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TWENTY-FIVE CENTS

Sohn Leaving HLS in June for Georgia

By Gretchen Rule

HLS Prof. Louis B. Sohn has been awarded the Woodruff Chair in International Law at the University of Georgia, a position which will become effective July 1, 1981. He will resign his posts of HLS Bemis Professor of International Law and John Harvey Gregory Lecturer on World Organization at the end of the current academic year.

Sohn joined the Harvard faculty in 1946, after participating in the San Francisco Conference of 1945 that established the United Nations. He has served as a consultant to the U.N. Secretariat, as a counselor on international law to the legal advisor's office in the U.S. Department of State, and as a consultant to the Office of International Security.

At first, Georgia seems an unlikely spot to find such an eminent scholar in international law as Sohn. Sohn, however, pointed out that Georgia is rapidly increasing its reputation as the center of information on foreign trade in the U.S. In addition, he admitted that the warm climate and relatively small-town atmosphere surrounding the University of Georgia were major drawing cards.

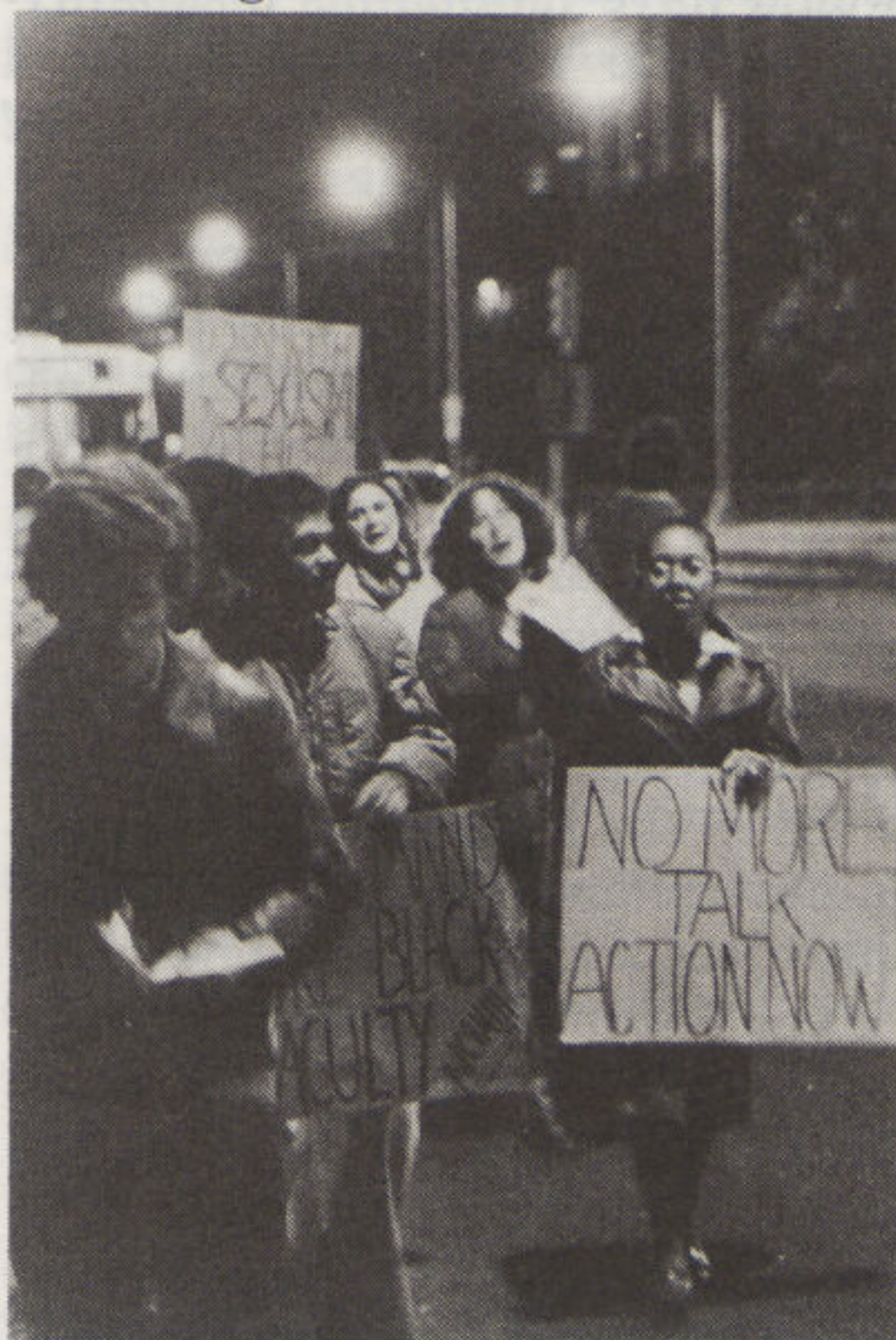
Sohn said that he has been considering a move for about a year

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Students Demonstrate for Affirmative Action at HLS

By Dan Hershman

Approximately 30 people, most of them Harvard Law students, marched from Austin Hall to the Cambridge Forum in Harvard



Students marched from Austin Hall to 3 Church St. in support of affirmative action on Oct. 29.

Square on Oct. 29 to demonstrate their support for affirmative action and student power at HLS. The brief march, sponsored by the 15 group Coalition on Responsible Dean Selection, ended with a picketline demonstration in front of 3 Church Street, where the First Parish in Cambridge, The Lowell Institute, The M.I.T. Chaplains,

and the United Ministry at Harvard and Radcliffe had jointly sponsored a discussion of "Should We Continue to Institutionalize Affirmative Action?"

The primary reason for the Coalition's march and protest prior to the Forum was that Dean Albert M. Sacks was one of the panel participants. Dr. Nancy Randolph, Harvard President Bok's special assistant on affirmative action, shared the spotlight. The Coalition stated in a flyer distributed at the Forum that "Dean Sacks is not qualified to speak on this subject, because Harvard Law School has not yet *begun* to institutionalize affirmative action." The Coalition, which considers faculty hiring to be relevant to the selection of a new Law School Dean, called "unjustified" the facts that in January there will be one third world person on the HLS faculty, that there is one tenured woman faculty member present (with another on indefinite leave), and that HLS has no third world administrators.

Coalition spokesman Fritz Byers, 3L, said that these facts are probably sufficient evidence for the EEOC to find probable cause for bringing a successful discrimination suit against HLS. The Coalition proposed that/HLS hire five women faculty for 1980-81 with tenure or tenure tracking and at least two third world faculty as well, "until the percentage of third

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Tribe, Bator Debate Judicial Selection

By Tom Heywood

Profs. Larry Tribe and Paul Bator debated the potential for abuse in the appointment of Supreme Court Justices during the next presidential term before an attentive crowd of some 200 on Oct. 27 at HLS. The lively debate was carried out with the support of the Law School Forum, with Prof. James Vorenberg introducing the speakers and Prof. Bernard Wolfman serving as moderator.

"I don't believe the Constitution should ever be held hostage to a single issue," contended Tribe in his five-minute opening argument, referring to the plank in Reagan's platform promising the appointment of judges who would uphold "family values" in their decisions.

Regarding Reagan's claim that, as President, he would appoint judges mindful of the proper constitutional limits on the judiciary, Tribe allowed that, "Were that true, that would be an important claim." Tribe went on to indicate that he felt "In fact, the evidence . . . pushes in the opposite direction," and that we have to gauge how a presidential candidate would make Supreme Court appointments from all that we know about that candidate.

Summing up his own perceptions of Reagan's probable appointments, Tribe concluded, "[Reagan] cannot be trusted to uphold an oath to defend the Constitution — he is not truly dedicated to constitutionalism."

Responding to Tribe's argument, Bator in his opening argument stated his belief that Reagan's vow to appoint judges who would uphold traditional family values was "stupid and silly," but said that he was "less frightened than Larry Tribe" by the platform.

"First," contended Bator, "I don't find party platforms frightening generally." He went on to point out the gap between campaign rhetoric and political action.

Second, continued Bator, even if Reagan wanted to appoint judges who would reach certain decisions, "it wouldn't work." Bator argued that looking at the process of judicial decision-making, it is implausible to think that any President could obtain a given result from the judiciary through selective appointments.

Bator further argued that he was not convinced theoretically that there should not be a single-issue test, observing that, "The people who are screaming [about Reagan's position] would be totally willing to disqualify judicial candidates on certain issues." As an example, Bator speculated that many people would have no qualms disqualifying anyone who openly disagreed with the holding in *Brown v. Board of Education*.

Bator concluded his opening remarks by suggesting that the real question before us is whether Reagan or Carter can deal with Supreme Court appointments in a constitutional spirit, and by arguing that the "single-issue" characterization of Reagan is more rhetorical than factual.

Tribe then commenced his ten-minute rebuttal by stating that he disagreed with Bator's viewpoints. "I don't think one can safely disregard the evidence we have" about Reagan's likely appointments, said Tribe.

