NEW ASSOCIATE DEANS

Charles P. Kindregan

Russell G. Murphy

Volume 21 No. 2, Spring 1991

The Suffolk University Law School Journal
Table of Contents:

Interview with Professor Michael J. Slinger, Law Librarian
by Professor Gerard J. Clark ................................................................. 2

Assignment: Bulgaria
by Terrence B. Downes ....................................................................... 6

Racial Discrimination And The Death Penalty
by Rebecca Bell Butler and Denise DeMore Keohan ......................... 19

For Capital Punishment: the meaninglessness of the right to life
by Professor Stephen C. Hicks ........................................................... 28

Back To The Future - Part Law
by Professor Joseph D. Cronin ........................................................... 34

The Lawyer As Hero?: 1991
by Professor Gerard J. Clark ............................................................... 39

Review of Recent Bankruptcy Books
by Professor Michael Rustad .............................................................. 44

Richard J. Leon Appointed to Presidential Commission .................... 46

Massachusetts Criminal Defense
by Eric D. Blumenson and
Members of the Massachusetts Criminal Defense Bar
Reviewed by Professor Joseph D. Cronin .......................................... 47

New Associate Deans:
Charles P. Kindregan, Russell G. Murphy ........................................ 48

In Memoriam: Professor Charles B. Garabedian .............................. 50

Elder Law at Suffolk Law School ....................................................... 51
INTERVIEW WITH
PROFESSOR MICHAEL J. SLINGER
LAW LIBRARIAN
SUFFOLK UNIVERSITY LAW SCHOOL

interview conducted by Professor Gerard J. Clark.

March 8, 1991

Advocate: Michael, you've been here at Suffolk for eight months, what do you think about the collection in the law library? Could you describe it?

Slinger: It's a good basic American law collection. Of course, one of the principles that Professor Bander operated under was that Boston itself is a wonderful collection. There are so many law libraries in town. But one of the things that we have to be concerned about is you can't get access to a lot of materials easily if other people hold them. So we have to make sure that we support our primary customers, who are of course the faculty and the law students here. Secondarily, we try to help provide a decent legal collection for the university at large and for our alumni. Although because of funding restraints we can't buy material for the alumni that doesn't also serve the direct needs of our faculty and students, we just don't have the funds to do that, but we certainly want to make the collection available for the alumni to come and use.

Advocate: You mentioned the alumni. What is the library's policy with respect to use of the collection by the alumni and if I could expand that, how about the lawyer public?

Slinger: As far as the alumni are concerned this school has a very, very strong reputation as being supportive of the alumni and that's something that we're trying to continue in the law library. The alumni are absolutely encouraged to come and use our collection. In fact they have borrowing privileges here, which is fairly unusual. Most law libraries don't permit their alumni to borrow material. We'll also provide reference service for them, when appropriate. We really like to see the alumni come back. As far as attorneys are concerned, our location in downtown Boston is a weakness as well as a strength and we can get inundated with the attorney population here, so we can't grant general privileges to them, but we do allow them to come into the library and use the resources. They don't have circulation privileges and they don't have opportunities to work with reference librarians in the same way as our alumni do.

Advocate: You mentioned your reference librarians. What kinds of services can students, faculty or attorneys expect from the professional staff in a law library such as ours?

Slinger: Well, first I'd like to say that one of the priorities I had in coming to Suffolk is to really promote the abilities of the law librarians. Law has become so complex in terms of figuring out how to find things that in many cases it is necessary to have a trained professional assist you in the planning stages of your work. As far as the student body is concerned, one of the first things we did was move the reference desk down to the main floor of Mugar so that the students would have easy access to the reference librarians. When students ask questions at the circulation desk, the circulation people can easily point them to the reference desk where a professional librarian can help them. We have professional librarians on duty at the reference desk virtually all hours that the library is open. As far as the faculty is concerned I have been very interested in supporting faculty research. Librarians are very talented and skilled at uncovering documents and materials that perhaps the faculty doesn't have the time or the searching expertise to find on their own. We have been encouraging the faculty to take advantage of our talents and our people are as happy as clams when they get faculty requests. It makes them enjoy their work more. So, let's put an end to the notion that some people might think, "well, I don't want to disturb these busy library people," because the librarians really do want to help and be active. As far as our alumni are concerned, generally we help them in some of the same ways that we help students and if they have a question about how to proceed or where material is and things of that nature, they can come to the reference desk and the reference librarians will attempt to assist them.

Advocate: Speaking about professional librarians, you had the benefit of coming to a library where the associate
librarian Pat Brown has worked in our library for thirty-seven years. I imagine she was a great help to you.

Slinger: Pat Brown is an incredible person. She has really lived the institutional life of the Suffolk Law Library. She has done just about everything that you could imagine in terms of making this place work. The amount of help that she gave me in coming here is truly mind boggling. One of the sad things that the alumni and a lot of other people are not aware of is that Pat is going to be retiring in January of 1992, after close to 40 years of service here. I am sure that in that time she has made an appreciable contribution to many people's legal education in terms of what they were able to find in the law library and what they were able to do. I would like to take this opportunity to thank her publicly on behalf of, not just myself, but all the librarians who served with her. She has contributed so much to the university community at large.

Advocate: I know the faculty enjoyed greatly the presentation on legal research methods that you gave to them and I think most of us have been making greater use of your professional staff. I assume that is one of your goals because it's evident already in your short tenure as head of the library. Do you have other goals that you hope to achieve?

Slinger: Yes, one of my major goals is that I would like to bring the library further into the twentieth century in terms of technology and to do that we need to develop an automated library system. That's something that I've had some preliminary discussions with the Dean about and he seems enthusiastic about it. One of the things this system would give us is an automated catalog, and the potential of an automated catalog is incredible. For example, faculty members, students, alumni who have modems and computers will be able to access our catalogs from their homes or offices. It also will make a major difference in how efficiently we buy books, keep track of materials and circulate them. So that is something that I hope we'll be able to have within three years.

In addition, we really would like to be sensitive in providing as much research support as possible for the students and student journals. Toward this end I've got some long range goals, if we can expand the library physical space we can do things like provide reservable carrels for students who are researching particular topics so that they will have a place to keep a certain number of books, and won't have to continually keep picking up the books and reshelving them.

This year we've been able to add WestLaw and Lexis permanent learning centers and that means that we were able to jump our total number of WestLaw and Lexis terminals from 4 to 16 and I'm hoping to expand beyond that for the benefit of our students because I think that in the future lawyers are going to have to be competent in the electronic world. Gone are the days when you could ignore this type of technology, and I want our students to be as comfortable with these systems as possible when they go into the "real world."

Advocate: You mentioned computers and we all are aware of the databases that are in the library and available through computer. How has it changed legal research over the past fifteen years?

Slinger: Well it's really revolutionized legal research. In particular law school because one of the things that the Lexis and WestLaw companies have realized is that if they want their products to be used by attorneys, which is where the money is, they ought to provide as much access to law students as possible. As a result students are now graduating with a fairly good understanding of what these systems can do and are demanding to use them at their firms.

It has revolutionized things because so much is available on the databases; the entire breadth of court reports from the federal and the state level are pretty much on line now and that is just the tip of the iceberg. Even in the largest firm libraries, they are not going to be able to find the SouthWest Reporter in book form when they need a case from that jurisdiction, but on that little computer screen you can call up any case from the SouthWest Reporter any time you want. So it's been incredible in terms of the power and information that is made available to the individual and I think it's also going to revolutionize practice for individual practitioners who formerly were really at a disadvantage in terms of research when they went up against large firms. Now with the computer and WestLaw and Lexis, you can pretty much count on the fact that you're going to have access to most of the materials that the big law firms are going to have access to. That will make a big difference. It is also going to make a big difference for those practitioners who are in remote areas where there are no good law libraries around. They will have access to materials that they never could have dreamed that they would have access to before. I knew an attorney in Alaska who used to make several trips a year to Seattle just so he could use a decent law library. He had to cut those trips down because of cost, but then he got WestLaw and Lexis and found that the trips weren't necessary anymore because he was able to obtain most of the basic documents from WestLaw and Lexis.

Advocate: What is happening in the technology today and what are you expecting in the future? Will there simply be expansion of databases and indexing or are we going to move into some kind of new age?

Slinger: Well, I think we're on the verge of moving into a new age. In addition to the databases, which are so important and are also becoming so readily available to people in their homes and offices, so much material now is being made available on CD roms, which are the equivalent of the CD disk that people have in their homes for entertainment. You can keep so much information on
them that you can literally have the entire length and breadth of Federal Taxation material on one CD. That cuts down on on-line charges and things like that. That is a major difference but in addition to that networks are expanding so much that I really see in the near future - when I say the near future I mean the next five to ten years - practitioners and others are going to have access to huge high speed networks that will enable them to share not only Westlaw and Lexis type of information but also personal information. There will be a lot of boutique databases. For example, maybe something specifically designed for attorneys practicing in the area of wills and trusts. They are going to be able to share briefs and other information through this technology. They are also going to have tremendous opportunities for transmitting information back and forth. I think Federal Express and those kinds of services are really going to be suffering in the future because I think you are going to be able to send most material via networks. It is going to become second nature to operate like this for law offices and others including courthouses across the country. So it is really going to be a new world, I think, in the next five to ten years.

Advocate: How has this change in the technology affected the decisions that you make about additions to the book collection in the library?

Slinger: Well once again it has affected us profoundly because most of the basic materials are available through databases so you don't think anymore in terms of keeping three or four or five of the same sets of materials. Maybe you keep one set for the people who can't get access to Lexis and Westlaw but you can pretty much rely on the computer to prevent excessive duplication. It also makes a big difference in terms of expensive loose-leaf services. A lot of expensive loose-leaf services are becoming available on-line. When you get them on-line, you can start thinking in terms of, "Well, do we really need this in our collection? Do we really want to spend one thousand dollars to buy this if we can access it pretty easily from our computer terminal?" Those are the kinds of decisions that you are making and generally you make decisions not to add material because it is available to you in other formats.

Advocate: Do you see the Suffolk collection as having any particular specialty collections?

Slinger: I don't know that we have any particular specialized strengths in our collection. I think Prof. Bander deserves credit for trying to build a good basic American collection. What my goal is in terms of collection development is to try to maintain that and also try to serve the particular needs of our student body and faculty. In other words, if particular professors are working in certain areas they are going to need certain materials. It has always been my goal to try to react to that as much as the budget will permit. We've got a transnational Law Journal here so we will be looking to buy more international materials that will be of use to them. I think you can't buy everything in the world and not even Harvard can do that. So what we try to do is try to figure out what our faculty and students need and then we try to go out there with the dollars that are available and meet those needs as well as we can.

Advocate: Can you give us some numbers? How big is the collection and how big is the budget of the library?

Slinger: Well as far as the collection is concerned we are in the neighborhood of 300,000 volumes which makes us a pretty respectable library. We are certainly not up there with Harvard or Yale but we're a good collection. As far as our budget is concerned, just like everyone else in the Commonwealth of Massachusetts, I wish we had more money. We can't always respond to the requests that people give us simply because of financial limitations. By the same token, I often see materials that I have a great desire to buy but I know that I can't afford them. I have a huge drawer in back of my desk which is full of publishers' handouts for materials that I would really love to have and I know that our patrons would have use for them but the cost is prohibitive and our budget is not big enough to buy everything. So what can you do? You have to make sacrifices. Everything has to be a balancing act and we just hope we balance it on the side of getting the most useful material that is possible.

Advocate: Michael, you are also the teacher of one of the more popular electives here at the law school entitled "Advanced Legal Research." What kind of things do you cover in that course?

Slinger: Advanced Legal Research is a course that's basically designed to help people feel comfortable with doing legal research. Unfortunately, the timing of legal research courses in most law schools is in the first year and people really don't have that much perspective when they take the course. It is only later, after they have clerked for a while, that they realize that they don't feel as comfortable as they need to be and don't know as much as they really need to. So what we try to do is cover the materials that they have not had much of a chance to cover in the first year. Things like Legislative Histories and Administrative Law and things like learning to be comfortable with Lexis and Westlaw and learning about non-law sources which are so important now for legal research. We try to give the students practice in those areas. I can tell you the students who take the course are generally students in their last semester of law school. These are students who are really well motivated. You can't go out there and be Perry Mason unless you know how to research. Similarly, in your first couple years out, you can not expect that someone else is going to do the research for you. What my course is about is making the students feel more comfortable so they are going to be more effective. It is a competitive world and we want our students to be as efficient as possible for their clients' sake and also for their own sake, particularly if they are in situations where they are being evaluated against other attorneys.
Advocate: Michael, to most lawyers the heart and soul of legal research continues to be statutory and case oriented and therefore for a Massachusetts attorney if you had sets of Massachusetts and Federal Statutes and the case Law of Massachusetts and the Federal system you have met 90% of the needs of the practitioner. Yet we find most of the same statutes and cases in services coming from CCH and Bender. How do we decide whether to order services like that?

Slinger: Well, first I would like to say that services have their place in practice and certainly if you were a tax attorney, for example, you would not often need to go outside of the services because they are so comprehensive. At the same time there is so much duplication of effort and the cost is so prohibitive that we find it hard to buy many of the services that are available. We really have to weigh things and although the practitioners and our alumni out there may wish that we had every potential loose-leaf service or at least most of them for the areas they practice in, the realities of the situation are that a lot of these tools are not really adding anything unique and they are certainly not adding enough to our collection to justify the cost in terms of educating the students. You must realize the students aren't practitioners at this point and most of the papers they are going to write are going to be scholarly in nature and we have to emphasize that side of research. The faculty also is interested in scholarship and we always have to remember that our primary job is to support the educational interests and research curriculum here at the school. I might also mention that because of the cost involved, we have had to make significant cuts in the area of loose-leaf services. It is possible that some alumni may come back and remember something that they used at one time and it may not be here anymore. I want people to understand that our decision to end the subscription is not made because we think the service is necessarily bad or that we don't want to provide the service to our patrons, but was made because the shrinking dollars dictate that we can't have everything. We also believe we can find the material that is in the service somewhere else, perhaps not the commentary but the material is available. We are doing the best we can in this difficult area.

Advocate: Michael, you came to Suffolk eight months ago after leaving a position as Associate Director for Public Services at the University of Notre Dame Law School Library and you spent six years at Notre Dame. How do you compare Suffolk Law School to Notre Dame?

Slinger: One of the things I was truly amazed to find is how much people love this school. One of the most interesting experiences I had was attending the annual Alumni Dinner. When I went into the hotel I was thinking to myself, well there probably will be a couple hundred people here. I think there were in the neighborhood of four thousand people there. I was stunned by the size of the turnout and, from talking with people, their affection for the school. Similarly with the law students, I often asked them "How do you like it here?" And they really like their legal education. They think there are excellent teachers here and they think the people care here. This is a huge school; this is one of the top six law schools in the country in terms of size of the student body. My experience has been in many places the students don't have as good an appreciation of their school, they don't like it that much. Often you will find people will say that they don't want to contribute anything to their school in terms of money or in terms of service to the school after graduation. That is not the case here. The interesting thing in talking about Notre Dame is that it was exactly the same way with the student body of 500 as opposed to 1700 at Suffolk. When I came here one of the things I thought I was going to sacrifice was that kind of feeling. Much to my surprise the affection is just as strong here and I think people would be totally amazed across the country if they knew that. I don't think people think of Suffolk as being a small school and because of its size they certainly don't think of it as a school where students and alumni are going to have this kind of respect for what the school is doing. So it is a tribute to the student body, to the alumni and I think most of all to the faculty who make it work.

I would also like to say that I have had great support from Dean Sugarman, Dean Kindregan, Dean Murphy and Dean Donahue, as well as from the library committee chaired by Professor Rounds since I've come here. That is similar to what we enjoyed at Notre Dame, and it bodes well for the future of library development at Suffolk.

Advocate: Michael, you attended undergraduate school in Pittsburgh, you got your legal education in Pittsburgh at Duquesne University and then went to work at Notre Dame. I guess that labels you as a midwesterner. What do you think of Boston and New England?

Slinger: Well let me say that I am a native of Pittsburgh and the one thing that people from Pittsburgh always have problems with is when people label Pittsburgh as being part of the Midwest. People in Pittsburgh definitely feel that Pittsburgh is in the East, so one of my main goals in coming to Boston was to come back to the East. My wife is from Connecticut. Her home town is about three hours away so in many ways I feel like we are coming home. As far as Boston is concerned, it is a great city. I spent time in Chicago and I rank Boston higher than Chicago in terms of quality of life. The one concern I have is of course the same concern that everybody has; the financial situation here is poor. You are seeing a lot of people on the streets and that is very disquieting, particularly someone like me who has spent the last six years in a Midwest college town where you don't see a lot of that sort of thing. I would also like someone to please lower the cost of housing here. It makes it very difficult, not just for me personally, but it makes it difficult to recruit qualified librarians because of the cost.
ASSIGNMENT: BULGARIA

by Terrence B. Downes, Esq.¹

The telephone rang at 11:00 a.m. on Tuesday, June 12, 1990. My wife Annie was on the line — Robert Henderson was trying to reach me from Washington, D.C., something about Bulgaria. A couple of minutes later I had him on the wire.

An old friend from Harvard, Robert had gone on to the foreign service school at Georgetown, and is now Vice-President of the National Republican Institute for International Affairs (NRIIA). Both the Republican and the Democratic parties have such an organization, each dedicated to assisting emerging democracies throughout the world. Heavy demands have lately been made upon them to provide assistance to the startling number of countries now throwing off the chains of political oppression, and attempting to undertake free and fair elections. Such elections are the first major step on the long and difficult road to democratic rule.

The relatively small size of the organizations has required them to go outside their own staffs to recruit certain people, both from the U.S. and other countries, who are familiar with international affairs and with democratic electoral processes, to join them as members of international election observation delegations. Traveling to any country which requests such observers, they monitor the electoral process and report on their findings, particularly noting whether the process was fair, open and honest.

The purpose of these observation delegations is to accomplish just these things. In no way is their purpose ever to interfere in the internal affairs of other sovereign nations, even though some of those nations may well be governed by political establishments whose philosophies, motivations, methods, and aspirations are inimical to those of the United States and other democracies. The job of international observers is to "show the flag" of democracies both to the host government and to the people as well, and to serve as embodiments of the concerns of free people and governments everywhere for the spread of true self-determination to all nations. What the people in any given country decide is their business, and their business alone. How they are able to decide, and to make their decisions known is the legitimate concern of free people everywhere. By their mere presence in another country, the international observers bring the force of international opinion to bear on the government which sponsors the elections. In order to be judged a success, the elections must be deemed "fair, open and honest," accurate tabulations of the voting must be published promptly, and the decisions of the electorate implemented within a predesignated period.

Should the observers judge that the election has been a failure, it is their duty to report that judgment along with supporting evidence. Few people, even well-armed despots, want to go down in history as having been blamed for the defeat or loss of democratic principles in their countries. There is little so potent as the bright spotlight of international public opinion, the direction of whose beam is the responsibility of, among others, international observation delegates.

One of the better known examples of the impact of election observers, ironically, involved the failed attempt to hold free, fair, and binding elections in Panama in May, 1989. The election observation delegation was led by former Presidents Gerald Ford and Jimmy Carter. The elections themselves plainly bespoke the will of the Panamanian people, with the government of strongman Manuel Noriega being thoroughly thrashed at the polls. So the election itself worked fine. It was implementing the result which was the problem. When Noriega and his henchmen realized what was happening, they tried to hijack the process by announcing phony results. They had made it unlawful for anyone but themselves to announce election tabulations to the public; however, certain independent groups, notably the Catholic Church's elections observers, decided to defy the ban and announce accurate tabulations. Thus exposed, Noriega had to either retreat or go on the offensive. Unfortunately for Panama, he chose the latter course; unfortunately for him, Carter, Ford and company were on hand and quickly blew the whistle loud and long. Within 24 hours, the entire world

¹Terrence B. Downes, Esq., is a member of the Adjunct Faculty at Suffolk University Law School. A graduate of Harvard and Suffolk Law (J.D. '78), he teaches Criminal Law, and Arbitration: Private Dispute Resolution. An official of the Massachusetts Trial Court, he lives in Andover with his wife, Ann O'Connor Downes, Esq. (S.U.L.S., J.D. '86). Upon his return from Bulgaria, he was awarded a Resolution of Commendation by vote of the Massachusetts House of Representatives for his contribution to the advancement of democracy in Eastern Europe.

The author gratefully acknowledges the assistance of Stephen P. O'Connor and Olga Ortiz of the University of Lowell, and Christine P. O'Connor (S.U.L.S. '94) in the preparation of this report; and of Michael A. Kane, M.D., of the Massachusetts Institute of Technology, whose timely assistance helped make the trip possible.
knew what was really happening. The election itself was nullified through the exercise of raw military power. Noriega himself did not last very long, and in any event the job of the election observation delegates was brilliantly discharged thanks to the courage, tenacity, and political acumen of Presidents Ford, Carter, and the other delegates. Although the observers may be personally dissatisfied with election results, they must remember that they are guests of the host country. It is their duty to report on the elections, but never to try to substitute their judgment for the will of the people.

From his office in Washington, Henderson described the problem. The second round of the Bulgarian national elections was to be conducted in five days. Qualified international observers were needed immediately to form a team of about six people under the aegis of the NRIIA. The newly organized opposition parties in Bulgaria had previously requested assistance from the world community in providing election observers for the June 10 balloting. In response, the NRIIA and the NDI (National Democratic Institute), acting jointly, had sent over a large delegation the previous week, headed by the NRIIA Chairman, Congressman Robert J. Lagomarsino of California, Governor Madeleine Kunin of Vermont, Steingrimur Hermannsson, Prime Minister of Iceland; and Senator Robert Hill of Australia. The delegation numbered about sixty in all. Along with other international groups, they had pretty well covered the two hundred electoral districts across Bulgaria on that first day of voting. No clear winners having emerged in eighty of the districts, run off elections were required for the following Sunday, June 17. The result of this latter voting would determine who held effective control over the newly resurgent National Assembly, which for two generations had been a rubber stamp for the Bulgarian Communist Party (B.C.P.). Considerably less international attention seemed in the offing than had been available for the June tenth balloting. The opposition feared that the infamously short attention span of the western democracies, especially the U.S., would wane fast now that one round of reasonably democratically based voting had taken place, and that the western observers would be content to conclude that democracy had arrived in Bulgaria, and as an “irresistible historical force,” needed no further nurturing or safeguarding in the form of western political and media representatives on the scene, watching closely and reporting accurately from Bulgaria. Painfully aware of Bulgaria’s backwater status in the minds of most westerners, and fearing a Communist backlash against the fragile democratic movement that had gone public just six months earlier, after a half century of the most brutal repression, they were determined not to let their nation slip again unnoticed into the twilight of tyranny. The opposition again sought the help of the world’s democracies. Their pleas for assistance were heard, resulting in the call going out, albeit somewhat belatedly, for a small team of observers to drop whatever they were doing and travel immediately to Sofia, from there to cover as much ground on election day as possible in an effort to keep the process fair, open and honest.

Now, invitations of such a remarkable variety don’t arrive on a regular basis, particularly the chance to observe such a momentous undertaking as the effort to transform Eastern Europe from totalitarianism to democracy. It would be especially thrilling to be involved in this process in Bulgaria, since it was one of the most notoriously repressive of all the Communist states. Not for nothing did the government there, in a country about the size of West Virginia, with a population of around nine million, feel the need to operate a gulag system of which Stalin himself would have been proud: five major prisons and fifteen labor camps, in a country where, if crime were defined by western standards, a few county jails would probably suffice.

