Law Quadrangle Notes

The University of Michigan Law School

Volume 20, Number 2, Winter 1976

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Cover: Ann Arbor and the Law Quadrangle experienced a "storybook" fall this year; but when winter did arrive, it did so with great gusto, as captured in this photo by Bob Kalmbach, University of Michigan Information Services photographer.

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Peter Steiner Recalls Experiences In Africa

For Peter Steiner, returning home to Ann Arbor in the fall after an experience abroad was like finally waking up from a haunting dream.

A professor of economics and law at The University of Michigan, Steiner made headlines last June when he helped gain the release of four hostages—one Dutch student and three American students from Stanford University—who had been kidnapped by rebels in central Africa.

The students had been studying primate behavior at a research center operated by British anthropologist Jane Goodall in western Tanzania. The rebels, from neighboring Zaire (the former Belgian Congo), sought ransom money, firearms, and publicity for their effort to overthrow the Zaire government.

A visiting professor for a year at the University of Nairobi in Kenya, Steiner was asked by the parents of one of the students, Barbara Smuts of Ann Arbor, and by Stanford University to represent the students' interests in the politically-tangled affair.

"For nearly a month, gaining release of the hostages became the sole focus of my life," the 53-year-old professor recalled in an interview in Ann Arbor. "I lived with the issue day and night. It was like a chess game, trying to determine what was in the minds of the PRP (the Popular Revolutionary Party of the Congo) and what their next move would be.

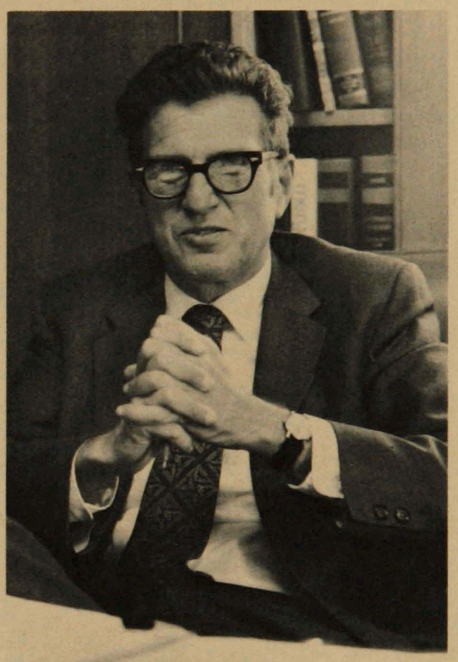
"I now find it hard to purge myself of an involvement like that," Steiner continued. "If the students had been killed, it would have been a nightmare I would carry with me for the rest of my life. Thank God it didn't turn out that way."

As it did turn out, the four hostages were released unharmed at different times during the summer. Steiner played a key role in attempting to establish contact with the kidnappers following the release of one of the hostages, Miss Smuts, who carried a message bearing a list of the rebels' demands.

According to Steiner, the rebels asked for a ransom of $500,000 in U.S. currency or 200,000 British pounds; they made a detailed list of American and Belgian firearms which they wanted; and they asked for the release of two named PRP rebels and several unnamed rebels who were being held in Tanzania at the request of the government of Zaire.

Steiner also notes an "implicit" demand for worldwide publicity. The rebels, he recalled, wished to portray themselves "not as bandits but as a socialist revolutionary movement working for the benefit of the people of the Congo."

It was agreed that the final settlement would remain secret, but Steiner—knowledgeable of the settlement but not a participant in the final negotiations—points out that there have been newspaper reports estimating the size of the ransom at $40,000 to $400,000.



Peter Steiner

"It is clear that a sizeable monetary ransom was agreed upon, and that it was raised by private sources," said Steiner. "This is all I can say.

"The official position of the U.S. government is that, while it cannot raise the ransom money itself, it will not prevent private parties from raising such money to gain release of a U.S. citizen," according to the U-M professor.

"It is also clear," Steiner said, "that the kidnappers got the release of some of the PRP prisoners held in Tanzania. But it is apparent they could not have gotten the arms they asked for. There is no way the government would consent to an agreement to provide arms to such a rebel group."

Finally, he noted, the PRP seems to have succeeded in gaining the worldwide publicity, which was their motive for kidnapping Americans or Europeans instead of Africans. "They recognized that African hostages would not serve to focus world attention on them."

After Miss Smuts' release, Steiner was authorized by the U.S. Embassy to fly to the city of Bujumbura in the small, neutral country of Burundi to seek contact with the PRP who were holding the hostages in a camp in eastern Zaire. Steiner chose Bujumbura as his base of operations because of its geographic location between Tanzania and Zaire and its political neutrality, which he hoped would lure the PRP into negotiating there.

A local Catholic missionary, a fisherman and others familiar with the jungle area were dispatched by Steiner to travel down Lake Tanganyika into Zaire, seeking to establish direct contact with the PRP. Meanwhile, Steiner's presence as an American negotiator was made known in local political circles and through radio messages carried over Voice of America, the British network, and in other broadcasts.

After nearly three weeks without direct contact with the PRP, Steiner returned to Nairobi to visit with his wife and children. Surprisingly, while Steiner was in Nairobi, PRP representatives chose to travel some 750 miles by railroad through politically-hostile Tanzania, arriving at the American Embassy in Dar es Salaam where they announced they were ready to negotiate.

Steiner believes the PRP made this daring appearance in Dar es Salaam because they sought maximum publicity by negotiating directly at the American Embassy, and also because they believed Burundi, despite its official neutrality, was too closely aligned politically with the government of Zaire.

One unforeseen result of the PRP's tactics was a U.S. State Department reprimand and eventual reassignment of W. Beverley Carter, U.S. ambassador to Tanzania. Carter was criticized for using the U.S. Embassy as a negotiating place, for granting political asylum to the rebels in order to carry out negotiations, and for using the U.S. diplomatic pouch in the delivery of the ransom money.

Steiner maintains there was no justification for removing Carter from his post. "Ambassador Carter was reprimanded for playing a larger role in the negotiations than is proper for a U.S. official," said Steiner, "but it seems to me that he had no alternative.

"It was a total surprise when the PRP showed up at the U.S. Embassy in Dar es Salaam, traveling some 750

miles across Tanzania and risking arrest. This came after nearly a month of our attempting to get in touch with them. Under these circumstances, it would have been unthinkable for Carter to expel them from the embassy and to refuse to allow negotiations with them."

Steiner speculates that Carter's reassignment from Tanzania was basically a "political move," designed to ease U.S.-Zaire relations which had been strained by the kidnapping.

Zaire President Mobutu Sese Seko, Steiner noted, sought to ignore the kidnapping and stifle any publicity about the PRP. "But this would have been an impossible stance for the United States, since three U.S. citizens were involved," Steiner pointed out. "In the end, I think the U.S. chose to use Ambassador Carter as a scapegoat."—*Harley Schwadron*

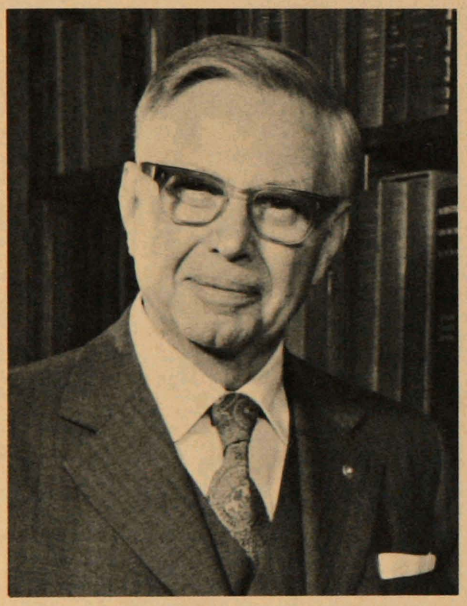
Law Alumnae Directory Offered By Women Students

If you need to know where to write to Her Majesty, Queen Juliana of The Netherlands, the Women Law Students Association at the U-M can help you. The Queen is listed along with other members of the Law School Class of 1952 in a directory of Michigan women law graduates published recently by the association.

