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VERBA VOLANT SCRIPTA MANENT

MOTIONS

University of San Diego School of Law

Volume 39, Issue 6

March 2004

SCALIA COMES TO USD

U.S. Supreme Court Justice and two other distinguished jurists judge final round of the McLennon Moot Court Competition

**FOR MOOT COURT
COVERAGE,
PLEASE SEE
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Photo by Pablo Mason

CORPORATE-OWNED LIFE INSURANCE, OR “HOW MUCH ARE YOU WORTH TO YOUR EMPLOYER?”

By Nicole Rothstein
Staff Writer

Have you ever wanted to know how much you are worth to your employer? Well, it may be a lot more than you expect and for all the wrong reasons. In fact, you may be worth more to your employer dead than alive.

Jane Sims thought her husband was a valuable employee to Wal-Mart. She just didn't know how valuable. He had worked in the receiving department at one of Wal-Mart's distribution centers for eleven years when he died in 1998 of a sudden heart attack. Unbeknownst to Jane, after his death Wal-Mart collected \$64,000. Jane herself got nothing. What she discovered is that Wal-Mart, the company her husband Douglas worked for before he died, had taken out a life insurance policy in his name.

Wal-Mart isn't the only American corporation that fattens its bottom line in this manner. The coverage is called broad-based insurance, corporate-owned life insurance, or just COLI. For decades, a corporation or an individual wanting to buy life insurance on someone else had to have a significant financial or emotional stake (known as an “insurable interest”) in the person's survival. Companies

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MOOT COURT JUDGES RESPOND TO STUDENT QUESTIONS

By Damien Schiff
Editor

As part of the events leading up to the finals of the McLennon Moot Court Competition, Justice Antonin Scalia of the United States Supreme Court, Circuit Judge Michael Hawkins of the United States Court of Appeals for the Ninth Circuit, and Justice Judith Haller of the California Court of Appeal, Fourth District, were present to answer University of San Diego School of Law students' queries at two question and answer sessions. Both sessions were held Monday, February 16, at the Kroc Institute for Peace and Justice.

The morning session consisted of two dozen or so law students, representing various school organizations, in a conversation with the three illustrious judges, moderated by USD Law Professor (and former Scalia law clerk) Michael Ramsey.

Not surprisingly, the first question posed to the jurists concerned the recent Massachusetts Supreme Judicial Court's decision requiring the state legislature to sanction same-sex marriages. Asked how the issue might become a federal one, Justice

Scalia responded that the question of same-sex marriages would most likely make it to federal court as a Full Faith and Credit Clause matter (see Art. IV, § 1). Notwithstanding his professed conservatism, the justice added, in reference to the attackers of same-sex marriage, that “it is a little too late to talk about the sanctity of marriage” in America; and he cited Ms. Brittany Spears' one day union as a case in point. Justice Haller noted that California voters recently approved a referendum that, at least facially, would prohibit the state's recognition of same-sex marriages. In light of some California municipalities' recent recognition of same-sex marriages, Justice Haller anticipated court challenges to those city ordinances based upon the referendum.

Responding to one student's query as to which newspapers they were accustomed to reading, the august jurisconsults gave widely varying answers. Justice Scalia reads the *Washington Post* and *Washington Times*; Judge Hawkins the *New York Times*, the *Arizona Republic* and about a dozen on-line

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*Motions*

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

LRAP PLEDGE DRIVE

It's time once again for the USD School of Law Public Interest Law Foundation LOAN REPAYMENT ASSISTANCE PROGRAM (LRAP) pledge drive. LRAP helps USD law grads repay their law school loans if they choose a career in public interest law. Any USD grad who works in a public interest law position that pays \$40,000 or less and who has no more than \$50,000 in law school loans is eligible.

The Pledge drive is the main source of income for our school's LRAP fund. Thanks to the support of Dean Rodriguez, faculty, students, and all those who contributed past pledge drives have raised over \$30,000!

During the week of March 8th - 12th, PILF students will be visiting you and have a table in the Writs to ask for donations. Any assistance you can provide would be greatly appreciated and assist in the provision of legal services to low-income individuals and traditionally under-represented interests through LRAP. Your donation is tax deductible!

**** A prize will be given to the largest donor for each day. There will also be a raffle each day for every donation of \$5 or more! ****

The Dean's Corner

Mid-semester is here and spring break is fast approaching. It has been a busy semester so far, and so much more to come in the next weeks and months.

Upcoming in March: The Hon. H. Lee Sarokin will moderate a distinguished panel discussing "Secret Settlements vs. The Public Interest," on Thursday, March 25 at 7:00 p.m. in the Peace & Justice Theatre of the Kroc Institute. Distinguished Professor Carl A. Auerbach will be honored for his more than 55 years of academic service and his 20 years at USD School of Law, at a special reception and program on Friday, March 26, again at the Institute for Peace & Justice. Saturday, March 27 finds the action still on campus but at another venue. Preparations are currently underway for an evening of fun at "The Golden Anniversary Casino" (a/k/a The Degheri Alumni Center). The event is sponsored by the Law School and the SBA, and will feature fun, gambling, some 50th anniversary memories, and much more. A peek into our busy April calendar reveals the visit of Justice John Paul Stevens of the Supreme Court of the United States. Justice Stevens will deliver the 20th Nathanson Memorial Lecture on Wednesday, April 7. The big 50th Anniversary Gala Weekend comes up on April 23-25. Watch for details on these and other events.



I am sorry to report that our community has been touched by the deaths of 2 former faculty and one generous and dedicated benefactor. Distinguished Professor **Herb Peterfreund** passed away in January at the age of 90. Professor Peterfreund practiced law in New York City and served as a captain in the infantry, U.S. Army (1942-46) before moving to academia in 1947. He taught at New York University Law School for more than thirty years, where he was Frederick I. and Grace A. Stokes Professor of Law, and Stokes Professor Emeritus, before coming to USD in 1978. Professor Peterfreund was a familiar and friendly face around the Law School until his retirement in 1995. Professor **Michael Navin**, current law professor and co-director of the Agricultural Law Center at the Dickinson School of Law at Penn State, died on February 25. After several years of private law practice with a major firm in Seattle, Washington, Mike Navin joined the faculty of the Willamette University College of Law, from which he later moved on to a 14-year tenure on the USD Law School faculty, from 1973-1987. In 1997 Professor Navin became the seventh dean of The Dickinson School of Law and has served on that faculty continuously since then. Although Mike Navin left USD in 1987, his ties to our campus remained strong. He and Herb Peterfreund will be missed and cherished in our history and memories.

Mr. **George Pardee**, a long-time friend of the University and a generous benefactor of our law school, passed away on February 23 at the age of 87. The names of George and Katherine Pardee are proudly attached permanently to our Pardee Legal Research Center. We mourn his passing just as we celebrate in our thoughts and prayers his productive and philanthropic life.

I wish all of our community a happy and restorative Spring Break.

NOTE TO THE READERS

From the Editor,

Some of the readership will no doubt recognize a few changes with this edition of *Motions*. To begin with, the newspaper has acquired a new formatting program that, it is hoped, will greatly increase the appearance (if not content) of the publication. Secondly, astute perusers will have noticed by now that no issue appeared for the month of February. No slight is intended toward that great month (indeed, not the cruelest, and the only which occasionally really does last longer than usual). Rather, the absence of a February edition is due in large measure to a change in technology and computer equipment. Thirdly, especially sharp readers will have noticed a change in the paper's masthead, and specifically in the motto appearing at the top of page one. Formerly that motto read, "ACTA SEMPER VERUS COMMODOUM," which phrase, shocking though it may seem, is pure mumbo-jumbo. Although each word is a genuine Latin *verbum*, strung together they are meaningless (and I challenge any lawyer philologist-classicist to show the contrary). Consequently, after some debate and research, a new motto was chosen, thanks to the apt suggestion of the Reverend Joseph N. Tylanda, S.J., presently of the University of Scranton. Father Tylanda is well qualified to proffer a Latin motto, as the esteemed translator of Thomas à Kempis' *Imitation of Christ* and other Latin works. The new motto, "VERBA VOLANT SCRIPTA MANENT," is especially *apropos* to a newspaper. And properly to solemnize the occasion, *Motions* will give one *Initial Portable DVD-9510 Player* to each of the first two persons to translate correctly the new motto into English, and to send said translation, with proper identification, to the paper's e-mail address.

HOW CAN YOU HELP A CHILD?

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 Prosecutor (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 sessions will be March 24 and April 14. Call Voices for Children at (858) 569-2019 or visit www.voices4children.com.

Q & A, from page 1

publications; and Justice Haller often peruses the *Union-Tribune*, the *Los Angeles Times* and the *Daily Journal*. Justice Scalia also noted that, generally speaking, the press do a poor job in reporting legal news. They are concerned with informing the readership whether the "good guy" or the "bad guy" won, and not whether the court properly applied the law. But the average Joe is more interested in the press's simplistic characterization, even though it is a caricature of the judicial process.

Asked about the importance of an independent judiciary, Justice Scalia admitted his preference for life-tenured judges, but stressed that, if the people want to elect their judges, then the candidates must not be constrained from speaking to the issues. Thus did the justice rationalize his Court's recent decision in *White v. Minnesota*, in which a state law forbidding judicial candidates' discussion of their personal opinions regarding issues likely to come before them was held to violate the First Amendment as incorporated in the Fourteenth Amendment.

Justice Scalia was then queried whether in his opinion foreign law or jurisprudence has any role to play in interpreting the federal constitution. Succinctly the justice retorted that foreign law and legal notions have absolutely no role to play, and ought not to, unless one adopts the "evolving meaning" theory of constitutional interpretation. But that theory produces an "empty bottle" permitting constant evolution in meaning: "We may evolve into Frenchmen, God help us."

Discussion turned to the American Association of Law Schools (AALS) and its controversial position concerning JAG Corps recruiters. The AALS, as a matter of policy, forbids its members to allow JAG Corps recruiters on their campuses, because of the military's allegedly discriminatory "don't ask don't tell" policy for homosexuals. Justice Scalia's opinion of the AALS? "Intolerantly tolerant."

And recusal? "No comment."

What about legal education at Yale? "Yale is a lousy law school."

When questioned about their law clerk hiring practices, all the panelists professed willingness to hire outside the much-ballyhooed "Top Ten" law schools. Justice Scalia noted that he has often hired outside the top tier; but even if Harvard and Yale are bad schools, it nonetheless remains the case that the best minds are attracted to them. And whatever one might conclude about the legal education that the elite schools provide, it is not so bad as to spoil minds that were good before matriculation. Judge Hawkins chimed in, arguing that "really good law students are good wherever they are." As for grades and school reputation, Justice Haller reassured the attendees that most academic accolades are helpful in finding the first post-graduation job, but after that, one is measured by one's job performance.

The morning could not of course pass without a question to Justice Scalia on his avowed textualism. "I do not use intent . . . I do not care about the intent of the Framers [as opposed to original understanding] . . . I do not use legislative history." But stare decisis requires that some cases, although wrongly decided, be followed. They are like "water over the dam." "I do not propose ripping up every decision," but only those decisions that present issues incapable of judicial — as opposed to legislative — resolution, an example of the latter being the abortion cases. A democratic society should solve these judicially unresolvable problems by passing laws, not by deferring to "a bunch of lawyers." The Bill of Rights is but a narrow exception to the rule of democracy; the constitution is not meant to be a medium of change.

And what about RICO, Justice Scalia? "It's a lousy statute."

Asked about the judicial appointment process, Judge Hawkins declared flatly, "I think the process is broken." How has this happened, Justice Scalia? "The Court has made itself a political institution . . . With five hands the Court can do anything." Thus the politicization of the confirmation process is but

MAKING THE GRADE

LAW SCHOOL CONSIDERS CHANGES TO ITS GRADING SYSTEM

By Jonathan Meislin
Staff Writer

What's wrong with USD? After all, the national ranking is rising, the campus is beautiful, the weather is perfect, and the beach is close by. The answer, many claim, is the grade distribution a consequence of the Court's self-politicization.

Justice Scalia, when asked how it can be that Justice Clarence Thomas is considered more a "Scalian textualist" than Scalia himself, responded that the charge simply is false. In fact, the greatest difference between the two, argued Scalia, is that "my Brother Clarence does not believe in stare decisis."

Your opinion, Justice Scalia, on the Ninth Amendment? "The Ninth Amendment is a laugh." Well then, what about the Tenth? "The Tenth Amendment is just a reiteration of the whole framework of the Constitution."

The afternoon question and answer session presented a larger audience and similar questions. But when asked about judicial activism, the jurists provided fresh quips. Judge Hawkins compared judicial activism to what H.L. Mencken defined as an alcoholic: an alcoholic is someone you don't like who drinks just as much as you; thus a judicial activist is someone whose decisions you don't agree with. Justice Haller defended the courts generally, arguing that day in day out "we [judges] do our job in a routine way . . . we do justice."

Justice Scalia was pressed on his textualism. What about *Brown v. Board of Education*? How would that case have turned out if presented to a Scalian court? The justice responded that the questioner was "waiving the bloody red shirt of *Brown*." At one level, a textualist can argue that the result would have been the same. But at another, deeper, level the textualist can argue that it does not matter, because no theory of interpretation can produce likeable results in every case. Even "a stopped clock is right twice a day." Without textualism and originalism, the people will be unable to control a life-tenured judiciary gone crazy over the "living constitution malarkey."

