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# MOTIONS

University of San Diego School of Law

Volume 39, Issue 3

November 2003

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# HAPPY THANKSGIVING!

## CONTINENTAL CONGRESS THANKSGIVING PROCLAMATION 1782

By the United States Congress assembled.

### PROCLAMATION.

IT being the indispensable duty of all Nations, not only to offer up their supplications to ALMIGHTY GOD, the giver of all good, for his gracious assistance in a time of distress, but also in a solemn and public manner to give him praise for his goodness in general, and especially for great and signal interpositions of his providence in their behalf: Therefore the United States in Congress assembled, taking into their consideration the many instances of divine goodness to these States, in the course of the important conflict in which they have been so long engaged; the present happy and promising state of public affairs; and the events of the war, in the course of the year now drawing to a close; particularly the harmony of the public Councils, which is so necessary to the success of the public cause; the perfect union and good understanding which has hitherto subsisted between them and their Allies, notwithstanding the artful and unwearied attempts of the common enemy to divide them; the success of the arms of the United States, and those of their Allies, and the acknowledgment of their independence by another European power, whose friendship and commerce must be of great and lasting advantage to these States:----- Do hereby recommend to the inhabitants of these States in general, to observe, and request the several States to interpose their authority in appointing and commanding the observation of THURSDAY the twenty-eight day of NOVEMBER next, as a day of solemn THANKSGIVING to GOD for all his mercies: and they do further recommend to all ranks, to testify to their gratitude to GOD for his goodness, by a cheerful obedience of his laws, and by promoting, each in his station, and by his influence, the practice of true and undefiled religion, which is the great foundation of public prosperity and national happiness.

Done in Congress, at Philadelphia, the eleventh day of October, in the year of our LORD one thousand seven hundred and eighty-two, and of our Sovereignty and Independence, the seventh.

JOHN HANSON, President.  
Charles Thomson, Secretary.

## GEORGE WASHINGTON'S THANKSGIVING PROCLAMATION 1789

Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor; and Whereas both Houses of Congress have, by their joint committee, requested me "to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness": Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquility, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

Given under my hand, at the city of New York, the 3d day of October, A.D. 1789.

G. Washington

([www.night.net/thanksgiving/kwash-11.html](http://www.night.net/thanksgiving/kwash-11.html))



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SCHOOL OF LAW

Published Since 1971  
Formerly *The Woolsack*

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MOTIONS welcomes all letters, guest columns, complaints and commentaries. All submissions must be signed and include daytime and evening phone numbers. We do not monetarily compensate contributing writers. We reserve the right to edit for content, length and style.

# The Dean's Corner

November 2003

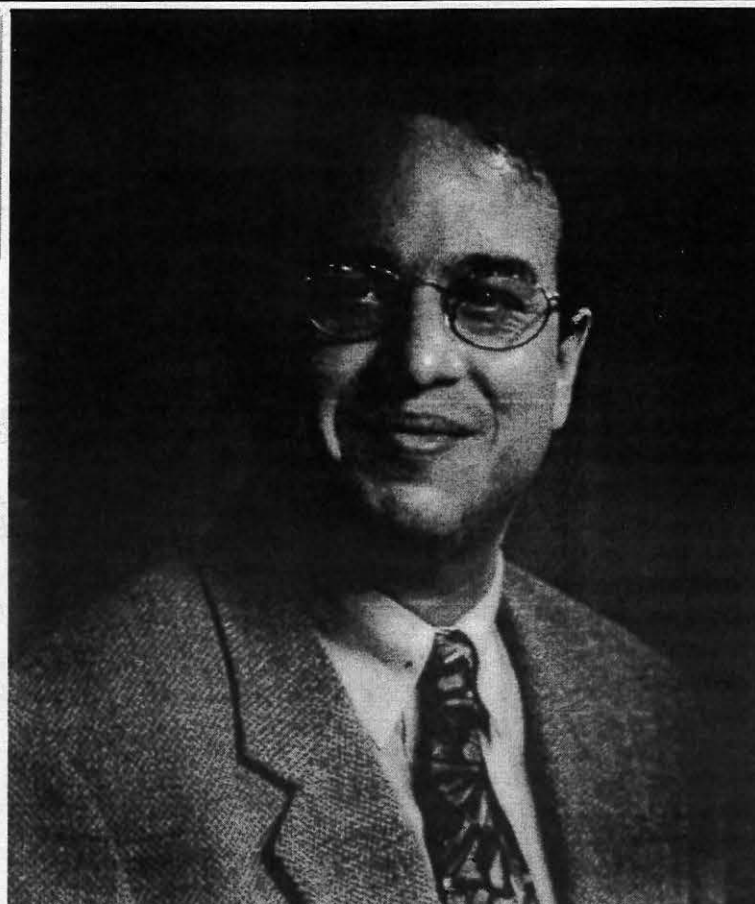
The Honorable Peter W. Bowie, Class of 1971 and Theodore J. Boutrous, Jr., Class of 1987 were named co-recipients of the 2003 Distinguished Alumni Award, the highest honor accorded by the Law Alumni Association. The awards were presented at the Distinguished Alumni Award Luncheon on November 5th at the Wyndham Emerald Plaza Hotel in Downtown San Diego.

**Judge Bowie** has served in the Justice Department in Washington, D.C., and as Assistant and Chief Assistant U.S. Attorney in San Diego. Since 1988, he has served as a United States bankruptcy judge. He currently serves as an advisor to the ABA's Joint Commission to Review the Model Code of Judicial Conduct. His current memberships include: Master, American Inns of Court, Louis M. Welsh Inn; Emeritus Member, Board of Governors, ABTL San Diego; Emeritus Member, Board of Directors, San Diego Bankruptcy Forum; Rotary Club # 33; and Advisory Board, Federal Bar Association. **Theodore J. Boutrous, Jr.**, is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP. He is Co-Chair of the firm's Appellate and Constitutional Law Practice Group and its Media Law Practice Group. Mr. Boutrous has represented clients in appellate courts throughout the nation in a wide spectrum of cases. In recent years, he has obtained damage award reversals or reductions totaling over \$1 billion dollars, including a reversal on behalf of *The Wall Street Journal* of the largest libel verdict in history. *The American Lawyer* recently named Mr. Boutrous one of the "45 under 45" rising stars of the private bar, calling him a "media law star." Mr. Boutrous is the 2002 recipient of the ACLU of Southern California's First Amendment Award.

The School of Law is hosting "*Are the Markets Out of Control?*", a presentation of the MCLE Program Series for San Diego and North County attorneys. Students are welcome to attend **at no charge**, and are asked to RSVP to the Alumni and Development Office at 260-4692. The program will be held on Monday, November 17, 2003 at the Joan B. Kroc Institute for Peace and Justice, from 8:00 a.m. - 9:15 a.m. in the Peace & Justice Theatre. Participants include William Lerach, Partner, Milberg Weiss Bershad Hynes & Lerach LLP; Professor Frank Partnoy, author of *Infectious Greed: How Deceit and Risk Corrupted the Financial Markets*; Michael Devitt, Visiting Professor, USD School of Law and attorney specializing in audit fraud; and Professor C. Hugh Friedman.

The Law School is pleased to welcome JoEllen Kay as the new Associate Director of Development and Director of the Annual Fund for the School of Law. JoEllen brings nearly a decade of fundraising experience to the law school, including seven years at UCSD, first as Program Manager of its successful Chancellor's Associates program and more recently as the Assistant Director of Annual Giving. Before beginning her career in fundraising, JoEllen spent thirteen years in health care administration, working principally for UCSD Medical Center and later for Sharp Healthcare. Her primary focus will be on managing the Law Annual Fund program, class reunion campaigns, and graduation award solicitations, among a host of other fundraising projects and initiatives.

As Mary Lyons awaits her inauguration as USD's new president, a presidential steering committee is hard at work guiding a plan to develop "strategic directions" for USD. This process will look at our university from an institutional perspective: our mission, our distinctiveness and our priorities. During the ensuing months, the steering committee will solicit input from a wide variety of on- and off-campus constituencies.



ety of on- and off-campus constituencies. Students, faculty and staff are encouraged to participate in this valuable process. Please watch for surveys and other correspondence via your USD email address.

A final note. The Southern California wildfires have wrought havoc throughout our community and, of course, have affected many of our students, faculty, alumni and friends. The University of San Diego campus and the law school are working hard to help our community members recover from this personal and financial devastation. As with the terrorist attacks on 9/11/01, the hard impact of this disaster has brought out the generosity and spirit of our law school community. We will continue to work on recovery efforts and will provide whatever humanitarian and legal help that is required to bring San Diego back from this tragedy. Meanwhile, we send out our prayers and good wishes to all who have been affected by this disaster.

And, a note of thanks. The recent passing of Joan Kroc has been noted with much sadness not only in our community which she touched so profoundly, but throughout this country and the rest of the world. The generosity of this remarkable human being and her absolute commitment to the cause of peace has been further witnessed by her bequest of \$50 million to the USD Joan B. Kroc Institute for Peace and Justice. On behalf of the Law School, I join with the University community in offering our thanks and gratitude for a gift that will inure to the benefit of all for decades to come (Ed.—see also below).