Bulgarians have been kept repressed by accidents of geography (being located deep in Eastern Europe), history (backing Germany in both world wars, which led directly to Soviet invasion and ultimate communism in the late 1940’s) and, most particularly, by fear and the gun. The effort of the democratic forces there would be met by considerably stronger opposition from the communists than has been the case in other East European countries. The Bulgarian communists were especially and notoriously repressive, and nobody expected them to give ground easily. So the battle lines were drawn quite starkly: on the one side the communists, still very much in command, still with all the power, all the money, all the guns, all the inertia. On the other side, the democratic forces: organized only in the previous six months, risking whatever futures they might individually have in order to advance for themselves and their fellows the elusive ideal of individual liberty and collective republican self-determination. They labored without resources, unprotected by any force save that of world public opinion, uncertain as to tactics, guided only by a fierce determination, in the face of incredible odds, to live the lives of free people. I wouldn’t have missed it for anything.

Two days later I was at Logan Airport in Boston, boarding a Pam Am flight for New York, thence to Frankfurt, West Germany, and on into Bulgaria.

A REMARKABLE COUNTRY - A REMARKABLE HISTORY

The first impression of Bulgaria, in flying over it, is one of disorganization and confusion. The land is poorly laid out. Over Germany, Switzerland and Austria, one looks down over meticulously manicured and well defined fields, farms and forests. The pride of the people working the land is evident even from twelve thousand feet. But as soon as we passed over the Bulgarian frontier a dramatic change was evident. While obviously a land of great natural beauty, gone were the neat divisions, straight lines and squared corners of the productive private farms to the west. In this place were fields that wandered, some small, some tiny, few large. There seemed little order or organization about them. They reminded me of an image of rural farms in Appalachia a century ago, small, isolated and frustrating. The collectiv-
ization of farms here in Bulgaria had worked the same magic that has been seen elsewhere in the communist world. With individual initiative stifled by the total absence of any system for rewarding individual effort, and with the economy in a state of nearly total collapse thanks to centralized planning, resulting in critical shortages of farm machinery, farmers often plough their fields behind mules and labor without modern fertilizers. The main desire of the average farmer has been not to excel, not to produce record crops, but simply to produce a sufficient minimum crop size to keep the local government officials off his back, since all food produced under a collectivized system must be turned over to the government, which alone decides how it will be distributed among the population and/or what portion of it will be exported abroad. Recently there have been experiments with small plots of land dedicated to the private use and profit of the individual farmer. On trips through farming villages there was evidence of this in the selling of strawberries and some other items at family run fruit and vegetables stands. But how well this tiny concession to capitalism was helping the people concerned remains an open question.

Also from the air was apparent Bulgaria's truly terrible problem of air pollution. A haze, sometimes brown, sometimes gray hangs over the entire country; it simply cannot be escaped wherever you travel. Once on the ground it is infinitely worse, since then of course you have to breathe the stuff without the filtering aid of a jetliner's ventilation system. The road system as viewed from the air appeared rudimentary. Although a few main highways do exist, in general the roads are the rough equivalent of our country roads, small, in acceptable condition (but nothing more than that), many with few painted markings on the road surface or advisory signs on the shoulders, and very often with but one lane in each direction. On the other hand, as many Bulgarians will admit, even this system is a big improvement over what existed before the fairly recent past. At least now most, if not all, towns and villages are connected with the rest of the country by at least one decent paved road. For people for whom isolation, even from their nearest neighbors in the next village, has been a way of life for all recorded history, for whom uneven dirt tracks traditionally constituted a roadway and a dirt road a thoroughfare, a two lane blacktop, passable in any weather is a thing of wonder and beauty.

And it's not as if this elementary road system is overburdened with vehicles. One seldom sees many cars or trucks on the roads, even in the capital areas around Sofia. While private passengers cars can be purchased, you have to have patience when ordering one. Lots of patience. Twelve years worth of patience to be exact. Because that's the waiting period for a new car in Bulgaria. When it finally arrives you are expected to pay the going price for a car when you pick it up, not the price of a car as of the time when you ordered it, twelve years earlier. (Very little impulse buying in Bulgaria goes on as a result. No easy financing either.)

The cars are almost universally from the U.S.S.R., whose only passenger car exported to Bulgaria is the "Lada," a tiny subcompact, four cylinder engine model with four doors. For years made with a 1.3 liter engine, of late they've reportedly increased the engine to a 1.5 liter model, which is considered a big advance. Many of them billow blue smoke at a constant, alarming rate. This condition, combined with the universal burning of leaded gasoline throughout Eastern Europe and the U.S.S.R., contributes materially to the region's appalling air pollution.

It appears that keeping your Lada well tuned is a real challenge, since spare parts are seldom made available through official sources. The Russians make more money exporting completed models than they do selling individual parts, or so goes the Bulgarian explanation for the chronic lack of spare parts. Either that, or the Soviets haven't yet learned about the fortune to be made in the manufacture and sale of spare car and truck parts. In any event, keeping one's Lada on the road is a constant source of concern for those few lucky enough to own one. Scavenging is something of a minor art form in Bulgaria, and much profit can be made selling the still usable parts taken from cars wrecked in accidents. Things as simple, as basic - and as vital - as spark plugs and tires are always in great demand and always fetch a premium price whenever they are available. To these costs must be added the already shockingly high price of the car at the time of delivery. Average Bulgarian workers receive in pay about fifty Leva (their basic monetary unit) each week, or about twenty-five hundred dollars per year. A person making three thousand leva each year is doing well. Somebody making thirty-five hundred leva is quite comfortable by Bulgarian standards. Yet the price on delivery of a new Lada, as explained to me by several citizens, currently stands at about twelve thousand leva. That's a full four years wages even for someone considered to be doing well. For an American making $30,000 a year it would be the equivalent of plunking down $120,000 for a tiny imported sub-compact.

The possibility of purchasing a good, small, reliable passenger car for a modest amount of money (say four or five months wages) simply doesn't exist in that country. That the average American is able to buy and operate, with relative ease, a private automobile is to them another hallmark of the desirability of an American style economy being established ultimately in Eastern Europe. The fact that in the U.S. cars are bought, sold and delivered to the purchaser, often within forty-eight hours, is simply beyond their comprehension, but not beyond their desire. Information like this is avidly sought by many Bulgarians who express a fervid desire to move away from their own controlled economy to that of a free market system. People commonly indicated they knew capitalism has many drawbacks, and that it is not an absolute guarantee of universal betterment for every person in every segment of society. But they seemed to realize that it does offer real hope and promise of improvement for most of the people, assuming that the people are willing to work. Gone will be the days when "we will pretend to work, and the government will pretend to pay us." In its place will be rewards conferred in rough proportion to the value of the services rendered or the things
produced. People will truly have to earn their financial worth, a frightening prospect to some. But the concept of a rewards system offers such hope for dramatic improvement in the lives of the average person that I did not encounter even one Bulgarian who was not enthusiastic about the prospect of its coming to pass.

On arrival in Sofia, we found the weather to be quite pleasant: sunny, temperatures in the upper 70’s, the air rather dry. It was typical of the weather we encountered all week. The Bulgarian climate is rather like that of Nebraska, with which it shares an approximate latitude. Apart from the constant smell of pollution, which at times was quite severe, the climate was pleasant. It was the human institutions that provided the unpleasantries.

In the first place, the condition of the main airport terminal was incredible. A small, old wooden structure, inside it was dank, dark and depressing. A fitting introduction to the physical condition of structures throughout Bulgaria as a whole, grime and confusion reigned. The structure reminded me of a set from a “Mission Impossible” episode depicting an airstrip in some anonymous banana republic, except that in this case what we had encountered was presumably a showplace, the introduction and salutation to the world at large of a country, the physical manifestation of a nation to the world at large. It was, in a word, seedy.

The first order of business is getting through customs. I had been a bit concerned about this all the way over, especially since I didn’t possess a visa to enter Bulgaria. With the extreme shortage of time associated with assembling the observation team, it turned out that most of us arrived at the Sofia airport without the requisite government permission to enter the country. Given the reluctance with which the Bulgarian government has traditionally issued entry visas, especially to Americans, and the hostility that has marked U.S.-Bulgarian relations over the past few decades, our concern (for it was shared to some extent by my colleagues) was understandable. The Bulgarian communist government never took too lightly to Americans dropping in unannounced for visits to the country, especially when their avowed purpose in visiting was to check on how things are run politically and report those results to the rest of the world. I rather imagined being interrogated in some way by suspicious and perhaps hostile military or intelligence officers who might finally give ground grudgingly and admit us into the country. What we got instead was a bored woman sitting in a pathetic little wooden coop, who sullenly handed us each a short-term visa upon our payment of $50.00 U.S. in a “visa fee” after we told her our purpose in visiting. Only later did we learn that for a tourist this money could be returned if we engaged in any scheme to extract the same from western visitors in whatever amounts they think they can get away with, a curious manifestation of capitalist tendencies, to be sure, albeit perhaps not consciously realized by its practitioners.

After clearing through the rest of the immigration and customs process, which consisted of a cursory baggage check by means of x-ray machines, we soon found ourselves in the main waiting area of the dimly lit and grimy structure, being greeted by Jeffrey Hartshorn, an NRIIA staff member. He piled us into taxi cabs, and off we went into the city. The driver of my cab was a friendly enough fellow, proud of his cab, proud of the fact that he knew a few words of English (which helped since his passengers then knew not a word of Bulgarian), and very proud of his Panasonic tape deck, on which he loudly played American rock music. I just couldn’t believe it; even in Bulgaria you can’t escape that scourge. Into the city we drove at what seemed to me to be the normal breakneck pace of cab drivers everywhere. He seemed to delight in roaring up to the car ahead, finally veering into the next lane, just missing the other car’s bumper in the process, oblivious to the obvious danger of a crash, all the while giving us a running commentary/tour of Sofia in a combination of Bulgarian and broken English. Some of his points actually got through to his listeners, but most were lost to the noise of the wind roar or drowned out in rock lyrics. We drove past industrial areas, complete with smokestacks spewing out smoke of several different and vivid colors. As an introduction to air pollution of a most remarkable intensity that ride could have few peers, although more seasoned travellers informed me confidently that the situation is considerably worse in the northern industrial city of Rousse, on the Danube River across from Romania. There hundreds of young mothers, in early 1990 surrounded city hall with empty baby carriages in a silent protest over the high still born and infant mortality rate in that part of the country, attributable to pulmonary ailments caused by the air pollution. The protesters were so eloquent in their silence and so impressive in their numbers that even hardened communist officials agreed that the problem of air pollution did in fact exist and would have to be addressed. Nothing had yet been done of course, but at least the government had conceded the validity of the protesters main points, which in Bulgaria constitutes a major victory for the people at large.

Entering the downtown area, I was struck by the apparent beauty of the city’s older buildings. Although coated everywhere in thick grime, it was obvious that Sofia was once a handsome place, built with pride by gifted architects and craftsmen. Although marred by an abundance of dreary modern high rise apartment buildings, all alike and none attractive in their cheap concrete slab designs; it was also obvious that, given the correct conditions, an improvement in air quality and the proper building cleaning technology, it could once again be a handsome and architecturally attractive community. A monumental undertaking, but one well-suited to the tenor of the times. As East Europeans seek to clean up the wreckage of generations of oppressive political and economic orders, they could also clean away the generations of grime and pollution which they have been forced to endure as well. The work cries out to be accomplished anyway, and it would be a fitting symbol indeed for a people emerging from a dark and a dreary era.
Throughout the capital area there runs an extensive system of electric “light rail” street cars. Although all the cars I saw were old and seemed to be in poor condition, they manage to carry tens of thousands of people daily into, out of and around the Sofia area. Most people depend upon the system since most people can’t afford (or are in the long process of waiting for) a private passenger car. There is constant grumbling about the condition of the streetcars, all of which appear to be of pre-World War II vintage, and their chronic overcrowding. But the system is a monument to the thesis that in a crowded metropolitan area a major public transit system can accomplish its goals. And as severe as the air pollution there already is, it would be infinitely and insufferably worse if the city was choked with private cars and diesel busses. Ironically, what many Sofians regard as their urban transportation nightmare of a mass transit system may also be the single biggest factor sparing them from enduring even worse air pollution than the permanent cloud that now chokes them and their compatriots.

Along the route into the center of the city, we passed many signs and posters displayed on the sides of buildings, on fences and utility poles. They were all political in nature, many featuring photographs of communist party officials vying for the newly democratized elective positions in the National Assembly, but a great many also for members of the 16 nascent opposition political parties. Some of the posters were covered with printed messages of the various candidates, and a good many people were actually stopping to read what these messages had to say. You may not easily attract the attention of an American with eight square feet of solid printed matter, but plenty of Sofians pay attention, and eagerly too, for their political future is at stake and they know it. They take their vote very seriously and want to be as well informed as possible before going to the polls.

Nearing the hotel we traversed a large public square where a great number of people were passing through, but where also at least a hundred people were paying close attention to an exhibit of political parties and a couple of men who were speaking. The cabbie explained it was one of the great many political demonstrations now suddenly, common in the popular squares of downtown Sofia. A great deal of attention was being paid to what people had to say there, and yet a great many other people - including uniformed army personnel - were simply going about their business as usual. It struck me that perhaps the scene was indicative of a rapid political maturation, which certainly would bode well for Bulgaria’s future. If everyone in the area had been so struck by the novelty of a political demonstration that all normal business had come to a halt, then maybe the authorities would get nervous and revert to their traditional repressive methods of dealing with dissent and crush the democratic movement - or trigger a revolution. We passed through the square, turned a corner and soon pulled up to our hotel, the Sheraton Sofia Hotel Balkan.

THE SHERATON SOFIA HOTEL BALKAN

In a sea of grime, decay and shortages of nearly everything one might ever want to buy, in the heart of downtown Sofia stands one of the most elegant hostleries in all of Europe - the Sheraton Sofia Hotel Balkan.

A gleaming jewel amidst a sprawl of misery, it stands as an apt metaphor of the false face communism has displayed to the west throughout its sad history: five floors of meticulously maintained, ultra modern rooms to cater to any taste, with room service for the weary and an exotic dance bar in the basement for the decadent. You’d think you were in London or Rome until you looked out the window, or until you looked up. In the dining and other common areas, the closed circuit television cameras mounted high on the walls are positioned to take the best advantage possible of all those foreigners gathered together in one place below, and perhaps not coincidentally of the Bulgarians who come to meet with them on a variety of subjects. Anyone reviewing the daily tapes would be ideally situated to quickly learn which Bulgarians are dealing with and connected to westerners, a very important, in fact perhaps a critical sort of information for any dictatorial government.

Now of course a normal thinking soul might inquire why such meetings aren’t conducted in other premises, away from the invasive influence. But many people probably never realize the cameras are there, and even when they do, the significance doesn’t always sink in right away (if it ever does). The average traveller, business or tourist, simply doesn’t think in terms of spy capitals and listening posts. He or she wants to arrive, discharge the necessary duties, and clear out in as short a time as possible. This is particularly so in Bulgaria, which at the moment has little to cause a visitor to tarry awhile.

Secondly, a short walk outside the hotel is enough to drive most people back inside in a hurry. Sofia, and indeed all of the Bulgarian regions that I was exposed to, has a serious air pollution problem, one so bad that the sky is several shades of yellowish gray because of it, and the air quite simply smells bad. All the time. Everywhere you go. Although I was not there long enough to obtain any meaningful information on the topic, one has to guess the local populace is likely suffering from a high degree of pulmonary difficulties. Certainly this was the indication I received from a number of Bulgarians with whom I spoke, both in the capital area and in the surrounding countryside. With bronchitis, I can report from personal experience, it’s often hard to breathe; it must be absolute hell for people with asthma and other more serious breathing difficulties.

You can’t duck into too many clean, comfortable restaurants to escape the pollution either, because there aren’t many of them. The Sheraton’s dining rooms are vastly superior to anything else available, so those who are able to do so tend to remain congregated there. With the possible exception of one other hotel in the area, there are no other
places at which most westerners would tend to stay if it could be avoided. I did encounter a family from the States travelling through one morning in the lobby; the husband said their rooms in another hotel in Sofia-whose name I did not learn, were acceptable, although at $110 per night very expensive, particularly when, as his family had learned during their travels within the country, native Bulgarians would only be charged a small fraction of the amount a westerner would be charged for the same accommodations. He went on to assure me that this other hostelry, although acceptable, was decidedly inferior in quality to the Sheraton. And every Bulgarian with whom I spoke confirmed the fact that nothing even remotely like the Sheraton exists anywhere else in the country. The facilities and the food simply are unmatched-by an enormous margin- anywhere in Bulgaria.

The food deserves special mention. It is in every way first rate, very well prepared and presented. Rumor has it that it's all shipped in from West Germany by the Sheraton Corporation. While I can't speak to the accuracy of that assertion, certainly this is the only place in Bulgaria (except perhaps in certain officials' homes) where high quality beef and other gourmet foods are available.

The staff as a whole speaks a remarkably good, text-book brand of English. They smile a lot and are fairly attentive, but they demonstrate a strict adherence to an absolutely rigid division of labor which seems to exist nation-wide in Bulgaria. I was told repeatedly in my time there by the staff that some simple task could not be performed because it was the duty of some other person, currently absent, to perform. This message is conveyed in a straightforward, matter of fact tone of voice, letting you know instantly that until the absent party appears, absolutely nothing will happen.

Many people seemed to have a mysteriously absent "colleague." In fact "my colleague" is regularly an important person, the only person who could possibly accomplish the simple thing which you desire to see occur, but where he is, or when he'll return, are state secrets in Bulgaria, guarded as closely as Chairman Zhivkov's tax returns.

This attitude, which precludes everyone from straying the least bit from their minimum mandatory duties, is common throughout the country, according to our guides. There simply is no point in doing anything extra, since no economic gain is likely ever to be forthcoming in this rigidly controlled economic system. After forty-three years of state control, individual initiative is a patient on his deathbed-breathing only with assistance, and likely to give up the ghost at any moment, without either notice or fanfare.

Wages at the hotel are considerably higher than at most other places in the area. One hotel employee with whom I spoke quietly told me that the average wage for a worker in Bulgaria was around 2400 leva per year, with good money being in the 3000 leva annual range. By contrast, a common wage at the Sheraton Sofia is reportedly 400 leva per month, or 4800 leva per year. This, I was assured both by the employee and later by our guides, was excellent money indeed by Bulgarian standards. Thus there is no shortage of people who want to work in that establishment.

Some cynics among our international group suggested that good service for the guests isn't all that the high wages are intended to buy. It was speculated that the government might expect them to pass on any interesting pieces of conversation they overheard from among the guests. This was purely speculative of course, but it surely would keep the Bulgarian KGB happy if it were true, which it may be.

The hypocrisy of course is that the Sheraton, wonderful though it is for those fortunate enough to be staying there, is totally artificial. Within a block of the front door are shabby establishments badly in need of work. From a fifth floor window one looks out on acres of roofs, all in obvious need of repair. This place is a roofer's paradise. Also a carpenter's, plumber's, and an electrician's. In the capital area alone nearly every residential and ordinary business building is badly run down. Even some of the government buildings obviously need work. They're old, tired, and dirty. The only buildings in consistently good repair are those of the communists. While it is true that in the cities a lot of residential construction is going on, it is all in the form of large cement buildings, and no one I spoke with liked them. They're drab, cramped, and nearly identical to each other on the outside. Those familiar with the inside say that's how the interiors are as well, and that unaddressed maintenance problems are common. We spoke with one person whose apartment is on the nineteenth floor of a building. The elevator had been out of order for many weeks due to the unavailability of a certain spare part. And so the residents were forced daily to walk up and down the staircase to the nineteenth floor, if that's where they live, every time they have to go out. These things anger, but do not surprise urban Bulgarians.

In the country side, things and attitudes are a bit different, but all is not well there either. Much construction of residences has been undertaken in the past twenty-five years, replacing the dilapidated houses in which the rural population had been surviving. The houses are all styled from the same three or four variations of white or cream color stucco with red tile roofs, mostly one story, but occasionally two and even what appear to be three story multi-family dwellings in some villages and towns. Basic electric service, sufficient for lighting and to power small appliances is provided. However, the plumbing leaves much to be desired. Most of the rural houses have only cold running water. Water must be heated on a stove when its use is desired. This hardship makes it difficult to clean anything properly, even if decent soap were commonly available, which it isn't. Many of the public buildings are suffused with an odor of mixed griminess laid over with disinfectant sporadically applied. Proper soaps and detergents are rarely available, and people must get by with poor quality, often pungent cleaning soaps locally produced. This is a source of frustration for many for which they blame the government in Sofia. Further, sewage systems in rural areas are nonexistent, and even the people in new housing report they are
using outhouses. For them, full in-door plumbing is a luxury many years in the future. Indeed, the nicest building by far we saw outside Sofia was the community center in the town of Svoge. We were, as was the case nearly everywhere, warmly received by the people, officials and private citizens alike, and invited to tour their regional election office on the second floor. Ten people were there working in a medium size office and conference room. They were attempting to field questions on proper voting procedure from three towns and dozens of individual polling places via their single telephone line. Often they had to shout into the line to be heard, and they reported to us that getting and keeping a line is often difficult. While leaving this place, a modern and comfortable building in other respects, I stopped by the “men’s room.” It was appalling. The single toilet took three attempts to flush properly, the water flowing down from an ancient water closet up near the ceiling. The “toilet paper,” for those in need of it, was roughly torn newspaper hung on a nail from a week old edition of a government newspaper. No soap was anywhere in sight, and a cold water faucet was the only amenity in evidence. The floor was truly grimy. One wonders what impact this utter lack of basic hygienic material must have on the health of the population, if even the most important and modern government building in a region can’t be provided with a decent toilet, hot water and hand soap. But at least in Svoge the average person is allowed inside a decent building. In perhaps the ultimate hypocrisy, the area within the Sheraton Sofia is off limits to ordinary Bulgarian citizens. Except to serve as employees, they are forbidden the use of the facilities by order of the government; thus the use of the one truly fine establishment in the city is forbidden to its citizens. In the best tradition of communist regimes in the USSR and elsewhere, which set up fine shops in capital cities for hard currency for the benefit of foreigners only, the average citizen is shut out completely. The first week our delegation was present, the hotel management attempted to bar our Bulgarian interpreters and guides from having lunchen with the delegates. Imagine barring your own people from the only decent place in town for the sin of not being foreigners. Only when the delegation leadership threatened an international uproar was the rule waived. At least a few Bulgarians have thus now had a small sampling of the culinary pleasures of the hotel, courtesy of the gentleman from Tennessee, Edward Stuart, whose indignation would not allow no for an answer.

So there it stands, a truly spectacular establishment, hard by the shabbiness of the city of Sofia, catering to tourists with hard currency, charging inflated prices, barring its own citizens, watching who’s who in the public areas on the permanently mounted closed circuit T.V. cameras. And who could forget those funny looking apparatuses, permanently affixed to the middle of the ceiling of each of the rooms? They look a little like smoke detectors, but none of us had ever seen any that looked like that before. Perhaps they are for detecting smoke. Perhaps they are for detecting other things. Perhaps they have a dual role. Perhaps they are perfectly innocent. Perhaps.

Lord knows I was happy to be staying there. Some of our delegation spent two nights in the city of Rousse, up north on the Romanian border. Conditions in the hotel there were reportedly quite poor, e.g., the elevator having no guard door or gate to keep passengers from scraping against the wall of the shaft while travelling up or down; and the air pollution, bad in Sofia, was reportedly truly horrendous in Rousse. Without some first class accommodations being available, western business people would be unlikely to go to Sofia willingly, depriving the country of desperately needed modern industrial and developmental know-how. But all that glitters is not gold, and I cannot clear my mind of the hypocrisy that is the Sheraton Sofia Hotel Balkan.

