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TWENTY CENTS

Freund: 40 Years Of Supreme Court History Recalled

By Tim Cooper

Paul A. Freund, professor emeritus, last week provided a Law School Forum audience with a "40 Year Retrospective" of the Supreme Court from his days as a law clerk to his recent years as a scholar in constitutional law.

Freund clerked for Justice Brandeis in the 1930's and became, in the words of Prof. Andrew L. Kaufman, "the preeminent con-

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Bakke Impact Questioned; Critics Deride Defense

By Randy Phillips

The Great American Test Case or a Great American Miscarriage?

With increasing frequency at Harvard Law School and elsewhere, that question is being asked about *Bakke v. Board of Regents of the University of California*. The case, now before the U.S. Supreme Court, deals with the claim of an unsuccessful, white applicant that the University of California at Davis Medical School minority admissions program constitutes "reverse discrimination,"

allegedly violating the Equal Protection clause of the Fourteenth Amendment.

When the Supreme Court granted *certiorari* early this year, the event was hailed as a conclusive opportunity to settle the issues the high court declined to reach in 1974 when it dismissed *DeFunis v. Odegaard* on grounds of mootness.

But already revisionist voices are being heard. Because of the atypical structure of the U.C.-Davis' admissions program, they say, a decision upholding the California Supreme Court could very well have minimal adverse impact on minority opportunities at the nation's professional schools. But, they add, to the extent that *Bakke* ends up being significant, it could mean disaster for minority groups because of the University's allegedly desultory defense of its program at the trial level.

The revisionist view found a public forum at HLS on March 3 in a spirited address by Prof. Derrick A. Bell, sardonically titled, "With Friends Like These: The Anti-Affirmative Action Defenders of Affirmative Action."

Bell charged that the University has placed itself on unnecessarily shaky legal ground by failing to recognize other approaches to affirmative action besides its own and by neglecting possible defenses at the

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Removal Of Legal Advertising Ban Would Favor High-Volume Clinics

By Terry Keeney

Bates & O'Steen is not your average two-person law firm. Few young lawyers are like John R. Bates and Van O'Steen, who left the county legal aid office in Phoenix, Ariz. less than two years out of law school to establish a "legal clinic." Few young lawyers have had the kind of practice that stresses an efficient, high-volume, low-profit approach. And few young lawyers have to face economic realities and challenge one of the most traditional taboos of the legal profession — the ban on lawyer advertising — merely to survive.

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The Burger Court: Opining Without An Opinion

By Paul Coady

To some commentators, it is the content of the Burger Court's decision which earns it its singular reputation. But whether its critics regard the Court's opinions with amity or enmity for having pulled away from the doctrinal moorings of the Warren Court, the draconian manner in which the Court has hastily disposed of cases has recently drawn fire from some of its careful observers.

The formal term "summary disposition" is the label most frequently applied to the quick-fire method of dispensing justice. Leonard B. Boudin's treatment at the hands of the Court, however, might better be termed "sudden death." Boudin, counsel to two defendants convicted in federal district court on charges of filing false tax returns, succeeded in having the jury's guilty verdict overturned on appeal to the Fourth Circuit.

The story might have ended there, had it not been for the government's decision to file a petition for a writ of certiorari. For in October, 1976 the Supreme Court, *with neither oral argument nor full briefing on the merits*, simultaneously granted the government's motion and *summarily* reversed the circuit court. The convictions were reinstated with a threadbare *per curiam* decision. Boudin and his clients never knew what hit them.

Unlike a denial of a petition for a writ of certiorari, a summary affirmation or reversal — such as that handed down in the tax case which Boudin handled — is a decision on the merits and is entitled to precedential value. In Boudin's petition for a rehearing, now pend-

ing before the Court, he attacks this form of decision-making head-on, and claims that it runs afoul of time-honored Supreme Court procedure.

"This Court's increasing practice in recent years of reversing the lower courts upon petitions for certiorari without briefing and oral argument is inconsistent with its Rules and is an unsound practice." Furthermore, Boudin argues, any *per curiam* grant of certiorari accompanied by an instantaneous summary reversal "is inconsistent with the views expressed by members of this Court on the need for deliberate decisions in cases that reach this Court."

Contacted at his New York law firm which specializes in constitutional litigation, Boudin

"In the Cold War period . . . the Court was denying petitions for a writ of certiorari in many of the very important political cases. . . . Now the Court is doing the same thing."

explained that all that the Court had as a basis for its summary decision was the government's "very slim presentation" in its petition for a writ of certiorari and his own memorandum in opposition to this petition.

Though it was the defectiveness of instructions to the jury which lay at the core of Boudin's appeal to the Fourth Circuit, the full charge to the jury was never presented for the Supreme Court's examination. Neither party transmitted the record of the proceedings below; Boudin's document contained no more than a brief statement of the facts and a skimpy five-and-one-half page argument.

In a recent interview, Boudin

squarely assigned a political dimension to what he perceived as the Court's increasing tendency to decide cases summarily. Comparing the Burger Court to the Court of the 1950's, he claimed that the same forces then at work are present today. "In the Cold War period . . . the Court was denying petitions for a writ of certiorari in many of the very important political cases raising issues that should have been considered by the Court. That was very deplorable. Now the Court is doing the same thing. It is taking the cases and disposing of them in a summary way. And I regard both as different sides of a coin, and both as different methods for failing to give the kind of consideration that a case deserves."

Discussing with the RECORD

the Supreme Court's tendency to make summary reversals, Professor Paul A. Freund displayed much the same viewpoint as Boudin. However, Freund defended the appropriateness of summary reversals when there had been an "intervening" Supreme Court decision in point. In such a situation, he explained, one might expect a reversal or an order remanding the case to a lower court to reconsider the case in light of the intervening Supreme Court decision. In most other situations, Freund felt, the reversal should at the minimum be accompanied by a citation to some controlling authority. "The use of *per curiam* decisions can be a useful saver of time and energy if it is not blind," Freund stated. "But so long as it is going to have precedential value, it seems to me that they ought to at least inti-

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Scenes From A Package

By Bruce Howard

I am not a voracious reader, but I do read what I eat. That is, I read packages.

Mostly you'll find me curled up with the latest *Count Chocula* cereal box or *Peter Paul* candy wrapper, but in a bind I'll read any container, including the cardboard that comes around a garden hose, if it comes to that or talk to a 1L at the Harkness TG about Liebman's property exam. My favorite package message in the "inedible commodity/legal problem posed" category is a warranty I read on a *Curad Ouch-less* bandage box just last week at Bence's (where I hang out in my shades hoping to be discovered by a soda-sipping Cravath interviewer).

Actually, at the time, I was reading, and about to purchase, a box of *Johnson & Johnson Band-Aids*, from which I was learning that J&J had invented and copyrighted the word "*Band-Aid*," when I glanced over and spotted the *Curad* box. On its side was the boldface guarantee: "Sterile: Sterility guaranteed unless wrapper damaged or opened."

Now just how, we should wonder, when Harold Frett nicks his finger dicing a celery stalk, applies the *Curad Ouch-less*, contracts Gannett House flu from the contaminated bandage, suffers amputation of his Stradivarius-playing hemophiliac index finger, and sues *Curad* in foul weather on the side of a hill in a no-fault pre-*Erie* state without service of process, just how will *Curad* be able to use that disclaimer to escape civil liability? You cannot use class notes or notes written in the margins of your textbooks.

Answer: Break Harold on the stand.

"No, I tell you! That wrapper was closed when I opened it!"

"Do not frivol with this court, Mr. Frett. That wrapper was damaged and you know it."

"No, no! It was sealed! I remember pulling the string! I re-

member...uh. Please, may I have some water?"

* * *

But in fact, packages often advise purchasers how to put their contents to use, even when a lawsuit is not involved. In my refrigerator right now is a *Stouffer's Chicken a la King with Rice* that has a no-nonsense instruction prescribing action in case of thaw. It says: "Keep frozen until ready to use. If product thaws, prepare promptly and enjoy it." It is the "and enjoy it" that worries me. I am obedient to expiration dates, even open to suggestions on preparation methods, but I draw the line at taste—enjoyment is my business, and I'll thank a package to stick to the facts.