As Thanksgiving approaches, I am reminded that, by large gift or small and in a myriad of ways, we all contribute to the special place that our Law School has become. My thanks to all faculty, staff, students, alumni, special friends and other members of the law school community, far and near, and my best wishes for a happy and safe Thanksgiving.

# FROM THE PRESIDENT

Dear Campus Community:

I am grateful to announce that the University of San Diego has received one of the largest gifts ever given to a university for the study of peace. Mrs. Joan B. Kroc, who died on October 12 after a brief illness, bequeathed the University of San Diego an endowment of \$50 million to establish the Joan B. Kroc School of Peace Studies at the Joan B. Kroc Institute for Peace & Justice. Mrs. Kroc also generously bequeathed \$50 million to the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame.

While many of us continue to mourn Mrs. Kroc's passing, she has also given us reason to celebrate. With this enormous gift, the Joan B. Kroc School of Peace Studies will educate and train graduate students in peace and conflict studies, support the addition of professional staff and faculty with recognized expertise in peace studies, and expand the Institute's work in peacemaking and peacebuilding.

Mrs. Kroc was a visionary. She was committed to making this world a better place and believed in the abilities of both the University of San Diego and the University of Notre Dame to make her vision a reality through the educating of students committed to building a more peaceful world. Peace and conflict studies, social justice, and concern for humanity lie at the foundation of our identity as a Catholic institution.

The months ahead promise to be very exciting as our campus community works together to give form to the Joan B. Kroc School of Peace Studies. I look forward to working with Dr. Joyce Neu, Executive Director of the Joan B. Kroc Institute for Peace & Justice, and others committed to Mrs. Kroc's glorious dream.

Mary E. Lyons, Ph.D.  
President, University of San Diego

# PUBLIC INTEREST LAW STUDENTS GO TO WASHINGTON

## CONFERENCE AND CAREER FAIR HELD FOR LAW STUDENTS DRAWN TO PUBLIC INTEREST LAW

### ATTENDEES HEAR FORMER ATTORNEY GENERAL JANET RENO AND FORMER GREEN PARTY CANDIDATE RALPH NADER SPEAK

By Karen Prosek  
Special to Motions

What do Ralph Nader, Janet Reno, over 150 public interest employers and sixteen USD law students have in common? All attended the Equal Justice Works 2003 Career Fair and Conference in Washington D.C. on October 23-24.

Equal Justice Works (EJW) funds law students and lawyers in programs bringing equal justice to millions of low-income persons and families. Equal Justice Works also assists law schools, including USD, to develop Loan Repayment Assistance Programs (LRAPs) to help public interest lawyers repay law school loans. Each year, EJW brings together public-interest minded law students, employers and speakers from around the nation for this two-day conference.

This year USD sent sixteen students to the conference. Students participated in individual interviews, as well as career development and substantive law sessions on both days. Included among the 150 employers were the New York Legal Assistance Group, Georgia Justice Project, Washington Legal Clinic for the Homeless, American Civil Liberties Union, Appalachian Citizens Law Center Inc., National Housing Law Project and the National Association of State PIRGS. As a result, several students have already received summer employment offers!

Panel topics included "The Death Penalty and the Growing Moratorium Movement Around Our County," "The Public Interest Job Search," "Children's Law: Keeping Children Safe," and "Post 9/11 Civil Liberties." Panelists also shared career experiences and provided

advice on the financial challenges and personal rewards of a public interest law career.

Distinguished panelists included Diann Rust-Tierney, Director of the ACLU Capital Punishment Project; Randi Youells, Vice President for Programs at Legal Services Corporation; Laura Murphy, Director of the Washington Office of the ACLU; and Ann Jordan, Director of the Initiative Against Trafficking in Persons at the International Human Rights Law Group.

Students also attended the 2003 Equal Justice Awards dinner. Former U.S. Attorney General Janet Reno was the evening's guest speaker. The outstanding work of public interest leaders, law school deans, law students and public interest student organizations was honored.

Ralph Nader—consumer advocate, lawyer, author, presidential candidate, Green Party leader and the final conference speaker—challenged students with these parting words: "What will be your mark on your law school to increase public interest opportunity?"

At USD, this public interest law opportunity was made possible by Dean Daniel B. Rodriguez, the Center for Public Interest Law, Associate Provost Dr. Don McGraw, USD Public Interest Career Advisor Julie Hoyle and the USD Public Interest Law Foundation (PILF). Conference attendees would like to express their thanks for making this opportunity possible. In return, these students are committed to increasing public interest awareness and opportunities—to making their mark on the USD campus and in their future legal pursuits.

Students were selected by an application process organized by PILF. This organization promotes public interest legal careers as viable career choices for USD students. In addition to public interest career fairs, conferences and speakers, PILF fundraises for USD's LRAP. This spring, PILF will conduct its annual LRAP fundraising drive. In the past, donations from professors, staff and students have raised over \$30,000 to assist USD graduates practicing in the public interest field.

Congratulations to the following students chosen to attend the 2003 Equal Justice Works Conference. 3Ls: Lori Batra, Jack Dailey, Jessica Heldman, Meredith Ruston, Celeste Toy, June Miyagishima. 2Ls: Lori Gaines, Emily Grant, Eric Lazarus, Allison Stanely, Karen Prosek, Taha Gaya, Summer Stech, Jerome Sybold. 1Ls: Hannah Gibson, Erin Blower.

**RECRUITING WRITERS, ILLUSTRATORS AND LEGAL PONTIFICATORS!**  
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**VOLUNTEER!**

San Diego's abused and neglected children need you. There are over 7,500 children in foster care waiting for help. Become a child advocate today. Serve as a Court Appointed Special Advocate (CASA). You'll be glad you did. All training provided. Volunteers research the case, gather information, attend court hearings and lend support to the child. The next information session will be December 2. Call Voices for Children at (858) 569-2019 or visit [www.voices4children.com](http://www.voices4children.com).

**ST. VINCENT DE PAUL'S  
NEEDS YOU!**

Twice a week students head out in a USD van on a 15 minute drive to St. Vincent de Paul/Joan Kroc Center to help serve some 1,000 meals to homeless men, women and children. Trips are made during mid-day "dead hours" (10:50AM to 12:30PM); students return in time for afternoon classes. Please call University Ministry at x4735 or stop by the office in the UC.

# WORLD PEACE AND COURTS: A LINK?

## SOUTH AFRICAN JURIST SPEAKS AT THE KROC PEACE & JUSTICE CENTER AS PART OF ITS DISTINGUISHED LECTURE SERIES

By Damien Schiff  
Editor

Justice Richard J. Goldstone, late of the South African Constitutional Court, spoke on the themes of international law and deadly conflict in a presentation before the packed auditorium of the Joan B. Kroc Institute for Peace and Justice. The lecture, entitled "Preventing Deadly Conflict: The Role of International Law," was given October 15, 2003. The South African jurist was introduced by Dr. Joyce Neu, Director of the Kroc Institute.

Dr. Neu began her remarks by eulogizing the life and philanthropy of Joan Kroc, who had passed away just a few days prior to the lecture. Mrs. Kroc had asked that no public memorials be given for her; consonant with those wishes, Dr. Neu declared that the Institute would in effect memorialize Mrs. Kroc through continued efforts to bring about world peace.

Dr. Neu then rehearsed Justice Goldstone's impressive *curriculum vitae*. The South African served as the first Chief Prosecutor for the UN International Criminal Tribunals for the former Yugoslavia and for Rwanda. From 1994 until 2003, he served as a member of the South African Constitutional Court; and, starting in 2004, he will be a visiting professor at Yale and Fordham law schools. Following the director's remarks, Elena Salsitz, Chief of Protocol for the City of San Diego, presented Justice Goldstone with a small gift, and acknowledged the City's pleasure in having the justice present again in San Diego.

Justice Goldstone gave his lecture in a casual manner, apparently without prepared text save for an outline. The first topic discussed was the United Nations Charter. This document, Justice Goldstone argued, enshrined two concepts that now form the basis of international law: (1) the sovereignty of nations; and (2) the outlawing of military force except when (a) necessary as a last resort to preserve international peace and security; or (b) in legitimate self-defense.

In the fifty years since the UN Charter was signed, the principles contained therein have to a certain degree become obsolete or outmoded, argued the South African jurist. Indeed, much of the progress in international law has come through "piercing the veil of the sanctity of nations," as well as the gradual acceptance of universal jurisdiction in the trying of war criminals, a principle formerly applied only in the case of pirates.

But these criticisms of the UN Charter must be tempered, he argued, by acknowledgement of the progress that has been made in protecting human rights through international law. Justice Goldstone cited the 1984 Torture Convention, through which a Spanish judge had former Chilean President and General Augusto Pinochet arrested while in London for medical treatment, as an example of such progress. It is now more dangerous for these monsters to travel abroad, declared Justice Goldstone. And certainly, "if the United Nations did not exist today, it would have to be invented," such being the present need for an international forum.

