Superior Court Department, recognizing the potential for simply shifting backlog problems from the Superior Court Department to the District Court Department where such pre-trial delay did not previously exist.

Advocate: Chief Justice Hennessey recently made a statement at the Alumni Law Dinner at Suffolk University that there has been an explosion in the family law area. Do you think this is going to have a significant impact on drawing reserves from the District Court level to the Probate level?

Mason: As with the jury-of-six statistics in the District Court Department, we are closely watching the pending caseload of the Probate and Family Court Department. It is clear that statutes like c. 209A relating to domestic violence has increased the number of entries in both the District Court Department and Probate and Family Court Department. However, it is our expectation that with sound caseload management techniques we will be able to effectively utilize the judicial personnel of the Trial Court. As an example of the flexibility developed to date, we have successfully utilized Probate and Family Court Department Justices in the Superior Court Department as well as Justices from several of the other Departments of the Trial Court.

Advocate: Aside from the problem of judicial manpower from the backlog, do you have any problem with the physical courtroom space?

Mason: Pursuant to Court Reorganization, the counties retain ownership of the courthouse facilities. The Act requires that the Chief Administrative Justice enter into leases with the 14 counties for the use of said facilities.

We endeavored to structure an office that reflected the various management requirements of the Act. This included the development of personnel, fiscal, legal, facilities and research and planning departments.
It is my position that the counties are required to maintain at least the same services as they did prior to Court Reorganization. To effectively negotiate leases to insure the maintenance of services, we have undertaken a comprehensive survey of all courthouse facilities. This survey will enable us to determine the adequacy and availability of courtrooms and will result in a report by a commission established under the Court Reorganization Act to the Chief Justice of the Supreme Judicial Court, the Governor and Legislature no later than June 30, 1980 recommending whether the Commonwealth should acquire by purchase or otherwise some or all of the courthouse facilities. We are fully aware that some of the facilities are inadequate and for the purpose of jury sessions are nonfunctional. Some of the structures in which the Superior Court Department conducts trial sessions are in excess of 150 years old. In addition to our concern for the physical condition of the facilities, we are attempting to gain more courtroom space to meet the increasing number of trial sessions.

Advocate: Mr. Chief Justice, is the intent of the Court Reorganization Act to change the traditional community atmosphere of the District Court to that of a circuit Court much like the present Superior Court in Massachusetts?

Mason: It is my opinion that it was not the objective of the Act to totally remove the community atmosphere of the Divisions of the District Court Department. In fact, prior to Court Reorganization Chief Justice Zoll had utilized his assignment power to transfer Justices within the District Court Department to meet the needs of the individual Divisions. We continue to watch caseload imbalances between divisions as well as Trial Court Departments. To meet the needs of the larger divisions of the District Court Department, more traveling by Justices appointed to a specific division of the District Court Department will be required. However, this will be done with a keen awareness of the needs of the communities in which a division of the District Court Department is located.

Advocate: The Act gives you the power to promulgate rules to transfer cases from one division to another within the same or adjoining counties. Some members of the bar feel that perhaps you should also have more power regarding the consolidation of cases where one case may involve action in the Probate Court, the Superior Court and the District Court also. Do you feel that the rules of consolidation should be expanded beyond where they are now, and do you feel that your office should make more use of consolidation?

Mason: We are looking into that possibility. However, requests for consolidation have been few. It is accurate to state that the statute does provide for the transfer of cases based upon the rules promulgated by this office and approved by the Supreme Judicial Court. We are at the present moment looking at some form of transfer within the District Court Department in order to compensate for the limited judicial person power available in the various divisions. For example, it is feasible to transfer defendants to various divisions of the District Court Department for purposes of arraignment in those circumstances where a Justice is unavailable in the division with original jurisdiction. The case would revert to the original division for trial when a Justice is made available. We are evaluating these alternatives in an attempt to facilitate the movement of cases and to cause the business of the Court to go where the judicial resources are available while taking into account the needs of the public and the bar.

Advocate: Mr. Chief Justice, if the Judiciary budget remains the same for the next four or five years, do you see a forced consolidation in a sense because of the forced shut down of courtrooms due to financial reasons?

Mason: If the funds are not made available to maintain existing facilities and to meet the needs of expanding caseloads, it will become necessary to consider the consolidation of divisions of the Trial Court currently utilizing separate physical structures. The demands of the counties and other public and private entities owning the buildings give us some cause for concern.

If the funds are not made available to maintain existing facilities and to meet the needs of expanding caseloads, it will be necessary to consider the consolidation of divisions of the Trial Court currently utilizing separate physical structures.
in view of our limited inability to negotiate leases for amounts where the money has not been appropriated.

Advocate: Would you care to speculate where the major portion of an increased budget would be allocated?

Mason: At the present time we have an unqualified need for clerical/secretarial assistance. There are other areas in which additional appropriations are necessary. However, it has been determined that in order to adequately document these needs a resource allocation study is necessary. The study will concentrate on the state of equipment, including the availability of modern business machinery. In this current fiscal year no monies were appropriated for equipment.

Advocate: Mr. Justice Hennessey stated in the Third Annual Report on the State of the Judiciary: "I suggest that most of 1979 was a period of grace in preparation for proper response to expanded trial facilities; bench and bar share this responsibility to the litigants and to the public." Now that we are in January of 1980, is there anything that the bar can look forward to in terms of change from this point on?

Mason: This past year was a period of transition during which our energies were devoted to building the organizational foundation on which to construct a sound caseflow management program. Although the various organizational systems are in the process of being refined, we are undertaking a concerted effort to expedite the movement of cases. This is evidenced by the increased number of trial sessions in the Superior Court Department to which I previously referred. The impact of the speedier flow of cases, particularly for the civil business in the Superior Court Department should become apparent as a result of the additional trial sessions.

The impact of the speedier flow of criminal cases is already being observed as a result of the effective operations of the six-man jury sessions in the District Court Department.

In addition, the Administrative Justices of several of the Trial Court Departments have experimented with various individual calendaring programs which may be expanded during this year if they prove beneficial. All of these efforts, if they are to be successful, will require the full cooperation of the bar. In view of the continuing support of the bar which we have experienced during our first year of operation, we are optimistic about the positive impact that the caseflow management efforts will have for the public and the bar in 1980.

In view of the continuing support of the bar . . . we are optimistic about the positive impact that the caseflow management efforts will have for the public and the bar in 1980.
Chief Justice James P. Lynch, Jr. graduated from Holy Cross in 1943 and served in the United States Naval Reserve from 1943 to 1946. He graduated from Boston College Law School and was admitted to the Bar in 1949. After serving as a Law Clerk in the United States District Court for the district of Massachusetts, he engaged in the private practice of law from 1950 to 1972, (except for the period from 1953 to 1955, when he served as an Assistant United States Attorney for the District of Massachusetts). He was appointed to the Superior Court in 1972, and in 1978 was appointed Chief Justice of the Superior Court Department of the Massachusetts Trial Court.

Advocate: In Chief Justice Hennessey's 3rd annual report on the State of the Judiciary published in the Mass. Law Review this past fall, he mentions that central in the purposes of court reorganization is the lessening of the present intolerable delays in the disposition of all litigation, but in particular, civil litigation and specifically in the Superior Court Department. Were the delays intolerable, specifically in civil litigation?

Lynch: They were intolerable in a sense. I suppose any delay that means that a litigant can't get a case heard on the civil side within a reasonable time after the case is entered is intolerable. There was, and is now, in my view, a period of time in which it is not unreasonable to expect a case is probably not going to be reached, with some exceptions. I don't know what that time is, I would think probably 18 months is a reasonable period of time to let people conduct discovery, interview witnesses, and so forth. And if you run a great deal beyond that time, certainly at the outside two years or thereabouts, it probably becomes intolerable if you want to try that case. There was such delay before Chapter 478 and, unfortunately, there is such delay even now. I think it would be the ideal situation if everybody who wanted a trial could get a trial no later than 18 months after filing.

Advocate: Has the Act in the last year and a half decreased delays?

Lynch: Well, yes and no. It hasn't in and of itself decreased delays. I don't think it had the mechanism to be self-operative. What has been done is give greater flexibility in the use of judicial personnel and has helped put some judges in places where there is a greater delay than in other counties. When we have more people to handle the cases, the quicker we will get rid of them. But there is nothing in Chapter 478 itself that simply by pushing a button the day it becomes operative, makes the delays melt away. Still, to get rid of cases you have to get the parties at issue, get the judicial support personnel to try the cases, and you have to get a courtroom in which to put these personnel. We still do not have enough judicial personnel and we still don't have enough courtrooms. We have a legacy of a great backlog that we are working on despite Chapter 478 and the problem remains that, while we are getting rid of a lot of the old cases, we are still suffering from the fact that an equal number of cases, or even more, are coming into the pipeline. I watch the monthly statistics and I see that, for example, if we got rid of 500 cases in Suffolk County in the last month, 512 are coming in downstairs in the clerk's office. We will never really gain in that sense. We gain having eliminated a lot of old cases, and making a few litigants happy, but you have a lot of new people and new cases in the courts.

Advocate: You mentioned the amount of judicial personnel which you have. I think a lot of people are under the impression that because of the Act, and since it went into effect, there has been a large increase in the number of judges you have available. I don't think that is true. Would you like to comment on that?

Lynch: It's not true. The Act, as you know, provided that, in substance, the Superior Court would eventually get ten additional justices. Without getting into the mechanics of it, it's illusory to begin with. By virtue of the Act itself, we lost the day-to-day judicial services of Chief Administrative Justice Mason. Because of his many duties he simply can't sit at all and nobody in his right mind would expect him to sit. We are immediately down one, so that gives us a net gain of
When you take the diminution in the District Court personnel available, and the fact that we’ve waited quite a bit for our own additional judges, . . . we’ve been down the last year and a half in the number of judges we’ve had available.

nine. The problem with that is we still, even as we speak, haven’t had all of those judges. One of the judges of that number (including him within the nine net additional) was just confirmed, Judge Hurd. He isn’t yet available. Judge Mone has been on the bench a month or less. Really we didn’t get the bulk of those judges until last fall: September, October and November. They’re just coming on the bench now and becoming acquainted with their Superior Court duties. The minute that we seemed to be up to snuff again, we find that we will lose Judge Nolan to the Appeals Court and we don’t know how long we’ll have to wait again for a successor. The other problem has been that to the extent we have picked up a few of those additional judges, of our net nine, we have had less judges available to us from the District Court system to help us out. For very legitimate reasons, which I’m sure Chief Justice Zoll pointed out, he still now has a number of vacancies, which have not yet been filled. He has also had to make some adjustments in his department because they have taken on the six-person juries at the criminal end and had to readjust their schedule somewhat, so I am in no way critical of the inability of the District Court to give us as many judges as it used to. When you take the diminution in the District Court personnel available, and the fact that we’ve waited quite a bit for our own additional judges, we haven’t had a net gain and we have been down the last year and a half in the number of judges we’ve had available.

Advocate: When we talked to Chief Justice Mason, he talked about looking to set up 73 sessions in Superior Court. Do you think that is in the near future and do you think that is going to be enough?

Lynch: No, it’s not enough. The 73, as I’m sure he’d tell you, is my magic number which I came up with by sitting down and taking a look at each of the fourteen counties and deciding realistically, given the number of Superior Court judges I can expect and given the number of recall judges which we haven’t mentioned that will be available most of the time; and then with a very practical eye trying to figure probably the number of District Court judges I could count on as adjunct judges, sitting on the Superior Court. Then the other factor is the number of courtrooms available. What would be the ideal number of sessions that I could fill every month to keep those counties busy? I came up with the figure of 73. We haven’t gotten to 73 for the reasons that I have given you.* The most we’ve had up until now has been 69. When we get them, 73 will keep those courtrooms pretty busy and I think it will be pretty hard to say that we would be able to get many more than 73 simply because the District Court can’t be milked dry of all its people. We have to be aware of that. The number of recall judges fluctuates from time to time and depends upon the health and availability of all those judges. If I had them, I probably could take another seven judges; then I would just about run out of courtrooms even if we were using broom closets. In fact we are almost using broom closets in some places. Seventy-three seems like a number that we can operate with, it is a realistic number. It is not the maximum number, or utopian number, however.