The panelists were asked to name the jurist whom they most admired. For both Justice Scalia and Judge Hawkins, it was Robert Jackson: Supreme Court Justice, courageous dissenter in the reviled *Korematsu v. United States*, Attorney General under Franklin Roosevelt; a man who attended neither law school nor college but was entirely an autodidact. Of him said Scalia, "he writes like an angel." For Justice Haller, Chief Justice Marshall deserved high praise, but so too Justice Sandra Day O'Connor for having been the first female member of the U.S. Supreme Court.

When questioned about the Ninth Circuit's high reversal rate by the Supremes, Judge Hawkins affably replied, "I don't know what the Supreme Court would do for fun without my court."

Should we care what the Europeans think about our federal constitution? Said Justice Scalia: "We have a lot of stuff in [the Constitution] that is not European, and thank God!"

How, Justice Scalia, should an originalist law student avoid altercation with differently-minded law professors? Not easy to say, he responded, but one can still agree with a position held by a person one does not like. After all, in *Texas v. Johnson* (the flag burning case), Scalia came out for, in his words, a "scruffy, sandal-wearing bearded weird-o." But if not originalism, argued the Justice, by what principle would these non-originalist professors limit the discretion of unelected judges?

Lastly, the panelists were asked what made them choose law as their profession. For Judge Hawkins, the starting point was a city council meeting in his home state of Arizona, where a very unfriendly council was persuaded to go the other way because of a lawyer's oral argument. For Justice Haller, it was a personal challenge in a time when the legal culture was hostile to women lawyers. But for Justice Scalia, he could thank "Uncle Vince," who convinced a freshly college-graduated Nino that the lawyer's life was not so bad after all.

system. USD uses one of the strictest grading curves in the nation. The median student can expect to get a C under the current system, as opposed to the B curve used by most other law schools. The proposed solution, supported and represented by the Student Bar Association (SBA), is to inflate USD's grade distribution system to be comparable to other schools' systems. This change will give USD graduates a much deserved edge in the job market, and will eliminate the awkward moment when USD students have to explain to their interviewer that they are a victim of a strict grading system. Although there is a lot of student and faculty support for the new system, the specifics have not yet been worked out.

With the increasing competition among law schools, many students are finding it hard to get a job or an internship despite USD's prestigious ranking and amenities. USD is ranked the 59th best law school in the nation, the third best law school in Southern California, and the best law school in San Diego, according to *US News & World Report*. Beyond the rankings, USD's bar pass rate was an astounding eighty-three percent, higher than many of the more highly ranked law schools in California, only surpassed by Stanford, Berkeley and UCLA. For a school with so much to offer, USD's students still compete in an uphill battle against other law schools that use the already inflated curving system. This is a problem because most employers will not number-crunch to figure out if a student from USD with a lower GPA is more qualified than a student from another school who boasts a higher and facially more impressive GPA. Although some employers now understand USD's strict grade distribution system, many do not, especially employers located outside of San Diego. Students from USD who are in competition with students from schools like USC, Davis and Hastings, start with a hurdle to overcome, despite the fact that USD's ranking is becoming more and more comparable to such schools.

Even though grade inflation may seem like the right answer, many complications still lie ahead. For instance, the new system may aid future students entering USD, but it is unclear which members of the current student body will benefit from the curve inflation. This may be a problem for those who are competing for jobs with students from lower classes who will benefit from the grade inflation. This is the case for the dual-degree and evening students, who will graduate in four years and compete with students from the classes below. Will they be disadvantaged from the grade distribution system because they graduated with a class that had the benefit of the inflated grade distribution system? What about future employment opportunities, where students who graduated only a year apart from one another will look different on paper, despite their actual qualifications? These details have not been worked out. One possible solution is to apply the grade inflation to all students, or at least to all current students. This option was used at Willamette, where all students' grades were inflated, no matter what class they were in. (See: *Bell Curve Ball*, *The National Jurist*, page 4, January 2004.) USC is another school that has inflated its grading system. USC's solution does not apply retroactively, but the inflated grading system will change in form, so employers will not be so confused. USC's new system will use a 1.9-4.4 grading scale, as opposed to its original 65-90 grading scale. (See <http://lawweb.usc.edu/students/handbook/sec-6.8.html#a>.)

The grade distribution system is USD's next step to becoming more competitive. The details are expected to be worked out in the next few months, and possibly applied to students' grades by next semester. Until then, students can only look forward in anticipation.

THE GAY MARRIAGE DEBATE: LAWYERS' PERSPECTIVES

By David Moynihan
Special to Motions

By Nicole Rothstein
Staff Writer

By D. Scott Carlton
Special to Motions

Two opinions by the Supreme Judicial Court of Massachusetts have together spawned a controversy over same-sex marriages that has brought into question the propriety of the public policy against persons of the same sex marrying each another. Although the legislatures of thirty-eight states have spoken definitively against the union of persons of the same sex, the Massachusetts high court, in an opinion signed by three justices with one other concurring in the judgment, and over three dissents, found the Commonwealth's statute limiting marriage to two persons of the opposite sex invalid (*Goodridge I*). Incredibly, the court's subsequent opinion (concerning the remedy required of the Massachusetts legislature) changes without explanation the basis for the first ruling. This article examines the jurisprudence — or lack thereof — displayed by the court, and in no way is meant to enter into the debate as to how public policy should resolve the matter.

Goodridge I

To quote an earlier Chief Justice of the Supreme Judicial Court, who spent more than half of his 96 years as a justice, first in Massachusetts and then on the U.S. Supreme Court, Oliver Wendell Holmes Jr. opined: "Upon this point a page of history is worth a volume of logic." The present Chief Justice graces us with these facts:

The plaintiffs are fourteen individuals, from five Massachusetts counties. As of April 11, 2001, the date they filed their complaint, the plaintiffs, Gloria ..., sixty years old, and Linda ... fifty-five years old had been in a committed relationship for thirty years; the plaintiffs Maureen ..., forty nine years old, and Ellen ... fifty-two years old, had been nine a committed relationship for twenty years and lived with their twelve year old daughter, the plaintiffs Hillary ... forty-four years old, and Julie, forty-three years old, have been in a committed relationship for thirteen years and lived with their five year old daughter; the plaintiffs Gary, thirty-five years old, and Richard ... thirty-seven years old, had been in a committed relationship for thirteen years and lived with their eight year old daughter and Richard's mother; the plaintiffs Heidi, thirty-six years old and Gina, thirty-six years old, had been in a committed relationship for eleven years and lived with their two sons, aged five tears old and one year, the plaintiffs Michael ... forty-one years and David ... forty-one years old had been in a committed relationship for seven years, and the plaintiffs David ... fifty-seven years old, and Robert, fifty-one years old had been in a committed relationship for four years and had cared for David's mother in theory homes after a serious illness until she died.

With these facts we anticipate that the decision will show us the relevance of the plaintiffs' mature years, or the length of their commitment, or how people who care for their parents should be allowed to marry. But wait, there's more!

The plaintiffs include business

Please see Moynihan at page 5

In the nation's most far reaching decision of its kind, the Massachusetts Supreme Judicial Court, in a 4-3 ruling, cleared the way this month for same-sex couples in the state to marry, ruling that government attorneys "failed to identify any constitutionally adequate reason" to deny them the right. In response to a request from the Massachusetts Senate for clarification of the court's decision last November and for a ruling on its proposed Bill No. 2175, the Massachusetts Supreme Judicial Court affirmed that the state constitution requires the recognition of same-sex marriage not just civil unions. The Massachusetts Legislature has been given six months to rewrite the state's marriage laws for the benefit of same-sex couples.

According to the court's latest opinion, the issue considered in *Goodridge v. Department of Public Health* was not only whether it is proper to withhold the tangible and intangible benefits of unions from same-sex couples, but also whether it is constitutional to create a separate class of citizens and withhold from that class the right to participate in the institution of civil marriage itself. 440 Mass. 309 (2003). Calling the issue a matter of constitutional interpretation, and not mere social policy, the majority held that marriage, being a basic civil right, if offered to straight couples, cannot be denied to gay or lesbian couples without branding the latter as second-class citizens. Thus, even civil unions "would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits."

Quite frankly, the Massachusetts Supreme Court should be applauded for its common sense opinion—which rightly rejected the state's plainly discriminatory justifications for denying same-sex couples the right to marry. Pointing to the considerable defects of rationality within the state's arguments, the court held that "segregating same-sex unions from opposite sex unions cannot possibly be held to rationally advance or preserve...the Commonwealth's legitimate interests in procreation, child-rearing, and the conservation of resources."

The State first asserted that it wanted to provide a favorable setting for procreation. If procreation is indeed the crucial concern, then what about citizens over childbearing age or those unable to have children naturally? As the court noted in its earlier opinion, "even those who cannot stir from their deathbed may marry." And what is to be done about lesbian couples, who may be able to conceive via artificial insemination and the like, but who still cannot marry? Arguably, a couple made up of two women, both of whom may be fertile, equals double the chances of procreating.

The State also argued that it wanted to ensure the optimal setting for child rearing. Although the Department of Public Health defines the optimal setting for child rearing as a "two parent family with one parent of each sex," the court aptly pointed out that even awful, self-centered opposite-sex couples are not precluded from getting married and having children. And, with the liberal adoption laws of Massachusetts, preventing same-sex couples from marrying makes it no more likely that children will be raised by two parents of the opposite sex.

Finally, the State said it wanted to preserve scarce public and private resources. The court flatly rejected the assumption that same-sex couples were more financially independent, and thus less in need of public and private subsidies. Furthermore, how can you rationally include non-needy couples of the opposite sex, while denying non-needy couples that happen to be of the same sex?

Please see Rothstein at page 6

Redefining the word "marriage" strikes a loud uncomfortable chord among Americans. The Defense of Marriage Movement, with its deeply religious roots, poses an un-engaging opponent to those demanding same sex marriages. To confront those citing dubious biblical references is like asking your mother why you must do a chore, and she harshly responds: "Because I am your mother, and I said so." The simple fact is, however, that marriage has always been defined as the union between a man and a woman. It makes sense to use the word marriage to define this traditional union, and to use another term, domestic partnership, to define a union between two people of the same sex. The two unions are apples and oranges, both fruits, but still not the same.

If states are going inequitably to disburse benefits to these two distinctly different unions, more than simple semantics is required to justify the disbursement. The most rational justification for such a distinction is the states' desires to promote reproduction and the cultivation of offspring. Religions and cultures have recognized this benefit for thousands of years. In order to continue the human race, a man and woman must engage in sexual relations. When children are produced, it is beneficial to rear the children with two parental figures, with a natural and inherent connection, both participating in the children's upbringing. The ability for same sex couples to undertake reproduction, through sexual intercourse, is naturally impossible, and unnaturally infrequent (i.e. adoption or artificial insemination).

The common, civil rights response to the traditional husband and wife marriage, however, is that same sex couples can both raise and adopt (and in some cases bear) children. Since same sex couples can perform some of the important functions associated with the traditional marriage, civil rights advocates are demanding equal treatment from state laws. But to make laws for the exception, rather than the norm, is contrary to the idea of adopting laws for the greater good. Perhaps some exceptions should be made for domestic partnerships that actually come closer to the functions of the traditional family, but to redefine marriage for the exception fails to provide a sufficient justification for a state to accept same sex marriages as the societal equivalent to traditional marriages. Domestic partnerships simply do not result in the preferred "nuclear family."

Compounding the argument against the Defense of Marriage Movement, however, is the very public and very untraditional unions of "man and woman." The marriages of Michael Jackson, Britney Spears and Liza Minnelli mock those who look to the government to preserve the sanctity of marriage. While these sham marriages don't speak well for those calling for the preservation of the traditional "holy union," it seems equally irresponsible for the state to provide incentives or subsidies to domestic partnerships based on the occasional and tasteless marriage by a handful of irresponsible heterosexuals.

Along with banning gay marriages, states have chosen to prevent marriages between unions of men and women that are harmful to society. For example, states criminalize incestuous relationships and void incestuous marriages between relatives of close blood relation. Even though incestuous relationships are a union between a man and a woman, bearing children in these particular circumstances is likely to result in severe medical problems. Like same sex marriages, nature provides sufficient justification to deny

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executives, lawyers, an investment banker, educators, therapists and a computer engineer. Many are active in church, community and school groups. They have employed such legal means as are available to them — for example, joint adoption, powers of attorney, and joint ownership of real property — to secure aspects of their relationships. Each plaintiff attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children

Perhaps the court is going to fashion a marriage law based on the white-collar status of the marriage candidates. We can't decipher—at least not yet in the Chief Justice's opinion, why any of this history is relevant, except for one fact. They all have been in a "committed relationship" for many years. WHERE WERE THEY BEFORE APRIL 11, 2001? Could it possibly be that after George W. Bush's inauguration in January of 2001 it became clear that the "marriage penalty" was to be eliminated? It is remarkable that after all these years these couples were able to find their co-plaintiffs finally to "affirm publicly" their commitment to their respective partners.

Back to the constitutionality of the Massachusetts statute. The law in question, G.L. c.207, on which the Chief Justice focuses, licenses the legal union of a man and woman as husband and wife, "and the plaintiffs do not argue that the term 'marriage' has ever had a different meaning under Massachusetts law. . . . This definition of marriage . . . derives from the common law. . . . Far from being ambiguous, the undefined word 'marriage' as used in G.L. c.207 confirms the [Massachusetts House's] intent to hew to the common law and quotidian meaning concerning the genders of the marriage partners." Following a *tour de force* of the futility of abandoning distinctions such as "illegitimacy" and a comparison to laws against interracial marriage, the court gets down to the constitutional business at hand.

The department argues that no fundamental right or "suspect" class is at issue here, and rational basis is the appropriate standard of review. ...[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not meet the rational basis review, we do not consider the plaintiffs' arguments that this case meets strict judicial scrutiny.