Other problems with the UN Charter include its geopolitical obsolescence, in that neither Japan nor Germany is a permanent UN Security Council member; and the "incapacity of the Security Council to get its act together" during international crises. As an example of the UN's ineffectiveness, Justice Goldstone offered NATO's humanitarian intervention in Kosovo. Under international law Justice Goldstone considered the intervention to have been illegal, as it accorded with neither force provision in the UN Charter. That is not to say that the intervention was wrongheaded; rather, it demonstrated the need for updating in international law. A sign of that updating, argued the South African justice, is the emerging concept of humanitarian intervention as an additional legal basis for armed intervention in a sovereign state's internal affairs.

Justice Goldstone offered his own multi-part test for determining the legality of humanitarian intervention. First, there must be a severe violation of human rights on a sustained basis. Second, the intervention's overriding aim must be to protect the innocent. Third, the means used must be commensurate with the ends sought. Fourth, punitive or retaliatory goals must be excluded. Finally, the use of military force must be as a last resort.

Having spent the first half of his talk on general themes, Justice Goldstone moved in the second half to more topical matters, including Iraq. To warm applause Justice Goldstone declared that he was appalled that one justification used for the recent war was the protection of Iraqi human rights; as he saw it, that justification, if it existed in the minds of the Coalition's leaders, was far down the list. He also chastised the U.S. for its anti-terror measures at home because they produced a "knock-on" effect: "evil countries" justify the violation of their citizens' rights by citing recent American "examples," such as the Guantanamo Bay detentions and the authorization of military tribunals. U.S. actions thus permit leaders of "evil countries" to say: if the U.S. does it, so can we.

Justice Goldstone emphasized that he was not equating the U.S. with rogue nations or the Axis of Evil; rather, he simply wished to underscore America's obligation as leader of the free world to set an example for all nations. "I'm optimistic; the pendulum swings." Justice Goldstone also noted that, had he been speaking in Paris or even London about those countries' policies, he would

have had to be much more measured in his choice of words. Ending the formal part of his remarks, Justice Goldstone urged the audience and all American "never to fall for the belief that democracy and rights are a weakness."

Following the justice's lecture, audience members had the opportunity to send written questions to Dr. Neu, who then posed them to Justice Goldstone. First among these was on the new International Criminal Court (ICC), which the U.S. has refused to ratify, a decision Justice Goldstone termed "a tragedy." Justice Goldstone deemed completely groundless the fears of some Americans that the Criminal Court would become an anti-American forum.

Asked about assassination, the justice stated his complete opposition to the practice, regardless of the circumstance.

On the Israeli-Palestinian conflict, he stated that both sides are lacking in credible leadership, which fact precludes any imminent resolution.

As to the U.S. Constitution, Justice Goldstone found its genius to be in its brevity, but he decried those Supreme Court Justices who would look only to original intent and refuse to update the document with the times. Again the justice's remarks were met with warm applause.

Commenting on the lecture, Professor Richard Pugh of USD Law School, who is presently writing a book on the ICC, said, "I thought that Justice Goldstone's talk struck to the heart of U.S. foreign policy under the Bush II Administration. The justice praised the United States for leading the world community in establishing the Nuremberg Tribunal and the UN Criminal Tribunals for the former Yugoslavia and Rwanda, and he lamented the fact that the United States now refuses to support the ICC and indeed is actively attempting to undermine it."

But all was not gloom and doom, according to Professor Pugh, for Justice Goldstone was hopeful that "other voices will be heard . . . and the United States will resume its traditional role in support of the rule of international law and in support of multilateral institutions to which it belongs. I share that hope."

Following the question and answer session a splendid reception was hosted in the Institute's rotunda. For more information on the Institute and its upcoming events, please navigate to its website, <http://peace.sandiego.edu>.

## CORPORATE GOVERNANCE & COMPARATIVE LAW

By J. J. Darby  
Professor of Law Emeritus  
University of San Diego School of Law

Does comparative law have anything useful to contribute to corporate governance? This was the theme of the academic portion of the annual meeting of the American Society of Comparative Law, held on 17 and 18 October 2003 at Stetson University College of Law in Gulfport, Florida. As is well known, the captains of American industry have recently come in for some vigorous, indeed enraged, criticism in the wake of a series of corporate scandals at Enron, Tyco, World Com and other companies that left shareholders with nearly worthless stock, completely trashing the life savings and retirement dreams of hundreds of thousands of middle class workers and investors.

It was, therefore, particularly appropriate for the meeting to focus on how law is being used in foreign countries in an attempt to keep corporate leaders honest. Papers were read and discussed on the legal aspects of corporate governance in China, Korea, United Kingdom and Canada. A round table was devoted to the experience of the European Union. All this occurred against the background of the Sarbanes-Oxley Act of 2002, the accounting oversight board provisions of which seem to some to bring the United States closer to the German-Dutch-Luxembourg board of supervisors model. Corporate leaders in all countries must now manage company business with an unprecedented level of outside scrutiny. Further legislative changes are likely if public confidence in the integrity of our securities market is to be restored and maintained.

USD Law School is a sponsor member of the American Society of Comparative Law, a national organization actively engaged in promoting the comparative study of law and the understanding of foreign legal systems. Professors Joe Darby (Board of Directors) and Laurence Claus (Editorial Board of the *American Journal of Comparative Law*) are the USD Law faculty members who interface with the Society on behalf of the law school.

# WARREN HALL ROOM 3B RENAMED THE "DARRELL D. BRATTON CLASSROOM"

*RECENTLY RETIRED USD LAW PROFESSOR BRATTON HONORED  
BY COLLEAGUES, ADMINISTRATORS, STAFF AND STUDENTS IN  
FACULTY READING ROOM CEREMONY*

By Damien Schiff  
Editor

On October 15, 2003 at a ceremony held in the faculty reading room, Room 3B of Warren Hall was renamed the Darrell D. Bratton Classroom. Professor Bratton, a thirty-seven year veteran of the University of San Diego School of Law faculty and recipient of this signal honor, was present to receive the commemorative plaque from Dean Daniel B. Rodriguez. The ceremony was attended by many longtime law school faculty, staff, administrators and students. The evening began with a prayer by Monsignor Daniel Dillabough, Vice President of Mission and Ministry for the University. Thereafter Dean Rodriguez offered brief remarks, congratulating Professor Bratton on behalf of all assembled and emphasizing the many years of distinguished law teaching that Professor Bratton gave to the University prior to his retirement earlier this year.

Following the Dean's remarks, Professor Bratton strode to the podium to deliver his thanks and gratitude. Professor Bratton stated that his goal had always been to make a "contribution that will have a lasting effect on the lives of students." He acknowledged the many colleagues who had so distinguished the law school in the past, especially the late Professors John Winters and Paul Wohlmuth, and Dean Donald Weckstein. He emphasized that every faculty member was "committed to the welfare of students and the betterment of the law." In closing, Professor Bratton accepted the accolade in the name of all other teachers who have worked so hard, and declared "I share this honor with you."

Professor Bratton has made many dear friends among his colleagues at USD Law. Professor John Minan is among them. "I have been a faculty colleague with Professor Bratton for more than twenty-five years. It is most fitting that a room be

integrity, fairness of attitude and sound judgment. During his career at the law school, he touched the lives of his students, the staff and his colleagues through his unfailing encouragement and gentleness of Christian spirit. His support of the Padres baseball team through its many 'wait-till-next-year' seasons exposed another redeeming personal quality—eternal optimism. His retirement diminishes us and his wise counsel will be missed."

In much the same vein were Professor Jorge Vargas's comments. Professor Vargas is also a long-time colleague and friend of Professor Bratton. "Throughout these years, my respect and admiration for Professor Bratton has grown steadily year after year. Professor Bratton has been a remarkable role model for me to emulate. He

is a renowned expert in the legal areas of his expertise, after having taught certain courses for more than thirty years, such as civil procedure and federal jurisdiction. Seeing him interact with students over the years, I have realized that he is always kind and sincerely interested in helping his students. He is friendly towards his colleagues and ready to share an interesting or amusing anecdote. In many ways Darrell is the living repository of the history and salient memories of our law school. In my opinion, Professor Bratton certainly deserves a very special place in our law school."



Photo by Barry Carlton

Admiration for Professor Bratton is not limited to his colleagues. Ms. Rosemary Getty, Professor Bratton's secretary for nearly two decades, had these words of praise for Professor Bratton. "Darrell has been my professor for over twenty years. In that time I have had the privilege of watching him grow from a very good person

making a gift of his heart to his family, his church, the law school, the prison ministry and so many others, emptying himself of self and thus being filled with God. That transforming union with God, along with his ability to recognize gifts in others, is what attracts me to him. Darrell has become a mirror of God's love for all of us."

The plaques that will be placed on the exterior and interior of the old 3B classroom bear the following inscription:

"Darrell's love of life and service to others are commemorated here by his colleagues and friends. May all who enter the Darrell D. Bratton Classroom be touched by the indomitable spirit, consummate integrity, and unfailing good humor of this gentle and caring man. Dedicated on 15 October 2003."