Advocate: Traditionally, Superior Court operated on a state-wide circuit basis. It is my understanding that you may change it to more or less a regional system? Lynch: On January 2, 1980, a regional administration program began but that will not change the circuit system. What it will do, essentially, is make a Regional Administrative Justice responsible directly to the Chief Justice in each of the regions. We have five regions: Suffolk and Norfolk are one; Middlesex and Essex is another; Plymouth, Bristol, the Cape and the Islands are another; Springfield and the western counties another; and then by geographical or other accident, Worcester is all by itself, as “the heart of the Commonwealth” county. So we have five regions. In those regions, the Regional Administrative Justice will take more control of a lot of the scheduling matters that otherwise the Chief Justice would have to do. To see the theory behind this system let’s take the extreme example, geographically, of Region V which is Hampden, Hampshire, Berkshire and Franklin. There Judge Moriarty, who will be its first Regional Administrative Justice, knows far more than I ever would about whether Greenfield needs two jury sessions in May or one jury session and one non-jury session or no session at all. He has the feel of what goes on up there. He will, and this is just one example, have the authority to take the judges and send them a quota basis. He will also decide where in the region the best use of those judges is indicated. He will also have the authority, as will the other Administrative Justices, to appoint judges sitting within their regions for the particular month to capital or homicide cases or to suggest to my office whether particular cases ought to be assigned to a particular Justice or receive other special handling from that point on. They will be doing a lot of other administrative matters and planning within those regions. They will know best where the maximum use of judicial and other personnel is. I think it will be helpful. It doesn’t mean that the judges won’t be on circuit, they will. We’ve already lengthened out some of the trial sessions. We have discovered, I think, that it makes more sense to have a judge sitting two or three months in a particular county rather than moving every month. There is a lot to gain by having a judge who will be available for a longer period. The judges will still continue to ride the circuit, but on a less drastic basis. Particularly in the bad weather, they will be pretty much staying where they happen to live. For example, a Worcester judge would be more apt to be in the Worcester region for two or three months during the winter season, than otherwise. But in some regions there are more judges than there are courtrooms. We do have necessities, so it is
going to curtail the circuit system. I would say the vast majority of judges in the Superior Court system are strongly in favor of the circuit system. They would be opposed, as I would personally, to the abolition of the circuit system. So I don’t think we are going to see that; I think it’s going to strengthen the Superior Court by having the judges moving about. The bar, by and large, likes to see new faces and it’s a good thing to revitalize the bar and the judiciary by moving them around on different types of cases. I don’t think we are about to make any great changes in the circuit situation.

Advocate: Sir, you were speaking earlier about the benefits derived from the Act, being flexible and relocating justices where they are needed. Up until now you have mentioned geographical relocation where the cases are most burdensome. Now, under the Act, there is a transfer of justices among the courts also, for example, from the District Court to Probate Court. Do you feel that you are losing a certain amount of expertise transferring the justices from one court to the other?

Lynch: I think that transfer provision gives flexibility if it is used reasonably. So far it has been used sparingly and reasonably. For example, let me give you a situation that happened earlier this month. Judge Elizabeth Dolan was the probate judge sitting mostly in Middlesex, but she was assigned, I think, to the Islands originally. She had a case over there, a domestic relations case, which had been concluded except for some loose ends such as visitation rights and so forth. She then was appointed to the Superior Court. It turned out that just before Christmas there was a serious problem as to the visitation rights over the holiday. Now, under the old system, she had been appointed to the Superior Court and there was no way the Probate Court would have been able to retain her services. But by agreement of Chief Justice Podolski, Judge Dolan and myself, with a flick of Judge Mason’s pen she was reassigned to the Probate Court for the limited purpose of hearing that matter further on visitation rights. She became a probate judge again for a day, so to speak. By switching a judicial “hat” I’ve sat here in the Housing Court, without ever leaving this place to handle some Housing Court matters. We have had cases where Land Court judges have taken some of our matters just by the stroke of a pen. I think that there is a great deal more flexibility if you can do that. I don’t think you are going to see many Superior Court judges sitting in the small claims section of the District Court or that you will see Land Court judges sitting in capital cases in Superior Court. For example, take another instance we had with Judge Hurd. Well, it may be that while he is waiting to be sworn in, by agreement with Chief Justice Zoll, and again by the stroke of the pen, he could be transferred into the Superior Court to begin ahead of time. That could not be done before. But I don’t think you are going to see any loss of expertise. I think what you are going to see is a happy facility of transferring judges on an ad hoc basis back and forth. We still have, as we had before, the ability to have district court judges and other judges sit on the Superior Court. I don’t think that hurts anybody, I think the District Court judges like it, and it’s a salvation to us, we really need their help. We enjoy having them with us and it makes everybody feel better about it and it is helpful to the docket.

Advocate: You were talking about the amount of judicial manpower and flexibility gained. Another aspect of Court Reorganization is, (again this is from Chief Justice Hennessy’s report), the establishment of system wide court personnel standards, you mentioned earlier the support staff . . . Do you see many changes or gains through changes in support staff available and is it now going to be a different type of support staff? Are you going to be looking for more professional career people involved?

Lynch: I haven’t seen any major changes in that area thus far. My chief concern is caseload. Judge Mason’s office has dealt more with that type of change mandated by Chapter 478. I think that the jury is still out at this point. We lack experience as to the extent to which that phase of Court Reorganization is going to become helpful. I don’t think the Superior Court ever had a real problem with support personnel in the sense that people who work for them, the clerks and so forth, were not able people. I have never thought in my thirty years of practicing law that there was any problem in the courtroom atmosphere or the Clerk’s Office. They need more court personnel and they need more sophisticated advanced equipment, but I was never one who thought there was any great problem in that area. We need more courtrooms and more assistant clerks, more sessions and more judges, it all goes together. Certainly the Superior Court has needed, and will get, more secretaries and more support personnel in that sense. I haven’t noticed any huge upheaval.
I don't think there is any question that the Superior Court judges are underpaid. That is a matter of easy record to document.

Advocate: Chief Justice Lynch, would you care to comment on the pay rate of the judges in the Superior Court?

Lynch: I don't think there is any question that the Superior Court judges are underpaid. That is a matter of easy record to document. When Chapter 478 was passed the increase in salary in the Superior Court was much less by both dollars and percentage than the increases for the judicial personnel in all the other departments. I think if the truth be known, and it ought to be known, the Superior Court was not treated very generously under that Act so far as compensation is concerned. As far as I am concerned, there is no question at least in my mind that, because of the calibre and nature of the cases that the Superior Court Department handles, its justices ought to receive a greater compensation than the judges in the other departments.

That is not to say that the judges in the other departments are not entitled to the salary that they currently receive. But if one just takes a look at the jurisdiction of the Superior Court Department, one sees immediately that we handle the most sophisticated and complex cases of the whole Trial Court for which now, under the provisions of Chapter 478, we don't receive one cent more in compensation. I don't think that is equitable and I don't think it is fair. I think it has always been detrimental to the morale of the Superior Court. The Superior Court judges have always welcomed the opportunity to handle complex cases. We are the jury Trial Court in the Commonwealth. We handle all sorts of difficult matters, products liability, medical malpractice, homicide cases, all of the serious felonies, and all administrative matters that come down daily from the State House; and the proof of the pudding is that, whenever the legislature passes a new act, such as the recent Civil Rights Act or the Hospital Patient Bill of Rights, the Superior Court Department gets exclusive jurisdiction over those cases. I think the judges in the Superior Court Department, to a man and a woman, feel that they should receive recognition by some pay differential because of the cases they do handle. Now I would not take one cent away from any judge in any other department. I think they were long overdue for a pay raise, and I think they are presently at a reasonable rate for their departments, although I am sure it would not be unfair to give them more.

But the Superior Court Department suffered because the existing differential was wiped out, and we are not now receiving financial recognition for the work we are doing.

Advocate: Mr. Chief Justice, you mentioned the Civil Rights Act, to what extent will that expand the jurisdiction of the Superior Court?

Lynch: I don't think there is anyone on the Superior Court who knows at the moment or can say what volume of cases is going to be visited on our doorstep as a result of the very sweeping provisions of that Act. As I understand it, it goes far beyond the more modest provisions of the Federal Civil Rights Act and it's practically unlimited as to coverage. I expect that we will see a great deal of additional litigation. That is another example, as I say. We have been trying with might and main to get rid of the old cases in the pipeline and yet the legislature now favors us with a potential flood of new cases.

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Advocate: Do you foresee any further expansion of the jurisdiction of the Superior Court Department beyond the Civil Rights Act?

Lynch: Well, I am annually amazed at the ingenuity of the Legislature, which seems always able to find new areas for us to try, so I would not be at all surprised if we get new expanded jurisdiction. Medical malpractice tribunals are just another example of added jurisdiction. We get at least one of those a day, over 300 of those a year. That means a great deal of additional work for judges.

Advocate: This really isn't relative to Court Reorganization, but I know a lot of members of the bar are currently interested in the upcoming experiment in media access to courtrooms. For instance, TV cameras inside the courtroom. Would you like to comment generally on that?

Lynch: While I am on that committee, and I suppose the esteemed chairman of that committee is the one who should speak about it, I have generally been in favor of reasonable, structured use of cameras in the courtroom. I think that under an enlightened and reasonable set of rules the public will probably be far better educated as to what goes on in the courtroom. I have a hunch that the problem will be that the media will not find the run-of-the-mill trial very interesting, so the media may concentrate on a narrow range of cases, probably more criminal than civil. I think that under an enlightened and reasonable set of rules, the rules will have to be very careful, as I am sure they will be, to insure that the rights of all parties are scrupulously observed and that the media understands that there are certain things that go on during a trial that will simply have to be conducted without the scrutiny of the camera, just as a number of things are conducted in the courtroom these days without any pencil-press being privy to them. I am thinking of such things as side-bar conferences. You simply have to insure that matters that need to be taken up in some privacy continue to be treated in that way; and there will have to be some ground rules that are understood by all concerned governing touchy parts of the case, voir dire proceedings, and things of that nature. But on balance, I have been in favor of it. I think it is a good thing.
It is an interesting experiment and I am looking forward to it.

Advocate: Because of the Court Reorganization Act it was foreseen that there would be a pick-up in the cases regarding continuances and things of that nature. Members of the bar were called upon as things progressed to take on an added responsibility. Has that happened and what can the bar look forward to in terms of the future?

Lynch: I think that the additional judges in the Superior Court are just now beginning to have an impact and that it will begin to be felt first when we get additional help from the District Court or from the other departments. When we get up close to that magic 73, I think the bar is then going to have to appreciate that not every case that goes out to a particular attorney is going to be handled by that attorney. That is a great problem with continuances. I have been, I think for a year, trying to shout to the bar in advance. I think the Trial Courts are going to have to be a little more strict in insisting that, with the exception of the unusual cases, talking now primarily about the complex civil cases, a large law office with a number of litigators is going to have to make accommodations so that if litigator A, who would normally be expected to handle a case, is caught in Middlesex, and he is trying the case over there and then along comes a case at Suffolk in which he is a counsel, somebody else in his office is simply going to have to pick that case up. There is going to have to be more of a team system in the larger law offices and the clients particularly are going to have to understand that they cannot always have the lawyer that they think they ought to have trying the case

large law firms, particularly those which have a number of litigators, should begin the habit of teaming up. I think that the younger members of the bar who are interested in trial work are going to find themselves required to try cases at an earlier stage of their careers than they might have years ago. It is going to have to be less bag-carrying for the associates and more trial work, which may be a very good thing. When no-fault took away the training ground in auto cases for a lot of young trial lawyers something had to come along to replace it. I think this in part will do that. Younger lawyers are going to be seen trying a lot more cases than they ever were before and judges in charge of lists are going to have to be a little bit more Captain Blyish about continuing cases due to unavailability of counsel due to conflicting engagements. It is touchy. Nobody likes it and no one is trying to take the bread out of anyone’s mouth but there has to be accommodation within reason.