First, asserted Tribe, to the extent that one is programmatic in his views on a particular issue, he should be disqualified as a judicial candidate.

Second, Tribe argued that, "Even

if I were prepared to agree that there were a few fixed stars in the firmament, I am unprepared to believe that *Roe v. Wade* could qualify." Tribe noted that the courts are increasingly being called upon to decide cases where two fundamental values or interests are in conflict, such as the right to life of the unborn fetus and a woman's rights regarding her own body in abortion cases, and that such cases are so problematic as to constitute a "black hole" or "void." Tribe asserted that these sensitive issues should not be left in the hands of those who adopt a programmatic, ideological approach to the problem.

Tribe concluded his remarks by re-emphasizing his belief that, "A commitment to constitutionality is not likely to characterize a Reagan presidency."

In his rebuttal, Bator noted that during his tenure as governor of California, Reagan appointed judges whose ideological views ranged over a considerable spectrum and who did not comprise a single ideological bloc. Bator also reiterated his argument that history shows that it is extremely difficult to achieve the dire results that Prof. Tribe foresees.

Bator did concede, however, that it "will make a difference" who one votes for in this election in terms of judicial appointments. As Bator saw it, "The issue is not one of legitimacy, but rather what general philosophy we think the Supreme Court should have." Bator noted that, quite clearly, Carter would be likely to appoint more liberal, activist judges, while Reagan would be more likely to appoint conservative, restrained judges.

In conclusion, Bator related his own preference for judges who would be "moderate conservatives" in the "high intellectual tradition" of such justices as Hughes, Frankfurter, Jackson, and Harlan. In any event, Bator contended, one's thoughts on the candidates' probable judicial appointments should not be decisive in terms of one's vote, since foreign policy and economic issues are more important.

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Dershowitz Condemns Censorship

By Gabe Varges

Prof. Alan Dershowitz argued in a panel discussion Oct. 29 that government censorship has no place in a free society, under any guise. Defending his role in the *Deep Throat* pornography case which sparked wide controversy at Harvard last year, Dershowitz asserted that "the criteria for applying the First Amendment can surely not be quality. Bad arguments and bad, even obnoxious, books and films are those which most need protection."

Pornography was the subject of the discussion, sponsored last Wednesday evening by the Harvard George Washington Society. The other panelists were Joseph Sobran, Richard Brookhiser, and Jeffrey Hart, all editors of the *National Review*. Pornography has become a subject of considerable debate among the editors of that nationally-circulated journal of conservative opinion.

A "Dereliction"

Sobran and Brookhiser maintained that pornography is a "dereliction" which at best dehumanizes and demoralizes society. Hart, also a professor of English at Dartmouth, disagreed, arguing that "artistic expression, even at its worst, is of universal interest . . . Pornography is but a mode of . . . erotic art, albeit one of inferior quality."

Brookhiser argued that neither the showing last spring of the movie *Deep Throat* at Quincy House, a Harvard undergraduate dorm, nor

* The movie, after considerable debate among the Quincy House residents, and after a warning by the University that the students would proceed at their own risk, was shown to some 100 people. Another 200 stood outside protesting the showing. The co-chairmen of the Quincy House Film Society were arrested and faced a five-year felony sentence. In return, however, the students filed an action against county officials claiming violation of their First Amendment rights. After a motion to drop the charges had been denied by Judge Arthur

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Dershowitz's subsequent defense of the students who were arrested and charged with "disseminating obscene materials" had a proper place in a community of scholars. Dershowitz responded that, perhaps more than elsewhere, freedom of expression should be exercised and protected in such a community.

"It was probably insensitive to show a movie like *Deep Throat* in a Harvard dormitory, which is essentially a home," said Dershowitz, "but neither the University nor the state should have censored it." The students themselves, according to Dershowitz, should have been left alone to decide the issue.* Brook-

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Prof. Sohn Plans to Leave HLS for U. of Georgia Law

(Continued from Page 1)

now. He explained that the Law School's policy allows professors to teach full-time until they become 70 years old, with an additional allowance of two years of part-time teaching. Sohn feels, however, that it is easier to change one's lifestyle before the seven-decade mark is reached.

Another major consideration for Sohn was the challenge that the new post presents. Apparently accepting the label of "the father of the concept of peace through world law," Sohn stated that because he had "invented it and pioneered it in a way," that it was time for him to move on and not simply "sit on my laurels."

Sohn said that he will miss the students at HLS the most. He feels that his "U.N. classes," classes composed of students from many different countries, were particularly beneficial in helping students understand other points of view, since they could hear those views first-hand. Sohn also pointed out that many of his foreign students who return to their home countries assume positions as ambassadors or as other official representatives in international relations. Through them, Sohn feels that he has an indirect impact on international policy.

Sohn is the first scholar to be named to the Woodruff Chair. The chair was established in March by a one million dollar grant from Ernest Woodruff, the former Coca-Cola magnate. ☞



J.M.

Prof. Louis B. Sohn

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ACLU Attorney Sees Threats to Liberty

By Erich Merrill

"We're witnessing the most concerted attack on our civil liberties and civil rights that we've seen in many years," David Landau, ACLU attorney, told about 50 students on Thursday, Oct. 23. He asserted that national security interests tend to erode important civil liberties. He addressed in particular problems with protection of the intelligence community, with the draft, and with the War Powers Resolution of 1973.

Landau, a graduate of American University Law School, has been staff counsel for the Washington national office of the ACLU since 1977. He is vice-chairperson of a national coalition against the draft, and is currently involved in the case before the Supreme Court which will determine whether registration is unconstitutional because it excludes women.

Landau began his talk by pointing out the problems which arise when national security threats cause the country to back the covert operations of the intelligence community. Before Congress now is the Intelligence Identities Protection Act, which makes it a crime to reveal the identity of any covert agent of the United States. Such a bill blatantly violates First Amendment rights, Landau said. "Many constitutional scholars have already decided this bill is flatly unconstitutional."

He pointed out that in the face of increasing international tensions, Americans all too quickly forget the abuses of the recent past. While five years ago the ACLU proposed charters for the CIA and FBI, which would keep those agencies from carrying out covert operations, today support for such a charter has diminished to such an extent that Congress is on the verge of passing a bill which protects those operations, at the expense of civil rights.

Landau spent most of his time talking about the abuses of a peacetime draft or registration. He quickly outlined the country's his-



David Landau

R.W.

toric dependence on volunteer armies, saying that the American Revolution and the War of 1812 had both been fought without conscription. It was not until after World War II, he said, that America started a peacetime draft.

"When you are at peace, individual rights should be given their highest protection," Landau said. A draft forces people to learn to kill, and if war breaks out, to kill. "To me, that is the ultimate violation of our civil liberties," Landau stated.

A peacetime draft or registration will also chip away at individual rights indirectly, Landau stated, and weaken the system of checks and balances. If registration breeds contempt for the government in peacetime, then the government will probably have to clamp down on anti-government actions. When any government takes such action, infringements of individual rights abound.

He mentioned the ACLU's suit to halt registration on the grounds of sex discrimination. Landau thinks the ACLU has a good chance of winning the suit, and feels that only Justices Renquist and Powell will definitely rule against the ACLU. While on the issue of sex discrimination, the attorney said he was somewhat surprised at the

reaction of women's groups to the registration issue. Most of them did not come out strongly against registration, as Landau had hoped they would.

After discussing briefly the War Powers Resolution of 1973, Landau answered students' questions. A question about ABSCAM seemed to strike a favorite chord with Landau. "Sixty to 75 years ago what happened in ABSCAM would have been considered entrapment." He said the government set up all the elements of the crime, and looked for people who were supposed to have leanings toward corruption. "Those people would never have committed a crime if the FBI hadn't set it up, *never*."

Code Threatens

In response to a question about his feelings toward the proposed criminal code which is before Congress, Landau listed several provisions of the bill which he felt violated civil liberties. He said the "Kennedy bill," which is the current version of the proposed code in the Senate, would abolish parole, allow the government to appeal lenient sentences, and change the bail system to make it much easier to detain suspected criminals until trial.

The last question of the evening was an incredulous "Is the Moral Majority taken seriously in Washington?" Landau's answer was grave. "Very seriously. They give an appearance of a great deal of support," said Landau, although he thinks this appearance is due to the fact that the group is very vocal. He sees the group and others like it as a great threat to civil liberties. Two of the group's goals are to remove the jurisdiction of the Supreme Court from any cases having to do with prayer in schools, and to promote the MX missile. Landau is surprised that a group which espouses religious beliefs also supports the MX. "I don't know what happened to 'Peace on Earth,' but that seems very inconsistent to me."