THE PRO BONO LEGAL ADVOCATES BOARD WOULD LIKE TO THANK EACH AND EVERY ONE OF ITS VOLUNTEERS FOR DONATING TIME AND TALENT IN PROVIDING PRO BONO SERVICES AND SUPPORT TO INDIVIDUALS THROUGHOUT SAN DIEGO COUNTY IN NEED OF ASSISTANCE. THE SELFLESSNESS AND DEDICATION THAT YOU HAVE ALL EXHIBITED THROUGHOUT THE FALL SEMESTER ARE MUCH APPRECIATED.

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Ashley Harber  
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# ADVANCED MEDICAL DIRECTIVES: THE POLITICS OF LIFE AND DEATH

By Nicole Rothstein  
Staff Writer

Most law students are too busy starting their lives—balancing school, work and family—to think about planning for the end. Maybe it's just too morbid. Or, perhaps it just seems too far off. But the fact of the matter is that most of us have family members who are perhaps nearing the end and none of us can predict when sudden illness or emergencies may leave us medically incapacitated and helplessly in the hands of others.

Just take one look at the news making headlines and you see how dangerous it is to leave these life and death decisions up to chance, your family members or even state law. In Florida, the Supreme Court is getting ready to decide the fate of Terri's Law, the Florida legislature's answer to the feuding family members regarding one Terri Schiavo. Schiavo, whose heart temporarily stopped beating in 1990 when she was twenty-six, has been severely brain-damaged and unable to speak for years. Her husband (who is also her legal guardian) has sought to have her feeding tube removed, arguing that his wife made it clear to him that she would never want to live the way she now does.

Schiavo's parents, on the other hand, have been fighting their son-in-law in court for five years, contending their daughter wants to live and that life in any form is worthwhile. After a judge ruled it permissible to remove Schiavo's feeding tube, Schiavo's parents appealed to Florida Governor Jeb Bush and the Florida legislature, which hastily passed Terri's Law, allowing the feeding tube to be reinserted.

Lacking any sort of written instruction from

Schiavo about how she would want to be treated, her husband, her parents, a long succession of judges, the Florida legislature and Governor Bush have all intervened to decide whether she should live or die thirteen years after collapsing in her home.

As illustrated by this case, an advanced medical directive (AMD) is an important document to have at any stage in your life. It provides a guideline for caretakers and medical professionals if you are incapacitated and cannot make your own medical decisions. Without an AMD in place, not only do you risk having a decision made for you that you would not otherwise support, but your family members may be forced to make hard choices that they may never be sure are "right."

An AMD comes in many forms, including living wills and durable powers of attorney (also called health-care proxies).

A living will allows you to put into writing what your preferences are about terminal illness and the use of life-sustaining technology. It allows you to express clearly your desires about the kinds of treatment you do or do not want. Life-prolonging treatments that you may want to cover in a living will include: respirators, kidney dialysis machines, ventilators and tube feeding. However, be aware that a living will *only* covers physical conditions that are considered to be terminal.

A durable power of attorney grants authority to someone you trust to make decisions with a physician regarding your medical care needs and options. The medical power can be used even if a person is not terminally ill but nevertheless unable to make his or her own decisions for some other reason.

Treatments that you may want to cover in a

durable power of attorney include: cardiopulmonary resuscitation, mechanical breathing, artificial feeding through nasal tubes, major elective surgery, kidney dialysis, chemotherapy, invasive diagnostic tests, blood transfusions, pain medications and cremation versus burial. Durable powers of attorney are thus more flexible than living wills and can be applied to more situations.

AMDs can be used in every state in the U.S. A 1991 federal law, the Patient Self-Determination Act, requires that hospitals and nursing homes inform patients that they have the right to fill out an AMD.

Having completed such a document does not necessarily mean that your work is finished, however. It simply is not enough to sign a document or appoint an agent; you have to go out of your way to make sure that it is honored. You need to let everyone know about your decision: spouse, children, doctor and friends. Most hospitals will allow you to keep a copy of your AMD on file with them, which can help ease concern about what will happen to you once you have entered a hospital for treatment.

You should keep in mind, however, that in emergency situations, personnel are trained to react quickly and decisively to save a person's life. Thus, heroic measures may be used when you have directed that they not be. And, once support systems are in place, they may be difficult to remove. Although doctors who revive patients against their will are rarely penalized, lawyers have begun to press "medical battery" claims against hospitals and doctors who do not honor AMDs.

## SCOTT TUROW AND THE DEATH PENALTY: ONE LAWYER'S INTELLECTUAL ODYSSEY

### A BOOK REVIEW

By David S. Moynihan  
Special to Motions

Scott Turow, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* (2003) [165 pp. with appendix and notes].

Oliver Wendell Holmes Jr., in his classic work *The Common Law*, penned an oft-quoted passage in his attempt to give perspective to Anglo-American Jurisprudence:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of the nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

There was a time when few serious students of the law made it by the first year of their matriculation without some reference to Holmes's book. Similarly, but on a lighter vein more suitable to its times and the hyped anxieties of that first year, few students made it by that ordeal without some reference to Scott Turow's *One L*, or at least watched the television series that it inspired. *One L*, published in 1977, chronicled Turow's first year at Harvard Law School from which he was graduated in 1978. The characters he described, fictional only in name, peopled the fascinating if shocking odyssey Turow encountered, replete with humiliations, triumphs and challenges that changed the mind of the student and teacher of creative writing at Stanford. Subsequently, Turow became known as the author of several novels about the disturbing sectors of experience where law and reality intersect—stories such as *Presumed Innocent*, *Burden of Proof*, *Pleading Guilty*, *The Law of Our Fathers*, *Personal Injuries* and *Reversible Errors*.

In *Ultimate Punishment*, Turow returns to non-fiction to set out an account of how his views on the death penalty have evolved, from the "Aquarian Faith" of his school years that automatically rejected the death penalty as barbaric, to his absolute

acceptance of the death penalty as an impassioned prosecutor, and finally to his introspective service on the Illinois Commission that precipitated then-Governor Ryan's wholesale commutation of 167 death row sentences on his last day in office.

Turow's tale also presents a brief history of America and the death penalty, including some judge-made law in and out of the Supreme Court, reflecting Holmes's admonition that experience rather than logic give the law its life. Turow argues that public support for the death penalty has "waxed and waned in the United States throughout our history. A 1966 public opinion poll showed for the first time that a majority of Americans opposed capital punishment." Turow suggests that it was perhaps this "seeming evolution in prevailing standards" that inspired the Supreme Court's 1972 *Furman v. Georgia* decision, in which, in his words, the justices in the majority noted the "utter caprice with which American juries were allowed to decide whether a defendant lived or died. The unsettled Sixties, however, inspired the public and the court into a backlash, when two justices in the majority in *Furman* found the revised bifurcated approach in the new Georgia statute to be constitutional. It was the advent of DNA, and the repeated showing that innocent people had been convicted of violent crimes, that caused in 2003 a polling of 49 percent of Americans opposing the death penalty when informed of the alternative of life imprisonment without the possibility of a parole. The discovery of thirteen innocent defendants on the Illinois death row inspired Governor Ryan's moratorium.

Turow suggests that Governor Ryan's unprecedented pardons not only inspired then-Maryland Governor Parris Glendening to suspend executions for a year (the moratorium was reinstated by his successor, Robert Erlich, and probably, Turow opines, because of the Beltway Sniper killings), but also saw a new willingness on the part of judges to restrict the death penalty. Turow cites the United States Supreme Court decisions that insist upon jury determinations of the death penalty where the defendant elected trial by jury, and the ruling that execution of the retarded was cruel and unusual. The former Supreme Court opinion brought into question the death sentences imposed in nine states.

Although he spends some time discussing Governor Ryan's motives, Turow dwells mostly on his own metamorphosis on the issue from his college days until his time on the Commission. Describing himself as a "Death Penalty Agnostic," he begins his book with his first encounters with capital cases as an Assistant United States

Please see Turow, page 8.

# "Show me the water"

## *A Negotiator's View of the Historic Imperial-San Diego Water Transfer*

*San Diego County Water Authority General Counsel Dan Henschke speaks to Professor John Minan's Water Law Class*

By Damien Schiff  
Editor

One of the great man-made climatological triumphs of the last century was the recreation of Southern California as an oasis. That feat required water and lots of it. To keeping the taps flowing and swimming pools full in the wake of the Interior Secretary's drastic reduction in California's Colorado River allotment was the goal of San Diego County Water Authority (SDCWA) General Counsel Dan Henschke and staff. After years of negotiation with fellow Southern California water districts, an agreement was reached and approved by the State Water Resources Control Board late last year. But many of the legal obstacles were contracted away, so future litigation between different parties remains a possibility.

Mr. Henschke, along with Assistant Counsel Jim Robertus, gave an extended talk on their work in the aforementioned legal wrangle before Professor John Minan's Contemporary Water Law class this October 21, 2003. Mr. Henschke began the discussion by noting that, as a general counsel, he knows a little about everything and a lot about nothing. Notwithstanding his self-deprecation, Mr. Henschke gave a thorough preface in which he outlined the grim facts of water availability in San Diego County, detailed in the graphics (see *Tables One and Two*; figures are approximate). Mr. Henschke underscored that the 2020 numbers reflect a presumed marked increase in the county's water conservation measures (see *Table Three*).