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III. Chief Justice Samuel E. Zoll

Advocate: Mr. Chief Justice, assuming the Court Reorganization Act has fulfilled one of its basic purposes, to lessen the case load in the Superior Court system, has the correspondingly increased load placed on the District Court been manageable up until now, and if so, do you think it will remain manageable in the future?

Zoll: I would say that it has become manageable. We have added approximately 20,000 cases under the new de novo modification. The small claims amount has increased to $750 in its jurisdictional limitation, so that has increased a substantial number of cases. There hasn't been any substantial increase in the number of civil cases that have been entered and/or tried in the District Court system although the recovery test has increased to $7,500, where it used to be $4,000. Two things happened, tangential to Court Reorganization, but apart from it. One was the passage of G.L. 209A which is the Family Violence Statute, permitting people who are abused family and household members to seek restraining, custody and support orders in the District Court. Those types of proceedings were formerly handled by the Probate Court almost exclusively. We have essentially become a Probate Court for moderate and low income people by virtue of this Act. There has been a tremendous increase in that kind of case load under the statute that wasn’t anticipated at the time Court Reorganization went through. Now when you talk about manageability, one of the difficulties of these cases is that the statutory intent was that they be given immediate hearing. Well, if you’re in a busy court such as a community like Lawrence, and you have seven or eight of those a day and they have to be heard immediately, you can’t ask a mother or wife who has been the subject of a beating the night before to wait from 9:00 until 3:00 to have her case heard. You have to take it and treat it as an emergency kind of thing. In addition, these cases can’t be disposed of within five minutes. They are sensitive kinds of cases; but that is upsetting the so-called case flow management in many of the courts and that impacts manageability. The other thing that wasn’t envisioned at the time was that the Cure and Protection cases involving minor children, abused children, would increase dramatically. They became more public after the Gallison case and the combination of the increased penalties for failure to report these types of cases, in the form of criminal sanctions, and the fact that people are now reporting them more frequently have caused a tremendous increase in those cases. They are long, protracted, delicate proceedings, which affect everything else. So I guess you can’t just look at Court Reorganization in the abstract before you make a prognosis as to the impact.

Advocate: Mr. Chief Justice, the trial de novo system had been constitutionally upheld by the Ludwig decision; do you think the trial de novo system places an unnecessary burden on the Commonwealth and do you think the Commonwealth can afford it financially for an indefinite period of time?

Zoll: I believe in the trial de novo system. I think that a person has a right to an appeal and, in the sense with the types of offenses with which we are dealing in the community court level, that right of appeal ought to extend both to the facts and the law. The most precious thing that we are dealing with is a person’s reputation in the community and I want to make absolutely sure a person has had every opportunity to protect that reputation. Trial de novo is a vehicle for such protection. It has been modified, it

Chief Justice Samuel E. Zoll graduated from Boston University in 1954, served in the United States Navy from 1954 to 1956, then returned to Boston University's Graduate School to receive his Masters in Business Education in 1958. In 1962 he graduated from Suffolk University Law School, and was admitted to the Bar. He served on the Salem City Council from 1958 to 1965, as a State Representative from 1964 to 1969, and as Mayor of Salem from 1970 to 1973. In 1973 he was appointed Chief Justice of the District Court Department of the Massachusetts Trial Court.
is manageable, and it ought to be preserved. The only change I might suggest under the Court Reorganization Act, the way the language is phrased in the statute, is that you have an immediate right to a first instance jury trial, so you must waive that right to go to a bench trial. My thought from a purely administrative point of view, not a substantive point of view, is that you don’t have that immediate right, but you only have that right when you ask for it. Instead of working as a waiver it would work in the form of a motion. This would cut down on the paper work since a very small percentage elect to go to a jury trial in the first instance. To that extent I would recommend a modification.

Advocate: Mr. Chief Justice, going back to G.L. 209A, the Family Violence Act, and the fact that these actions deserve immediate attention, and sometimes involve a protracted and delicate hearing, has your court come up with any particular means of handling these cases as opposed to the normal hearing in the District Court? Do you anticipate separating them?

Zoll: We have encouraged all of the Care and Protection cases to be heard in the afternoon so that the youngsters are separate and apart from the regular calendar. That way the youngsters and the family members aren’t congested in the corridors with all that anxiety. In terms of the Chapter 209A cases, no, we have not done anything in terms of separating them, particularly when the alleged victim comes in seeking an emergency order. We have after the five days has expired and they have chosen to go to a full hearing, but with the emergency temporary orders, there isn’t much you can do. When they come in they have a right to be heard, so we have done no case load management as to that.

Advocate: Under the Court Reorganization Act, as you mentioned, the jurisdictional amount increased from $4,000 to $7,500 on the civil side; you have not found any increased case load resulting from that?

Zoll: Nothing significant.

Advocate: Do you anticipate one in the future?

Zoll: No, I don’t. Unless it is an extremely complex matter, counsel is almost obligated to seek a jury trial on a civil matter from the point of view of avoiding what might be considered malpractice, and I think that option always has to be exercised and discussed. As long as that’s out there, people at least seem, for the moment, to have more confidence in the decision of the jury in a civil matter, as opposed to a single justice. And I think the only way that we are going to be able to overcome that is to inspire confidence among members of the bar that the District Court judiciary is equipped to hear the most complex of civil cases. We have some outstanding Justices. And secondly, to be able to convince you beyond a reasonable doubt that you can get a trial date in the District Court on the civil side within three or four weeks of completion of pleadings which is, I think, at the moment favorably comparable to the time schedule in other court departments.

Advocate: Going back to the concern about the individual’s reputation in the community. First, how many more judges will be incorporated into the District Court system in the future, and secondly, the traditional District Court role has been a community role in Massachusetts. Do you think that by consolidation of other judges in the various District Courts this will create a circuit court aura, and therefore take away from the community type of atmosphere?

Zoll: That’s one of the major concerns that we have. Firstly, Court Reorganization did not contemplate any additional judges. To the contrary, it reduced our complement by ten so that through pre-court reorganization we had a statutory complement of 163, albeit not all of them were full-time. We now have a statutory limitation of 153 judges. I see no plans on the horizon to increase that. In addition to the 153 we have assumed roughly 20,000 de novo cases. We now have more cases and fewer judges. If you add to that absences, retirement, vacation, things of that nature, we are running at a substantially reduced complement on a daily basis. Therefore, we are in the position where we have to move people from court to court in order to make up deficiencies in judicial complement settings. Originally, the community court system you describe had a sitting justice, and a special justice (most courts have two justices), the larger ones having four or five. In most two-judge courts you found judges living in the same community or within the geographical jurisdiction of the court to which they were appointed. They were there practically everyday and there was continuity. There was a total familiarity with community resources. The bar was a little uncomfortable with the familiarity that continued presence brought, so they argued that you ought to move people around. I think the answer is somewhere in between, that you have to provide some permanent anchor, but that you keep moving people around. I think its good for the community, the bar and the prosecution, and very good for the judges. We’re a court now where a high percentage of the defense bar is appointed and not private counsel and we see the same lawyers practically every day in the courts. I just think total permanency doesn’t contribute to anybody’s growth.

Advocate: With regard to shifting of the judges and personnel under the Reorganization Act, do you find it an administrative difficulty in dealing with the shifting of personnel, rather than having the static setting as before where everybody was in their respective places and there was no administration involved? Do you find that is taking up a lot of your time at the administrative end?

The most precious thing that we are dealing with is a person’s reputation in the community and I want to make absolutely sure a person has had every opportunity to protect that reputation.
Zoll: I would say that it is administratively challenging. We have decentralized the state into five regions. We have five regional judges, and day-to-day assignments are handled by these regional judges who are much closer to the scene than I, although we're involved in approving the monthly scheme and assignment. It's just another part of the job, but a very important part. We like to accommodate everybody if we can, but on the other hand, the objective is to provide the best possible judicial service.

Advocate: Do you find any objections from people being shuffled around, that they are not entirely amenable to being shuffled around?

Zoll: I would say that on occasion some of the assigned judges, who are encouraged to do so, accept the invitation to comment on their assignment.

Advocate: Under the Act, the district attorneys are not involved in a criminal case prior to the filing of a complaint. Do you think there would be any benefit in having the district attorney or an assistant district attorney in the District Court be involved in a screening and review of complaints before they are issued, to do away with the problem of defective complaints or complaints issued on insufficient evidence?

Zoll: My experience with screening programs has been a good one, and I think any assistance the local prosecutor can get from someone who, by virtue of advanced training is helpful, not only to the prosecution, but also to the court, is a good thing.

Advocate: Do you feel there is now a need for uniformity in procedure and remedies in the various district courts? For example, in driving under cases, one particular court in Concord does not employ any program whereas in Cambridge they employ the program for first and second offenders. Waiver of indictment forms and probable cause are clearly discretionary to the clerk, and individual complaint forms and the way they are filled out are also discretionary. Is there a power given to you under the Court Reorganization Act to create uniformity in the District Courts, and do you plan to promulgate such uniformity?

Zoll: More specifically as it relates to operating under the influence, the language of the statute as it relates to the offense which permits enrollment in a program, is purely discretionary. This is a specific statutory offense and the judges have very broad discretion. I feel that any modification of that lies with the legislature and I will abide by their voice in that particular area. As to forms, yes, there is a strong need for the development of uniformity in forms. The difficulty is that with all this sort of thing, it is a matter of priorities, and ultimately matching resources and people. The question of forms as an issue that you are going to deal with is not ranked at the top of my list although I recognize its importance.

Advocate: Mr. Chief Justice, you stated that you are working with ten less judges and you picked up 20,000 new cases. My information from interviews with some district attorneys is that the Law Enforcement Administration Agency grants from the federal government are coming to full term now and might be renewed. Do you think the judicial budget is going to be significantly affected by these changes? Are you going to have to cut back in certain areas to be able to finance the necessary judicial manpower?

Zoll: Over the long run I don't think increased judicial manpower will be the causation of an increased judicial budget. In my judgment, the single most pressing priority in the District Court system for the moment is the need for additional clerical personnel, modernized clerical-type equipment, and more expeditious management practices. We need more people. The problem is the proliferation of all the rights and programs that are necessary has resulted in so much paper that we have difficulty in getting the paper from the counter to the courtroom. Now we are in the financial business and must deal with such things as purchasing, personnel, and accounting, so a lot of your key people who were formerly dealing with such things as docketing and execution had to shift over with substantially no increase in personnel. If it came down to it, I would increase the clerical staff and equipment before increasing the judges. These people are working very hard and they are dedicated, but it is just impossible with 18-year-old typewriters.

We have another problem. I don't know the up-to-date figures at the moment, but we will have between 50 to 55 resignations this year from members in clerical positions in the District Court. Now that's unheard of because they used to be very attractive types of jobs for many reasons: prestige, security, the money was reasonable. However, they have fallen far behind now in terms of what somebody can get in the private sector. Secondly, and I don't want to appear chauvinistic, we're talking about skilled women in these jobs who can go to large insurance companies where they...
have hi-fi music filling the air all day and much more social activity. Thirdly, better opportunity for professional advancement exists in the private sector, whereas it’s very limited in the court system. Fourth, the district courts work Saturdays, and these young women, most of whom have families, have to take their turn working on Saturdays. Although it is not every Saturday at every court, it’s most Saturdays. You don’t have to do that in most private industries. Also, because of Court Reorganization or incidental to it, the demands have become much more sophisticated. In terms of new management techniques, you have to read the regulations. Before you didn’t have that in the county system. The accounting system was a very accurate, but informal system. Now you’re into regulations and bureaucratic types of approaches that are necessary. Well, the people in the courthouse haven’t had that type of training and we have pressed them into that. You add all those together, and to me, that’s the dark side of the operation.

