

Law Quadrangle Notes

The University of Michigan Law School

Volume 17, Number 2, Winter 1973



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The Cover: With one major article devoted to a look at Supreme Courts, and another dealing with emerging laws and court decisions about them, what better time to use this striking illustration of the Supreme Court Building in Washington, D.C.?

Law Applications Up, Admissions Are Down

The number of applicants for admission to the University of Michigan Law School continues to increase at a record pace, although the number of admissions are being reduced slightly as the Law School tries to reach an optimum enrollment level.

Freshman classes in recent years had bulged to a high of 444 students in 1969 as a result of the Law School's policy of over-enrollment in anticipation of high draft calls. During this period the School also automatically admitted veterans who had been accepted—or who were already enrolled—at the Law School prior to their military service.

Now, however, Dean Theodore J. St. Antoine says the School is attempting to reduce freshman enrollment to about 350 students a year. This figure, he says, is in keeping with the size of the School's physical plant and faculty.

Jane Waterson, the School's assistant dean and admissions officer, reports that 363 students were placed in the freshman class in 1972. The total number of first-year applicants was 4,915.

By contrast, the School in 1971 received 4,768 applications out of which 360 first-year students were admitted; in 1970 3,740 applications were received and 419 were enrolled; in 1969 there were 2,810 applications and 444 students enrolled.

Total enrollment at the Law School—including first-, second-, and third-year students and a small number of postgraduate students—is nearly 1,200. The School hopes to reduce this number to about 1,100.

Miss Waterson explains the high number of applications by noting a general increase of student interest in the legal profession. In addition, she notes that more minority and women applicants continue to apply to the Law School, and that many applicants have chosen the law as a career after pursuing graduate studies in other areas where they found employment opportunities limited.

A total of 51 students in this year's freshman class have done graduate work in other areas, according to Miss Waterson. Six of these students have earned Ph.D.'s and 31 have master's degrees.

Miss Waterson offers these additional figures:

Applicants for admission in 1972—not including transfer students and students applying for re-admission—included 711 women and 4,163 men. Of this total, 58 women and 164 men were placed in the freshman class. This year's first-year class has



Jane Waterson

some 46 minority students, including blacks, Mexican-Americans and American Indians.

About 25 per cent of this year's applicants were from Michigan. Current freshman enrollment at the Law School includes 51 per cent from Michigan, compared to 55 per cent last year and 46 per cent in 1970. All told, this year's freshman class represents 34 states and the District of Columbia.

This year's first-year class had a mean undergraduate grade-point average of 3.49 (out of a possible 4.00), which is higher than figures for the past three years. In 1971 it was 3.47; in 1970 it was 3.37; and in 1969, 3.21.

Student scores on the Law School Admissions Test (LSAT) are also on the rise. For this year's first-year class the mean LSAT score was 695 (out of a possible 800); in 1971 the figure was 680; the 1970 mean score was 666; and in 1969 it was 630.

Michigan, Brussels Establish Student and Faculty Exchange

The law schools of the University of Michigan and The Free Universities of Brussels (Belgium) have formalized plans for a faculty and student exchange program.

Each year a member of the Brussels law faculty will spend one term teaching and doing research at the U-M, while a Michigan law professor spends equal time at Brussels teaching courses in American or international law. In addition, two U-M law graduates and two Brussels graduates will pursue postgraduate studies under the exchange program.

The Belgian faculty and students will come from both the Flemish and French-speaking universities at Brussels. Fellowship grants for the program will be provided by the host institutions.

U-M law Prof. Eric Stein, who was instrumental in establishing the program, notes that an informal Michigan-Brussels exchange was begun in the late 1950's, but it was not until this year that the program was formally endorsed by the participating law faculties.

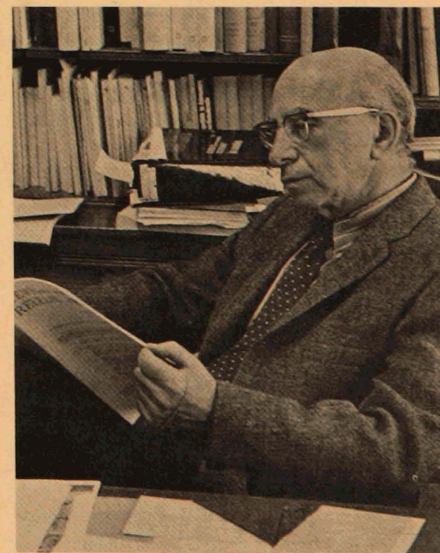
Stein, an authority on international and comparative law, emphasizes the importance of Brussels as the administrative headquarters for the European Common Market. He notes that many of the Brussels law faculty have a close relationship with the legal staff of the Common Market Commission, the executive body of the Common Market.

Thus, for American lawyers and legal scholars, familiarity with legal developments in Brussels will be of increasing importance as the United States and European nations continue to develop close economic ties, Prof. Stein points out.

Conversely, the U-M professor says, European lawyers are eager to learn more about the American legal system—particularly in areas relating to interstate commerce, antitrust regulation, and tax and corporate law—because the American system is viewed as a model for a unified European legal system.

"From a business point of view," says Stein, "Brussels is the best place to go for the study of the new European law. And since Europe and America have already become economically interdependent, it will be important for people of various nationalities to be able to communicate with each other and to have a familiarity with foreign legal developments."

A major reason the U-M Law School was chosen as a co-participant in the exchange program is the extensive



Eric Stein

research done by members of the U-M law faculty on problems of Common Market nations. In addition to Prof. Stein, other researchers in the field have included Profs. L. Hart Wright, Whitmore Gray, John H. Jackson, Alfred Conard, and Paul Kauper.

U-M faculty members overseas will deliver lectures in English at the Brussels Program in International Legal Cooperation, under which lawyers of many nations come together for the study of multinational legal problems. Stein notes, however, that Americans studying in Brussels will be required to have at least a reading knowledge of French.

A 1971 U-M law graduate, Carolyn E. Hansen of New Holstein, Wis., is currently studying in Brussels under the exchange. This winter Prof. Frans De Pauw, dean of the Flemish law faculty at Brussels, will teach two international law courses at the U-M.

Prof. Stein says the program will eventually include more student and faculty participants each year.

National Group Works For Uniform Laws

When new federal and state laws are passed, it is often a group of lawyers, judges, and law professors who have worked behind the scenes to research and draft the legislation.

After 20 years' association with the National Conference of Commissioners on Uniform State Laws, Associate Dean William J. Pierce of the University of Michigan Law School has grown accustomed to the group's anonymous role in legislative reform.

"Often, in newspaper editorials and elsewhere, the National Conference has been described as a 'little-known but highly prestigious' organization," says Pierce, who serves as the group's executive director. "What this means is that although we have the legal expertise, it takes legislative action to transform our goals into reality."

Thus, when the federal Truth-in-Lending Act became law several years ago, it was the National Conference that provided the scholarly research in preparation for the required disclosure of interest rates by lending institutions.

And when 49 states finally passed revised legislation governing sales, investments, and other commercial transactions, it was the National Conference that had spent over 20 years researching and urging passage of a Uniform Commercial Code across the country.

There are numerous other areas where the National Conference has contributed to legislative reform over

the years, ranging from uniform standards for consumer credit to proposals for uniform laws governing mortgage transactions, gifts of securities to minors, and the donation of human organs for transplant purposes.

Founded in 1892, the Chicago-based group has at least three commissioners in every state who serve on a total of 42 committees dealing with specific legal problems. In most states the commissioners are appointed by the governor.

Prof. Pierce was appointed a commissioner from Michigan in 1953, and since then he has served as chairman of the executive committee and as president of the National Conference. In 1969 he resigned as commissioner to become the group's executive director, supervising the organization's research activities across the country.



William J. Pierce

"When I began with the National Conference," Pierce recalls, "few of the projects were as ambitious as they are now. But as society grew more complex and the prestige of the National Conference increased, we found ourselves involved in many controversial projects of national importance."

One of these projects is the proposed Uniform Probate Code designed to ease the time-consuming and costly burdens of estate settlements. The project was initiated by Prof. Pierce many years ago but is now in the hands of U-M law Prof. Richard V. Wellman, who drafted the proposed code and is heading an effort to get it passed by state legislatures.

Recently, a National Conference committee completed a proposal which sets forth uniform requirements for no-fault auto insurance across the country. Pierce notes that the proposal will be con-

sidered by several state legislatures this year, and will also be introduced in Congress by Michigan Sen. Philip A. Hart.

The no-fault controversy illustrates a major problem faced by the National Conference as it seeks conciliation of state and federal laws. Enactment of no-fault requirements by states, Pierce notes, will also affect the thousands of federally-owned and federally-insured vehicles used at the state level. Thus, he says, unless the federal government enacts similar no-fault legislation, the taxpayer will have to bear the burden of increased insurance costs for the government vehicles.

In addition to Pierce and Wellman, several other U-M law professors are working with the National Conference on proposed reforms.

One current project involves Profs. Yale Kamisar and Jerold H. Israel, who are drafting revised rules of criminal procedure, covering such areas as the issuance of warrants, the right to legal counsel, and the use of pre-trial "discovery" to gain evidence. The project, sponsored by the National Institute of Criminal Justice, is expected to be completed in 1974.

A project by U-M law Prof. Vince Blasi, who is drafting a model state statute clarifying the rights of newsmen who are ordered to reveal confidential news sources, is also scheduled for completion in 1974.

Among other projects to be undertaken by the National Conference, says Pierce, are proposed uniform codes governing state anti-pollution measures, post mortem medical exams to determine cause of death, and the legal rights of illegitimate children.

Students Work In International Law

Three University of Michigan law students have participated in clinical and internship programs with federal agencies in the field of international law.

Joseph C. Shevelson, a second-year law student from Oak Brook, Ill., completed a clinical program with the Legal Adviser's Office of the U.S. State Department in December. Shevelson received Law School credit for his four-month stint in Washington, D.C.

Also serving with the Legal Adviser's Office was Philip Frost, a third-year student from Birmingham, Mich. Frost completed a 10-week internship with the agency this summer.