OPEN LETTER:

To the Michelman Committee and the Law School Community From the Student Advisory Committee (Big Mac)

In the spring of 1978, 332 first year students signed a petition urging the faculty to adopt mandatory pass-fail grading in the first year. To accompany that petition, Aaron Bayer, '80, representing a student group known as the Committee on Grades, submitted to Dean Sacks, Dean Bernardi, and the Committee on Legal Education a concrete proposal detailing his views on how and why the grading system should be changed. Specifically, the Bayer proposal recommended that the categories of Excellent, Good, Low Pass, and Fail be used to grade Torts, Criminal Law, and fall semester practice exams in Contracts and Civil Procedure. Grades in Torts and Criminal Law, under Bayer's proposal, would be recorded as Pass or Fail on the student's transcript.

No formal action was ever taken on the Bayer proposal. Instead, in early 1979, Dean Sacks created your Committee (the Committee on Educational Planning and Development) to "undertake a comprehensive review of the existing educational programs of the School . . . [including all] aspects of the School's activities as [the Committee] thinks those activities significantly affect curricular programs or have an important impact on the educational functioning of the School." Clearly, an examination of the grading system falls directly within this mandate, and as student advisers to your Committee, we feel it is our duty to remind you of the history of deeply felt student concern over the grading issue. Indeed, because of the crucial importance of grading to students, we have chosen grading as the first substantive issue upon which to focus our attention.

We find ourselves in broad agreement with the general principles cited in the Bayer proposal. We agree that the grading system "creates in part or contributes to an overly competitive atmosphere which is not conducive to open-minded intellectual exploration."

Likewise, we would characterize the grading system as imbued with "an element of arbitrariness" both because "examinations can measure only a few of the legal skills important to success as a lawyer" and because "one three-hour examination is an insufficient basis for making the extremely fine distinctions in a nine category grading system." In addition, our particular concern over the grading system arises from our opposition to the role that system plays in perpetuating a hierarchical system within the Law School which we believe runs counter to the long-run social goals which the School should be trying to promote.

Because of our principled dissatisfaction with the current grading system and to help mitigate the negative effects of grading, particularly in the first year, we recommend that the following steps be taken.

1. All first year required courses should be given only on a pass-fail basis. To ensure that students receive necessary feedback, examinations in these courses will be evaluated by professors on the basis of an informal grading system calculated to be more informative than the current formal structure.
2. For the purposes of the transcript, each first-year examination will be graded as follows:
 - a. Satisfactory work shall be graded "pass."
 - b. Unsatisfactory work shall receive no grade, but the student shall be notified that, to maintain a satisfactory academic standing, he or she must take a reexamination in that subject during the second semester. Work which on the present grading scale would have received a "D" or an "F" shall be considered unsatisfactory work for purposes of this paragraph.

- c. If a reexamination results in a performance of "D" or better, the student shall receive a grade of "pass," and the transcript shall not indicate the previous performance. If on the reexamination the student receives an "F," that grade shall be recorded on the transcript.

3. All elective courses (in all three years) should have a student pass-fail option.

Although we recognize that there are other possibilities incorporating the pass-fail concept which we would support as preferable to the present grading system, we believe that our proposal will best further the Law School's educational goals until and unless more sweeping curriculum change occurs. We express no opinion on the desirability of such broader change as this is a topic we will turn to later in the year.

In closing, we would like to invite the members of your Committee to an open meeting of the Law School community at which we will present in detail the reasons for our proposal. We hope that Aaron Bayer will be there to present his views as well. At that meeting we will be glad to answer any questions you may have concerning the specifics of our plan. The meeting will take place on Friday, Nov. 7 at 2:30 p.m. in Langdell North Middle.

We hope you can all attend.



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A Pro Se Plaintiff's Arduous Haul

David Quinto

Editor's note: David Quinto, a senior editor of the RECORD, is on a Rotary Fellowship in Asia this year. He will return to HLS to complete his third year next fall.

"You'd better hire a lawyer. You have an ironclad case and I'd hate to see you blow it," Bill Brown '80, told me last spring.

Having devoted virtually all of my free time this past summer to a *pro se* action against Harcourt Brace Jovanovich's *Legal Times of Washington* subsidiary, I concur in Brown's conclusion, if not his reasoning. True, my foolish client does have an idiotic attorney. But I'm more distressed at having been exposed personally to excruciating pressure, psychological warfare tactics, and the fossilized formalism of our legal system. I cannot imagine how a non law-trained *pro se* litigant can possibly survive in federal court.

At first things seemed simple. The *Legal Times*, without my permission, published verbatim an article I wrote for the *Record*. That is *prima facie* copyright infringement. I wrote to the *Legal Times* to complain and, receiving no reply, phoned them. During that conversation I was told that I was not even entitled to a freelance fee.

Frightened at the prospect of having to go into court by myself and of having to relearn Civ. Pro., I wanted to find a way out of the brouhaha. Then I was told that the *Legal Times* never paid freelance fees for works which it had not commissioned, that it believed that it did not need permission to reprint verbatim articles which it deemed "newsworthy," and that it thought that I shouldn't sue because its other victims hadn't.

Cavalier Treatment

Upset that that particular article had been taken, irritated at being treated in a cavalier fashion, and faced with an outfit that ap-

parently raised lawlessness to a business practice and sought justification in a "many wrongs make a right" defense, I was impelled to file suit.

Friends told me that my complaint was "discursive" but it survived the scrutiny of two HLS profs. I thought I was engaging in "fact pleading." Convinced of the righteousness of my cause and the merit of my case, I failed to realize that virtually every paragraph in the complaint would later be denied simply because my opponents would claim not to have known of some trivial fact or would quarrel with the definition of a word.

I read the District of Columbia local court rules, meticulously prepared a proper cover sheet for the complaint, and trimmed the paper to 13 inch length. I attached to my complaint various discovery requests which sought to prove the willfulness of the infringement and to show that the taking was part of a systematic pattern. I knew that it would be burdensome to respond to the latter.

Mistakenly I believed my work was largely completed. Once *Legal Times'* lawyers looked into the matter, they would realize that their case was hopeless. If they were inclined to fight, the burdensome discovery requests would soon dissuade them.

Immediately things went awry. The clerk of the court rejected my pleadings because I had failed to include a separate cover sheet for each type of discovery request, all of which were stapled to the complaint. Then the U.S. Marshal's office decided that it wanted more money than it had earlier requested to serve the complaint and discovery requests, charging additionally for each type of discovery.

I received notice from the marshal that *Legal Times'* managing editor had been served, but I received back the summonses for the two co-publishers and for the cor-

poration itself! Obviously the marshal should have served the corporation when he served Mr. Beckwith, the managing editor. The co-publishers' summonses bore a notation that the marshal had twice tried to serve them (an exceptionally vigorous effort, I'm told), once when the co-publishers were supposed to be present in *Legal Times'* offices. There was no explanation of the failure to serve the corporation.

No Response

I have yet to receive a response to my letter asking the D.C. Recorder's Office for the name of *Legal Times'* agent for service of process; my 60 or so calls to the Recorder's office went unanswered. As an out-of-state plaintiff, it seemed that the *only* way left to serve the defendants was to find a special process server. They charge \$25.00 per hour and up, plus transportation.

Because I clerked in D.C. last summer, I was able to travel to the jurisdiction to address the problem. There I had a law firm messenger serve Mr. Beckwith for the corporation.

Legal Times immediately moved to quash for insufficiency of service, citing *Moore's* for the proposition that F.R.Civ.P. 4(d)(7) provides for service in the *manner* but not by the *person* allowed by the local rules (the use of the messenger had satisfied D.C. rules). I had not used a U.S. Marshal or a specially appointed process server.

To my dismay, *Wright & Miller* agreed (although it suggested that the rule might be changed soon). I pleaded the equities, arguing that it was not my fault that the marshal violated F.R.Civ.P.4 by failing to serve Beckwith and that it was not fair to so burden a *pro se* litigant, especially in view of the fact

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Drama Society Shining Through a 'Prism'

By Laura Taylor

WAIT — don't bury yourself in those hornbooks just yet! The HLS Drama Society has a pre-Thanksgiving treat in store for you. *Prisms* — *Under Color of Law* will hit the Ropes-Gray Room in Pound Hall next Thursday, Friday, and Saturday (Nov. 13 through 15), at 7:30 and 10:00 p.m. each night.

The revue, the result of six weeks of work by 20 law students and various outside helpers, will feature popular music, original skits,

and a surprise film short. Free popcorn is one drawing card, and beer will be sold.

Musical Director Chuck Allen, 3L, noted that "the *Prisms* title gives kind of a hint" about the theme of the show. "It's kind of a color theme," he added.

Tom Briscoe, 2L, is the producer of this year's fall revue, and Andrea Davis, 3L, is the director. In keeping with the Drama Society's on-going efforts to encourage people from different parts of the University to participate in Drama

Society productions, the "Prism" cast and production staff include people from Harvard College, Lesley College, the Design School, the Divinity School, and the Harvard Business School.