Advocate: As I understand the Act, it does not clearly state who is ultimately responsible for criminal prosecutions in bench trials in the District Court, meaning that there could be some friction between the district attorney and a police prosecutor. Could you comment on this?

Zoll: I never like to feel that there is any friction at all, just difference of opinion. I think in those areas where the district attorney has the capacity to prosecute, after negotiation with the local law enforcement agency, that generally they do. I am not aware of any relationship that has become so separate and apart that it has risen to the level that it would come into this office. I am personally unaware of any difficulty.

Advocate: One of the basic premises of the Act, Mr. Chief Justice, was an increased responsiveness of the Court, and increased efficiency and expediency in handling the case load. It seems to also require an increased responsiveness on the part of the bar in meeting their case load and accepting only a manageable number of cases and promptly and effectively handling what cases they had scheduled for trial in the District Court. Have you observed an increased responsiveness on the part of the bar members in meeting their court dates since the passage of the Act?

Zoll: I think there is an increased awareness on the part of the bar in realizing that the various Trial Court Departments are extremely serious in setting trial dates and holding people to them. I think the day has gone, which existed when I was practicing, when you scheduled two or three things the same day. You’d schedule a District Court matter, a Probate Court matter, and a passing all in the same day, and you’d get to all three, causing perhaps undue delay for everybody involved. We are proposing case flow standards and there are also individual policies and individual divisions which are holding the bar, with a capital H, to commitment. I think the bar is going to have to design their practices to meet this kind of thing. I don’t want to intrude on policymaking among members of the bar, however. It presents a great problem for an individual practitioner in the medium or smaller sized community who is all alone, or maybe with somebody else; he can’t be everywhere and I don’t know how he does it. You know you can’t afford to turn business away in a very competitive market. These kinds of regulations tend to have a less severe impact on the larger firms, I think that this kind of adherence to stricter policies is really going to affect the smaller community practitioner more than anybody else. He is going to have to decide when and how to schedule trials and when clients start to be assessed costs. They are going to be aware of the policy of the court that when it says December 18, you are going to be there December 18 and you can’t call and say “well I’m held here and I’m held there”.

In the long run, however, we are going to be making it easier for the lawyer because we’re giving him some degree of reliability. For example, he knows that when we say a case is going to trial on December 18 at 2:00 in the afternoon, he knows it’s going to trial, it will not be a hit or miss approach.

Advocate: Mr. Chief Justice, do you think that in the past the quality of justice in Massachusetts was in any way

In my judgment, the single most pressing priority in the District Court system for the moment is the need for additional clerical personnel, modernized clerical-type equipment, and more expeditious management practices. We need more people.
compromised in the interest of expediency, at least in the District Court in terms, for example, such as adhering to the rules of evidence or the number of witnesses called in terms of really developing a sufficient case and do you think that the Act is correcting anything that may have been compromised or conveniently handled in the past?

Zoll: No, I don’t think the Act speaks to that at all. I think it is a gross misconception among people who have no recent familiarity with the District Court as to these kinds of so-called professional deficiencies. Many people will comment about the District Court based on an experience of eight, nine, ten or fifteen years ago when things were a little bit different, a little bit less formal. I think that the entire accent has been on elevation of the quality of the trial in the District Court and I think that it has happened. We have many outstanding judges, very knowledgeable law men and women, trials are productive and we handle some very complex things. I think hard evidence of that is under Chapter 304 of the Acts of 1976, Chief Justice Hennessey’s proposal initiated the assignment of substantial numbers of District Court judges to the Superior Court to handle all types of cases, and they handled them all admirably. You are always going to get a few judges, a few lawyers, and a few doctors who don’t meet the standard, but I think that the whole concept was an overwhelming success and I have to say that our judges, the District Court judges, carried that off very, very well.

Advocate: Have you noticed a trend in terms of the competency of attorneys at the District Court level who appear before you?

Zoll: No I haven’t. I’ve noticed the young people coming out of law schools now are extremely well-qualified. All of these clinical programs have prepared them well. You fellows are tremendous students both academically and practically, so I would say that, by and large, there is a high quality coming out. Where the difficulty lies, is that if you have been out practicing for a half a dozen years and you’ve only had a half dozen District Court cases and then somebody comes into your office with a rather complex or serious matter and you run down to the District Court and you attempt to try that case. You’ve been away, changes have taken place, and it is very hard to do that. It’s almost as hard as going into the Federal Court and trying an anti-trust case. I don’t mean to exaggerate it, but it has changed dramatically. So I don’t think it goes so much to the competency, I just think there is a narrower base of lawyers who are practicing in the District Courts, and it is the court of the highest volume. My recommendation, I suppose, is like the doctors telling everybody to go up to Catscall, Maine rather than practice in Boston. If I were coming out of law school now, I think the District Court is a very exciting and fertile place in which to practice and I would attempt to develop a practice in that area. The work is out there, it is not corporate taxation, but if you want to help people and see where the action is, I think it is there.

Advocate: Mr. Chief Justice, do you have any specific statements you’d like to make as to the Court Reorganization Act?

Zoll: I would say that Court Reorganization has gone through a transition period, and, as in the development of all new institutional changes, there are difficulties. I think the Chief Administrative Judge, Chief Justice Mason, has done a fine job in addressing many of the statutorily imposed responsibilities that he has. I think the challenge for all of us that are involved is to see that justice is meted out fairly and expeditiously. That’s essentially what the design is, with some centralization and uniformity. I am cautiously optimistic about the future.
INTRODUCTION

In this short piece, my purposes are two-fold: to summarize the holdings of nearly the entire 1978 term of the Supreme Court along the lines of federalism and to critique the court’s work. Any attempt at a brief summary of some 90 of the 138 cases that compose the 1978 Supreme Court term would have to be a bit simplistic and a bit subjective. The fact situations ranged from tribal land disputes caused by changes in the course of the Missouri River (Wilson, 2529) to disputes about the legality of laetrile (Rutherford, 1238); the legal doctrine ranged from collateral estoppel (Parklane, 644) to the bargainability of cafeteria food (Ford Motor Company, 1842). However, a recurring theme is the primacy of state law over federal statutory law or constitutional interests. Yet the court assumes quite an activists posture when reviewing purely federal cases. The court’s work is growingly academic or perhaps even pedantic. Its opinions are needlessly long, confused and technical, and the proliferation of concurring and dissenting opinions makes them incomprehensible even to the specialists. While the court was asked to judge novel domestic relations questions no less than thirteen times, it broke little new ground overall but did restrict the scope of its constitutional precedent.

STATE LAW CASES

The doctrine of federalism refers to the distribution of governing power between the national and state governments. The Burger court, since its accession to power in 1971 has attempted to move federal and statutory law into a posture of deference to state law. It has done so by choosing state law over federal when the choice presented itself, by restricting the scope of federal statutory causes of action especially in the civil rights area, and by restricting the federal constitutional rights of criminal defendants and others.

In no less than eleven cases did the court choose to decide claims that presented a conflict in federal or state law standards in statutory cases. In most cases the court ruled in favor of state law. In Butner (914) the court ruled in favor of state law as governing the right of second mortgagees to rent during the pendency of a bankruptcy proceeding. In Aronson, (1096) the court ruled in favor of state law as governing the right of second mortgagees to rent during the pendency of a bankruptcy proceeding. In a number of other cases the court while stating the standard to be federal, adopted the state standard for its own. In Kimbell (1448) the state standard with respect to lien priorities in a Small Business Administration loan was adopted as the federal standard. In Omaha Indian Tribes (2529) the state standard with respect to rights because of the movement in the flow of the Missouri River was adopted as the federal standard. State law also prevailed against claims of superseding federal interest. In Nevada v. Hall (1182) the court approved the California disregard of Nevada sovereign immunity over a claim of violation of the constitution. In New York Telephone (1328) the court found that the state payment to strikers was not preempted by federal labor law. The only case...
clearly against this trend was Felsen (2205) in which the court held that a bankruptcy court was not bound in res judicata by a previous state court ruling even though the state law may have required the same.

An overall evaluation of this trend is difficult at best and each case generates its own considerations. Most often the constitution or statutory law gives little or no guidance and thus the decision imports the justice’s own notion about the role of national and local policy-making. While that question involves considerations more political than legal, a preference for local control does contravene trends being set by the other two branches of the Federal Government in favor of nationwide standards and a unitary national and even worldwide economy.

This same notion of federalism probably in combination with notions of separation of powers motivated the court’s treatment of the 1871 Civil Rights Act (“1983”)2. The 1983 action, sometimes called a constitutional tort, creates a civil action for injunction or damages against state officials who violate Fourteenth Amendment rights. It has been responsible for a major part of the Supreme Court’s Fourteenth Amendment Doctrine under Due Process and Equal Protection. The three cases which involve the explication of 1983 Doctrine narrowed the rights of plaintiffs. In Tahoe (1171) a Board of Commissioners from Nevada and California which was established to oversee and control the development of the Lake Tahoe area was granted legislative immunity against the plaintiffs who claimed that the rules of the Commission deprived them of the beneficial use of their property. In Chapman (1905) the court construed 1983 as not creating a federal cause of action for violation by the state of the Federal Social Security Act. In Novotny (2345) 19853, a statute creating a claim for victims of conspiracy to violate rights protected under 1983 was defined as not protecting a male who was dismissed from employment for voicing his support of female employees’ equal employment opportunities at a Board of Directors meeting of the defendant.

An exception was Jackson (2781) where a state prisoner brought a 2254 habeas corpus proceeding to a federal court seeking to set aside his conviction because of insufficient evidence. While the court affirmed the denial of the writ, it made clear that a federal habeas corpus jurisdiction case was obligated under In re Winship4 to assure itself that conviction was based on proof beyond a reasonable doubt. This significant expansion of the scope of habeas corpus is at odds with prior terms where the court has narrowed the scope of the writ of habeas corpus significantly, on the theory that the availability of the writ involved the federal courts in procedures which lacked sufficient respect for the decisions of the states.

The civil due process cases similarly evidence a concern with federalism. The court continued to apply the doctrine of Mathews v. Eldridge5 which dictates that liberty or property interests under the Fourteenth Amendment be defined at a second stage in accordance with the state law which gives rise to the interest. Such redefinition restricts the liberty or property interests to its definition under state law and affectively eliminates most federal review. In Orrin W. Fox (403), the court approved a California statute which delegates power over new franchises to existing franchisees with unfettered discretion. In Leis v. Flint, (698), the court approved unfettered discretion in a trial judge in granting or denying applications of attorneys to appear pro hac vice. In Harrah Independent School District (1062), the court approved alterations in the tenure of public school teachers. In Barry (2642), the court approved the suspension of a horse trainers license in the absence of prior notice and an opportunity to be heard. In Greenholtz (2100), the court approved the denial of parole in the absence of due process. In Parham (2493), the court found due process to be satisfied with respect to the incarceration of a juvenile if a state psychiatrist passed upon the case. The sole exception was Addington (1804), requiring additional procedural safeguards in civil commitments. Perhaps the most serious erosion of due process occurred in the case of Bell (1861), where pretrial detainees not only were denied the right to receive packages (including most hardback books) but also were denied immunity from strip searches and overcrowded cells. Only in abortion did due process claims prevail over state law. The court in Colauti (675), struck down a criminal abortion statute as void for vagueness and in Bellotti (3035), the court invalidated the Massachusetts procedures required of a minor seeking an abortion, but made clear that there is a judicial and parental role in cases involving immature minors.