THE POLITICAL SITUATION

We arrived late Friday, June 15, and met the other delegation members. Early on Saturday we went into conferences and briefing sessions with a variety of people and government officials. The second secretary of the American embassy Marshall Freeman Harris, a young Virginian, led off the day with a briefing on the current political situation and some insights into practical Bulgarian government operations. Sixteen opposition political parties have sprung up since the abrupt resignation the previous December of the longtime strongman, Tudor Zhivkov. His announcement that he was leaving office, coming as it did on the same day the East Germans announced the tearing down of the Berlin Wall, was almost completely overlooked by the western media, but caused a considerable uproar domestically. The winds of change, so prevalent in much of the rest of Eastern Europe, were now reaching even into the very heart of one of communism’s most rigidly controlled nations. The new government leaders promised free elections in June, and removed some of the toughest old line communists from power. The communist party renounced the provision in the Bulgarian constitution guaranteeing it the preeminent place in Bulgarian society, and even changed its name, abandoning the term “communist” and adopting instead the title of “Socialist Party.” Public relations played a large part in the decision to abandon the title Bulgarian Communist Party (“B.C.P.”) and adopt that of Bulgarian Socialist Party (“B.S.P.”) in its place. Whether the new title means any real change in party philosophy, beliefs and methods of operation of course remains to be seen.

He went on to explain the remarkable role of mayors in local villages and towns throughout the country. Appointed by the government, which in practice means the B.C.P., these officials hold office at the pleasure of the appointing authority. Within their jurisdictions they control all jobs, pensions, access to health care, housing, salaries, and other necessities as well. There is some input from the local council, but the mayor has the final say about everything. Needless to say he wields enormous power in his community. The attitudes of these local chieftains towards the electoral process would be of real importance in each of the towns where voting was to occur the following day. This was
particularly so since the government had also pledged to hold local elections in the fall for the offices of mayors and local commissioners, the rough equivalent of town councillors, with competing political parties eligible to nominate candidates. Thus for the first time ever the local mayors' tenure in office would be directly subject to the will of the Bulgarian electorate, a happenstance bound to make some of the current incumbents uneasy as to future employment prospects.

All the parties participating in the current elections had been free to request international observers. However, Harris informed us, the B.C.P. turned B.S.P. had invited no observers, while the Union of Democratic Forces ("U.D.F."), an umbrella group consisting of the sixteen newly formed opposition parties, had made requests for observers to be present, and thus we had been asked to undertake our respective duties as "International Election Observation Delegates."

Two other parties of note exist in Bulgaria. The Agrarian Party, and the Independent Society for the Protection of Human Rights in Bulgaria. The latter is the party of the Turkish minority in the country, and is nearly universally referred to simply as "The Turkish Party." The Agrarians have existed for many years as a token opposition group, historically dominated by and subservient to the Bulgarian Communist Party. Their role in the current elections had been in some doubt until, a few days before our arrival, the party leadership somewhat surprisingly, but very publicly, threw in its lot with the U.D.F. It even urged its followers to vote the U.D.F. candidates rather than their own Agrarian party candidates, in order to establish a really viable opposition bloc within the National Assembly, an act of true political courage and selflessness.

The elections themselves were to fill seats in the soon to be convened National Assembly. A unicameral body, it normally is composed of two hundred members, and has the usual powers of a national legislature. This time however, a "Grand National Assembly" was to be convened, meaning that, in addition to its normal authorities, it would also be vested with the power to change the national constitution as well, something not within the purview of an ordinary National Assembly. A Grand National Assembly ("G.N.A.") consists of twice the usual number of members, so four hundred seats were available at the start of the voting the previous Sunday. Changes in the constitution may be adopted by a two-thirds vote of a G.N.A. As a result of the voting of June 10, three hundred twenty seats had been filled. Although fairly close, the communists held the most seats as of the ballot counts of that day's voting. If the U.D.F. could sweep all, or nearly all of the remaining seats, it could gain a majority in the G.N.A. If a similar sweep went to the B.S.P., the future chances for real political change in Bulgaria would be bleak. Clearly much was at stake. Bulgaria stood at a most remarkable crossroads.

MEETING BULGARIAN OPPOSITION LEADERS

After our meeting with Harris we broke for luncheon. In the elevator, I met one of the many reporters covering the elections, Klas Bergman of the Christian Science Monitor, who said he'd be covering some of the polling places in the Sofia area the next day, then head for Yugoslavia on Monday. Later, I met more reporters, this time several women from Taiwan, also in Sofia to cover the polling. They spoke a little English and seemed quite happy, although obviously a bit surprised, to bump into an American in Bulgaria. I tried not to betray my surprise at encountering Taiwanese under the same circumstances. There were other media people in evidence as well. The West European press was especially well represented. Along the way I spotted T.V. crews carting cameras with the CBS and ABC logos. Readers Digest and the Toronto Globe & Mail had correspondents there, as did many other news organizations.

Back in the briefing room, we were introduced to the Chairman of Bulgarian Association for Fair Elections (BAFE), the Secretary of that organization, a member of its Board of Directors, and the wife of the president of the Agrarian Party. BAFE, whose membership was estimated at around ten thousand people, is dedicated to working impartially to ensure that the free, fair and open elections promised by the government would in practice be just that: free, fair and open. They had placed volunteer poll watchers in many of the polling places the previous Sunday, and planned to repeat the effort on the next day. They were remarkably attuned to the possibility and, it was reported, the occasional active practice of political dirty tricks, especially as carried out by "Socialists" against the opposition candidates. We heard of phony political leaflets, distributed under the U.D.F. and Agrarian party names, containing false information about U.D.F. and Agrarian candidates, passed out by B.S.P. supporters to cast doubt in the minds of the electorate as to the credentials and the desirability of opposition candidates. The Helsinki Watch organization had reported numerous human rights violations prior to the first round of voting, and we were told of many reported cases of people being told by B.S.P. representatives that pensions and other benefits would be lost if U.D.F. won the election.

Indeed, in our visits to outlying polling places in particular, we heard stories directly from voters of B.S.P. attempts to scare voters via frightening forecasts of losses of pensions, jobs and salaries if the U.D.F. prevailed. In one place we even overheard a man reporting to the mayor that a certain local fellow had been informed quite sternly that, should he fail to vote (and, presumably, to do so for the "correct side"), there'd be no liquor for him that day. The reporter seemed rather pleased with himself in making this report, although he did not realize we were within earshot at the time. The B.S.P., it seemed clear, would even stoop to buying the votes of local inebriates in order to win.

We were told of other improper activities as well, such as soldiers, assigned to desirable duty as members of military athletic teams, being taken to special polling places reserved exclusively for them after being told by their commanding officers that, if given a "blue" (i.e. opposition party candidate) ballot were found to have been cast by anyone in their entire
group, then every one of them would be promptly transferred to such duties as digging ditches. Controlling the military vote (especially that of the great many conscripts in the Bulgarian army) is viewed as important by the government. For that reason, members of the armed forces are not permitted to vote by absentee ballots in their home districts. They are all brought to special military voting places, where they cast their ballots as a group. Although they vote on an individual basis after entering the ballot booth and pulling the curtain behind them, they reportedly do so only after commonly being subjected to the same sorts of patriotic appeals as were said to have been directed to the athletes in uniform. With a very large standing army for a country its size, control of the many votes represented by military voters gives the government a decided, and a decidedly unfair, electoral advantage. It is for this reason, and none other, that the army’s membership is required to vote together in special military balloting places where no civilian voting is allowed. The practice is obvious, heavy handed and unjustifiable; opposition politicians hope to change the practice in the future.

From these sources we also learned the break down of the previous Sunday’s voting. The balloting had gone, by proportion to: Socialists 47%, Union of Democratic Forces 36%, Agrarian 8%, Turkish Party 6%, with the remaining 3% scattered over other splinter groups. So the race was close indeed. The recent decision of the Agrarians to throw in their lot - indeed to urge their followers to vote for the UDF on the 17th in the runoff election - was of major importance. This view was seconded by Mr. Petka Simeonoff, campaign director for the Union of Democratic Forces, who arrived a bit later in the afternoon. His opinion (and that of nearly every Bulgarian with whom I spoke during my visit there, absent certain BSP/BCP members) was that the change of names from the Bulgarian Communist Party to the Bulgarian Socialist Party was little more than a ploy, a public relations gambit aimed at western public opinion, whose major purpose is to con westerners, their media and their governments into believing that substantial political changes are underway in Bulgaria, and that the name change accurately testifies to those changes. In fact, an amazing percentage of Bulgarians themselves believe no such thing. They maintain that the liberalizations now underway have been forced upon the Communists by dint of the democracy movement now sweeping the world in general and Eastern Europe in particular, that the Communists in power in Bulgaria would quickly repudiate these liberalizations if they thought they could get away with it. They marvel at what they see as the amazing pliability and gullibility of some in the western press in apparently accepting at face value Communist assertions that, overnight, democracy has flowered in Bulgaria. More than a few of them indicated they wished the western press would display towards such pious Bulgarian government assertions the same healthy cynicism they are famous for displaying towards the assertions of the governments in their own countries.

ELECTION DAY IN BULGARIA - JUNE 17, 1990

On Sunday, June 17th, the delegates and staff assembled in the hotel lobby at 6:00 A.M. and by 6:45, along with a local driver, who spoke a few words of English, we were off. In my group, we were four in all: the driver, an interpreter, an NRIIA staff member, and myself as the observer. Joyce Wyatt was the NRIIA staffer assigned with me. Although only in her mid-twenties, she handled herself like an accomplished veteran throughout our visit to Bulgaria, organizing and assisting in a myriad of details which were of great benefit to our delegation. On election day in particular she proved a tireless worker and a good travelling companion. I was amazed to learn, late in the day, that this was not only her first overseas assignment for NRIIA, it was her first real trip outside the U.S.A., and yet she carried off the day, and indeed the whole trip, as if she'd been doing this sort of thing for years. She certainly showed what determined, heads-up Americans can accomplish when they set their minds to it.
on it - in Mariana's case it amounts to about sixty percent of her normal salary as a teacher - it does help a lot, and it makes you wonder why we don't have a similar program in the U.S. American working mothers need an income while they're on maternity leave (indeed American working mothers need maternity leave!) just as much as do Bulgarians. In this one way, alone of all the things we observed of Bulgarian public policy, they are far ahead of the U.S. in terms of a decent, humane and intelligent approach to a serious public policy problem.

MEETING THE BULGARIAN PEOPLE

At 7:04 am. we arrived at our first polling place, in the town of Novi Iskar, in the Sofia metropolitan area. Like all the polls we visited, this one was picked somewhat at random from among those in the geographical areas in Sofia and out in the countryside covered by the four delegates working in the Greater Sofia area. We would each take a large area and visit as many polling places as practicable during the 7:00 a.m. to 6:00 p.m. balloting period, and also try to observe a local counting of ballots after the polls closed. With so few of us available it wasn't possible for more than one official observer to be in any one area. Two of our colleagues, Donna Evans of the Georgetown Center for Strategic and International Studies, and Lonnie Rowell of the South Carolina National Republican Committee, had agreed to travel the previous evening to Rousse.

Once at the polling place in Novi Iskar, we got out and looked around. A young militiaman sat outside the building in a white Lada, watching everyone, and talking from time to time with a fairly well dressed man who was identified by voters as the local B.S.P. Party Secretary. The voters weren't happy to see either official or the militiaman hanging around outside the building, as their mere presence threatened to constitute an undue influence on the minds of the voters.

Inside the polling place we were greeted cordially by the election officials, and were confronted, for the first of many times that day, with a typical reaction: amazement at meeting Americans. Travel within Bulgaria has been so tightly restricted since the 1940's that the people there aren't even accustomed to seeing fellow citizens from a hundred or so miles away, let alone foreigners. A Greek or Yugoslavian showing up in town is unusual indeed; a West European is outright exotic; and an American! Why Americans are the stuff of legends. Americans simply are never seen in Bulgaria, thanks in large part to Bulgarian government policies which discourage Americans - and others from democratic countries-from visiting. Particularly in the more rural areas, the sight of an American caused quite a stir among the people.

The atmosphere in the dark and grimy building was tense; no one knew what to expect and everybody sensed that the next twelve hours could change the course of Bulgaria's future for many years to come.

There were signs of the government's efforts to influence the voting even inside the polling place itself. Outside were the Party secretary and the militiaman: everybody entering knew who they were, and knew that their presence had been noted. Inside was the election commission, with representatives of the B.S.P., the U.D.F., and two "nonpartisans" among its members. The chairwoman smiled at us from behind the ballot box, and on top of that box, in full view of all the voters, was a single, beautiful red rose. In another place, and in another context, it might have been appropriate, but not on a Bulgarian ballot box, since the red rose is the symbol of the Bulgarian Socialist Party. There it was thorns and all, perched atop the ballot box on the very day the Communists were most desperate to influence the actions of the Bulgarian people. They simply had to get across the message that they were, as always, present, ever vigilant. Even in the polling place. No other party symbols were on display, needless to say. The government wouldn't tolerate that.

And yet we found there was reason for hope. I spoke privately with the Election Commission chairwoman about the matter, and while I agreed with her contention that it was certainly a beautiful flower, I did not agree that its presence was harmless. I explained that since, by the sheerest coincidence, it also constitutes the symbol of the Bulgarian Socialist Party, its presence on top of the ballot box might be seen by certain cynics as an effort to influence how the people ought to cast their ballots. And that such criticism might come from people who would be in a position to be heard on the subject in a way that would put the central government in downtown Sofia on the defensive. If that were to happen, who did she suppose would take the heat for this embarrassing oversight: the boys in Sofia (who perhaps had suggested the lovely floral decoration in the first place), or the poor local election commission chairwoman, who, after all, is charged with proper operation and maintaining fairness in that voting place? The rose was moved, quietly but promptly. When we returned at the end of the day, the rose was still on the distant side table to which it had been moved at 7:15 a.m., far more innocent in appearance (and, it is to be hoped) effect than it ever had whilst atop the ballot box itself, beaming, the beacon of government control.

The voters in that polling place went on to confound the experts. We returned after the polls had closed to witness the votes being counted. Although the B.S.P. was favored to win there, the result was a surprise thrashing of the B.S.P. candidate by the U.D.F.: four hundred thirty four votes for the U.D.F. versus two hundred seventy one for the Communists/Socialists.

From there we went on to visit a number of other polling places throughout the day, up in the hills and mountains north of Sofia and in the plain southwest of the city running towards the Yugoslav border. At a few of the precincts we were greeted rather cooly by some of the election commission chairmen, at least until our written credentials were examined. In a couple of places, notably place #60 of Election District #200, we again spotted suggestive floral bouquets inside the polling places. There were no fewer than
three separate bouquets of red (or very pink) roses on three tables in full view of the voters. The local chairman adamantly rejected any notion that their presence might in any way be susceptible to any misunderstanding whatever, and flatly refused either to move them or at least add some other flowers of different colors. “They're not really red!” was his remarkable excuse, and besides “There are no other flowers available.” Yet, just outside the building, in profusion on a wall across the road, were the most lovely blue flowers growing wild. Apparently it was inconvenient for him to see them there (quite possibly because blue is the color of the opposition U.D.F., and the chairman may not have wanted to give the voters the “wrong” impression.) As we were leaving that polling station, we were informed, in answer to our question, that there had been “no problems,” that “everything is normal.”

**THE "NO PROBLEMS" SYNDROME**

In the first five polling places we visited, and indeed at nearly every place we visited all day, the answer to the question: How is everything going? Any problems? was an eerily uniform “everything normal.” How could everything possibly be normal if this was the first free election in generations? One has to wonder what constitutes “normalcy” in Bulgaria, and since we didn’t really know what the term meant within the Bulgarian context, we were wary about reading into such responses any meaning that might not in fact be justified. We particularly cannot, therefore conclude that “everything normal” is a term that necessarily imports “everything acceptable” within the context of a free and fair election as seen through western democratic eyes.

Certainly there were some serious problems. Thomas S. Kahn, an observation delegate to the first round of voting, wrote in The Christian Science Monitor (June 22, 1990) that he had “met with opposition leaders in small towns who said Communist supporters threatened to hang them and burn their homes.” Pretty frightening sort of tactics, even for the bravest of souls.

**U.S.A! U.S.A! U.S.A!**

As we entered different regions, the landscape changed, but in general the receptions did not. With the exception of a few local election commission members and other scattered officials, the greeting we got from the overwhelming majority of the Bulgarian people, once they got over their initial shock at seeing us in their towns, was one of real delight at meeting Americans. The word somehow would spread quickly, especially in the smaller, more rural areas, that foreigners were in the village. People gathered in small groups just to watch us. We could hear them speaking quietly to one another, gesturing towards us. Now and then we could hear someone whisper, “Americanski!” They were generally much too polite to address us first, some people explaining that Bulgarians are indoctrinated with the notion that “mere peasants” should be seen and not heard. They certainly don’t approach foreigners on the street in their village. Both because they are peasants, and because, historically, being seen by communist party officials, or their many informers, conversing with strangers put one in a very delicate position automatically. We did our best to undermine that custom in a hurry.

Approaching many of these onlookers directly and extending a hand, a smile and a “doberden!” (“Hello! How are you!”), we found them to be initially shy, but once they realized that: 1) we were, in fact, Americans, and 2) we really wanted them to talk with us, the ice melted fast. Once they started to talk, many of them poured out their feelings in torrents of words. And those torrents revealed a remarkable thing: an unshakable desire for democracy, coupled with a deep respect for America and American ideals. Indeed, for many of the people with whom I spoke, there were only two topics of conversation: democracy and America. Their own system has failed so miserably at providing for even the most elementary needs of the people, and has done so at such horrific cost in terms of utter lack of freedom, dignity, and any sense of individual worth or need for individual motivation, that the people, disenfranchised as they know themselves to be, have long ago in their collective outlook determined the Marxist-Leninist-Stalinist approach to have failed utterly. There is, by contrast, a level of respect and admiration for American democracy that is heartening indeed, and perhaps somewhat surprising after two generations of virulently anti-western and especially anti-American propaganda. When we asked people about that, they often told us proudly of listening on shortwave radios to the Voice of America, Radio Free Europe, and the B.B.C.

Bulgarian admiration for America was perhaps best demonstrated by what occurred three days before the first round of voting on June 10th. An enormous rally, sponsored by the U.D.F., took place in downtown Sofia involving, according to estimates, anywhere from five hundred thousand to seven hundred thousand people. A bus appeared on the edge of the square, carrying American observation delegates from the airport to their hotel. When that word was announced by rally leaders, the crowd surged towards the bus, chanting: “U.S.A! U.S.A! U.S.A!” The delegates were brought up onto a stage, where, amidst a wild and thunderous applause, they received a hero’s welcome. A woman who witnessed the scene said the effect was electrifying. Over half a million people, packed together, in utter delirium over the appearance of one bus load of ordinary Americans. In few places on earth could the idea of America carry more poignant meaning.

**WESTERN RADIO BROADCASTS ESSENTIAL**

A startling number of Bulgarians either own, or have access to, a shortwave set; and the listenership to those three sources is surprisingly high. Many people indicated that these are their only sources of accurate information about world events and that respect for the integrity of the broadcasts is high. Some people voiced fears about ru-
mored reductions in V.O.A. and R.F.E. broadcast hours said to be planned because of the "democratization" of Bulgaria and other Eastern bloc nations. Such eventualities, we were repeatedly assured, would be harmful to the Bulgarian people and to the liberalization movement. The government still controls nearly all aspects of mass communication in the country, giving access only grudgingly to opposition voices, and then keeping that access to a minimum. The continuation of V.O.A. and R.F.E. broadcasts is thus viewed as critical. Now that democracy's seed has actually started to sprout and grow, it very much needs the careful deliberate nurturing that only accurate, unbiased information, widely disseminated, can provide. To shut off or restrict the flow of that information now, in the view of the Bulgarians working for democracy, would be akin to a farmer shutting off his irrigation system just when the crops most need water. Accurate, unbiased information, timely disseminated throughout a nation, is the critical water of democratic life; without it, despots thrive while democrats perish. Bulgaria begs these essential pipelines not be restricted.

THE NECESSITIES OF LIFE

Even those who readily concede that major strides have occurred in the area of housing also point out some pitiful shortfalls as well.

In rural areas a great many houses have been constructed in the past generation. Although there is only one basic style in evidence (squared off stucco construction with Bulgaria's ubiquitous red tile roof), with three or four variations on the theme, we learned that these simple but sturdy structures are a major advance over the buildings most people used to live in the countryside, many of which, from the descriptions we received, must have been little short of hovels. The new buildings all have large casement windows, electricity, and rudimentary plumbing. The latter commonly consists of cold running water installed in the kitchen areas. It might not seem like much, but it's quite popular with people who spent centuries carrying water in buckets. The idea of hot running water is only a dream for people in these villages, who generally get their hot water from pots atop the coal and wood stoves which serve as their source of heat.

June 17, 1990, in the Town of Novi Ishkar

The author (second from right), standing at ballot box with local election chairwoman at polling place on outskirts of Sofia. Seated at table are local election council officials. The man standing in front of the table is a voter. He is pictured producing his Bulgarian Internal Passport, a document all adults are required to carry at all times outside their homes.
Central heating is another dream which remains years in the future for most rural Bulgarians. The idea of a dial on the wall which you simply turn to achieve the desired level of warmth seems to them wildly wonderful and the height of comfort. As for indoor toilets, safe to say most rural Bulgarians still employ out-houses.

In the cities, the approach to providing housing has been considerably more dreary. At least the rural houses, even with two, three, or four apartments common per structure have some land around them and some open space between them so the residents don’t feel too crowded in atop one another. Urban dwellers, on the other hand, are often crammed into tiny apartments in high rise “modern” apartment buildings, all of which have apparently been constructed from the same dismal mold. They look like what they are, cheaply constructed concrete affairs, often in the twenty-story height range. Many people complained that they are cold in the winter and hot in the summer. Air conditioning, of course is out of question, except in a few twenty-story buildings. Recall the case of the married couple who live on one of the upper floors of a twenty story high-rise apartment building. They told me that they’d walked down nineteen flights that morning to reach the ground from their apartment in order to go to work, and that they’d have to walk back up those flights in order to get home to their apartment that night, carrying with them their daily food bundle, since the elevator in their building (and there was only one in the whole place) was out of order. A part had failed without which the elevator was inoperable. When I asked what the chances were they’d find it working again when they got home that night, they laughed in reply. Spare parts, it seems, are unavailable in Bulgaria, and not just for automobiles. The elevator, they explained, had been out of order for weeks. And for weeks, hundreds of residents had been forced to trudge up and down the dark cement staircases, many as high as nineteen or twenty stories. The condition, they assured me, was not at all uncommon.

As far as medical facilities go, we were warned by a number of local citizens not to get sick in Bulgaria. While we did not see or visit any of the hospitals or clinics ourselves and thus cannot testify firsthand, it was plain the Bulgarians themselves think little of their medical establishment. Hospitals there, I was repeatedly told, are dirty, understaffed and chronically short of modern medical equipment and pharmaceuticals. Indeed, even such basic medicines as properly compounded aspirin were nearly impossible to obtain. When, upon getting ready to leave the country, I gave a resident a small (one hundred tablet) bottle of American aspirin, a bar of new soap, a bottle of shampoo, and some antacid tablets, I was thanked profusely and assured that such exotic items as these simply are not available on the open market. Emotionally, she assured me that she was especially grateful for the soap since she could “finally give my baby a decent bath.” The only Bulgarian soap usually available, a lye-and-lard based concoction, is far too harsh to be used on a child’s skin. Parents are reduced to holding a bar of the stuff under the (cold) running water, making an oily mixture in a pan. This filmy water is used to bathe children. It is a wholly unacceptable procedure and a constant source of frustration to Bulgarian parents. Perhaps some ranking party and government officials have access to such basic hygiene items as hot water and soap, but the average citizen rarely does.

As for getting really sick, the universal advice was to get on a plane to Western Europe for medical treatment. That giving an adult Bulgarian gifts of soap and aspirin can reduce him or her to tears, amply demonstrates just how far that nation has to travel to join the modern era.

A LOOK TO THE FUTURE

A complex and confusing set of questions now confronts the Bulgarian people. How much freedom is the government willing to concede? How much can the people force? How much and how fast can the economy be overhauled to replace the failed centralized strategies of orthodox communism with a socially healthy brand of market oriented capitalism? The people know communism has failed, but they sense that unrestrained capitalism might lead to abuses and inequities as well. As in the dawn of any new era, the challenges are daunting, the possibilities exhilarating.