Admission is \$2.00 at the door; no advance tickets will be sold. If this revue is up to the level of the Drama Society's efforts of recent years, it should be well worth the two bucks. And aren't you sick of trying to catch up in Tax?

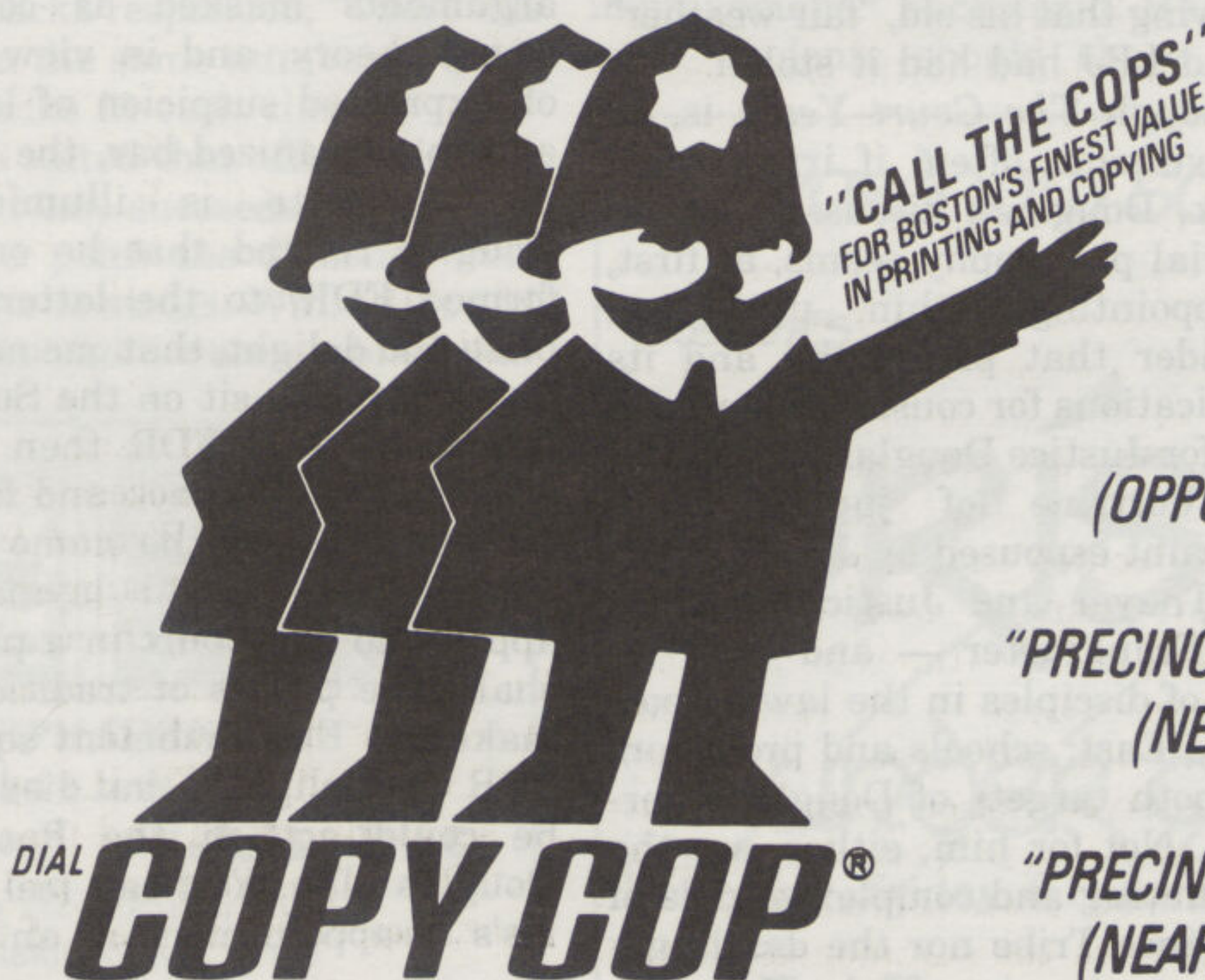
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Justice Douglas's Long Hike

Richard B. Bernstein

William O. Douglas, *The Court Years, 1939-1975: The Autobiography of William O. Douglas*. xi + 434 pp.; 16 pp. of illustrations. Random House, \$16.95.

Reading *The Court Years* is like going on a long hike with William O. Douglas through the lake country of Minnesota or along his beloved C&O Canal, listening attentively as he ranges from affectionate reminiscences and tributes to friends to tough, pointed lectures on constitutional politics (*never* theory); from excoriations of those who disagreed with him and sought to tear him down and disparage his ideals to eloquent statements of his faith in the Bill of Rights and even more eloquent praise for the natural beauty of America. It is a relaxed, anecdotal, meandering book that is not the blockbuster most critics had foreseen nor a probing analysis of constitutional theory and doctrine nor a grand, sweeping autobiography like that of George Kennan. But I don't think Douglas thought of this book as any of those things. Rather, it was his political and environmental testament — his last chance to voice his hopes and fears for "our beloved America."

The Court Years seems to have been published as Douglas left it, with almost no editing. This reverence is unfortunate, as the book is often repetitive and occasionally tedious. I suspect that had he not died in January, Justice Douglas would have tightened and polished the book, excising surplusage, completing those trains of thought that, as they now stand, abruptly trail off, perhaps even taking up the only other book claiming to lay bare the intimate details of the life of the Supreme Court, *The Brethren*. *The Court Years* does confirm

the *Brethren's* accounts of Thomas Corcoran's outrageous attempt to lobby Justices Black and Brennan in the El Paso Natural Gas case, and Chief Justice Burger's tendency to manipulate assignments of opinions and target Warren Court precedents for overruling.

Selective Frankness

The Court Years is selectively outspoken; Douglas is reticent about his private life. He never mentions his wives, for example, nor his children, nor his last painful months on the Court following his stroke in 1974. Douglas does reveal his disgust and contempt for Richard Nixon; his mingled affection, sorrow, and pity for Lyndon Johnson; and his ambivalent, often stormy friendship with Felix Frankfurter, though he takes pains to minimize the friction that their disagreements often produced. He voices his suspicion that the offices and conference room of the Court were often bugged, particularly during the Johnson and Nixon years. He also claims that his first draft of the section of *The Court Years* dealing with Johnson was stolen from his offices in the fall of 1968, implying that his old, "fair-weather" friend LBJ had had it stolen.

Though *The Court Years* is, as I have said, often, if irregularly, frank, Douglas's discussion of his judicial philosophy seems, at first, disappointingly thin, until you consider that philosophy and its implications for constitutional law. Not for Justice Douglas is the careful doctrine of judicial self-restraint espoused by James Bradley Thayer and Justices Holmes and Frankfurter — and their legion of disciples in the law schools of the East; schools and professors are both targets of Douglas's derision. Not for him, either, are the fascinating and complex models of Laurence Tribe nor the dazzlingly intricate theories of John Hart Ely.

Douglas's constitutional theories begin with a remark he says was made to him by then-Chief Justice Charles Evans Hughes: "Justice Douglas, you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." Douglas's theories are not theories at all, but applications of his political values. He believed that "the Constitution is not neutral. It was designed to take the Government off the backs of people." This belief dominates *The Court Years*. He also believed that reading the Constitution and particularly the Bill of Rights strictly, taking the words to mean precisely what they say, no more and no less, is the only way to promote the ideals of the Framers, Jefferson, Lincoln, and Franklin D. Roosevelt — in short, the ideals of American liberalism. He considered quarrels over constitutional interpretation as at least as much political as intellectual. Consequently he had little patience for those of his critics whose attacks on him were purely intellectual.

In view of his distrust of political arguments masked as constitutional theory, and in view of his oft-expressed suspicion of lawyers and the organized bar, the following anecdote is illuminating: Douglas related that he once informed FDR, to the latter's surprise and delight, that one need not be a lawyer to sit on the Supreme Court. He and FDR then tossed dozens of names back and forth in an effort to find the name of "an outstanding, liberal layman" to appoint to the Court in a plan "to shake the pillars of tradition and make the Establishment squirm." FDR was delighted, but died before he could act on the Roosevelt-Douglas plan. You can feel Douglas's disappointment at an oppor-

(Continued on Page 14)

Richard B. Bernstein, HLS '80, was the book review editor of the Harvard Law Record in 1979-80. He is now an associate in a New York law firm.

Demonstrators Seek Affirmative Action

(Continued from Page 1)

world professors on the Law School faculty is at least equal to the percentage of third world people in the nation."