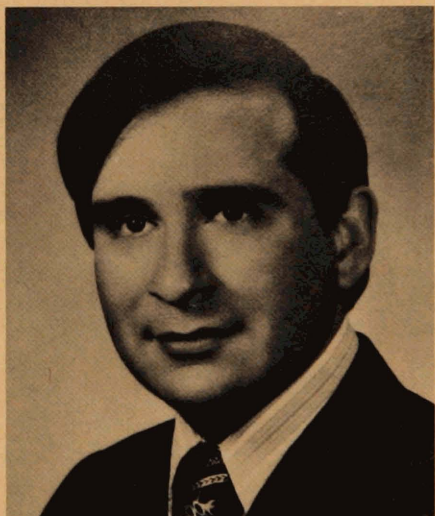
Frederick Williams, a second-year student from Ann Arbor, participated in a 10-week summer internship with

the Office of the General Counsel of the U.S. Arms Control and Disarmament Agency, which is responsible for United States negotiations in the arms control field.

Two Law Grads Named Supreme Court Clerks

Two recent graduates of the Law School have been selected as law clerks for Justices of the U.S. Supreme Court for the 1973-74 court term. They are Terrence G. Perris, a 1972 *summa cum laude* graduate, who will clerk for Justice Potter Stewart; and Joseph C. Zengerle, a 1971 *magna cum laude* graduate, who will clerk for Chief Justice Warren E. Burger.

Perris is currently clerking for Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit. A 1969 *magna cum laude* graduate of the University of Toledo, Perris compiled one of the highest scholastic averages



Terrence G. Perris



Joseph C. Zengerle

in the history of the U-M Law School. He was also articles editor of the *Michigan Law Review* and active in the Law School's moot court program, where he served in an important administrative capacity.

Zengerle is a graduate of West Point and the Ranger and Airborne Schools. Before attending law school he held many responsible positions during his five years of military service—such as special security assistant to Generals William Westmoreland and Creighton Abrams in South Vietnam. He was note and comment editor of the *Michigan Law Review*. His wife, Lynda, is also a 1971 graduate of the Law School. Zengerle is presently clerking for Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia Circuit.

Prof. Siegel Explains New Corporate Laws

Michigan's new Business Corporation Act, which went into effect at the first of the year, is one of the most "advanced" business laws in the country and is likely to stem the tide of Michigan firms incorporating in other states to take advantage of their liberalized corporation laws.

This is the view of U-M law Prof. Stanley Siegel, who authored the new Michigan legislation under sponsorship of the Michigan Law Revision Commission.

Signed by Gov. William G. Milliken last October, the new act replaces provisions of Michigan's 40-year-old General Corporation Act which, according to Siegel, had subjected Michigan businesses to many "archaic" restrictions.

The "guding principle" of the new act, said Siegel, is "to carry forward only those restrictions that protect important interests, and to eliminate all archaic strictures on the legitimate operation of corporations."

Siegel said he expects that the Law Revision Commission—along with the state bar, chambers of commerce, and the state legislature—will update the new act periodically to ensure that the state legislation is "the most modern, effective, and liberal statute available."

Siegel was recently appointed executive secretary of the Law Revision Commission following his four-year legal drafting effort. He is also the author of a new book, *The Michigan Business Corporation Act* (Midwest Business Planners, Ann Arbor, \$22.50), which contains all provisions of the new Michigan legislation with explanations and samples of new legal forms required of businesses.



Stanley Siegel

Enactment of new corporation laws in Michigan follows the example of other major commercial states—such as New York, New Jersey, and Delaware—which have revised their legislation in the past 15 years to better serve the needs of modern corporations.

Siegel noted that during this period, as a result of Michigan's outdated statutes, several major Michigan firms have incorporated in states with liberalized legislation where they could operate under non-resident corporate status while maintaining their plants in Michigan. In general, he said, Michigan's outdated laws have served to "frustrate the incorporation of new businesses" in the state and have "imposed costly restraints on existing businesses."

By contrast, Siegel pointed out, the new Michigan legislation is designed to simplify incorporation procedures and other administrative matters, to eliminate outdated restrictions regarding mergers and the issuance of stocks and bonds, and to accommodate the special needs of small businesses. Also, the new legislation takes into account the use of electronic communications and record-keeping equipment now widely used by business firms, according to Siegel.

Here are some of the specific features of the new act:

... Provisions for filing and documentation have been simplified. For example, all corporate documents—including articles of incorporation, amendments, and certificates of merger—can now be filed in one office, in one copy, with only a single signature required.

... Numerous special provisions are made for "close corporations" (small corporations with a limited number of stockholders), including provisions regarding voting arrangements, control agreements, share transfers, mergers, and dissolu-

tion of the corporation. The effect of these provisions, according to Siegel, is "to allow a wide discretion in the structuring of close corporations."

... There has been considerable simplification regarding activities of a corporation's shareholders and directors. For example, the legislation permits shareholders to act without a meeting if the necessary consent is obtained in writing. Also, it is possible for directors to "attend" a meeting of the board by means of a conference phone call.

... The act permits the issuance of virtually every form of stock or bond. In addition, the only substantial restriction on the distribution of a company's assets is that the distribution does not cause or threaten insolvency of the corporation.

... Voting procedures for all major corporate changes—such as mergers, asset sales, and dissolution of the corporation—have been simplified. In most cases, these decisions can now be made through a single majority vote of the voting shareholders.

... The act continues Michigan's previous procedure of requiring full annual reports to shareholders in order to "protect legitimate corporate constituencies."

... Prior laws have been clarified through detailed provisions on foreign corporations in Michigan.

New Faculty Additions Have Varied Interests

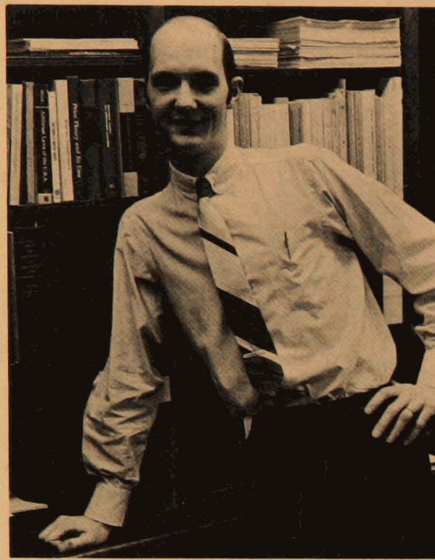
Legal history, civil procedure, and anti-trust law are among the research and teaching interests of two new faculty members at the University of Michigan Law School.

Prof. Edward H. Cooper comes to the U-M from the University of Minnesota, where his research covered such areas as pre-trial "discovery" in civil cases, patent exploitation, and the relation of judges and juries.

Currently he is investigating provisions of federal anti-trust law governing "attempts to monopolize." This is an area, he says, which has never been clearly defined from a legal point of view.

Prof. Cooper is a *summa cum laude* graduate of Dartmouth College and Harvard Law School. He served as a law clerk to Judge Clifford O'Sullivan of the U.S. Court of Appeals, Sixth Circuit, and was associated for two years with the law firm of Beaumont, Smith, and Harris of Detroit.

While practicing law, he was an adjunct professor at Wayne State University Law School. He then spent five years on the Minnesota law faculty.

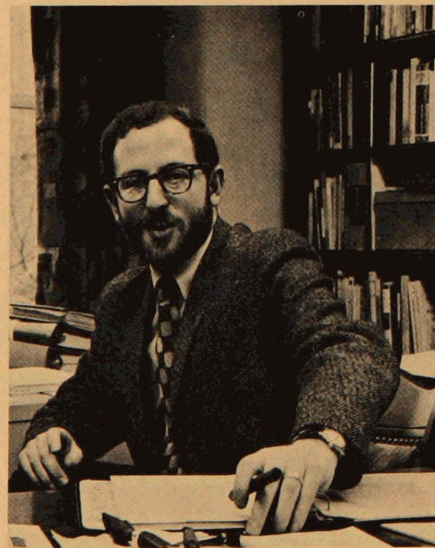


Edward H. Cooper

Prof. Thomas A. Green is a legal historian whose primary research interest has been the historical role of the jury in medieval England and the United States.

An article by Green discussing 16th century concepts of criminal liability for homicide appeared in a recent issue of *Speculum*, a national historical journal. In investigating the topic Green traveled to England where he compared rare records of coroners' juries with the official reports of subsequent jury trials—all recorded in Latin script—for an analysis of the jury's historical prerogative of nullification of the law.

Prof. Green is a *magna cum laude* graduate of Columbia College, and he received both a law degree and a doctorate in history from Harvard University. His background also includes two years as an assistant professor of American constitutional history at Bard College.



Thomas A. Green

Prof. Kauper Revises Law Casebook

As University of Michigan law Prof. Paul G. Kauper notes in the preface of his latest constitutional law casebook, U.S. Supreme Court decisions over the past several years reflect "far-reaching and revolutionary" shifts in judicial interpretation.

Some of the changes occur so quickly, in fact, that Prof. Kauper has a hard time keeping up with them.

The fourth edition of Kauper's casebook, *Constitutional Law: Cases and Materials*, was completed in 1971 and published recently by Little, Brown and Co. But after the 1,435-page work was completed, four new justices had been appointed to the Supreme Court and, as Kauper points out, "changes in some basic aspects of constitutional interpretation had become apparent."

Thus, parts of the casebook already needed revision at the time the book came out. In order to keep his major works up to date, Kauper has found it necessary to issue annual supplements.

"The tempo of change in this area is very rapid," Prof. Kauper explains, noting the large number of constitutional cases decided by the Supreme Court in recent years. "Sometimes I feel as if I'm hanging on to the tail of a bear—I don't want to let go, but it takes a lot of effort to hang on."

The decisions reported in Prof. Kauper's revised casebook go as far back in history as 1803, when the Supreme Court heard the famous *Marbury v. Madison* case. The newest materials deal with cases decided during the years 1966-71. Most of these cases were heard when Earl Warren was chief justice of the Supreme Court.

The Warren Court, says Kauper, was characterized by "increased emphasis on protection of the accused, a closer judicial scrutiny of discrimination against certain classes, and an enlarged emphasis on free speech and a free press."

Among other decisions made before the character of the Supreme Court was substantially changed, the Court ruled that state residency requirements for welfare recipients were unconstitutional, upheld the right of newspapers to print the "Pentagon Papers," and closely examined electronic surveillance and other procedures used to obtain evidence in criminal cases, Prof. Kauper notes.