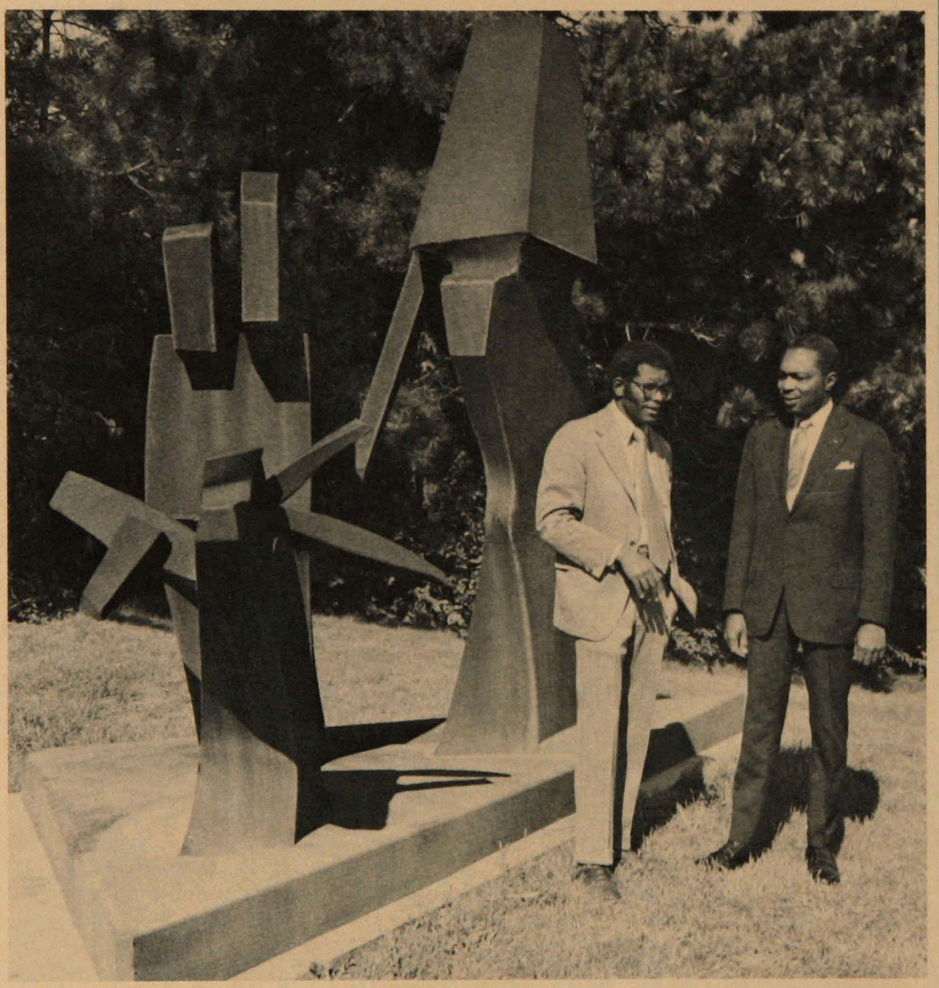
More than 400 alumnae are listed according to year of graduation and

alumni notes

EDITOR'S NOTE: *A more complete listing of items about other law alumni is carried in the summer issue of* Law Quadrangle Notes. *Alumni information should be sent to Prof. Roy F. Proffitt, Director, Law School Relations, Hutchins Hall, Ann Arbor, Mich. 48109.*



Robert A. Manchester II, a 1927 graduate of the Law School, has been selected as president of Rotary International for 1976-77. A member and past president of the Youngstown, Ohio, Rotary Club, Manchester will assume the presidency of the international organization on July 1. He has held many posts with Rotary International during the past 20 years, and has been active in local church and civic affairs. He served as mayor of Canfield, Ohio, where he resides, for eight years, and as solicitor of the village for 10 years. Manchester is a partner in the Youngstown law firm of Harrington, Huxley & Smith. He received both the A.B. and a law degree from Michigan.



Hobart Taylor, Jr., (right), a 1943 U-M law graduate, is the donor of two outdoor sculptures dedicated recently at the U-M's Bentley Library, which houses the Michigan Historical Collections. In photo, Taylor talks with Richard Hunt, well-known sculptor who executed the works. The sculptures, titled "Peregrine Section" (pictured here) and "Historical Circle," are both of weathering steel. Taylor, a Washington, D.C., attorney, commissioned and donated the sculptures as a memorial to his father, Hobart Taylor, Sr., a rancher, businessman, and political figure in Texas who died in 1972 at the age of 76. Before receiving his law degree from Michigan, the younger Taylor graduated from Prairie View College in 1939 and earned a master's degree from Howard University in 1941.

cross-indexed by geographical location and type of legal practice, beginning with Henrietta E. Rosenthal of the Class of 1918, a retired Detroit lawyer who specialized in criminal law. Queen Juliana, for example, is included under the heading of "Foreign Government." (Her Majesty's address, by the way, is Soestdijk Palace, The Netherlands, Utrecht.)

Copies of the soft-cover U-M law alumnae directory can be ordered by mail by sending a check or money order for $1 each to the Women Law Students Association, 116 Legal Research, The University of Michigan, Ann Arbor, MI 48109.

The directory is one of many ambitious projects undertaken by the women students this year. In addition to the first Alumnae Weekend, held in November, the women hosted a speaking appearance by Carole Kamin Bellows, a Chicago attorney who is president-elect of the Illinois Bar Association, the first woman to be chosen to head a state bar.

Plans for a Susan B. Anthony memorial dinner are under way for February to observe the anniversary of the women's rights crusader's birth; and a committee of U-M women law students hopes to have the 1977 meeting of the National Women in the Law Conference at U-M Law School.—*Bruce Johnson*

Sax Goes To Japan To Discuss Environment

Prof. Joseph L. Sax of U-M Law School recently completed a trip to Japan where he addressed groups on environmental law and citizen action to halt environmental damage.

Sax, who is author of Michigan's Environmental Protection Act, spoke at Hokkaigakuen University in Sapporo, and before the Japan Federal Bar Association and the International Congress of Scientists on the Human Environment in Kyoto.

Michigan's Environmental Protection Act, which gives citizens the right to bring polluters to court, has been copied by other states.

Kauper Cites Rewards Of Government Work

Thomas E. Kauper, on leave from the U-M law faculty while serving as U.S. assistant attorney general in charge of the Justice Department's antitrust division, says government service can still be a rewarding experience, despite its tarnished image in the wake of Watergate.

The U.S. antitrust chief, visiting the Law School recently, spoke at the annual banquet of the *Michigan Law Review*.

Thomas E. Kauper

"Government service provides an unparalleled opportunity to learn, to experience, and to contribute to the public well being," Kauper said. "It can also involve personal risks. But those risks are greatest to those whose sense of right and wrong is muddy, and to those whose motive is other than experience and service."

Kauper told students that, following Watergate, personnel recruitment by the Justice Department was not substantially impaired over "an extended period of time. Fortunately, where the department was concerned, young people did not seem to follow the advice to stay out of Washington."

But Kauper noted some departmental changes resulting from the Watergate experience.

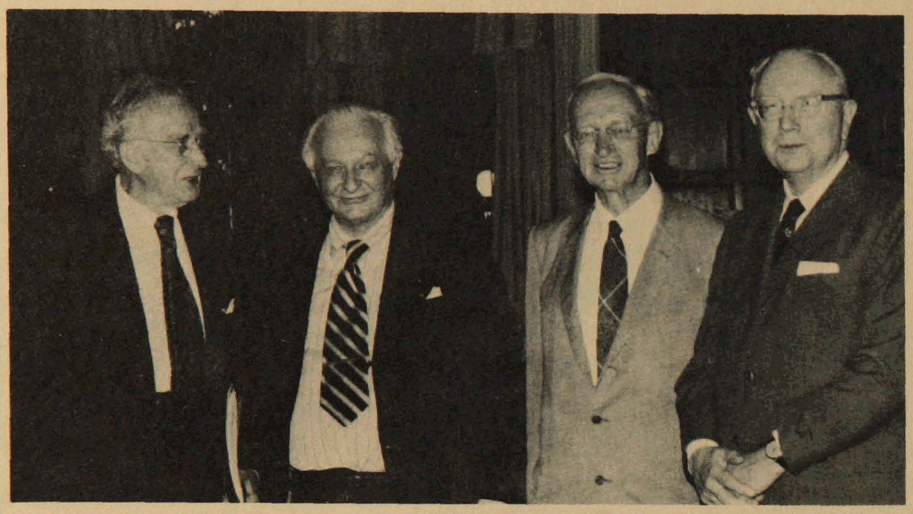
"There can be little doubt that the department is standing in a more independent position than it had occupied earlier," he said. "There is far greater openness about its operations, and that . . . is a healthy sign. There have been organizational and procedural changes designed to immunize the department and its component parts from political and other non-professional pressures."