Having established the background, Mr. Henschke gave the floor to his Assistant Counsel and expert on the law of the Colorado River, Jim Robertus. Mr. Robertus began his talk with a review of the 1922 Colorado Compact and the 1928 Boulder Canyon Project Act, both fundaments of the law of the river. In these acts California was assured 4.4 million acre-feet, but for most of the twentieth century California exceeded its allotment. Thirsty California proved an inconvenience to no one until Arizona began to use its full allotment in 1998. The reserve dwindled until 2003, at which point no surplus remained and the Interior Secretary ordered California to reduce its consumption.

As California's accustomed supply was threatened, so too was San Diego's principal source for its water. Thus a new water management plan was required, and SDCWA looked eastward to the Imperial Irrigation District (IID), which oversees water distribution for the Imperial Valley.

IID has a substantial appropriative right from the Colorado River, and in 1998 agreed with SDCWA to transfer 200,000 acre-feet annually for a maximum of seventy-five years to the SDCWA. The Coachella and Metropolitan Water Districts contested, arguing that under California water law IID was forbidden to transfer its water right if so doing would negatively affect junior appropriators along the Colorado.

Presented with a mountain of litigation, SDCWA urged and sought a universal settlement which materialized as the Quantification Settlement Agreement (QSA). Under the QSA, Coachella is assured of water, Metropolitan enjoys a surplus and several other long-simmering disputes are resolved. The QSA was formulated in 1999 but the deal has only just gone through because the fate of the Salton Sea emerged as a potentially deal-defeating issue.

Formed in 1905 by the accidental breach of irrigation canals, the Salton Sea (formerly known as the Salton Sink) became in a matter of years a huge inland freshwater lake. It was expected to evaporate in a few decades, but agricultural run-off provided enough new water for the lake's dimensions to be maintained. As a consequence, however, of its not having any outlets, the Salton Sea is exceptionally salty---in fact 25% more saline than the ocean.

Environmental groups have long sought some comprehensive protection for the Salton Sea. The Sea has become a major stopping point for various birds, including some endangered species, on the Pacific flyway. Environmentalists were concerned that the proposed IID water transfer would reduce agricultural flows into the Salton Sea, thereby hastening its demise. A compromise was reached, approved by the State Board, whereby run-off to the Salton Sea will be maintained at pre-transfer standards for fifteen years. That time period will give the scientists enough opportunity to figure out whether the Sea can be saved in its present form.

In summing up, Mr. Henschke pointed to a number of legal issues that were contractually resolved by the parties to the QSA but not litigated, which might present future grounds for water disputes in California:

(1) Can a federal right to transfer water be frustrated by state water law restrictions?

(2) Who has regulatory authority over Colorado River water once it has been diverted into a state?

eral or state statutes? (Note that, in order for the QSA to go through, the California Endangered Species Act had to be amended to allow for some "take" of certain species).

(4) What socio-economic impact will the QSA have on Imperial County?

(5) What weight should be given to possible growth inducement when considering the propriety of a water transfer?

Reflecting upon the talk, Professor Minan noted that "California now is embarked on a great experiment---approving the largest water transfer in our nation's history. The long-term transfer of water from the farms of the Imperial Irrigation District to the San Diego area is incredibly complex both institutionally and legally," a fact not lost upon Professor Minan's students in the audience. Notwithstanding these potential difficulties, the QSA, according to Mr. Henschke, will provide San Diego County a "soft landing" into the next two decades as local government struggles to provide adequate water to a region once a desert

TABLE ONE		
Water source	% of water supply in 2000	Projected % of water supply in 2020
Metropolitan Water District (in turn from the Colorado River and the State Water Project)	85%	35%
Groundwater	3%	?*
Surface water	11%	11%
Desalination	0%	3%(?)
Imperial Irrigation District	0%	25%
Recycled water	2%	7%

\*Likely increase

TABLE TWO	
Total water use in 2000	Projected total water use in 2020
700,000af*	815,000af

\*One acre-foot equals the amount of water required to cover one acre of land to the depth of one foot.

TABLE THREE	
Acre-feet conserved in 2000	Projected acre-feet conserved in 2020
26,000af	93,000af

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TROY ATKINSON  
SCOTT HAYDEN CALDWELL  
ANNA YUM

TEAM COACH:  
PROFESSOR RICHARD "CORKY" WHARTON

# SPELING ERRORS DETECTED

## LETTER TO THE EDITOR

Dear Editor:

I should like to express my appreciation of your inclusion of the column "Ask Madam Grammar" in this year's Publication of Motions. It is not only timely and appropriate but also entertaining and provocative. I have enjoyed it immensely in each of this term's issues. I had a good laugh at each of the three letters in your October issue.

Yours Sincerely,

Ina Levy

P.S. Of course with a cheer, often comes a sneer. A little more detailed proof-reading before publication would have corrected a few obvious flaws -- such as bottom of Page 3 "girl's" (plural, not possessive); headline Page 8 "Steriods"; and Page 10 "Nnew counsel" and "despite" (capital needed).

Dear Ms. Levy,

Thank you for your compliments. Madam Grammar is most appreciative. As for your trenchant criticisms, I am also grateful and respond *mea culpa*. Madam Grammar has heaped untold animadversions upon me for the many errors in the October issue, not the least of which was the misspelling of the THORSNES Moot Court Competition in the headline on page one. In my defense I can only repeat Pope's line "To err is human, to forgive divine."

The Editor.

## Car Care Corner

### Car Care And Driving Tips For Colder Weather

(NAPS)—Getting ready for colder weather can put car owners on the road to safer driving.

"Prepare your vehicle for the inclement weather that you know is coming soon," said Andy Cella, technical education manager for the Northeast zone of BFS Retail and Commercial Operations, LLC (BFRCL). Your best bet is to have the whole vehicle checked by a professional and serviced according to the recommendations in your owner's manual. Doing it now sure beats needing a road service on a cold night."

Wet fall weather can create hazardous driving conditions. Your tires often determine how well you will be able to stop, go or turn and it's important to remember these precautions when driving in wet or snowy conditions:

- If you want a tire that will perform better in rain, select tires enhanced for wet weather driving and traction.

- Maintain your tires for better traction when the roads are slick. This includes proper rotation, inflation, alignment and replacement. Have your tires inspected twice a year by a professional.

- Be prepared for longer stopping distances on wet pavement. Slow down in wet weather to improve traction.

- Try to avoid abrupt movements when braking, accelerating or turning.

- Be cautious of wet leaves: they can be extremely slippery.

**Safety Tip:** If you feel your vehicle start to hydroplane, gently take your foot off the accelerator and try to regain road feel. Do not abruptly press on the brake pedal or you could lose control of your automobile.

While winter tires reduce the danger of driving through rough conditions, the following tips may increase your safety.

#### Car Care Check List When To Check

<b>Weekly</b>	Antifreeze
<b>Monthly</b>	Belts, Brake fluid, Hoses, Power steering fluid, Tires, Transmission fluid
<b>Every two months</b>	Air filter
<b>Every three months or 3,000 miles</b>	Change oil
<b>At every oil change</b>	Battery
<b>Every other fuel fill-up</b>	Engine oil, Washer fluid
<b>Replace when out</b>	Lights
<b>Replace when worn or leaking</b>	Shock absorbers
<b>Yearly</b>	Exhaust, Wiper blades

- All four tires should be season mud & snow tires.

- Reduce your speed during adverse driving conditions.

- Under-inflation in winter lessens a tire's gripping action because the tread will not meet the road surface as it is designed to do. This also occurs with over-inflation. Check tires once a month with an accurate pressure gauge when the car has been sitting for at least three hours or driven for less than a mile at moderate speed.

**Safety Tip:** Stock your car with a traction mat, a shovel, a bag of sand or kitty litter, flares, blankets, water, flashlight, canned food, a cell phone and reflective Help sign. Keep your gas tank at least half full during the winter.

To learn more about seasonal driving tips and maintenance, visit [www.MasterCareUSA.com](http://www.MasterCareUSA.com).

## Turow, from page 6.

Attorney in Chicago from 1978 until 1986. A colleague became involved in what appeared to be a federal kidnapping but evolved into a murder case; his colleague was kept on the case by the state as a Special Assistant Prosecutor because he had become steeped in the investigation. Turow spent hours listening to the details of the murder victim's horrid last night, through her escape after rape only to be returned to her assailant's grip when neighbors were convinced that she was merely drunk and hysterical. When the perpetrator was executed for his crimes, Turow "relished the victory" of his colleagues. He abandoned his Aquarian shibboleths.