... The department posits three legislative rationales for prohibiting same-sex couples from marrying: (1) providing a "favorable setting for procreation". (2) ensuring the optimal setting for child rearing, which the department defines as "a two parent family with one parent of each sex"; and (3) preserving scarce State and financial resources. We consider each in turn.

The lower court held that the "state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation." The Chief Justice's answer: "This is incorrect." Not "this is irrational," but "you, Massachusetts, are wrong about what your primary purpose is." Interesting. It is incorrect, the Chief Justice says, because the law does not privilege procreation above all other forms of intimacy. As a basis for her conclusion the Chief Justice

states that it only appears that the marriage laws regulated heterosexual intimacy because only heterosexuals could marry. Suggesting this is circular reasoning. She misses the point that that is precisely why the laws were passed, and homosexuality was not dealt with at the time although it existed. On this first point, the Chief Justice clearly prefers her reasons to that of the Commonwealth, and therefore declares the Commonwealth's reasons "irrational."

Regarding the second rationale, the Chief Justice merely states that "[r]estricting marriage to opposite sex couples cannot plausibly further the policy of protecting the welfare of children." The opinion does not touch on the word "optimal," which was the basis for the Commonwealth's position. Instead, the Chief Justice prefers her conclusion, so the Commonwealth's conclusion must be "irrational." Here the Chief Justice suggests that because same sex couples may have dependents, including aging parents in their care, they are no less deserving of the economic benefits of marriage, although she does not mention why single persons with dependents should not reap the legal financial benefits of marriage.

Two Justices joined in the Chief Justice's opinion. A third concurred in the result, finding, all alone, that the Commonwealth's statute violated equal protection. Justice Greany stated "[t]hat the classification is sex based is self evident." He does not state which sex, male or female, is discriminated against, and instead invents a new gender: "same sex." Obviously this cannot be discrimination against an individual, and it is clear why the other three justice who found the law unconstitutional avoided any "suspect" class analysis.

Three justices dissented. All three joined in the opinions of one another. Justice Spina, warning of the far reaching repercussions of the majority's activism, wrote:

This court has previously exercised the judicial restraint mandated by art. 30 and declined to extend due process protection to rights not traditionally coveted, despite recognition of their social importance.

...

Likewise, the Supreme Court exercises restraint in the application of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest we, to a great extent, place the matter outside the area of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preference of the Members of this Court. [internal quotation marks omitted] [Mr. Justice Spina cited to various cases of the Massachusetts and United States Supreme Courts].

Justice Sossman, also dissenting from the Chief Justice's opinion, pointed out:

It is not, however, our assessment that matters. Conspicuously absent from the court's opinion today is any acknowledgment that attempts at scientific study of the ramifications of raising children in same-sex couples households are themselves in their infancy and so far have produced inconclusive and conflicting results. Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date

reveal that there are still some observable differences between children raised by opposite sex couples and children raised by same-sex couples. . . . The legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.

... Shorn of ... emotion-laden invocations, the opinion ultimately opines that the Legislature is acting irrationally when it grants benefits to a proven successful family structure while denying the same benefits to a recent, perhaps promising, but essentially untested alternate family structure.

Justice Cordy, also dissenting, stated that courts that have found the right to marry to be fundamental have focused on the underlying interest of every individual to procreation. The legislature's allowing same-sex couples to adopt, argued Justice Cordy, is premised on the inability or unwillingness of one of the biological parents to do so.

The Chief Justice's opinion and the concurrence by Justice Greany were enough to carry the day. But the remedy ordered was not to require the various departments to issue marriage licenses, nor was it to strike down the marriage statute *in toto*. Instead, the court ordered the legislature to do an undetermined something within the next 180 days.

Goodridge II

In response to Goodridge I, the Massachusetts Senate considered a bill that would make available to same sex couples all of the protections, benefits, rights, responsibilities and legal incidents that are now available to opposite sex married couples, but would denominate the relationship thus created a "civil union" instead of a "civil marriage." The Senate submitted the question to the Supreme Judicial Court whether such a designation would comply with the equal protection and due process clauses of the Constitution of the Commonwealth and various articles of the Massachusetts Declaration of Rights. The same majority signed a new opinion by the Chief Justice that answered a resounding "NO."

In rejecting the Senate's proposal to confirm to same-sex couples all the rights and responsibilities of marriage but not the title "marriage," the Chief Justice argued:

[I]ntangible benefits flow from marriage ... intangibles that are an important component of marriage as a "civil right". [We] stated that "[m]arriage also bestows enormous private and social advantages on those who choose to marry ... [and] is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity and family." Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition. Therefore, without the right to choose to marry, same-sex couples are not only denied full protection of the laws, but are "excluded from the full range of human experience."

Not only is there no explanation as to how the compromise legislation would deny anyone the "full protection of the law," but this is the language of fundamental rights and suspect

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classes that the court so carefully eschewed in *Goodridge I*. In dissent Justice Sossman wrote:

Today's answer to the Senate's question discards the fig leaf of the rational basis test and, relying on the rhetoric rather than the purported reasoning of *Goodridge I*], assumes that discrimination on the basis of sexual orientation is prohibited by our Constitution as if sexual orientation were indeed a suspect classification. If that is the view of the majority of the justices, they should identify the new test they have apparently adopted for determining that a classification ranks as "suspect" — other types of persons making claims of a denial of equal protection will need to know whether they, too, can qualify as a "suspect" classification under that new test and therefore obtain strict scrutiny analysis of any statute, regulation or program that uses that classification.

Nevertheless, the resounding "No" of the majority has forced a constitutional crisis and a constitutional convention. A compromise amendment similar to the Senate bill was rejected last week by liberal and conservative elements of the Massachusetts legislature, each taking an "all or nothing approach." The battle is set to produce an amendment prohibiting same-sex "marriages." Political pundits are predicting the amendment's passage in the Massachusetts legislature and, by a narrower margin, the people of the Commonwealth. Presumably the *Goodridge I* and *II* majority will be able to hear the legislature and the people when the constitutional prohibition against same-sex marriages is answered by a "YES." At least the four justices cannot prohibit the process.

In the meantime, the City of San Francisco is issuing marriage licenses to same-sex persons in violation of California law. Why these couples could not wait the average fourteen years the Massachusetts plaintiffs waited to assert their commitment is unclear, but then again April 15th is coming up, and those deductions are looking awfully good.

[The cases are *Goodridge v. Dep't of Public Health*, SJC 08860 (Mass. Nov. 18, 2003); and *Opinions of the Justices to the Senate*, SJC 09163 (Mass. Feb. 3, 2004)].

(David S. Moynihan is a graduate of the College of the Holy Cross (as is Mr. Justice Greany) and the New England School of Law. He received an LL.M. in International Law from the University of San Diego in 1998, and an LL.M. in Taxation from the same school in 2002. He is licensed to practice law in California, Massachusetts and before the United States Supreme Court).

Rothstein, continued from page 4

The Massachusetts decision also seems to rest squarely within the reasoning of *Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003). In *Lawrence*, the United States Supreme Court struck down a statute criminalizing same-sex sodomy, affirming that the "core concept of common human dignity, protected by the Fourteenth Amendment to the Constitution, precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner." In reaffirming the central role that decisions such as whether to marry or have children play in shaping one's identity, *Lawrence* suggests that statutes banning same-sex marriage may be unconstitutional. The court also plainly rejects the principle that fundamental rights are dependant upon a finding of "deeply rooted tradition," stating

that rights can be fundamental even if they were traditionally considered immoral or even criminal, as long as they have become "implicit in the concept of ordered liberty."

Whether States may use their regulatory authority to bar same-sex couples from civil marriage was a question the United States Supreme Court left open as a matter of federal law in *Lawrence*, where it was not an issue. The Massachusetts court picked up this issue and cited *Lawrence* for the proposition that the court's obligation "is to define the liberty of all, not to mandate our own moral code." According to the court, barring same-sex couples access to civil marriage arbitrarily deprives them of membership in one of the community's most rewarding and cherished institutions, an exclusion incompatible with the constitutional principles of respect for individual autonomy and equality under law. Citing the fact that same-sex couples are elsewhere afforded equal treatment under Massachusetts law, especially in the realm of parental rights, the court stated that the ban "works a deep and scarring hardship on a very real segment of the community for no rational reason."

Critics of the most recent decision by the Massachusetts Supreme Judicial Court argue that proposed Senate Bill 2175, drafted in response to the high court's ruling last November, accords same-sex couples all of the substantive benefits, rights and privileges as opposite-sex couples within a parallel civil union framework. As Justice Sosman points out in her dissent, why is it that a different name, a mere difference in form, automatically connotes a lesser status in violation of the Constitution? Exactly what is in a name?

As the Massachusetts court points out, the difference between the terms "civil marriage" and "civil union" is far from harmless—"it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual." The denomination of the difference as merely a "squabble over the name to be used" clearly misses the point that separate but equal hardly ever is. Maintaining two separate classes of unions, according to the court, has the effect of "maintaining and fostering a stigma that the Constitution prohibits." The word "marriage" itself then is one of its protections.

Marriage is a unique relationship—synonymous with "family." While same-sex couples can protect themselves in limited ways by creating wills, health care proxies and co-parent adoptions, these arrangements do not come close to emulating the automatic protections and peace of mind that marriage confers. Further, it is a gateway to hundreds of legal protections established by the state and over one thousand by the federal government.

Far from undermining marriage, the struggle for full equality for same-sex couples is an acknowledgement of the important role marriage has in society and the power it has over all our lives. Same-sex couples, in seeking the freedom to marry, have simply asked that their relationships be given the same respect under law accorded to others.

With the ruling, the Massachusetts legislature is now set to consider an amendment legally defining marriage as between a man and a woman. The ruling has also revived interest in a proposed federal constitutional amendment that would define marriage throughout the country as "the union of a man and a woman," which has been pending in Congress since May 2003. Although both President Bush and U.S. Sen. John Kerry, a Massachusetts Democrat, oppose gay marriage, the proposed amendment could well become an issue in the 2004 presidential election.

In the meantime, one of the biggest questions arising from this decision is whether other states will have to recognize Massachusetts's same-sex marriages. The answer is presently unclear. Article IV of the federal constitution requires that each state grant "full faith and credit" to "the public acts, records, and judicial proceedings" of its sister states. However, a judge-made exception to the full-faith-and-credit requirement currently permits states to deny recognition to out-of-state marriages on public policy grounds.

States whose public policy condemns same-sex marriage might be able to invoke this exception to deny recognition to Massachusetts marriages.

The Defense of Marriage Act (DOMA), passed in 1996, specifically authorizes states to deny recognition to same-sex marriages of sister states. But the statute may not be constitutional. The federal constitution empowers Congress to prescribe the "manner" in which states accord full faith and credit; yet, some say that it does not appear to give Congress the authority to regulate the substance of full faith and credit. If the legal briefs filed in the Massachusetts case are any indication, it is likely that the DOMA could be challenged on Full Faith and Credit grounds (or Equal Protection Clause grounds) now that same-sex marriage is legal in Massachusetts.

Carlton, continued from page 4

marital benefits to those that cannot, and those that should not, bear children. Yet same sex marriages do not substantively impact society as might incestuous child-bearing relationships. In terms of harmful effects, gay marriages do little but offend religious zealots. Hence, states banning same sex marriages may not do so on the basis that such relationships may result in potential harm to the innocent.

In addition, the refusal of states to grant legal benefits to incestuous marriages is not formed on moral grounds. Incest laws generally prevent relationships between those of close blood relationship; they do not prevent relationships between close family members (i.e. step-brother & step-sister). A man can marry a woman with a ten year-old daughter, and eight years later divorce his wife and marry his eighteen year-old step-daughter. But states take no action to prevent this morally questionable relationship. Therefore, states banning same sex marriages cannot base their rationale on moral grounds. If society is prepared to recognize the marriage of a step-father and step-daughter and but not to recognize the marriage of two consenting adults of the same sex, then marriage is a baffling moral hypocrisy. The only rational way to justify the failure of states to recognize same sex marriages while recognize step-father - step-daughter marriages, is to address the fact that the former relationship has the natural potential of developing into a child-bearing family.

Since the state's interest in subsidizing marriage through incentives relates more to developing the natural and traditional family, those incentives should be conferred only to those couples that have a reasonable potential of forming such families. Current marriage laws, however, extend marital benefits to several categories of heterosexual relationships unrelated to the intended goals of the incentives. In fact, these relationships, enjoyed by heterosexual couples, are also commonly found in domestic partnerships. However, states fail to define these traditional marriages as domestic partnerships, or at least fail to prevent subsidizing marriages that possess no rational relation to the state subsidizing the couple. So why should states continue to subsidize marriages that, like same sex marriages, are highly unlikely to need incentives associated with the nuclear family?

Prior to the formation of any marriage between man and wife, it would be difficult appropriately to identify which particular young heterosexual couples will have children and which will not (due to infertility, elective surgery, medications, and choice). Thus, it would be impossible to identify which couples would be eligible for marital rather than domestic partnership benefits. Further, it is not irrational to presume that a high percentage of young heterosexual marriages develop into the nuclear family. True, a high percentage of heterosexual couples eventually develop into the traditional nuclear family. But when should marriage benefits start? At the beginning of those unions? The refusal of states to designate young, childless heterosexual married couples as domestic partners (or at least bestow or deny the same rights) suggests an underlying form

Please see Carlton at page 11

From the Editor: Continuing our look back into the law school's past during its fiftieth anniversary year, MOTIONS reprints this issue the front page of The Woolsack's November 1969 edition, featuring the inimitable Melvin Belli, "King of Torts."