At the same time, he cited dangers if the department were "pushed too far."

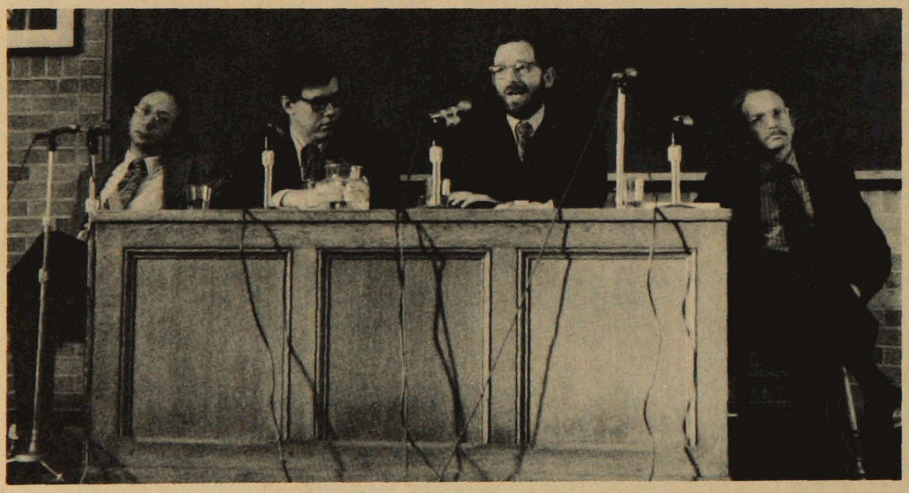
For example, "wholesale disclosure of investigative data can compromise our investigative efforts by disclosing the identity of informants, by discouraging firms from submitting data they legitimately view as confidential, and, ultimately, by permitting political pressures to be brought to bear during the decision-making process," according to Kauper.

Recent Events

The first "Alumnae-Student Weekend" at the Law School was held in November, featuring seminars on legal and women's issues. Among the organizers of the gathering were the following members of U-M Women Law Students Association (bottom row, from left, in photo): **Ellen Dannin, Lynn Chard, Gayle Horetski, Mary Ruth Harsha, Jean Bertrand;** (top row) **Debra Armbruster, Kathleen Ziga, Susan Lesinski, Margaret Huneke,** and **Helen Hudson.** There are now some 430 women graduates of U-M Law School and the number is increasing rapidly. Last year alone, some 75 women graduated from the Law School, notes the Women Law Students Association. The Alumnae-Student Weekend, in addition to serving as a social gathering, included discussion of such issues as the "role of the woman lawyer" and "combining career and family." Legal topics discussed by alumnae panels included tax and corporate law, criminal law, state and federal government legal work, labor law, and general practice. Keynote speaker at the evening banquet was **Rosemary Pooler,** a 1965 U-M law alumna who is now head of the New York State Consumer Protection Board. Her topic was "Making It" in the legal field.



International law became the topic of discussion when three well-known authorities—**Philip C. Jessup, Brunson MacChesney, and Myres S. McDougal**—visited the Law School to honor U-M Law Prof. **William W. Bishop, Jr.**, who has retired after teaching international law at Michigan for nearly 30 years. (In photo, from left, are Jessup, MacChesney, Bishop, and McDougal.) Speaking at an evening symposium, Jessup, former judge of the International Court of Justice, urged greater U.S. attention to international negotiations regarding use of the oceans. Noting that deep sea mining will yield nickel, cobalt, magnesium, and other valuable industrial metals for many years, the former Columbia professor added: "Current Law of the Sea negotiations are raising fundamental questions that will affect the wealth and conditions of people over the world for a significant period of time. Prof. McDougal, of Yale University, discussed "human rights" in international law, noting that the needs of nations—particularly the developing nations—"are being inadequately met. There is little sharing of wealth, standards of living vary widely; and many countries have low standards of health and education." Prof. MacChesney, of Northwestern University, recounted Prof. Bishop's contributions to the field of international law. Among other things, he noted that, as legal adviser in the State Department during the Truman presidency, Bishop formulated the "continental shelf doctrine" asserting U.S. jurisdiction over coastal waters.



In a departure from tradition, the Law School's Thomas M. Cooley Lectures this academic year were presented not by one but by three speakers, each a specialist in legal history. The lectures, including a panel discussion moderated by Prof. **Thomas A. Green** of U-M Law School (second from right in photo) featured (from left) Prof. **Morton J. Horwitz** of Harvard Law School, Prof. **William E. Nelson** of the Yale University law faculty, and Prof. **Stanley N. Katz** of University of Chicago Law School. Speaking on the theme "The Emergence of an American Theory of Law," the speakers shared views about how political, social, and economic realities helped shape American attitudes about the law and its interpretation. Prof. Katz spoke on "Property and the American Revolution: the Law of Inheritance"; Prof. Horwitz's topic was "Separation of Powers and Judicial Review: the Development of Post-Revolutionary Constitutional Theory"; and Prof. Nelson devoted his portion of the three-day program to "The Development of the Concept of Judicial Review." The Cooley Lectureship was established to stimulate research and to communicate the results in public lectures. The lectureship is supported by the William W. Cook Endowment for Legal Research.

THE COST OF EQUALITY: CIVIL RIGHTS DURING PERIODS OF ECONOMIC STRESS

by Harry T. Edwards
Professor of Law,
University of Michigan Law School
Visiting Professor of Law, Harvard Law School

The Problem of "Last Hired, First Fired"

Many minority workers, only recently hired under affirmative action programs, have been laid off during the present recession under "last hired, first fired" seniority systems. Thus, it has been claimed that the gains in equal opportunity employment that have been made over the last ten years are in danger of being lost through layoffs in the recession of the '70's.

Unfortunately, it is difficult at best to discern the actual impact of "last hired, first fired" seniority plans on minority

employment. Most people have assumed that there is a direct and significant relationship between the current high levels of unemployment among blacks and the existence of "last hired, first fired" seniority systems. But the data on this point is at best unclear.

In April 1975, Julius Shiskin, the commissioner of labor statistics at the Department of Labor, reported that most of the rise in unemployment since the recession began in 1973 has been due to layoffs. But Shiskin also suggested that it was difficult to tell which population group (that is, blacks v. whites) has had the greatest *percentage increase* in number of laid off workers since the start of the recession. In determining that percentage increase . . . . , the figures vary depending upon the base period that is used. From the fourth quarter of 1973 through the first quarter of 1975, the number of black male workers laid off increased at a faster rate than white—169.3 percent versus 146.3 percent.

However, the opposite result is found if the third quarter of 1973 is used as the base period for measurement. From the third quarter of 1973 through the first quarter of 1975, the percentage increase in laid off workers was 171.6 percent for white males and 139.8 percent for blacks.

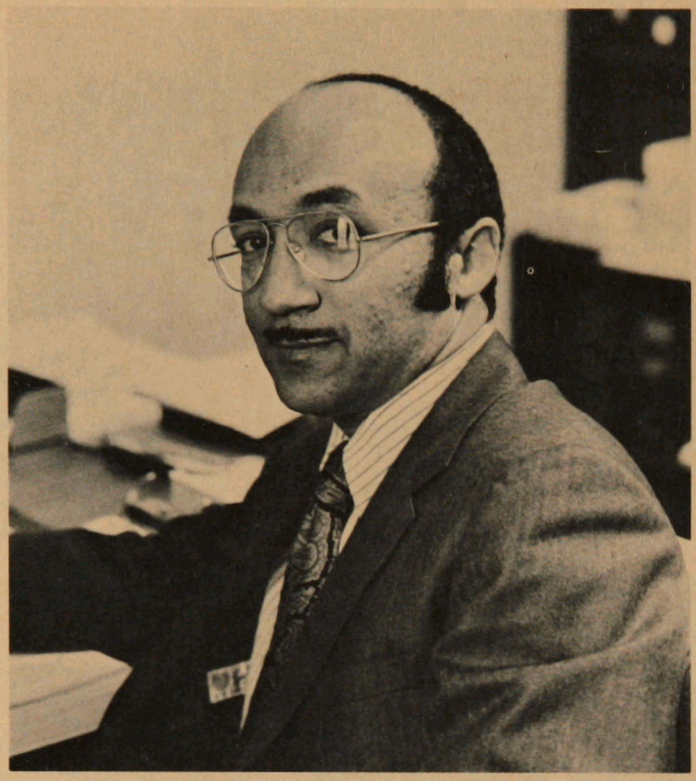
These figures do indeed suggest that blacks and whites have been affected about the same by layoffs during the current recession. However, this does not mean that black and white persons have suffered equally during the recession; in fact, nothing could be further from the truth because blacks were in a substantially worse economic position in the first place. But the Department of Labor figures are still important because they do question how much of a detrimental impact "last hired, first fired" seniority systems have had on minority employment during the 1973-75 recession.