My best friend, on the other hand, is bothered not at all by the enjoyment clause, which he considers idle chit-chat. Instead, he is stirred by the "Information Panel" which lists the ingredients in chicken a la king with rice: "Milk, chicken, mushrooms, peas, chicken fat, celery, red peppers, onions, chicken base (salt, chicken meat, monosodium glutamate, chicken fat, sugar, flavorings, tumeric), flour, modified starch, water, green peppers, mushroom base (sauteed mushrooms, salt, monosodium glutamate, butter, hydrolyzed plant proteins, sugar flavorings), salt, monosodium glutamate, tumeric. Rice Ingredients: Rice, soya oil, chicken base (salt, chicken meat, monosodium glutamate,

chicken fat, sugar, flavoring, tumeric)."

Specifically, my friend is concerned that the words "monosodium glutamate" appear four times, and the word "tumeric" appears three times, in two sentences, and that he was unable to find either in the Oxford English Dictionary. Unfortunately, he did find the word "glutinate", about which the OED says: "to cure relaxation in (the bowels, veins, etc); to constipate," and the word "tumeify", which the OED defines as "To cause to swell; to make bulky." My friend prefers that his food have little or no effect on the relaxation of his veins and bowels, and basically feels that the etymological implications of the "information panel" make the talk about enjoyment moot.

For myself, the scholastic approach to packages carries things too far. Often, in fact, messages about ingredients leave most things to the imagination. For example, at the bottom of my baby powder canister (also *Johnson & Johnson*, though here they lay no claim to the words "baby powder"), there is the brief notation: "Active ingredient: Talc." The reader is left to wonder what it is about talc that accounts for its activeness. And what of the other, passive ingredients that get no mention?

"Active ingredient: Talc" is almost too cryptic for my taste. I'd even say it's lazy. I prefer at least an effort at literature. Some adverbs, say. The instructions on my deodorant contain, in my experience at least, a record number of adverbs—five in four sentences. The message on my *Old Spice Lime* stick deodorant implores: "Glide stick gently under arms . . . it dries quickly on the skin. Use daily for best results. To extend stick push up gradually from bottom. Close tightly after each use." What strikes me about that is the combination of telegram-style economy with lavish verb modification. Notice that there is no room for articles; it is "extend stick" and "from bottom", not "extend the stick" or "from the bottom." On the other hand, we are advised to glide

APOLOGY

Page Three sincerely apologizes to the staff and management of Hair Care, a Cambridge hair salon inadvertently mentioned by name in the *Page Three* column in the Feb. 11 issue of the *RECORD*. The column was not meant to be an accurate or serious description of events at Hair Care, and we regret any impression to that effect that may have been conveyed.

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"Holmes Is" Scores With Inside Humor

By Peter Borowitz

Until this year the Federal Trade Commission might well have requested injunctive relief against the Harvard Law School Drama Society. From 1973 (*Praise the Law and Pass the Erudition*) to 1976 (*Laws*), The HLSDS had falsely advertized its annual production as "The Law School Show" when in reality it was only "An English - Graduate - Student's Show." Chris Harding, the culprit chiefly responsible for the last four scripts, always tried hard to compensate for his affiliation with the Harvard English Department, but he never could capture the shared experience every Harvard Law student must undergo. He never sued for Jack Katz. He never complained about a *Securities Regulation* exam. In fact, he never even received a recruitment letter from Milbank, Tweed.

With Mr. Harding's long-awaited graduation last June, the HLSDS finally got a chance to cease its fraud and desist from its folly. Scriptwriters Howard Katz, 3L, Robert Noto, 3L, and Ivan Orton, 3L, took the challenge and concocted *Holmes Is Where the Hark Is*, a show so dominated by humor from inside the Law School that it's hard to imagine there's anything particularly funny on the outside. Since virtually every professor receives his fair share of abuse, even 3L's foolish enough to have taken extra credits will not understand much more than half of the satire.

Fortunately, the central plot is straightforward enough. Sherlock Holmes and Dr. Watson, weary of capturing criminals whom Professors Dershowitz and Nesson always manage to free, travel from 221B Baker Street to 221B Everett Street to investigate the source of the trouble, Harvard Law School. What they find there is every imaginable form of human malevolence running the gamut from Professor Moriarty to Professor Fried.

Since they can do nothing about Fried, they set to work on trapping Moriarty, who has undergone a change-of-sex operation and is posing as Professor Emanuelle Gilbert. Moriarty, it seems, has already burglarized the Registrar's files, presumably finding everything but Professor Kay's grades, and has proceeded to blackmail the entire faculty by threatening to expose all of their darkest secrets.

In any event, Holmes ultimately helps Harvard Law School send Moriarty packing to New Haven, justice prevails, and everyone lives happily ever after . . . except perhaps Professor Fried's students.



Dr. Watson, 1L Erik Kitchen, belts out a number with a little help from his friends.

SJ

Holmes' triumph seems all the more astonishing in view of the number of one-line gags through which he must wade before confronting Moriarty. Of course, most of the rapid-fire routines are a joy.

However, by the time the Prison Legal Assistance Project puts on its mixer at Walpole, the authors, like their subject after the injection of his seven-per-cent solution, appear to be losing some of their control. Subplots begin to vanish almost as soon as they emerge, and one scene in particular, in which Heaven wins a tug-of-war with Hell, is so gratuitous that the writers would do well to slide it down a slippery slope and out of the show. A joke about the Pope and several of the more puerile sexual puns are further candidates for omission from a script, which on balance is

still the wittiest to hit the Pound Multipurpose Room in the last five years.

Geoffrey Menin's score, while serviceable, follows its musical precedents a bit too closely. Although the imitations of the soul, swing, and hustle sounds are all designed for satiric effect, several other numbers, which are purportedly original, may come in conflict with the copyright laws. In fact, the principal theme, "Here Comes Holmes," bears such resemblance to "Food" from *Oliver* as to make out a *prima facie* case for what may at least be condemned as subconscious parallelism. No one, how-

ever, will dispute the originality of Mr. Menin's lyrics for "Remembering Holmes" and "Remembering Moriarty," both of which offer a deft survey of the Holmesian exploits.

Nor will anyone accuse Orton, the director, of breaching his fiduciary duty to the audience. He has selected a better-than-average Law School cast, which makes up in dancing what it lacks in diction. Of the leads, Erik Kitchen, 1L, (Watson) and Lisa Berlin (Moriarty) boast the biggest voices while Frank Bowman, 1L, (Holmes), Bruce Ryder, 1L, (Moranda), and Betsy Zagrans (Olivia Wendy Holmes) take good care of some of the biggest laughs.

The supporting cast is essen-

(Continued on Page 5)

"Holmes" Here

(Continued from Page 4)

tially a theatrical Xerox machine, churning out such classic impersonations as Ron Abrams' Charles Fried, Roger Kotecki's Luis Tiant, Howard Katz's Howard Cosell, Patty Johnston's Loretta Haggars, and Mary Upton's Mary Hartman. But the best of the bunch are Keith Avery, (2L) Murray Fogler, Jeanine Widmer, and Diane Williams whose Nerds are the most convincing I've seen since I took the LSAT in Memorial Hall. Tom Foster, 3L, gets in some real knee-slappers, too.

Producers Linda Fee, 2L, and Charles Janoff, 3L, promise to supplement their cast with several celebrity guest stars. Professors Liebman and Friedenthal will show their deep respect for Johnny Carson by alternating in the role of Professor Karnak while Deans Sacks and Bruce and Professors Countryman, Nesson, Stewart, Katz, and Edwards are all slated to put in cameo appearances.

Although absent from the preview I attended, State Rep. Barney Frank, 3L, will play the role of Ray Elizabeth, Mary Upton's gigolo-secretary, and will likely perform with great confidence as long as he has the director's assurance that he will not be replaced by Elaine Noble at any time during the show's two-week run.

Some ornery law students will no doubt refuse to be deprived of their \$3 property interest in the absence of a constitutional guarantee that *Holmes Is Where the Hark Is* is an unqualified triumph. Grim reality, however, tells us that even the most successful Law School show will invariably have its failings. Since the current edition so clearly improves upon the past, most HLS theatergoers will justify their attendance on the basis of a flexible interpretation of the Due Process Clause. They will, as Justice Rehnquist urged in *Arnett v. Kennedy*, take the bitter with the sweet.