Grant Cooper

Cooper Reveals Pressures In Defending Unpopular Clients

Grant Cooper, Sirhan Sirhan's defense attorney, spoke in More Hall Oct. 24, at the invitation of Phi Alpha Delta. Mr. Cooper's topic was, "Criminal Lawyer — Saint or Sinner."

Mr. Cooper opened by questioning the basic concept of our legal system — that a man is presumed innocent until proven guilty. He said that with the upsurge of interest in criminal law due to the mass media, a defendant is often found guilty in the eyes of the general public before the case even comes to trial. This is especially true with a notorious defendant, such as Jack Ruby, Sirhan, Richard Speck, etc.

Mr. Cooper countered that the question of guilt or inno-

cence must be decided by an impartial jury upon careful consideration of all the facts, not by the press, the police, the District Attorney, or the public. He also advised that there is a very real possibility that the opportunity of a fair trial goes by the board if these forces are not kept at bay.

Mr. Cooper went on to describe the problems associated with being in the position of defending an unpopular defendant. He said that when it was announced that he would defend Sirhan, "The reaction of the public was almost universally one of shock and indignation."

He read a few letters from people attacking him for taking the case (See photo above). The letters were extremely abusive, their writers calling him everything from a communist to a fascist, as well as several unprintable names, simply because he had the courage to practice the precept of equal justice for all.

The major problems of the defense attorney, he thought, are that the public feels that the attitudes of the defendant are the attitudes of his attorney, that there is a tendency to allow personal feelings to affect the willingness to fight for a client, and that the financial problems of trying to defend indigent clients are immense unless there is some outside support to keep the attorney going.

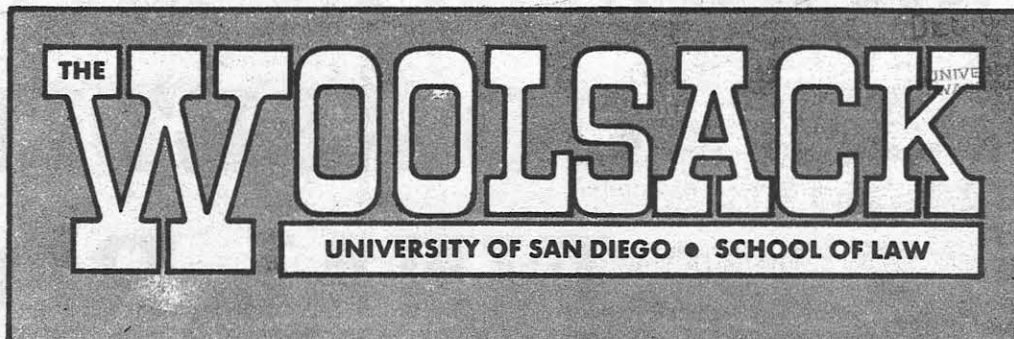
Concluding, Mr. Cooper stated that the defense attorney has a duty to defend his client, regardless of his personal feelings.

Early Posting of Grades OK'd

Half forgotten in the heated discussion during and following the Student-Faculty Co-operation Committee meeting Nov. 13 were three interesting topics.

Approved was the proposal that grades be posted on the bulletin board as soon as all grades for a separate section or class are in. The policy has been to withhold all such information until grades were mailed to the student after every professor in the school had turned in his grades.

The subject of mandatory attendance at classes is to be studied further to determine precise state requirements as well as those of the Veterans Administration covering students who qualify for VA benefits.



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NO. 3

King of Torts

Capacity Crowd Hears Belli

He was introduced as the King of Torts but he was more like the pied piper as he led his spellbound audience from place to place, sharing with them experience after fascinating experience along the way.

The speaker was Melvin M. Belli, a lawyer who lives the law. The kind who goes to Stockholm to get a different view of pornography and probes into a cadaver to get a real feel for human physiology.

At the invitation of P.A.D. law fraternity, Mr. Belli came to San Diego Nov. 7 to speak in More Hall. And speak he did. He covered everything from topless dancers to capital punishment. His main theme, however, was the modern-day law. He spoke of a "present day revolution in the law" which is ushering in a "golden age" of the law, a law that "fits into daily living."

High on his list for praise was the Supreme Court, for its part in bringing changes about.

"The Brown case alone was enough to justify the existence of the Warren Court," he said. "Whether you're from the South or the North or wherever. If you don't like it or you do like it, you've got to recognize the social and historical fact that if we didn't get integration when we did, we'd have had the damndest revolution in this country that they ever had."

Belli went on to talk about Gideon v. Wainwright and Escobedo v. Illinois.

"What runs through these Supreme Court



M. DOFFLEMYRE

the coroner's inquest onto the same garbage heap, saying it worked well in the days of Henry VIII but that most of the states had progressed beyond that period.

Mr. Belli spoke of corpus juris — the "whole body of the law," and said "if you have something festering in one spot its going to affect the entire corpus." What he was getting at was the topless controversy. "The same law that applies to obscenity and pornography cases is the law that applies to your right to go to church and the right to hold property," he maintained.

"If you have arbitrary law in obscenity or topless, you set the stage for some arbitrary law in the right of minority religions to worship," he continued.

Mr. Belli said that in his defense of a recent topless case he had come head to head with



B. ENGLEBRECHT

cases is the protection of the individual," he said. "That's the gravamen of the law revolt in the United States Supreme Court, and you're not getting it in the legislature. In the legislature its en masse. In the United States Supreme Court they don't work on causes, they work on individuals."

"The layman says the Supreme Court wastes too much time on the drunks, the Gideons and people like that," he went on. "I say, as long as the Supreme Court wastes its time, if you will, on the least of us, then the majority of us are protected."

All is not yet perfect, however. Belli called the Grand Jury system outmoded, observing that when a man is indicted and later acquitted, people tend to refer to him as the man who was indicted. Mr. Belli would toss

the California Alcoholic Beverage Control Board. "The ABC has a plenary grant of power. In everything to do with liquor they shall determine if its good for the health and welfare of the people," he said, adding that within this power the commissioner can arbitrarily determine what goes on, in there, including what color wallpaper, what kind of lights, what type of entertainment and the like.

"That amounts to censorship," he warned, saying the same rule of law that applies to freedom of speech applies to topless.

An hour after it had begun the world-wind tour ended, leaving many a law student with stars in his eyes. The more practical voiced a different view: Can you imagine having to face that man in court?

Judge Kunzel Dies at 68

U.S. District Judge Fred Kunzel, 68, a 10-year veteran of the federal court bench, died of an apparent heart attack Nov. 19 at his Point Loma home.

Judge Kunzel was chief U.S. district judge for the southern district of California, including San Diego and Imperial counties. He was appointed to the federal bench in 1959 by President Eisenhower.

In the next few weeks students will face a special SBA election to vote on proposed changes to the SBA By-laws. On page 2, these proposed changes are printed, as well as an editorial stating the Woolsack's position in the matter. Also on that page, SBA President, Sam Alhadeff gives his views on the subject.

Also inside ... on page 5 we are printing the first semester exam schedule, along with a special feature aimed at the beginning law student facing his first exams.

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THE 2004 MCLENNON MOOT COURT COMPETITION: FINAL ROUND

THE CASE

*ACLA v. Planned Parenthood of Columbia/
Willamette, Inc.*

The case presented three issues:

1. Whether two anti-abortion posters produced by Petitioner constitute a true threat or protected First Amendment speech;
2. Whether the materials posted on the Petitioner's website constitute a true threat or protected First Amendment speech;
3. Whether *de novo* review is the correct appellate standard.

JUSTICE SCALIA:

"It was a close question and the court was divided, but someone has to win and someone has to lose. It's not much different from what you would see in an appellate court. The questioning is just as annoying — it's the judges' opportunity to probe for weakness. I think they did a very good job, and I congratulate both counsel and the team that picked the case."

(George Decker, "Scalia puts USD law students to the supreme test," San Diego Daily Transcript, Feb. 18, 2004, at 3A).

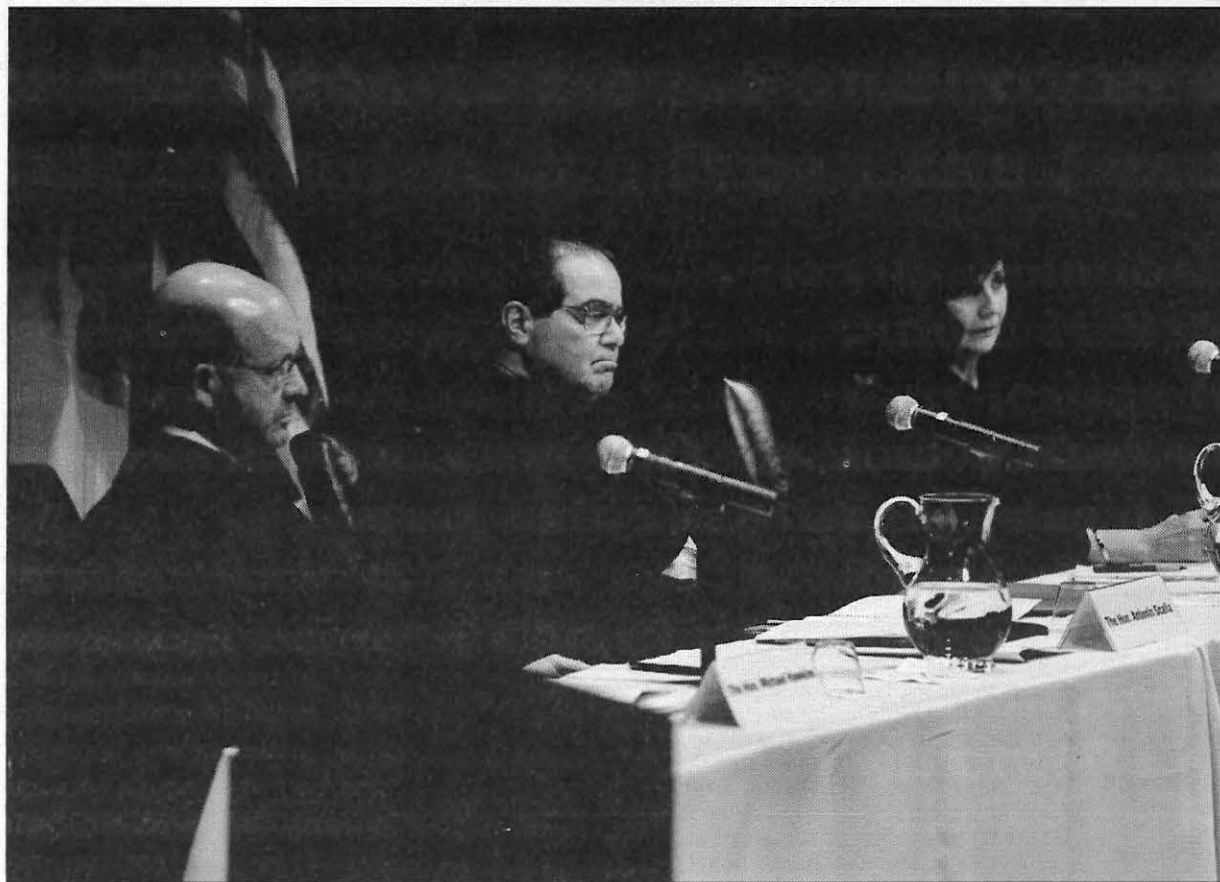


Photo by Pablo Mason

Pictured from left to right: Judge Michael Hawkins of the United States Court of Appeals for the Ninth Circuit; Justice Antonin Scalia of the United States Supreme Court; and Justice Judith Haller of the California Court of Appeal, Fourth District.



Photo by Pablo Mason

"What an amazing honor—to argue before a justice of the Supreme Court and other distinguished judges. This is the opportunity of a lifetime."

Finalist and Winner of the 2004 Moot Court Competition, Jessica Heldman

"I remember well over a year now Dean Rodriguez indicating to me that the USD law students deserve a prestigious internal moot court competition. The Dean explained in detail his vision of this competition and has continually provided his time, energy, wisdom, and financial support so that his idea could become a reality. Having now finished the third year of this very successful competition, I am confident in saying that the tradition Dean Rodriguez has started will not end. This is especially true given the dedication and hard work of the USD Moot Court Board. On behalf of the faculty, I also wish to congratulate each and every one of the advocates. Let me sum up with a few words that come to mind regarding the students that competed in the McLennon competition: intelligent, confident, poised, and most definitely fearless. You are an amazing group of lawyers and I am proud and honored to have been your teacher."

—Professor Michael Devitt

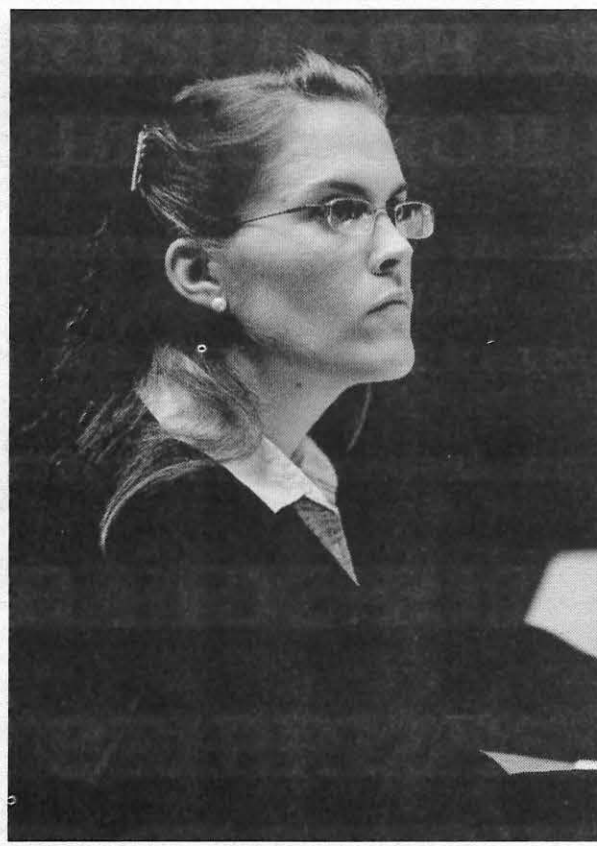


Photo by Pablo Mason

"Arguing in the final round before such a distinguished panel of jurists, including Justice Scalia, was an unparalleled thrill and a delight."