For Americans, this is a time of new opportunities as well. Bulgarians admire Americans as do few other peoples in the world today, both for what our society has accomplished economically, and for what it represents to them politically: the hope that they too might be masters in their own house, that they might control their own destinies, that they might, in a word, be free.

In many of the places we visited on Election Day, as we were preparing to leave to check on other locations, everyday people would lean in the car window and put their hand on my arm. With strength in their voices-and often with tears in their eyes-they would plead: “Please! Don’t let America forget Bulgaria! If America forgets us, the Communists will take over again and we’ll never be free. If America remembers us, we’ll have a chance. Don’t let America forget Bulgaria!”

It is difficult to overestimate what the United States means to the Bulgarian people. We have an extraordinary opportunity now to help shape, by a constructive, positive, and respectful approach, the future of an entire nation standing at the crossroads of change. Such opportunities present themselves but rarely in the history of humanity. America ought not to allow the moment to pass unnoticed, the opportunity to be lost, a glimmering amongst the wonders of the world that merely might have been.
RACIAL DISCRIMINATION AND THE DEATH PENALTY
by Rebecca Bell Butler and Denise DeMore Keohan

William Sloane Coffin, a long-time civil rights and peace advocate, spoke at a recent Massachusetts Citizens Against the Death Penalty meeting. He proposed many arguments against the death penalty, and he characterized the American public as "not valuing life." In fact, the opposite is true. Americans do value life, but they value the life of the victim as much as the life of the offender. Americans can, therefore, justify to themselves the taking of another person's life by society as punishment for a grave wrong committed against society.

When the value society places on the life of the victim is measured by the color of the victim's skin, however, then society is itself committing a grave wrong. Under the United States Constitution all people, including victims and defendants, are to be treated equally. And "treated equally" means that society must treat all people without discrimination.

But when it comes to capital punishment, society does not treat all people equally. Studies conducted over the last fifty years have indicated that race is a strong factor in the administration of the death penalty. The United States Supreme Court attempted to address this issue with its decision in Furman v. Georgia, when it stated that all death penalty statutes as they were then administered constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. The Court concluded that the statutes as they then operated were "... pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."

However, a study conducted in 1984 by Samuel Gross and Robert Mauro showed a pattern of racial disparity in the administration of the death penalty both before and after the Furman decision. The Gross and Mauro study indicated that black defendants were being sentenced to death more often than white defendants. Paternoster conducted research based on post-Furman cases during the first four years of South Carolina's reformed death penalty statute. His results showed substantial indications of racially based discrimination and arbitrariness in the administration of the death penalty. He discovered that the heinousness of the crime and the criminal history of the defendant influenced the prosecutor's decision to seek the death penalty. Even, when these factors were controlled, however, the race of both the victim and the offender influenced the prosecutor's decision. In fact, prosecutors were more likely to seek death sentences if the victim was white than if the victim was black.

Baldus, Woodworth, and Pulaski presented strong empirical evidence that race is a factor in Georgia capital sentencing decisions. The authors compared pre-Furman and post-Furman death penalty cases in Georgia and determined that Georgia's capital sentencing reform statutes had not eliminated the arbitrariness and discrimination of
the pre-Furman statutes. They further suggested that the laws as they now stand will not alleviate the arbitrary and discriminatory manner in which death sentences are administered. The findings of their work were used in McClesky v. Kemp. 10 McClesky attempted to show, as Furman had in 1972, that his constitutional rights had been violated under the eighth and fourteenth amendments. The Supreme Court, however, did not find that the statistics presented by Baldus indicated that McClesky had been discriminated against in his particular case. 11 Baldus assessed that, with the decision of McClesky, the Supreme Court was removing itself from the future of equal justice in capital punishment. Therefore, the task of providing equal justice regardless of race will be that of Congress and state legislatures. 12

After McClesky, Congress directed the General Accounting Office (GAO) to evaluate racial disparities in capital punishment sentencing. The GAO reported that there is a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision. 13 The study conducted by the GAO further stated that “race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks.” 14

In this article we will explore the history of death sentencing discrimination, the post-Furman statutes, the effect of the McClesky decision, the findings of the GAO study, legislative response to the GAO study, and current public support for the death penalty. The continuing evidence of racial disparities in the administration of the death penalty indicates that our nation’s death penalty remains cruel and unusual in its application.

**HISTORY OF DEATH SENTENCING DISCRIMINATION**

Discrimination in death sentencing cases was first studied by Thornsten Sellin in 1935. 15 In that year, 199 people were executed in the United States. 16 This number is relatively low in comparison with the number of capital crimes actually committed in that year. Sellin later reported that in Massachusetts, between the years 1931 and 1950, a defendant convicted of murder had a 4.2% chance of receiving the death penalty. 17 Though the number of capital sentences varied from jurisdiction to jurisdiction, Sellin noted that those death sentences which were administered were disproportionately imposed on black defendants. 18

Later studies were conducted which supported Sellin’s findings. In 1940, C. Mangum 19 researched the clemency patterns in Southern states during the 1920’s and 1930’s. He found that white offenders were more likely to receive clemency than black offenders. In 1949, Garfinkle 20 conducted a more in-depth study of capital sentencing in North Carolina. His findings indicated that there were significant disparities in death sentencing. Blacks who killed whites were substantially more likely to receive the death penalty than blacks who killed blacks. 21 These results shifted the basis of the discrimination in death sentencing from the race of the offender to the race of the victim.

The vast majority of the studies conducted prior to the 1970’s provided at least some evidence of racial disparities in death sentencing cases. The disparities were not only found in the sentencing phase of the justice system. Racial disparities could be found within the indictment phase, as well as within the sentencing phase. However, none of the studies prior to the 1970’s used sophisticated methodology, and thus disparities could not be tied exclusively to racial discrimination. Researchers typically ignored factors such as: violence of the crime, number of victims, type of weapon used or even the prior criminal records of the offenders. Because researchers neglected to consider these factors, it was difficult to show conclusively that race alone was a significant factor in the decision to impose a death sentence. 22

During the late 1960’s and early 1970’s, researchers began conducting studies which would provide better methodology for discerning discrimination in capital sentencing. They limited their research to include only death-eligible crimes, and then reviewed these crimes for relevant factors which might have a bearing on the outcome of the case. Through the use of statistical techniques which controlled...
the relevant factors, the researchers were able to report more conclusive evidence of discrimination based on the race of the victim. Blacks who killed whites were not apparently treated any differently than whites who killed whites. However, blacks or whites who killed blacks were far less likely to receive a death sentence than blacks or whites who killed whites. The results of the research did not identify any non-racial distinguishing factors which justified certain cases receiving the death penalty when other similar cases did not. Based on the growing evidence from these empirical studies, it was apparent that capital punishment was being administered both arbitrarily and discriminatorily prior to the 1972 decision in Furman.

With this evidence in hand, the NAACP Legal Defense and Education Fund, Inc. began to mount a campaign against the death penalty. Prior to this effort, the courts had left the decision of capital punishment to state legislatures. However, in 1972, the United States Supreme Court, with its decision in Furman v. Georgia, squarely addressed the issue whether, and under what circumstances, a state or the federal government could take the life of a citizen for the commission of a crime. After the Supreme Court's decision, states rewrote their statutes to comply with the Furman decision.

**POST-FURMAN STATUTES**

In Furman v. Georgia, the defendant, a black man, was convicted of murder and sentenced to death. His defense was that the state's capital punishment statute permitted the jury uncontrolled discretion in determining whether the penalty should be death or a lighter punishment. Therefore, the defendant was denied his rights under the eighth amendment as applied to the states by the fourteenth amendment.

The Court held that the imposition of the death penalty in Furman constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. Five justices wrote separate concurring opinions in support of the Supreme Court's judgment. The Court did not find the death penalty per se unconstitutional, but each Justice found the death sentencing process in place at the time to be unconstitutional on two grounds: 1) death penalties were being imposed too infrequently, and 2) there was no rational explanation why death sentences were handed down in some cases and life imprisonment sentences were imposed in other virtually identical cases.

Since existing death penalty statutes were found to be unconstitutional under the Furman decision, states that wished to retain the death sentence were compelled to rewrite their statutes. The new statutes explicitly established guidelines and safeguards which juries could follow in determining when the death penalty was an appropriate sentence. The hope was that juries would thereby be prevented from determining sentences in a discriminatory and arbitrary manner. State legislatures quickly began rewriting their statutes and adopting new procedures in an effort to retain capital punishment.

Various methods were employed to harmonize the statutes with Furman. Some state statutes categorized crimes for which the death penalty would be mandatory punishment. Others defined statutory lists of aggravating and mitigating factors that juries and judges would need to consider before passing judgment on a defendant. Still other statutes, such as Florida's, provided a two-phase approach wherein the sentencing of a defendant would be determined at a separate trial after conviction. In Georgia, the statute provided an automatic review by the state supreme court if a death penalty was imposed.

These new statutes continued to be attacked on constitutional grounds. North Carolina's revised statute imposed the death sentence for anyone convicted of first degree murder. The Court struck down the statute in Woodson v. North Carolina, stating that the statute treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless,
undifferentiated mass to be subjected to the blind infliction of the penalty of death." 38 The Court held that the eighth and fourteenth amendments guarantee the rights of the individual person. The rights of the individual could not be protected if all cases were treated the same. The statutes would need to provide juries the ability to assess the aggravating and mitigating circumstances of each case before making a determination to administer a death sentence. 39

While the Court struck down statutes that did not provide some flexibility for the juries, it upheld statutes that permitted the jury to choose the death penalty or life imprisonment. In Gregg v. Georgia, 40 the Court upheld Georgia’s reformed statute. Georgia’s statute permitted a death sentence to be imposed if one of ten aggravating circumstances was present. 41 However, in contrast to the North Carolina statute, Georgia’s statute did not compel a death penalty sentence. Juries were free to impose life imprisonment over the death penalty if they so chose.

Refinement of capital punishment statutes continued through the late 1970’s and early 1980’s. The Supreme Court’s goal was to minimize the risk of unwarranted sentences and remove the arbitrary decision-making process of a jury. However, the new statutes did not apparently cure the problem of racial discrimination that was noted by the court in Furman. It was not until 1987 in McClesky v. Kemp 42 that the Court was forced to look at the racial discrimination inherent in the imposition of the death penalty.

EFFECT OF McCLESKY V. KEMP

In McClesky v. Kemp, 43 the Court examined the research of Professor David Baldus and his colleagues, Professors George G. Woodworth and Charles A. Pulaski, Jr. 44 Baldus presented statistical evidence of racial discrimination within the Georgia death penalty system for the years 1973 through 1980. The raw numbers collected by Baldus indicated that defendants charged with killing white persons received the death penalty in 11% of cases, but defendants charged with killing black persons received the death penalty in only 1% of cases. 45 The data also indicated a reverse racial disparity according to the race of the defendant, and therefore 4% of black defendants received the death penalty versus 7% of white defendants. 46 McClesky claimed that Baldus’ statistics proved that the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the eighth and fourteenth amendments to the United States Constitution. 47

The Court dismissed McClesky’s fourteenth amendment claim. It ruled that for McClesky to prevail under the equal protection clause, he would have had to have shown that the decision makers in his particular case had acted with discriminatory purpose. 48 This McClesky either did not or could not do. 49 The Court went on to state that, while “in certain limited contexts” statistics had been accepted to show proof of discriminatory intent, the statistics utilized by McClesky were insufficient. 50 According to the Court, 51 the nature of capital sentencing decisions and the relationship of statistics to those decisions are fundamentally different from the types of decisions in which the Court permitted the use of statistics to show discriminatory intent.

The Court previously had permitted the use of statistical disparities to show discriminatory intent in a juror venire selection case and in a Title VII case. 52 The Court stated that the juror selection case and the Title VII case were different from McClesky’s case because the statistics utilized in those cases related to fewer entities and fewer variables existed that might undermine the persuasiveness of the statistics to prove discriminatory intent. 53 The Court in McClesky also differentiated McClesky from the juror selection cases and the Title VII case, stating that in the cases where the Court had accepted the statistics to show discriminatory intent, the party imposing the penalty had been given the opportunity to explain any statistical disparity. 54

38 Id. at 305.
39 Id. at 299-3.
41 See Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.C. Davis L. Rev. 1327, 1335 n. 35 (1985), which details the circumstances under which a death sentence may be imposed under the Georgia statute.
43 Id.
45 McClesky, 481 U.S. at 286.
46 Id.
47 Id.
48 Id. at 292.
49 Id. at 292-3.
50 Id. at 294.
51 Id.
53 McClesky, 481 U.S. at 295.
54 Id.
In *McClesky*, the Court stated that the state had no practical opportunity to rebut Baldus' statistics. However, Georgia could not, without "impropriety," require prosecutors to defend their decisions to seek death penalties potentially years after such decisions had been made. However, as noted by Baldus in his book about the statistics utilized in *McClesky*, Georgia never attempted to call the prosecutor in the *McClesky* case to testify regarding potential discrimination in that case or in Georgia death penalty cases in general. The Court stated, however, that no rebuttal was required of Georgia in *McClesky* absent "far stronger proof" because the legitimate explanation was that McClesky had committed an act for which the United States Constitution and Georgia laws permitted the imposition of the death penalty.

With the *McClesky* decision, the Court was able to skirt the issue of discrimination. Instead of confronting the discrimination that could be occurring in justice systems across the nation, the Court emphasized the need for statistical data pertaining only to the case at hand. The Court stated that discrimination needed to be shown in the particular case and indicated that data showing discrimination in death penalty cases in general was insufficient to prove an eighth or fourteenth amendment violation.

**FINDINGS OF THE GAO STUDY**

After the *McClesky* decision, the Anti-Drug Abuse Act, enacted in 1988, required the Government Accounting Office to study capital sentencing procedures to determine whether the race of either the victim or the defendant may have any influence upon the likelihood that a defendant is sentenced to death. To fulfill this mandate, the GAO conducted an evaluation synthesis based on existing empirical research studies on death penalty sentencing.

Fifty-three studies were identified through computer-generated bibliographic searches, review of criminal justice researchers and organizations that conduct work related to death penalty sentencing. Studies were excluded based on two factors: 1) the data was collected prior to the Furman decision, and 2) it did not examine race as a factor for influencing death penalty sentencing. A second review eliminated studies that did not contain empirical data or were duplicative. There remained twenty-eight studies used by the GAO to conduct its synthesis.

Each study was independently rated based on five dimensions: 1) study design, 2) sampling, 3) measurement, 4) data collection, and 5) analysis techniques. An analyst reviewed the raters' assessments to ensure consistency. Finally, a statistician reviewed the studies that used specialized analytic techniques in order to assess whether the researchers had utilized the correct techniques and reached the correct conclusions.

In the report the analysts state that the major benefit of an evaluation synthesis such as that performed by the GAO is that the evidence from the studies viewed as a whole provides greater support for a conclusion than the evidence from an individual study could. The major limitation is that the quality of the GAO report is dependent upon the quality of the research performed by the independent researchers.

The GAO analysts extracted all relevant information on the relationship of race to death penalty sentencing from each of the studies. Then analysts compared and con-
trasted the studies to identify similarities and differences in the findings. The analysts created a rating system whereby each of the 28 studies was rated as high, medium, or low. The ratings reflected both how well the studies related to the objective of the synthesis and the quality of the body of available research. The ratings were important because the results of the synthesis were dependent upon the quality of the studies: a sufficient number of high and medium quality studies was necessary in order to make the GAO report an accurate and valuable reflection of the data arising out of death penalty sentencing cases.

The GAO analysts judged a study to be of high quality if it: 1) was characterized by a sound design that analyzed homicide cases throughout the sentencing process; 2) included legally relevant variables (aggravating and mitigating circumstances); and 3) used statistical analysis techniques to control for variables that correlate with race and/or capital sentencing. A study was rated as medium if it was missing one or more of the above characteristics. According to the GAO, the medium studies typically had more in common with the high studies than they did with the low studies, which often had weak or flawed designs, were more simplistic, and utilized less reliable statistical analysis. Studies published prior to 1985 were likely to be of low quality, at least partially because more sophisticated statistical techniques had been developed fairly recently.

The GAO examined the limitations of the studies it was utilizing and determined that three major methodological limitations existed which might have affected the design, analysis and conclusions of the studies: 1) the threat of sample selection bias; 2) the problem of omitted variables; and 3) the small sizes of the sample selections.

Sample selection bias could occur when the selected sample of cases or statistics studies was not representative of all cases. Racial discrimination could influence decisions made at any stage during the criminal process; thus, the GAO made the determination that studies were particularly susceptible to sample selection bias when the researchers had considered only whether persons convicted were sentenced to death. The GAO found that most of the low quality studies suffered from sample selection bias, often because the studies only examined the sentencing phase. In contrast, more than two-thirds of the studies rated high or medium had examined the cases from the time prior to conviction through the end of the judicial process.

The problem of omitted variables was examined by the GAO during the rating process. The GAO determined that omitted variables in death penalty research were potentially of two types: 1) variables that were known and were believed to be correlated with race or the death penalty outcome, and 2) variables that were not known and may be correlated with race or the death penalty outcome. Omitted variables are especially troubling because the effect of racial discrimination can only be determined after all other variables that affect sentencing have been controlled. Studies that neglected to account for the effects potentially resulting from variables unrelated to race report results of limited value in proving or disproving racial discrimination. Many of the better quality studies controlled for many different variables.

Overall, the GAO report indicates that, of the twenty-eight studies reviewed, 82% found that race of victim influences the likelihood both of being charged with capital murder and of receiving the death penalty. The majority of the studies used by the GAO, however, presented statistics that were based on death sentencing cases between 1935 and 1980. The GAO did not evaluate studies which were reflective of more recent racial discrimination, from 1980 through 1990. In addition, few of the studies the GAO evaluated showed any form of race of defendant discrimination. Instead, the studies supported only a conclusion of race of victim discrimination. The statistics showed that
more blacks were sentenced to death for killing whites than for killing blacks. Based on the McClesky decision and the GAO findings, the issue of discrimination within the justice system has been left for the legislature to act upon.

**LEGISLATIVE RESPONSE TO THE GAO**

The Supreme Court in McClesky suggested that discrimination in capital sentencing is best presented to the legislative bodies. In accordance with that suggestion, Congress recently considered the Racial Justice Act as an amendment to the proposed Federal Death Penalty Act. The purpose of the Racial Justice Act is to establish procedures to guard against arbitrary and irrational application of the death penalty at the state and federal level. The act would make it possible for a defendant who receives a death sentence to have his sentence overturned if he can show an unexplained racially discriminatory pattern in death sentencing. To establish that a racially discriminatory pattern exists:

1) ordinary methods of statistical proof shall suffice; and

2) it shall not be necessary to show discriminatory motive, intent, or purpose on the part of any individual or institution.

The defendant may establish a prima facie case of discrimination by showing that death sentences are being imposed or executed:

A) upon persons of one race with a frequency that is disproportionate to their representation among the numbers of persons arrested for, charged with, or convicted of, death-eligible crimes; or

B) as punishment for crimes against persons of one race with a frequency that is disproportionate to their representation among persons against whom death-eligible crimes have been committed.

Thus, if statistical methods, much simpler in nature than those used in the Baldus study, were to show that 15% of all defendants, whether black or white, received the death penalty if convicted of killing white persons, and only one percent of all defendants convicted of killing black persons received the death penalty, there would exist a prima facie case under the act. In such an instance the defendant would be showing a discriminatory pattern based on the race of the victim.

Similarly, if the methods employed showed that 15% of black capital defendants received the death penalty regardless of whether the victim was black or white, and only ten percent of white capital defendants received the death penalty regardless of whether the victim was black or white, there would exist a prima facie case under the act. Here, the defendant would be showing a discriminatory pattern based on the race of the defendant.

In addition, if the ratio of defendants of one race receiving the death penalty is greater than the percentage of that race to the total number of defendants, then a prima facie case would exist under the act. This analogy was emphasized by Senators Thurmond, Hatch, Simpson, and Humphrey in their comments contained in the report from the Committee on the Judiciary. They stated that:

As shown by the Bureau of Justice Statistics' most recent report on capital punishment, 66.2 percent of those sentenced to death in 1988 were white (BJS Report, "Capital Punishment 1988," p. 7, table 5). At the same time, other official data indicated that whites constitute only fifty percent of those who commit murder (BJS, "Report to the Nation on Crime & Justice," March 1988, p. 47). In short the percentage of whites sentenced to death exceeds the white percentage of the pool of potential recipients of the death sentence.

The statistics from the studies used by the GAO provide widespread evidence of racial discrimination patterns in the imposition of the death penalty in jurisdictions across the nation. A defendant receiving a death sentence would have strong proof to establish a prima facie case under the act. Therefore, if it had been enacted, the Racial Justice Act literally could have eliminated capital punishment. However, the federal death penalty bill with its amendments for the Racial Justice Act received a tie vote in the Senate Committee on the Judiciary. The bill was then presented to the full Senate and was voted down by a vote of 58 to 38. Therefore, the Racial Justice Act was never introduced in the House.

---

91 McClesky, 481 U.S. at 319.
94 Id.
95 Id.
96 Id. at 25.
97 Id.
98 Id. at 43.
99 Id. at 48.
The most recent death penalty bill awaiting approval is S. 18.102 However, this new bill, while it establishes constitutional procedures for the imposition of the death penalty for certain federal offenses,103 does not include the Racial Justice Act. The bill does establish a special hearing to determine whether a sentence of death is justified.104 In addition, it establishes specific court instructions as a precaution to assure against discrimination. Under the bill, the court shall instruct the jury that, in considering whether a sentence of death is justified, the jury shall not consider the race or color of the defendant or of any victim.105 And the jury shall return to the court a certificate, signed by each juror, stating that consideration of the race or color of the defendant or any victim did not play any part in the jurors' decision. Each juror must also certify that he or she would have made the same recommendation regarding a sentence for the crime in question regardless of the race or color of the defendant or any victim.106

Part of the goal of the S. 18 proposed legislation is to prevent racial discrimination. Apparently the drafters of the legislation believe that a juror who is required to certify that race did not play a factor is less likely to racially discriminate in death sentencing. Most race discrimination in death sentencing, however, is likely to be unconscious on the part of the jurors, and the certification process of S. 18 is unlikely to prevent this unconscious behavior. S. 18 is even less likely to prevent conscious discrimination because no juror who does discriminate on the basis of race is apt to admit this in writing. In addition, S. 18 does not even address the issues of potential discrimination throughout the judicial process, from the time of indictment through the sentencing stage.

Moreover, the vast majority of death sentences are imposed not under federal law, but under state law by state courts. The question then arises whether state legislators would even consider legislation such as the Racial Justice Act. Such legislation would permit a defendant who has received the death sentence to prove statistically that a racially discriminatory pattern exists. The legislation would prohibit imposition or execution of a death sentence under color of state law if that sentence furthers such a pattern. States where researchers have shown a strong likelihood of racial discrimination in capital sentencing are extremely unlikely to institute legislation which would be similar to the Racial Justice Act. Such legislation could, based on research currently in publication, effectively eliminate the death penalty in those states. There is speculation, however, that Governor William Weld of Massachusetts may propose racial justice legislation along with any death penalty statute he introduces in Massachusetts.107 It remains to be seen whether a racially discriminatory pattern in sentencing can be shown today in Massachusetts, but Thornsten Sellin's pre-1935 research indicates that race discrimination historically was a problem in Massachusetts death sentencing.

CURRENT PUBLIC SUPPORT FOR THE DEATH PENALTY

The United States is plagued with violent crime. The legislative bodies have attempted to combat crime with a variety of anti-crime and anti-drug bills during the last decade.108 These laws have done little, however, to alleviate societal fears. The public demands that stricter penalties be enforced.