Calabresi: "Second Look" May Prevent Choking On Statutes

By Larry Zelenak

A new approach to injecting some life into "The Common Law in an Age of Statutes" was the subject of the Oliver Wendell Holmes Lectures delivered last Tuesday, Wednesday, and Thursday in the Ames Courtroom by Professor Guido Calabresi of Yale Law School. Calabresi is perhaps best known for his book, *The Costs of Accidents* (1970), a comprehensive and systematic economic analysis of tort law.

In his first lecture, "Choking on Statutes," Calabresi outlined three models of the judicial role in law-making. The first model was that of the common law, whereby the courts had complete control over the creation, development, and interpretation of the law. As legislatures gradually took over the responsibility for creating laws, a new model developed, which relegated to the courts the duty of merely interpreting statutes. The courts soon became impatient with the restrictions of this second model, and began to use a third model, involving overuse of the Constitution and tricks of statutory construction to achieve results much like those of the old common law model.

This reaction of the courts to the 20th Century orgy of statute-making has been perfectly natural, Calabresi suggested. The proliferation of statutes has inevitably led to a situation where there are too many statutes for the legislature to keep track of, and thus some obviously archaic statutes have remained on the books. Nevertheless, the unsystematic reaction of the courts has meant confusion both in the law itself and in judges' understanding of their role in the law-making process. Because of this confusion, there have been a number of suggestions for non-judicial responses to the problem of obsolete laws.

Calabresi listed three such responses, but found fault with each. The first was sunset laws, calling for the periodic death and reconsideration of statutes, such as the suggestion by former Rep. Wilbur Mills, '33, that all deduction provisions in the Internal Revenue Code be periodically rewritten from scratch. Calabresi objected to this solution because it might result in too little continuity in the law. The next proposal, indexing laws which would subject dollar figures in legislation to automatic cost-of-living increases, drew approval from Calabresi. He noted, however, that its effectiveness was limited to a small percentage of the out-of-date statutes. The third suggestion was for giving increased power to administrative agencies — in effect letting them revise the laws. He found this of little value, both because such agencies have a vested interest in maintaining the status quo and because he doubted the legitimacy of agencies as democratic, majoritarian law-making bodies.

In his second lecture, "Toward a Theory of the Second Look," Calabresi proposed a judicial solution to the problem of outdated statutes. He defined his doctrine of the second look as: "Judicial power to change or nullify statutes in appropriate cases, without declaring the statute unconstitutional, and thus without precluding a second look by the legislature."

He went on to explain the considerations appropriate to the application of the doctrine. First, the court should act only within the areas of legislative inertia—the idea is to deal only with laws the legislature, as a practical matter, can't reach. A court wouldn't be justified in simply looking to its own views and prejudices in overcoming legislative inertia. It must ask certain questions, such as: is the

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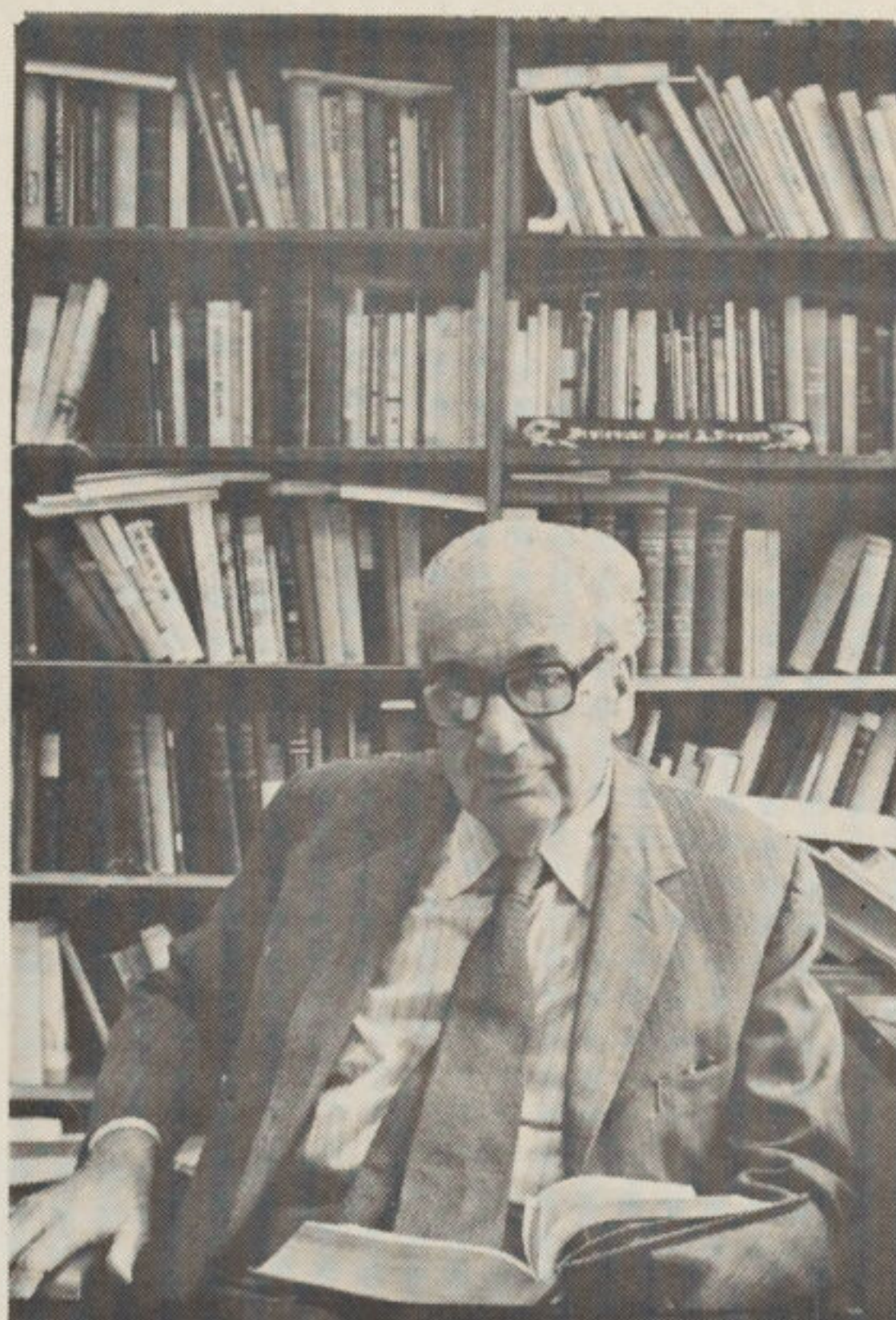
Swift 'Justice' At the Supreme Court

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mate the grounds for the summary disposition."

For Boudin, the consequence of the Supreme Court's growing impulse to use the summary device will be the "overloading" of petitions for writs of certiorari and memoranda in opposition to such motions, instead of his prior practice of merely supplying a "short reason" why the case should be accepted or rejected by the Court on certiorari. Freund, on the other hand, grasped for a more overarching conceptual remedy. He carefully drew the distinction between "certiorari cases" which the Supreme Court has total license to accept or reject, and obligatory "appeals" which under federal law the Court must decide if the case is found to contain a "substantial federal question." While Freund recognized that the Court would still remain free to decide cases summarily in the "certiorari area," he nevertheless urged the drastic revision of "appeals jurisdiction" as a partial cure. "It seems to me that the lesson to be drawn is that the mode of review by [obligatory] appeal should be eliminated and all review should be on certiorari. If the Court is disposed to decide a case on the papers without argument, it is often better that the disposition be a denial of review rather than a decision on the merits. . . . When the Court makes a disposition on appeal," Freund continued, "it does so for reasons like those in its denying certiorari. But the consequences as precedents are different."

Freund then proceeded to spell out a laundry list of possible factors undergirding both summary treatment and denial of petitions for writs of certiorari. These included: an unwillingness on the part of the Court to speak on a particular issue at a given moment; a desire by the Court that the problem be solved at the legislative level; and an interest in avoiding a waste of time where the issue is clear.



Prof. Freund: Remediating the appeals problem. SJ

Insisting that it represents a highly effective means of controlling and disciplining the lower federal courts, Professor Richard D. Parker defended the Supreme Court's summary practice. "The Supreme Court can only hear relatively few cases every year with full briefing and argument," Parker said. "A lot of these cases don't raise entirely new issues and don't merit an argument. So, the best thing to do with them is to dispose of them summarily."