Probably more important than "last hired, first fired" is that blacks have traditionally been excluded from the relatively "safe" white collar, technical, and professional jobs, where the effects of a cyclical recession are usually less severe. It is precisely because there have never been significant numbers of blacks in these "better" jobs that (1) the rate of unemployment for blacks has remained at a substantially higher level than the rate for whites during both periods of prosperity and recession and (2) the over-all impact of the current recession has clearly had a greater adverse effect on black persons in our society.

Whatever may be the *actual* impact of "last hired, first fired" seniority systems on minority employment during the current recession, the courts are split on the question of whether to grant "fictional seniority" to minority workers in order to insulate them from layoffs. It is clear that many minority workers hired during the last decade pursuant to the legal mandate of equal employment opportunity have been the first persons laid off when employers have applied "last hired, first fired" during the current recession. Thus, a number of courts have been faced with the issue whether such layoffs, which frequently have a disproportionate impact on black workers in a given employment setting, violate Title VII or other laws prohibiting job bias on the basis of race.

Those courts that have granted fictional seniority have reasoned that since minority workers would have been hired years earlier but for race discrimination, it is not improper to grant fictional seniority to put them in the position in which they would have been absent historical discrimination. However, since the effect of such a remedy is

[The comments on these pages are based on the last three parts of Professor Edwards' nine-part David C. Baum Memorial Lecture, delivered at the University of Illinois Law School on October 30, 1975, copyright © 1975, by the Board of Trustees of the University of Illinois. The full text of Professor Edwards' lecture will be published by the University of Illinois.]



Harry T. Edwards

to cause the displacement of white male employees in favor of minority employees, it directly conflicts with the oft-cited dictum in *Papermakers Local 189 v. United States*. In that decision, the Fifth Circuit stated in effect that employees with real seniority (i.e. actual time worked with the company) could never be displaced by less senior employees pursuant to a court order altering an existing seniority system.

However, the court in *Papermakers* did uphold the district court's order creating a company-wide seniority system in place of the pre-existing departmental seniority system. This had been done in order to minimize the residual effects of a formerly racially segregated department seniority structure.

Actually, the "fictional seniority" problem must be divided into two parts. First, there is the problem of the appropriate remedy for individuals who have suffered specific instances of discrimination. For example, a minority person who applied for a job two years ago and was rejected because of race would most likely be ordered hired and given back pay for the two-year period. But if a company using a "last hired, first fired" seniority system decides to lay off some workers, the same minority employee, recently hired but who should have been hired two years earlier, will have no seniority and will be the first to go. In such a case, where the specific discriminatees can be identified, retroactive seniority should be granted. The white male workers who might be disadvantaged are not really being treated unfairly because they will be in exactly the same position as that in which they would have been *but for* the discrimination. While it may be true that white males should not be prejudiced by the company's past discrimination, there is no reason why they should retain an unearned advantage. Besides, the retroactive seniority remedy, when limited to identifiable discriminatees, would have no effect on most employees, since the basic seniority system would be left intact.

Some support for this position may be found in the Supreme Court's recent decision in *Albermarle Paper Company v. Moody*, where the Court discussed the standards by which back pay should be awarded after proof of a violation of Title VII. First, the Court made it clear that Title VII

"requires that persons aggrieved by the consequences and effects of the unlawful practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." Second, the Court observed that the remedial provisions of Title VII were fashioned after the remedial provisions of the National Labor Relations Act and should therefore be construed in a manner consistent with the case precedent under the NLRA. Reinstatement with back pay and with retroactive seniority rights is a common remedy for victims of unfair labor practices under the NLRA. Although many of the NLRA cases have involved discriminatory *discharges*, the N.L.R.B. has also awarded retroactive seniority to victims of unlawful discrimination in *refusal to hire* cases. Thus, in following the suggestions made by the Supreme Court in *Albermarle*, it may be contended that persons who have been unlawfully denied job rights at the *hiring* stage of employment should be awarded both back pay and retroactive seniority under Title VII.

The issue of retroactive seniority for "identifiable discriminatees" will be resolved this term by the Supreme Court when it decides *Franks v. Bowman Transportation Co.* In *Franks*, the district court found that the company had discriminated against certain black applicants by denying them jobs as over-the-road truck drivers because of their race. On appeal to the Fifth Circuit, the Court of Appeals considered whether the victims of past discrimination should be awarded seniority retroactive to the date when they had first applied for and been denied jobs due to race bias. In rejecting the request for retroactive seniority, the court relied primarily on the dictum in the *Papermakers* case, and ruled that "constructive seniority" was impermissible as a remedy under Title VII.

The court in *Franks* also cited *Papermakers* for the proposition that:

> Creating fictional employment time for newly hired Negroes would consitute preferential rather than remedial treatment.

However, this statement ignores two important considerations: first, as shown above, the courts have frequently recognized that "preferential remedies" may in fact be *remedial* in may cases; and second, the "retroactive seniority" remedy is not the same as "fictional seniority." As one writer has noted:

> Retroactive seniority is "fictional" only in the same sense that most other standard remedies for Title VII violations are fictional. . . . . One may reasonably ask whether back pay is any less "fictional" than retroactive seniority. Is pay for time not actually worked any different conceptually from seniority for time not actually worked?

Another recent case involving a claim for retroactive seniority for identifiable victims of discrimination was decided by the Sixth Circuit in *Meadows v. Ford Motor Co.* The Sixth Circuit opinion, unlike the Fifth Circuit decision in *Franks*, plainly recognizes that "there is . . . no provision to be found in [Title VII] . . . which prohibits retroactive seniority."

Although the court in *Meadows* concedes that retroactive seniority may be an appropriate remedy for identifiable victims of employment discrimination under Title VII, some of the language in the opinion is troublesome. For example, the court expressed some concern about white workers being displaced as consequence of a grant of retroactive seniority to black victims of employment discrimination, but this concern is somewhat difficult to understand. The likelihood of job displacement among white employees is no greater in the retroactive seniority case than it is in the departmental or job seniority type case seen in *Papermakers*. When a court finds that a departmental or job seniority system is unlawful under Title VII and allows black workers to exercise plant-wide seniority to move into jobs formerly closed to them, the expectations of white employees are surely denied. While it is true that the courts have never condoned *direct* job displacement of white employees in the departmental or job seniority cases, it is important to recognize that an *indirect* form of job displacement has been allowed as a consequence of the remedial orders issued in these cases. A simple hypothetical example will suffice to demonstrate this point:

> **Example**—Under job seniority, a white worker with six years seniority on the "job" and six years in the plant would have superior rights to the "job" over a black worker with zero years on the job and 15 years in the plant. If, however, a court finds that the job seniority system is unlawful under Title VII, and orders the substitution of plant-wide seniority in place of job seniority, then the respective rights of the white and black workers will be significantly altered. It is true that the black worker will not be allowed to bump or displace the white worker from his job; however, the black employee will be allowed to fill any vacancy in the job on the basis of his plant-wide seniority. If the black worker elects to do this and if both the white and black workers are subsequently laid off, the black worker (with greater plant seniority) will have superior rights over the white worker to recall. Thus, if upon recall there is only one job left, the black worker will displace the white worker who formerly had superior job seniority to him.

This example should amply indicate that the courts have indeed at least implicitly condoned job displacement in the departmental and job seniority cases. No less should be done in the cases involving claims for retroactive seniority by persons who have been identified as victims of discrimination at the hiring stage of employment.

The most difficult problems in the so-called retroactive or fictional seniority cases arise when a company with a long history of discrimination finally starts hiring blacks and none of the minority persons hired are specific discriminatees. In such cases, if the employer subsequently finds it necessary to cut back the work force, and fictional seniority is granted to the recently hired minority persons, white employees who had an expectation of continued employment or promotion based on their seniority will be denied their expectations because of their race. However, if the remedy is denied, a round of layoffs can restore the earlier imbalance among minority employees.