There are currently thirty-seven states that have the death penalty as their ultimate form of punishment. With the growing concern of the American public, legislators across the country are facing increasing pressure to take action against crime. Therefore, growing numbers of legislators are seriously examining the death penalty. As recently as last year, New York's Governor Mario Cuomo vetoed the death penalty in New York.109 Yet there are plans to introduce a capital punishment bill in both the New York Senate and House in an effort to obtain enough votes to override the governor's veto. If successful, New York would reinstate the death penalty.110

A Massachusetts statute currently provides death as a punishment for murder, but the Supreme Judicial Court's decision in Commonwealth v. Colon-Cruz111 invalidated the law. In place of the death penalty the state imposes a sentence of life imprisonment without parole for first degree murder.112 During the past seven years, any attempts made to reform or reinstate the death penalty were consistently vetoed by Former Governor Michael Dukakis. Governor William Weld, however, supports the death penalty and during the recent election he represented himself as a governor who would be "tough on crime." Therefore, it is more likely today than at any time under the Dukakis administration that Massachusetts will see a death penalty in the near future. Before Massachusetts reinstates the death penalty, however, it

---

103 Id.
104 Id.
105 Id.
106 Id.
107 Lecture by Margaret Vandiver, supra note 101.
109 Id.
should carefully examine the problem of racial discrimination in capital sentencing. History has proven time and time again that it is impossible to administer the death penalty in a fair and non-discriminatory fashion.

**CONCLUSION**

It has been almost two decades since the United States Supreme Court handed down its decision in *Furman*, in which the Court found all state death penalty statutes as they were then written to be unconstitutional. The changes in the reformed state statutes have gradually taken effect. States after *Furman* attempted to curtail the arbitrariness and discrimination with which the death sentence was previously handed down. However, the research based on post-*Furman* cases has shown consistently that death sentences continue to be imposed in a discriminatory manner. The overwhelming statistics presented in the Baldus study and the GAO report support the conclusion that race of victim discrimination within the American judicial system still exists. The statutes have done little to combat the problem.

The issue arises, however, whether there is discrimination against the defendant when death sentencing is based on race of victim discrimination. Arguably, race of victim discrimination indicates only that black victims are being discriminated against because crimes against black victims are not punished as severely as crimes against white victims. Defendants, however, are not, according to the argument, the victims of discrimination at all because no race of defendant discrimination has been proved. This argument lacks merit because defendants do indeed face discrimination when the race of the victim plays a factor in death sentencing. A defendant who kills a white person has been discriminated against because he is more likely to be executed than a defendant who kills a black person.

There are three ways to cure race of victim discrimination in the imposition of the death penalty. First, fewer defendants who kill whites would be executed. The number of defendants receiving the death penalty for killing whites would have to be dramatically decreased so that the ratio of defendants executed for killing whites would be equal to the ratio of defendants executed for killing blacks. If this method were used to cure race of victim discrimination, then the death penalty would become even less common than it is now, and therefore the problem of disproportionality of sentence would become that much more apparent. Disproportionality is a problem when defendants who commit similar crimes are awarded either the death penalty or a lesser sentence in an apparently arbitrary manner. If an extremely small number of defendants receives the death penalty, then those who do receive it can probably rightfully claim disproportionality of sentence. Therefore, curing race of victim discrimination by executing fewer killers of whites is problematic.

The second method of curing race of victim discrimination is to execute more killers of black victims. This cure would lead to more black defendants being sentenced to death because statistics show that the vast majority of black victims are murdered by other blacks. While this scenario would alleviate the race of victim discrimination, potentially the pendulum would swing too far and result in race of defendant discrimination, given the history of racial discrimination in this country. This is a possibility because, in order to cure the race of victim discrimination, prosecutors would be given license to attempt to impose the death penalty on black defendants who have killed black victims. Additionally, death penalties should never be imposed as a method of curing statistically documented discrimination.

There simply is no adequate method for eliminating race discrimination in the imposition of the death penalty. Therefore, the best way to cure the race of victim discrimination that currently exists is to eliminate the death penalty altogether. This third method of alleviating race of victim discrimination is the only method that will not lead to another serious problem, such as disproportionality or race of defendant discrimination.

Despite the substantial evidence of racial disparities currently existing in the administration of the death penalty, death penalty statutes remain and may grow in number as public concern over crime increases. So long as racial disparities continue to exist in the administration of capital punishment, no death penalty statute can provide the equality guaranteed in the Constitution. Unless the American judicial system can remain true to the principle of equal justice without regard to race, there should be no place in the American judicial system for the death penalty.

---

113 D. Baldus, G. Woodworth & C. Pulaski, Jr., *supra* note 9 at 419.
FOR CAPITAL PUNISHMENT: 
THE MEANINGLESSNESS OF 
The Right to Life

By Stephen C. Hicks *

What follows is in four parts. Part I focuses on distinguishing contingencies, assumptions and methodological premises to state clearly what I think is at issue in capital punishment. Part II discusses the different justifications for it and especially the relationship between them, leading to the unavoidable but often avoided key issue separating opponents and proponents, which I discuss in Part III and Part IV.

Here I shall describe generally what follows. The problem as I see it is that opponents to capital punishment cannot cross the gap between the doing of wrong by the offender and the taking of life by society because of the value accorded to life and the relative lack of weight accorded to society. I shall argue that there is no right to life nor is life so basic to human dignity that it cannot be taken away. The attachment to life is either a matter of faith or else simply unexamined. In this, opponents to capital punishment are more emotional than they often take proponents to be. To argue otherwise depends upon mistaking abstractions for reality. All the arguments against capital punishment fail for this same reason leaving capital punishment in principle as a rational proposition supported by denunciation, proportionality, retribution and desert.

To begin with, a very important aspect to capital punishment is that we cannot talk of it detachedly. Because it is really about the meaning and worth of life we must acknowledge at some time our own guilt and see our own face in the newspaper. We know that there but for grace of God go I. What this forces upon us is a very personal perspective. We cannot help but look at it in the same way as we see ourselves. We are bound to identify with the parties. We may disagree about whether we should sympathize with the offender, the victim or with the executioner. But therein lies a very important methodological point. Capital punishment, and whether it is moral or not, is not about something out there apart from us. Certainly it is about how the offender sees the law and how the law sees the offender but these are bound together by how the offender sees him or herself, and how those who judge see themselves. Therefore, capital punishment not only says something about the offender but also about society. How we see capital punishment is also a function of how we see society as well as how we see life. Moreover, how one sees oneself is in part a social product formed from both actual intersubjective connectedness with others and anonymous influences from beyond. This makes us think of our autonomy differently, for the basis of anyone's being is as much mutually constituted as self-created. One's life is less one's own than one's self in its modern humanistic form imagines. The consequence is that social existence depends upon mutuality. Autonomy entails responsibility for being free. This responsibility too is not a matter of subjective choice. Thus, just as death is an inevitable feature of life and making sense of death is necessary to making sense of one's life, so too is society and its meaning necessary to one's own sense of freedom. What proponents and opponents of capital punishment need to grasp is the very personal dimension of our experience, as well as the fact that this experience is one of interconnectedness. Individuals are responsible for themselves because, without that, mutuality could not exist.

* Stephen C. Hicks, M.A., LL.B. (Downing College, Cambridge, 1972), LL.M. (University of Virginia, 1979). This essay is adapted from an article forthcoming in 18 American Journal of Criminal Law (Spring 1991). The author wishes to express his appreciation to his colleagues for their support, encouragement and feedback at a faculty colloquium where this paper was presented. In particular, the author wishes to thank Dr. Edgardo Rotman, Esq. criminologist, scholar and friend with whom this essay was conceived as a dialogue about the meaning of the loss of life.

Professor Hicks has been teaching Torts, Comparative Law and Legal Theory at Suffolk since 1977. His current interests include bioethics, feminism and psychoanalytic jurisprudence. He recently contributed to the new edition of Black's Law Dictionary (West 1990) and authored a chapter on Adam Smith's Impartial Spectator for a volume entitled Law and Enlightenment in Britain published by Aberdeen University Press in 1990.
PART ONE: THE ISSUES

I propose to approach the issue of capital punishment without regard to its contingent features. There are three: the method, the distribution and the application. Firstly, I shall assume that it is possible for execution to be humane, dignified and even painless. Whether the electric chair, the gas chamber, or death by hanging are grotesque and inflict torture over and above death is not relevant to the morality of capital punishment. Therefore, I do not believe it is relevant to our discussion whether capital punishment is cruel and unusual punishment. Cruelty may or may not be a contingent circumstance of the manner of the actual type of execution used or in the years of condemned waiting and I believe its unusual nature is quite relative. Indeed it has to be unusual though not bizarre as perhaps we think the guillotine is. The epithet, "cruel and unusual" is a conclusion. What is cruel and unusual, therefore, begs the very question we set out to discuss, namely, what is the relationship between our moral positions and our commitments to life, living and others in society.

Nor, secondly, is it relevant to my justification of capital punishment that classes or races may be disproportionately condemned. I shall assume that the possibility exists for a fair and just criminal process. If not, then law as a whole is without legitimacy. The same point applies to the fallibility of the criminal justice system. It does not argue against capital punishment in principle only against its particular application in certain circumstances. There is more to this of course. The finality of execution makes a difference. I shall deal with this below.

Lastly, I recognize the difficulty of determining which offenses might qualify for the death penalty and obviously the difficulty of determining in any particular case whether this guilty person deserves the death penalty. I believe though that certain homicides are those deserving of the death penalty. Recidivist torturers or rapists might also deserve the death penalty. In other cultures, apostasy or heresy might qualify exactly because they violate the essential demands of belonging in association with others. But to exemplify the principle is not difficult for me, putting aside all the above; serial killers, gangland executioners, those killing to cover up detection of some other offense would be among the few deserving of the death penalty.

What I want to do is argue for capital punishment in principle. My point is that the judgment "what for" ought to be temporarily separated from the prior general judgment about "whether to." This latter question forms my subject. I also think that by being clear about the justification for capital punishment in principle we will see clearly how to solve the problems of its scope, distribution and method.

PART TWO: PHILOSOPHICAL JUSTIFICATIONS

There are four reasons usually given in favor of capital punishment. I shall call these denunciatory, the proportionality, the retributive and the desert reason. Neither the arguments for, nor their counter arguments, are conclusive, however, for the reason I shall focus on below, namely, they depend on unspoken premises about the nature of our being. In the literature and debates on capital punishment I believe that this particular issue has not been dealt with. I shall show how it cannot be avoided and the discussion with its opposing viewpoints will show how enriched the debate about capital punishment can be once its fundamental morality or immorality is seen to be dependent upon our conception of human life and our way of being. Therefore, although I shall argue in favor of capital punishment, I also believe that when we understand the nature of our belonging together we shall get closer to an acceptable theory of punishment generally.

I, The denunciatory reason argues in favor of capital punishment by way of society’s expression of condemnation for certain crimes which threaten the stability of the boundaries of our mutual respect and living together. I think that it is a positive and healthy sign as well as a logical necessity that those who live together define their togetherness such that they stand by both victims and their feelings and the social whole and its bond by denouncing the subversion of that mutual belonging by the act of denial in the form of a crime. Crimes must really undermine the premise of social order, but when they do then logically they must be denounced.

The denunciation, therefore, is an act of symbolic power of the whole over an individual on behalf of the whole as a victim and on behalf of individual victims. It has a utilitarian aspect regarding the effects of this on society and a logical aspect regarding the coherence of society.

Of course, this denunciatory reason in and of itself does not argue for capital punishment without more over and above these justifications for punishment generally. The question remains whether the degree of denunciation rises to the level of incarceration or death. It is the proportionality argument in fact that makes that argument. Nevertheless, it is important to realize that this is not the same as revenge. It is impersonal and controlled. It is an act of recognition. It is not an outletting of feelings nor a taking up of vindictiveness or violence. That it is a collective act transforms what would be individual purposes, reasons and justifications. Nevertheless, we must be clear that we are not personally acting out of vengeance in the name of society.

It can be said that not only do I assume the existence of that social bond but I assume that the death penalty can reinforce that bond. The effect of capital punishment, therefore, may be to increase the actual totalitarian reach
of the law in effecting the social bond as a totalitarian construct.

In response to this I would say that the denunciation is a collective response or statement in reaction to an offense. The above argument inverts it so that the punishment seems to be the act and its effect on society the consequence. Rather punishment is the consequence. Its effect on the social bond is not what is important. What is important is that the denunciation be born of the community, an expression of it. Its effect as an affirmation or otherwise is incidental. It is not the purpose of capital punishment to build up togetherness. It simply depends upon it. So too the collective response or statement in reaction to an offense.

The above argument inverts it so that the punishment seems to be the act and its effect on society the consequence. Rather punishment is the consequence. Its effect on the social bond is not what is important. What is important is that the denunciation be born of the community, an expression of it. Its effect as an affirmation or otherwise is incidental. It is not the purpose of capital punishment to build up togetherness. It simply depends upon it. So too the denunciation depends on an otherness to the community, itself dependent upon the social bond.

Secondly, to say the criminal act evidences the lack of a real social bond may or may not in fact be true in a particular case. If it is true it would argue against capital punishment in that case. But criminality is not only possibly evidence of the non-existence of a social bond, indeed, it takes advantage of it, in whatever form it exists. Moreover, it is not criminality as such that is our subject but its further reaches where capital punishment is arguably appropriate exactly because it is even beyond normal criminality.

Lastly, to talk of totalitarianism, emotionalizes the issue and evokes a spectre. It exaggerates the legitimate use of force our society has in fact. If this monopoly of force is totalitarian it argues against the legitimacy of punishment as a whole of course, not just the death penalty. Punishment is justified as the protection of togetherness and an expression of the bounds of tolerance from within that social bond. The question is whether society may or indeed has to denounce certain offenses by executing the offender. Nevertheless denunciation itself still stands in need of a measure to validate the extreme of execution.

II. The proportionality reason adds this. Death by execution is more nearly equal and proportionate to the criminal acts of killing that ground capital punishment than is incarceration. Given the ideal of equality in our conception of justice, the fact of its metaphorical representation by terms of years of incarceration for lesser offenses against persons and property does not mean that when we can use the equality that inspires our law we should not. On the contrary, when we can we should. It is quite consistent to use the most severe sanction for the worst offenses. Moreover, since we believe that incremental severity deters and incremental severity is logical for severe offenses, then we should not only use capital punishment but we should logically believe that it deters also in those cases where its application is most fitting. Therefore the gravity of the punishment should be proportionate to the gravity of the offense. The question is “why not execute?” But of course no reason yet has been given for capital punishment. In fact the value by which proportion is to be determined is not made explicit. Nor can it be in the case of a sentence for years incarcerated. But the argument will be that neither the right to life nor as is obvious the right to take life is a given premise nor an exceptionless principle. Proportionality is determined, therefore, according to our deep value of the worth of life.

In reply it might be said that there is no compelling reason to include death in the catalogue of sanctions. There is no “logical” need to extend the incremental severity of punishment to the extreme of criminal punishment. Some other ultimate penalty (such as life imprisonment) can be just as valid for purposes of measure and proportionality. Also, the evil inflicted by punishment can never be precisely homogeneous with the offense. Such a system could not work even in the most primitive lex talionis schemes. The impracticability of the idea is patent in the proposition to rape the rapist. Finally, it can be said that in discussing the morality of capital punishment, moreover, one cannot bring in questions of deterrence. The existence of a deterrent effect is a contingent fact that has not been proven by the most sophisticated criminological research and indeed is contradicted by psychoanalytic theories that suggest that the death penalty incites crime by creating a subconscious craving for punishment.

We have to be clear about this. I did not say that it does deter. I only said we should think it does. That it deters makes better sense than that it does not in the context of our actual scale of punishments and their assumption. We should question this assumption perhaps. It is a mistake to ask whether as a fact it deters. Like tort, criminal law includes the judgment that the offender should have considered what would happen. Whether the actor did or did not take into account the threat of capital punishment is beside the point. The argument for capital punishment need not rely at all on deterrence. Perhaps it simply is an ineffective deterrent because criminals are on the whole successful, it seems, and the cause of this is our inefficient detection and apprehension system which is a fair price to pay for our liberty generally. Thus to say in fact it does not deter may be true but nevertheless the criminal law still depends on the logic of proportionality between offense and sentence.

Lastly, it may be impracticable to rape the rapist. But it cannot be denied it would be proportionate. This does not mean that it would be the same. It would be different for the rapist. Many aspects of the offense, not least of which is the shock and surprise, could not be replicated institutionally. In addition those who do such things do them for reasons that also have to do with feelings they have towards themselves, and so do not care in the same way if it is done to them. Their externalization of violence is a projection of feelings they have towards themselves as well as their victims and society. By this I do not suggest that rape should be a capital offense. Nor do I disregard the role of therapeutic treatment of offenders. My point is that there are complicated reasons why we do not rape the rapist. It is because it would not measure up to the gravity of the
off one’s debts and dues to society because of the unfair gains from exploiting social order. Punishment restores the self respect of the offender by describing to the offender how the offender and the offense are seen from society’s point of view. Having paid one’s debts one then deserves to be rehabilitated.

For capital punishment this means that society sees the offender as having forfeited even the right to be restored in his or her self-respect, that is, by having acted inhumanly one’s desert is the loss of one’s humanity. Desert must take into account both harm and culpability. One who takes life renders their own life vulnerable to taking by virtue of having set into motion a pattern of the taking of life. Of course not all deliberate murders will appear so inhuman as to warrant the forfeit of humanity.

The equation here is that like attracts like, a variation on the reciprocity and fair play principles often taken to formalize the social bond. On this basis not only is the act of society through its agent, the state, not a wrong which simply adds to the wrong, but even if it were not a right rectifying a wrong, it would still be valid if it ended the sequence or pattern set in motion by the original act. It cannot be said two “wrongs” do not make a right when the question concerns the nature of wrong.

What lies at bottom here is an ethic of one’s example being the basis of one’s meaning as a person. If one’s act says of life that it is worth taking then one is obligated to stand by that as a valid expectation of the response to one’s own acts. As I act so does the world according to the stand I take by my act. It is my freedom to establish the appropriate measure for judging me on the basis of the example of how I act that creates what is due, what I deserve. Therefore, personal desert establishes that execution is proportionate because of the inhumanity of the offense. This is reinforced socially by justified denunciation and retribution. In this way each separate justification supports the other though none alone would argue for capital punishment without reference to deserving to lose one’s life and the proportionality of execution to the act and the actor. This brings into focus the real issue between proponents and opponents of capital punishment, namely, the correspondence or lack thereof between the taking of life by crime and punishment. It is the meaning and value of life that we need to discuss.

PART THREE: THE BASIS OF JUSTIFICATION

What underlies the denunciatory and retributive arguments are proportionality and desert. Both of these deep arguments assume that there is no ultimate limit to the state’s right to punish on behalf of society and victims. It is a matter of degree only whether life imprisonment or capital punishment is more fitting. Any limit must be argued for. The argument in favor of capital punishment is that there are some offenses for which people deserve to die because that is more proportionate than any other punishment to the example of their own worth and the worth of life that they have held out.
The unspoken premise here is the continuity or relationship between life and death. Death is not that important because life is not what is important. We must recover the metaphysics of our existence by drawing out the difference between what we do experience and what we do not. Life and death are abstractions from our actual living. We make meaning from what we can experience. We do not experience life. The noun refers to nothing. We live.

Therefore, the morality of capital punishment rests upon the claim that the offender’s death is proportionate to the offense because ultimately death is no less sacred than life and life is worth no more than death. They are both abstractions. As abstractions they are useful if we do not mystify them. Not only is there a connection between life and death but they form a unity, for before birth and after life are the horizons without which living would have no context. But living is what we do. It is not life but living that we value and use as a measure by which to judge all things. Life and death are too elusive for us to experience. Such a connectedness to life, as if it were what one most was, is a misplaced concreteness, a romantic illusion or the mistaking of the narrative for the meaning.

In fact, the meaning of one’s life comes to us from others because of our living our example. Life goes on, nature goes on regardless of the egos in the world and when we think otherwise it is not life but living that we signify. Therefore, I think that while one can say that the uncertainty of the effect of death, or our lack of knowledge of what it means, argues against the certainty of capital punishment, yet it can also be said the punishment itself is not death, which we do not experience, nor is life as such lost. The change in the offender’s living is the punishment; to be living, waiting and contemplating one’s finality. Dying is the condition sine qua non of death by execution. Moreover, death as loss of one’s own life may be no punishment to those who do not fear it, such as perhaps professional hit-men, but living through that certain time would be different, I suggest. This is the dying in capital punishment that proportionally reflects the living of the offender. It is this that can be deserved, living finitely.

I argue that life is not mine. Life is me. I am it being me. I cannot possess it anymore than I can “possess” my body. We say “live life to the fullest” and “life is for the living.” My life as lived is a shared phenomenon, a social experience. Therefore I cannot say society is not in control of my lived life to the extent I am responsible to society for it. I suggest that what is mine is my experience and my achievements. There is no right to life. Life does not prioritize all else. The value of the lived life is just that, not life but its works. Living is what we experience. It makes great sense to say that, if we do not see life teleologically as an expression of God’s plan for us or the unfolding of the program of human nature, then the meaninglessness of life places the burden on us to make meaning out of the very personal task of living. There is no right to life, only a very different right to go on living. Moreover, that existence as lived is only mine contingently, subject to circumstances. Its worth is not given but worked for, and it can be thrown away, given away or lost and taken away, in accordance with one’s free will and its deserts. There is nothing outside our sharing and our commitment to sharing so that we could say this, life, is still life and worth something independently of our living and belonging together.

There is no self as such nor life as such. The self may be ego-centered and therefore assume the right to life follows from the survival instinct but this biological entity is not the same as our being human or personhood. Indeed being a person is being condemned to being the opening for the appearance of one’s works. Our living acknowledges this claim upon us. We are what we have made ourselves every second, and we do it through society. It is this participation in our collective being that we make of ourselves that we call “life,” not the biological, organic processes nor the religious and metaphysical extrapolations. Nature is sacred, but I am not this. Indeed biologically and metaphysically life lives me not vice versa. The lived life is social life. It is the worth of our living our life’s work that is evaluated by criminal justice and there is nothing sacred about life such that certain offenses can be said not to deserve its taking, because indeed I am responsible to the social whole for living and I am claimed by the whole for who I am to myself and others through my example.

As I am in living so shall society judge me, even if it has to catch me first. But this judgment is not irrational. It is based upon what a person will give up in taking a risk with another’s life. We bear the risk of paying the price for our mistakes and deliberate calculations. The price to be exacted is the effect of the judgment we live by that defines humanity and our social belonging, and its identification differentiates the inhuman we cannot logically and should not normatively let live in the image of ourselves as a community of mutually respectful social beings. We identify our humanity and belonging through the example we each make of the worth of living a life. If by our example we deny the worth of that then in principle we have risked our right to go on living, which society may justifiably denounce on the basis of the retributive effects of our act proportionately to the inhumanity of that act.

PART FOUR: THE COUNTER ARGUMENTS

Obviously in thus arguing for capital punishment I have not dealt directly with the many bases for rejecting it. This is what follows.

Capital punishment violates human mystery by defining death in time, i.e. only God can give or take life. Moreover, it excludes the possibility of spiritual growth towards understanding the meaning of life during incarceration, by prematurely ending life.

Life is sacred; it cannot be taken away. The right to life is absolute. Life is the very basic value for prioritizing all else. Life is not ours to control.
Capital punishment undermines the greatest virtues of compassion, mercy and forgiveness. There is no proof evil exists rather than social accidents which deserve our forgiveness. Capital punishment makes violence respectable. It sends a double message which legitimizes certain murders, those by the state. Two wrongs do not make a right.

The problem of the death penalty has to be seen from the perspective of the executioner as well as the executed. Its acceptance and practice transform the participants into a society of executioners. It debases us. The death penalty acknowledges our failure, not just that of the offenders.