Similarly the court continued to allow the states a good deal of freedom in equal protection cases. Discrete classes went without relief. The rights of methadone addicts (Beazer 1335), the unmarried (Boles 2767), Parham 1742, the handicapped (Davis 2361), the aged (Farse 1939, approving a mandatory retirement) all went without equal protection coverage. The court also approved the denial of the right to teach to aliens and approved discrimination against illegitimates in Lally, Balls, and Parham.

In Holt Civil Club, (383), the court approved the denial of the right to vote to the subjects of municipal authority who reside outside of municipal boundaries. In Agnovarian (471) the court approved the denial of Social Security benefits to citizens living outside of the United States. In Feeny (2283), the court approved the Massachusetts veterans preference.

The two exceptions were classifications based on race and gender. In race the court approved the system wide desegregation plan in Penick (2941), and it approved the finding of de jure discrimination in Brinkman (2971). In Weber (2721), a statutory case, the court approved a benign racial classification included in a collective bargaining agreement.

Orr (1102) invalidated a gender classification which differentiated between husbands and wives with respect to the responsibility for support after divorce. In Caban (1760) the court protected unmarried fathers in adoption. In Duran (664) the court invalidated a female option not to serve on the grand jury. In Wescot (2655), the court invalidated a classification against unemployed fathers in unemployment compensation. In Davis (2264), a federal case, the court approved a Fifth Amendment sex discrimination claim against Congressman Passman.

Indeed the definition of familial relations attracted the attention of the court no less than thirteen cases. The status of marriage as opposed to non-marriage and the rights of illegitimates required definition four times. The rights of husbands and wives in marriage involved the court three times (Duran, Orr, Wescot). The court also had to define rights to property in divorce involving a divorced wife’s right to Railroad Retirement Act benefits Hisquiro (802) and a widow’s rights to Longshoreman’s benefits in Rasmussen (903). The court restricted the rights of parents to stop their children from getting abortions in Bellotti (3035) and redefined
CRIMINAL CASES

Increased freedom to the states is the result of most of the Term's criminal cases most notably those involving the Fourth Amendment. The court in the last eight terms has been consistent in its desire to distinguish and circumscribe narrowly this body of precedent. President Nixon, in his appointment of four justices, was clear about his goal to restrict construction of the Bill of Rights based on his concern about "weakening peace forces". His appointees and the court have generally remained faithful to those goals. As usual, the Fourth Amendment received the most attention.

In fourteen separate cases, the court addressed the scope of the fourth amendment; and the result was a significant narrowing of its coverage. The two most important cases were Rakas (421) and Baker (2689). In Rakas the police stopped a car they suspected of being a getaway vehicle in a robbery. It had a driver and four passengers. A warrantless search produced a rifle and a box of rifle shells. Two of the passengers were charged with the robbery and the rifle and shells were admitted into evidence over their objections. The court approved the admission of the evidence in the absence of probable cause because the defendants, as passengers, had no standing to raise rights under the fourth amendment since they were not the owners of the vehicle searched. The case overrules precedent and narrows the scope of the fourth amendment significantly. Apparently guests at one's home, on one's property, or in one's car no longer have a legitimate expectation of privacy. The analysis ties the fourth amendment to the law of property and invites many narrow distinctions. In Baker the court held in a 1983 action that the fourth amendment afforded no protection to one falsely arrested and mistakenly incarcerated for eight days. The victim, the brother of the true target of the arrest warrant, protested his detention vigorously for eight days. The court held that good faith reliance upon a validly issued arrest warrant was sufficient for the police conduct to comply with the fourth amendment. In a somewhat related case, DeFillipo (2627), the court upheld the admissibility of evidence obtained as a result of an unlawful arrest predicated upon violation of a void statute, provided that such arrest was made in good faith. The court also excluded Fourth Amendment considerations from extradition in Doran (531). It approved covert entry in Dalia (1682). It approved the use of pen registers on telephones without warrants inSmith (2577). It denied suppression of evidence obtained from a covert microphone planted on an Internal Revenue agent in violation of the Internal Revenue Service's regulations in Caceres (1465).

It approved the Massachusetts breathalyzer rule which requires the driver upon request to either submit to a breathalyzer or to forfeit his license in Montrym (2612).

On balance, however, the court did sustain Fourth Amendment objections in six cases. It approved the exclusion of evidence obtained from routine stops and frisks Prouse (1391), Dunaway (2248) and Brown (2637). It invalidated general warrants Loji Sales (2319) and is excluded evidence resulting from the warrantless seizure of the contents of baggage lawfully seized from a taxi Sanders (2586). It also applied the Fourth Amendment to Puerto Rico Torres (2425).

The 1978 term is thus comparable to the 1975 term in which the court nine times distinguished fourth amendment protection against unreasonable searches and seizures.

In other criminal cases the court narrowed the right to counsel to defendants who are in fact incarcerated Scott (1158). It approved the inferential waiver of Miranda rights Butler (1755) and denied the invocation of Miranda by one who asked to see his probation officer Fare (2560).

The court also twice interpreted the case of In re Winship requiring proof beyond a reasonable doubt in each element of the offense charged. In Sandstrom (2450) the court reversed a murder conviction where the judge charged the jury that the defendant is presumed to intend the natural consequences of his action. However, in Ulster County (2213) the court approved a jury charge stating that the owner and three passengers of an automobile are presumed to possess illegal firearms found in the vehicle in which they were travelling.

FEDERAL CASES

The diversity of the purely federal cases defy generalization more than the state cases. However, on balance it can be said that freed of concerns about state and local interests, the court was much more willing to assume an activist posture. The court was not in the least reticent about overturning the determination of administrative agencies. The National Labor Relations Board, for instance, was reversed three times: In Detroit Edison (1123) overturning an NLRB order that management turn over psychiatric tests in collective bargaining; in Catholic Bishops of Chicago (1313) overturning an NLRB order that Catholic school teachers were protected by the National Labor Relations Act; in Baptist Hospitals (2598) overturning an NLRB invalidation of a no solicitation rule in hospital waiting rooms. The court, however, approved an NLRB ruling in Ford Motor Company (1842) making the food in a company cafeteria a subject of compulsory bargaining. In addition, the Federal Trade Commission was reversed on its finding that specialized pricing by the A & P on milk was a violation of anti-trust Great & P Co. (925). The Federal Communications Commission was overturned in their attempt to regulate cable TV Midwest Video (1435). The Interstate Commerce Commission was overturned in its attempt to regulate price fixing Southern Railway Company (2388).

The regulators of the economy fared much better, however. The court approved the Federal Reserve Board's order prohibiting a bank merger in Board of Governors (505). It approved the Federal Energy Commission's denial of a rate increase in Penzoil (765). It approved an IRS definition of inventory in Thore Tool (737). It approved an IRS ruling that the applicant was not a business league and entitled to favored tax treatment in National Muffler Dealers Association (1304). The SEC was affirmed in its decisions that the SEA applied to brokers in Naftalin (2077) and that the SEC covers union pension funds in Teamsters (790). In addition, the court approved a Federal Power Commission Regulation regulating abandoned oil wells (McCombs, 2461) and a Food and Drug Administration ban on laetrile (Rutherford, 2470). Finally in an Interior Department position that a budget cut to the Fish and Wild Life Service is not subject to environmental
impact requirements of NEPA was upheld (Sierra Club, 2335).

The court also evinced an activist posture in four of its five cases involving the existence vel non of a private claim under federal regulatory statutes. In Reiter (2326) the court granted consumer standing to handicapped under the Rehabilitation Act of 1973; in Gladstone Realtors (1601) it granted standing to town residents in Title VIII Housing Discrimination violations; and in Canon (1946) it granted standing to victims of sex discrimination under Title 9 of the 1972 Education Amendments. Only in Chrysler (2819) did the court deny standing to a disclosing company to enjoin dissemination of information filed pursuant to the Trade Secrets Act. Finally, the cases in which the court took perhaps its most activist posture involved the Speech and Debate Clause. In Passman (2264), the court found that speech and debate cause implied no general immunity from discrimination actions with respect to a congressman's staffing of his own office. In Proxmire (2675) the court found no protection for Senator Proxmire in an action by a recipient of his "golden fleece award", where the alleged defamation appeared in a press release issued before award was announced on the Senate floor. In Helskotki (2445) court required a congressman to testify about meetings with constituents and staff leaving only his actual vote subject to protection of the speech and debate clause.

WIDELY DEBATED CASES

Only three cases, Weber (2721), Gannett (2898) and Herbert (1635), generated any widespread public interest. Weber gave the court its first opportunity to apply and clarify Bakke. In Bakke it will be recalled, the plurality invalidated an unsubstantiated numerical quota as a basis for admission to medical school but ruled that Title VII would sanction a judicial or administrative finding of past discrimination as a basis for preferential admissions. Weber questioned the legality of an affirmative action plan — collectively bargained by an employer and a union — that reserved for blacks 50% of the openings in an in-plant craft training program, until the percentage of black craft workers in the plan was commensurate with the percentage of blacks in the local labor force. The plants requirement of 50% blacks violated plant seniority and Weber, a white, with greater seniority than the junior black admitted into the program challenged the plan as violative of Title VII. No Fourteenth Amendment question was presented because the plan was voluntarily negotiated between private parties and involved no state action. In approving the plan, the court concluded that the congressional history of Title VII evidenced an intention to approve such plans. A forceful dissent argued that Title VII prohibits all racial discrimination in employment, including preferential treatment of blacks.

While the case is certainly significant, it leaves open the question of what the courts may order in discrimination cases and what the Constitution requires in state action cases. Additionally the question of affirmative action for women and recent immigrants has yet to be addressed. In Gannett the court reviewed a state court order excluding the public and the press from suppression hearings in a criminal case. The order was pursuant to a motion by the defense counsel consented to by the prosecution. Its basis was the unfavorable publicity the case had received in the press which if continued would jeopardize defendant's right to a fair trial.

The media has debated the proper scope of the right of the public and press access, as opposed to the right to fair trial, since the Stuart decision which invalidated a trial judges "gag order" on the press as a prior restraint in violation of the First Amendment.

In approving closure the court read the right of public access in the Sixth Amendment as protective of defendants and as implying no correlative right of trial access in the public and the press. The four dissenters (per Blackman) found the right of public access in the Sixth Amendment. Only Justice Powell in concurrence gave consideration to the First Amendment right of the media, ultimately concluding this right to be inapplicable because it was not raised by a reporter sitting in the courtroom at the time of the defendant's motion.

While the case is significant and deserving of the debate it has generated, its stare decisis effect may be limited. Stewart's poorly written opinion emphasizes the circumstances of the particular case, including the lack of contemporaneous objection, subsequent access to the transcript of the proceeding and the pretrial nature of the proceeding.

In Herbert the court approved an interlocutory order of a district court requiring answers to questions in depositions that sought information about the mental impressions of the editors of the television show Sixty Minutes in the creation of a broadcast which implied that the plaintiff, a retired Army officer who had criticized the Pentagon and others in their conduct of the war, lacked candor, and was improperly motivated. The defendant sought a privilege for editorial impressions under the First Amendment but the court ruled that the trial court's order was consistent with New York Times v. Sullivan, requiring a showing by public figures of actual malice to recover in defamation.

The basis of Herbert's publicity is more the fame of the parties than the importance of its doctrine. The court's decision is logically required by Sullivan which makes intent relevant and therefore discoverable.