Finalist and Runner-Up of the 2004 Moot Court Competition, Maura Hartmere

Join the WOMEN'S LAW CAUCUS

Tuesday, March 23d at 4PM in the Writs

for the

ANNUAL FACULTY AUCTION

**Champagne, Beer, Hors D'Oeuvres & Door Prizes
Proceeds to Benefit Becky's House and
The Loan Repayment Assistance Program**

Faculty donations in the past have included:

- * **Dinner with Dean Rodriguez for 10**
- * **Wine tasting for 8 with Professor Allen Snyder**
- * **Happy Hour with Jocelyn, Pat and Verna from the Records Office**
- * **Tailgating & Padres Game with Lawyering Skills Faculty**
- * **Round of Golf with Professors Minan & Cole**
- * **Dinner & Drinks with Professors Devitt & Claus**
- * **\$500 off BarBri**
- * **& Many More!**

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To ensure the confidentiality of your comments, surveys go directly to LibQual+ and will be aggregated without names for the LRC. E-mail addresses are separately registered for random electronic selection of prize winners.
The LRC will notify winners in April.

WHY HAS OUR CULTURE BECOME SO COARSENEED?

By Frank Morriss
Special to Motions

Anyone whose memory goes back four or five decades knows over the past ten years or so there has been a coarsening of America, a descent into public vulgarity, indecency, and a demeaning of human dignity, as if culture itself were the waiting room of a brothel. Our children use words suitable for a saloon in a red-light district. Even respectable figures find language acceptable that once marked the user as common. Comedians present to general home audiences toilet humor and worse. Girls from normal families dress as if they were auditioning to be streetwalkers.

None of this can be denied, though some find it apparently progress toward liberation, whereas it is like the stagnant pond that the poet crossed led by his Muse to visit Hell, and seeing a

man filled with mud rise before the boat, asked, "Who are you who have become so foul?" (*Ma tu chi se?, che sei si fatto brutto? La Divina Commedia*, translated by Louis Biancolli).

All this should be considered as to its causes and its consequences, before it is too late. The coarsening of culture has preceded the fall of empires more than once in history. When animal instincts of man challenge his intellect and spiritual qualities, his appetite can replace the qualities of selflessness necessary for the dedication that sacrifices self for the common good. Victory at arms needs a certain purity of heart as much as it needs skill. Discipline fails when indulgence replaces it. The vocation to put others ahead of self serves nations as well as God, and at the heart of America's descent toward "the sands of horror" (*orribil sabbione*) is a sort of isolation of the individual in the few years given us humans to live.

How has this isolation taken place? For one, by the putting aside of thought and replacing it with feeling, that is, with "experience." It is considered today that we know best, or even only, by experience. That is the essence of existentialism. But that ignores that such is possible only for the individual, who cannot feel or experience what any other of his fellow humans do. To do that requires knowledge of that which one shares with all other humans, "human nature." Pascal said this better when he wrote (*Pensées*) of "the extraordinary blindness" that is living "without investigating what we are." He commented long ago on what is today the human situation: "True nature being lost, everything becomes its own nature; as the true good being lost, everything becomes its own true good."

In this state of things the individual sees whatever he chooses to do or say as his "right" and therefore good, without reference to its effect on others. He does it "his way," and is considered a hero in doing so, even if in the doing it he does and communicates more in the manner of a brute, than a man. Again Pascal: "Man does not know in what rank to place himself. He has plainly gone astray, and fallen from his true place." The consequences of abandoning ontology and the knowledge of Christian faith served by the science of being has now caught up with post-Reformation culture. The individual is isolated in self and consequently acts, speaks and "experiences" without regard for consequences brought upon others, with disdain for any "common good."

Respect for any ethics that stressed duty as the concomitant of "right" has nearly disappeared. The conservatism that follows from scholastic ontology's insistence on the importance of human nature has been

replaced by an extreme libertarianism that puts the individual not merely beyond, but alone and outside all others. The isolated man acts without a sense of social duty, without sensitivity to others' feelings, with no regard for others' reaction. Indeed, shock brought on by such insensitivity gives to the isolated man a sense of superiority to others. It has become a sign of being "cool" to speak and act with regard only for self.

Partly responsible for this isolationism is the academic acceptance of Darwinism as an explanation for the appearance of man on earth, an offshoot or "sport" in the evolution of brutes from amoebae, and from brutes to "rational animals." There was no place in this "descent of man" for his being "a little less than an angel," since modern man does not believe in angels, that is modern "educated" man. With the discard of angels, man inevitably became just a little more than a brute. It was inevitable that Darwin's Man would become

the disgusting Yahoo of *Gulliver's Travels*.

With acceptance of men as merely "naked apes," history became of little importance. And with contempt for history, man must be simply isolated in the present. Since with evolution the past was less perfect than the present, then nothing of the past could be a model or lesson for the present. That is why the study of history has been set aside. It now has nothing to say to those who come after it. The idea of the past as prologue is incomprehensible to those of today's generation, told as they are that past times were an example of the need to escape to a future utopia.

A scientific world needs no culture; it needs only technique, and the application of induction, rather than deduction. It "feels" its way to achievement. It ignores that the importance of man walking on the moon or Mars is only in that it is being done by Man—that is, *what is doing* the walking, not on the *what* of the moon or Mars. We could drop off a whole menagerie of brutes on the farthest planet there is from earth, and it would be of absolutely no importance at all other than what Man might learn about himself from the doing of it. Scientific accomplishment is neutral regarding culture or human dignity.

Another cause of the coarsening of modern culture is the feminist movement that has insisted that having equal rights means accepting women's doing everything men are allowed to do. The insistence was that to have equal rights women should be accepted as no different from men. Thus acceptance of a certain coarseness thought to accompany maleness, whether with any basis or not, became acceptance of the same regarding women. When women became troopers, it was inevitable they would soon be swearing like troopers. If men have historically been tolerated in acting out lust, it became certain that women would be more inclined to offer themselves for such practice. And male reaction to sexual desire would soon be considered to be identical to that of women. Nakedness, undress on the part of women, was carried to an extreme far beyond prudent modesty with the excuse that men and women were the same in matters of sex, when it is quite obvious they are not.

Flirtation, long considered proper by women in courtship, degenerated first to titillation and then to sexual enticement. Signs that once said to a man the woman was available for marriage have come to mean "no need to wait for marriage," though the woman might have no intention the sign be taken seriously—a dangerous naïveté.

All of this has demeaned considerably the genuine purpose of sex, for procreation in

the environment of marriage necessary to create the stable family. Today sex is publicly flaunted as a toy, nothing private or precious. It is the matter of low comedy, to be laughed at and put on a plane with bodily functions that serve man's animality, whereas sex is meant to serve his capacity to love, rather than to lust. Women are encouraged to think of themselves as the object of that lust, rather than of love. Dante wrote about that, too, in his *Inferno*, when describing the fate in Hell of Thais, a prostitute who used her beauty to bring about the burning of nations' greatness. It is a lesson about the destructiveness of lust, which can overpower the greatest and destroy civilizations as easily as it does the intellects and wills of men.

There is a type of isolation that is shown by the capture of modern interest by the present and the prurient, shown in illiteracy about not simply history, but about the nobility and courage of the past in the pilgrimage of man from his beginning toward his intended goal.

Television has proved to be an instrument of the trivial. Few of its offerings transcend entertainment and diversion. A popular fad of "reality TV" shows men and women embracing a sort of barbarism and battling for survival. Of course, it is staged and scripted. Even as fiction it is primitive compared to the literature of past geniuses, which for the most part treated the moral and spiritual struggle of humans against evil. Such writing today finds difficulty in getting published, and usually earns small, if any profit for writers of publishing houses.

Part of "reality TV's" success is its frankness about the formerly private aspect of living. So, too, with the invasive cameras that show people carrying out "private" needs involving various degrees of nudity. There certainly was earthiness to some—even much—that Shakespeare wrote. But never in its use was the true dignity of man insulted; rather, such dignity was enhanced by its contrast with the cheap and vulgar. The good folk of Shakespeare's art were always superior of soul, noble in will and choice, "genteel" in the genuine meaning of that word, that is, having virtues associated with a true superiority—self-respect, deference, courage, fulfillment of duty. Now, entertainment has become a display of emotions, of animal capability, of instincts for survival put to cunning use.

Barbarians were once the uncivilized, ignorant of art and crude of language. The Catholic Church was the main influence that civilized the barbarians, "gentled" them into gentility. That was fortunate for most of us. America was created by descendants of the former barbarians. Their present descendants—that is, our children, grandchildren, great-grandchildren—are in grave danger of being decivilized, and again made barbarous. A major help in this process has been America's divorce not simply from any established Church, but from religion itself. The idea has grown greatly, starting in the 20th century, that almost all values are superior to religious ones.

With that has come the idea of self-sufficient Man. But the truly educated man, he of wisdom and philosophy, of ethics and honesty, recognizes above all his dependence on a Superior Being from whom he received immaterial gifts, the greatest being the capacity to love unselfishly and generously.

Do not be surprised if that aspect of humanness is discarded under pressures to consider Man self-sufficient. Do not be surprised if a barbarian state of tyranny becomes again admired, as it was when exercised by modern and older despots. If today's coarseness has reached our soul, we have a fatal condition.

(Mr. Morriss is Executive Editor of The Wanderer, in which publication this article first appeared). (Reprinted with permission).

A scientific world needs no culture; it needs only technique, and the application of induction, rather than deduction. It "feels" its way to achievement.

Carlton, continued from page 6

of discrimination embodied in the Defense of Marriage Movement.

Examination of some state incest laws provide further evidence of states' failure appropriately to define marriage in light of the benefits conferred. In some states first blood cousins can marry, in other states first cousins are not permitted to marry, and in states such as Utah, Arizona and Indiana, first cousins are permitted to marry if the couple is of a certain age (generally between fifty-five and sixty-five) or sterile or both. In Utah for example, state incentives provided through recognizing marriage for cousins is strictly based on the determination that the couple cannot have a natural family. Therefore, cousins, who undergo a vasectomy or are too old to conceive children cannot be rationally distinguished from a domestic partnership relationship. The probability of either group raising children appears to be the same. Moreover, these blood relationships, prohibited for their harmful consequences, are accepted once those harmful consequences are eliminated. This brings back into question the rationale of state marriage benefits. Is the purpose of marital status benefits to promote general stability in companionship, or to foster an environment to provide for the nuclear family? If the former prevails, then same sex marriages should receive the same recognition as traditional marriages. If the latter prevails, then Utah's recognition of sterile marriages contains no justifiable basis.

The analysis of state incest laws leads to another significant and easily recognizable class of citizens who should be classified as domestic partners (or be denied the rights of marital status) — elderly couples married after the age of sixty-five. At a certain age, elderly citizens become incapable of reproducing. As suggested by incest laws, it is statistically inconceivable for a woman to reproduce at the age of sixty-five. Hence, it is improbable that the traditional marriage can come to fruition (and even less likely through adoption). So why should states provide marital benefits supposedly aimed at the promotion of the traditional family? States cannot bestow marital benefits on promoting companionship between two people, for that would look eerily similar to same sex relationships. If nature plays a part in the definition of an appropriate marriage, as demonstrated by the inability of homosexuals to reproduce, or the ill effects of incestuous relationships, then how can a state justify providing benefits to the elderly or older incestuous companions, whom society acknowledges to be incapable of conceiving children? But let's see the traditionalists convince the American Association of Retired Persons that the elderly who marry are just domestic partners.

As long as Americans are so concerned with protecting the sanctity of marriage, they should also focus their efforts on preventing those who are not old enough to graduate from high school, or haven't lived long enough to die in a war, from joining in a "sacred union" — a union so important that society feels compelled not to appease a *de minimis* number of same sex couples. Surely "sanctity of marriage" partisans see the absurdity of the notion that young boys and girls can fully comprehend a lifelong commitment they are allowed to make before these same children are allowed to vote president, let alone drive a car. Ironically, California's laws appear to put more requirements on those acquiring domestic partnership status than those applying for a marriage license. Domestic partners must be at least eighteen years of age, but heterosexual couples need not be. Perhaps Californians think it is just a phase for youthful homosexuals, and they will grow out of it. Yet a similar state age requirement for the traditional marriage (or better yet a constitutional amendment) seems appropriate.

In order to justify subsidizing marriage to protect the traditional family, states must do so on a consistent basis. As long as distinguishing rights from homosexual unions and heterosexual unions rests on the nuclear

family, those who have a realistic potential of having a family should be classified as married, and those who have no potential should be domestic partners. Otherwise, a state's failure to recognize same sex marriages reeks of discrimination, justified by the "moral" condemnation of homosexuality.

Unfortunately, the inability of Americans to separate church and state has allowed the traditional definition of "marriage" to determine legal rights. Legal rights, however, should rest on rational application, not just tradition. The irony is that generally all traditional religions don't recognize gay marriage, but no traditional religion recognizes heterosexual marriages outside their particular church. Accordingly, those married outside of our own particular religion should not be considered married. However, somehow Americans manage to compromise these traditional notions when forming laws to promote a better society. As we have done for hundreds of years, Americans must again compromise tradition to preserve the purpose of government intervention. If this is an uncompromising area for Americans, America is better off taking marriage, and any connotation of it, out of our laws and putting it back where it traditionally belongs — our churches.