But I think the difficulties with such counter arguments are clear now in light of what has been said above. They either appeal to abstractions such as God or Life or they prioritize virtues and values according to a false sense of being a person, one that makes our being human depend upon abstractions that avoid responsibility in seeking refuge in metaphysics or faith, or else depend upon an ideal of the self's independence and autonomy. The idea of "God" in a proposition like this means the ultimate causal principle in the universe, a sort of catch-all category for what is beyond us. It adds nothing except faith to the discussion of the meaning of life and death. Moreover, it is exactly a faith in divine retribution. It provides an escape from earthly, personal responsibility for judging. It also subverts the possibility of debate because there is a given proposition beyond debate. But even if we have faith that God will rectify all imbalances in the hereafter, what argument is that against sending a certain offender to his or her maker right away. One could just as easily say that capital punishment facilitates spiritual growth in the contemplation of death for facing the hereafter and one's reincarnation, as say that life is sacred and only God can take it away. My faith is that "God" wants us to take responsibility for life and death, and the earth, and our future, the sooner the better. Most importantly, the right to "Life" is not absolute because that is not the basis of personhood or our being but a presupposition necessitated by a particular concept of the way the world is, which turns out to be naive. Our autonomy is predicated upon its functioning within society. We are not self contained. If living in mutual respect of others is the basis of personhood not autonomy then that weakens the argument that no one can take life or that life cannot be forfeited to society. Life is to that extent social. Autonomy is not autonomous. Otherness is constitutive of self also, through language, conventional practices and the socialization process. Moreover, others see us through our example, i.e the mode of the appearance of our mutuality in society is through the moment of the self's example to others. This makes us see ourselves both as a self experiencing living and as others see us. Therefore, each self must ask themselves whether they could make or take life in the laboratory, take their own lives, see their life being taken, risk their life or give up their life.

If one can recognize such possibilities, then the morality of capital punishment cannot be excluded, because death is not as significant as the supposedly sacredness of life implies. Talking of the abstraction "life" enables us to escape looking in the mirror at ourselves. There is, therefore, no rational distinction to be drawn for the ultimate significance of "life" between sacrifice in war, execution for wrongdoing and one's suicide. This qualifies or relativizes life as such. The sanctity of life is not an absolute, either as a principle or as a choice of action. I suggest that how one answers this reveals not only the example we make of ourselves, but that it is life as lived collectively by which we judge and expect to be judged, not by an abstract concept or principle. Even if we translate the right to life into a right not to have one's life taken away arbitrarily, that recognizes that there is no absolute objection to capital punishment for it assumes the existence in principle of non-arbitrary examples of capital punishment. Thus what we really signify by "life" is living. Our right to go on living is contingent. We have to make it something. We are responsible for what we make according to the example we give of the very value of living with others in the world.

Thus all four justifications for capital punishment support each other. Denunciation and retribution are the vehicles for the evaluations by desert and proportion. They all cohere around the meaning that life has for us. Desert is based upon one's example of the worth of life and proportion is determined according to that. Retribution and denunciation in different ways express societal reactions to the offense as a proposition of one's value of life. This leads to the logical possibility, the practical necessity and the impossibility of rational rejection, of capital punishment, because of the judgment about the loss of the offender's humanity, according to a theory of the meaning of life as living in society, based on the offender's own example of extreme inhumanity.

To repeat, the basis of judgment for or against capital punishment in the particular case is the same as for or against it in principle, namely, the example or stand taken towards living in the social world by one's acts. The substantive determination of death by execution as appropriate is based on what one's acts and conduct and character say of the worth of living in society. This is one's professed standard by which one expects to be judged. Whether living in society in prison, or the loss of one's right to go on living in society at all, is appropriate must be a decision based on the facts in all cases. I think the difference can be argued for in principle as reflective of the nature of our social being. I say this is the only and final basis upon which capital punishment can be based. It reduces arguments based on abstractions and metaphors to their experienced phenomena. It forces us as a people to reflect upon the meaning of our own living and the claim we have upon others and the social whole to go on living. The validity of capital punishment as the taking of life rests upon the fact that life as lived is a shared, socially experienced and intersubjectively constituted phenomenon, which is only contingently any particular individual's. Even though obviously the primary moment of its activation appears to belong to the self, yet the privilege to it can be outweighed, for example, as I have argued, by the effects of one's inhumanity upon that overlap of selves we call social order, as well as by, among other things, as in wartime, for example, the interest in peace and security.
The federal courts, particularly the circuit courts, are in crisis due to case overload. This condition is expected to accelerate unless corrective measures are adopted. Two recent studies discuss this problem and propose reforms. The first is C. Harrison and R. Wheeler, eds., The Federal Appellate Judiciary in the Twenty-first Century (Federal Judicial Center 1989). Although the foregoing is the official citation form prescribed in the book itself, future references in this article will be simply to the "FJC study." The other study is the Report of the Federal Courts Study Committee (April 2, 1990), hereinafter "the Report." There has been a very limited response by Congress to the Report in the Judicial Improvements Act of 1990.1

The FJC Study grew out of a "conference for all appellate judges, arranged by the Federal Judicial Center."2 "The Federal Judicial Center is the research, development and training arm of the federal judicial system."3 Numerous judicial and academic authors prepared the essays that developed out of the conference. Many different topics are covered and, of course, the authors are not always in agreement. As the title makes clear the FJC Study has to do with federal appellate courts, although this topic necessarily interrelates with the problems of other federal courts and even state courts.

The Report is from the Federal Courts Study Committee and concerns the federal courts in general. The committee is "of diverse membership appointed by the Chief Justice at the direction of Congress."4 The fifteen members included six judges. One of the Congressmen on the Committee, Senator Howell T. Heflin of Alabama, had previously been Chief Justice of the Alabama Supreme Court and Chairman of the Conference of Chief Justices.5 Although obviously not all of the committee members agreed on all matters and some individual dissenting statements are included, the format is that of a group report as opposed to the individual essays in the FJC Study.

Someone once said that it's hard to predict, especially about the future. Somewhat more elegantly the Report notes: "We have tried to peer ahead and forecast the federal caseload, but have found the crystal ball opaque. First, it is extraordinarily difficult to predict any but the grossest social, economic, political, and demographic trends more than a few years in advance — if that far."6 The report then recommends a philosophy of incremental rather than radical reform, on the theory that the consequences of radical reform cannot be foreseen, accompanied, however, by consideration of radical reform should it become necessary.

### The Problem

Some statistics — more perhaps than even a tolerant reader ought to be burdened with — are needed to set forth the caseload problem confronted by the federal courts:

- "From 1900 to 1989, the population of the United States slightly more than tripled. The number of appeals increased 36-fold."7
- "In 1945, the courts of appeals terminated 1,992 cases on the merits; the Supreme Court granted certiorari in 150 of them (7.5%). In 1989, it granted certiorari in less than 1% (0.6%) of the 19,322 appeals cases terminated on the merits."8 The Supreme Court takes about 150 cases a year for full consideration, which is not likely to change. About 75% of these cases come from the federal courts of appeals.9 The Court no longer routinely resolves intercircuit conflicts.10 Between 1958 and 1988 case filings in the district court increased three-fold, while the increase in the courts of appeals was more than ten-fold.11 In 1945, litigants...
appealed about one of every forty district court termina-
tions; they now appeal about one in eight." 12 The reversal
rate by the courts of appeals in 1945 was 30%; by 1989 it had
fallen to 13.1 percent. 13 "Since 1960 the number of appeals
filed per judge has more than tripled." 14

The overall message from this array of numbers is that
while cases are increasing generally, the problem is much
more acute at the circuit level. 15 Thus, as the reversal rate
decline indicates, the district courts are less closely super-
vised. "The relationship between what appellate judges say
and what district judges do is less certain." 16 The appeals
courts in turn are more autonomous because although the
Supreme Court takes as many cases as it used to, it is
selecting from a much larger pool. 17 Also, of course, today the
Court has almost complete control over its docket. Access to
the court is now almost entirely by certiorari rather than
appeal as of right. 18

Causes

Part of the increase is simply from population and economic
growth. Other considerations, however, are at work. As to
appeals it may be partly a question of money. In the FJC
Study former Attorney General Griffin Bell observed: "The
only bargain left in the federal judiciary is to take an appeal.
You can spend a million dollars litigating a case in the
district court, and for $50,000 you can get a fine appeal in the
most complex case. That may give you an idea why we have
so many appeals." 19

As to the general docket explosion there are many causes
but drug cases are prominent, even unique, among them.
"Drug cases now account for 44 percent of the federal
criminal trials, and almost all of these are jury trials." 20 Civil
rights claims from state prisoners have also grown dispro-
portionately. "In 1958, petitions from state prisoners com-
plaining about the conditions of their confinement constituted
about 1 percent of federal civil filings. By 1989, there were
almost 25,000 such filings, representing 11 percent of all
civil filings." 21

Additional contributing factors are: "expanded use of
class actions and 'one-way' shifting of attorney's fees", 22 also
the Civil Rights Acts of 1964 and 1968, as well as the
expansive interpretations of §1983. 23

Further, non-settlement is a problem. "If parties were
settling pending civil litigation prior to submission to a
court of appeals at the 1958 rate of 95.8%, the courts of
appeals would have been asked to decide only 10,965 civil
appeals in 1988 instead of 19,178." 24 Non-settlement is re-
lated to the problem of indeterminacy in the law. 25 If lawyers
cannot predict with confidence how a court will rule, that
may be a disincentive to settle. One of the factors contrib-
uting to indeterminacy is that the composition of the appellate
panel is unknown. In the Ninth Circuit, where there are
twenty eight circuit judges, putting to one side senior and
visiting judges, there are 3,276 possible panels. 26 Thus
having more appellate judges tends to produce a higher rate
of appeal and makes it that much more difficult for the
Supreme Court to police uniformity of the law in the lower
courts. 27 Further, it may be that other factors such as
increase in diversity of jurors 28 and decline in respect for
stare decisis 29 have contributed to indeterminacy in the law.
Much of this interrelates with the problem of frivolous
appeals. It is harder to stamp out frivolous appeals when
lawyers cannot determine what arguments are frivolous. 30

12 Report at 110.
13 FJC Study at 267.
14 FJC Study at 63.
15 Report at 10.
16 FJC Study at 75.
17 FJC Study at 23.
19 FJC Study at 21.
20 Report at 36. See also Chief Justice Rehnquist’s 1990 Year-End Report of Federal Judiciary at 5 [hereinafter, Rehnquist Report]: “Appeals of drug cases increased 29 percent and accounted for 60 percent of all criminal appeals filed this year.” Because of seizures of property, drug cases also have a substantial impact on the civil caseload. 1990 Report of the Director, Administrative Office of the United States Courts at 1.
21 Report at 49.
22 Report at 5.
23 FJC Study at 41.
24 FJC Study at 88.
25 FJC Study at 73.
26 FJC Study at 133; Report at 122.
27 FJC Study at 52; Report at 7.
28 FJC Study at 77-78.
29 FJC Study at 113.
30 FJC Study at 74.
Solutions

More judges? A partial solution, especially for the trial courts. As noted above, however, more appellate judges tend to contribute to the problem as well as solve it. Also, the more federal judges there are the more the nomination and confirmation process becomes pro forma.

Realign the circuits? Even if politically feasible, with larger circuits there would be more intracircuit conflicts; with more circuits there would be more intercircuit conflicts. "Jumbocircuits," i.e., more than fifteen active judges, are permitted a limited in banc procedure. The Ninth Circuit uses eleven judges. This could be extended even to smaller circuits.

In a provocative article in the FJC Study Judge Gibbons of the Third Circuit starts from the premise that "our primary function is dispute resolution and our lawmaking function is only incidental to that primary function." He concludes that there should be a presumption against oral argument but that a "reasoned written disposition" in all cases be provided. That does not mean a published opinion. Judge Gibbons also favors a presumption against publication; and thus a "presumption against an opinion becoming a binding precedent."

Many suggestions in these two volumes for improving the federal courts are "incremental" and indeed often familiar. Professor Paul Carrington of Duke University Law School, however, advances a proposal that would be much more fundamental. He suggests that the advent of video recording may make it desirable to reverse the order of trial and appeal. "By far the most important circumstance for the third century, in my perception, is the availability of inexpensive video recording." Under this proposal all testimony would be taken at depositions. Legal issues would be resolved before edited evidence is presented to the factfinder. Trial time would be saved. There would be no mistrials. Trial and appellate judges would look at the same record.

More modest and familiar proposals include cutting down on certain categories of cases that now crowd federal court dockets in egregious numbers, particularly diversity cases, drug cases and state prisoner civil rights claims.

Diversity cases. The FJC Report recommends as follows: "Congress should limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader, and suits involving aliens." In the event that Congress is unwilling to make so fundamental a change, the Report suggests the following four more limited changes in diversity jurisdiction:

1. Prohibit resident plaintiffs from invoking diversity;
2. "Deem corporations to be citizens of every state in which they are licensed to do business;"
3. Jurisdictional floor can be met only by reference to economic damages;
4. "Raise the jurisdictional minimum from $50,000 to $75,000 and index the new floor amount."

Another suggestion is to make diversity jurisdiction discretionary.

The possible benefit from these proposals to the federal courts is clear. "Since the early 1970s, diversity cases have consistently constituted from 20 to 25 percent of the district court caseload and 10 to 15 percent of the appellate caseload. And the volume of filings understates diversity jurisdiction’s impact. Diversity cases account for about half the civil trials in federal court, and they frequently generate complex procedural and jurisdictional problems, making them more time-consuming and expensive to process than similar claims in the state courts."

An obvious problem with this is that the proposal simply transfers a category of cases to already overburdened state courts. This is true but the disparity in size between the federal and state court systems is such...
that a significant benefit would result to federal courts while the relative increase for the states would be marginal. If 30 percent of federal cases were transferred to state courts the state court caseload increase would be one percent.44 "...98% of all the litigation in the country flows through the state courts."45 Further, the state Conference of Chief Justices has expressed willingness to accept the diversity cases.46 A dissenting statement, however, warns that the state Chief Justices would not object to the elimination of diversity “if supplied with additional resources to handle those cases" but “there is no assurance that they will ever be provided with these resources."47 Also, the majority of judges in the large states that would be most affected by the abolition of diversity “vigorously oppose" the change.48

Drugs. The distorting influence that the inordinate and growing number of drug cases has on the federal judicial system is documented above. The Report responds to this with the following proposal:

"Federal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts and should forge federal-state partnerships to coordinate prosecution efforts. Congress should direct additional funds to the states to help them to assume their proper share of the responsibilities for the war on drugs, including drug crime adjudication."49

The Committee seemed especially concerned that drug cases more appropriately prosecuted in state courts were in federal courts because of the availability of federal funding.50

State prisoner civil rights suits. As also noted above there has been an extraordinary growth in this type of litigation, contributing to the crush in the federal court system. In the Report the Study Committee recommends that this be solved by requiring exhaustion of state institutional remedies.51 The State would have to make a showing to a court or the U.S. Attorney General that the administrative remedies are adequate. An existing statute is a step in this direction but, in the view of the Committee, it needs to be expanded.

National Court of Appeals

There have been various proposals in recent years to alleviate the Supreme Court's docket problem by having some intercircuit conflict cases and perhaps some statutory interpretation cases go to another court. The Report does not favor creation of a new national tribunal proposed by the 1975 Hruska Commission.52 Instead, it proposes statutory authorization for an experiment whereby the Supreme Court would refer, on a random basis, cases of intercircuit conflict for in banc review by a circuit not involved in the conflict. The decision of the Circuit Court would be nationally binding, subject to review on certiorari in the Supreme Court. How many cases the Supreme Court refers would depend in part on which intercircuit conflicts the Court considers “tolerable" and which "intolerable."53

The obvious objection to this proposal is that it would simply result in additional petitions for certiorari in the Supreme Court. There would be the pre-reference petition and then the loser in the reference circuit would seek certiorari in the Supreme Court. Proponents of the experiment apparently are satisfied that since by reference to the circuit the Supreme Court has decided both that the intercircuit conflict needs to be resolved and that the Court does not desire to decide the issue itself,54 few cases would receive further review from the Supreme Court and that little in the way of judicial resources would be expended in

44 FJC Study at 64.
45 FJC Study at 128.
46 FJC Study at 129; Report at 41.
47 Report at 43.
48 Id.
49 Report at 35.
50 Report at 37.
51 Report at 48-49.
52 Report at 117.

(a) INTERCIRCUIT CONFLICTS. — The Board of the Federal Judicial Center is requested to conduct a study and submit to the Congress a report by January 1, 1992, on the number and frequency of conflicts among the judicial circuits in interpreting the law that remain unresolved because they are not heard by the Supreme Court.

(b) FACTORS TO CONSIDER IN STUDY. — In conducting such a study, the Center should consider, to the extent feasible, all relevant factors, such as whether the conflict-

(1) imposes economic costs or other harm on persons engaging in interstate commerce;
(2) encourages forum shopping among circuits;
(3) creates unfairness to litigants in different circuits, as in allowing Federal benefits in one circuit that are denied in other circuits; or
(4) encourages nonacquiescence by Federal agencies in the holdings of the courts of appeals for different circuits, but is unlikely to be resolved by the Supreme Court.

54 FJC Study at 140.
ruling on the petitions. Unless the decision by the reference circuit seemed totally "off the wall" the Supreme Court would routinely deny certiorari.

One proposal in the Report is almost embarrassingly simple but it does appear that its implementation could materially reduce litigation. The proposal is for a technical checklist to be used by congressional staffs in reviewing proposed legislation. Among the eighteen items noted are the following:55

1. "the appropriate statute of limitations";56
2. "whether a private cause of action is contemplated";
3. "whether pre-emption of state law is intended";
4. "severability";
5. state court jurisdiction; removevability;
6. retroactivity;
7. exhaustion of administrative remedies.

**Space Communities**

There is one article in the FJC Study that is of special interest although it does not principally bear upon the federal courts' docket problem, which has been the main focus of this discussion. The article is a seven page rumination by now retired Justice William J. Brennan on, of all things, the Governance of Space Societies.57 He cites the proposition that we will have moon bases and outposts on Mars in the not so distant future. Justice Brennan believes that if we are to be a spacefaring nation we had better be planning the law of space communities. Already "Congress has extended federal criminal law to punish criminal conduct on the moon or other celestial bodies."58 But Justice Brennan notes other problems that have been raised. "If the United States creates a society populated by U.S. citizens, what federal law should govern that society? Admiralty law, perhaps? Does the Constitution follow space?"59 The practical importance of some of these problems may be more imminent than we suppose.

**The Meaning of All of This for Law Schools**

There is a widespread assumption that legal education will become more and more clinical. That may be. If we could step into a time machine, however, and visit the law schools of 2020 or 2030 perhaps the most striking change to the visitor would be the integration of video and computers, but especially video, into the everyday law school experience. Also, if it is true that oral arguments at the appellate level will continue to be less emphasized, an important aspect of law school moot court programs will be more and more outdated. Appellate law clerks often conclude early in their clerkships that they could do as well as the lawyers they are watching. That is not because of their advocacy training, of which they may have had little. It is not typically because they are precocious, since they probably would not have the same thought if they were clerking in a trial court. It is because there just isn't that much to it. Law school traditionally emphasized appellate advocacy perhaps in part because so little needed to be taught. More recent emphasis on interviewing and counselling, alternative dispute resolution and rudimentary trial skills is probably an important step in the right direction.

---

56 See Judicial Improvements Act of 1990, § 313: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."
57 FJC Study at 217-23.
58 FJC Study at 220.
INTRODUCTION

In his introduction to a recent Yale Law Journal symposium dedicated to popular legal culture, Stewart Macaulay suggests that thinking involves “a traffic in significant symbols used to impose meaning upon experience.” Cultural patterns including aesthetics provide programs or templates for thinking or processes of social and psychological categorization. Popular culture is such a template for thinking about law and lawyers. It is thus relevant to help explain the way in which law operates in American society today. Macaulay goes so far as to suggest that human beings essentially think in terms of myth or “a complex of characterizations and imaginings, stories about events cast in imagery about principles” and that these myths somewhat akin to Jungian prototypes shape human knowledge about law, and indeed everything else as well. It is interesting therefore to try to describe current myths of law and lawyer. Is the myth of lawyer the sleazy money-grubbing hired gun or the defender of truth and justice? Are courts corrupt bureaucracies or dispensers of truth and justice?

THE TRADITIONAL MYTH

Webster, Lincoln and Darrow are American lawyers who have overtime become characters of mythic proportion. Webster is the famous advocate who argued so many cases before the United States Supreme Court. In doing so, he helped the Court to fashion sound principles of constitutional interpretation. In Luther v. Borden, for instance, oral argument lasted for two days and plumbed depths of the Constitution’s Republican Form of Government Clause. His emotion in the Dartmouth College Case is said to have brought tears to Chief Justice Marshall’s eyes and may well have been determinative in his opinion. The myth is further enhanced by Benet’s The Devil and Daniel Webster where Webster defeats the devil himself before a jury from hell on behalf of his fellow New Hampshireite who in a moment of weakness made a pact with the Devil. He describes Webster as follows:

You see, for a while, he was the biggest man in the country. He never got to be President, but he was the biggest man. There were thousands that trusted in him right next to God Almighty, and they told stories about him and all the things that belonged to him that were like the stories of patriarchs and such. They said, when he stood up to speak, stars and stripes came right out in the sky, and once he spoke against a river and made it sink into the ground. They said, when he walked the woods with his fishing rod, the trout would jump out of the streams right into his pockets, for they knew it was no use putting up a fight against him; and, when he argued a case, he could turn on the harps of the blessed and the shaking of the earth underground. That was the kind of man he was, and his big farm up at Marshfield was suitable to him.3

With Lincoln we think of the poor boy from the log cabin who studied law by candle light. As a lawyer, he represented ordinary people at reasonable prices from his spartan law office where he drafted documents by quill pen and earned the sobriquet of Honest Abe. He used rhetorical skills in the campaign for a seat in the Senate against the capable adversary Stephen Douglas. His inherent morality led him to free the slaves and to save the union.

In Darrow, we have the idealistic young lawyer from the country who moved to Chicago to defend unions and progressive causes. In Debs, he defended the head of the Socialist Party who was charged with espionage for a speech he made against the war. In the Scopes trial Darrow vindicated the rights of free expression and religion against the “Monkey law” prohibiting the teaching in public schools of any interpretation of the book of Genesis but that sanctioned by the fundamentalists. The trial in a hot court room in a fundamentalist atmosphere seems inextricably etched in our minds by Spencer Tracy’s portrayal of Darrow and Frederick March as William Jennings Bryan in Inherit the Wind.

Fictional characters have provided much to the substance of the myth as well. In perhaps the most famous law film of all time, To Kill a Mocking Bird, Gregory Peck, as Atticus Finch, defends Tom Robinson, a black wrongfully accused of raping a white woman in a small Alabama town in the 1930’s. He and his children suffer the fate of outcasts for being identified with blacks, and the vengeance of the father of the victim who sees Finch’s defense as casting doubt upon the virtue of his daughter.

In Otto Preminger’s Anatomy of a Murder, the defendant, Frederick Marion, is charged with the murder of a man who raped his wife. After giving the famous “lecture” on the insanity defense, James Stewart supplies a guilty but morally somewhat sympathetic defendant, with the only defense he could have

ple. He skillfully makes the defendant into a sympathetic figure whom the jury finally acquits.

But perhaps the greatest of modern American myth makers is the television character Perry Mason played by Raymond Burr. A large man with a booming voice who works diligently for clients, Perry's greatest skills are in the courtroom. Over ten years in 271 episodes with the re-runs as popular as ever he cross-examines the perjurious witness with such skill, wit and tenacity that they break down on the witness stand and confess to having perpetrated the ill deed that Perry's client is charged with. In the end Perry, the father-figure makes it right.

The lawyer-hero is the independent entrepreneur fighting for justice for the common man with the exercise of superior wit and intelligence and by means of hard work. Courts, staffed by skillful judges, are places where duplicity is uncovered and ultimately where good and evil clash with good usually winning out. The law is an instrument of justice and progress. The lawyer is the artisan who invokes the law and fashions it into a tool for the good. Perhaps these figures, both historical and fictional, have achieved such maturity in the American mind because they partake Macaulay's "templates." The template of "hero" is portrayed in the history of Western literature over and over again. The attributes of these classical heroes are quite similar to our lawyer heroes in popular legal culture.