Moreover, in discussing the use of summary reversals for certiorari cases — the very situation which left Boudin blistering — Parker advocated a qualified extension of the Supreme Court's summary decision-making. "My view is that the practice of summary reversals in the certiorari area has been used inappropriately at times. But if used appropriately, they should be used a lot more than they are now." One such inappropriate use which Parker singled out was any "significant" change in legal doctrine; an "appropriate use" he cited was when the court below is "just plainly wrong."

Parker also took issue with the notion that the Supreme

Court's pattern of summarily deciding cases over the past several terms has marked a departure from the past. "The Court has done this for many years," he said. "All you have to do is read *United States Reports*." Taking the Court's 1971-1972 term as a reference point, Parker estimated the number of summary reversals that were then handed down by the Court. "You must draw the distinction between the 'appeal line,'" Parker remarked, "where there were more than eight or ten per year, and the cases where the Court granted certiorari and then reversed. During the term that I [clerked with] the Court, there were perhaps five to ten of the latter," Parker said.

Parker disagreed with the view frequently expressed by detractors of the summary practice, that the individual justices of the Supreme Court fail to focus closely on cases they decide summarily. "The fact that there are dissenting opinions at times goes to prove that there is a certain amount of attention paid by the justices," Parker contended. "And it is my experience that there is a certain amount of reasonable focus."

Henry P. Monaghan, LL.M. '60, a professor of law at Boston University Law School, was less inclined than Boudin to attribute political motivation to the Supreme Court's summary dispositions. Monaghan, who teaches Constitutional Law and Federal Courts and has followed the Court's tendency to flirt with summary practice, noted, "I'm sure there's some political dimension, but I'm not sure that's a substantial factor. The Burger Court does tend to see the world differently than the Warren Court . . . It probably sees it more clearly," he added.

According to Monaghan, the precedential value of a summary opinion varies depending upon who is invoking it. Whereas some lower courts
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Bakke Facts May Cushion Impact

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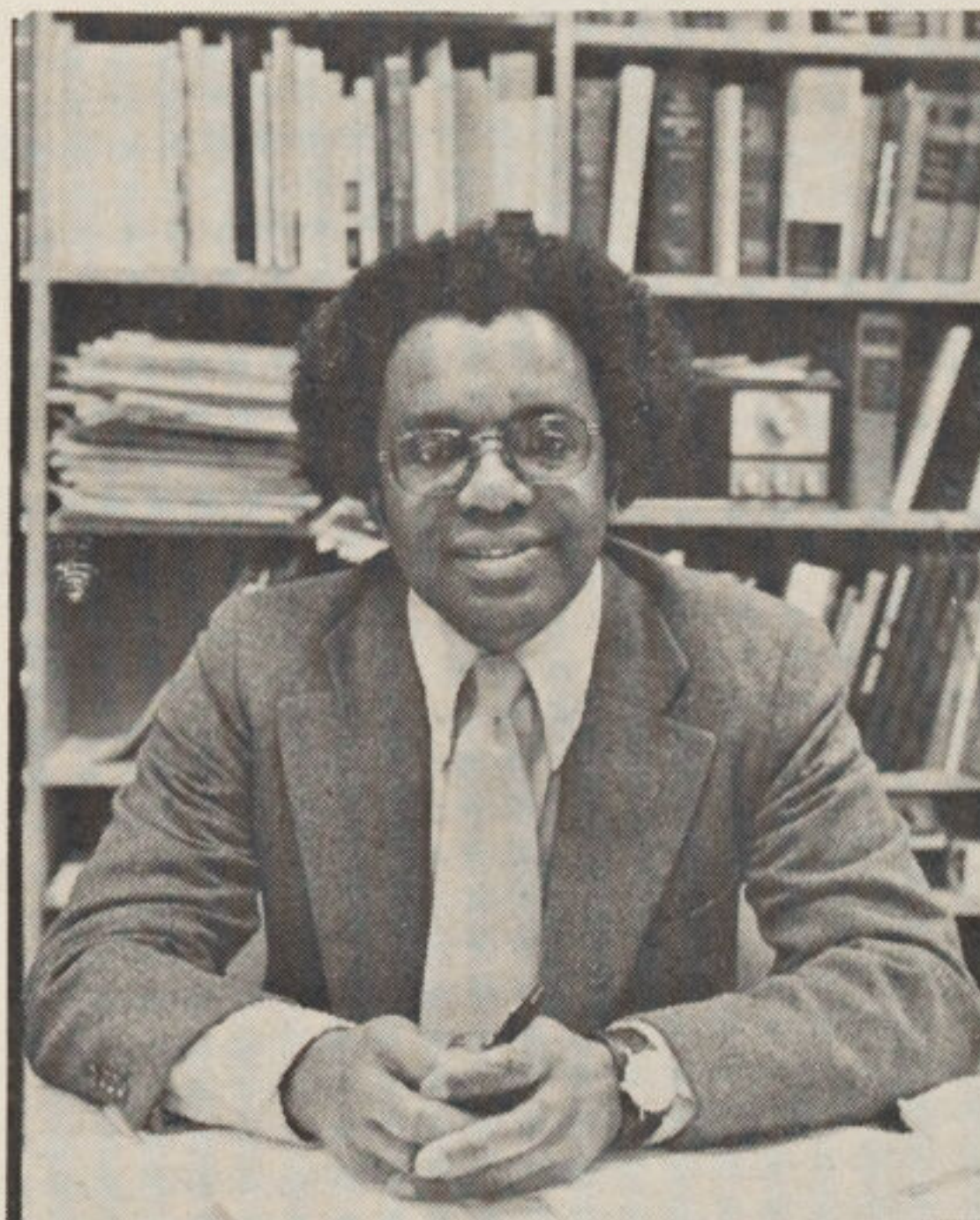
trial level. Unfortunately, Bell warned, those most likely to be harmed will not be the U.C.-Davis Medical School but the aspiring black, Chicano and Native American lawyers and doctors the University says it wants to help.

"You know, I like courage. I like to take risks," Bell remarked jocularly. "But what you have here is kind of an upgraded Kamikaze mission in which those who want to play the Kamikaze role get into a 747 and load all the minorities in with them and take off. And I have a little more of a problem with that."

The plaintiff, Allan Bakke, filed suit after being rejected by U.C.-Davis in both 1973 and 1974. The trial court found Bakke had failed to show he would have been admitted either year even without the special admissions program, but agreed with his contention that the program was unconstitutional. Both Bakke and the University appealed to the California Supreme Court. That court held that it was up to the University to show Bakke would not have been admitted. It also ruled that, absent any showing of past discrimination by the Davis Medical School, any preference for minority students on account of their race was subject to the same "strict" scrutiny traditionally used for measures that have been used by the majority in the past to the detriment of minorities.

In a petition for rehearing, the University took a position that later opened it to charges of an attempt to "fabricate jurisdiction" by *amici curiae* who asked the U.S. Supreme Court to deny certiorari. The University stipulated that it could not meet the new burden of proof and the California Supreme Court accordingly ordered Bakke admitted.

In explaining its turnabout, the University's attorneys wrote: "It is far more important for the University to obtain the most authoritative decision possible on the legality of its admissions process than to argue over whether Mr. Bakke would or would not have been admitted in the absence of the special admissions program. A remand to the trial court for determination of that factual issue might delay and perhaps prevent review of the con-



Prof. Bell: With friends like these . . . SJ

stitutional issue by the U.S. Supreme Court."

Bell and other critics have cited the concession on the standing issue as simply one among many advantages and arguments forgone that render the record in the Bakke case too weak to support a Supreme Court decision with potentially major national consequences. But minority advocates as diverse as the Urban League and the National Lawyers Guild in

fact pleaded with the University to let the state court decision stand to avoid a possibly adverse U.S. Supreme Court holding.

That approach was labeled "totally misguided" by Donald L. Reidhaar, general counsel for the Board of Regents. In a telephone interview Tuesday, Reidhaar told THE RECORD that "given the prestige of the California Supreme Court, it (*Bakke*) would have had a powerful effect across the country." Already, Reidhaar said, the University's action has helped limit Bakke's impact. He pointed to a recent North Carolina federal court opinion that declined to follow Bakke because the U.S. Supreme Court had granted certiorari.