(Mr. Carlton is a second-year law student at USD).

Madam Grammar, continued from page 15

query made in good faith. Would you please explain the difference between a gerund and a participle?

— Timid not Truculent

Dear Timid not Truculent,

Gladly shall I accede. An English gerund is formed by adding the suffix "ing" to the root form of a verb. The gerund functions both as a verb and as a noun. For example, the gerund of *walk* is *walking*, and may be used thus: "My *walking* after tea gives me indigestion." Note that the gerund refers to the process of walking as an act and as a thing. Now, a present participle is also formed by adding "ing" to the verb's root. Accordingly, the present participle of *walk* is *walking*, which is facially indistinguishable from the gerund. The present participle differs from the gerund, however, in that the participle functions as a verb and as an adjective. For example, "Walking to the haberdasher's, I came across several old school chums." Here the participle *walking* both identifies an act and describes the actor in the sentence's main clause (as part of a participial phrase).

Dear Madam Grammar,

What is your opinion of British spelling appearing in American publications?

— Aspiring Anglophile

Dear Aspiring Anglophile,

You raise a question of some concern and delicacy among grammarians on both sides of the Pond. As you well know, spelling in the English language did not become regularized to any degree of satisfaction until well into the nineteenth century. Prior to that time, it would have been difficult to say, "This is the American (or colonial) spelling, but that is the English spelling," simply because no regional idiosyncrasies had yet emerged. But nowadays certainly there are divergences: any of the Latin derivations ending in "or" for the Americans and "our" for the Brits; an "s" to replace a "c" as in "defense" (American) and "defence" (British); a single "l" or double "ll" as in "willful" (American) and "wilful" (British).

Who has the better of it? I would say for the mere sake of simplicity and brevity that the Americans generally have the better forms: they can write "labor" in six rather than seven letters and they take the word verbatim from Latin. They perhaps also score for phonetics: their "civilization" sounds closer to the spoken word than the British "civilisation" (although anyone who has ever had the great good fortune of hearing Lord Clarke vocalize that word, will never

LAWYER LIMERICKS

A MOTIONS/WOOLSACK REPRINT

"The Woolsack is indebted to Professor Robert Simmons, a candidate for the law school poet laureate award, for his submission of the verse printed below. Professor Simmons reports that these selections were prepared in connection with a trial techniques course."

—February 1973.

Jury Selection

An unctuous lawyer named Quick
Began his voir dire very slick.
He smiled, syruped and fawned
Till a male juror yawned
And allowed it was making him sick.

A loquacious young lawyer named Blabberskit,
Began his voir dire and just wouldn't quit.
When he finally forbore
The jurors all swore
That they now had a bias and shouldn't sit.

Opening Statement

A prattling lawyer named Prance
Leaves nothing whatever to chance.
He spews facts and law
With a piston-like jaw
Putting everyone into a trance.

A pedantic young lawyer named Fission
Reads each word of his five-page petition.
He misses his aim
By burying his claim;
But he's proud of his vast erudition.

Plaintiff's Case

A languorous lawyer named Short
Wouldn't dream of preparing for court.
His questions at trial
All miss by a mile.
He's in contract—the case is in tort.

An eloquent lawyer named Gruited
Is superb at summation, 'tis bruited.
It's a shame that he's lax
At gathering facts,
For his client is always non-suited.

Defendant's Case

A belligerent lawyer named Bendix
Bullies, brow-beats and plaintiff-pricks.
His passionate furors
Delight the insurers
Till they learn the size of the verdicts.

A contract lawyer named Perry Fling
Will never admit to anything.
In his fight over trifles
He usually stifles
Any hope of his client in winning.

Closing Arguments

A vehement lawyer named Benadeux
Declares to the jury what they must do.
His insistent demands
Are persuasive commands
To the client, his wife and Benedeux.

A forgetful lawyer named Fairly
Never quotes the evidence squarely.
His errors so wide
Always favor his side.
But the jury favors him rarely.

cease giving thanks to the Almighty for British pronunciation). But then one can come right back with "fulfil" (British) and save a consonant to the Americans' "fulfill." Perhaps we would do well to cite the *Anglo-American special relationship* and call it a tie. But as for your specific question, viz. the practice of British spellings popping up in American printed matter, I think the practice to be lamentable. The Americans have a beautiful if provincial dialect; they need not "put the dog on."

CASENOTES

POLICE ROADBLOCKS AND THE FOURTH AMENDMENT

By Jonathan Meislin
Staff Writer

On January 13, 2004, in *Illinois v. Lindster*, the United States Supreme Court clarified a controversial point of law when it held that brief police roadblocks for the purpose of questioning motorists for informational reasons do not violate the Fourth Amendment. This decision comes after the Supreme Court ruled in *Indianapolis v. Edmond* (531 U.S. 32 (2000)) that police roadblocks for the purpose of finding evidence of drugs violate a motorist's Fourth Amendment rights. Justice Stephen Breyer, writing for the majority in *Lindster*, distinguished police road stops for questioning from police road stops used to search for drugs by noting that when an officer stops a motorist for questioning, the officer is not trying to ascertain whether or not the motorist has committed a crime, but rather whether the motorist has any information that can assist the police in apprehending other criminals.

Lindster concerned a drunken motorist who was arrested after he was stopped at a police roadblock. The roadblock was set up to question motorists about a hit-and-run that had occurred a week earlier in which a seventy-year-old bicyclist was killed. The police set up the roadblock at the same location and time of day as the hit-and-run. The police were stopping motorists to ascertain if they had any information about the hit-and-run, and to hand out flyers with contact information. The defendant *Lindster* pulled up to the roadblock, nearly hit an officer, and immediately was given a sobriety test due in part to the smell of alcohol on his breath. At trial *Lindster* cited *Edmond* and claimed that the road stop was an unconstitutional invasion of his privacy. The Illinois Supreme Court agreed with *Lindster*. The United States Supreme Court reversed, holding that informational road stops are not a violation of a motorist's Fourth Amendment rights.

Justice Breyer began his opinion for the majority by distinguishing between the purpose of stopping motorists for questioning and the purpose of stopping motorists under the suspicion that any given motorist has committed a crime, which latter practice was held unconstitutional in *Edmond*. In that case a search of an individual's car by an officer's general inspection (which entailed the shining of a flashlight into the "plain view" area of the car and the use of a drug sniffing dog) was held to be an intrusion into a motorist's right to privacy. In *Lindster* Justice Breyer argued that the stop in question was nothing more than an inquisition for information, not a stop based on generalized suspicion, and therefore not a violation of the Fourth Amendment. Stops not based on generalized suspicion, argued Breyer, are less likely to be intrusive or to provoke anxiety. These factors, in combination with the fact that the stops are brief and are not intended to elicit incriminating information, confirm the Court's conclusion that the stops do not violate the Fourth Amendment.

The opinion did not come without some criticism. Justice John Paul Stevens, in his partial concurring opinion, wrote, "There is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier." Justice Stevens, along with two other justices, were of the opinion that the facts did not show whether the road block was tailored enough to the specific task at hand. Stevens cautioned that the determination of whether alternative and less obtrusive methods

are available is a question for the trial court, and that the proper procedure would be to remand the case to the state courts for further inquiry. For if police are able to have free reign to set up roadblocks any time there is a "need" for information, motorists may become trapped in unconstitutional situations.

CAN LOTTERY WINNINGS EVER BE CAPITAL GAINS? UNLIKELY, SAYS NINTH CIRCUIT

By Damien Schiff
Editor

In a case of first impression, a panel of the Ninth Circuit was asked to decide whether the right to annuity payments derived from state lottery winnings, when transferred for valuable consideration to a third party, is entitled to treatment as capital gain under the Internal Revenue Code (26 U.S.C. (I.R.C.) § 1222).

Plaintiff and spouse, an Oregon couple, won a \$9 million jackpot in the state lottery in 1991. Plaintiff elected to take the winnings in annual installments of \$450,000. In 1995 the Oregon state legislature authorized lottery annuitants to alien their lottery annuity. The following year Plaintiff transferred to Woodbridge Financial Corporation his right to the remaining fifteen annuity payments in exchange for nearly \$4 million.

On his 1996 tax return Plaintiff recorded the \$4 million as ordinary income. In 1998 Plaintiff petitioned the IRS for a partial refund of his 1996 taxes, arguing that the \$4 million received in exchange for his annuity right should have been characterized as capital gain and therefore taxed at a lower rate. The IRS agreed and refunded with interest some \$300,000. But in March 2001 the IRS sued Plaintiff for the refunded taxes, arguing that the \$4 million should have been classified as ordinary income not capital gain.

On summary judgment the district court for the District of Oregon found for the government, concluding that "capital gains treatment is not appropriate here because no asset appreciated." Plaintiff appealed to the Ninth Circuit, which affirmed the district court.

In an opinion written by Judge Raymond Fisher, the Court noted that it was the first to address the issue whether "the sale of a lottery right is a long-term capital gain." The Court highlighted the balancing task before it: ensuring on the one hand that taxpayers can avoid the unfairness of being taxed all at once for the multi-year appreciation of a capital asset, and preventing shrewd but unscrupulous taxpayers from craftily classifying all their income as the transfer of rights to a future stream of income.

To make that balancing task easier, the Supreme Court has established the "substitute for ordinary income" doctrine. That doctrine requires that the courts narrowly construe "capital asset" to preclude taxpayers from converting ordinary income into pseudo-capital gains. Any lump sum received in lieu of what would be received in the future as ordinary income is treated as ordinary income. Owing to the absence of Congressional guidance, the doctrine operates on a case-by-case basis.

Applying the "substitute for ordinary income" principle to the Plaintiff's lottery transfer, the Court had no difficulty in finding the \$4 million to be ordinary income, for two main reasons. One, Plaintiff "did not make any underlying investment of capital in return for the receipt of his lottery right." Two, the "sale of his right did not reflect an accretion in value over cost to any underlying asset" that Plaintiff held.

Plaintiff's purchase of the winning lottery ticket cannot itself be considered an

"investment" for capital gain purposes, stated the Court, because the Internal Revenue Code deems all gambling winnings to be ordinary income. (I.R.C. § 165(d)). Since Plaintiff by state law was able legally to alien his lottery interest only after he had won the lottery, and because Plaintiff had made no capital investment before winning the lottery, his right to the lottery proceeds could not be characterized as capital gain.

Additionally the Court concluded that, because Plaintiff incurred no cost to receive the right to alien his lottery annuity payments, the value paid by Woodbridge to Plaintiff could not be considered capital appreciation. Although Plaintiff received value, it did not compensate Plaintiff for an increase in value over cost for the annuity "asset." Rather, the \$4 million was intended to be the rough equivalent of what Plaintiff earned by gambling on the Oregon lottery in 1991. The reward for that labor — the lottery funds — was ordinary income, and its conversion to an alienable annuity did not change its classification for tax purposes.

As an aside, the Court also noted that its approval of Plaintiff's characterization would create a "dichotomous system" in which lottery winners who elected to take their winnings as an annuity would receive favored tax treatment over those winners who would take their winnings as a lump sum.

Plaintiff, anticipating a brutal assault with the "substitute for ordinary income" doctrine, tried to parry with three arguments. (1) The doctrine had been tacitly overruled by the Supreme Court. (2) The doctrine is inapplicable where the taxpayer retains no interest in the capital asset. (3) The lottery right is a debt instrument under I.R.C. § 1275.

Answering Plaintiff's first argument, the Court distinguished the "offending" precedent, *Arkansas Best Corp. v. Comm'r*, construing that case as concerning only the "business motive" element of the capital asset definition and not the "substitute for ordinary income" doctrine. Addressing Plaintiff's second point, the Court refused to hold the doctrine inapplicable to all transactions where the taxpayer no longer retains any interest in the capital asset. Instead the Court found that Plaintiff's transfer of his entire lottery right was not sufficient in itself to exempt the transaction from the doctrine. And as for Plaintiff's argument that the lottery right was a debt instrument, the Court concluded that Plaintiff's lottery right was based upon the state's gift not the "use or forbearance of money."

The Court did not address the government's contention that, even if the \$4 million had been classifiable as capital gain, Plaintiff would have been judicially estopped from so alleging, because he had argued the opposite position in state court tax proceedings.

The case is *United States v. Maginnis*, No. 02-35664 (9th Cir. Jan. 30, 2004).

PORTIONS OF PATRIOT ACT HELD UNCONSTITUTIONAL

By Damien Schiff
Editor

A United States District Court has ruled that part of the USA Patriot Act is unenforceable because unconstitutionally vague. In an opinion dated January 22, Judge Audrey B. Collins of the Central District of California in *Humanitarian Law Project v. Ashcroft* [HLP] enjoined the federal government from enforcing against the named Plaintiffs section 805(a)(2)(B) of the Patriot Act, which provision ostensibly proscribes the lending of "expert advice or assistance" to designated foreign terrorist organizations.

Please see Patriot Act at page 13

Patriot Act, from page 12

The HLP Plaintiffs were connected in varying degrees with the Partiya Karkeran Kurdistan (PKK), a political organization that seeks self-determination for Kurds in Turkey, and the Liberation Tigers of Tamil Eelam (LTTE), a political organization that seeks self-determination for the Tamils of Sri Lanka. In 1997 Secretary of State Madeleine Albright, pursuant to authority granted by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), designated the PKK and LTTE as "foreign terrorist organizations."