HEROES IN THE CLASSICS

Emerson suggests that all mythology opens with demigods whose "genius is paramount." The world is upheld by good men; "they make the earth wholesome." The good is generative and makes room for "continually ascend." The people delight in him and cannot see enough of him.3

The hero, Thomas Carlyle reminds us in his 1840 lectures, is the "living-light fountainhead" which enlightens the darkness of the world, "a natural luminary of natural original insight of mankind and heroic nobleness shining by the light of heaven," whose radiance infects all souls.4 Joseph Campbell suggests that the hero steps forward out of the life of the everyday when confronted with a challenge of supernatural dimensions the solution to which has baffled and troubled the community. After fears about his own capacity for victory he confronts evil and wins decisively. He returns to the community with the capacity to bestow his boon on his fellow man.5 In ancient Crete, King Minos had banished the Minotaur to the labyrinth constructed by Daedalus. However it required a continuous supply of youths or maidens causing Crete to have to conquer new lands continuously lest the Minotaur devour their own lands. Theseus arrives on the scene from Athens with the Athenian youth and be-

witches Ariadne, Minos's daughter. The slayer of Minotaur will need skill and courage which Theseus has, but must also be able to find his way out of the labyrinth. Ariadne consults Daedalus. He presents her with a skein of linen thread which Theseus may fix at the entrance and unwind as he goes through the maze. Theseus succeeds and upon his return, he takes Ariadne back to Greece with him, ending Crete's primacy in the ancient world.

Other examples abound. Prometheus ascended to the heavens, stole fire from the gods, and descended. Jason sailed through the Clashing Rocks into a sea of marvels, circumvented the dragon that guarded the Golden Fleece, and returned with the fleece and the power to wrest his rightful throne from a usurper. Aeneas went down into the underworld, crossed the dreadful river of the dead, threw a sop to the three-headed watchdog Cerberus, and conversed, at last, with the shade of his dead father. All things were unfolded to him: the destiny of souls, the destiny of Rome, which he was about to found, and in what wise he might avoid or endure every burden. He returned through the ivory gate to his work in the world.6

While awaiting the outcome of the battle between good and evil the attention of the world appears focused upon the event. For instance, when Moses climbed Mount Sinai to seek guidance after the Jews left Egypt "flashes of lightning, accompanied by an ever swelling peal of horns moved the people with mighty fear and trembling."7

The actions of our American lawyer heroes surely fit the mold. Lincoln steps out from among us and fashions a solution to the problem of slavery that has troubled the land since its inception. His solution of emancipation is courageous and unequivocal and changes his people inextricably for the future. Atticus Finch heroically confronts racism over false accusation at the risk of his own family. His method of confrontation is original and patterned to have maximal effect upon his own community. He risks his life and forever changes the perceptions of his community.

THE MODERN MYTH

The modern myth borrows from this tradition but portrays the humanity of the lawyer in a more honest light. The conflict of values reveals the lawyer and leaves a more ambivalent picture of the modern lawyer but ultimately the heroic aspect wins out not only in an external battle of good vs. evil but also in an internal moral confrontation. Three recent best-selling novels about the legal system contain common elements about lawyers and courts that can be generalized into a popular myth or culture with some degree of consistency.

In *Reasonable Doubt* by Philip Freidman the central character of the novel is Michael Ryan, an attorney. His son is murdered at a party thrown by an art dealer for the purpose of

---

3 Emerson, Representative Men (Boston: Ticknor and Fields, 1861) pp. 3-27.
6 Campbell at p. 30.
7 Exodus 19:3-5.
showing young artists' works to rich patrons including Ryan's son Ed. At the party, Ed is publicly seduced by a young artist. This so enrages his wife Jennifer that she grabs a platter of hors d'oeuvres and throws it on the floor in the middle of the party. Ed and Jennifer leave the party in a rage.

About one hour later Ed is found upstairs from the party dead, apparently from head wounds administered by a piece of sculpture. His wife, who is independently a member of high society primarily because of the wealth of her father, is charged with murder and seeks her father-in-law Ryan's representation. After initial shock and revulsion at the idea of defending a woman accused of murdering his son, he agrees to the representation and spends the next six months in trial preparation.

Ryan hires a female assistant Kassia Miller. The two of them work feverishly for fourteen hours a day seven days a week for the next six months attempting to uncover what happened that night. Protagonist Ryan is frequently racked with doubt about his client's innocence and about whether he can continue with this the most difficult case of his illustrious career. Their investigation leads them to conclude that the deceased was involved in numerous shady deals involving medicare fraud, pharmacies that accept false prescriptions and ultimately drug dealing. Apparently Ed had numerous other enemies, any of whom could have committed the crime.

The trial, covered by all of the newspapers, transfixes the public. The district attorney himself tries the case because of its publicity. The courtroom drama is intense and Freidman skillfully brings the reader through the tactics of the court room warriors and court rulings. After a highly dramatic presentation of the prosecution's case, Ryan presents no defense and argues reasonable doubt to the jury. After nine days of deliberation, the jury convicts Jennifer of manslaughter.

After trial Ryan continues his work with a forensic blood spot specialist who after securing some missing photographs of where the blood spots wound up in the room can conclude decisively that a person much taller than Jennifer had to have killed Ed. In addition, Ryan finds a tape recording of a telephone conversation between Ed and Jennifer's father that incriminates her father in the crime. He confronts her father and solves the mystery. He moves to set aside the verdict of guilty and is successful to the great adulation of client and public. The novel closes with a love scene between Ryan and Kassia.

In Presumed Innocent by Scott Turow, Rusty Sabich, the chief deputy county prosecutor, is tried for the murder of his colleague and former lover. The crime occurs in the middle of a hotly contested election campaign where the failure to discover the identity of the perpetrator proves to be the undoing of Rusty's boss. The new D.A., Della Guardia, an old enemy of Rusty, immediately charges the incredulous Rusty with murder. Rusty chooses the skillful Sandy Stern to defend him against the outrageous accusation. The prosecution makes extensive investigation of the victim's body, fibers taken from the rug of the place of the murder and a glass left at the scene of the crime, all of which appear certain to convict Rusty. The trial again is highly publicized and well litigated, all lawyers doing an excellent job. Stern uses his long experience in the local criminal justice system to learn that Judge Lyttle who is assigned to hear Rusty's case was involved in sex and corruption with the deceased. He repeatedly alludes to the "B file," which contains evidence of these events in his cross-examination of the prosecution witnesses. This causes the judge to dismiss the case. In the end Rusty learns that his wife actually committed the crime, but declines to prosecute her because it would deprive his son of a mother. Again the almost certain conviction of an innocent man is averted by the knowledge and resourcefulness of our hero, Stern.

In The Burden of Proof Turow continues the story of Sandy Stern. The novel begins with Stern's discovery of the suicide of his wife, Clara. He does not know why and is tormented by the lack of insight. Stern slowly learns Clara's secrets and discovers with other women the passion he and Clara had lost. While in mourning, Stern is called upon to defend his brother-in-law, Dixon, the wealthy owner of a commodities-futures brokerage firm. Dixon has been in and out of trouble for years, and now a beautiful U.S. attorney is investigating his commodities firm for possible fraud.

Stern's inquiries into his brother-in-law's business yield answers he never expected to find. Not only is Stern able to pierce his dead wife's veil of privacy, but he also comes to understand the awesome price he has paid for his own ambition. Stern's challenge here is to control his sleazy and dishonest brother-in-law who is constantly trying to hide evidence and he ultimately must steal evidence sought by the government in order to keep his brother-in-law out of trouble.

In the movie, Class Action, Maggie, the rare female hero protagonist, plays a perfect hero lawyer role. She is vehemently seeking partnership and talks her way onto the litigation team to defend the firm's largest client in an exploding gas tank case in spite of the fact that plaintiffs are represented by her famous father played by Gene Hackman. During the course of the representation she learns that warnings of a design consultant that the car was a time bomb on wheels were purposely ignored because a call-back would cost more than the cost of the projected wrongful death judgments. Her immediate superior approved, indeed recommended the decision. Her skillful father seeks documents relating to consultant's tests. She insists on disclosure but her immediate superior withholds the document. Confronted with a moral decision that she knows will "kill" her chances for partnership, she discloses the identity of other witnesses to the document to her father and then "kills" her immediate superior by eliciting perjurious testimony from him that the documents did not exist after he was called to the stand by her wily father. The perjurious testimony is then exposed by the witness whom Maggie gave her father. Thus by blowing the whistle on her superior, she breaks ranks with her firm and her client, requiring a 100 million dollar settlement, the probable disbarment of her immediate supervisor and her own exit from the firm.

In each of the cases the lawyer protagonists are confronted with evil and immoral adversaries who appear very much to have the upper hand. Doing what is right appears unusually difficult and extremely risky to their well-being. After extensive self examination each chooses the right path and succeeds in defeating the evil adversary.
The T.V. show L.A. Law has a whole stable of lawyer heroes in the law firm of McKenzie, Brackman, Chaney and Kluzak, a full service law firm with plush well-appointed LA offices and a generally sympathetic cast of lawyers.

The fourteen million viewers are treated to some of the most difficult and ambiguous legal issues of our day including, for instance, the termination of the life support system for a young woman in a coma, the duty of a psychiatrist to warn the intended victim of an apparently violent patient, toxic torts, capital punishment, date rape, insider trading, whether a food company that has hired an Olympic gold winner to promote its products can annul the contract when the young man decides to reveal his homosexuality.\(^6\)

Top billing goes to Harry Hamlin for his portrayal of Michael Kluzak. He is handsome, sexually attractive, intelligent, sensitive, well dressed, rich and a good lawyer. The firm serves its clients well and prepares accordingly.

Modern popular culture thus appears enamored of the lawyer as hero. The lawyer works extensive hours with experts from all disciplines, chasing down leads that initially appear futile, researches complex questions of law and drafts papers for the court which the court ponders. In the courtroom his advocacy and cross-examination are purposeful and usually successful. Judges listen to lawyers, understand lawyers and carry out the trial process in an efficient and fair way. Lawyers stand for justice and truth and they achieve this through diligent preparation and hard work the product of which is presented to juries in lengthy trials.

In the recent television special Separate but Equal it is the diligence, tenacity and intelligence of Thurgood Marshall, played by Sidney Poitier, that integrate the schools of the nation. Indeed perhaps it is the practice of law itself which is ennobling. Frank Galvin, the protagonist in Barry Reed's The Verdict, played so ably by Paul Newman in the movie, is anything but heroic until he is presented with the case of a young mother who entered a Catholic hospital to have a baby and came out a vegetable. The situation, the client and the law ennoble him and cause him to fight on for truth and justice.

**MORAL AND ETHICAL DILEMMAS**

The modern fiction writers, just as their classical counterparts, continue to present their heroes with difficult moral-ethical problems.

For instance in the famous lecture in Anatomy of a Murder James Stewart coaches his client into perjury to prove an insanity defense. Stewart appears to cross the line of zealous advocacy making him a subornor of perjury. He has courageously decided, however, that it would be unjust for Marion to face the death penalty because he killed his wife's rapist.

In Reasonable Doubt, protagonist Ryan faces a motion to disqualify because his defense of the woman who is accused of killing his son is filled with personal conflicts, especially if he concludes she is guilty, which is quite unclear until the end of the book, and because it will have undue influence upon the jury. While legal ethics appear to counsel against the representation, Ryan hangs on to his hope in his client's innocence, follows his instincts and finally finds the true murderer of his son.

In Presumed Innocent, Sandy Stern skillfully plays on his knowledge of the past impropriety of the judge involving the deceased and subtly blackmails the judge by threatening disclosure of this information, thus causing the judge to dismiss the case against his innocent defendant. In addition, one of Rusty's policemen friends suppresses the evidence, namely the glass with Rusty's fingerprints on it found at the scene of the murder. All, however, is for the laudable goal of freeing an innocent man who appears dangerously close to conviction.

In Burden of Proof Sandy is confronted with Dixon's continuous desire to suppress a crucial piece of evidence. This causes Sandy to break and enter his client's home and to steal the safe containing evidence from his in-law client lest it disappear, in a comic scene where Sandy must lie himself out of trouble.

In Class Action protagonist Maggie discloses crucial information to the opposing side represented by her father, again for the purpose of achieving ultimate justice in the case.

Of course L.A. Law hits upon an ethical issue in almost every episode. One of its most common is conflict between the ethical obligation of lawyers and the particular moral sensibilities of one of the lawyer characters in the firm. Examples include when Grace Van Owen objected morally to her obligation to prosecute the gay man who had killed his lover who was terminally ill with AIDS; or when Victor Sufuentes advised his clients against accepting a generous settlement offer from a hospital which he considered a vasectomy factory or when Ann Kelsy forces her client to stop polluting the city's water supply.

Thus the lawyer heroes must often violate the law or the rules of professional ethics to bring about the good. Even Perry Mason engaged in occasional breaking and entering to secure that crucial piece of evidence.

**THE ARENA OF THE COURT**

In lionizing the lawyer, popular culture sometimes lionizes the courts. None of the learned arguments or subtle proofs of the attorney heroes would be worth much if the courts where they are presented were not sophisticated enough to receive them. However judges sitting in their church-like court rooms in shining and beautiful buildings listen to the argumentation and work diligently to be fair and to apply the law. The jury trial is the norm; lawyers study the biographies of potential jurors and after dramatic trials and illustrous closing arguments juries ponder their decisions for days.

However, there is a good deal more equivocation about the courts than lawyers in popular culture. Often the courts are part of the adversary of the attorney hero. The judge at Sabich's trial is a criminal.

In the 1987 film Suspect Cher plays a public defender assigned to defend an innocent, deaf, homeless man accused of murder. She is successful despite the court system. She violates ethical rules by

working on the case with a juror and ultimately discovers that the judge assigned to the case committed the crime.

Likewise in Jagged Edge Glen Close plays the lawyer who successfully represents Jeff Bridges who is charged with the brutal murder of his wife and her maid. In the end however Bridges turns out to be a homicidal maniac who almost kills Close.

In Nuts Barbara Streisand plays a prostitute who is charged with murder of a customer although the killing was in self defense. Richard Dreyfus defends her and again uncovers a corrupt system which is being manipulated by Streisand's father who had abused her as a child.

In Twelve Angry Men, Henry Fonda plays the heroic role of sole dissenting juror in a case where the defendant is a Hispanic youth accused of killing his father. Fonda's dissent causes the other jurors to reevaluate the evidence and their own assumptions about the defendant. Ultimately an innocent man is freed in a story which portrays the judicial process and ultimately the jury as an institution that requires an heroic juror in order to achieve justice.

Bonfire of the Vanities, written by Tom Wolfe, is a review of the evils of New York and its criminal justice system. The protagonist in Bonfire is non-lawyer Sherman McCoy, a rich bond dealer in New York City, who is wrongfully accused of a hit and run perpetrated by his mistress. The prosecutors, abetted by self-appointed black leaders, knee-jerk liberals, and radicals, and a scandal-mongering press, portray the drug dealer victim to a credulous public as an honor student that he is not.

Wolfe's novel essentially trashes everything that it touches, which includes the city of New York, judges, district attorneys, lawyers, bond dealers, New York high society, politicians, black leaders, etc. Assistant District Attorney Larry Kramer is anything but heroic. He earns $36,000 a year, lives in a cramped three and one-half room apartment in Manhattan and takes the subway to work in the Bronx. The docket of cases he is assigned is a long list of black defendants that plead out. As he comes to work one morning he observes the van bringing "the chow" to the 35 criminal sessions of Bronx Supreme Court:

every year forty thousand people, forty thousand incompetent dimwits, alcoholics, psychopaths, knock abouts ... and people who could only be described as stone evil were arrested in the Bronx. Seven thousand of them were indicted and arraigned and there they entered the maw of the criminal justice system — right here — through the gateway into Gibraltar where the vans are lined up.

(N40).

Ninety eight percent are guilty and the caseload is so overwhelming that they don't waste time with marginal cases. D.A.s who are late for Judge Kovitsky's court "impede the shoveling of chow into the gutter" of the system. On good days, when the jurors deliberate during lunch, D.A.s get free lunch. Kramer gets roast beef with mustard — "the mustard in gelatinous sealed plastic envelope that he had to open with his teeth" and his office at the Bronx Court House is severely government issue. If there is one person whom Wolfe lets off slightly easier than the rest it is Killian, McCoy's defense attorney. At their first meeting Sherman finds it easy to talk to Killian "like a priest, his confessor, this dandy with a fighter's nose." Killian has made numerous deposits in the "favor bank" and he's therefore in a position to "make contracts" with people in the D.A.s office. Killian describes his alma mater Yale Law School as a "terrific place for anything you want to do as long as it don't involve people with sneakers, guns, dope, lust or sloth."

The trial of Sherman McCoy is a travesty of self-interest but trusty Killian does his best against insurmountable odds.

Judge Posner suggest that Bonfire is not great literature because it does not alter the reader's understanding of law; it merely describes it in a negative way. True examples of great literature about law for the learned judge include, Kafka's, The Trial, Melville's Billy Budd, Dicken's Bleak House and Shakespeare's Merchant of Venice. While these observations may or may not be true, it is undeniable that these examples of popular legal culture affect public perceptions.

REALITY

The fact is that the lawyers portrayed are larger than life. Real courts hold jury trials in less than one percent of the cases. The practice of law is far less interesting than portrayed in popular legal culture. In Freidman's book we have two high paid lawyers spending one hundred hours a week for twenty-six weeks in preparation and trial. The legal fee, which would surely exceed $500,000, is irrelevant because the client's family has unlimited personal resources. Likewise the legal fee in Reversal of Fortune and Burden of Proof would be far out of the reach of the normal person. No law firm has ever had as many interesting cases as McKenzie, Brackman nor as many sexy, interesting lawyers. Perry Mason seemed to have the luxury of working on one case at a time.

Lawyers I suspect are not more heroic than doctors or business people or carpenters. And courts are rarely presided over with the wisdom of the judges in L.A. Law or Class Action; nor are they as corrupt as those portrayed in Presumed Innocent or Suspect. If we are looking for realism the wonderful documentary The Thin Blue Line or Wambaugh's reality-based Onion Field can supply us with realism. Indeed we can expect books and movies, or docu-dramas on the celebrated Pamela Smart case which may or may not mirror reality.

It is certainly no criticism of the writers of fiction that their scripts lack realism. Their response would surely be, "So what, the script was a popular and financial success." Further it might prove difficult to create great dramatic tension out of will preparation or real estate closings. The script writer travels the world in search of dramatic tension, moral ambiguity and heroic characters. The courtrooms they create are more like dramatic stages than real courtrooms. Nor should it surprise us that the protagonists seem more like Theseus than real lawyers. The purpose is the creation of dramatic tension and entertainment and since the days of the Greeks the chosen vehicle has been the heroic archetype. The fact that we are the source of all of this attention is certainly in our selfinterest. The ABA could not hire a more effective public relations firm than the Hollywood of today. However as students of the legal profession and the judiciary we should be careful not to confuse the real with the celluloid fantasy.

Professor Charles "Bull" Warren, in his 1935 classic text, Bankruptcy in United States History, wrote, "[T]he law of bankruptcy is a dry and discouraging topic." In Professor Warren's day, bankruptcy evoked images of dust-bowl farmers whose farms were foreclosed, hard-luck businessmen whose partners ran off with the payroll, and flinty-eyed bankers scheduling foreclosure sales. Bankruptcy law is no longer the dry and discouraging subject that it once was, although for many the subject is still regarded as depressing and even frightening. Paul Perlstein, Washington, D.C. bankruptcy attorney recently wrote, "Bankruptcy is often perceived as an arcane and frightening area of the law - a statutory enigma shrouded in a patina of death."

Contrary to perception, bankruptcy has grown into an exciting area of practice and legal scholarship. The number of business and consumer bankruptcies is at a record high. In 1986, 400,000 consumers filed for bankruptcy. Many evenings the "Nightly Business Report" chronicles how cash-rich corporations strategically use bankruptcy to escape punitive damages, labor contracts, and environmental liability. In New England, large corporate firms are developing bankruptcy practices so that they might cash in on that region's recent economic downturn. Even Donald Trump has shown new interest in the law of bankruptcy. It is not surprising that law books on the subject of bankruptcy are also flourishing. In the past ten years, a proliferation of outstanding academic and practice-oriented books has descended upon the field of bankruptcy. What follows is a recent sampling.


Professor Thomas Jackson provides law and economics insights into reports of cash-rich corporations filing for Chapter 11. In contrast, the Sullivan et al. book provides a sociological portrait of consumer bankrupts. To Professor Jackson, Chapter 11 is a complicated set of rules and entitlement, which should be reserved to achieve a single purpose: collective debt collection. Professor Jackson argues that bankruptcy judges should not be in the business of changing entitlement of state law. The consumer bankruptcy project, in contrast, views bankruptcy as a complex social system.

Academics often joke that it would be easy for an economist to escape from a pit. He would simply assume a ladder and climb out. Professor Jackson's textbook gives an abstract exposition of the basic concepts of bankruptcy: collective action in debt collection, determination of liabilities, trustee avoiding powers of section 544, determination of assets for distribution, executory contracts in bankruptcy, pre-bankruptcy opt-out and preference law, bankruptcy's collective proceeding, commencement of proceedings, reconsideration of reorganizations, the fresh-start policy in bankruptcy, and the scope of discharge and exempt property. The trouble with his models is that they are necessarily over-simplified and are without empirical data other than hypotheticals.

Professor Jackson has very good hypotheticals. Creditors face a prisoner's dilemma or they are like lottery ticket holders. Without bankruptcy to moderate egoism, it's a mad, mad world. Granted, these are interesting hypotheticals. But they are also devoid of any data.

This book does wrestle with many of the big public policy issues in bankruptcy law. The avoiding powers of a trustee or a debtor-in-possession (DIP) are examined from a jurisprudential perspective. Professor Jackson notes how avoiding powers allow the trustee to "step into the shoes of the debtor in gathering property of the estate. . . . The avoiding powers . . . augment that activity by giving the trustee certain other powers to bring assets into the estate" (p. 68).
He argues that there is a tension between state-created priorities (Article 9 of the UCC) and bankruptcy statutory liens. A "common pool" problem is created by a bankruptcy process that permits self-interest of individual creditors (p. 85). One learns little about the bankruptcy players. Are they rational maximizers or are they fools?

Professor Jackson raises the $64,000 question of why we have a separate corporate reorganization process at all. Does it provide claimants a better opportunity to achieve a correct distributional result? His chapter on "The Fresh-Start Policy in Bankruptcy Law" is a clear exposition of the assumptions underlying discharge policy and exempt property. He describes the "Fresh-Start policy as meaning essentially that the individual's human capital is "freed of liabilities he incurred in the past" (p. 227).

Professor Jackson considers the philosophical question why society would find it desirable to allow individuals to discharge their debts in exchange for surrender of a portion of their total wealth. He discusses bankruptcy doctrine in the context of competing assumptions and theories. While Professor Jackson's book is devoid of data, it is well-written and highly recommended because it sheds new light on concepts such as the financial fresh-start, the use of bankruptcy to mediate social conflict, and other policy issues.

On the other hand, the Sullivan et al. book is a product of the Consumer Bankruptcy Project funded by the National Science Foundation and other agencies. The authors entered upon the darkling plain of bankruptcy through the filings of all natural persons who filed for bankruptcy in Illinois, Pennsylvania, and Texas for the year 1981. Elizabeth Warren's chapter on the fundamentals of consumer bankruptcy law is a model of excellence. Her clear exposition of the mechanics of Chapter 7 and Chapter 13 of the Bankruptcy Code is recommended to all who wish a demystification of these chapters. Ms. Warren provides an accurate rendition of a 341 meeting and the roles played by the debtors, debtors' attorney, bankruptcy clerk, trustee and creditors. She paints a picture of a bankruptcy courthouse brimming with debtors, debtors' attorney, bankruptcy clerk, and lawyers. Unlike Jackson, the authors of As We Forgive Our Debtors humanize the bankruptcy system.