The Davis Medical School admissions program differs from Harvard Law School's and that of most professional schools in that it divided its applicants into two distinct groups judged by different standards. The regular admissions pool filled 84 of the school's 100 annual places. Applicants with less than a 2.5 undergraduate grade point average were automatically dropped from consideration.

The remaining 16 places were filled by what Davis variously characterized as an admissions program for economically and educationally disadvantaged students or as one specially aimed at minority applicants. (The trial court found that though a number of white students had applied through the

(Continued on Page 12)

Colloquium on Israel's Legal System

Joseph Gross, Professor of Law and Associate Dean of the Law School, Tel Aviv University

Dr. Eliahu Likhovski, Visiting Scholar at Harvard Law School

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March 22

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Prof. Freund

(Continued from Page 1)

stitutional law scholar in the United States," teaching generations of law students for 37 years before retiring last year.

Freund began his talk by assuring the audience that his retrospection on the court would not simply be a collection of anecdotes since "nostalgia, alas, is not what it used to be."

Freund discussed the physical setting, membership, and business that came before the Court beginning in the 1930's. It was not until 1935 that the Court had its own building, Freund said. Before that the justices worked at their homes and did not have as much interaction as they would later have.

Freund spent quite a bit of time analyzing the membership of the Court from 1930 to 1941. The Chief Justice, Charles Evans Hughes, looked, said Freund, as though he were "made for the part." He was praised by all the members of the Court as a first-rate presiding officer. Felix Frankfurter said of Hughes: "He didn't exert authority, he radiated it."

Harlan Fiske Stone was a better "side" justice than he was a Chief Justice, said Freund. Benjamin Cardozo was in his first term when Freund clerked for Brandeis and had a "junior justice complex." His interventions into discussions, said Freund, were "few and apologetic" but they were also pointed and illuminating.

Brandeis did not approve of the new building the Court moved into in 1935. He believed, said Freund, it was too opulent and that the Court's prestige should depend on its intrinsic work and not on such outward manifestations. Brandeis also anticipated much of the criticism of big business in his dissent in an equal protection case involving a Florida chain store. In what Freund called "one of his most deeply-felt opinions," Brandeis launched a broad attack on the evils of bigness.

Poised against the justices who

(Continued on Page 9)

March 1, 1977

COOP NOMINATIONS

In accordance with Article VI, Section 1, of the By-Laws of the Harvard Cooperative Society, as amended, the Stockholders of the Society have nominated the following individuals for election as Student Directors of the Society at the next Annual Meeting of the Stockholders in September, 1977.

IMPORTANT — Members seeking nomination as student directors by petition are urged to obtain a sample form of petition and a more detailed statement of the requirements governing petitions from the cashier in any Coop store.

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*Currently members of the Board

PROCEDURE FOR MAKING ADDITIONAL NOMINATIONS FOR STUDENT DIRECTORS

Pursuant to Article VI, Section 2, of the Society's By-Laws, as amended, additional nominations for student directors may be made by petition signed by at least one hundred (100) student members and filed with the Clerk (by leaving the petition at the General Manager's office in the Harvard Square Store) not later than 5 p.m., March 23, 1977. A signature will be invalid unless the student designates his membership number and school and he is currently enrolled as a degree candidate in that school.

IF A STUDENT MEMBER SIGNS MORE THAN ONE PETITION, HIS SIGNATURE ON EACH PETITION WILL BE DISREGARDED.

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Freund Reminisces On the Court

(Continued from Page 8)

had "some semblance of an open mind" sat the "Four Horsemen": Van Devanter, Butler, Sutherland and McReynolds. Freund praised Van Devanter as the "most underrated and least studied" of all noteworthy justices. He said he had a "hawk-like" knowledge of the record and would make very good arguments in conference. "Fierce" Butler could be a terror to counsel arguing before the court.

Sutherland, said Freund, was a great gentleman, but did not have a very "searching mind." McReynolds was a very "idiosyncratic" man and was often "childish and peevish." It was because of these four, said Freund, that Roosevelt looked for a way to break the Court's continued obstruction of his programs.

The Hughes Court did become a watershed in the development of civil liberties. With cases such as *Near v. Minnesota*, *Stromberg v. California*, and the Scottsboro Boys Cases, it laid the foundation for the application of the Bill of Rights to the states, Freund said.

In other areas the Court of the early and middle 1930's did not forge new constitutional doctrine. For example, in a reapportionment case, the Court ignored the constitutional question. Something in the human mind and society helps to account for this, said Freund.

Approaching problems and changes "in stages" seems more natural than simply breaking with the past. Also, the eventual replacement of the Four Horsemen with men such as Black and Douglas helped to change the Court's outlook.

Comparing the Warren Court with the Court of the early 1930's, Freund said there were two differences which made the Warren Court not just a "left-wing version" of the earlier Court. First, the Warren Court struck down old laws which may or may not have reflected current political values, whereas the Court in the 1930's struck down recently passed laws. Freund stated his belief that the Court should feel freer to review old laws to see if they still comport with current political beliefs and values.

Second, the Warren Court was active in the fields of procedure, participation and personhood. This is a more appropriate area for judicial review than areas such as minimum wages and price controls, not because the latter are economic issues, but because the latter are the product of the political processes that are attacked in the first set of cases.

Freund argued throughout his talk for a "focus" with which to view constitutional law. He said that he was opposed to a free-

wheeling court because active review might carry the court beyond the areas explored by the Warren Court to decisions that we do not like.

With the Burger Court, said Freund, we are seeing a change that was like the change that occurred during the Roger Taney years (1835-1864) after John Marshall's tenure. There is an erosion and modification of what was done during the Warren years. Freund refrained from passing judgment on either the Warren or Burger Courts. "When I stopped grading papers, I stopped grading the Supreme Court," he said.

What issues will be important in the future? Freund said that personhood (equal protection, schools, birth control laws, etc.) would be an important and problematic area for the Court. Issues of legislative-executive conflicts may also arise. Freund stated that he hoped the Court would avoid involvement in political questions and encourage solutions through the political process.

Expanding his view that the Court should not be "free-wheeling," Freund felt that the judiciary should use non-judicial people as resources, but not as judges. "I'd have them on tap, not on top," he said. The judiciary is, and must be, bound by rules and procedures. It sits to decide cases, not write essays on society, said Freund. The use of non-judicial people in judicial roles would increase the tendency to be free-wheeling.

The Court, he said, is not the conscience of the country, it is a conscience. "We must pursue solutions on all levels, not just through the courts and the federal courts," Freund said. He hoped for the day when judges were just regarded as doing the "patch work" and were not responsible for the "fundamental health of the country." With all these thoughts in mind, he said, "I give two cheers for the Supreme Court."

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Let Them Eat Sugar

The FDA has announced that it will forbid the sale of saccharine because of a Canadian study showing that laboratory rats given large doses of the sweetener developed an abnormal incidence of bladder cancer. People, always insistent upon the right to kill themselves in their own chosen ways, have rushed to stock up on the substance. The company which makes saccharine has had more orders this week than it can handle in several months.

Nor is this hoarding irrational. This isn't thalidomide we're talking about, after all. Saccharine has been used for over 80 years, and no correlation between it and bladder cancer in humans has been found. Lab rats mainline their saccharine; most people take the less direct path and drink sweetener diluted in soda or coffee. Those "large doses" given the rats turn out to be the equivalent for humans of consuming 800 cans of diet soda a day for prolonged periods of time. Death from bladder overload would be a more reasonable fear than bladder cancer.

The large doses are also problematic in that large amounts of *anything* will upset the balance of a biological system. Had the rats been shot up with the sugar contained in 800 cans of Coke, they would have gone into hyperosmolar coma and died. This, however, is not grounds for taking sugar off the market.

Since the days when Greeks first advocated adherence to the Golden Mean, people have known that all excess is harmful. The saccharine study tells us in just what manner this particular excess is harmful. Because of the Delaney clause which requires removal of any drug which has been shown in lab studies to cause cancer, saccharine must go. Had the rats died of heart attacks or bloat, it might still be sold.

The ramifications of the news are slowly becoming apparent. A 78¢ bottle of saccharine is now selling for \$1.09. Rumor has it that the price of sugar will be up upon the removal of its most widely used substitute. Diet sodas, as they currently exist, will disappear; industry spokesmen say replacements will have sugar, more calories, and a mediocre taste. The effect of increased use of refined sugar upon health is not known, but that of being overweight is. The FDA, waffling its position a bit, has mentioned the possibility of having saccharine available in drugstores for diabetics, heart patients, and others who must restrict sugar intake; this should result in a flourishing black market.