Thus far, the three courts of appeal that have dealt with this problem, in the Third *(Jersey Central)* Fifth *(Watkins)* and Seventh Circuits *(Waters)*, have all followed the dictum of the *Papermakers* decision and have refused to alter "last hired, first fired" layoff systems even though the effect of these systems was to deny jobs to a disproportionate number of recently hired, low seniority minority persons.

Probably the best known case among this trilogy of courts of appeal decisions is the case of *Watkins v. United Steelworkers Local 2369*. In *Watkins*, the district court ruled that only "bona fide" seniority systems were permissible under Title VII and that a system perpetuating the effects of past discrimination could not be bona fide. This position is consistent with the recently adopted interpretive ruling rendered by the Equal Employment Opportunity Commission.

However, the district court decision in *Watkins* was subsequently reversed by the Fifth Circuit. The Fifth Circuit held that neither Title VII nor the Civil Rights Act of 1866 bars the use of a long-established seniority system, adopted without intent to discriminate, to determine which employees should be laid off, even though minority employee balance is adversely affected. But the court noted as part of its deliberately narrow holding that the employer's hiring practices had been nondiscriminatory for over 10 years, and that none of the individual employees laid off had personally been the victim of prior employment discrimination. The court "specifically [did] not decide the rights of a laid-off employee who could show that, but for the discriminatory refusal to hire him at an earlier time than the date of his actual employment, or but for his failure to obtain earlier employment because of exclusion of minority employees from the work force, he would have sufficient seniority to insulate him against layoff."

The decision in *Watkins* is important not so much because it follows the dictum of *Papermakers*, but rather because it leaves open the possibility that retroactive seniority (as opposed to "fictional seniority") may still be used as a

legitimate remedy for past discrimination under Title VII. The court in *Watkins* was careful to stress throughout its opinion that the plaintiffs were not identifiable victims of past discrimination and therefore, the court was primarily concerned about the problem of "reverse discrimination" against white employees.

Part of the problem when there are no specific victims of unlawful discrimination is that there is no way to determine whether the workers who benefit from "fictional seniority" are the same workers who were hurt by the company's (and/or union's) prior discrimination, and conversely, there is no way to tell how much the non-minority workers benefitted from the discrimination. In many cases there will be no correlation for either minority or non-minority workers between their individual positions and the prior discrimination.

Although the same problem exists to some extent in the preferential hiring cases, it is less serious in those cases because they do not thwart the long standing expectations of non-minority workers.

"White people in the United States have been able to live with high unemployment because unemployment is primarily a black problem."

Alternative Solutions to Fictional Seniority

Given the present composition of the Supreme Court, the uniformity of the opinions among the three courts of appeal that have thus far dealt with the issue, and the numerous difficult legal and moral questions raised by the problem of "fictional seniority," it is unlikely that the Supreme Court will overturn the precedents established by *Waters*, *Jersey Central*, and *Watkins*. Possibly in recognition of this fact, and surely in an effort to offer useful remedies for a severe national problem, a number of scholars, practitioners, and politicans have recently proposed alternative solutions to the problem of "last hired, first fired." Although there may be reason to be cynical about these alternative solutions—since many have been suggested in times past and none appear to be fool proof—still it would be irresponsible to simply ignore them. The "fictional seniority" remedy appears doomed and, therefore, alternative remedies must be considered. If nothing else, a consideration of some of the alternative remedies may reveal the true level of the commitment to the principle of equal employment opportunity in American society.

The U.A.W. Position: Guaranteed Recall and "Front Pay"

Not surprisingly, most union officials object strenuously to any erosion of the seniority principle. As a consequence, very few union leaders favor the concept of "fictional seniority," especially if it can be used against workers with greater actual seniority in a period of economic recession.

The U.A.W., although long an advocate of equal employment opportuntiy, is a good example of a traditional union that is strongly opposed to "fictional seniority." The official U.A.W. position has been stated as follows:

> Let us see what would happen if [a] hundred worker plant (60 whites and 40 minorities) were a U.A.W. plant, under a U.A.W. contract. Under the seniority and recall rights retention provision of the agreement, the 40 minority workers would be laid off, because they were last hired and had the least seniority—*but they would be laid off, not fired. "Last hired, first fired" applies only to non-union plants.* The minority workers would still be employees of the company with a contractual relationship between them and the employer. They would have a series of enforcable rights. Most importantly, each would have the right to be recalled when production increases. Each would have the right to valuable economic benefits while still on layoff, such as SUB, insurance, and vested vacation pay, depending on the agreement and their length of seniority . . .
>
> And consider the two situations in terms of affirmative action. In the union situation, though laid off, the minority employees are still employees of that employer with enforcable, valuable, contractual rights, including the right to return to work. It is no empty thing, therefore, to say that they are still in the work force and the 60-40 ratio achieved through affirmative action has been preserved. In the non-union situation the minority workers are gone forever and the affirmative action ratio has shrunk to zero.
>
> Most union contract seniority provisions include the so-called time-for-time principle, under which recall rights are lost if the layoff lasts longer than the worker's seniority. Even in the union situation . . . a long layoff might have the effect of severing the minority worker's employment relationship. Therefore, it is the U.A.W.'s position that affirmative action orders or agreements which apply to a union contract situation should include a provision guaranteeing that no employee's employment relationship can be terminated as a result of a long layoff.

When carefully evaluated, it is plain to see that the U.A.W. proposal is at best a modest concession to minority workers who must suffer through a recession without employment. For one thing, the proposal fails to deal with the enormous category of non-union workers. For another thing, while it is true that the right to "recall" is not an insignificant point, it is hardly a major consideration for a person who is suffering without a job during a period of economic recession. It must be recognized that not all union contracts provide for supplemental unemployment benefits; even when available, SUB benefits are but a percentage of a worker's normal take-home pay; neither SUB benefits nor unemployment benefits are guaranteed for unlimited periods; vacation and other like fringe benefits normally are not paid to unemployed workers; unemployed workers lose the opportunity to train for higher skilled jobs; and unemployed workers always risk the possibility of permanent job displacement in the event that the employer closes down a part of the operation. Thus, the right of recall referred to in the U.A.W. position is at best a small gain for the unemployed minority worker.

With respect to the problem of the "identifiable discriminatee," the U.A.W. has proposed a somewhat novel remedy, entitled "front pay." The U.A.W. "front pay" remedy is constructed as follows:

> [A minority worker who has been discriminated against at the hiring stage of employment] should receive, in addition to a job and back pay from the employer, all back seniority rights except those used against other employees in layoff and recall. In addition, any such discriminatee who is caught in a layoff in which he or she would not have been caught but for the employer's hiring gate discrimination, should continue to be paid full wages and fringes for the period of the layoff, or that part of it he or she could have avoided but for the employer's original refusal to hire him or her.

Again, it may be seen that the UAW position rigidly rejects any form of fictional or retroactive seniority that might be used against workers with actual seniority in a period of economic recession. The "front pay" remedy plainly does afford the minority worker some significant economic protection against layoff, but it effectively limits the right of the employer to reduce the work force during low production. It is because of this latter impact that the "front pay" remedy will probably be rejected by the courts. A modified version of the "front pay" remedy was adopted by the district court in the *Watkins* case, but rejected on appeal by the Fifth Circuit.

Inverse Seniority

Another proposal that has been suggested as an alternative to fictional seniority is "inverse seniority." This

suggestion, which was recently advanced by Robert Lund, Dennis Bumstead, and Sheldon Friedman in the September-October 1975 edition of the *Harvard Business Review*, contemplates inverting the order in which people are laid off as a method of solving the "last hired, first fired" problem. To implement this proposal, Lund and Bumstead suggest that:

> The most senior eligible person [be] permitted to elect temporary layoff in the place of the junior worker who normally would be subject to layoff. While on layoff, the senior person receives compensation—normally more than the amount provided by state unemployment compensation—and has the right to return to his previous job. Through this approach, it is possible to retain more people in junior ranks where disadvantaged workers tend to be clustered.
>
> If the layoff period is reasonably short, the substitution of senior worker for junior workers on layoff enables junior people to "bridge" the lay off period and continue to gain company seniority and job security. If the layoff period is an extended one, and inverse seniority is limited, the application of the concept will at least give junior workers more time to locate jobs outside the company or to fill those job openings inside the company caused by normal attrition.
>
> For many disadvantaged workers, procuring a job is just the first hurdle; the ability to hold the job is equally critical. Inverse seniority reduces the tendency of cyclical hiring and layoff practices to perpetuate unemployment among this portion of the work force.