One to Four Blacks

Dean Sacks described how he has seen affirmative action affect HLS over the last 20 years. From about 1962 to 1964, he said, roughly one to four blacks were admitted in each class of 550. "At that time, a decision was made that a special effort to attract, recruit, and admit black students should be made," Sacks said. Since 1972, the level of black students at HLS has ranged from eight to 11 percent, with total minority enrollment ranging from 13 to 16 percent, he said. Women, similarly, in the early '60s made up three to five percent of each class, but their number has "been at or about 30 percent in the last few years," Sacks said.

Later, during the question period, Penny Marshall, 3L, President of BLSA, stated, "We are starting to understand where we stand," an apparent reference to growing perceptions of administrative hostility to affirmative action, felt to be especially borne out by news of the Kiltgaard report (see Record, Oct. 24, p. 10). Marshall noted a steady decrease of black 1Ls over the past four years, to which Sacks responded, "There has not been the same number of qualified blacks in each class."

Sacks stated that affirmative action had not succeeded in faculty hiring, a point the demonstrators had come to stress. While 10 or 11 years ago there were no black fac-

ulty members at HLS, in two months there will be only one. Once there were three, Sacks said, but that "number is now going down because of what people choose to do with their careers." (Prof. Derrick A. Bell will become Dean of the University of Oregon Law School in January.)

Nonetheless, Sacks said, the figure for tenured and tenure track black and women professors was "discouraging; hopefully it will change." The group of black lawyers who could be chosen as HLS faculty is small, "and only growing now," Sacks said. "We do have to look among a qualified group from whom we can employ," he stated.

Much of the criticism of the Law School directed at Sacks concerned what many have characterized as the "old boy network," a faculty dominated by white males that seems to always hire its own. "There's no way you can avoid in [faculty] recruitment your 'old habits,'" Sacks said, but he added, "we are changing the modes of recruitment somewhat. I can't say we do it all the time."

Room for Improvement

"The principal responsibility for affirmative action has to rest on faculty and administration. It depends where you are. From where we are there's plenty of room for improvement," Sacks said. He felt male students should share the

blame for often being insensitive to women's problems at the Law School.

Nancy Wieggers, 3L, stated that the same comments about how the faculty wished it had more women have been made for 10 years. Sacks was challenged on whether women who weren't on *Law Review* could become professors. Sacks said there was "a variety of ways one can get on the faculty," but wouldn't say that *Review* experience would not always carry weight. He said he didn't know why so few women were on the *Review* at HLS (three new 2Ls this year).

Sacks refused to discuss whether Drew Days, an assistant attorney general — and a black, was being considered for a faculty appointment. Days has accepted a post at Yale Law School. "I'm not going to discuss an individual at a public forum," he said, but he later arranged to meet with students next Tuesday. He also urged students to speak with Prof. Richard Stewart, appointments chairman.

Throughout the evening Dr. Randolph urged that universities, Harvard especially, take a more active role in affirmative action. Harvard has been a "cold and isolating place" to minorities, she said, but she hoped that would change. "I'm very excited to hear that the Law School is to become pro-active," she said, responding to Dean Sacks's pledge to recruit more minority students and faculty. ❧



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Cause for Concern

Many Americans interpret Ronald Reagan's victory as good news for the U.S. Surveys taken at polling places indicated that inflation was the chief concern of voters. Reagan's promises of a huge tax cut and of a revitalization of the U.S. economy seems to have won the election for him.

Frankly, we at the RECORD are depressed and frightened by Reagan's victory, the magnitude of the victory, and the capture of the Senate by the Republicans. We are not enthusiastic about the job Carter did with the American economy. The fact is, however, that in focusing on the condition of their pocketbooks, the American people may have sold many other values at a bargain price.

Reagan, in addition to promising economic reform, has vowed to appoint Supreme Court Justices who have "proper respect" for family values and the rights of the unborn; has asserted that America has no energy problem and that therefore the oil companies should be given a free hand in energy affairs; and has declared an intention to dismantle a large number of government social programs. Granted, reform is needed — but the changes that Reagan is proposing may be downright dangerous. His answers are overly simplistic and appeal to many Americans who want to hear that "things are all right."

During the campaign, we at the RECORD, along with millions of other Americans, laughed at Reagan's more radical proposals. "After all," we said, "even if Reagan does get elected (and what right-minded person could vote for him?), the Congress will keep him in line." Well, we were wrong. Not only was Reagan elected, the Senate is now controlled by the Republicans. To make matters worse, some of the Senators elected seem even more right-wing than does Reagan; several were victorious because of the efforts of a group calling itself the "Moral Majority." All of a sudden, a Ronald Reagan presidency looks less like a laughing matter and more like a threat.

Perhaps most to blame for the political situation facing us now are those like ourselves — those who thought Reagan was a joke and that Carter was the lesser of two evils. We saw that Reagan's views posed potential harm to the rights of minorities and women, to the environment, and to other important, non-economic concerns. But we did not act to fight Reagan by telling others that his "attractive" economic policies masked dangerous social views, and by actively supporting and working for Carter during the campaign.

Well, the initial damage is done. In the days to come, however, there will be much to do for those afraid of Reagan's potential. We should all take President Reagan seriously and be vigilant against any attempts to increase the momentum of recent erosions in areas such as civil rights and affirmative action and to rewrite constitutional law through the appointment of Supreme Court Justices with the "correct" views.

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Fenno

Fenno's telephone rang as he scurried frantically around his room, doing a last minute check of his luggage. Fed up with answering calls from obsequious hiring partners, he flipped the button on the small beige box next to the offending instrument.

"Fenno's machine here," the caller was informed. "Make sure you send me two *first-class* plane tickets to your city with a stop over in Tokyo, and arrange to have a case of Dom Perignon sent to my hotel suite upon my arrival. Once I receive the tickets, I'll let you know whether I can fit a visit to your office into my schedule."

Fenno muttered to himself as he went down his by now familiar check list: "suntan oil, skis, sunglasses, hangover pills, beach reading, Hai Karate, *How to Pick Up Associates*, Pepto Bismol, tennis racquet, Fred Perry's . . . Where is my wetsuit? I can't go windsurfing without my wetsuit!!" Startled, Fenno thought: "Wet suit! That reminds me . . ."

Fenno suddenly remembered that he might need a business suit and a tie, but wasn't sure if he'd be able to fit one into his suitcase. He debated whether to pack a copy of his resume. "My naive charm and debonair nonchalance always bowl these turkeys over," he thought. With that, he threw the resume back into the pile of dirty laundry in his closet. "I think I'll pack my Ultra Brite instead."

Looking at his watch, Fenno realized that he had only one hour to catch his plane. Running out the door, Fenno congratulated himself on his flyout break schedule. First, three days of skiing in Switzerland, with the obligatory interview with the chief legal counsel for a major watch manufacturer. ("Yes — I think time is very important for all of us, and its legal implications are simply fascinating." Fenno had been through all this before.)

An early morning flight to Acapulco and an interview on the beach would ensure that Fenno would not lose any tanning time. ("I've always been deeply committed to the struggles of the oppressed peoples of the Northern Hemisphere. Would you — I think I need a little more oil on my left shoulder. Thanks.")

In a scheduling coup Fenno had arranged a few sets of tennis in L.A. with a partner from a smog law firm. That would take up the waiting time before he picked up his Mercedes for the drive along the Pacific Coast Highway to San Francisco, where he planned to examine the intricacies of Telegraph Hill condominium law.

A well-deserved rest in Tahiti before returning to Cambridge would afford Fenno ample opportunity to prepare his expense forms and to compose his very tactful letters of apology. "Why," he thought, "I've never even enrolled in an HLS course. I wouldn't be caught *dead* practicing law. I think I may go into public relations."



Letters to the Editor of the RECORD

RECORD Disparages

To the Editor:

It is regrettable that the RECORD should be so casually disparaging in its account of the performance of the HLS crew in the Head of the Charles Regatta ("HLS Crew Disappoints"; "placed a disappointing 34th out of 35"). Your writer obviously does not realize what a surprising and cheering feat it was to put together a crew which competed and finished in respectable time at all; nobody concerned with rowing at HLS was or should be disappointed by the crew's performance, which was splendid in every way. Our eight oarsmen were out of training; they first rowed together three weeks

before the race; the level of experience in the boat was widely divergent, as were the techniques of the oarsmen who came from many different schools; the crew trained with virtually no coaching at all. In addition, the HLS crew — a latecomer to the sport here — is relegated to the poorest equipment at Harvard; the creaky and heavy shell they rowed cost them at least a minute. Nonetheless, the crew rowed the race with considerable technical elegance and in a very respectable time. Your readers should know that, in a 3 mile race taking almost 20 minutes to row, only about 2 1/2 minutes separated the time of the winning boat (16/20) from that of our crew (18/45). Note also that 20 out of the 40 boats in the race had times over 18 minutes. Under the circumstances the performance was admirable and should evoke the cheerful enthusiasm of the Law School community.