Those of us who drink Tab so that we can also eat cheesecake resent the decision of the FDA that we must suffer heart attacks, obesity, and conscience pangs rather than accept the chimerical risk of bladder cancer.

HARVARD LAW RECORD

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Fenno

Fenno was reclining luxuriously in a Root Room arm chair, soothed by the gentle rustle of last week's newspapers and last year's gossip. The neighboring 1L sat up with a start, gasped, and thrust the latest *Time* at him. "Did you see that?" the 1L asked.

"See it?" queried Fenno. "Who do you think Tribe's P.R. man is? Of course, it nearly bankrupted the old boy, but I think the article is worth it in the long run for both of us."

"You mean you had to pay for that encomium?"

"Pay is an understatement. Didn't you notice only two of his children were mentioned? We had to auction off the third to raise the cash." Fenno rubbed his hands together. "He'll get it back though."

"The child?"

"No, his investment. I've given him a part interest in my touting service, and the clients have already begun piling in. Just today I signed up Dave Westfall for a feature in the British magazine *Monochrome*. He'll look dashing in that Bill Blasé outfit."

"You mean all the articles I've seen lately about Harvard professors have been planted? Even the one about Andy Kaufman in *Spy* magazine which called him one of the 10 leading young cryptographers for teaching a whole generation of students how to break the Code?"

"Not all. When Chuck Fried heard about the *Time* caper he commented that most of the faculty wouldn't deign to appear in such a magazine."

"You heard him say that?"

"No," Fenno replied. "I read it in that feature on him in *Hustler*. Unfortunately, that's one article I can't claim credit for. He earned recognition as among the ten most pompous on his own."

The 1L nodded. "It's his Aristotelian charm."

"He is," Fenno agreed, "widely known as peripathetic. It's just as well he's had his exposure. When Bator signed on, the survey of fatuous nonentities filled up and I don't know where else I could have put him."

"Another clean sweep for Harvard, eh?"

Yes, but the deluge has just begun. Soon you'll see Duncan Kennedy in *Weekly Reader*, Arthur Miller in *Modern Bride* and the chapter on Jim Vorenberg in *Sleep Positions, the Night Language of the Classroom*.

"What ever gave you the idea of flacking for the professors?" the 1L asked.

"I guess you might say a miraculous success emboldened me. It took five years, but I got Lance Liebman published in the *Law Review*. After that, I figured *anything* was possible."

Letters to the Editor of the RECORD

Feel Our Wounds, Doubting Alumnus

To the Editor:

The Harvard Law RECORD of February 11, 1977 printed a story about a Texas lawyer, a non-Harvard graduate who had his client take his pants down before a jury in a rape case.

I doubt the authenticity of the story; if the story is correct I doubt the competence of the trial lawyer; in any event I doubt the competence of the Sociology major editing the paper carrying the name Harvard.

You should consider either requiring competence in your editors or changing the name to something like THE FAR DARTER REVIEW, or SECOND CITY NOTES.

George M. St. Peter, '35
Fond du Lac, Wisconsin

Ed. note: Even parttime journalists like ourselves don't attribute bogus quotes to the Houston Post. We assure you, Mr. St. Peter, that Hailey's story was authentic. Watch for it in an upcoming issue of the Student Lawyer, an ABA-affiliated publication, which has requested permission to reprint the sociological study in its entirety. Their interest in science, you know.

Mr. St. Peter's letter brings up other points meriting some comment. We had considered requiring both competence and a sociology background for RECORD editors, but the present editorial board, a pack of incompetent humanists, voted the proposal down summarily. We had not considered changing our name. We must confess a certain fondness for

Mr. St. Peter's suggestion, THE FAR DARTER REVIEW, but we are afraid that we might start receiving mail from the other Review, across campus.

Harvard: Following Case Western Lead?

To the Editor:

I read with interest the article entitled "Library installs computer to aid legal research" published in the Feb. 18 issue under the name of Bill Ross.

While it was nice to read that Harvard is following our example in installing the computer, the inaccuracy of one of the statements made in the article was startling and certainly needs correction.

I cannot answer for Cleveland State Law School, but as regards Case Western Reserve, we installed our computer not a year ago, but more than five years ago, the first law school anywhere to do so, and our students and faculty have been trained to use it, and have used it rather intensively ever since.

Simon L. Goren
Cleveland, Ohio

Cryptic Law

The following excerpt from one of Justice Brennan's more cryptic antitrust opinions is in "judicial code." This week's selection is drawn from one of Phil Areeda's favorite cases. Decode it. (Hint: Each letter stands for a different letter of the alphabet.)

"[X] li xiwx sj e zmspexmsr mw alixliv, ex

xli xmqi sj wymx, xliwi mw e viewsrefpi

tvsfifmpmx xlex xli eguymwmxmsr mw

pmoipc xs viwypx mr xli gsrhiprih

viwxvemrxw. . . [W] ygl pmoipmlssh aew

tvszih ew xs xlmw eguymwmxmsr, Xli jmvi

xlex aew omrhipih mr 1917 gsrxmryiw xs

wqsphiv. Mx fyvrih fvmwope xs jsvki xli

xmiw xlex fmrih xli [xas jmvqw], erh mj mx

lew uymixih hsar, mx viqemrw lsx, erh, jvsq

tewx tivjsvqergi, mw pmoipc ex erc xmqi xs

fpedi erh qeoi xli jywmsr gsqtpxi . . ."

(Solution on Page 16)

Calabresi

(Continued from Page 5)

statute, because of changes in the world around it, clearly inadequate today; is the statute philosophically out of step with newer statutes; has there been an accretion of criticism from scholars, or a series of events undercutting the statute.

The final lecture, "Subterfuges, Openness, and the Limits of Legal Language," dealt with the question of whether the courts should openly proclaim a doctrine of the second look. As Calabresi put it, "Given that the balance between common law and statutes has changed, and that courts should act to restore that balance, should they do so openly through a second look doctrine, or should they continue to use tricks, devices, and subterfuges, such as overuse of unconstitutionality and the powers of judicial 'interpretation?'"

Calabresi admitted that there were situations where subterfuge and dishonesty might achieve the desired ends more fully than complete honesty and openness. Sometimes, he claimed, admitting the existence of a doctrine will result in overuse of that doctrine.

"Categorical language, such as 'courts must not change statutes,'" Calabresi explained, "begins by denying the trade-off or balancing test, and then defining the absolutes so as to make it possible to use trade-offs after all. That was the way Justice Black handled the First Amendment—he said freedom of speech was absolute, and then defined a lot of things out of the category of speech."

Calabresi came out in favor of the more honest approach of the doctrine of the second look. He concluded, "Open language shines light in dark corners. We must be very reluctant to use absolutes when we don't really mean them. They may be justified at the level of constitutional guarantees, but at the more prosaic level of the second look honesty may be more appropriate."

SPORTS QUIZ

1. State the real name and the pseudonym of the author of the Frank Merriwell books.
2. Which major league pitcher never won more than 23 games in a season, yet won at least 20 games 13 times?
3. Name the colleges whose athletic teams bear the following nicknames:
(a) Tartars
(b) Shockers
(c) Thundering Herd
4. Who went 0-for-21 in the 1952 World Series?
5. Who were the "Gallop Ghost" and the "Manassa Mauler," and who coined both nicknames?
6. In 1973, two New York Yankee left-handed pitchers were involved in a wife swap. Both were traded, separately, to a certain other American League team, and then both moved on, again separately, to a third A.L. team. Name the players and the teams.

Bakke Defendant Raises Desultory Defense Below

(Continued from Page 7)

program, none had been admitted.) Minority applicants, who did not qualify as "disadvantaged" were diverted to the regular admissions pool. Those remaining in the special admissions pool were not necessarily dropped from consideration if they had sub-2.5 grade point averages.

Bell complains that both affirmative action critics and the sponsors of programs like that at U.Cal. Davis share a common misconception that grades plus standardized test scores are the exclusive measure of professional school fitness and overlook the wide range of discretion that has always been exercised in college admissions in favor of applicants who may score lower than some other applicants but are nevertheless accorded preference because of their personal qualities or the school's belief that they can make a greater contribution to society.