The advantages of any program of "inverse seniority," which are discussed in detail by Lund, Bumstead, and Friedman, are quite obvious. The real difficulty with this proposal is the problem of getting high seniority persons to *elect* layoff status during a period of economic recession. Most workers on layoff will be receiving less (from SUB and unemployment benefits) than they would receive if they were working full time; thus, there is no real incentive for high senior employees to volunteer to go on layoff status. This is particularly true during a period of economic recession when employees are usually unable to accumulate excess funds by working overtime or by "moonlighting." Thus, it is hard to believe that most high seniority workers would be inclined to elect layoff in lieu of full employment in a period of economic recession. In addition, Lund, Bumstead and Friedman properly recognize that any effective program of "inverse seniority" would be tremendously expensive and, therefore, it is unlikely that many employers will voluntarily initiate such programs.

Probably the most significant suggestions made by Lund, Bumstead, and Friedman have to do with proposed government incentives to promote minority employment:

> In the area of direct incentives, several modifications to unemployment insurance regulations might be made. For instance, senior workers on voluntary layoff might be permitted to receive unemployment compensation when they are being replaced by junior people who would otherwise have been laid off from work.
>
> Some states now offer direct financial incentives to companies that provide continuous employment for disadvantaged people coming from public assistance rolls, occupational training programs, and the like. These incentives might be modified to specifically promote [the inverse seniority] approach.
>
> Another direct incentive might be to make compensation received while on inverse seniority layoff exempt from federal income tax, thereby reducing the cost to the company without cutting the amount of take-home pay available to the person on layoff.
>
> Indirect government encouragement of inverse seniority systems might take several forms. One approach would be to finance studies of the detailed mechanism of inverse seniority and economic appraisals of the most promising plans.
>
> [Some] federal agencies have already made rulings favorable to inverse seniority by exempting layoff compensation from minimum wage rules, from unemployment taxes, and from FICA taxes, and by agreeing that employer contributions to an inverse seniority fund are deductable expense for tax purposes.

Without such formal government support, it seems unlikely that "inverse seniority" plans will flourish to protect minority employment during periods of economic recession.

"The current recession has indeed served to highlight the problem of employment discrimination against blacks, but this problem has been with us for nearly 200 years now and it will still be with us when this recession ends. The real challenge, therefore, is to find some workable solutions to the larger issue—that is, the issue of race discrimination."

Work Sharing

A number of persons have suggested "work sharing" plans as possible solutions to the problem of "last hired, first fired." Work sharing is a simple concept whereby a company, faced with a need to cut back operations, uniformly reduces the hours of work of all employees so that all may share in the available remaining job opportunities. In other words, work sharing allows all employees to work part-time rather than some being laid off while others work full-time.

The most obvious difficulty with "work sharing" is that it runs directly counter to the seniority principle. In those cases where a company has adopted the principle of "last hired, first fired," pursuant to a collective bargaining agreement or by long-standing practice, the seniority principle will probably prevail in accordance with the legal precedent established by the *Watkins* case and like decisions. If the rule of *Watkins* is followed, it is simply unlikely that the courts will compel employers to abandon "last hired, first fired" seniority plans in favor of work sharing.

Another obvious difficulty with work sharing is that it may have at best only limited applicability. For example, if most blacks in a given employment situation are concentrated in certain job categories in the areas where the company intends to reduce its operation and if the minority employees do not have the necessary skills to transfer to other available work, then there may not be much work to "share." In addition, the concept of "work sharing" at least implicitly assumes that a company can uniformly reduce operations so that all of the remaining work can be evenly distributed among the entire work force; but this simply is not a valid assumption in many employment situations. It does not follow that because a company reduces over-all production by a certain percentage amount that the manpower needs of the company in its various departments will be reduced by this same percentage amount; as a matter of fact, different parts of the company operation may be

reduced by different percentage amounts, depending upon the extent of automation, customer demands, etc.

Furthermore, it must be recognized that, while certain jobs may be maintainable on a full-time basis, many jobs may be available only on a part-time and sporadic basis during a period of economic recession. Any company that has a mix of both these types of jobs will be hard pressed to "share" the work among all of the workers. In such a case, the problem of transferability of skills among workers becomes a crucial consideration; this is so because the company will obviously desire to retain only those persons who are capable of performing the work available to be done, whether it be on a full-time or part-time basis. However, to the extent that the available pool of workers share common job skills (e.g., police officers), the easier it will be for an employer to share the available work among all of the employees.

One final problem may be raised in connection with "work sharing" plans. In some cases, the amount of work may be so small that the average income level for each worker may be barely equal to or less than the amount that the same workers would receive in unemployment compensation. Obviously, if such is the case, it makes little sense to maintain all of the workers at a subsistence level of income when some could be earning a full income and others could be receiving the same amount in the form of unemployment compensation.

Public Works Jobs

One of the obvious solutions to the problem of unemployment during an economic recession is to create public works jobs of the type created to combat the severe depression of the 1930s. While such a solution may serve to give jobs and income to many disadvantaged persons in society, it is at best a modest, stop-gap measure. Public works jobs usually employ persons in very low skilled jobs and, as a consequence, little or no useful job training is achieved. In addition, public works jobs mostly maintain disadvantaged persons at a subsistence level which is hardly enough to significantly improve the economic status of blacks in this country. In short, public works programs may represent an important remedy in a period of severe economic depression; however, these programs cannot be viewed as a legitimate remedy for race discrimination in employment.

The Real Cost of Equality

A number of other solutions have been suggested to the problem of "last hired, first fired," but little would be gained by reciting these various proposals here. The cost of equality seemingly involves much more than finding a solution to the problem of "last hired, first fired." The current recession has indeed served to highlight the problem of employment discrimination against blacks, but this problem has been with us for nearly 200 years now and it will still be with us when this recession ends. The real challenge, therefore, is to find some workable solutions to the larger issue—that is, the issue of race discrimination.

"Last hired, first fired" may be but a small symptom of the larger problem. As a consequence, the importance of "fictional seniority" has conceivably been overstated. Fictional seniority may cure a portion of the problem of racial discrimination, but the gains likely to be achieved might be too insignificant and the costs (in terms of "white backlash") could be too great. Using fictional seniority to remedy race discrimnation in employment might be like prescribing an aspirin to cure a headache associated with a gun shot wound. The patient may be temporarily cured of the headache but he may later die from the wound.

Since the evidence is unclear with respect to how much of a detrimental impact "last hired, first fired" seniority systems have had on minority employment during the 1973-75 recession, one may seriously question the legitimacy of "fictional seniority" as a remedy for race discrimination in employment. So long as this data remains inconclusive, the competing equities must be given weighty consideration before we resort to fictional seniority which has the effect of displacing white workers with black workers. Among the competing equities, there are at least three important factors that warrant mention. First, any remedy that avoids job displacement along racial lines is clearly preferable to one that has this effect. Second, although seniority systems are not infallible, it must be recalled that the seniority principle has served the interests of large segments of the working class in this country and protected many employees from arbitrary employer actions for many years. Thus, any attack on seniority systems must consider the consequential losses to all employees (versus employers) stemming from an erosion of the seniority principle. Finally, it must also be recognized that there is no clear legislative policy supporting fictional seniority which results in direct job displacement along racial lines. Given this, the courts will probably continue to be reluctant to compel the use of such a remedy.

However, there is another side to the problem. If it can be conclusively shown that "last hired, first fired" seniority systems do in fact have a serious detrimental impact on minority employment, then we must be prepared to consider "fictional seniority" as a remedy to protect blacks who might otherwise be disproportionately disadvantaged during periods of economic recession. It is true that whites may be displaced by the use of fictional seniority remedies, but it is also more likely that the political leaders in our society will react quickly to find solutions to unemployment if a large segment of the white population is forced to suffer without jobs for too long a period of time. White people in the United States have been able to live with high unemployment because unemployment is primarily a black problem. If more non-minority persons had to suffer with blacks and with the problem of unemployment, the problem might be viewed as a matter of national concern worthy of some serious remedial actions. Furthermore, and more importantly, it must be realized that it is possible that minority persons will always be destined to suffer devastating setbacks during periods of economic recession until they get a real foothold in the employment market in the country. It may be that we will find that "fictional seniority" is one of the few remedies that will truly help blacks to make meaningful gains in employment.