In short, says Kauper, it was a time of "tumultuous change and growth in constitutional doctrine."

By contrast, Prof. Kauper observes

that the current Supreme Court—which has four Nixon appointees, including Chief Justice Warren Burger—“is likely to be far less activist than the Warren Court.

“The so-called Burger Court may not rush in to overrule decisions of the Warren Court,” Kauper says, “but it is likely to draw limits on some of the doctrines advanced in recent years, particularly with respect to protection of the accused and the interpretation of the equal protection clause.”

The first edition of Prof. Kauper's casebook on constitutional law was published in 1954, followed by editions in 1960, 1966, and now the new edition.

The books are, basically, a compilation of Supreme Court cases which serve as source materials for the study of various aspects of constitutional law. Some of the cases are reported in full or in part, while others are briefly digested. Short interpretive notes and bibliographical references are also included.

“The important consideration in a constitutional law casebook,” Prof. Kauper writes in the preface, “is to present a body of materials that, in terms of coverage and sequence, will accomplish four ends: sharpening the student's awareness of constitutional problems, stimulating critical thinking, creating a sense of historical perspective . . . and, in general, equipping the mind with a stock of ideas, concepts, and arguments relevant to the role of today's lawyer in handling constitutional problems.”

Kauper's casebook is one of five such works used by law students around the country. He estimates that his casebook is used in some 25 or 30 law schools.

Law Journal Studies Effects of Jury Size

The U.S. Supreme Court has maintained that the reduction of jury size will not affect the outcome of court cases.

This view will be tested by the *Journal of Law Reform*, a student publication of the University of Michigan Law School, in a study funded by the American Bar Foundation.

Researcher Lawrence Mills, a second-year law student, will compare civil cases heard in Wayne County, Mich., courts before and after the state reduced jury size from 12 persons to 6 in civil trials. His study will focus on civil cases heard during six-months periods in 1969 and 1971.

Findings of the study, including a comparison of verdicts and damage awards for negligence suits and other civil matters, will be published in the

spring issue of the student law journal.

Michigan reduced jury size for civil cases in 1970, around the time of a U.S. Supreme Court decision eliminating the 12-person jury requirement for criminal cases. The high court maintained that reduction of jury size would not affect the fairness of verdicts but could increase the efficiency of criminal justice.

The Supreme Court is expected to issue a similar ruling this year affecting jury size in federal civil cases.

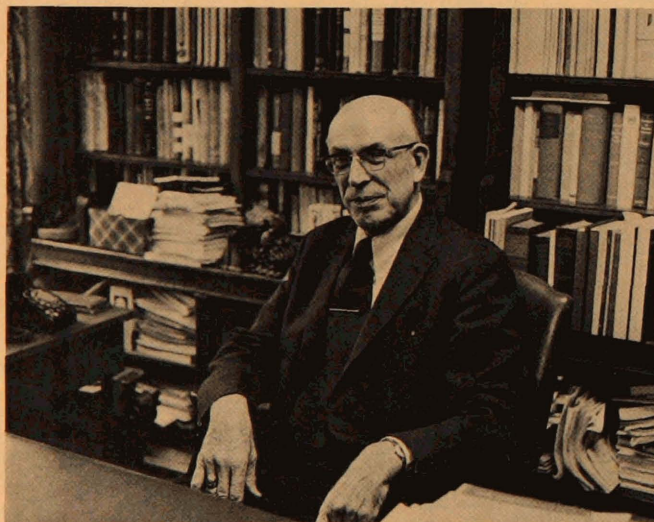
A second part of the law students' study will involve U-M speech students, who will serve on 6- and 12-member panels in deciding a videotaped mock trial.

Specialists in small group communications from the U-M Department of Speech, Communication and Theater will record the jurors' discussions and attempt to find patterns of decision-making in both the 12- and 6-person settings.

BURGER COURT



A talk delivered at the luncheon in honor of the Law School Committee of Visitors, October 27, 1972.



by Professor Paul G. Kauper

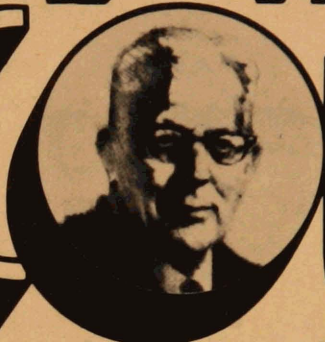
First let me say that the title is somewhat misleading insofar as it refers to the Burger Court. The truth is we do not really have a Burger Court if by that we mean a Court with a majority composed of persons appointed by President Nixon. To date we have four such appointees and if the thought is that this group is going to vote as a bloc or represent some change in constitutional theory, it is premature to speak of it as having a dominant influence. But apart from that I think the attempt to designate the style, tone, or direction of a Court by reference to its chief justice is misleading. This is commonly done. We refer, for instance, to the Marshall Court, the Taney Court, the Waite Court, the Taft Court, and the Hughes Court. The use of the name of the chief justice is a convenient tool to designate a given period in the history of the Supreme Court. In so far as it suggests that the chief

justice is a dominant person on the bench it may or may not be accurate. Any person on the Supreme Court may in a sense have a dominant or at least a highly persuasive voice simply because of his intellectual force and not because he is chief justice. I have always supposed that the particular position occupied by Chief Justice Warren was not attributable so much to any great intellectual leadership on his part as it was to qualities of personality which commanded the respect of his colleagues and of the public generally. Chief Justice Warren was aligned in many cases with at least four other justices, constituting a majority, who did fashion a series of constitutional interpretations which we now associate with the Warren Court. It is in this sense that I shall refer to the Warren Court.

Even though it cannot be said that the bloc of President Nixon's appointees constitutes a dominant group on the so-called Burger Court, the Court as reconstituted does warrant examination. Obviously the appointment of four new persons to the bench is an important development and could change the balance within a Court on many questions on which there has been a close division and could be prophetic of the direction in which the Court is or may be moving. Moreover since President Nixon said that he was very much concerned about his appointments to the Supreme Court and indicated a perceptiveness of the Court's role which not all presidents have displayed, and since he said he wanted to appoint strict constructionists to the Court, a close look at possible new directions is particularly relevant. Even this is somewhat premature. Only Chief Justice Burger has completed two terms on the Court, Mr. Justice Blackmun has completed about a term and a half, and both Justices Powell and Rehnquist less than one term. There is some basis, however, in the decisions handed down to date and in opinions written by these appointees to give us at least some insight to their views on basic constitutional questions and, more importantly, the conception they entertain of their judicial role.

Before going on to pinpoint these developments let me say a word about the term that President Nixon has used in describing the kind of persons he wants on the Supreme Court. He has repeatedly used the term "strict constructionists." I think I know what President Nixon

WARREN COURT



means but I do not think that his use of the term "strict construction" is a particularly felicitous term or phrase to convey what he has in mind. "Strict construction" is an ambiguous term and I doubt if it can be identified with any particular school of constitutional interpretation at least in recent years. Historically the difference between strict constructionist or liberal constructionist arose during the great controversy in the early part of the last century on the interpretation of the powers of Congress. It is elementary schoolbook learning that John Marshall and Alexander Hamilton represented the school of liberal construction which prevailed of course in *McCulloch v. Maryland* and which on the whole has dominated the Supreme Court's interpretation of congressional powers, a construction supported by the Necessary and Proper Clause of the Constitution. I doubt very much whether President Nixon is interested in reviving that old controversy since it seems to me to be so well settled generally in our American history in favor of the Marshall-Hamiltonian point of view.

There is another theory of strict construction which is often advanced as a standard of constitutional interpretation, although perhaps not always put in those terms. It is equated with a literal construction of the Constitution. It assumes that the Constitution can be interpreted by reference to the words, phrases, the pattern of arrangement of provisions within the four corners of the document, a process of interpretation aided by general principles explicit or implicit in the text of the Constitution and by historically established usage. This theory of interpretation is designed to minimize the subjective aspects of the judicial role in constitutional interpretation. The late Professor Crosskey was an exponent of this theory of strict construction. This theory generally has not been followed either and indeed there are very few on the Supreme Court, at least in the recent years, who have seriously suggested that the results they reach are based entirely on exegetical and historical considerations.

Somewhat related to this is another kind of literalness in construction of the Constitution which says that the words must be taken as they are without any dilution or interpretation which seems to alter their meaning. In this sense Mr. Justice Black was a strict constructionist at

least with respect to the First Amendment when he said that since it says Congress shall make *no* law abridging the freedom of speech, it means just that—Congress can make no law. Likewise Mr. Justice Black employed a strict construction theory in support of his general philosophy of legal positivism when he rejected any notion of interpreting the Constitution by what he termed "natural law" considerations which he condemned as an excrescence on the Constitution. In his view there should be no reaching out to give constitutional sanction to values and interests not explicit in the text. Yet it took a good deal of construction on the part of Mr. Justice Black to find that the indeterminate phrases of the Fourteenth Amendment had the effect of amending the First Amendment to read that neither Congress nor the states shall pass any laws. And perhaps a strict construction of "due process of law" by reference to historical usage would have precluded all substantive content. Moreover it is something more than strict construction to say as Mr. Justice Black said that the provisions of Article I of the Constitution providing for popular election of congressmen impliedly incorporated the one-man, one-vote rule. Nor was it strict construction for Justice Black to say as he did in the case involving the federal statute extending the voting right to eighteen-year olds that the power given to Congress to regulate the time, place, and manner of holding elections for congressmen includes the power to prescribe qualifications for those voting for congressmen, even though Article I of the Constitution explicitly recognizes the power of the states to prescribe voting qualifications. Justice Black did not really adhere to a strict construction philosophy. I mention these considerations not to criticize Justice Black, for whom I entertained high respect, or to suggest that exegetical or historical considerations are inappropriate to constitutional interpretation, but simply to suggest that a theory of strict construction based on a literal reading of the Constitution, supported by historical usage of words, affords no exclusive canon of construction and affords no dominant explanation of the history of constitutional interpretation.