His next direct encounter with capital prosecutions arose in 1991, when as a private attorney in a large national firm he was asked to take up the *pro bono* appeal of a murder conviction. The crime was so brutal and merciless that the local press dubbed it "The Case that Broke Chicago's Heart." When Turow was approached by the defendant's trial attorneys, the case had been through one appeal and a second conviction. The trial attorneys said the defendant was innocent; Turow was incredulous. After reading the transcripts, Turow was convinced: he wrote "I had to take the case or stop calling myself a lawyer." Shortly after the first conviction, a newly arrested man confessed to several crimes, including the one for which Turow's client was retried and re-convicted. No one informed the trial attorneys that another man was willing to plead guilty and exonerate their client. Turow won the man a third trial, but only after he was acquitted at trial did the prosecutors relent—even after DNA evidence excluded him. It was now 1994, and Turow was again changing his mind.

Governor Ryan posed one essential question to his Commission, which was composed of prosecutors and defense attorneys as well as various distinguished citizens, and chaired by former Senator Paul Simon. "What reforms if any, would make application of the death penalty in Illinois fair, just and accurate?" There were considerations of the survivors of the crimes, the "Victims" who in recent history have played an increasing role in the determination of the appropriate sentence. Turow concluded that "capital punishment defines too much about our society and us as its citizens for us to condemn defendants to death solely for the sake of victims whose loss may never be fully erased." He sought a justification for the death penalty that benefited all of us in society.

In attempting to measure the deterrence that capital punishment might afford, Turow turned to mathematical proofs, and found none on either side. He wrote that statistics and comparisons of death penalty versus non-death penalty states were inevitably subject to dispute. States that had no death penalty had low murder rates to start. When murder rates began dropping in 1993, a more rapid drop could be expected in these jurisdictions. Turow found ways to argue statistics for either side. He noted that New York reenacted its death penalty in 1995 after the number of murders had declined. New York's rate has remained low as compared to other states. Proponents usually find the clearest deterrent effect from executions, and there is yet to be one in New York. Like Holmes, abandoning his search for the law in the corollaries of mathematics, Turow concluded two years into the search that he was not going to find any definitive answers to the value of capital punishment in the realm of social science.

Eschewing philosophical debates, Turow and the Commission turned instead to what he termed the argument for "moral proportion." "Sometimes a crime is so horrible that killing its perpetrator is the only correct response." "[O]ur adherence to the death penalty not because it provides provable tangible benefits like deterrence, but rather from our belief that capital punishment makes an unequivocal moral statement."

Yet Turow was also troubled by the moral paradox of how the death penalty is carried out. He concluded that by combining the factors of race, gender, geography, who the lawyers and jurors are, and the "sheer serendipity of circumstances, one sees anything but the kind of bright-line proportionate morality the death penalty is intended to symbolize."

Returning again in the late 1990s to another *pro bono* case, Turow had the opportunity of visiting the issue of "redemption." He brings the reader through the arguments he made at the re-sentencing of the client he redeemed from the death penalty—a re-sentencing he dreaded because of the client's past tirades in and out of court. When the judge at the change-of-plea hearing invited the defendant's comments, Turow was shocked to witness a turnaround in which the client apologized, regretted he could not restore his victim to life and offered to meet with the survivors to answer questions about his victim's last moments. The veteran prosecutor approached Turow when it was over and stated "That's about as close as you get to a Hallmark moment in this kind of thing."

One last issue plagued Turow. What about when they murder again? For an answer he sought out the most egregious case in the most "solitary confinement" custody in Illinois. His candidate was "Illinois' poster child for the death penalty." Turow likened the man to Hannibal Lecter—"a veritable killing machine." In 1973, the perpetrator and three partners forced several cars off of an interstate highway that runs south of Chicago. Turow does not spare the reader the gory details of two of the ensuing roadside executions. The trial for these killings fell within the *Furman* death penalty moratorium, and so the perpetrator was given a sentence of 1000 to 3000 years. Seven months after the sentencing, the perpetrator stabbed a fellow inmate repeatedly after overcoming a guard with a homemade knife. At his sentencing hearing, after the moratorium had been lifted, proof of another senseless, barbaric murder was elicited. After his death sentence was imposed, the perpetrator continued his disciplinary rampage, accruing over 250 tickets, including stab-bings and brutal assaults.

This perpetrator was housed in a closed maximum security facility, where the worst 250 of Illinois 45,000 inmates are kept. The prisoners are held for twenty-three hours a day in a seven by twelve foot block of preformed

# FINALS "SCHMINALS": HOW TO COPE WITH EXAMS

By Nicole Rothstein  
Staff Writer

Ah . . . there is nothing else like quite like it in the world—law school finals. And by the palpable tension practically hanging in the air, you can tell that they are almost upon us. I don't mention this to put you in a state of panic (for the small portion of the student body that has somehow managed to avoid panic thus far) but to offer small words of advice . . . nay words of encouragement and support in this final hour.

For those of you who are first years, this will be an experience like no other . . . get ready for the ride of your life (emotionally as well as physically). For those of you who are second years, you have had your taste of the law school final and, while still a little nervous, can cram your way through it if need be. And finally, for those of you who are third years, you have by this time mastered the art of the law school final . . . or at least are so ready to get out of school that you don't generally even bother to sweat it anymore.

The most intriguing thing about the law school final is that it's not really the finals themselves, but the pre-final period that seems to stress everyone out. There are several ways to handle the stress of preparation and studying for a final of this nature (I should add a disclaimer here that I do not have all the answers and I don't pretend to know THE way to prepare for finals. This is just information that I have found helpful, gleaned from more than a few semesters in the pits).

Here are some constructive ways of coping with finals (a.k.a. things you should be doing):

1. Go to class . . . even if you have fallen behind in the reading. Just work on weaving that day's lessons in with your own "catch-up" reading, and outlining. You never know what your professor is going to say when you are not there.
2. Study with people you like (this doesn't have to be structured and is often more of a de-stresser if it is not . . . just get the information out there and discuss it).
3. Do collect previous exams made available by your professors, especially those with answers.
4. Take practice exams.
5. Do look to Hornbooks and Nutshells for any gray areas of confusion that you identify by taking practice exams.
6. Talk to trusted upper-division students who can give you tips on what specific professors expect.
8. Take your mind off work every so often by doing something frivolous (like call your parents and tell them that you are alive and well).
9. Get as much rest as you can.
10. Do things to de-stress: baths, walks, etc.

Here are the things you probably will do, but should try to contain (lest your weakened system become a prime target for the flu bug):

1. Yell at, scream at, and/or ignore loved one(s).
2. Consume excessive amounts of caffeine.
3. Pull all-nighters.
4. Blast through the last exam with a "who cares" attitude.
5. Work on outlines until the last minute.
6. Panic.
7. Procrastinate by making lists or cleaning your room for the twelfth time, unless that is your vacuous activity of choice (see above).

The truth is, in the end, there is not a formula for succeeding at finals that will fit everyone. You will hear plenty of advice from people besides me (especially if you are a first year), some good and some bad. It's usually best to take what you can, smile politely and instantly purge the rest to make room for . . . you guessed it . . . more law. The best advice I ever got was to do what worked for me in the past, as it had obviously contributed to my successful admission into law school in the first place, and then just crank it up a notch. Don't waste time "trying out" other strategies that may or may not slow you down . . . the law school final is not a puzzle to be put together or a riddle to be solved.

## INGENIOUS IDEAS

### In The Beginning, There Was The Pencil

*Then paper clips. Liquid paper. Sticky notes. But what's next?*

(NAPS)—Offices across the nation are chock full of innovations that help to make our work lives easier, and sometimes even a little more fun. Take a look around your desk and you're sure to find paper clips, scissors, Post-it® Notes and a variety of other office essentials that were once just ideas ready to burst forth from an inventive mind.

Ever wonder how that stapler on your desk or perhaps scissors came to be? Ever hear of a new product and think to yourself, "Why didn't I think of that?"

*To whom or to what do we owe thanks for making our daily work lives easier?*

In 1494 a sword maker in Toledo, Spain, Juan-Miguel di Sizore, invented the scissors, but only by accident when he mistakenly riveted two swords together.

Johan Vaaler, a Norwegian inventor who held a degree in electronics, science and mathematics, patented the paper clip in Germany in 1899.

Although there is some question of exactly who invented the stapler, it is known that the word "stapler" became commonly used in 1909. By the late 1930s, Swingline revolutionized stapling by creating a stapler that held an entire strip of staples.

*Why didn't you think of that?*

So you didn't invent scissors, the stapler or Post-it® Notes. Have you ever had a great idea for a new product, but not know where



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## Turow, from page 8.

concrete, with a forty-two by eighteen inch window segmented by a steel bar. The cell contains a stainless steel toilet bowl and a sink with a concrete slab over which a foam cushion is laid. The door is plate steel perforated for conversation but with holes too small for any hands. Once a day for one hour the prisoners are, one by one, allowed into a twelve by twenty eight feet, half-covered, surrounded by a thirteen foot wall. Showers are permitted several times a week on a similar basis.

Turow wanted to know whether this prison would keep this prisoner from ever killing again. The warden believed that the design of the facility and the technology permitted the staff to subdue the perpetrator even in the event of the unforeseen, but the warden would offer no guarantees.

Having examined every substantial argument for and against the death penalty, Turow and the Commission made their report to the Governor. Perceiving that the reforms called for in the report were not being adopted by the legislator, Governor Ryan did what he thought was the only thing to do. On the last day of his term as governor, he pardoned all 167 persons on Illinois' death row.