Even more important, your comments wholly miss the spirit in which this entire enterprise was conducted. The point of rowing in the Regatta was not to defeat a lot of other crews. The group interested in rowing in the Law School as an enjoyable recreation thought it would be fun to train on a sufficiently systematic basis to make a respectable showing and to give the entire program credibility in the eyes of the Harvard rowing establishment.

In general it would be wonderful if the RECORD abandoned the lordly and dismissive tone in which it judges the activities of our community, and if it showed some appreciation for the spirit and skill with which many of our ingenious and gifted students pursue an enormous variety of special and demanding interests. The RECORD often complains that HLS is an unhappy place; you contribute substantially to that atmosphere by your tendency to disparage everything that happens here.

Paul M. Bator
Professor of Law
Cambridge, MA

Next RECORD Nov. 14

SPORTS QUIZ

NOTE: This week's Sports Quiz deals with famous streaks and, more specifically, with who stopped them.

1. Joe Dimaggio went 56 games in a row in which he had at least one base hit. Can you name the team who stopped this streak?
2. In its first two games of the 1979-80 season, the Philadelphia Flyers had a win and a loss. Following this normal beginning, the Flyers went a record 34 games without a loss. Can you name the team who ended this unbeaten streak?
3. In 1972, the Miami Dolphins won 17 straight games including the Super Bowl. The next year, the Dolphins won their first three regular season games before finally losing. What team finally beat the Dolphins?
4. During the 1971-72 National Basketball Association season, the Los Angeles Lakers won 33 games in a row, setting a new NBA record. What team finally ended this streak?
5. On Jan. 20, 1968, an arena packed with the largest crowd ever to view a college basketball game saw UCLA's incredible 87-game winning streak come to an end. What school, before 52,693 people, finally managed to beat the Bruins?

(Answers on Page 16)



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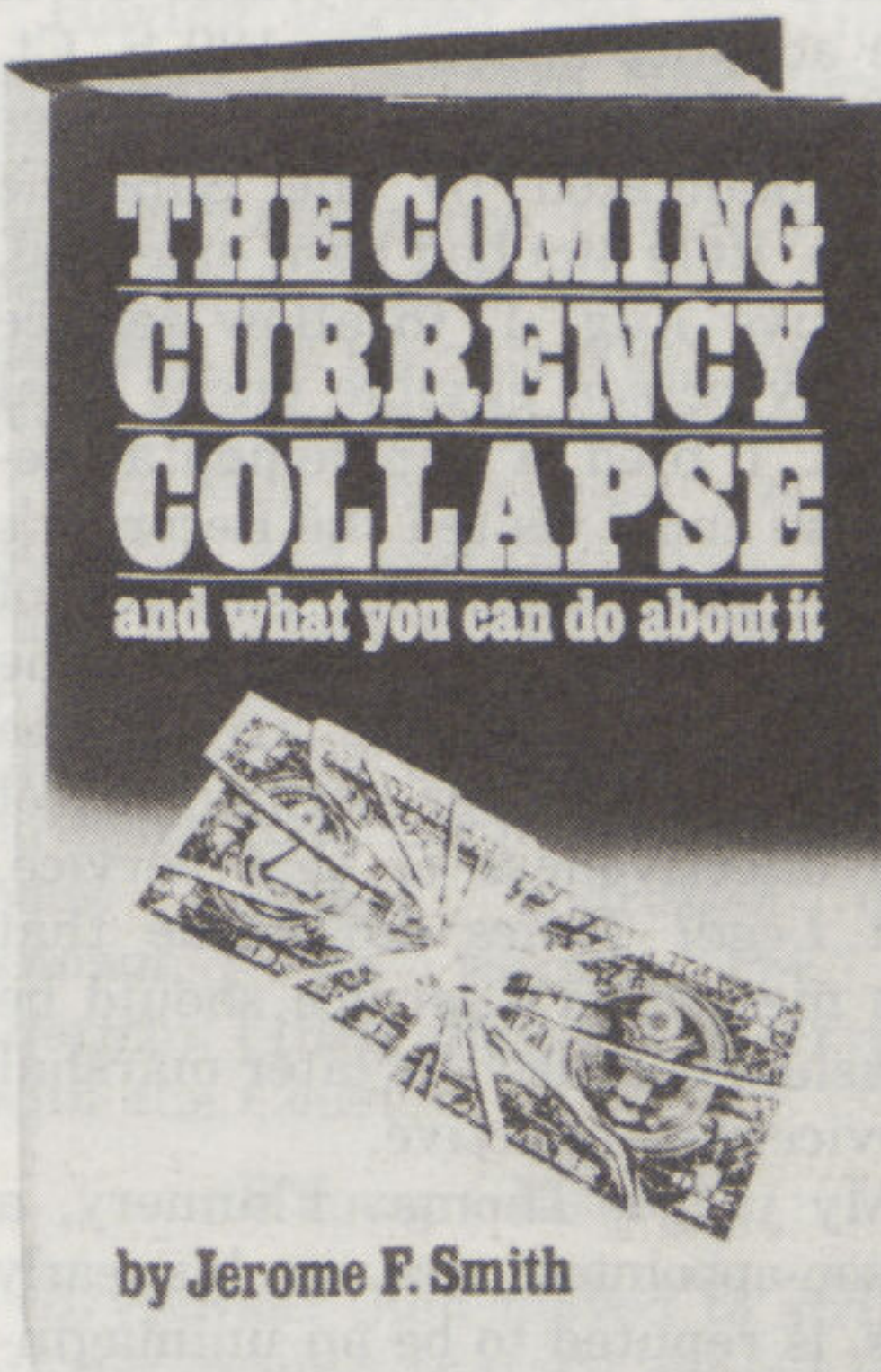
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The Long Haul of a Pro Se Plaintiff

(Continued from Page 6)

that the firm's attorneys had had the complaint for two months.

Then I ran into Evan Slavitt, 3L, at a party. Slavitt was incredulous that I had not read volume 16 of the advance sheets for 100 S. Ct. Reporter, containing rule changes just mandated by the Supreme Court. Rule 4(c) had been amended, effective Aug. 1, to allow service by any *person* eligible under local rules. I filed a supplemental response and I visited the Recorder's office, discovered the identity of the registered agent, and paid the marshal to serve the agent. The marshal has never notified me of the effectiveness of that service, but *Legal Times* did argue that the messenger's service should be quashed because the later marshal service was effective.

My judge, Thomas Flannery, a Nixon-appointee now in his early 60s, is reputed to be an unimaginative judge who hates copyright cases and who feels uncomfortable with *pro se* litigants. A graduate of what is now Catholic University, Flannery has served as a federal prosecutor. He is, however, considered a good judge and many attorneys have told me with admiration that he always reads the pleadings before making a decision (I have the distinct impression that he, not his clerks, decides cases). Nevertheless, I was surprised when he denied *Legal Times'* motion to quash, writing that to grant it would "subvert reason and justice to the barest of technicalities."

I had hoped that Flannery might encourage *Legal Times* to settle rather than allow his time to be used in *Legal Times'* effort to exhaust me. I asked him to compel *Legal Times* to answer my discovery requests. Knowing that Judge Flannery planned to take a vacation in September, it had not occurred to me that he might be on vacation in July also. It was not until mid-August that Flannery acted. It was clear that I would not receive any help from him.

Some of the discovery answers

that Brylawski & Cleary, *Legal Times'* counsel, sent to me were pure nonsense; e.g., it was not the "usual practice" of *Legal Times* not to pay freelance fees for previously published works though it had never paid before; *Legal Times* had attempted to notify me (unsuccessfully) of the taking of my work after I complained to them; and *Legal Times* had never before taken anyone else's copyrightable work without permission, but to list all the instances of that would be burdensome.

Flannery did decide that if *Legal Times* had answered some discovery requests which used the phrase "contribution to a collective work," it could not object to answering others for that reason. On the other hand, Flannery found that my use of "substantial" was "too vague" even though I had provided a precise definition and even though it is part of the statutory test for "fair use" of a copyrighted work. I fault myself for not explaining it more clearly to the Judge. Flannery is still sitting on most of my requests to compel.

Brylawski tried hard to intimidate me from the beginning and has not really abandoned that strategy. After he notified me for a deposition during my Labor Law final, he demanded by phone a 60-day extension to answer my complaint and initial discovery requests in exchange for a stay of the deposition. He seemed unwilling to moderate his demands until I said "26(c) protective order." Then he insisted that Flannery would require me to appear in Washington for an oral argument on it! I stipulated to a 30-day extension of the answer to the complaint in exchange for a postponement of the deposition, something I would not do today.

I did not have counsel at my deposition, but I did wish to have Evan Slavitt present for moral support. Brylawski denied me that luxury. He and an associate, Edwin Komen, took turns questioning me in a library filled with the works that were the subjects of

most of the great copyright cases. I did play into Brylawski's hands somewhat, and I answered too quickly because I did not want to go beyond the full day that the deposition took.