I think that what President Nixon intended in using the term "strict constructionist" is something quite different. I think he uses the term to describe a justice who is com-

mitted to a philosophy of self-restraint in the exercise of the power of judicial review. This philosophy, which goes to the heart of judicial review, has characterized a number of justices over the years, most notably Mr. Justice Holmes, Mr. Justice Stone, Mr. Justice Frankfurter, and Mr. Justice Harlan. The philosophy of "judicial abstention" or "self-restraint" or "judicial passivity" stands out in contrast to the "judicial activism" which I think it is fair to say has characterized the Warren Court, although I must enter a caveat here in speaking about the Warren Court since it was not a monolithic body in its views by any means and even it had an uncertain majority on certain kinds of questions. But at least over the period of years when Mr. Chief Justice Warren was at its head the Court did engage in a line of constitutional interpretation which could be said to be distinctive, which could be said to be innovative, which was a departure from precedent and practice, and which represented, I think it fair to say, to the outside observer a value-oriented and policy-directed use of judicial power. This I suppose we can describe as judicial activism. This represents a philosophy of judicial review which accords the maximum power to the Court in fashioning the country's constitutional development on the basis of values, policies, and priorities to which in the view of the Court the constitutional system should be adapted in the context of contemporary American society. It is a conception of judicial review which magnifies the discretionary authority of the judges and opens up a highly subjective element in constitutional interpretation. Indeed to some it is the same as recognizing that the Court sits as a continuing constitutional convention in the reshaping of the constitutional tradition to fit the mood of the day.

Referring again to the Warren Court I think it is more accurate to say that it was this philosophy of judicial review which prevailed as a general rule following the retirement of Mr. Justice Frankfurter and replacement by Mr. Justice Goldberg. It was not fully realized at the time that this was really a watershed in constitutional history. The circumstances of a judge's retirement from the bench was the occasion for a new alignment within the Court which rather drastically altered the course of constitutional construction. It is a commentary indeed on our constitutional system that so much depends on the individual justices on the bench and not so much on their own social and political philosophy as it depends upon the view that a given justice takes as to his role as a member of the Court and the functioning of judicial review in the constitutional system. It is on this latter point that we may more properly speak of liberals and conservatives on the bench. Certainly from that point of view I suppose the greatest conservative on the bench was Mr. Justice Holmes who took a very modest view of judicial power, at least when it came to challenging the authority of the other two departments of the government or the expression of the popular will through duly enacted laws. His most faithful disciples at a later day were Justices Frankfurter and Harlan. I have come to the conclusion that there is nothing inevitable about constitutional interpretation unless we could say that the retirement of Justice Frankfurter was inevitable or that the election of President Nixon or his appointment of four judges whom he terms as strict constructionists was inevitable. Our constitutional interpretation rides in part on the circumstances and accidents of history.

I now propose to examine the main lines of development under the Warren Court which distinguished it as an activist Court.

One development that took place during this period which has had important repercussions particularly on the administration of criminal justice and the increased subordination of the states to federal power and to surveillance by the Supreme Court was the progressive

application of the Bill of Rights to the states by means of the Fourteenth Amendment. As distinguished from application of the fundamental fairness theory to which the Court in earlier years, and a decreasing minority spearheaded by Justice Harlan continued to subscribe in more recent years, the majority applied to the states not only the basic idea expressed in the Bill of Rights but the whole crust and gloss of interpretation going with it respecting such matters as right to counsel, freedom from unreasonable search and seizure, the privilege against self-incrimination which I may add was the basic ingredient of the *Miranda* decision, freedom from double jeopardy, the right to jury trial, freedom from cruel and unusual punishment. I do not mean to say this development was wholly new. Even at an earlier time the Court had at least used the language of making the First Amendment apply to the states although this was often simply a rhetorical expression to designate that the rights embodied in the First Amendment were recognized as fundamental rights. But the development whereby not only the freedom but also its crust of interpretation was riveted upon the states in a kind of a strait jacket, thereby leaving the states little room to maneuver, was a distinctive aspect of the constitutional development during the period of the Warren Court. I should add also in this connection that a part of this was the adoption with a vengeance of the exclusionary rule, i.e., that any evidence obtained by unconstitutional means should be precluded from use at the trial later, a rule which as an evidentiary rule followed in federal courts did not originate with the Warren Court but was elevated by it to a constitutional rule binding on the federal government and states alike.

A second significant development was the elevation of the equal protection clause to the same high place once occupied by the due process clause of the Fourteenth Amendment as a means of protecting substantive right. This acquired its original impetus, I am sure, with the Court's decisions in the racial segregation cases, beginning with the *Brown* case, although the Supreme Court was unanimous in those decisions and the unanimity reflected a clear constitutional policy against racial segregation. The really expanded use of equal protection began with its use in the *Reynolds* case to invalidate any scheme of state legislative apportionment which did not correspond with the Court's one-man one-vote doctrine, a doctrine which was spun out of whole cloth in the face of history, precedent, and analogy furnished by the Constitution itself and which marked a departure from the familiar "rational basis" interpretation of the equal protection clause. Fundamental rights thinking emerged again but here in the guise of the equal protection clause rather than that of the due process clause. The Court began to use the equal protection clause as a convenient and useful lever in its hands for challenging legislative classifications of various kinds for which the Court could find no compelling reasons, as viewed through the spectacles of its own lights and understanding. Justice Harlan, often joined by Mr. Justice Black, pointed out in dissent that the Court by subjecting legislative policy determination to the kind of close scrutiny inherent in the compelling interest test was making a radical departure from the traditional interpretation of equal protection, namely, that the legislature had a wide basis for classification and that so long as there were rational grounds to support the classification the Court would not disturb it. The old classical view was clearly an exercise of judicial self-restraint as opposed to the activism which now posits a new standard, namely, that when the legislation is seen to impinge on fundamental rights, the same term used under the due process clause at one time, the Courts must scrutinize closely and invalidate the legislation unless there are compelling reasons to support it. Nothing of course is more reminiscent of the

activism of the Supreme Court in the early days of the New Deal and the preceding years when five members of the Court were using the same judicial technique in the name of the due process clause to condemn various kinds of legislation found to impinge upon fundamental right. The fact that this interpretation has now been shifted to equal protection as distinguished from due process does not serve to disguise the high element of judicial subjectivity involved in the Court's sorting out of legislative motives and considerations and passing judgment on whether they are adequate to support the given classification. The raiment is that of Esau but the voice is still that of Jacob.

The third category of development was in the interpretation of the First Amendment freedoms. The Court by a series of interpretative devices, again not unknown in prior periods of interpretation, has extended the protection of the First Amendment freedoms of speech, press, and assembly so as to minimize the possibility of intrusion on these freedoms by legislative or executive actions at various levels of government. A favorite technique has been to find that certain statutes are either too vague in dealing with First Amendment freedoms or that they are too broad and have a so-called chilling effect on these freedoms. A notable aspect of the development in the First Amendment area was the line of decisions curtailing the power of government to deal with the publication and sale of obscene materials. It all began with the *Roth* case when the Court said that while obscenity was not protected under the Constitution, it should be closely guarded by way of definition so that neither the federal government nor the states could declare just anything to be obscene, since too broad a view would be in conflict with the free press guarantee. But the *Roth* decision has been refined to include the "utterly without redeeming social value" test which as a practical matter has made obscenity legislation unenforceable. There is hardly a book or a film which cannot be found on the basis of expert evidence by some self-styled authority on literature or art to have at least one bare minimum iota of redeeming social value. I am not here arguing for obscenity laws. The Court might say all obscenity laws are unconstitutional as Justices Black and Douglas contend, or it might say that these laws must be limited to hard-core pornography, as some justices have said, but for the Court to posit a general test and then undermine it by a further criterion which makes the laws unenforceable is to state a self-defeating test. Secondly, the Court has severely curtailed the ordinary law of libel by weaving a considerable web of protection around those who criticize public officers even in statements which by ordinary canons of construction are defamatory and destructive of reputation. In doing so the Court has significantly restricted the law of libel at the expense principally of the power of the states to develop their laws in the interest of protecting reputation and privacy.

Finally I may say that a further development during this period, which parallels the expanded use of the equal protection clause, is the revival of natural right thinking under the Fourteenth Amendment as evidenced in the *Griswold* case. To be sure Mr. Justice Douglas attempted to find support for the newly created constitutional right of privacy in the peripheries and emanations of the freedoms catalogued in the Bill of Rights. Other members of the majority were more explicit in stating that the right of privacy was a fundamental right protected by the liberty clause of the Fourteenth Amendment. The result here and its important implications on many current questions cannot be attributed entirely to the Warren Court since it represents a revival of the thinking of an earlier day which indeed goes back to a main line of interpretation of the Fourteenth Amendment, a line of interpretation

shared by many judges and which would have to be put in a category of an activist interpretation as distinguished from the view taken by Mr. Justice Holmes who did not find an adequate basis in language or history for the substantive right interpretation of due process. I might add that this kind of natural right thinking found expression in the opinions of at least two of the justices who constituted a part of the majority which last spring held that capital punishment was cruel and unusual punishment within the meaning of the Eighth Amendment of the Constitution.

Basic to all of these developments I have briefly alluded to are certain general characteristics. First we have an expanded conception of right or freedom and a corresponding denigration and weakening of the legislative power to give expression to conceptions of public interest which restrict the right. Secondly, most of this expansion of the conception of right has resulted in increasing surveillance of the actions of state government at all levels, and represents a corresponding dilution and erosion of federalism. For all practical purposes the Supreme Court has converted the procedural limitations stated in the Bill of Rights as a restriction on the federal government into a constitutional code of criminal procedure for the states and made itself the nation's high court of criminal appeals. Thirdly, this development has been characterized not only by the creation of new rights in the name of interpretation, as in the case of the one-man one-vote rule and in the extension of procedural rights by carryover of the Bill of Rights, but an aggressive and even dogmatic assertion of these rights. Perhaps we have no better illustration than that found in the one-man one-vote cases. After having asserted that the legislative branch must be apportioned on this basis, and this would include not only the lower house but also an upper house, the Court then proceeded to apply the rule to a number of other units of government in a process that reached its climax in the case where the Court held that election of the six-man board of trustees of a community college owned and operated jointly by three communities was unconstitutional because under the statutory apportionment one city had only three trustees whereas under a strict one-man one-vote it should have been 3.6 trustees. Moreover the Court has said there can be no deviation from this except in extraordinary cases so again as to minimize the freedom both of legislatures and of the people who represent the basic constitutional power in the country to order their own affairs.