"I don't think if it (*Bakke*) is reversed, that it will be a great victory for minorities. What it will do is simply legitimate the notion that there are two separate programs — one for qualified folks, and one for unqualified but worthy minority folks," Bell predicted.

Transcending the speculation over Bakke's possible legal consequences is concern about the case's practical impact. "I really think the damage has already

been done and it's going to take a lot of positive work" — by black professional students and by schools committed to affirmative action — "to undo it," argued Theodore R. Laster, 3L, HBLSA president. Laster thinks *Bakke* will have — and is already having — two major effects, regardless of the ultimate legal outcome. Firstly, professional schools will use *Bakke* as an "excuse" for discontinuing efforts to attract minority students —

Page Three

(Continued from Page 3)

(the) stick gently under our arms. A non-reading user might be tempted to maul his arm-pits.

Another curious message showed up on my *Munch* bar. This 15¢, 1 7/16 ounce peanut candy bar manufactured by Mars Inc., Hackettstown, N.J. boasts this "Guarantee of Satisfaction": "If not fresh and in good condition, return unused portion for replacement."

Now I am not a neat nut. My mother, she is a neat nut. When I get out of bed in the middle of the night to go to the bathroom, my mother slips into the room and makes my bed. That's neat nuttism and I'm opposed to it. But still, I can't see myself dropping a half-eaten peanut bar in an envelope and mailing it to Hackettstown, N.J. The postal service has enough problems, not to mention New Jersey.

regardless of *Bakke's* particular facts or its actual relevance to their own programs. Secondly, Blacks and others, convinced that professional schools are becoming less and less receptive to them, will cease to apply.

"Maybe in the late 1960's it was felt that there was an advantage in being from a minority group, but I don't think minorities feel that way today. . . . *Bakke* is just indicative of the whole general attack on affirmative action. No one looks to see whether the same number of minority students that are admitted ultimately graduate or whether they have done well in professional life. They just jump to the conclusion that standards have somehow been lowered," Laster complained. "I don't know where our friends are — they just seem to have disappeared into the woodwork."

Other criticisms of the *Bakke* defense have included failure to show past discrimination by the U.C.-Davis or the California public schools or to cite the lack of demonstrated correlation between MCAT scores and professional school success. "When you boil it all down, it's really more a question of constitutional law than of fact," Reidhaar countered. The general counsel said the Supreme Court would have the benefit, through briefs, of "a great deal of statistical data" on past and present admissions practices and current minority-community needs for trained professionals.

Reidhaar also disagreed with the argument that it would have been easy to blunt the impact of *Bakke*, even within California, in view of the state high court's remarks that it is perfectly permissible to make allowances in admissions for disadvantaged backgrounds, without regard to race. "Two-thirds of the people below the poverty line are white," Reidhaar said. "A true disadvantaged program would eliminate most of the places for minorities or you would have to change the size of the regular admissions program — and that would leave even less opportunity for the DeFunis's and the Bakke's."

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We'll see about that

City Hospital? Do you have an
Alfred Glizz there?

Oh, yes, the rabid gentleman
in Room 12F... Mm-hm...
... He's barely conscious...

Great! I'll
be right
over.



These professors have it so
easy. A little dog problem
and they weasel out of their
obligations.

Good thing
there's people like
me around to
keep them honest.



Herb Garnish, Professor.

You're
welcome

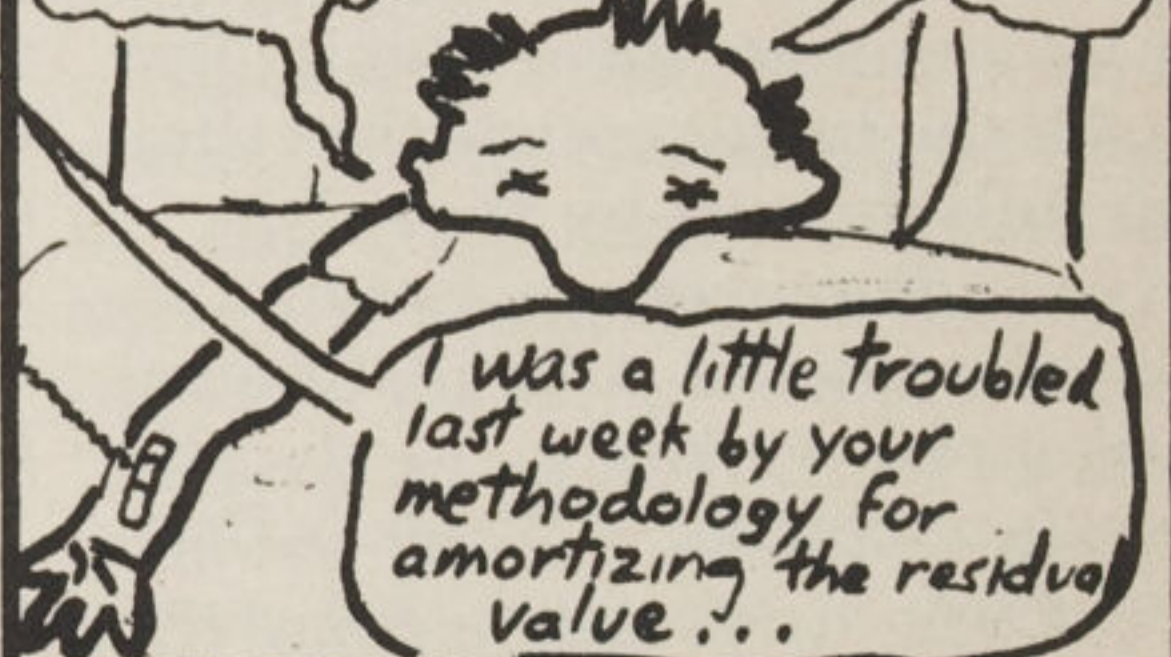
ZVXXJ



I believe today's topic was
supposed to be "Equipment
Leasing Part II"?

QNZZ?

SMERB!



I was a little troubled
last week by your
methodology for
amortizing the residual
value...

It seems
to me that...

VWP/PKN!

Excuse me?

Professor?

Professor?



Dead.

How
about
that.

NURSE!



(Yeah?)

Is there some
way I can get a
refund on these?



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Summary Practice: Adequate Guide For Bench And Bar?

(Continued from Page 6)

have occasionally felt free to treat a summary disposition as a denial of a petition for a writ of certiorari and not a controlling precedent on the merits, the Supreme Court has rebuked the federal courts, Monaghan said, by stating in effect, "You figure out what we decided but you're bound by that." Monaghan observed, however, that the Supreme Court would itself be more likely to overturn a decision it had handed down in summary fashion. "The Supreme Court feels half-bound by its summary precedents. But it tells the lower courts that they are fully bound by them."

David Rosenberg, a lecturer on law who teaches a Constitutional Litigation workshop, and previously a member of Boudin's firm, concurred in the view that summary action is on the rise. Though he disclaimed having made any sort of objective measurement, Rosenberg declared, "What has struck me empirically are summary reversals. What's appalled me are summary affirmances like the Virginia homosexual case, and equal protection application to rules of preclusion — such as guest statutes and the statute of limitations."

Singling out the Virginia sodomy case, Rosenberg explained

that the summary opinion was probably made in the interest of avoiding embarrassment. "If they tried to explain their opinion, they would look very foolish," he stated.

Rosenberg also downplayed the importance of any political dimension as an explanation for the Supreme Court's summary treatment. Though Boudin had placed great stock in this rationale, Rosenberg matter-of-factly observed that it would be unnecessary for the Court to side-step the issues on this ground alone. "It would be awfully optimistic to me to think that the Court believes it better to avoid a fight rather than to show one. But with the kind of majority on the Court now, I see no reason why they would want to avoid these cases."

Rosenberg, who maintains an ongoing legal practice in Cambridge, related the manner in which he deals with a summarily-decided precedent which bears on a case on which he is counsel. "Arguing against it," Rosenberg said, "I go back to the record and try to find an alternative ground or any other reason possibly indicating that the Supreme Court's decision was not on the merits. Secondly, I cite the Supreme Court opinions which demonstrate that summary affirmances mean very little. And thirdly, I look to history to show that the Court has summarily decided cases which it later takes up for full consideration."

Rosenberg also pointed out that since the Supreme Court's summary actions do not adopt the reasoning of the Court below, but only its result, a practitioner has the option of limiting the case to its facts.