Wolston (2701) and Proxmire are doctrinally more important for the press than Herbert. Both concern the application of Sullivan's public figure rule. In Wolston, a 1974 Reader's Digest story labelled the plaintiff a Russian spy on the basis of a guilty plea to espionage and a contempt for failure to respond to a subpoena to testify in a grand jury proceeding investigating espionage in 1958. The court held that the plaintiff was not a public figure and thus need not prove malice in a defamation proceeding. Likewise in Proxmire the plaintiff, a recipient of the "Golden Fleece Award" because he received federal funding for his research into aggression in monkeys, was not a public figure because he was publicly funded. The only pro-press case was Smith v. The Daily Mail (2667) which invalidated a statutory ban on the reporting of the names of minors involved in crimes.

A CRITIQUE

The appearance and the reality of Ninety-Nine Supreme Court are contradictory. The appearance is that of a Court scrupulously dedicated to stare decisis and a system of rational principal. The result of each case appears to flow naturally not only from prior case law, but
from the confluence of reason, history and social policy. Prior case law and its dogmatic development is traced with torturous detail, convincing the reader that the court's result is absolutely required by even an activist's definition of stare decisis. Frequent citation to history, both legislative and social, in opinions that attempt to mimic law review articles appear to evidence a true appreciation by the court of its role of applying the principals of the founders to today's controversies. The conflicting social interests presented by the facts are balanced and weighed in an apparently thoughtful and disinterested manner. However this reader thoroughly convinced of the irresistible rightness of the court's decision, is then confronted with a dissent, frequently composed of four justices, which upon examination turns out to be equally convincing. Further research discloses that both sides have manipulated precedent, reason, history, and social policy for their own purposes.

The embodiment of stare decisis is the opinion, in which the court engages in a process of trying to make particular applications of a proposition consistent or at least not rationally inconsistent with declared precedent, reason, history, and policy by a process of logical search and inquiry. This process is indeterminate, searching and susceptible to surprise. An honest court avoids the temptation to empty abstraction and mechanical logic, "the temptation is to surrender the vital logic which actually yielded the conclusion and to substitute for it forms of speech which are rigorous in appearance and which do give the illusion of certainty." One sees very little such honest inquiry in Ninety-Nine Supreme Court opinions. Blackstone defined stare decisis as "law . . . being solemnly declared and determined [making] what before was uncertain and indifferent . . . now . . . the permanent rule of law which is not in the breast of any subsequent judge to alter or vary . . .". This statement, however, would find very few adherents today when society changes at dizzying rates and the application of older rules, valid when decided, frequently yields injustice in current situations. Indeed, many of what are considered today as landmark cases are simply over-rulings of precedent.

Further, it is well established that the doctrine of stare decisis is less applicable when the court decides cases of constit utional law. As Justice Frankfurter stated: We recognize that stare decisis embodies an important social policy. It represents an element of continuity in the law and is rooted in psychologic need to justify reasonable expectations. However, stare decisis is a principal of policy and not a mechanical formula of adherence to the latest decision . . . when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience. However, even the Frankfurter statement is limited and allows an overruling only when the precedent in question is inconsistent with the broad underlying principal and where its rule is verifiably unsound public policy.

Justice Burger, however, stated in 1970 that he would not be bound by the prior courts holdings and President Nixon made it clear that overruling those holdings was his guiding principal in the appointment process. The addition of this thinking to a court whose commitment to the doctrine was already weak has lead to degeneration of stare decisis to a level where diligent study fails to produce any confidence as to what the law really is.

Yet, the purposes of stare decisis have as much validity today as in the past. Those purposes include the promotion of clarity, certainty, reliance, equality, efficiency and continuity. Few would debate the validity of those goals and yet this term's opinions sacrifices them to expediency, politics and ego.

Clarity is important because if case law is to function as law at all it must be knowable. Yet the court frequently engages in restatement of the recent prior case which is inconsistent with the case as originally written. For instance, in Planned Parenthood v. Danforth, the court appeared to settle the fact that the term liberty as used in Fourteenth Amendment applied to minors. The clarity of that holding, however, was undermined this term in Parham where the court reviewed a Georgia procedure allowing parents to civilly commit their children under eighteen. Danforth had held that a statute requiring parental consent as a condition to performing an abortion on a minor was unconstitutional. The court emphasized that "Minors as well as adults are protected by the constitution, and possess constitutional rights" (at 2843) and proceeded to find that a minor's liberty interest was violated. Danforth was distinguished by a five-member majority in Parham as involving "an absolute parental veto on the child's ability to obtain an abortion" but in Parham the fact that a hospital superintendent had to concur in the deprivation of a minor's liberty interest saved the statute yet twelve days later state judicial concurrence could stop a minor's abortion in Bellotti (3035). Neither majority or dissent felt the need to cite Parham. Meanwhile the dissenters in Parham convincingly that "this case is governed by the rule of Danforth. The right to be free from wrongful incarceration, physical intrusion, and stigmatization has significance for the individual surely as great as the right to an abortion" (at 2519).

Likewise in Scott v. Illinois, the court affirmed the conviction and fine for shoplifting, a crime carrying a one-year maximum incarceration of a defendant who was denied counsel. The majority of five found the question to be an open one after Argersinger which required jury trial where the defendant was incarcerated. The dissent stated that Argersinger required reversal because it held that the right to counsel is more fundamental than the right to jury trial and that jury trial is required where "imprisonment for more than six months is authorized" Baldini v. New York, 399 U.S. 66, 69, 90 Sup. Ct. 1886-1888 (1970).

Similar debates about the meaning of recent court opinions abound through 99 Supreme Court.

Certainty is necessary in the law because the law is massive and detailed and because courts judge the legality of legal arrangements after the fact. If the parties fail to comply with necessary details, sanctions such as voiding the transaction or the imposition of civil or criminal penalties can be extremely burdensome. If the law is to work well, this ex post facto surprise must be minimized.

The cases involving the rights of illegitimate children are so confused as to cause any attorney or lower court to be forced to engage in pure guess work when confronted with future questions involving the rights of illegitimates. In Lalli (518) the court addressed the question of whether a New York law requiring illegitimate children to obtain an order of filiation disclosing the paternity in order to share in the intestate estate of his father
was constitutional. The prior caselaw on the matter was by no means clear. In

**Labine v. Vincent** the court had approved a statute requiring acknowledge

ment by an illegitimate child in order to receive equal treatment in the intestate distribution of his father's estate. **Labine** spoke extensively of difficulties of proof of paternity and the power of state legislature to control distribution of property after death. Subsequently three cases narrowly distinguished **Labine** in striking down statutes relating to illegitimates. In **Weber** the court struck down a statute requiring acknowledgement in order for children to share in workmen's compensation benefits, and in **Gomey** the court struck down a statute distinguishing between legitimates and illegitimates with respect to rights to paternal support, and finally in **Jimine**, the court struck down a federal statute excluding illegitimates from social security disability benefits.

Finally, in **Trimble v. Gordon** the court invalidated an Illinois statute which excluded illegitimate children from inheriting by intestate succession from the estates of their father. The court did not overrule **Labine**, but indicated that "to the extent our analysis in this case differs from that in **Labine**, the more recent analysis controls." The court in **Trimble** indicated that the legislative distinction infringed upon "sensitive and fundamental personal rights." It went on to find the state interest in encouraging marriage and in simplifying problems of proof in paternity as insufficient when such important personal rights were involved.

The court in **Lalli** distinguished **Trimble** on the basis that the New York statute required only the judicial procedure of legitimation whereas the Illinois statute in **Trimble** required the additional intermarriage of the natural parents in order for the child to be able to share in the intestate estate. Much of the broad statement of reason in **Trimble** is ignored.

In **Parham v. Hughes** the court upheld a Georgia statute which allowed the father of an illegitimate child to sue for the wrongful death of his child only if the mother of the child was deceased and the father had legitimated the child before its death. The legitimation procedure required judicial intervention. In two 1968 cases the court had invalidated statutes which disabled illegitimate children from suing for wrongful death of their father and mothers of illegitimate children to sue for the wrongful death of the child's father. The court distinguished **Gomey** on the basis that it excluded every mother of an illegitimate child from bringing a wrongful death action while the statute in **Parham** excluded only father who had not legitimated their children. However, the case of **Weber** had found a legitimation procedure for illegitimates who seek to share in paternal workmen's compensation benefits. The court distinguished **Weber** on the basis that it expressed "society's condemnation of irresponsible liaisons, an illegitimate state purpose whereas the Georgia statute merely granted the father of an illegitimate child benefits under state law which a natural father had, and which he could have if he participated in the legitimation proceedings."

Finally in **Caban** the court invalidated a statute which required the consent of the mother of an illegitimate child prior to its adoption on the grounds that equal consent rights were not given to a father. The court found no basis to distinguish between mothers and fathers with respect to their parental right and further found no basis to distinguish between legitimate and illegitimate parents.

The court has thus addressed the question of the rights of illegitimate children and parents twelve times since 1968, holding that discrimination against illegitimates was invidious. The decisions in **Lalli** and **Parham** compounded the confusion in an area which had already been rife with confusion. Five-four decisions based on minute details that distinguish statutes which effectively accomplish the same thing can only confuse probate courts, and tribunals that distribute wrongful death and workmen's compensation benefits and administrative agencies that distribute disability and other subsidies. Certainty could surely be enhanced if the court would forthrightly declare that the status of illegitimacy is either a valid statutory criterion or an invalid one. The current constitutional status of illegitimates is essentially unknowable and state legislators, lawyers and the public must essentially flip a coin when confronted with questions that bear on these cases.

Another aspect of the need for certainty is the fact that constitutional decisions state rules of authority which society relies upon. The court's decision should make it possible to foresee with fair certainty how governmental authority will use its power in given circumstances and to plan one's affairs on the basis of this knowledge. For instance, administrative agencies have had to completely revise their procedures for withdrawing governmental benefits and entitlements pursuant to the due process revolution which began with **Goldberg v. Kelley**. The cases hold that "before a person is deprived of a protected interest, he must be afforded some kind of hearing." Pursuant to these cases, counsel to innumerable administrative agencies on the federal, state and local level undoubtedly rewrote their agencies regulations so as to comply with current doctrine. The 1976 decision of **Matthews v. Eldridge** clouded the question of when a protectable interest existed by the introduction of a four step analysis; however, the prior hearing requirements were apparently left intact. However, in **Barry** the court approved an administrative suspension of a horse trainers license in spite of the fact that a hearing was available only after the fact of suspension. Additionally the court in **Parham v. JR** allowed the hearing in civil commitment to be conducted by an admitting physician in the privacy of his own office. Finally, in **Greenholz** the court freed parole boards of due process commands in parole boards of due process commands in parole applications while affirming the rather strict due process requirements in parole revocations as enunciated in **Morrissey v. Brewer** and the court has invalidated a statute which required the admission of a horse trainers license in spite of the fact of suspension. 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because teachers perform “governmental functions” (1594). The four dissenters are surely correct in their attack on that distinction.

It is logically impossible to differentiate between this case concerning teachers and In re Griffith concerning attorneys. If a resident alien may not constitutionally be barred from taking a state bar examination and thereby become qualified to practice law in the courts of the state, how is one to comprehend why a resident alien may constitutionally be barred from teaching in elementary and secondary levels of the state public schools? One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals and his profound influence in the impartation of society’s values. Are the attributes of an attorney any less? He represents us in our critical courtroom controversies even when citizenship and loyalty may be questioned. He stands as an officer of every court in which he practices. He is responsible for strict adherence to announced and implied standards of professional conduct, he, too, is an influence in legislation, in the community, and in the role model figure that the professional person enjoys. . . If an attorney has a constitutional right to take a bar exam and practice law despite his being a resident alien, it is impossible for me to see why a resident alien otherwise completely competent and qualified, is constitutionally disqualified for teaching in the public schools of the great state of New York.”

The rule of stare decisis also leads to efficiency. When a court breaks new ground or departs from an established rule, it invariably requires rethinking of innumerable related doctrines and principle. Cardozo has said:

“There is nothing to do but to stand by the errors [of the past] whether we relish them or not.”34 (Cardozo, The Nature of the Judicial Process).