[Editor's Note: A case decided after this talk was delivered lends support to Prof. Kauper's analysis. In an appeal from Virginia, a 5-3 majority of the Court, per Justice Rehnquist, approved a state legislative reapportionment plan containing a population discrepancy of 16.4 per cent between the state's largest and smallest districts.]

A further feature which perhaps is not always appreciated but which again inevitably must accompany judicial activism is a weakening of the procedural and remedial devices that have held judicial review in check. Traditionally, in recognition of the fact that judicial review is an institution that finds no explicit recognition in the constitution and continues to be the subject of debate, the Court has said that the exercise of judicial review is a delicate matter and should be exercised in a sparing way and should be used only in aid of the Court's power to dispose of cases or controversies. There is no direct power of review given to the Court as in the cases of some constitutional courts of review in some countries. But the flowering of activism in recent years has highlighted the Court's function in dealing with constitutional matters and more and more of its docket is limited to these matters with the result that other kinds

of cases dealing with interpretation of statutes and the like occupy a diminished part of the Court's docket. In short the Court has converted itself into a court of constitutional review, and its reaching out to get constitutional questions marks a substantial departure from the earlier conceptions which were based on the theory that this is a power that should be exercised lightly, with great caution and with deference to the other branches of the government. Old notions of standing are rapidly being impaired by a broadened recognition of the kind of interest adequate to maintain a suit. Declaratory judgments and injunctions by three-judge federal courts are increasingly common. And in all these cases the disposition of the constitutional issue is not simply incident to a case or controversy but itself is the object of the whole case or controversy.

Basic to all this is an energetic and aggressive exercise of judicial review to sustain a particular and preferred set of values, and a channeling of judicial energy to achieve these values, whether it be to say that First Amendment freedoms are more important than others and are preferred, whether it be to say that protection of rights is more important than the principle of federalism, whether it be to say that ordinarily the rational test rule applies in equal protection but when it comes to dealing with values which a segment of the Court deem particularly important then we must apply a different test, it is the same basic drive and thrust of judicial power asserting itself in support of a particular set of values which the Court thinks important to our contemporary society.

One may ask then what stands in opposition to this kind of judicial philosophy which I think is best expressed in the term judicial activism. The general characteristics of what might be called judicial self-restraint are fairly clear by way of contrast to the identifying characteristics of judicial activism. Judicial self-restraint is marked by a more modest conception of the judicial role in constitutional cases, a greater deference to legislative judgment and discretion in determination of matters of public policy, a greater regard for history and precedent, a skepticism of the Court's role in transforming every one of the great issues of our day into a question of constitutional right, a refusal to convert the justice's moral predilections into constitutional imperatives, and a general sense of reasonableness, moderation and balance whether it be in balancing public interests against private right or in balancing assertion of right against the position of the state in our federal system.

Perhaps all this seems a bit abstract so I want to take some cases decided at the last term of Court when all four of the Nixon appointees took part simply to give some concrete manifestation of the ideas I have been expressing on the distinction between the activist and the self-restraint approaches to constitutional interpretation. I am taking three cases as laboratory cases here to give concreteness to my general observations.

Case One

The *Caldwell* and companion cases related to the validity of subpoenas directed against newspaper reporters requiring them to give information in connection with a grand jury investigation of crime. The Court for the first time dealt with this question at the last term with all nine justices participating. A majority of the Court, consisting of Mr. Justice White, Chief Justice Burger, and Justices Blackmun, Rehnquist, and Powell, held that the claim of privilege based on the First Amendment was offset by the public interest reflected in the need of getting information necessary to administration of the criminal laws. This clearly was a case where the four new appointees of the Court joined by one earlier appointee were using a balancing process in

dealing with First Amendment questions and was a departure from either an absoluteness of the Black-Douglas approach or a 75 per cent absoluteness represented by some notion of clear and compelling interest. Here was a return to a method of dealing with constitutional right that has a substantial basis in our whole history of constitutional interpretation and that is the process of balancing competing interests. Whether the Court balanced in the right way may be the subject of debate. The Court refused to get at this matter by absolutizing a journalist's right to get information. It is not inappropriate to point out in the light of the self-serving criticisms of the decision by the press, that the right claimed here was not a right recognized at common law, that it is not generally recognized by statute, that it was not first claimed as a federally protected right before the Supreme Court until 1958, so this is the familiar story evident in recent years of asking the Supreme Court to achieve a change in the law of the land by converting the issue into a constitutional issue. The decision leaves Congress and the state legislatures free to define public policy in this area.

Case Two

The second case was the case dealing with capital punishment. A majority held that capital punishment under the statutes and in the cases before the Court constituted cruel and unusual punishment and therefore was forbidden by the Eighth Amendment. The Court was badly fragmented in the case. While five judges pinned their results formally on the language of the Eighth Amendment, three based their decision on what they considered to be the episodic and capricious applications of capital punishment because of the discretion allowed to juries, a theory which apparently allows for capital punishment if mandated by legislation for certain cases. The four judges who dissented were the four appointees of President Nixon. Their opinion was a clear expression of the theory of judicial self-restraint. In their view there was nothing either in the language of the Eighth Amendment or history or precedent to support the view that the legislature cannot impose capital punishment, and that whatever might be the moral predilections of the judges on this question it was not their business to convert them into constitutional imperatives. This stands in particular contrast to the views expressed by two members of the majority, Justices Brennan and Marshall, whose basic position was that capital punishment was degrading, that it was contrary to the moral sentiment of our day, and that is something that the conscience of the nation should not tolerate. That view perhaps best epitomizes the whole conception of natural right as something transcending the Constitution and the use of the courts as a peculiarly chosen vehicle for expressing the conscience of the nation.

Case Three

The third case is *Wright v. Council of the City of Emporia*, where a majority held that a city would not be allowed to set up a separate school system where the effect of it would be to impede the dismantling of a dual school system which previously had been in effect when the city was part of a county school system. The Court did not say that in this case the larger unit and the local unit should always be taken into account but that under the circumstances of this case the effect of permitting a city to establish itself as an independent school district would be to interfere with the court order which had set up a desegregation plan. Chief Justice Burger dissented in an opinion joined by the three other Nixon appointees and here again the position taken is revealing. The minority did not question the *Brown* case or the whole body of law following that case but refused to extend the theory of these cases to preclude the establishment of a

new school district where, as the minority found, there would be no segregated schools although the ratio of the races might be different from that which the judicial decree had contemplated. Perhaps most interesting was the Chief Justice's observation that the *Brown* case was no warrant for the courts to serve as receivers of the public school systems and that a tolerable degree of local autonomy in the management of schools and discretion of the school boards to fashion schemes was to be recognized. Again it is the tone of moderation and reasonableness in applying established doctrine which is the distinguishing characteristic.

That the Nixon appointments will have a substantial impact on our body of constitutional doctrine is evident from cases I have mentioned, although these four justices will have to be joined by one of the earlier appointees, and this usually will be either Justice Stewart or Justice White, in order to constitute a majority. It is evident already that in the field of criminal procedure the Court is limiting some of the doctrines developed with respect to search and seizure and self-incrimination. It is evident also, I think, that the interpretations of the First Amendment are going to be limited. Over the long run the equal protection clause will recede somewhat in importance although to date there is no indication that most of the Nixon appointees are going to depart in a formal sense from the new standards of the equal protection clause. I do not expect a radical or dramatic course of explicit overrulings of earlier cases. We must remember in this connection that regard for precedent and stability in the law is in itself a substantial element of the judicial self-restraint theory. It is in this regard I think that the new appointees are boxed in because of their inherent dislike of rapid overruling of decisions or rapid change in the law or use of the judicial power to move out in different directions. I suppose this is the reason why Justices Blackmun and Powell in opinions they wrote last term adhered to some of the new standards under the equal protection clause. This may be the reason also why Chief Justice Burger and Justices Blackmun and Rehnquist joined Justice White in the decision upholding a state statute permitting convictions by a five-sixths majority, although the logic of their position should have led them to subscribe to Justice Powell's concurring opinion which was based really on the dissent by Justice Harlan in the case first extending the jury trial right to the states. Mr. Justice Rehnquist in dissenting from a result which had a foundation in prior decisions felt obliged to say why he felt free to disregard precedent which in this case had only two years' standing. In general it may be supposed that, as a matter of judicial technique, the new justices will not register a disregard for precedent except in cases where the issue has been raised and the whole Court has had an opportunity to hear arguments and to decide whether a case should be overruled. It is probably safe to say that right now there is a majority on the Court who, if faced with the question for the first time, would reach a result different from that of the majority in the *Mapp* and *Miranda* cases. But rather than overrule these cases they may move in the direction of limiting these doctrines, refuse to extend them and perhaps over a long period of time cause some erosion as the Warren Court did with respect to prior doctrine. Moreover it is hardly to be expected that a group of new appointees will vote as a solid monolithic bloc on every question. They are all highly intelligent, law-trained persons, and each brings his own individuality to the bench. While there may be a basis for some tentative conclusions on the general framework of thinking in which they operate, experience in the limited period to date confirms that they will not necessarily vote alike in dealing with specific questions.

Decisions before the Court this term should offer some illumination and instruction on the direction in which

the Court is moving on certain questions. I wish to call attention to three categories of cases particularly.

First, the obscenity cases. Apparently the Court is going to re-examine again the doctrines respecting obscene publications in the hope perhaps of achieving something rational, coherent, and commanding support of a majority of the court by way of a constitutional definition of what may be classified as obscene. I do not expect the court to adopt the position that all obscene publications are protected under the First Amendment nor do I expect the court to adopt the Harlan position that a different standard applies as between federal and state restraints, although this could be a defensible position. The critical question will be whether or not the Court will abandon the "utterly without redeeming social value criterion" and restore the rule earlier recognized in the *Roth* case which leaves some discretion at least in legislative bodies to deal with the problem. My own guess on this would be, and I realize that it is hazardous to make a prediction, that at least five members of the Court including the four Nixon appointees and Mr. Justice White will take the occasion to prune the doctrines respecting obscenity of some of the growth that has become encrusted upon it particularly in the respect mentioned.