Asked about the posture he assumes when the precedent supports his position, Rosenberg explained, "I always cite the Court's precedents when they're in my favor — and I then go on at length to explain what they decided."

Chirelstein Ex's Closed Out Of Corporate Fin.

By Madison King

After weeks of rumor, innuendo and unsubstantiated speculation, it is finally official: the 204 students who took the second-year course in *Corporations* with Professor Chirelstein will be foreclosed from taking Professor Victor Brudney's *Corporate Finance* course next fall.

The Law School catalogue lists the *Corporate Finance* course as open to third-year students who have successfully completed the second-year course in *Corporations*. However, Brudney said, "the overlap was just too great" to allow students to take both courses.

In addition to the foreclosure, the *Corporate Finance* course offered next fall will carry only three credits rather than the usual four credits.

"My cutting down the number of credits has nothing to do with the overlap," Brudney explained. "I cut it down for independent reasons. Now, however, the overlap issue appears larger."

Professor Chirelstein said the students who are being foreclosed aren't "losers" because they have already covered the material which

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CLASSICAL GUITAR
TUES. EVES. By JOHN JERVIS

Is Advertising Essential?

(Continued from Page 1)

The case of *Bates v. State Bar of Arizona*, argued before the U.S. Supreme Court in January, presents a major test case on the constitutionality and legality of the legal profession's self-imposed ban on advertising. The decision, expected by the end of the term in June, could determine the future of legal practices like Bates and O'Steen's, accelerate the gradual demise of the solo practitioner and small firm, or increase consumer demand for legal services.

Any change in the advertising prohibition will affect smaller firms that serve the needs of private citizens of middle or low income rather than larger law firms that handle corporate matters.

"Advertising is absolutely essential to law firms like this one," said Van O'Steen. The Bates & O'Steen legal clinic is like the large discount store in a world of small specialty shops, he said.

"This practice depends upon high-volume intake that can be handled by legal clinics. The only way high volume can happen is by advertising," he argued.

Bates & O'Steen is indeed a unique law practice. It relies heavily on high-volume, low-profit work and employs cost-saving features which standardize routine tasks and para-legal personnel, who free the lawyers to concentrate on their specialties. The firm has 2½ paralegals, two secretaries and four attorneys, two of whom

were recently hired. "We're gearing up in anticipation of a favorable decision," O'Steen explained. The firm can charge lower fees than the competition simply because its costs are low and the volume of business is high.

The two young lawyers challenged the rule against advertising, promulgated by the Arizona Supreme Court, on constitutional and anti-trust grounds. O'Steen argued that the First Amendment prohibited any regulation beyond protecting consumers from false and deceptive advertising.

"My view of the First Amendment is that false or misleading advertising can be proscribed by associations," he said. O'Steen would limit advertising restrictions to such improper advertising.

Prof. Andrew L. Kaufman noted that unlimited advertising may not necessarily provide the maximum amount of useful information to consumers.

"I think the important aspect of the issue is its relation to access to legal services, which is from a professional point of view the major area of legitimate debate," Kaufman said. "I think the profession has to respond to the issue in terms that take into account the maximum access to useful information."

The Arizona State Bar argued in its brief that advertising by any profession is inherently offensive to professional status. The brief argued, "[A]dvertising is incompatible with every element of a profession which makes a profession worthwhile as a calling, except money-making."

O'Steen strongly contends that advertising and professionalism do mix. "That argument by the bar association is purely internal. The only people you hear making it are lawyers. Members of the public are only interested in quality legal services," he said.

Kaufman is more persuaded by the bar association argument and believes that unlimited advertising

by lawyers may tarnish a profession that is often devoted to public service. "People see advertising as boasting or as deceptive or misleading, if not legally so," said Kaufman. He believes that advertising may hurt "shy" lawyers who may be reluctant to boast about their practice.

The American Bar Association, which along with eleven state bar associations filed an *amicus* brief in the case, argued that different cases require different fees and any information on fees publicized by attorneys is inherently unreliable. "Consequently, most if not all of the apparently truthful and seemingly straight-forward information that a lawyer can disseminate about his abilities or fees is at best non-informative and at worst confusing and misleading," the ABA brief argued.

Bates & O'Steen has avoided misleading its clients about fees by charging uniform fees for standard work, even if the case requires the firm to take a loss. "As long as an advertiser sticks to a fee there's nothing inherently misleading about the ad," O'Steen said.

O'Steen would also limit lawyer advertising by imposing "time, place and manner restrictions." These restrictions would avoid the "ambulance chaser" and the case of a lawyer who distributes leaflets in a hospital emergency room.

The removal of the advertising ban would likely increase the demand for firms such as Bates & O'Steen, at the expense of small firms and solo practitioners. The number of solo practitioners, which comprised over 60 percent of the profession in 1948, has declined to 37 percent. Existing firms, with only a few attorneys, may be unable to compete with legal clinics like Bates & O'Steen, which would expand to provide specialized services with economies of scale.

"I think that advertising will speed up the demise of solo practitioners and small law firms," O'Steen said. "I think there will be a new breed of law firms." The new breed will be those firms that can charge

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Sports Answers

1. Gilbert Patten; Burt L. Standish.
2. Warren Spahn.
3. (a) Wayne State.
4. (b) Wichita State.
4. (c) Marshall.
4. Gil Hodges, Brooklyn.
5. Red Grange and Jack Dempsey; sports-writer Grantland Rice.
6. Fritz Peterson and Mike Kekich; Cleveland and Texas. Peterson now pitches for the Chicago White Sox and Kekich for the new Seattle Mariners.

Advertising Poses Threat To Small and Solo Firms

(Continued from Page 15)

lower fees and be large enough to adopt such cost-saving processes as automatic type equipment, computers, and specialization.

"Law firms may pop up that specialize in bankruptcy and offer 50-state practice," said O'Steen. The specialization encouraged by advertising may result in a law firm resembling specialists like H & R Block, he said.

Prof. Gary G. Bellow noted that lawyer advertising will increase demand for legal services. Bellow believes that lawyers have been entering fields never before thought to be "legal" and as the availability of lawyers becomes more publicized, demand for legal services will increase accordingly.

"Legal demand is like medical demand — it's elastic," Bellow said. As more people become aware of available legal services, legal need will rise. "The amount of legal need is a function of who is available where," he said.

Lawyer advertising may lead to greater involvement in what O'Steen calls "preventive law." If people know that lawyers can help them in estate planning, land conveyances and landlord-tenant problems, they will go to lawyers to prevent future legal problems.

"People don't know that a lawyer can look at a standard form con-

tract and give them advice on it," he said.

Bellow noted that the opposition to liberalized advertising rules comes not from large corporate law firms, but from the small or solo practitioner who is threatened by the "new breed" firms like Bates & O'Steen which may render the small firm extinct. "I have a feeling that they are really feeling the economic crunch and the opportunities of advertising look expensive," Bellow said.

Although many attorneys may oppose Bates and O'Steen in their suit, the two have found their relations with fellow Phoenix lawyers have not deteriorated. "Our relationship with other members of the bar have been surprisingly cordial," O'Steen said.

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Corporate Finance

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will be offered in *Corporate Finance*.

"It's no big deal because I give the basic *Corporation* course that's like the finance course he [Brudney] gives," Chirelstein said.

"Most of the students won't be disadvantaged because his course covers much of the subject matter they've already had and they'd have to read many of the same cases over again, particularly in the areas of business planning and securities regulation," Chirelstein said.

"What they missed is the basic, basic, basic *Corporations* course, but so what?"

One second-year student who asked not to be identified said, "I think the whole thing is unfair because I should have been informed before I took Chirelstein. I wanted to take Brudney."

Despite the claim that the overlap was substantial, some students were questioning the degree of similarity.

"The point is that I am supposed to have had *Corporate Finance* already when I had Chirelstein," a 2L mused, "so I must have missed something."

The Registrar's Office confirmed that students who took Chirelstein's course will be foreclosed from Brudney's course and added that it's unfortunate for second-year students who were planning to take *Corporate Finance* next fall, but the decision has been made.

Solution to "Cryptic Law"

353 U.S. 586 (1957).
States v. E. I. du Pont de Nemours & Co.,
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 fire that was kindled in 1917 continues to
 hood was proved as to this acquisition. The
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