These considerations aside, I would stress that the thing that is most troublesome about the current debates over "last hired, first fired" and "fictional seniority" is that these controversies have obscured the really serious issue of race discrimination in employment. This same point was made 10 years ago by Robert L. Carter in *Equality*, when he offered the following significant observations (pp. 103-105):

> My real objection to the discussion of these concepts in the context of American race relations is that one is engaged in an interesting but abstract intellectual exercise. What reason is there to debate the legality or wisdom of preferential treatment, when we are not even close to winning the war against discrimination? . . . What we must concentrate on is the elimination of discrimination—only then may discussion about preferences become pertinent to the question of equal treatment.
>
> More dangerously, debate about the wisdom of compensation, preferences, and even benign quotas, insofar as Negroes are concerned, distorts and obscures the basic problem that our society now faces and must resolve. Ours is a racist social order; despite our supposed dedication to the principle of equality without reference to race, color, or previous condition, the white skin is regarded as inherently superior and the black skin as innately inferior . . .
>
> Today, newspapers are concentrating on what is called the "white backlash" in reaction to the "Negro revolution." In short, the inference from use of this terminology is that Negro progress has been so phenomenal that white people are beginning to react against it. The real facts are that the so-called Negro revolution is merely a drastic break with the traditional Negro image. No great

improvements in the Negro's status have yet been accomplished . . . . As the Negro's protest has grown more militant, with resort to direct action, whites, who previously had no need to manifest their prejudices in public, have begun to do so. Since Negroes have become bolder in demanding the removal of all vestiges of slavery, which have kept them shackled in subjugation, whites have become bolder in insisting that the fetters not be removed. All that has happened is that Negroes and whites are being more open and candid in revealing their true sentiments.

I put the discussion of quota, preference, and compensatory treatment in the same myth-maintaining category. If we debate about these questions, we can pretend that the problem of discrimination itself has been solved.

As Carter suggests, race discrimination was a problem in 1965 and it remains an unsolved issue in 1975. If change is to come, we must begin to grapple with some of the more fundamental causes and effects of race discrimination in employment. For example, a major problem remains in the areas of white collar, management level, professional, and technical jobs. Blacks have been historically excluded from these positions and the attendant economic and social consequences of these exclusionary patterns have been quite severe. Although these facts are well known, very few effective remedies have been developed to cure the problem of employment discrimination in these higher level jobs. It is unlikely that we will be able to train "older" minority persons to fill many of these white collar, professional, and technical jobs in any significant numbers at any time in the near future. Thus, a serious commitment must be made to prepare younger minority persons to assume some of these jobs.

If our energies and resources are to be spent on the younger generation of minority persons, we cannot expect these persons to achieve with the same measure of success what older white employees have attained after years of experience. Blacks entering new jobs must be given time to gain maturity and experience on these jobs; they will need real support from the existing power structures—support that has often been absent in the past; and they will need adequate, not grudging and minimal, training opportunities. The level of tolerance for mistakes by blacks on the job is often very low. (Mistakes by whites are frequently attributed to immaturity or inexperience; mistakes by blacks are often attributed to incompetence.) These patterns of intolerance simply must be broken if we are ever to achieve a goal of equal employment opportunity.

In addition to these considerations, we also must give some serious attention to the problems of education and unemployment in our society. In asking the question about the legitimacy of "fictional seniority" as a remedy to cure "last hired, first fired," we implicitly accept the condition of mass unemployment. Surely it may be asked whether this country should ever tolerate the high levels of unemployment that we have been willing to accept as a consequence of cyclical recessions during the past two decades. With respect to the problem of education, it may be questioned why we have allowed our public school systems to deteriorate to a point where many parents, both black and white, are looking to private schools to provide adequate educational opportunities for their children? We may also ask why our public educational school systems do not provide *equal* educational opportunities for all children and why certain children (living in wealthier neighborhoods) are advantaged?

It is obvious that answers to these questions and solutions to these problems will serve to improve the economic status of blacks in the United States. However, it is also obvious that solutions to these problems will serve the needs of white persons as well.

It is difficult to examine the long-standing patterns of race discrimination in this country with an intellectual detachment and objectivity. It is all too easy to be enveloped by attitudes of frustration, hostility or cynicism. However, I am inclined to believe that most human beings live best with hope, not despair; that most of us prefer goodness and not vengeance; and that most people strive to find basic ideals for survival. It may be considered to be somewhat of a luxury to search for ideals during the time in which we live; however, without such a search, we may be doomed to live forever with the inhumanity of racism.

James Comer, in *Beyond Black and White*, proposed certain ideals that may provide a foundation for the solutions to the problem of race discrimination. Because Comer's ideas so perfectly summarize the underlying thesis of this author, they are offered here as a fitting conclusion to this paper:

To bring about the kind of change that will reduce black and white conflict and take America successfully to and through the twenty-first century, a powerful humanist coalition must emerge—a coalition composed of education and health lobbies, consumer advocates, environmentalists, minorities, women, the young, liberals, and humanistic conservatives. Political and social action—in intergrated groups, in separate groups, in temporary and sustained coalition—is needed to force the leaders of the country to respond realistically to the needs of all its citizens . . . .

We have now reached the danger point. We do not have the social programs which take the extreme fear and insecurity out of modern living. The people who have been scapegoated are angry. More fortunate but still relatively powerless whites are frustrated, confused, and feeling falsely blamed. The level of trust between various interest groups in America is extremely low. Many leaders still view political victory or economic gain by any means necessary as more honorable and American than supporting essential social policies that may lead to political defeat or less immediate financial profit . . . .

National leaders must reconcile their own needs and desires and those of their class with the needs of all the people, the environment and the society . . . .

The specific programs needed are no mystery. New housing, health care, job and income guarantees, child-care, and retraining programs are but a few of them. Without a leadership group or national ego committed to creating a national sense of community, new programs can continue to divide blacks and whites, rich and poor, old and young, women and men, while benefitting only a few—relieving the insecurity of only a few. The humanist coalition everywhere in America must make certain that all our new social programs are designed to reduce the level of fear, anxiety and insecurity of all America.

"Using fictional seniority to remedy race discrimination in employment might be like prescribing an aspirin to cure a headache associated with a gun shot wound."

The Medical Malpractice "Crisis"

by Marcus L. Plant
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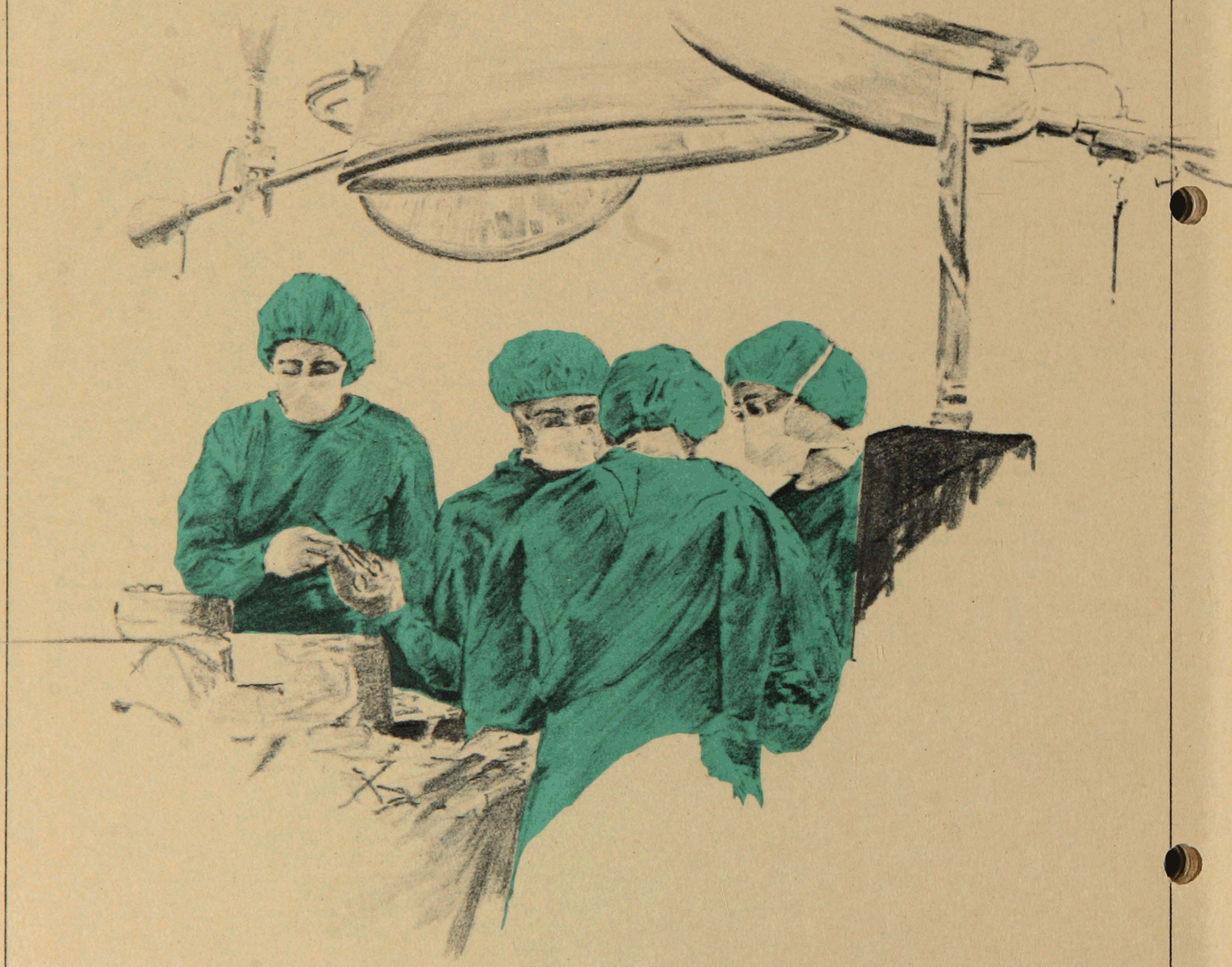