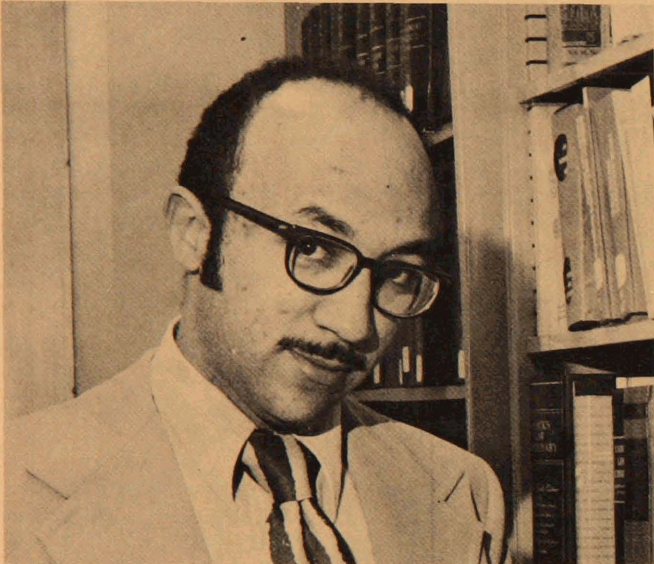
Second, the abortion cases. This line of cases in particular poses before the court the question of balancing a newly fashioned constitutional right of privacy, a right which must essentially rest on natural law considerations, as against the power of the legislature to impose restrictions founded on considerations of health and safety and conceptions of public morality relating to the sanctity of life, also grounded on natural law considerations. I simply suggest at this point that the court is faced with the basic question of whether it will defer to a legislative judgment in regard to the considerations appropriate to the issue or whether it will proceed from a newly formulated conception of right in order thereby to minimize the legislative power to deal with the problem. [Editor's Note: Some months after the talk was given, a 7-2 majority of the Court per Justice Blackmun, struck down most existing abortion laws.]

Third, and perhaps in some respects the most important question before the court, is what it will do with judicial decrees below dealing with the question of racial segregation in the schools. Will it stretch the concept of de jure segregation so as to include the racial imbalance situation resulting from a combination of housing problems and use of the neighborhood school concept and will it support the actions of lower court judges in extending cross-busing decrees to embrace not only the school district before the court but outlying suburban districts as well. These are problems not of adhering to prior cases but problems of further extending existing doctrine in new directions. It would not be surprising if the Nixon appointees refused to go along with such extensions which would mark further subordination of the public school system to the equitable power of the federal courts.

Conclusion

The Burger Court will not be as innovative in the forging of new constitutional doctrine as the Warren; it will take a more modest view of its powers, accord greater deference to the legislative branch, attach greater respect to precedent and established doctrine, and allow greater freedom to the states in the exercise of their authority. One thing is quite certain: The Burger Court will not be the dramatic, spectacular, and exciting court that the Warren Court was; it will go about its business in a more modest way and without the drama and stirring of attention that accompanies the ploughing of new fields. And perhaps it is well that this should be the case—at least for a while!

THE EMERGING LAW ON.



by Professor Harry T. Edwards

Based on a paper delivered to the Labor Relations Law Section of the State Bar of Michigan on January 13, 1973. Much documentation has been omitted but will be supplied by the author upon request.

I was somewhat amused when our chairman, Sheldon Klimist, asked me to speak to you about the "emerging law on sex discrimination." Had my topic assignment been race discrimination, the title of my speech probably would have been "recent developments in the law on race discrimination." The difference, of course, is that the law on race discrimination under Title VII has emerged in substantial form and lawyers are now watching mostly for recent developments; whereas, the law on sex discrimination is still malleable and observers are patiently awaiting its full emergence.

In considering the issue of sex discrimination in employment, the attitudinal perspective cannot be ignored. One of the reasons why sex discrimination has persisted as an uncurbed evil in our society is because, to date, it has been treated with a frivolous sense of curiosity. The major doctrinal expansion needed to reverse the historic pattern of inequality cannot be generated unless women's rights are taken seriously.

The problem of sex discrimination is compounded because it is inexorably tied to a societal norm in the United States which defines the woman's role as housekeeper and childrearer, but not breadwinner. It might be more appropriate to define this notion, that "the woman's place is in the home," as American folklore, for, at least during the last century in the United

States, there has never been a societal norm which has excluded women from the job market. In fact, most women work out of economic necessity. It has been estimated that 70 per cent of the women in the labor market are widowed, divorced, separated, single, or have husbands earning less than \$7,000. More than one-third of the families who live in poverty are headed by women. Contrary to popular belief, women are not temporary members of the labor force; they are, for the most part, mothers who will remain in the labor force for most of their adult lives.

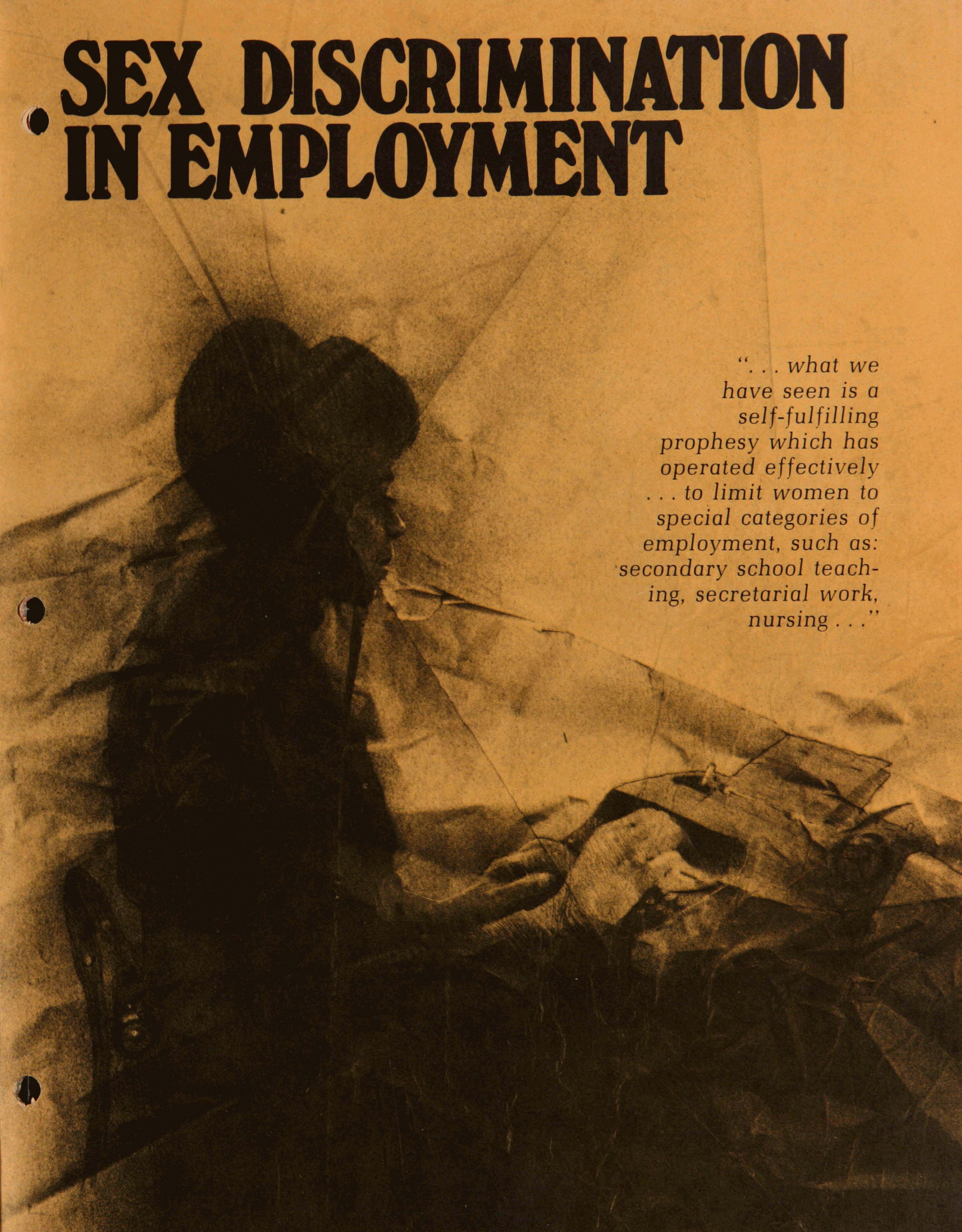
Women have always been welcomed in the labor market, but only in lowest paying jobs with limited promotional opportunities. Some, of course, will claim that women have not been systematically denied employment opportunities, but, rather that they simply have not aspired to the better paying and more responsible jobs in society. But to advance such an assertion ignores reality. It is true that many women have failed to aspire to jobs which are commensurate with their talents and training, but this has resulted from a tradition of explicit exclusion of women from most of the better jobs. This tradition of exclusion has, in turn, caused a continued lack of role models to encourage younger women to raise their goals and expectations and it has resulted in the perpetuation of the myth that women are not a good investment in the job market. Thus, what we have seen is a self-fulfilling prophesy which has operated effectively in the United States to limit women to special categories of employment, such as: secondary school teaching, secretarial work, nursing, retail clerking, and insignificant and low paying factory work.

Even when Title VII was first enacted in 1964, the question of sex discrimination was treated with a "frivolous sense of curiosity." As most of you may recall, the proscription against sex discrimination was added to Title VII as an after-thought; indeed, the original proponent of the sex discrimination amendment was apparently persuaded to act because he believed that a provision against sex discrimination might prove to be sufficiently controversial to ensure legislative rejection of the entire Equal Employment Opportunity Act. This legislative maneuver obviously failed and Section 703(a) of the Civil Rights Act of 1964, as finally passed, requires that persons of like qualifications be given employment opportunities irrespective of their sex. However, the prohibition against sex discrimination in Section 703(a) of Title VII is qualified by Section 703(e)(1), which provides that:

it shall not be an unlawful employment practice for an employer to . . . [discriminate on the basis of sex] where . . . sex . . . is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise . . ."