In a prior case, Plaintiffs obtained an injunction against the enforcement of section 805(a)(2)(B)'s statutory predecessor, found in AEDPA. That version prohibited giving "training" and "personnel" to foreign terrorist organizations. Judge Collins granted Plaintiffs' injunction in the first suit, holding that the AEDPA provision was unconstitutionally vague. The Ninth Circuit subsequently affirmed that decision. Accordingly, Plaintiffs brought the instant action to contest the Patriot Act's addition of "expert advice or assistance" to the old AEDPA provision.

Plaintiffs principally argued that the statutory phrase "expert advice or assistance" was impermissibly vague and thus violated the Fifth Amendment's Due Process Clause. Plaintiffs also argued that the statute could be construed to trench upon First Amendment liberties, such as speech, petition and association.

Responding to these contentions, the HLP court began its analysis by noting three reasons why a statute might be unconstitutionally vague. (1) A statute would be void for vagueness if a reasonably intelligent person could not anticipate which activities the statute prohibited. (2) A statute might also violate the constitutional vagueness rule if it permitted arbitrary or discriminatory enforcement. (3) Lastly, a statute that created a chilling effect on the exercise of First Amendment liberties would be constitutionally infirm. And as for criminal statutes generally, a court would be compelled to overturn a law that failed to give fair notice that particular conduct was sanctionable.

Plaintiffs argued that the words "expert," "advice" and "assistance" as used in the Patriot Act fail to identify the type of conduct prohibited, and are indistinguishable in meaning from the words "training" and "personnel," which Judge Collins had previously held to be impermissibly vague.

The government conceded that section 805(a)(2)(B) does not prohibit advocacy on behalf of terrorist groups, nor does it sanction association with those groups for advocacy purposes. But the statute gives "fair warning" that any expert advice or assistance to terrorist organizations is forbidden, including medical and economic development assistance, as well as human rights advocacy activities.

In ruling for Plaintiffs, the court stressed the close relation between AEDPA's "training" and "personnel" and the Patriot Act's "expert advice or assistance." The latter phrase can easily be construed to encompass activities covered by "training" or "personnel." Given that these terms have already been held to be impermissibly vague, it follows, argued Judge Collins, that their synonym — "expert advice or assistance" — is also impermissibly vague.

Notwithstanding the government's concession that section 805(a)(2)(B) does not impinge upon First Amendment liberties, its admission that any and all "expert advice or assistance" is proscribed would, the court declared, lead necessarily to some constitutionally protected activity (such as petitioning the United Nations on behalf of the terrorist organizations) falling within the section's scope. Accordingly, the court concluded that section 805(a)(2)(B)'s vagueness deprived Plaintiffs of liberty without due process of law.

Curiously, although the court considered section 805(a)(2)(B)'s possible application to First Amendment-protected activity to be an important factor leading to its conclusion that the provision is unconstitutionally vague, the court nevertheless denied Plaintiffs' overbreadth challenge. Plaintiffs had argued that the

By Mary Moreno
Special to Motions

The 19th Annual Southern California Public Interest Law Career Day sponsored by the various Southern California law schools, including USD, was recently held at UCLA. Many regional, state and federal organizations had tables with brochures and resume-drop trays. 2Ls and 3Ls who had previously pre-registered and submitted resumes were able to interview with interested agencies for summer and full-time employment.

One of the more edifying events was the morning Panel Discussion. The discussion was moderated by Associate Dean R. Scott Wylie (Whittier Law School), with participants ranging from a mid-level associate in a civil rights law firm and the Inspector General of the Los Angeles Police Commission to a Skadden Fellow at the nonprofit Public Counsel Law Center.

"expert advice or assistance" provision prohibits a substantial amount of protected speech. The government countered that Plaintiffs offered no examples of "core political activities" prohibited by section 805(a)(2)(B).

In holding for the government, the court stated that the "Patriot Act's prohibition of the provision of 'expert advice or assistance' is aimed at furthering a legitimate state interest: curbing support for designated foreign terrorist organizations' activities, which unquestionably constitute 'harmful, constitutionally unprotected conduct.'" Thus the court concluded that as-applied challenges to the "expert advice or assistance" provision would be sufficient to safeguard First Amendment liberties.

The court also disagreed with Plaintiffs' contention that section 805(a)(2)(B) criminalizes protected associational activity, and that the Secretary of State's authority to designate organizations as terrorist is impermissibly broad. The court instead held that Plaintiffs' "associational" challenge had been ruled upon in earlier litigation, and that the Secretary's authority to designate terrorist organizations was not tantamount to "unfettered discretion."

HLP also presented significant justiciability issues of standing and ripeness. The government strongly argued that Plaintiffs had no history of prosecution under the "expert advice or assistance" provision and that they had failed to articulate any concrete plan for violating the provision in the future. Additionally, the government contended that the activities Plaintiffs intended to commit were not arguably "expert." Consequently, the government claimed that Plaintiffs' case did not present an Article III case or controversy.

Plaintiffs parried arguing that their mere fear of prosecution was sufficient to overcome any standing obstacles in light of the less rigid justiciability requirements applied in First Amendment cases. Plaintiffs pointed to the government's vigorous enforcement of the material support provision of AEDPA (as amended by the Patriot Act) since the September 11 attacks. Furthermore, Plaintiffs' intended medical and humanitarian activities, such as making presentations to the UN and providing medical expertise, were clearly "expert" within the meaning of section 805(a)(2)(B).

The court found no justiciability obstacle. It considered Plaintiffs' plans to be more than hypothesis and therefore sufficient to overcome the government's justiciability objections. Although the threat of prosecution may not be exceptionally high, in the First Amendment context the courts have adopted a "hold your tongue and challenge now" approach to permit adjudication of First Amendment cases. The court considered Plaintiffs' peacemaking and human rights advocacy to be arguably "expert" enough to fall within section 805(a)(2)(B)'s scope. But the court dismissed two Plaintiff organizations because they failed to describe their activities sharply enough to permit the court to determine whether they were sufficiently expert.

Thus the court granted Plaintiffs' injunction precluding enforcement of section 805(a)(2)(B) against the named Plaintiffs only.

PUBLIC INTEREST LAW CAREERS IN SOUTHERN CALIFORNIA

The panelists' comments were frank, realistic and far-ranging, worthy of the attention of anyone interested in a legal career, let alone a public interest law career.

The panelists were: Mike Evans, a four-year associate with Brancart & Brancart, a civil rights law firm with a concentration on fair housing and lending issues; Ines Kuperschmidt, a Skadden Fellow at the Public Counsel Law Center; Karin Wang, Vice President of Programs at the Asian Pacific American Legal Center; Andre Binotte, Jr., Inspector General, Los Angeles Police Commission; and Bert Voorhees, a partner of Traber & Voorhees, a private public interest law firm specializing in employment discrimination, fair housing, and similar issues.

First, Dean Wylie asked the panelists if any had intended public interest as a career while in law school. All responded in the affirmative.

Next discussed was the best way while in law school to build a resume attractive to public interest law employers. In other words, what do employers look for? The main "must have" is proof of your choice of public interest as a career. Each panelist had been actively involved while in law school in public interest activities on campus or in the community or both. This held true in the nonprofit and for-profit arenas. Bert Voorhees emphasized that for-profit law firms like his also look for work experience in addition to commitment to social change, or some evidence both of passion and production/critical thinking.

An area of huge concern to 2Ls and 3Ls is the present barriers to getting a job in the public interest law field. Mr. Evans' comment brought down the house: "The biggest barrier to getting a job is that we are not hiring." It was recognized by all that there is a lack of jobs as well as a lack of affordability in terms of pay scale.

Andre Binotte Jr. (Inspector General of L.A. Police Commission) believes that "civilian oversight of law enforcement is a growing field by regional development." The Inspector General's Office reviews police misconduct reports, all "shooting" cases (anytime a police weapon is discharged on the job), and conducts operation audits. Mr. Binotte was appointed in May 2003, and he finds that the office is still evolving in terms of responsibilities and scale.

Ms. Kuperschmidt mentioned that fellowships are one way through the barrier, although it is very competitive; students must think ahead and begin to prepare by their second year of law school. Another way to jump the barrier is to commit to a meaningful amount of time in the public interest field while a law student via internships and externships.

All the panelists agreed that candidates with language skills truly stand out. While almost any language is useful, of course in the Southern California area fluency in the Spanish language is most prized by employers, followed closely by Pacific Rim and Asian languages. Ms. Kuperschmidt emphasized that many law schools permit transfer of a limited number of credits for non-law school courses, and that this may be a way for students to obtain or polish language skills.

She also encouraged students to maximize the use of law school credits in the form of clinics, practicums, internships, externships and clerkships to gain real work experience. A Skadden Fellow, Ms. Kuperschmidt stated, "You can pass the Bar without taking Bar classes in law school" providing you take a solid bar review course and are the type of student who performs well under cramming-type conditions. She cautioned that this path was not for everyone—some students will perform better on the Bar having taken Bar courses in law school—and that students should know themselves and be confident in their study habits and abilities before taking this route.

In terms of making the most of
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EDITORIALS

ON BEING A GOOD LAWYER

By James V. Schall, S. J.
Professor of Government
Georgetown University
Special to Motions

"But while Gallio was Proconsul of Achaia, certain Jews made a concerted attack on Paul and brought him before the Tribunal. 'We accuse this man,' they said, 'of persuading people to worship God in a way that breaks the Law.' Before Paul could open his mouth, Gallio said to the Jews present, 'Listen, if this were a misdemeanor or a crime, I would not hesitate to attend to you; but if it is only quibbles about words and names and about your own Law, then you must deal with it yourselves -- I have no intention of making legal decision about things like that.'" These words, of course, are taken from the eighteenth chapter of the *Acts of the Apostles*. They serve to remind us of the fact that St. Paul was not slow to use legal means available to him when it was necessary to protect himself and his mission from unjust treatment.

To be a good lawyer, however, is it enough to be merely a "good" lawyer? To be a good lawyer, is it enough to be a "good man?" To be a good lawyer, is it helpful or advisable or even necessary also to be a good Christian, a good Catholic? Is it legal or politic to ask such questions, even in a church in a free society? Dare we even hint at such a correlation? Is law like mathematics in which there can be no specifically "Christian" approach?

The story is told of the famous lawyer Rufus Choate, an associate of Daniel Webster, about a case involving a Boston shipping house. On the witness stand was a crusty Irish shipowner. Choate was trying to confuse the Irishman by asking him a long and involved technical question. According to a spectator at the trial, Choate's questioning bobbed all around the case and straggled through every street in Boston. But the witness remained calm and unflappable through it all. When Mr. Choate at some length had finished, the Irishman leaned forward and, in a voice clearly heard throughout the court, asked him, "Mr. Choate, will ye be afther repating that question again?"

So let me, following a famous pedagogical principle about the mother of studies, repeat once more my initial questions: To be a good lawyer, is it enough to be a "good" lawyer? To be a good lawyer, is it enough to be a "good human being?" To be a good lawyer, is it helpful or advisable or even necessary also to be a good Jew, a good Christian, a good Catholic?

If good lawyers can do a great deal of good, must it not in logic follow that bad lawyers can do a great deal of harm? Following Plato, lawyers, like doctors, can be "bad" lawyers in two senses: a) they do not know the law, or b) they do know the law but skillfully use it for a wrong purpose. And can the evolving system under which lawyers become lawyers in the first place, the constitutional system itself, make it more difficult to be a good lawyer, and hence a good human being, particularly when our philosophers, unlike Socrates, too often teach that good and bad do not constitute a real distinction?

Political philosophers are asking this question about the integrity of what, in practice, is passing for the Constitution today. Not a few have the distinct impression that our constitutional system no longer has a stable grounding in something other than itself, in something other than pure will of lawyers, judges, or people. This very point -- the notion of a constitution grounded only in will -- is the most disturbing problem about modern democracies

But, we might ask ourselves, does not the world love lawyers? Is not law a growth industry? In a *New Yorker* cartoon, we are in a well-appointed Manhattan living room. We see three persons, two ladies and a broadly smiling, self-satisfied, portly gentleman. The second lady, evidently a newly arrived guest, stands, arms folded, with a most puzzled look on her face. The other lady, obviously the wife of the gentleman, is quite buoyant. Her arm is on her husband's shoulder. She is pointing at his ample mid-rift, saying proudly, "Edna, this is Frank, my happiness, solace, delight, inspiration, comfort, joy, and lawyer." Some wives still love their lawyer husbands.

But does the world love lawyers? Most liberal arts universities today, it seems, are filled with undergraduates preparing for law school. I cannot even begin to count the vast number of law school recommendations I have written for good students over the years. I sometimes wonder, so much has our lives become politicized, if becoming a lawyer ought not to be a natural right, something to be issued with our birth certificate.

On every side, no doubt, we hear complaints and worries about the over-legalization or over-politicization of society. We suspect that so many laws are not leading to more virtue but to an exclusive identification of morality with positive law. Not a few critics directly relate the economic decline or prosperity of a nation to the relative burden of the law on an economy.

On this topic, I take a bemused delight, I must confess, while we are reading Plato in class, to pause at the passage in *The Republic*, in which Plato points out that a society filled with students of medicine and law is already a sick society. On hearing this, the students laugh half-heartedly, vaguely wondering whether Plato was ever wrong. Plato meant, of course, that lack of self-discipline or lack of virtue caused many of the medical problems and most of the legal and criminal ones in any society. Plato's passage still gives us pause even after twenty-five hundred years; though, I suppose, from a self-interested point of view, lawyers could apply to themselves de Mandeville's famous remark in *The Fable of the Bees* about economics, that it prospered handsomely when vices were most flourishing.