No body of law has generated a greater number of decisions over the past five or six terms than the 1983 cases35 (42 U.S.C. 1983 (1970)). The 1978 term was no exception. In addition, the complexity of the law surrounding this frequently invoked statute continues to grow. The court decided four such cases last term and an adequate explanation of each would exceed the length of this piece. Briefly, the court barred injunctions against state juvenile proceedings (Moore) immunized local policy makers from damages (Tahoe) and narrowed the scope of 1983 in employment discrimination cases (Novatny) and welfare cases (Chapman). Each opinion generates more questions than it answers and it well may be years before this law will be able to be characterized as settled.

Finally, the court’s decisions ought to provide continuity in the law. The law ought not change an established rule of law simply for the purpose of changing it. Constant alterations in the body of the law undermine the respect that the society has for the law in general. This is especially true in cases like Lalli affecting property distribution after death where valid expectations are upset and change itself causes social friction. A similar rationale probably applies to decisions surrounding the Fourth, Fifth, and Sixth Amendments because they alter policy practices in bringing alleged criminals to justice. One can almost imagine the cynicism with which the urban police officer views the current Fourth Amendment doctrine.

Indeed the court treats the facts of history with about as much respect as it does precedent. Clearly history is helpful to illuminate the meaning of the constitution in its original context and to reveal societal changes bearing on subsequent interpretation. Historical revisionism is an abuse of history and is dishonest. A typical historical debate was waged in Gannet (2898) on whether the Sixth Amendment guarantee of public trial was seen solely as a protection of the defendant or as a protection of the public at large. For the majority of five, Justice Stewart stated that “There exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed there is substantial evidence to the contrary,” while admitting in a footnote that pretrial hearings were rare in criminal cases (note 17), Justice Blackman in dissent states that “Study of our heritage reveals the tradition of conducting the proceedings in public. . . unrelated to the rights of the accused and that the practice at common law was to conduct all criminal proceedings in public.” A defense of that statement lasted a full four pages. Likewise in Weber, the majority found it “clear” (27 28) that congress had no intention of prohibiting private affirmative action plans and backs the statement with four pages of Congressional history. In response, the dissent offered twelve pages of legislative history which “irrefutably demonstrate” that the affirmative action plan under review was prohibited by Title VII of the 1964 Civil Rights Act.

A final method of justifying a holding is on the basis of its wisdom as social policy. Since the court’s holdings are law and thus govern conduct, it is certainly appropriate to consider their effects on the lives of the populace. But again, there is little consensus. For instance, in Rakas, the majority notes that it is “unrealistic . . . to suggest that passengers in an automobile have an expectation of privacy” (436) while the dissent states that logic “inescapably” (441) leads to the conclusion that such an expectation exists.

In Mackey (2612), the license suspension triggered by the refusal to submit to a breathalyzer test is not subject to error because the police officer is a trained “observer and investigator” (2619). Thus “there will rarely be any genuine dispute as to the historical facts providing cause for the suspension”. The four dissenters “find this equation highly dubious” and find that such questions too frequently involve “issues of credibility and veracity”. Finally, in Herbert the dissent complains that allowing inquiry into a reporter’s notes and conversations will lead to “more muted and less vigorous give and take in the editorial room” undermining truth and responsible journalism (2658). The majority denies that “truthful publication will be stilled by this rule.” (1647). Similar examples abound in 99 Supreme Court.

The confusion is compounded by the court’s style. The style is an academic one and is characterized by fact statements that are too detailed, reviews of precedent that are unnecessary. Much of term is “a
kind of mystery whose performance was absorbing to the higher ups, but like the ceremonies at eleusis, unknowable saved to the elect\textsuperscript{37}, and social policy debates extend beyond the court’s competence. In \textit{Parham v. JR}, for instance, the court reviews Georgia’s civil commitment procedures for juveniles under the Due Process Clause. The court’s statement of facts is five pages, including a recitation of the history, the capacity, and the staff practices of each of seven of the state’s eight regional hospitals. We learn of the marriage and remarriage of JR’s parents, his erratic behavior at home visits, his placement in foster homes, and his diagnosis — “he was border-line retarded and suffered an ‘unsocialized aggressive relation to child’” (2498).

If such statement were merely irrelevant, students of the court’s work would have little cause for concern. However, as every lawyer knows, every fact stated presents an opportunity to distinguish. Such close distinctions are demonstrated by \textit{Arkansas v. Sanders} where the court invalidated the warrantless search of a piece of luggage lawfully seized from a taxi, in which the defendant was riding. Two years ago, in \textit{United States v. Chadwick}\textsuperscript{38}, 433 U.S. 1, 97 Supreme Court 2476 (1977) the court surpressed a 200 pound footlocker taken from the defendant’s automobile trunk and searched without a warrant. The dissent in \textit{Sanders} distinguished \textit{Chadwick} by arguing that the Sanders search was done “at the height of the afternoon traffic”, that the suitcase was “unlocked” and that its relationship with the automobile was less “attenuated” because the footlocker was in the process of being loaded into the car (2596). The concurring opinion infers that the result would be different if the suitcase were inside the car. Meanwhile the majority finds the failure to comply with the warrant requirement fatal, but goes on to affirm four recent cases which approve warrantless searches of glove compartments, passenger compartments, trunks, and concealed compartments on the dashboard (2593).

Similarly in \textit{Whorton} (2088), the court reviewed a failure on the part of the trial judge to instruct the jury on the presumption of innocence. Only one year before in \textit{Taylor v. Kentucky}\textsuperscript{39}, case, the court had held that the failure to give instructions concerning the presumption of innocence was reversible error. \textit{Taylor} stated that “the principal that there is a presumption of innocence in favor or the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. In \textit{Whorton}, the Kentucky Supreme Court followed that specific language of \textit{Taylor} and reversed the state trial judge for failure to give the instruction. The Court reversed the Kentucky Supreme Court emphasizing that the holding in \textit{Taylor} was based on the facts of that case and that the future application of the \textit{Taylor} rule must hinge on the “totality of circumstances” (2090).

Similar confusion will almost certainly be spawned by the court’s opinion in \textit{Gannett} which fails to clarify the issue of whether its holding would abe the same if there has been a contemporaneous objection from the member of the press, if subsequent access to the transcript were denied or if the hearing were not in the nature of a pretrial hearing.

A perhaps more disturbing practice of the court is its habit of interpreting prior caselaw to stand for more than it meant when it decided. For instance, in \textit{Moore}, the court reversed a federal district court’s intervention under 1983 into state juvenile proceedings. The scope of such federal court intervention has demanded the court’s attention more than twelve times since 1971 when it issued its seminal opinion in \textit{Younger v. Harris}\textsuperscript{41}. In \textit{Moore}, for the first time, the court informs us that one of the reasons for the doctrine is to allow state courts to be “principal expositors of state law”. It cites \textit{Trainor v. Hernandez}\textsuperscript{40}, as its authority. An examination of \textit{Trainor} indicates only one sentence in the lengthy opinion which even infers this. However, \textit{Trainor} does not cite the \textit{Pullman} case\textsuperscript{42} which is the doctrine the court is reading into the \textit{Younger} law in \textit{Moore}. \textit{Pullman} involved the different question of whether a court ought to decide a question of state law which has not been authoritatively construed by the highest court in the state. The addition of \textit{Pullman} consideration to the \textit{Younger} analysis is new law but a reading of the court’s opinion in \textit{Moore} implies that it is established doctrine.

Similarly in \textit{Quern} (1139) the court reviews a district court order requiring state officials to send out notice to welfare recipients concerning administrative procedures by which the recipients may be entitled to past welfare benefits. The court unanimously approved the district court order. However, the majority and concurring opinion have a heated dispute as to the scope of Eleventh Amendment doctrine. The majority in \textit{Quern} goes out of its way to make clear that money damage actions in federal court against a state are barred by the Eleventh Amendment. That question appeared to be somewhat open at best with respect to attorney’s fees after the courts decision in \textit{Hutto v. Finney}\textsuperscript{43}, 437 U.S. 678, 98 Sup. Ct. 2665 (1978) where the question was hotly debated in the concurring and dissenting opinions. However, the court cites its \textit{per curium} opinion of \textit{Alabama v. Pugh}\textsuperscript{44} U.S. 98 Sup. Ct. 3058 (1978) as its authority for closing the question apparently left open in \textit{Hutto}. \textit{Pugh} involved a motion to strike the state as a defendant where other state defendants named or joined in the proceeding would have produced adequate relief on behalf of the plaintiffs. In a one page \textit{per curium} the court approved the motion. The dissent chided the \textit{per curium} majority for addressing a question that the Court of Appeals never addressed and for wasting the court’s time with insignificant orders. It made no reference to the fact that it was answering the question debated in the footnotes of \textit{Hutto v. Finney}, and no plain reading of the opinion could have so informed the reader.

Finally, the court is often too willing to engage in discussion and to find facts which are either highly debated in the profession or essentially unknowable. For instance in \textit{United States v. Rutherford}, the court appears to conclude that laetril is a dangerous drug. The dissenting opinion in \textit{Beazer} concludes that drug addicts on methadone maintenance programs exceeding one year make satisfactory employees and thus have no greater need for employer supervision than other employees. The majority on the other hand finds that the employment of drug addicts on methadone maintenance will require special supervision and the expenditure of additional resources. In \textit{Parham} the court debates the existence \textit{velnon} of a stigma after discharge from a mental hospital. The majority cites a number of sociological studies to the effect that “the stigma of mental hospitalization is not a major problem for the patient” (Note 12, Page 2503). The concurring opinion on the other hand finds such stigma and that “the fact of past institutionalization lasts forever” (Note 3, Page 2514). The dissent emphasizes that institutionalization of young children...
leaves them damaged for life, while majority finds such institutionalization beneficial. The majority finds little cause for concern in expert testimony that parents “dump” their unwanted children on mental institutions, while the dissent finds this to be a substantial and difficult problem. Finally, the majority finds that with respect to admisions into mental hospitals the generality of cases presents little risk of error. The defense varies with this conclusion. The current due process doctrine requires the court to look at the generality of cases which the facts represent and to draw conclusions about that generality instead of the facts before the court.

Finally, I hope it not inappropriate to make a comment on the court’s style of expression. Cardozo quotes Henry James to the effect that “strenuous selection and comparison are the very essence of art and that form is . . . substance to that degree” 245. In Gannett, perhaps the most doctrinally significant case of the terms, the court (per Stewart) addressed the public interest in an open trial as follows:

There can be no blinking the fact that there is the strong societal interest in public trials . . . but there is a strong societal interest in other constitutional guarantees extended to the accused as well. The public, for example, has a definite and concrete interest in seeing that justice is fairly administered. Similarly, the public has an interest in having a criminal case heard by a jury . . . Recognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry, however, from the creation of a constitutional right on the part of the public.

This is tepid pudding, indeed, and the task of reading Ninety-Nine Supreme Court becomes an arduous one with very little excitement and very little novel discourse.

When Dean Pound was asked to evaluate a particular court’s work as to whether the decisions were good or bad, he demurred. However, he was willing to answer “How thoughtfully and disinterestedly the court had waives the conflicting social interests involved in the cases and how fair and durable its adjustment of interest conflicts promised to be.”46. One gets the impression that the justices on the court are anything but disinterested in results. Their willingness to disregard and alter recent precedent evidences a result orientation which ought to be more characteristic of its advocates than its justices. The justices demonstrate no self-doubt about the righteousness of their world view and every justice feels entitled to decide each case based on his intuitive sense of self-justice. From here the argument from reason, history, and social policy are constructed in a revisionist fashion much as in Orwell’s 1984, as Justice Rehnquist points out in his dissenting opinion in Weber. If a justice can gain the concurrence of four others, his political view becomes the rule of law regardless of what it does to precedent and principal. I suspect that Pound and Cardoza would have found such an approach totally unacceptable.