Even though there is some legislative history which suggests that the BFOQ condition creates only a "limited exception" to the proscription against sex discrimination, the qualification nevertheless gives explicit

SEX DISCRIMINATION IN EMPLOYMENT



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recognition to our long standing societal norm that women may be treated differently from men in the job market. Given this statutory qualification, especially when coupled with historical patterns of sex discrimination in the United States, it is not surprising that the evolution of the law on sex discrimination has been sparse and equivocal.

The judicial precedents dealing with race discrimination appeared promptly following the passage of the Civil Rights Act of 1964 and, for the most part, the courts held steadfast while strictly enforcing the ban against race bias in employment. Indeed, it may be observed that the federal courts, especially in the Fifth and Sixth Circuits, demonstrated little reluctance to give relatively broad and unqualified readings to the proscription against race discrimination under Title VII. The net effect of these early cases was the development of a new approach focusing on discriminatory effects rather than intentions to challenge a wide variety of common employer and union practices. The unnecessary and irrelevant job qualifications, which the Kerner Commission said "often have the same prejudicial effect" as purposeful bias, were made vulnerable to litigative attack under Title VII. This new interpretative approach reached maturity in the Supreme Court's landmark opinion in *Griggs v. Duke Power Co.* (1971). *Griggs* laid to rest many of the troublesome issues that had arisen in the race cases, by its holding that:

Under . . . [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. . . .

Although many of the principles enunciated in *Griggs* are applicable in race and sex cases alike, the *Griggs* opinion does not purport to give definition to the BFOQ exception under Section 703(e)(1). There really has been no case like *Griggs* in the area of sex discrimination to give meaning to the statutory proscription and impetus to the enforcement effort. As a consequence, the evolution of the law on sex discrimination under Title VII has been relatively retarded.

To date, the Supreme Court has had but one opportunity to deal with a sex discrimination case, in *Phillips v. Martin Marietta Corp.* (1971). However, it would probably be a gross understatement to suggest that the opinion in that case left much to be desired. *Martin Marietta* involved a complaint of alleged sex discrimination resulting from the defendant employer's policy of not hiring women with pre-school-age children. Defendant was granted a summary judgment by the district court and the court of appeals affirmed; however, the Supreme Court vacated and remanded for reconsideration, holding that:

The Court of Appeals . . . erred in reading . . . [703(a)] as permitting one hiring policy for women and another for men—each having pre-school-age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under §703(e) of the Act. But that is a matter of evidence tending to show that the condition in question "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The record before us, however, is not adequate for resolution of these important issues.

While it is probably noteworthy that the Supreme Court saw fit to remand the case for further consideration, the Court's implicit suggestion that the BFOQ exception under §703(e) might be expanded to include a hiring policy which discriminates against women with

pre-school-age children is troublesome to say the least. Justice Marshall's concurring opinion voices a legitimate concern about the court's approach in this regard:

While I agree that this case must be remanded for a full development of the facts, I cannot agree with the court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" *Martin Marietta's* business could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities.

I may be unduly pessimistic in my reading of the *Martin Marietta* case, but I do not view the case as representing a strong pronouncement in support of the proscription against sex discrimination under Title VII. Several commentators have already observed, with disdain, the jovial, half-serious oral arguments exchanged during the Supreme Court's review of the *Martin Marietta* case. (Murphy, *Sex Discrimination in Employment—Can We Legislate a Solution?*, 17 *New York Law Forum*, 437, 439 (1971); Dorsen and Ross, *The Necessity of a Constitutional Amendment*, 6 *Harv. Civ. Rts.—Civil Liberties Law Review* 216, 219 (1971).) At one point during the oral arguments, after counsel had revealed that 80 per cent of manual workers assembling small electronic components were women, the Chief Justice replied with the following remarks:

Well, I have assumed up to this time . . . that the reason you have 75 or 80 per cent women is again something that I would take judicial notice of, from many years of contact with industry, that women are manually much more adept than men and they do this kind of work better than men do it, and that's why you hire women. . . . For just the same reason that most men hire women as secretaries, because they are better at it than men. . . . The Department of Justice, I am sure, doesn't have any male secretaries. This is an indication of it.

These remarks, which may accurately reflect the dominant attitude towards sex discrimination in the United States, do not augur well for the kind of major doctrinal expansion that will be necessary to reverse the historic patterns of legal inequality.

Fortunately, the Supreme Court's seemingly stereotyped view of the proper place for women in the job market has been rejected by most of the lower federal courts which have considered the issue of the meaning of the bona fide occupational qualification exception to Title VII. The majority view in this regard was probably best expressed by the Fifth Circuit Court of Appeals in *Weeks v. Southern Bell Telephone and Telegraph Co.* (1969). There the court, in construing the BFOQ exception, rendered the following opinion:

We agree with the Commission that . . . [a] broad construction of the bona fide occupational qualification [exception] . . . is inconsistent with the purpose of the Act—providing a foundation in law for the principle of nondiscrimination. Construed . . . broadly, the exception will swallow the rule. We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of providing that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

The strength of the holding in *Weeks* is mellowed somewhat by the court's statement that the BFOQ exception does not apply unless there is a factual basis to demonstrate that "all or substantially all women would be unable to perform . . . the duties of the job"; nevertheless, the final result achieved in the case appears to comport with the Fifth Circuit view that the BFOQ exception should be read narrowly. The court in *Weeks* found discriminatory a company rule which prohibited women from performing a switchman job

which required occasional lifting of weights in excess of 30 pounds. In this regard, the court indicated that the company offered "no evidence concerning the lifting abilities of women," and, therefore, it could not rely on a "stereotyped characterization that few or no women can safely lift 30 pounds, while all men are treated as if they can."

The EEOC *Guidelines On Discrimination Because of Sex*, which were last amended on April 4, 1972, similarly subscribe to this narrow definition of bona fide occupational qualification. Accordingly, the Commission has indicated that the following situations *do not* warrant the application of the BFOQ exception:

(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men. (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. . . . and (iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients, or customers. . . .

The Fifth Circuit, in *Diaz v. Pan American World Airways* (1971), reinforced the EEOC guideline that "customer preferences" cannot be used to justify impermissible acts of sex discrimination. In the *Diaz* case, the court ruled that an airline violated Title VII when it refused to hire a male applicant for a flight cabin attendant position, notwithstanding the trial court's finding that airline passengers overwhelmingly preferred to be served by female stewardesses. On this point, the court observed that:

We begin with the proposition that the use of the word "necessary" in section 703(e) requires that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively. The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide . . . may . . . be important, . . . [it is] tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation. . . . What we hold is that because the nonmechanical aspects of the job . . . are not "reasonably necessary to the normal operation," of Pan Am's business, Pan Am cannot exclude all males simply because most males may not perform adequately.

The same type of rationale has been used by the courts to strike down state protective legislation which is inconsistent with the mandate against sex discrimination under Title VII. The leading case on this score is *Rosenfeld v. Southern Pacific Company* (1971), decided by the Ninth Circuit. In *Rosenfeld* the court ruled that California statutes which limited the number of hours that women could work and weights that they could lift on the job did not make sex a "bona fide occupational qualification" for the job of railroad agent-telegrapher, which required work in excess of the permitted hours and lifting of weights in excess of those permitted by the applicable state law. The employer in *Rosenfeld* had argued that under Section 708, Congress had expressed an intention to preserve existing state protective legislation; however, the court rejected this argument. Section 708 provides that nothing in Title VII "shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any state," excluding those laws which purport to require or permit the doing of an act which would be an unlawful employment practice under Title VII. In construing this language, the Ninth Circuit ruled that:

This section was added to the Act to save state laws aimed at preventing or punishing discrimination, and as the quoted words indicate, not to save inconsistent state laws.

The court also made the pertinent observation that:

The premise of Title VII . . . is that women are now to be on equal footing with men. . . . The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification. Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity. . . . This alone accords with the congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work.

A similar ruling had previously been handed down by the Seventh Circuit in *Bowe v. Colgate-Palmolive Co.* (1969).

The 1972 EEOC *Guidelines on Discrimination Because of Sex* appear to follow the principles enunciated in *Rosenfeld* and other like judicial precedents. Section 1604.2(b)(1) of the guidelines states, in this regard, that:

Many States have enacted laws . . . with respect to the employment of females. . . . The commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The commission has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

These judicial precedents and the recently amended EEOC guidelines, give some evidence that, despite the Supreme Court's equivocal opinion in *Martin Marietta*, the lower federal courts and the commission have thus far felt constrained to give a very narrow reading to the BFOQ exception under Title VII. If these opinions and guidelines give an accurate forecast for the future, then it may be assumed that the enforcement of the proscription against sex discrimination under Title VII will, in short order, produce some significant changes in the job market in the United States. Indeed, some have argued that the BFOQ exception should be strictly limited to situations involving the employment of male or female actors or wet nurses; if such a definition is finally adopted by the courts, a serious obstacle to the effective enforcement of the ban against sex discrimination will be removed.

Aside from the issue involving the meaning of the BFOQ exception, there have been only two or three other relatively significant developments in the emerging law on sex discrimination under Title VII.

One such development has arisen with respect to the legality of the maintenance of fringe benefit plans which pay different benefits to male and female employees. In *Bartmess v. Drewrys* (1971), the Seventh Circuit ruled that a retirement plan, adopted pursuant to a collective bargaining agreement, in which it was agreed that female employees were to retire at age 62 and male employees were to retire at age 65, violated Title VII since it provided for different treatment of men and women. In reaching this conclusion, the court ruled that Title VII proscribed classifications by employers which would tend to deprive any individual of employment opportunities because of such individual's sex. The court then went on to observe that the female plaintiff had been discriminated against because she was forced to give up three years of work together with the money she would have earned during the period between age 62 and 65; that such a forced retirement was tantamount to a discharge; and that in any event the classification of

employees on the basis of sex was, of itself, contrary to the intent of Title VII. The Supreme Court denied certiorari in *Bartmess*, and thus the case presently stands as the leading precedent on this point.

The EEOC has consistently ruled, in numerous commission decisions, that male and female employees must be treated without distinction in the granting of fringe benefits. For example, the EEOC has ruled that an employer violated Title VII by maintaining a group insurance plan where spouses of male employees were covered by the insurance plan but spouses of female employees were not (EEOC Decision No. 70-510 (1970)).