The New Testament, it can be easily noticed, is surprisingly filled with many legal incidents and precedents. No study of law is complete without a detailed look at this record. The trial of Jesus before the Roman governor Pilate is an obvious instance. We cannot ponder John's account of this trial often enough.

Certain chapters near the end of the *Acts of the Apostles* can be considered. Before the law, Paul was fighting to prevent his being killed by local para-legal bands out to eliminate him. He skillfully presented himself before the Roman law courts, before Felix, Festus, and Agrippa.

It is sometimes overlooked how shrewdly St. Paul used his Roman citizenship, even though he was a Jew, a Pharisee in fact. These passages in St. Paul alone are enough to make us realize that the New Testament itself, though it pioneered the notion that some things do not belong to Caesar, did not intend to supplant or overlook the civil society in which it appeared. The sword was given for our punishment, Paul taught in *Romans*. Indeed, Paul recognized that Roman civil law, the famous *Codex Juris Civilis*, as it came to be entitled when later set down under Justinian, the remote origin of all modern legal systems, gave him a certain welcome freedom and protection to pursue his own mission which required him to go over from Asia into Macedonia and on to Rome.

Thus even though Christians were advised to settle disputes among themselves by their own institutions and religious principles, there were times, with St. Paul, when they had to resort to the Roman courts. When we

understand this fact, we still should not forget the result of the trial of Jesus or the fate of Paul. We should not forget, in the end, the sorry record of the lawyers and the judge in this most poignant forensic scene of life and death before the legally appointed Roman judge and politician, whose authority Christ himself said would not have existed if it did not come from God.

Do I have any concrete advice for lawyers who are Catholic? Indeed, I do. The first thing that they have to do, and this will take time and effort, as serious a study as anything ever studied in law school, is to learn precisely what the Catholic Church teaches about itself. If I were but to list the misconceptions and downright lies that appear about the Church almost daily in our media and even in our scholarly journals, it would, I fear, take me considerable time.

The Church, without denying its own faults, needs far more effective legal mechanisms than we now have to call careful attention to and, yes, at times even to prosecute and sue, certain false and slanderous statements about the Catholic Church. This latter effort is surely a task of Catholic lawyers, both individually and corporately. We now begin to get public figures and appointees who are, by any standard, prejudiced and biased against Catholicism as such.

We almost daily have charged to us with impunity what analogously, were it to be said of Jews or blacks or Muslims, would cause the roof to cave in. It is a commonplace that we Catholics are almost the only group that can be attacked with no legal or political consequences. We do not forget about turning the other cheek. But we also do recall about the light shining before men. We do not forget that the truth, including the truth about ourselves, "the whole truth about man," as John Paul II often puts it, is to be clearly and accurately stated. We have a right and duty to do so, as Peter and John already had taught us in *The Acts of the Apostles*.

In any case, my second suggestion is to read most carefully the *General Catechism*. I think it is the most complete and finest statement of the contents of the faith ever written. It is thorough, clear, to the point. No lawyer's book shelves should be without it. And it is what the Church teaches about the essential things that really matter. These are not primarily lawyer things, of course, though some are. But they are all human things and no one can afford to neglect a careful and faithful reading of this remarkable document. We all have time for it. We must make time for it. We have on the Throne of Peter the most remarkable of popes perhaps ever. He said explicitly that this document is meant for the intelligent layman. If even the most average lawyer is not that, he should not be in the legal profession.

And at least some lawyers also should pay attention to the study of the new Code of Canon Law and the Church law itself. They will be astonished to learn how much of the content and practice of modern government derives from canon law. If someone is in any doubt, I suggest a reading Professor Harold J. Berman's magisterial *Law and Revolution: The Formation of the Western Legal Tradition*.

Christof Cardinal von Schönborn, the secretary of the commission for drafting the *General Catechism*, remarked that the *General Catechism* is written from the point of view of the contents of the faith, that is, what is said about God, about the sacraments, about the commandments, and about how we pray. This is what is handed down to us, what has been pondered, defined, and reflected on over the centuries by councils, popes, saints, theologians, philosophers, and, yes, lawyers.

We should be astonished that we
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Good Lawyer, continued from page 10

ever allowed ourselves not to know the truth about these things as the Church has taught them. So lawyers, like priests, and everyone else, need to acquaint themselves with the intellectual and legal side of the faith. It is a much more fascinating enterprise than we might initially expect. We live in a world in which the coherent, profound, consistent side of our religion is not even known or suspected, often not even by ourselves. It is time to put a stop to this, beginning with ourselves, both as individuals and as organized groups.

Catholic lawyers, to conclude, can learn much by reflecting on this account from the twenty-third chapter of *The Acts of the Apostles*. It seems that about forty young militant Jews of the area had made a vow not to eat or drink until they had killed Paul. Paul's nephew got wind of this proposed ambush and told Paul. Paul called a centurion and asked him to take the young man to the tribune. The tribune listened to news of the plot. Immediately he called two centurions and two hundred troops, plus seventy cavalry, to escort Paul by night to Caesarea.

With the centurions the tribune sent the following letter to Felix, the Roman governor. This is how the letter read:

Claudius Lysias to his excellency the governor Felix, greetings. This man has been seized by (certain) Jews and would have been murdered by them but I came on the scene with my troops and got him away, having discovered that he was a Roman citizen. Wanting to find out what charge they were making against him, I brought him before their Sanhedrin. I found that the accusation concerned disputed points in their Law, but that there was no charge deserving of death or imprisonment. My information is that there is a conspiracy against the man, so I hasten to send him to you, and have notified his accusers that they must state their case against him in your presence.

This letter is delivered to Felix who read the letter. Felix asked Paul what province he was from. Paul said Cilicia. Felix said that he would hear his case when the accusers arrived. He put Paul in protective custody overnight.

As we know, this same Paul had appealed to Rome, was sent there, and eventually perished there, the exact circumstances of his death we do not know. Paul would not have us say that this conclusion to his own life prevents us from using the law when we can also use it to uphold the justice that belongs to us to teach and practice the truth. We are, finally, often told that our era is very different from that of Paul and Felix. In a time when we are rather vividly aware of scandals in the Church that embarrass us all, even as we are reminded about inner status of those who are to cast the first stone, I leave the subject of good lawyers with this one thought -- is our time so different?

With the Irish ship-master, in conclusion, let me recall and repeat the beginning passage of these reflections from *Acts of the Apostles*:

But while Gallio was proconsul of Achaia, certain Jews made a concerted attack on Paul and brought him before the tribunal. "We accuse this man," they said, "of persuading people to worship God in a way that breaks the Law." Before Paul could open his mouth, Gallio said to the Jews present, "Listen, if this were a misdemeanor or a crime, I would not hesitate to attend to you; but if it is only quibbles about words and names, and about your own Law, then you must deal with it yourselves -- I have no intention of making legal decisions about things like that."

On reading such a passage today, it is difficult not to admire the stern wisdom of the Roman legal mind in seeking to moderate public

frictions while not denying that they needed to be resolved in their own order. We cannot but admire the tribune who sent Paul to higher authorities, to Gallio, the proconsul, who had "no intention of making legal decisions about things like that."

COLI, from page 1

could insure only key executives, whose untimely deaths might cause real problems for the company.

But a loosening of state rules in the 1980s allowed for an explosion in a new kind of COLI that covers rank-and-file workers, known in the insurance industry as "janitors insurance" or "dead peasants" insurance. Nowadays broad-based COLI plans typically continue to insure workers even after they have quit the company or retired, making it difficult for some to see how the company would suffer a loss if these individuals were to die.

The practice is as widespread as it is little-known. Research by the *Wall Street Journal* found that numerous corporations purchase COLI policies on millions of lower-level employees, typically without their knowledge. The business of selling COLI policies is thriving, with premiums growing from \$1.5 billion in 2000 to \$2.8 billion in 2001. Among the U.S. corporations that have bought such insurance are AT&T, Dow Chemical, Nestle USA, Procter & Gamble, Disney and Pitney Bowes.

Insurance executives maintain that such policies are perfectly legal. In fact, Herb Perone of the American Council of Life Insurers argues, "Nobody gets upset when a company insures its plant or its fleet of cars or land or any other business asset. To think that your labor force is not a business asset is extremely shortsighted."

The appeal of this newer kind of COLI is driven by the generous tax benefits allowed life insurance generally. Corporations gain not merely from the tax-free life insurance benefits they receive when current or former employees die; corporations also can borrow money against these policies. Corporations are not taxed on gains from a life insurance policy; thus, COLI policies in effect amount to tax-free investments for businesses.

Currently, federal tax law prohibits the use of life insurance as a tax shelter if there isn't a legitimate business purpose for having it. From the start, many companies have asserted that they use COLI to help finance looming costs for retirees' benefits. While the IRS can find out about COLI policies directly from the companies, disclosure requirements aren't tight. Employers do, in fact, use other kinds of COLI to pay for lavish retirement benefits for executives. But disclosure rules don't require them to distinguish between this COLI earmarked for executive benefits and dead peasants/janitors COLI.

To top it all off, after the September 11 attacks on the United States, some of the first life insurance payouts went not to the victims' families but to employers. Many of the details surrounding the payouts have not been publicized. But Hartford Life Insurance Company's quarterly regulatory filing referenced an after-tax charge of \$2 million related to the September 11 attacks. Hartford itself has confirmed this.

Many states have quickly moved to put restrictions on the use of such policies. Most have "advise and consent" laws that technically require companies to get workers' permission before buying life insurance on them. Even then, however, companies may choose to offer a small \$1,000 or \$5,000 benefit for the employee, without telling them that the insurance benefit the company will receive will be much larger. And, if the particular state allows negative consent, an employee could be insured unless they act within a certain period of time to reject the coverage.

The California Labor Federation last year successfully lobbied politicians in the state's capital to ban the corporate practice of insuring the lives of rank-and-file workers. That means that any employer that currently holds any corporate life insurance policy that is prohibited under AB 226 must disclose it to the subject employee(s) in writing by March 31,

2004. Policies that are already in effect which violate AB 226 will become void on the next premium payment due date that is on or after January 1, 2009, but no later than January 1, 2010.

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opportunities, the panelists agreed that "focus" and "hustle" are very important. They also suggested narrowing in on a general sense of where you want to go: client work, public policy, impact litigation, etc. For example, Karin Wang of the Asian Pacific American Legal Center stated that her agency has a comprehensive social change approach. When first out of law school, Ms. Wang worked in litigation for a big law firm while staying involved in the community public interest issues she favors. After a few years, she realized she was more interested in working for social change. With her work experience, and more importantly the credibility of her commitment to public interest, she found her way to the Asian Pacific American Legal Center.

Networking was mentioned, but it was recommended particularly in the public interest field that student interest be sincere and credible. If your background is in public policy, it is unlikely in today's climate that a public interest agency focused on client work will consider your resume. All the panelists encouraged students to make the most of their law school Career Services Office and public interest centers while in law school.

ASK MADAM GRAMMAR

Dear Madam Grammar,

My husband and I have an ongoing (but friendly) disagreement about the proper use of the verbs "bring" and "take." I think they can be used interchangeably; he says "take" is only used when transporting an object away from its current position, and "bring" is used when returning an object to its original place (as in "bring it back"). If that is the case, how do you explain "BYOB"?

— A Friend

Dear A Friend,

As the Supreme Court sometimes refuses to decide on the merits cases deemed to be too contentious, by terming them "political questions," so perhaps also should Madam Grammar decline to comment upon interspousal debates, in the interests of domestic tranquility. A happy medium may be found, however, in the issuance of a "grammar advisory opinion," which shall not be binding upon the disputing spouses but nonetheless may have some effect upon subsequent usage. Having reviewed the matter thoroughly, it is Madam Grammar's position that your husband has it right. The very first definition of *to bring* is to describe the transporting of a thing to the place from which the thing is regarded. In my dictionary, the meaning of *to take* in the analogous sense is accorded definition number fifteen, and even then the end-point of the transporting is presumed to be a place distinct from the point from which the thing is regarded. Now, given that we speak here of grammar, one would be hard-pressed to defend this position against every possible exception either in theory or in practice; for only a small number of rules, generally ascribed to the natural law, can admit of no exceptions. And as much as Madam Grammar would like to have it otherwise, the rules of grammar are not widely considered to be of the natural law. Thus "BYOB" can be admitted as an exception to the *rule* established above.

Dear Madam Grammar,

I hope you will forgive what may appear to be an overly fastidious question, but if I have learned anything from being an avid reader of yours, it is that you of all people are least likely to refuse to answer a grammar-related

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at page 11**



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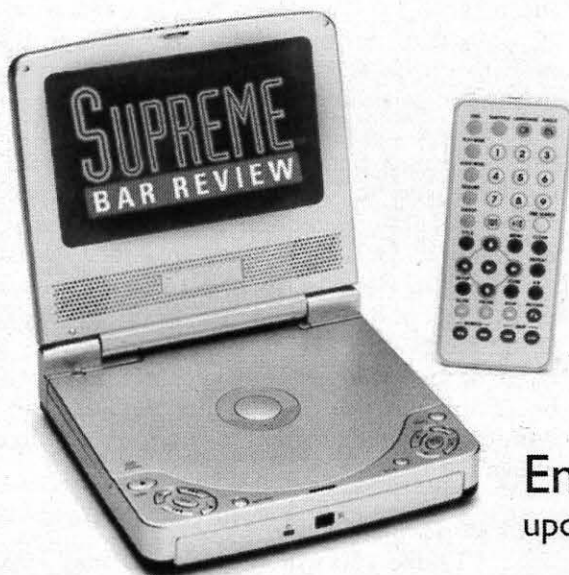
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