Under Chapter 7, exemption rules determine what a debtor can keep. Non-exempt property is conveyed to the trustee in bankruptcy. After the papers have been filed, there is a hearing in which the debtor is given a fresh start. "Debtors usually rise en masse and are declared discharged from their debts," Ms. Warren writes.

In contrast, Chapter 13 plans are approved by the court. Chapter 13 sets the minimum amounts that must be paid according to an established plan. The goal is to require the debtor to pay off debts with any money beyond what is necessary to life. Trustees monitor how well the debtor does living within the established Chapter 13 plan.

The heart of this study is its Herculean effort to develop a sociology of consumer bankruptcy. Bankruptcy statistics are humanized through the authors' case studies. We learn why one Chapter 13 plan succeeds while another plan fails. We see the difference between patient creditors and those who initiate garnishments.

I was surprised there was no reference to William O. Douglas' landmark study of consumer bankruptcies in Boston published in the 1930s. Many of his subjects filed bankruptcies as a result of bad business planning, bad business partners, bad marriages, and bad luck. Parallelizing the Douglas study completed fifty years ago, the Consumer Bankruptcy Project develops typologies which sub-categorize consumer debtors. The authors devote chapters to women, credit card junkies, small business entrepreneurs, and recidivists. The study goes a long way toward explaining the financial box in which women find themselves in our society. As the authors note, if the authorities would enforce social support laws, bankruptcies for single women might subside. "One dour reality in bankruptcy," state the authors, "is the continued dependency of women on men. Even in bankruptcy, wives are far better off than single women" (p. 159).

Credit card debt constituted an important independent variable in this study. Contrary to popular mythology, abusers were rare. Of 1202 cases, the authors could only find 23 debtors who met all three criteria indicating credit card abuse: high credit card debt/income ratio, high proportion of unsecured debt, and in the top 15 percent of the absolute amount of credit card debt carried into bankruptcy.

The study also debunked the notion that there are many repeaters, those who have declared bankruptcy before. In their sample of 1502 petitions, only 120 debtors had previously filed a petition (p. 192).

One of the most fascinating findings was the bankruptcy of Chapter 13 - an extraordinary flop. The study concluded that fewer than one third of those in debt were still making Chapter 13 payments after two years. The authors ask whether debtors are done any service by Chapter 13, when they are doomed to failure. At a minimum, the authors advocated turning down the volume on Chapter 13.

The greatest strength of this book is that it provides a counter to the law and economics assumption that debtors are invariably economically rational. Repeatedly, the authors observe, idiosyncratic and unpredictable behaviors or economic reversals generally plunge these individuals into bankruptcy. On the other hand, the use of bankruptcy filings is limited. One does not know whether the whole story is presented. The debtor may have engaged in manipulative or even fraudulent behavior that would not have been recorded in an official record.
Still, this book is well worth reading because it humanizes the consumer bankruptcy law and gives many insights into the social system for what it is. It is an important empirical test of the economic model of bankruptcy. It is a valuable corrective to law and economics scholarship such as Professor Jackson’s work, which assumes that debtors hold perfect information and behave in an economically rational fashion.

In fact, the Consumer Bankruptcy Project reveals that debtors are not rational profit maximizers as hypothesized by Professor Jackson. Most, if not all, are ignorant of the elaborate statutory incentives of the Bankruptcy Code.

The authors employ regression models and path analyses to test economic assumptions and conclude: “(1) the simple economic model can be laid to rest as a powerful predictor of debtor behavior, and (2) the relative importance of non-economic factors is unknown” (p. 254). The data also indicates that “property exemptions do not have the desired effect. . . . Financial travail swamps the effects of incentives” (p. 243). What is called for is a closer study of the sociological, psychological, and other non-economic factors underlying consumer bankruptcies.

The Indiana Law Journal (Winter 1989) devoted an entire issue to As We Forgive Our Debtors. Professor Douglas G. Boshkoff states that the work contains much which should interest bankruptcy teachers. He believes it “casts doubt upon the correctness of some fundamental attitudes toward consumer bankruptcy.” Professor William Whitford is lyrical in his praise of the authors for shedding new light on questions about consumer bankruptcy. Professor Marjorie Girth’s review highlights the empirical limitations of the study, but concludes that there is “quite firm” data for many other findings. Professor Zipporah Wiseman sees this book as “a compelling commentary on the economic plight of American women who head households.” Professor Lisa McIntyre focuses on how this work sheds new light on the social problem and systems of bankruptcy.

I recommend these two books to all acquisition librarians. These are the works that have moved bankruptcy from the backwaters of the legal academy to Niagara Falls. I plan to require all my law students to read both books when I teach my bankruptcy seminar.

RICHARD J. LEON APPOINTED TO PRESIDENTIAL COMMISSION

Attorney Richard J. Leon, a partner in the Washington office of the national law firm of Baker & Hostetler, and an alumni trustee of Suffolk University, has been appointed a member of the President’s Commission on White House Fellowships.

President Bush appointed Leon to the program, often referred to as “the Rhodes Scholarship of Public Service,” which was instituted under President Johnson more than 25 years ago.

Members of the President’s commission select outstanding young Americans to serve for a year as personal staff assistants to the President, Vice President, and each cabinet officer. Program alumni include General Colin Powell, U.S. Sen. Timothy Wirth (D) Colorado and New Mexico Gov. Garrey E. Carruthers.

Leon, former deputy chief minority counsel to the U.S. House Select Iran-Contra committee, is a 1971 graduate of Holy Cross College with a bachelor of arts degree and received his juris doctor degree cum laude from Suffolk University Law School in 1974. He also holds a master of laws degree from Harvard Law School.

A native of Natick, Mass., Leon formerly was a law professor at St. John’s University Law School in New York and served as a deputy assistant U.S. attorney general during President Reagan’s administration.

In February of 1990, he was elected to a three-year term as an alumni trustee on Suffolk University’s Board of Trustees. Prior to that, he was a president of the Suffolk University Law School Alumni Association. He also founded and is past president of both the Metropolitan New York and Washington alumni associations.

The Advocate extends thanks to Louis B. Connelly, Director of Public Relations, Suffolk University for providing this information.
The Advocate wishes to congratulate Suffolk University Law School Professor Eric D. Blumenson, Editor and co-author of the recently published two volume work *Massachusetts Criminal Defense*. Professor Blumenson wrote fifteen of the chapters. Professor Stephen J. Callahan was co-author of the excellent and comprehensive chapter on search and seizure law. This chapter integrated very well the Fourth Amendment, Article XIV of the Declaration of Rights as well as state statutory and common law.

*Massachusetts Criminal Defense* is truly a monumental work, unsurpassed in quality and thorough in coverage. It will be immensely useful to the criminal defense bar, clinical students, the courts and even prosecutors. Don’t leave your office without it.

The forty-nine chapters cover a rich variety of topics. There are procedural chapters on such matters as de novo, arraignment, grand jury, etc. There are chapters on areas in the intersection of Criminal and Constitutional Law — search and seizure, eyewitness identifications, confessions. There is a particularly excellent chapter on double jeopardy, wherein complicated conceptual material is presented in a clear and precise way. The author of that chapter, David Rossman, interrelated state and federal law in an extraordinarily effective way. There is also a high quality article on plea bargaining. Plea bargaining involves “how to” as much as cases and rules. The perceptive tactical suggestions put forth in this chapter reflect this.

In addition, there are chapters on such varied topics as investigation and interviewing, forensic science and expert testimony, jury selection, opening and closing statements, directory of sentencing alternatives. Finally, there are appendices containing court rules as well as the sentencing guidelines of the Superior Court. Pocket part supplements are scheduled.

Quick entry by a reader looking for information in a hurry on a specific point is crucial in a work of this sort. In the front of each volume there is a five page Summary of Contents followed by a fifty-five page Table of Contents for both volumes. At the end of Volume 2 there is a fifty-nine page Table of Cases, followed by a fifty-five page index. This treatise rewards comprehensive study but it also seems well designed for quick, targeted research. With some books the index is the Achilles heel. This seems not to be the case here.

Any complaints? Not really. As the title warns, these volumes are unabashedly defense oriented but there is nothing wrong with being ardently partisan. In some ways prosecutors may like *Massachusetts Criminal Defense* best of all. They will learn all the defense arguments and tactics without having to disclose their own. In any event these volumes are “must reading” for anyone involved in the criminal justice practice in Massachusetts. There ought to be avid readers in other states as well.
NEW ASSOCIATE DEANS

Charles P. Kindregan

Charles P. Kindregan has been appointed Associate Dean effective July 1, 1990, succeeding Herbert Lemelman. Dean Lemelman has resumed his position as a member of the law school faculty after sixteen years of distinguished service as Associate Dean.

Dean Kindregan has served on the faculty for twenty-three years. He was born in Philadelphia, and attended LaSalle College (now LaSalle University) in that city. He graduated first in his class from Chicago-Kent College of Law (Illinois Institute of Technology) with a Juris Doctor degree and received an L.L.M. degree from Northwestern University Law School. He is a member of the Illinois and Massachusetts bars, and of several federal bars.

Kindregan has described himself as a “utility infielder of law teachers,” having taught courses in Wills and trusts, Equity, Biology and the Law, Torts, Family Law, Professional Responsibility, Legal Method, Financial Aspects of Family Law, Family Law Practice and the basic course in Family Law. His special interests in the legal profession and family law reflect his extensive writings in those fields.

Over the years Dean Kindregan has written a number of books. His most recent book is the four volume FAMILY LAW AND PRACTICE, which he co-authored with Monroe Inker in 1990; the treatise has been published as Volumes I, 2, 2A and 3 of the Massachusetts Practice Series by West Publishing Co. Since 1983 he has also served as the co-author of the seven volume supplements for MASSACHUSETTS PLEADING AND PRACTICE, published by Matthew Bender Co. He is the author of MALPRACTICE AND THE LAWYER, published by the National Practice Institute in 1981 and several other books.

Dean Kindregan has also written a number of book chapters. These include a study of the historical background of promotion of access to legal services in PUBLIC INTEREST PRACTICE AND FEE AWARDS (1980) and a study of the California Probate Court for the American Law Institute-American Bar Association which was published in COMPARATIVE PROBATE LAW STUDIES - ESTATE PLANNING (1977) and chapters in other books.

The author of numerous articles and reviews, Dean Kindregan’s writing has appeared in such diverse journals as the Hastings Law Journal, Barrister, Valparaiso Law Review, Trial Magazine, Fordham Law Review, University of Louisville Journal of Family Law, Human Life Review, Santa Clara Law Review, Massachusetts Law Review, Legal Malpractice Review, Suffolk Law Review, Massachusetts Family Law Journal, Catholic Lawyer, The Advocate, Reporter on the Legal Profession, Chicago-Kent Law Review, America and other publications. One of his most recent articles was co-authored as a study which was part of a symposium on tort reform and was published as the lead article in the St. Mary’s (Texas) Law Journal. He has also served on the editorial boards of the Journal of Legal Education and of the American Bar Association Family Law Quarterly.

Long active in bar associations, Dean Kindregan has served as co-chair and vice-chair of sub-committees of the American Bar Association Section on Family Law, and on various committees of the Massachusetts Bar Association. He was a member of the Massachusetts Bar Association Task Force on the Model Rules of Professional Responsibility and of the Massachusetts Supreme Judicial Court Committee on Legal Education.

He also served on the Attorney General’s Advisory committee on Conflict of Interest, the Special Legislative Commission on Clinical Therapy and Human Experimentation and other government committees.

Long convinced that law school must maintain an active association with the practicing bar and that legal education is a life-time activity, Dean Kindregan founded the center for Continuing Professional Development (now the Center for Advanced Legal Studies) at Suffolk University Law School and served as its Director for eight years. He has served as a continuing legal education instructor in Massachusetts, Louisiana, Colorado, Virginia, North Carolina and other locations. He has delivered talks at the national conventions of the Association of Trial Lawyers of America, and the Federation of Insurance and Corporate Counsel. He has also served as a reporter for the convention of the National College of Probate Court Judges and as an active participant in other national and local bar meetings.

He has served as chairman of several committees at Suffolk, including the Long-Range Planning Committee,
the Continuing Legal Education Committee and the Faculty Publications Committee. He was the Law School coordinator for the Seventy-Fifth Anniversary of the founding of Suffolk University Law School.

Dean Kindregan and his wife Patricia live on Beacon Hill. Their son Chad, a graduate of the Law School, is an attorney in the firm of Hale and Dorr. Their daughter Helen Christina is a Ph.D. candidate in Biochemistry at Boston University. Their daughter Patricia is a student at Suffolk University and their son Brian is a student at the California Institute of the Arts. Their daughter-in-law Teresa Farris, who also graduated from the Law School, is an attorney in the firm of Martin, Magnuson, McCarthy and Kenney.

At the time of his appointment Kindregan expressed his hope that he will be able to live up to the high standards developed by Dean Lemelman and looks forward to working with Dean Sugarman, Associate Deans Donahue and Murphy, and his colleagues on the Suffolk faculty toward the continued development of excellence at Suffolk University Law School.

Russell G. Murphy

Russell G. Murphy was appointed Associate Dean of the Law School on January 1, 1991. Dean Murphy will replace Associate Dean Malcolm M. Donahue, who will return to full-time teaching after a sabbatical leave during the Fall, 1991 semester. Dean Donahue has been a member of the full time law faculty for 35 years and has served with great distinction as Associate Dean since 1973.

Dean Murphy assumes his administrative position after twelve years of teaching on the Suffolk Law Faculty. He is a magna cum laude graduate of the University of Massachusetts at Amherst, where he was honored as a Phi Beta Kappa scholar. He was awarded the Juris Doctor degree by Suffolk University Law School in 1973, graduating second in his law school class. He served as Law Clerk to Honorable Charles E. Wyzanski of the United States District Court in Massachusetts. Dean Murphy is a member of the Massachusetts state and federal bars, as well as the Bar of the Supreme Court of the United States.

Dean Murphy's varied teaching interests include Criminal Law and Procedure, Legal Writing, Constitutional Law, Civil Procedure and Federal Courts. His primary scholarly writing has been in the field of state constitutional law, publishing articles in the Massachusetts and Northern Illinois Law Reviews, and the Preview of Supreme Court cases. He has taught extensively in bar review courses for the states of Massachusetts, Vermont, Maine, New Hampshire, Connecticut and Pennsylvania.

Dean Murphy's prior administrative experience includes service as Assistant Dean of Boston College Law School, Director of Legal Writing at Gonzaga University School of Law in Spokane, Washington, and Director of several Council on Legal Education Opportunity (CLEO) Summer Institutes for financially and educationally disadvantaged law school candidates. He is a member of the Board of Directors of Action for Children's Television and served for a number of years as a member of the Human Life Protection Committee of the Dana Farber Cancer Institute in Boston. Dean Murphy's association with Suffolk includes a three year term on the Board of Directors of the Suffolk Law School Alumni Association and chairmanship of the Law School's faculty Committees on Placement and Minority Affairs.

Dean Murphy lives in Swampscott. His daughter Larisa will be a first year student at the Law School in September, 1991. His other daughter, Caitlin, will graduate from the College of Liberal Arts in 1992.

In assuming the responsibilities of his new position, Dean Murphy observed that it would be a great challenge to carry forward the tradition of excellence in administration set by Dean Malcolm Donahue. At the same time, he is anxious to work with Dean Sugarman, Associate Dean Kindregan and his faculty colleagues towards the continued strengthening of Suffolk University Law School.
Charles B. Garabedian, law professor at Suffolk University Law School with 47 years teaching experience, died on February 20, 1991 at Winchester Hospital after a two-week illness. He was 73 years old and lived in Winchester.

Long one of the most popular faculty members at Suffolk, Garabedian taught courses in Damages, Judicial Proof and Massachusetts Practice and headed up the outside clinical program for students. A jaunty, energetic man, Garabedian played tennis once a week up until he was stricken.

"Suffolk University has lost a very strong advocate," said Suffolk President David J. Sargent, colleague and friend for more than 30 years. "Suffolk was a major part of Charlie Garabedian's life and he dearly loved the school, its students and his colleagues with every bit of his unbridled and unmatched enthusiasm and vitality. We have lost a wonderful and loyal friend."

Born in Everett, Garabedian was a graduate of Everett High School and received his bachelor of arts degree from Tufts University in 1939. He received his LL.B. from Boston University Law School in 1943 where he was a member of the Law Review.

Garabedian was a roommate of Joseph Kennedy, Jr. at Harvard during the year he attended that institution and was friendly with all of the Kennedy brothers. He was one of 500 people from throughout the word to tape reflections on the late President John F. Kennedy for the Kennedy Library.

Early in his career, Mr. Garabedian was associated in practice with Dean Frank L. Simpson, late dean of Suffolk Law School, and also served as his administrative assistant.

Later, he served as New England Regional Enforcement Attorney and Massachusetts District Enforcement Attorney with the Office of Price Stabilization and during the fifties was a federal hearing examiner. He also served as a consultant to the Massachusetts Civil Service Commission.

Garabedian published a number of articles in legal publications on trial preparation. During a trial practice career he served as counsel to General Motors and was a consultant on law and trial techniques for numerous firms and attorneys.

His lifelong commitment to Armenian community efforts moved the weekly Armenian Mirror-Spectator to note that his "keen discretion and sense of purpose and principles have marked his place as a true pillar of the Armenian community in the United States."

A four-term parish council member of the Holy Trinity Armenian Church of Greater Boston, Garabedian chaired the banquet and dedication committee of the Church Cultural Center, was a member of the Trinity Men's Union, a delegate to the Diocesan Assembly and a member of the board of trustees of the Armenian Church of North America. He also helped to prepare the church's constitution and bylaws.

In 1985, he was awarded the St. Nersess the Graceful Medal by his Holiness Vaken the First, Supreme Patriarch and Catholicos of all Armenians, for his lifetime dedication and service to the church and was his church's "Man of the Year" in 1987.

He was a member of the American Trial Lawyers Association and the American Bar Association. He was also a member of the Armenian General Benevolent Union and served as past commander of the Knights of Vartan-Haik Lodge.

Garabedian leaves his wife, Nancy C. (Kocha), a son, Mark Charles, a sister, Elizabeth Kolligan of Arlington and a niece Joan Kolligan of Arlington.

The Advocate extends thanks to Louis B. Connelly, Director of Public Relations, Suffolk University for providing this information.
In the fall of 1990 the Law School responded to the emergence of Elder Law as a growing area of law practice that offers significant challenges to family law and general practitioners as well as a fertile opportunity to serve the public in the richest tradition of the profession. A new elective was offered entitled: "The Elderly and disabled Client: Law and Social Policy." The course was taught by Alex L. Moschella, Esq., a 1974 graduate of the evening division of the Law School. Mr. Moschella is in private practice in Boston. His practice, started in 1983, concentrates in representing the elderly and families with disabled children in estate planning matters. Prior to entering private practice Mr. Moschella served as the Assistant Executive Director of the Massachusetts Bar Association (MBA) for eight years where he designed and developed a number of public service programs for the MBA. He is a member of the National Academy of Elder Law Attorneys.

Fifteen students enrolled in this first semester course that was offered in a time slot that made it possible for both evening and day students to participate. The course focused on such areas as financing health care for the elderly, the role of the attorney as both an estate and financial planner and the ethical and practice problems that arise in such situations. Decision making and competency issues were explored in the context of medical treatment decisions for the elderly and the disabled and the impact of guardianships and other restrictive measures on their autonomy. A substantial amount of class time was spent analyzing the recently enacted Massachusetts Health Care Proxy Act, MGLA C. 201D. In addition, numerous "model" documents were reviewed to provide a practical understanding of methods to protect the family home of the elderly by establishing various trusts and homestead provisions as well as protecting a disabled child's eligibility for medicaid and other governmental benefits through the use of supplemental trusts. The response to the first semester course was exceptional in terms of student motivation and commitment to the subject matter. A number of students brought practical experience to the class as illustrated by the class composition - a protective service worker for the elderly, a financial planner for an insurance company, a law clerk for a major Boston law firm, wife of a physician, a manager of a non-profit agency that provides housing to the disabled and a number of students who faced sensitive and difficult issues with family members involving terminating treatment and nursing home financial issues. The class expressed substantial interest in continuing the course as a second semester clinical program since many of the evening students, due to their work schedules, had not had the opportunity to participate in the clinical programs offered by the Law School. Both Dean Sugarman and Associate Dean Donahue approved the concept of a program to serve the community while also providing the students an opportunity to serve elder clients.

The Clinical Program presented a workshop on the Health Care Proxy to over 85 senior citizens at the Somerville Council of Aging, utilizing an innovative student designed and conducted role play of how to select a health care agent and a checklist of concerns that must be addressed before executing a Health Care Proxy. The program assisted over 50 elderly persons in executing health care proxies as well as meeting with several homebound elderly clients who were too sick to leave their homes to execute health care proxies at the Council of Aging.
Two additional workshops are scheduled at the Somerville Council of Aging that will focus on "How to talk to a Lawyer: A Legal Checkup." The students will conduct a mock interview, utilizing a model interview sheet that addresses a number of vital concerns of the elderly. A final workshop will cover such issues as homestead protection, medicaid eligibility, estate planning issues and durable powers of attorney.

The response to the health care proxy workshop and the materials designed by the students using their own at-home or office computers has been so great that a number of students with supervision will be conducting similar health care proxy workshops in their home communities, with several already scheduled in Norwood, Randolph and Cape Cod.

Two class members, together with Attorney Moschella, have represented Suffolk University Law School on a statewide Task Force on the implementation of the new Health Care Proxy Act. The Task Force is comprised of representatives from a number of diverse statewide organizations and associations including the Massachusetts Bar Association, the Massachusetts Medical Society and the Federation of Massachusetts Nursing Homes. The Task Force has issued an Interim Consensus Report that the students were actively involved in editing and revising for final Task Force approval. The release of this report to the public is a significant step in the education of health care professionals and attorneys as well as the general public. The education of health care professionals is of primary importance due to the recent passage by Congress of the Patient Self Determination Act (Danforth Bill) that will be effective December 1, 1991 and mandate that health care providers inform patients of their right to refuse treatment under state law as well as information relative to health care proxies and living wills. The Task Force has also developed a model health care proxy form that will be made available to the public and that students have utilized in assisting elderly persons.

The entire Law School community can benefit from the work of the Elder Law Clinic since copies of the Task Force report can be made available as well as the model Health Care Proxy form for easy execution.

The Elder Law Clinic has significant potential to draw on the lessons learned from this novel first year effort and to refine its objectives for presentation to the Clinical Committee of the Law School for inclusion as a fully recognized and certified clinical program. The Suffolk Probate Court has also expressed interest in students' serving as temporary guardians for the elderly in certain medical and abuse prevention cases as well as counsel for the elderly and the mentally disabled in competency cases where treatment issues arise concerning anti-psychotic medications.

Those students electing to participate in either the first semester course and/or the second semester Clinical Program experienced the profound satisfaction that comes from interacting with senior citizens in an attorney-client type situation. The personal aspect of this relationship was captured during the numerous interviews with senior citizens to help them execute their health care proxies. Strongly held views and values concerning death and dying were shared and discussed. We were all faced with confronting our own feelings on this subject as well as our own mortality. The experience was exceptionally fulfilling for all involved.

The clinic participants were: Anne Collins, Lori Glover, Meredith Helmer, Matt McNamara, Steve Morrissey, Joyce Petta Robinson, Miriam Roos, Joseph Sullivan, Sarah Valentine.

Professor Barry Brown
New England School of Law Professor Robert V. Ward (Suffolk Law '78) is congratulated by Suffolk University Law School faculty members Stephen C. Hicks (L) and Joseph P. McEttrick (R) after receiving an award from the Intercultural Affairs Committee of Suffolk University. Law School Dean Paul R. Sugarman presented the award on April 19, 1991 in recognition of Ward’s efforts to advance intercultural understanding.

Note from the Advocate
The Advocate welcomes completed manuscripts and ideas for articles that would be of interest to our readership. Please contact Professor Joseph D. Cronin, Suffolk University Law School, Beacon Hill, Boston, MA 02114. Tel.: 617-573-8547.