Another significant development has involved the question of pregnancy leaves. In *Schattman v. Texas Employment Commission* (1971), a federal district court held that an employer violated Title VII when it terminated a female employee who sought to continue working until two weeks before her expected date of delivery during pregnancy. Since the case arose before the enactment of the 1972 amendments to Title VII, the Fifth Circuit reversed the district court holding for the reason that the state employment commission was not an employer within the meaning of Title VII. The Fifth Circuit also held that since the state policy was reasonable and rationally related to a permissible state purpose, it did not violate the equal protection clause of the United States Constitution.

However, in *Cohen v. Chesterfield County School Board* (1971), another district court held that a school board regulation which required a teacher to take a leave of absence from her duties at the end of her fifth month of pregnancy discriminated against her as a woman, thereby violating the equal protection clause. The court concluded that because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounted to a discrimination that is without rational basis.

Section 1604.10 of the 1972 EEOC guidelines states that an employment policy which automatically excludes women from jobs because of pregnancy will be considered to be a prima facie case of discrimination under Title VII. This guideline is consistent with a 1969 decision rendered by a federal district court in the matter of *Cheatwood v. Southern Central Bell Telephone & Telegraph Co.* The court in that case ruled in effect that all women cannot be excluded from a particular heavy job assignment merely because some of them may become pregnant. The EEOC guidelines also indicate that employment policies having to do with maternity leaves and health insurance benefits must "be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." In this regard, the guidelines further indicate:

Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has disparate impact on employees of one sex and is not justified by business necessity.

One final development of note with respect to sex discrimination under Title VII involved the Seventh Circuit's approval of an EEOC guideline determining that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is discrimination based on sex prohibited by Title VII. In *Sprogis v. United Airlines*, the Seventh Circuit ruled that a female employed by an airline as a stewardess was discriminated against because of her sex when she was discharged by her employer for violating a company policy which required that stewardesses must be unmarried. In reaching this conclusion, the court made the noteworthy observation that the proscription against sex discrimination under Title VII was not con-

finied to explicit discrimination based solely on sex. The court rejected the company's contention that the no marriage rule should not be declared to be discriminatory because it had been applied only to female employees falling into the single, narrowly drawn occupational category of stewardess; the court observed, on this point, that no male flight personnel had been subject to the no marriage condition of hiring or continued employment and that since the rule resulted in a disparity of treatment it was violative of Title VII even though it was confined to a particular job position.

With the exception of these few cases there really have not been any profoundly significant legal developments in the area of sex discrimination arising under Title VII during the past two years. In the cases where the BFOQ question is not in issue, the courts have tended to follow the law developed in the race cases under Title VII. A good example of this was seen in *Danner v. Phillips Petroleum Co.* (1971), where a woman who had worked for 10 years for the company was bumped out of her job and replaced by male employees. The company responded to her claim of sex discrimination by citing a "neutral" company policy of giving seniority and bumping rights only to certain job classifications, such as "roustabouts" or "roughnecks." Since Mrs. Danner was neither a "roustabout" nor a "roughneck," the company argued that she had no right to retain her job. The evidence disclosed, however, that while the system appeared neutral, it was discriminatory in effect because no female employee held a job as either a roustabout or roughneck. The Fifth Circuit Court found further that Mrs. Danner performed substantially the same work as the seniority-protected males and, therefore, she was improperly excluded from the seniority system. This ruling was handed down notwithstanding the special protection for seniority systems in Section 703(h) which provides that "bona fide" seniority systems will not be considered to violate the Act.

Outside of the realm of Title VII, two important cases of fairly recent vintage have been handed down by two different state courts. In one of the cases, a New York court declared unlawful a professional baseball league's restriction against the hiring of women umpires. The New York court noted that the bona fide occupational qualification exception must be given a narrow construction and must be affirmatively proved by the party claiming it; the court further concluded that the employer had failed to show a factual basis for the asserted belief that women were not qualified for the job of a professional baseball umpire, notwithstanding the evidence that the job would require some physical strain, travel, and loss of weight, and the possibility of some physical injury. *New York State Division of Human Rights v. New York-Pennsylvania Professional Baseball League* (1972). The New York case, while amusing in some respects, emphasizes the important points underlying most of the federal cases dealing with claims of sex discrimination, i.e. that women must be treated as individuals in the job market and that they cannot be precluded from job assignments on the basis of stereotyped generalizations about the incapacities of the so-called weaker sex.

The second case of note involves a Pennsylvania Commonwealth Court decision sustaining the Pittsburgh Commission on Human Relations finding that a newspaper was guilty of violating the city human relations ordinance by classifying its help-wanted ads according to sex, *Pittsburgh Press Co. v. Pittsburgh Human Relations Comm.* (1972). In reaching this conclusion, the Pennsylvania court ruled that by printing sex-segregated ads, the newspaper was improperly aiding employers to discriminate; it held further that since the nature of the charge involved discrimination against a

protected class, no specific incident of injury need be alleged. The U.S. Supreme Court has recently granted certiorari to review the case; the Court has agreed to consider (1) whether the law against sex-segregated ads violates the First Amendment and (2) whether it is a violation of due process for a newspaper to be found in violation of the city ordinance, for aiding employers, in absence of any specific evidence demonstrating that any advertiser discriminated against women in violation of the ordinance.

Section 1604.5 of the 1972 EEOC guidelines suggests that it is a violation for a help wanted ad to indicate a preference as to sex unless sex is a BFOQ as to the particular job involved. The EEOC has consistently ruled that the "placement" of a sex-segregated ad by a covered employer constitutes prohibited discrimination under Title VII; however, it is not clear whether the publisher of the ad is likewise covered by the proscription. In at least one case, a federal district court has ruled that since a newspaper is not an "employment agency" under Title VII, it does not violate the act by the publication of sex-segregated ads. *Brush v. San Francisco Newspaper Printing Co.* (1970). The court made the further observation that the liability for the placement of unlawful sex-segregated ads rests solely on covered employers, unions, and employment agencies and that newspapers are not required by Title VII to determine whether sex-segregated ads satisfy the BFOQ exception to the act. The Supreme Court's disposition of the *Pittsburgh Press* case may simultaneously serve to settle some of the unresolved issues on these points under Title VII.

Outside of the judicial arena, the most important developments affecting the law on sex discrimination have been the legislative amendments to the Equal Pay Act and to Title VII. In March of 1972, President Nixon signed a bill amending Title VII of the Civil Rights Act of 1964. Section 701(a) of the 1972 amendments includes state and local governments and their agencies within the definition of covered employers and the exemption for both public and private educational institutions formally found in section 702 has been removed. Consequently, professional, technical, and staff employees working for public employers, including universities and colleges, are now covered and protected by the provisions of the Federal Equal Employment Opportunity Act. It has been a long time in coming, but the 1972 amendments to Title VII suggest that Congress has finally given "serious" recognition to the problem of sex discrimination, at least within the education profession. The house committee report which was filed in Congress preceding the enactment of the 1972 bill addressed itself to the problem of sex discrimination in employment within the university community, and the following statement was made a part of the legislative history of the new act:

Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment . . . In the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars. When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. . . . The committee feels that discrimination in educational institutions is especially critical. . . . To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.

This congressional statement is significant because it may give impetus to court imposed remedies of "affirmative action" on the part of universities and other public employers to alter existing patterns of sex discrimination. Women have for years been employed in large numbers by public employers, but they have usual-

ly been limited to the less significant job positions; consequently, the legal imposition of a duty of fair recruitment and "affirmative action" would likely have a profound impact on the job placement problem in these employing situations.

Indeed, it is highly likely that there will be some significant developments in the law on sex discrimination under Title VII now that public employers and universities are covered by the federal proscription; this is so because many of the jobs being offered by these institutions involve the use of brain power and not brawn power, and, therefore, the BFOQ exception, which has thus far been a serious obstacle in the development of the law on sex discrimination in the private sector, will be largely without relevance. Thus, the legal precedents which have developed in the race discrimination cases, requiring employers to take affirmative action to remedy the present effects of past patterns of discrimination, will have a significant and an immediate impact in prompting women to aspire to jobs in the public sector which are commensurate with their talents and training and in compelling public employers to actively recruit women candidates for job positions of consequence.

The recent amendment of the Equal Pay Act, to include coverage of professional, administrative, and managerial employees, should have a like impact. The legal requirement of equal pay for equal work, which now covers these higher classifications of employment, should serve to remedy the existing patterns of discrimination where women have been performing duties of a higher position without the benefits of advanced rank and higher pay.

These recent amendments to Title VII and the Equal Pay Act should quicken the pace of litigation involving claims of sex discrimination in the near future. An article appearing in the November 25, 1972, issue of *Business Week* reported that:

All told, some 400 equal pay cases have been filed by the U.S. Labor Dept., and the results should gladden a feminist's heart. The department has won 178 of 208 lower court decisions handed down to date. It has won 14 of the 30 "losers" when they were appealed to higher courts.

The most important decision under the Equal Pay Act—from a standpoint of the money it involved and the precedent it set—was the 1970 U.S. Circuit Court ruling against the Wheaton Glass Co., of Millville, N.J. The court ruled that jobs need not be identical, just "substantially equal," for the equal pay law to apply. It ordered Wheaton to pay close to \$1 million in back pay to women inspector-packers. The U.S. Supreme Court refused to hear an appeal, in effect confirming the decision.

Business Week also reported that other recent awards in equal pay cases have resulted in back pay judgments ranging from \$100,000 to \$650,000 enforced against numerous large corporations.

EEOC Chairman William H. Brown, III, has indicated that more sex discrimination cases under Title VII will likely be in the offing now that the EEOC has authority to seek court enforcement under the 1972 amendments to the Equal Employment Opportunity Act.

In fiscal 1971, there were 5,800 charges of sex discrimination filed with the EEOC; this number jumped to 10,400 in fiscal 1972. This flurry of activity certainly gives evidence that more attention is now being paid to the problem.

In time we should see the "emerging law on sex discrimination" cut through the maze of specious issues to the real question having to do with the illegitimacy of a social norm which fosters sexual bias in employment. As a consequence, the law on sex discrimination in employment may yet be instrumental in redefining artificial sexual roles in our society and in establishing a "new tradition," if you will, in which both men and women will be free to develop and grow according to their individual abilities.

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