Counterclaim Threatened

During our first phone conversation, Brylawski also broached the possibility of a counterclaim, a suggestion he has not repeated since I threatened to sue him for vexatious litigation. Brylawski also "warned" me that I might be denied admission to the bar on ethical grounds because I had circulated copies of my complaint to the news media. This was the first of several "unclean hands" defenses thrown at me. Even if I were an attorney, this would not have been a violation, since it was a public document and the circulation had not caused excessive and prejudicial publicity.

Over the summer, Brylawski & Cleary sent me letters accusing me of "unprofessional conduct" in refusing to settle, demanding that I enter into a discovery plan, threatening me with protective orders unless I agreed not to talk with third parties about the suit, and demanding that I allow the judge's "good offices" to be used to resolve the dispute. Several times I wrote back stating my willingness to discuss settlement. That ended their letters to me. During our last status call, Flannery agreed to postpone a trial, if one is necessary, until I return from my current fellowship in Hong Kong. Subsequently, Brylawski warned that the clerk might nonetheless schedule the trial to occur while I'm in Asia.

On occasion, Brylawski would casually mention on the phone cases which allegedly stood for propositions damaging to me, such as "statutory damages are never punitive." I never could find his cases and I was not surprised when he never cited them in any of his pleadings. In fact, the best he could

(Continued on Next Page)

Copyright Litigation Staggers to Justice

(Continued from Previous Page)

do was to cite cases which actually said, for example, that statutory damages for innocent (as opposed to ordinary or willful) infringement are not punitive.

At times it seemed as if everyone were trying to harass me. Friedli, Wolff & Pastore, Court Reporters and Stenographers, mailed me a transcript which I never ordered, and enclosed a sizeable bill. I hand-returned the transcript. Back it came, followed by a stream of bills. But the biggest gaffe was Flannery's. On Aug. 30, I received an order to respond to Brylawski's motion for summary judgment and two motions to dismiss (on three grounds) "on or before Sept. 2." Under the Federal Rules, I should have had until Sept. 7 for two and until Sept. 11 for the remaining motion (as it had been served later). Because it was Labor Day weekend, I could not even protest before Sept. 2.

Exhaustion, Depression

I complied and I complained. Not only did the effort exhaust me, but the affair depressed me. At our last status call, Flannery had refused to compel Stephen Glasser, *Legal Times'* co-publisher, to appear for a deposition, even though Glasser had already filed an affidavit in which he stated that he is "often" present in Washington. Furthermore, Flannery refused to compel the Glassers to answer my interrogatories to them within 30 days of my service upon them. This would have allowed me to have their answers before the oral argument on our cross-motions for summary judgment. At that time Flannery had stated that he was not going to go "outside the rules," although he immediately granted the Glassers an *extension* of their answer.

Even though Flannery then allowed me until Sept. 5 to file supplemental responses, I was not taken seriously in that I was both denied discovery and subjected to incredible stress. I could not believe that the judge was being de-

liberately harder on me because he expected me to prevail. He still seemed unacquainted with the case and his new clerks had just started.

You are wondering why I took so long to serve Stephen Glasser? (And even longer to serve Lynn Glasser)? I got caught in the seamless web of the law. First, the U.S. Marshal learned that the Glassers are usually present at *Legal Times'* offices on Mondays, but when he paid a Monday visit, he was told they were not there. That ended his efforts.

Law firm messengers made the next four attempts, phoning ahead first to ascertain when the Glassers would be present. On successive visits one day, the messengers were told that the Glassers were late, that their car had broken down, and that they had decided not to come that day.

Having already learned the hard way that certified mail, return receipt requested, is worthless if the addressee chooses not to sign the return receipt (mailmen do not wait for addressees at offices to sign; instead they pick up any cards waiting for them the following day; similarly, signature at a post office is voluntary), I thought it would

be pointless to try to serve the Glassers by certified mail at their regular offices at Law & Business, Inc. in Manhattan. The U.S. Marshal also seemed worthless because the least effort to evade him is sure to succeed.

Having learned that the Glassers live in northern New Jersey and learning nothing further from directory assistance, I asked a New Jersey law firm to find out their address. 145 Colonia Ave., Garden, New Jersey was the answer.

Out went summonses via U.S. Marshal and certified mail. Back came a receipt signed by "Stephen A. Glasser." I was sure he had fallen for the old hand-addressed envelope ruse. Lynn Glasser's came back stamped "addressee unknown." "He warned her," I thought. I filed affidavits of service with the Court.

Wrong Glasser

Brylawski then moved to strike on the ground that I'd served the wrong Stephen A. Glasser. Attached was an affidavit from the real Stephen A. disavowing any connection to the Colonia address. It was notarized by "Joanne Ivanko" of Queens County, New York.

Thinking it odd that a New Jersey resident working in Manhattan would use a Queens notary, I checked on Ms. Ivanko. The New York Secretary of State and the Queens County Clerk had no record of either her name or her number and she was not listed with the American Society of Notaries Public.

Glasser responded with a new affidavit with a new notary and even Joanne Ivanko contributed an affidavit saying she had no idea she was not listed as a notary.

Even though Stephen Glasser was obviously in touch with what was going on and was aware that I was trying to serve him, the law required that Flannery strike the service.

Following the debacle, friends learned from the New Jersey State Police that the right Stephen A.

(Continued on Page 14)

ATTENTION HBLSA ALUMNI

HBLSA is planning its **Fourth Annual Alumni Conference** and we would very much appreciate your current thoughts on, in hopes of securing your presence at the Conference.

The Conference date is open to your determination from the three following weekends:

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Please address your responses and questions at your earliest convenience to:

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Thank you for your cooperation.

A Pro Se Plaintiff's Arduous Haul

(Continued from Page 13)

Glasser was born in July, 1943, has no tickets on his record, and lives at 86 Highland Ave. in Montclair. The wrong Stephen A. Glasser dropped in at my house in Washington and proved to be a hell of a nice guy. A return visit to the D.C. Recorder's Office also revealed the real Stephen Glasser's address. On my first visit to the Recorder's Office, I had seen nothing relating to the Glassers. This time I asked for everything. Apparently the Glassers could have listed a business address as corporate officers; fortunately for me they had used their home address.

"On my first visit, I had seen nothing. This time, I asked for everything."

This time Stephen Glasser's daughter signed for his certified mail summons and I claimed service on Lynn under F.R.Civ.P. 4 (d) (7) which allowed me to serve in the manner allowed by D.C. rules, which in turn allowed me to serve in the manner allowed by D.C. statute, which allowed me to serve in the manner allowed by New Jersey rules, which allowed me to serve by ordinary mail where service by certified mail was being evaded. Lynn never did sign for her certified mail summons and it was returned to me on Sept. 24 (having been mailed in July). In September, also, the marshal notified me that he had been "unable" to serve the Glassers at the Garden, New

Jersey address.

I wanted to serve the Glassers in part for the sake of completeness, and in part because I had heard from several sources that Law & Business, Inc., which they head, had taken without permission or credit several chapters from a book published by the Young Lawyers Division of the American Bar Association. (The ABA decided not to sue because it was Law & Business's first apparent offense against them and because Law & Business had reputedly not made money as a result of the alleged infringement.) All of this sug-

gested to me that the Glassers might be encouraging the *Legal Times* to commit infringements.

The Glassers did eventually hire separate counsel, a Stephen Trattner, whose name has still not been removed from the name plate at Brylawski & Cleary. The effect, predictably, was to give the Glassers additional time to answer while Trattner "familiarized" himself with the case. The answers proved to be virtual carbon copies of those prepared by Brylawski for *Legal Times* and Beckwith.

Trattner did raise a lack of per-
(Continued on Page 16)

Justice Douglas's Hike

(Continued from Page 8)

tunity lost as he tells the story. The story explains Douglas's often sketchy analysis of constitutional issues, because for him such esoteric analysis was just a device cloaking political reality — the Establishment's struggles to maintain its power over the American people.

Faith and Bitterness

Douglas's book veers between faith in the Constitution, the Bill of Rights, and the American people and bitterness at the repeated and increasingly successful attempts of the Establishment to turn back the victories of the Warren Court. I can't help thinking that Douglas's bitterness was fed by his final illness; by his rejection at the hands of old friends for his dissents against the Red-baiting decisions of the Court in the late 1940s and early 1950s; by Nixon's success in stacking the Court; and by the sight of his beloved wilderness dying and being exploited by corporations and government agencies, a situation to which other government agencies and the public were all too indifferent.

"There was always one comfort at the end," he writes in the last pages of *The Court Years*. "When

I shut the door to my home I seemed to shut out the world . . ." When Douglas dissented from the Court's decision to vacate his stay of execution for the Rosenbergs, "I became temporarily a leper whom people avoided . . . I was dropped from social lists, which did not bother me, as I much preferred to spend winter days in the Potomac Valley looking for wild persimmon trees and their sweet fruit, or conversing with an old barred owl on a cold crisp morning, or walking the old C&O Canal towpath at night in a thickening fog when the Virginia deer were on the move."