Footnotes

1. For purposes of simplicity and clarity, references to the cases that composed the 1978 term will be referred to by single name titles proceeded by a page reference to 99 Supreme Court, West’s unofficial system.
5. 424 US 319 (1976)
7. note 4 supra
8. 376 US 254 (1964)
11. See also Lehar, Honest Judicial Opinions 74 NW UL Rev 72 (1979).
16. Levy, Against the Law p. 32.
25. id at 776 n. 17.
26. id et 774.
29. Hayek, Road to Serfdom p. 78.
31. Board of Regents v. Roth 408 US 570 h.7 (1972).
36. See discussion infra.
42. Railroad Commission of Texas v. Pullman Co. 312 US 496 (1941).
43. 437 US 678 (1978).
44. US . . . 98 S Ct. 3057 (1978).
The Brethren


In February of 1969, two weeks after the inauguration of Richard Nixon and half-way through the last term of Earl Warren, Warren Burger was invited to the White House by the President to swear in several government officials. Then a judge on the 5th Circuit Court of Appeals, Burger had known the President since the 1948 Republican National Convention, which Nixon attended as a freshman Congressman and Burger as floor manager for Minnesota Governor Harold Stassen.

Following the ceremonies, the President invited Burger to the Oval Office. Like most lawyers, Burger knew that the President was strongly committed to changing the complexion of the Court. Five days after his inauguration, for example, the President had ordered the IRS to begin an audit of Justice Douglas' tax returns and had instructed the FBI to investigate Douglas' alleged ties to a Las Vegas casino owner. Burger also knew, however, that the President's immediate concern was finding an appropriate successor to Earl Warren.

Upon arriving at the Oval Office, the President casually remarked that he recently had used several points from an article written by Burger critical of the criminal trial system. Not one to miss an opening, Burger replied that he coincidentally happened to have brought a copy of the article with him that evening. The polite chat quickly blossomed into a seventy minute meeting. At its conclusion, John Ehrlichman was instructed to circulate copies of the article to the White House staff. Three months later he was to circulate Warren Burger's name as the President's nominee for the new Chief Justice.

So begins The Brethren, Bob Woodward and Scott Armstrong's much discussed excursion behind the closed doors of yet another Washington institution—this time the Supreme Court. Combining the exhaustive research and interview techniques that made All the President's Men and The Final Days so successful with an ear for cocktail hour tidbits that would make People magazine proud, Woodward and Armstrong have put together a captivating and highly readable account of the first seven years of Burger's tenure on the Court.

The book was assembled from interviews with more than 170 former law clerks, who supplied the authors not only with recollections and impressions but with memos, diaries, and documents from the chambers of 11 of the 12 men who have served on the Burger Court (John Paul Stevens being the sole exception). Putting aside the propriety of such behavior, around which much of the book's discussion has centered, the portrait of the Court which emerges is by and large favorable.

Collectively, the Justices appear as a hard-working, fiercely independent lot, truly concerned about the law and the import of their decisions. That is not to say that their decision-making process is devoid of politics or personality clashes or that such considerations do not influence the eventual vote in particular cases. Justice Stewart, for example, made it his personal policy never to cast the fifth vote in favor of overturning a Warren Court precedent regardless of his views on the merits of the case, while Justices Brennan and Marshall refused to grant certiorari in Fourth Amendment cases involving less than flagrant police misconduct after Justice Black, the crucial swing-vote, had begun to reassess his support of the exclusionary rule. And in the book's most dismaying episode, Justice Brennan chose to let stand a dubious murder conviction rather than switch his vote and offend Justice Blackmun, whom he was attempting to pry from Burger's influence.

In a book that relies so heavily on the anecdote, however, it is easy for the reader to lose sight of the forest for the trees and to grant significance to those details which are interesting only because they were hitherto unknown. It is to the Justice's credit, therefore, that despite the lapses into less than judicious behavior made by each, a reader can leave the book feeling that for the most part each strives to reach an appropriate result in the overwhelming majority of cases.

Unfortunately, the same cannot be said for Warren Burger. From the picture appearing on the book's cover, depicting eight of the Justices conversing with each other while the Chief Justice stares in solitude at the camera, to the open insurrection of his eight fellow Justices during the drafting of the Nixon tapes decision, Burger repeatedly appears as the judicial equivalent of Captain Queeg, unable to inspire anything more than scorn in the other Justices.

Sarcastically referred to by Justice Douglas as "this" rather than "The" Chief and privately labelled "Dummy" by Brennan, Burger's attraction to the pomp and splendor of the Court, his lack of intellectual rigor ("We are the Supreme Court and we can do what we want," he once told a fellow Justice), and his blatant grabs for power at the expense of the Court's rules and traditions have succeeded in straining relations with his fellow Justices "to the breaking point", according to the book.

As told by the authors, Burger began stirring antagonisms even before his first term on the Court began. Deeming his office too small—"How can I entertain heads of state?"—he attempted to annex the Court's traditional conference room for himself to the collective shock of his fellow Justices. A confidential memo to his clerks,
Meanwhile, instructed them to view the Court as comprised not of nine members of the same law firm but rather of nine different law offices coincidentally occupying the same building and accordingly admonished them from discussing with other clerks cases, votes, or anything which might "tend to place the Chief Justice in an unfavorable light".

The book makes it clear, however, that the chief cause of Burger's rejection by the rest of the Court stems from his misuse of his prerogative to assign cases when in the majority. The book is replete with instances in which Burger withheld his vote on a case until he saw which side had a majority or changed his vote at the last minute in order to gain control of an opinion. On one occasion, for example, Burger voted five ways in one case and on another tried to assign four majority opinions in a single day even though the conference vote indicated that he was in the minority on each.

The inevitable result of this behavior has been the creation of a "frayed and bitter Court full of needless strains and quarrels", to use the prophetic words of Justice Douglas contained in an angry memo to the Chief following a particularly egregious instance of vote switching. It has also created a Court led by Burger in name only. "On ocean liners they used to have two captains," Justice Stewart is quoted as saying. "One for show, to pilot the ship safely. The Chief is the show captain. All we need now is a real captain."

In its concluding account of the Court's most recent decisions on the death penalty, the book makes clear that the Court has found that captain in the centrist bloc consisting of Justices Powell, Stewart, Stevens, and White. With the departure of Justices Warren, Fortas, Black, and Douglas, it is this group which will set the tone of the Burger Court in the years to come. And when all the commotion about the book's tattletale aspects subsides, it is in the account of this transition that the real value of The Brethren will be found to lie.

The Letter of the Law

by Katherine A. Davis Roome.
Random House, New York. 1979
$8.95. Pages 208.

"Even more revealing in this gallery of abstract self portraits is the multitude of 'ladders:' lists of paired names, with the winner of each couple written on a line to the right. This halved list is again paired and pared in half, until eventually, on the right-hand side of the poster, there is a small line for the champion . . . There is a ladder, obviously, for every conceivably competitive activity. Two or more of us cannot congregate without immediately entering into active combat."

These words describe not only the interior decor of an educational institution, but law school life in general according to Katherine A. Davis Roome. A 1977 graduate of Cornell Law school, Ms. Roome, in The Letter of the Law, presents still another view of law school from a student's perspective. Instead of the usual first year confusion and fear, however, she chooses to focus her account on the competitiveness of the institution as manifested by the second year Law Review writing competition.

Ixias Smith, the narrator, enters "the ultimate competition" in a combination of fear, reluctance, and drive. The novel, in journal form, follows Ixias as she progresses through the writing of her competition piece, determined as are the other competitors to win in almost any way possible. The fierce competitiveness which is the basis of the story leads to a soap opera like tale of broken friendships, strategic love affairs, and devious tricks all used as a means to achieve victory in the contest.

Ixias' college love, Jeremy, arrives upon the scene of the competition adding not only a dramatic romance, but more importantly, the perspective of one not involved in the law school community. He cannot understand the drive that is keeping Ixias in school, and instead characterizes it as sheer greed.

In capturing the essence of law school in the 1970's and the drive for achievement which leads to successful jobs, Ms. Roome has emphasized the competition and thus omitted the cooperation and dedicated study which is also a part of a legal education, perhaps because it is the less exciting aspect upon which to base a novel. The author has, however, provided an interesting, entertaining narrative which law school students and graduates will recognize as an overly dramatic account of the second year of law school. For those readers, like Jeremy, who have never been exposed to a legal education, The Letter of the Law must be seen as a fictional piece, read with the knowledge that Ixias Smith does not express the view of all attorneys by her attitude and these words upon the completion of two years of law school:

Well, watch out, world. Looks like we'll all be out there next year . . .
And of course we'll be after just as much as we can grab, and you'll be paying for it at premium prices. I can see the ads. Get your justice, folks, while it lasts. God help us all, but me just a little more than all the others.

Andy O'Donnell
Faculty Notes

Associate Professor Bernard V. Keenan was recently voted a sabbatical leave by the University Board of Trustees. During the 1980-81 academic year, Prof. Keenan will be enrolled at Columbia University School of Law as a candidate for the degree of Doctor of the Science of Law (J.S.D.). Law School Professors Bernard V. Keenan and Joseph P. McEttrick recently testified at a hearing conducted by the Judiciary Committee of the Mass. House of Representatives. Their testimony related to a proposal to alter the legal consequences of real estate ownership between husband and wife.

Professor Valerie Epps recently published an article on the Validity of the Political Offender Exception in Extradition Treaties at 20 Harvard Journal Int’l Law 61 (1979). She is currently doing research on the termination of treaties; she has also been elected to the Board of the Massachusetts Civil Liberties Union.

Professor Gerald Clark recently argued the case involving receivership of the Boston Housing Authority before the Supreme Judicial Court of Massachusetts; he represented the Tenant Policy Council. Professor Milton Katz served as moderator of an A.B.A. sponsored panel discussion on the First Amendment and the Progressive Magazine case; the panel discussion took place at Harvard Law School. Professor Karen Blum recently published an article defining The Scope of Municipal Liability in the Federal Courts at 51 Temple Law Quarterly 409 (1978).

Professor Richard Pizzaro is currently the Visiting Scholar at the Harvard Law School, where he is doing research on Psychiatry and the Law.

Professor Lisle Baker delivered a paper on the subject of Windfall Recapture for Benefits Conferred by One Landowner on Another at a conference sponsored by the Vermont Law School. Professor Charles Kindregan recently addressed the

The Alumni Placement Committee is initiating a program to assist the growing number of students pursuing employment opportunities beyond the borders of Massachusetts. To ensure the program’s success, the active cooperation of alumni/ae is necessary.

The Committee requests graduates of the Law School to provide accommodations to students being interviewed by prospective employers in their (graduates’) cities.

A form is provided below for alumni/ae wishing to participate in this program. The completed form should be mailed to:

I._______________________________________________________

Address: ____________________________

Phone Number ____________________________ Class ________

I am willing to provide overnight accommodations for a student____(# times per year).

_____ Although I am unable to provide overnight accommodations, I am willing to discuss employment opportunities with students.

_____ Please insert any other suggestions that may assist students interested in employment in your area.

Women’s Bar Association of Massachusetts and delivered a lecture on Legal Malpractice to the National Practice Institute in Denver, Colorado. He also has been appointed to a Special Committee on Legal Education by the Supreme Judicial Court of Massachusetts.

Professor Charles Burnim has published an article on the Massachusetts Rape-Shield Law at 64 Massachusetts Law Review 61 (No. 2 April 1979). He has also continued serving as the Reporter to the Advisory Committee on Uniform Rules of Evidence for the Commonwealth of Massachusetts. Professor Louise Weinberg has returned to Suffolk after teaching admiralty as a Visiting Professor at the University of Texas School of Law; she also attended the Noble Prize awards in Stockholm, Sweden, where her husband Steven received the Noble Prize for Physics for 1979.
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