Still a "Death Penalty Agnostic," Turow recommended to the Governor that the death penalty be abolished.

There will always be cases that cry out to me for ultimate punishment. That is not the true issue. The pivotal question instead is whether a system of justice can be constructed that reaches only the rare, right cases, without also occasionally condemning the innocent or the undeserving . . . Thus, for me . . . the question is which mistake I prefer to see made by this system that has long symbolized our instincts as a nation.

Scott Turow appeared at the UCSD Revelle Forum October 17, 2003. He reiterated his view that because the death penalty will always remain flawed, it will never serve the moral purpose that American people want of it.

FROM THE EDITOR--Continuing our look back into the law school's past during its fiftieth anniversary year, MOTIONS reprints this issue the article from 1998 announcing the selection of Daniel Rodriguez as Dean.

4 MOTIONS

APRIL 1998

# New Law School Dean Selected

Daniel B. Rodriguez has been chosen Dean of the University of San Diego School of Law effective July 1, 1998.

Rodriguez, 35, is a professor of law at Boalt Hall School of Law, University of California, Berkeley. He served as acting professor of law at Boalt from 1988 until 1994, when he was promoted to full professor with tenure. He has taught Administrative Law, State and Local Government Law, Constitutional Law and Legislation.

Rodriguez has been a Visiting Professor at the McGeorge School of Law-Government Affairs Program (1995), a Visiting Scholar at the Hoover Institution, Stanford University (1993), a John M. Olin Fellow in Law and Economics at the University of Virginia School of



Daniel B. Rodriguez Law (1993) and a Visiting Professor, Free University of Amsterdam, The Netherlands (1991 & 1992).

"Dean Rodriguez is a distinguished scholar and educator who will provide outstanding leadership to the School of Law," said Dr. Frank Lazarus, USD Vice President and Provost. "He

has outlined an exciting agenda for excellence, and he will support wholeheartedly the efforts of the Bar to enhance the status of the legal profession in Southern California."

"I am absolutely delighted to be joining a law school with a fine reputation at a university with high standards and values" said Rodriguez, "The USD School of Law is highly regarded throughout the country, and I am convinced that the best is yet to come."

Rodriguez earned his J.D. cum laude in 1987 at Harvard Law School, where he was Supreme Court Editor of the Harvard Law Review. He served as judicial law clerk for The Honorable Alex Kozinski, U.S. Court of Appeals, Ninth Circuit (1987-88).

He also is an alumnus of California State University,

Long Beach, where he earned the highest honors as outstanding graduate in the School of Social and Behavioral Sciences in 1984.

Rodriguez, a member of the American Law Institute, was honored by the Western Political Science Association in 1990 with its Pi Sigma Alpha Award. He has appeared as a television and radio commentator on various legal topics on such programs as PBS's "The MacNeil-Lehrer News Hour."

He has made important contributions to work in the field of public choice theory and the positive political analysis of legal institutions. His research has been presented to top U.S. law schools and universities, including Harvard, Yale, Stanford and Georgetown, and abroad at universities in Japan, the Netherlands, Germany and Australia.

## CASES AND CONTROVERSIES

By the Editor

"Aristocracy is not an institution: aristocracy is a sin; generally a very venial one. It is merely the drift or slide of men into a sort of natural pomposity and praise of the powerful, which is the most easy and obvious affair in the world." G.K. Chesterton, *ORTHODOXY* 222 (1918).

We in the United States generally do not take kindly to the aristocracy of blood, nor to the regime of titles and honorifics that normally goes hand in hand with it. Indeed, this natural American repugnance to familial aristocracy is even enshrined in our Constitution: Article I, section 8, clause 8 forbids the U.S. to grant titles of nobility; Article I, section 10, clause 1 establishes the same prohibition against the states. In the early days of the Republic, the pull of the old system was strong enough that some persons seriously considered calling the President "Your Elected Highness." That ungainly title was defeated by "Mr. President"; and though the latter may be significantly more prosaic than the former, "Mr. President" proved to be more consonant with the nature of the post (notwithstanding the emergence of the modern-day imperial presidency).

In England there is no repugnance to titles; indeed, quite the opposite. Our friends across the Atlantic revel in various distinguished monikers, such as duke and earl, viscount and marquis, baron and sir. All these names, to one degree or another, have their origin in English feudalism; the modern English have retained them because they have been drained of all their natural power. Titles now represent at best only an acknowledgement of some personal achievement, even if that achievement be so slight as having been born into the right family.

Yet the American dislike of titles is not ruthless; that is to say, we on this side of the Pond make a place for them. We permit the occasional title, but the exception to the general proscription is based upon the Jeffersonian principle of an aristocracy of merit. For example, we address a medical doctor with the title "Dr." because he heals our wounds; we address a judge as "Your Honor" because he gives us justice; we refer to bishops as "Excellencies" because they shepherd the flock; and we used to refer to Supreme Court Justices as "Mr. Justice So and So" because, as final expositors of the Constitution, they occupy a position of capital importance (the use of "Mr. Justice So and So" changed, I believe, once Sandra Day O'Connor was elevated; but I see nothing wrong with the phrase "Madam Justice So and So"; and neither does Madam Grammar).

Now, more to the point of this article, does America accord lawyers (those who are not judges) any special title of respect? You will say, "Certainly, it is Esquire." That is in theory correct; but practice belies the theory. The trend presently is away from esquire, and even away from its abbreviation "esq." usually found at the end of the name. Certainly no one addresses a lawyer, "Good morning, Squire." But is not the lawyer an accomplished professional? Is he any less distinguished than an M.D., a D.D.S., a D.V.M. or a Ph.D.? I should think not, and yet the practice is well settled that one always refers to a medical or dental or even (I suppose) a veterinary doctor as "Doctor." Thus we have the anomaly: the people will honor with a title the man who

pulls their teeth or sets their bones or heals their sick hamster; but they will not honor the man who, by dint of skill and mental acuity, is able to keep their doctors in business by defeating malpractice suits. So it is "Good morning, Doctor" to the man who gives you fluoride; but it is only "Mister" to the man who sued that dentist of yours who pulled the wrong tooth.

Perhaps the reluctance by the public to afford lawyers an honorific is because the title that has been given them---esquire---smacks too much of the old-style aristocracy. The Oxford English Dictionary gives the following definition for esquire: "(3) As a title accompanying a man's name. Originally applied to those who were 'esquires' in [that they ranked immediately below a knight]; subsequently extended to other persons to whom an equivalent degree of rank or status is by courtesy allowed. . . The designation of 'esquire' is now commonly understood to be due by courtesy to all persons (not in clerical orders or having any higher title of rank) who are regarded as 'gentlemen' by birth, position, or education. . . In the U.S. the title belongs officially to lawyers and public officers." Thus the highest authorities on these matters---the English---consider the present use of the word "esquire" to be entirely devoid of any aristocratic significance in the traditional sense; in fact, it is used interchangeably with "Mister." In the U.S., the OED concludes that lawyers hold "esquire" by virtue of their professional accomplishments, in the same way that the M.D. or D.D.S. carries his title.

It may well be asking too much of the American people to have them address lawyers as "esquire." Possibly the word "esquire" simply grates on American ears. In that case, why not call lawyers "Doctors"? After all, the degree awarded a lawyer is a *juris doctor*, a doctor of law. How is that degree meaningfully different from a *medicinae doctor* (M.D.), *dentium doctor scientiae* (D.D.S.), or a *philosophiae doctor* (Ph.D.)? True it is that the lawyer need not write a thesis to obtain his degree, but neither need the medical doctor or dentist.

At the root of the public's snub of lawyers in the way of titles, I believe, is the "de-professionalization" of the bar. The lawyer is no longer considered a member of a learned profession; he is now treated as nothing more than a learned legal technician. Yes, you admit, so it is; but cannot the same be said of the modern-day HMO practitioner? Maybe. Nonetheless, the people do not wish to acknowledge that their doctors may be medical pencil-pushers and prescription dispensers; they have no qualm with treating their lawyers as exalted notaries.

If the honorific "esquire" is outmoded, so be it; but surely "esquire" cannot be outmoded while "doctor" remains so much in vogue. Besides, I think all lawyers would very much enjoy being called "esquire" (or for lady attorneys, "esqu Coast"). Just think of the fun. For example, "Good morning, Esquire Tom. Do you have that set of interrogatories ready yet?" Or "Your honor, Esqu Coast Jane requests permission to approach the bench." The title is chivalrous; it is hallowed; and it is genteel. In short, it captures in two syllables the very pinnacle of that old ideal which practically formed the human foundation of our American Republic: I mean the gentleman lawyer. Chesterton may have been right to conclude that the "great and very obvious merit of the English aristocracy is that nobody could possibly take it seriously." (*Id.* at 226). The same cannot---must not---be said of "esquire."

## COFFEE

### Facts & Fancies

#### Italian-Style Espresso

(NAPS)—Espresso was not always brewed in pump-driven machines, decked out with gadgets like frothers, drip trays or filter holders. In fact, espresso is a drink that evolved from an Italian process known as "moka." Moka does not refer to a chocolate flavored coffee, but rather to the coffee maker used to make this unique Italian drink.