Always more comfortable with trees and wildlife than with people, William O. Douglas was the natural heir of the mountain men, of Thoreau and John Muir and John Burroughs, a frontiersman who always seemed a bit out of place in the urban world of law, politics, and courts. With *Go East, Young Man*, published in 1974, Justice Douglas began a classic American autobiography. With all its faults, *The Court Years* is a worthy successor to that earlier book, a monument to a puzzling, idiosyncratic, annoying, yet ultimately a noble and courageous legal and judicial career without parallel in our history.



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Dershowitz Condemns Censorship

(Continued from Page 3)

hiser and Sobran, however, thought that the Harvard case illustrated the need for selective censorship.

"The problem with Prof. Dershowitz's absolutism," complained Sobran, "is that it assumes that if a freedom is good, every excess of it must also be good." He added, "certainly if we can't exercise censorship where it is shown to be useful, then we must at least be able to redress the abuses resulting from what goes uncensored."

Implications for Expression

Prof. Hart took issue, however, with his two colleagues' line of reasoning. He expressed fears that such an approach had wide implications for freedom of expression. "In any case, pornography, as I see it, is mainly masturbatory. I don't think there is any evidence of it destroying communities," said Hart.

"My presumption," Hart concluded, "is that all human experiences, including the erotic, are subject to imaginative treatment. And no one, but the artist himself, should have a right to determine that treatment." ❦

(Continued from Page 3)

Garritty, a settlement was reached between the District Attorney and the defendants. The settlement was the result of the work of Prof. Dershowitz and Jeanne Baker, a

Boston-based attorney who works frequently with Dershowitz. By arguing that the state surely must have more interest in apprehending the distributors of the obscene film than in jailing a few Harvard undergraduates, Dershowitz and Baker led the District Attorney to agree that if the defendants revealed the identity and where-

abouts of the distributor, the charges against the students would be dropped. This was done and the students were set free. The catch? The name of the distributors and their exact address were on the box in which the film came — a box which had been in the possession of the police all along!

❦

Call for Independent Validation of Bar Statistics

In ads and posters published all over the country the Josephson Bar Review Center (BRC) has loudly *challenged* its competitors in the bar review field to agree to a system of independent computation and publication of comparative bar passage rates.

The BRC *challenge*, as they put it, is that each bar review course would agree to submit the names of its enrollees to the law schools or independent professional auditors *before* the bar exams are graded and the results are published. The law school or auditors would then verify graduation and class standing and publish the results so that the performance of each course is revealed in terms of quartile (the same way the law schools compute percentages for their own use).

The BRC proposal for independent validation of bar statistics is not new. In fact, it has been made in writing by BRC since 1974 but the BAR/BRI course has always refused to participate. BRC has escalated its efforts to publicize the issue this year because of what it terms, "an unprecedented number of distortions" in recent years.

According to Michael Devlin, Director of Enrollments for BRC, "Under the present system, bar review courses publish statistics only when it suits them and there is no consistency in the way the percentages are computed. The BAR/BRI courses have, we think, been particularly adept at juggling figures or avoiding them entirely."

Mr. Devlin cites figures used by the BAR/BRI course in Alabama, California, Florida, Hawaii, Minnesota, New York, New Jersey, and Pennsylvania as examples. "Most of their claims are oral and they can't be pinned down, but sometimes they will also publish the most outrageous claims."

When asked for specific examples, Mr. Devlin said: "The very best example I can think of now, because it is so easy to prove, is what they are saying in Alabama. BAR/BRI has never offered an Alabama bar review course though it is planning to do so for the summer 1981 exam. Nevertheless, they sent a letter to Alabama seniors extolling the virtues of the nonexistent course and claimed a passing rate of 95% on the Alabama Bar Exam."

Devlin gave other examples of what he labeled "statistical misconduct." In Massachusetts, Devlin claimed, BAR/BRI ran full

page ads asserting that it was the "largest course in the state," when in fact it had lower enrollments than either BRC or the SMH course. Moreover, "their passing claims just don't jibe." In New Jersey, BAR/BRI tried to blame the low passage rate in recent years on BRC although BRC published and offered to verify statistics showing that BRC students substantially outperformed students using other courses.

"Finally," Devlin admitted, "what they are trying to do in California now is just the last straw." What BAR/BRI is "doing in California" is to run full page ads attacking a statistical study of bar passage rates done by a dean at a major California law school. The study compared the performance of students who took the BRC course with those who took the BAR/BRI course (in California over 95% take one course or the other). It showed that BRC students had a higher passing rate at each level of class standing. The advantage of BRC students ranged from 6% for students graduating in the top half of their class to almost 20% for those graduating in the bottom quarter.

The BAR/BRI ads suggested it was "unprofessional" for BRC to reveal the study and that the figures used by the dean were inaccurate.

Devlin responds that "The whole attack on the dean's study is ridiculous. BAR/BRI promised to provide him with additional figures but they never did. Finally, nine months after the study was sent to us, the dean reaffirmed the accuracy of the report and his personal responsibility for the figures."

"We wouldn't be quibbling about the statistics at one school if BAR/BRI would change its policy of concealment and agree to across-the-board statistical validation. The fact is that we are willing to 'put up or shut up' because we are totally confident in our system and we know it produces better results. If BAR/BRI thought we were wrong, don't you think they would accept the challenge and prove it? Only they know what their figures are and they don't want anyone else to know."

To encourage all courses to agree to independent statistical validation, the BRC proposal urges law schools to require participation in such a program as a condition to allowing the course to solicit students on campus.

[We have asked that this article be run in this paper and we have paid for it as an ad — BRC.]

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The Long Haul of a Pro Se Plaintiff

(Continued from Page 14)

sonal jurisdiction defense, arguing that the D.C. long arm statute could not reach the Glassers. Otherwise his pleadings simply incorporated by reference those filed by Brylawski. One "joint" motion was not even signed by Trattner. Although my opponents might have used the new front to exhaust me, it proved a mistake. By moving for summary judgment, Trattner may have waived the Glassers' right to raise the personal jurisdiction question (Flannery still has to decide this). Certainly the Glassers had nothing to gain by making the same summary judgment motion already made by *Legal Times*.

Undoubtedly, the addition of Mr. Trattner added to *Legal Times*' legal fees (assuming the Glassers are

indemnified). At the oral argument on the cross motions for summary judgment, for instance, *Legal Times* et al. had three attorneys at the defense counsel table, a fourth in the audience, and two secretaries there as well. Presumably the show of force was calculated to intimidate me. Instead, it only increased *Legal Times*' bills.

At this juncture, I am waiting for Flannery to decide the summary judgment motions. If I prevail, there will be a hearing on damages upon my return (even though the statutory damages I am seeking are a matter of the court's discretion, Flannery won't award them on the papers); if both summary judgments motions fail, I shall have to go to trial.

Initially I tried to litigate as Everyman might. I wished to avoid using my legal training and to keep costs to a minimum (the award of costs to the prevailing party in copyright is also discretionary). I did not hire an attorney because I doubted that I could find someone to represent me effectively in a small case where the award of attorney's fees is discretionary.

Time, Money Invested

I was forced to invest \$288 in taking a deposition because I could not get answers to written discov-

ery requests. My costs, not recoverable for a year if at all, now amount to \$628. As the fight became tough, I began to employ my law-training, an advantage that most *pro se* litigants presumably don't enjoy. And, as I had a full-time job, I had to work past midnight night after night making and responding to motions and discovery requests. I am seeking to recover attorney's fees for my time (there is D.C. Circuit precedent for giving *pro se* plaintiffs attorneys fees in FOIA cases). My time investment in a very simple, though hotly contested, case now exceeds 300 hours.

I imagine that *pro se* litigants with family responsibilities are unable to use all their non-working, non-sleeping time to respond to blizzards of motions within the 10 days allowed by the Rules, and might depose and be deposed less well. They might also concede many more tactical advantages in the face of threats and harrassing tactics, make poorer legal arguments, and irritate judges more through clumsiness and unfamiliarity with litigation and court procedure than attorney represented litigants.

There is no easy step on the route from start to finish. Even serving the opposing parties is a major hurdle as both the U.S. Marshal and certified mail can be ineffectual. If a *pro se* litigant wishes to prevail on summary judgment rather than face the difficulty of trying to introduce evidence at trial, he or she must then respond to a myriad of frivolous defenses. If a *pro se* litigant's resolve ever weakens, he or she might agree to a paltry settlement, possibly leaving him- or herself open to a subsequent action, or might simply drop the suit.

I think it is suggestive of the difficulties which *pro se* litigants face that of the half-dozen or so cases I have found where *pro se* copyright litigants asked for attorneys' fees, all were denied on the grounds that the *pro se* litigant was the losing party. ❧

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