An electric version of a traditional Italian machine might be just your cup of espresso.

In a traditional moka, water is boiled in the lower chamber and forced upward by steam pressure through finely ground coffee. The resulting moka beverage is rich and smooth and tastes something between drip coffee and espresso. It is served directly from the pot—straight, or with frothy milk for a cappuccino or latte.

Kitchen appliance manufacturers, such as the Italian-based company De'Longhi, have recently introduced electric versions of the moka. These new machines are modern, convenient adaptations that allow users to brew and serve espresso at the dinner or coffee table.

The De'Longhi Moka is currently available at Bed Bath & Beyond stores nationwide and at amazon.com. For more information, visit [www.delonghi.com](http://www.delonghi.com) or call (800) 322-3848.

## Healthy Workplace Snacking

### Are You A Squirrel, A Gopher Or A Vulture?

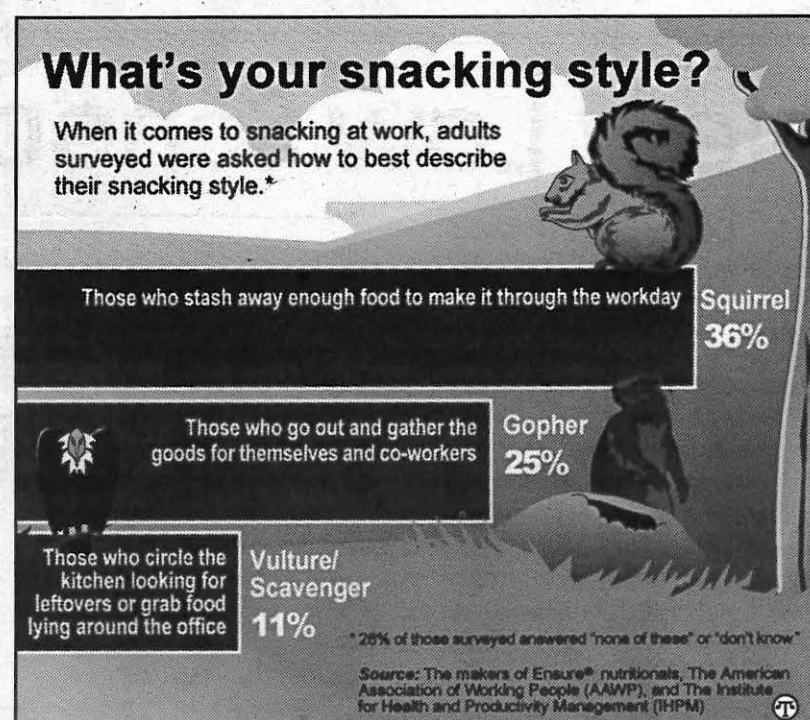
(NAPS)—When it comes to snacking at work, are you a "squirrel," "gopher" or "vulture"? A new survey provides a glimpse into America's snacking styles and habits on the job.

More than one-third (36 percent) of American workers surveyed characterized themselves as "squirrels"—those who stash away enough food to make it through the workday. A quarter called themselves "gophers," people who go out and gather food for themselves and co-workers. Eleven percent admitted to acting like a "vulture or scavenger," circling the kitchen or eating area at work looking for leftovers.

The survey, sponsored by the makers of Ensure nutritionals, the American Association of Working People and the Institute for Health and Productivity Management, also found that 89 percent snack at least once every day, with more than half eating less nutritious foods such as chips, candy, cookies or doughnuts.

Hunger was the number one motivator (61 percent) given for workday snacking; the need for energy was cited by more than half of respondents while 23 percent claimed it was stress.

"Snacking during the workday provides the energy we need to keep the wheels in our brains turning effectively—but only if we munch on the right foods," said Mary Donkersloot, R.D. and author of *Quick and Healthy Eating at Home and On-the-Go*. "No matter how you classify your snacking style or why you snack,



we can all make small changes to improve our overall health and sustain our energy levels at work."

Five simple suggestions include:

- **Fortify at your desk.** Keep healthy snacks within easy reach, such as carrots or celery sticks, a piece of fruit or a handful of nuts like almonds or walnuts.

- **Stock the fridge.** Load up the office refrigerator or your own portable lunchbag cooler with nutrient-dense, grab-n-go options like yogurt, low-fat mozzarella string cheese, or a nutritional such as Ensure, which is now available in a convenient, reclosable bottle.

- **Make better choices at the vending machine.** Select reduced-fat snacks such as fig bars, low-fat popcorn, pretzels and sugar-free gum. Consider snacks high in nutrient density, but reduced in calories.

- **Graze through the day.** Spread calories out so that you do not go more than four hours without eating. Avoid skipping meals, and eat at least three or four times a day.

- **Walk the talk.** Integrate at least one 10 minute walk into your day for a little exercise and a much needed break.

## DID YOU KNOW?

The Irish Herald reports that Governor-elect Arnold Schwarzenegger is not the first foreign-born governor of California. That distinction belongs to John G. Downey, of Castle Sampson, Roscommon, Ireland, who was elected governor of California in 1859. He was a successful businessman in southern California; the town of Downey is named after him. Following his term as governor, Downey lived in Los Angeles. He died in 1893.

## ASK MADAM GRAMMAR

Dear Madam Grammar,

I consider myself an optimist, and so use "hopefully" a great deal in conversation. I am concerned, however, that I may be misusing the word. Would you please explain the proper use of "hopefully" as against "hopeful"?

---Adverbially Sanguine

Dear Adverbially Sanguine,

It is no doubt the case that we have many optimists among us; consequently, your question *I hope* will be of great interest to the readership. And note Madam Grammar's use of the verb in the preceding sentence. That should clarify any difficulty. The word "hopefully" is an adverb and therefore can modify another adverb, a verb, or an adjective. To use the word in a freestanding manner, e.g. "Hopefully Bob will arrive on time," is incorrect, unless one means that Bob will arrive not only on time *but also* in a hopeful manner. If one merely wishes to express the possibility that Bob will arrive on time, the sentence should then read "I am hopeful that Bob will arrive on time." A proper use of the adverb would be: "Bob will arrive on time," said Tom hopefully." Here the adverb is, correctly, modifying the verb "said."

Dear Madam Grammar,

As a soothsayer, I find myself often asked to predict the future. This requires frequent use of the future tenses. But I am confused as to when to use "shall" and when to use "will" when forming the future tense.

---Prognosticating Palmist

Dear Prognosticating Palmist,

The distinction between will and shall in the English future tense is a nice one, but nonetheless should be learned and maintained by all interested in preserving the King's English. The rule is rather straightforward. When one wishes to express the simple future (predictive future, which I suspect is more common in your line of work), one must use "shall" for the first person (singular and plural) and will for the second and third persons (singular and plural). When one wishes to express the "imperative" or "subjunctive" or "promissory" future, one must use "will" for the first person and "shall" for the second and third persons (basically the reverse of the practice for the simple future). Examples of the simple future: "I shall be leaving tomorrow for London"; "You will be dining at the Savoy tomorrow evening." Examples of the "subjunctive" future: "I will take tea at noon"; "He shall not eat my cucumber sandwich."

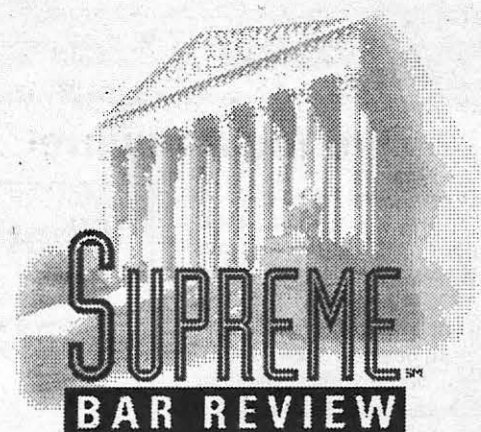
Dear Madam Grammar,

As a francophile, I often intersperse my badinage with quaint phrases from the Gallic tongue (my friends adore me for this). This practice, however, has caused a dispute between me and my confreres over the phrase *nom de plume*. Now, the literal translation is "pen-name," but it is often used in English as a synonym for "pseudonym," especially when one is engaged in a war of words. *Mes amis* tell me that the proper phrase is *nom de guerre*. Who is correct?

---Ingénue de grammaire

Dear Ingénue de grammaire,

I'm afraid your friends will say *touché*. The phrase *nom de plume* is an English corruption of the proper French phrase *nom de guerre*. Although literally meaning "war name," *nom de guerre* is used in French to mean "pen-name"; it means essentially the same thing as our faux-French phrase *nom de plume*. Now, I ask you, which would you rather use: a foreign phrase whose actual meaning is uncertain in English; or an Englishman's phrase crafted out of French words having no special meaning in French and very little stylistic value in English? *Ecrasez l'infâme!*



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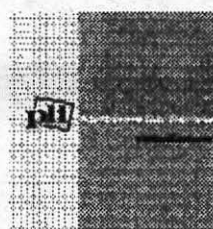
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