[Based on a speech before the Committee of Visitors of the University of Michigan Law School, October 24, 1975, Ann Arbor, Michigan.]

Marcus L. Plant

Introduction

The problem in preparing this discussion was to determine what to omit. When I have finished some may think that I did not omit enough! But at the risk of superficiality or banality, I am going to limit myself to survey treatment rather than in-depth analysis.

The immediate malpractice "crisis" does not lend itself readily to scholarly dissertation. It is a political maelstrom, characterized by highly opinionative assertions. Facts often seem irrelevant and the more strident voice prevails.

There are four interests involved: the insurance carriers, the medical profession, the legal profession, and the consumer or patient.

Since World War II there has been an on-going debate as to how society should manage catastrophic personal injuries incurred in the course of medical or surgical treatment. The immediate so-called "crisis" developed in late 1974 and early 1975 because a number of important carriers of malpractice liability insurance announced enormous increases in premium rates—increases which the governor of New York described as "obscene." Other carriers announced termination of coverage of certain specialties or of the writing of medical malpractice insurance altogether.

The explanation offered for such drastic actions is that carriers either cannot make enough money at going rates or are actually losing money. The numerous reasons given in explanation range from the ridiculous through the plausible to the convincing. A sample of the ridiculous is the claim that a flood of malpractice litigation was started when no-fault automobile insurance was inaugurated because lawyers previously active in that area transferred their efforts to medical malpractice. No data is ever offered to support that claim; it is usually stated slyly on radio and television talk shows with the assertion that it is "an interesting coincidence" that the increase of malpractice cases coincided with the adoption of no-fault—another assertion which is not supported by data. The theory has some kinship to astrology.

Somewhat more persuasive is the idea that the carriers find it difficult or impossible to make actuarially sound predictions of liability from year to year because of the so-called "long tail" problem in medical malpractice. By this is meant that because of the language or judicial interpretation of statutes of limitation, lawsuits may be started during the current year based upon occurrences that took place 5, 10, or in some states possibly 20 years ago. This has long been recognized as a serious problem.

Other reasons offered are the higher level of patient expectation of success (the Marcus Welby syndrome); lowering legal requirements for success in malpractice suits; the greater volume of medical care to increasing proportions of our population; the contingent fee system; and many others.

The announcements of increased rates of cancellations brought consternation in many quarters. Some physicians even stopped practice or limited themselves to emergency practice. There ensued 10 to 12 months or frenetic activity on the part of medical societies, bar associations, trial lawyers' associations, state houses, executive mansions, carriers, and insurance commissioners. Some of the antics were vaguely reminiscent (at least to an oldster) of the Keystone Cop comedies that were so entertaining in the earlier days of the movies. For example, in Michigan a group calling itself the Physicians Crisis Committee prepared a strange document entitled "Petition," asking the Supreme Court of Michigan to promulgate contingent fee limitations in malpractice cases and supporting its request in large part with clippings from the Detroit newspapers attached as footnotes. This was filed with the court administrator with the demand that it be referred "to the appropriate staff committee" without any provision for notice, answer, hearing, or the taking of evidence. With assistance from the Bar Association the subject was properly presented to the supreme court, which later issued a schedule of maximum contingent fees.

A more serious and distressing development was that something like warfare developed between the two supposedly learned professions of medicine and law. Newspapers and pulp magazines had a field day and propaganda pronouncements and pa
a shouting contest is not that it will injure the throats of the participants but that it will leave wounds that heal very slowly and scars that may be permanent. There is some evidence that that may have happened.

The product of the cauldron has begun to emerge in the past few months, and it is a mixed bag. Some is good and helpful. Some is neutral, i.e., neither helpful nor harmful; these are mostly measures embodying pet theories of an individual or group. Some is bad—even vicious—or at least potentially harmful.

I will not try to describe it all but will refer only to segments from the enactments of Michigan, New York, Indiana, and Pennsylvania.

The direction a state goes in seeking the solution depends on its concept of the problem. If it is thought that the major component of the problem is legal, i.e., that the "crisis" is a function of deficiencies in the legal system, the legislative solution will have one kind of mix; but if it is thought that the major component is economic, i.e., that the "crisis" is the result of putting too heavy a burden of catastrophic loss on too small a base of insured population, the legislative mix will be entirely different. And between these extremes there may be gradations of remedial efforts.

Availability of Insurance Coverage

In all four states one or more acts seek to make it certain that professional liability insurance will be available to any eligible health care provider desiring it.

The Michigan and New York programs are impressive. Michigan has created a state-operated medical malpractice insurance fund. Close to 1,000 binders have already been issued to physicians at what had come to be considered reasonable rates; e.g., Class V neurosurgeons (a high risk category) $900 per month for $200,000-$600,000 coverage ($10,800 per year). An executive of an insurance company

should be nervous about that development; while the statutory life of the fund is limited to 18 months, these things have a way of not dying—particularly if good results emerge, as they sometimes do from government agencies. I understand that the state medical society is providing for the creation of a so-called "captive" insurance agency—another development that an insurance company should find ominous.

New York's technique was to create a Joint Underwriting Association (a JUA) of all personal injury liability insurers in the state. It will exist for six years. It will not function unless there is no private insurance available as determined by the superintendent of insurance in consultation with the commissioner of health. A reserve fund of $50 million of state money was established and assessments must be paid if the fund drops below $25 million. The New York State Medical Society is also permitted to set up a so-called captive company.

Indiana and Pennsylvania have also made provision for availability of insurance but I want to refer to their systems later.

Provisions Relating to Insurers' Finances

Related enactments that I view with great favor (and here my bias shows) are those such as Michigan's act that require the insurance commissioner to investigate annually the reserve practices and investment income of medical malpractice insurers doing business in this state. The stated purpose is to determine if the industry is making excess profits. A collateral result should be better information as to the *source of the losses* that carriers are alleged to be suffering. There is some opinion (and I share it) that at least in the case of some companies those losses are to be attributed in large part to decline in investment income and values, rather than excessive payouts on liability claims. Many organizations (such as colleges) which depend on investment stability or growth and which account for the value of investments at the lower of cost or market show substantial losses in recent years, some to the point of disaster. I have not seen any careful analysis of this aspect of liability insurers' financial affairs, and would hope and urge that such information will be developed.

In that connection let me quote some recent remarks by Richard F. Gibbs, M.D., J.D., who is chairman of the Massachusetts Medical Society's Professional Liability Committee and its Medical Malpractice Commission. Writing in the *Journal of Legal Medicine* for February, 1975, he says:

> The State Insurance Commission serves as the watchdog regulator who requires the insurance carriers to justify all proposed rates with supporting data which include loss development and trending statistics. In this author's experience, no state—with the possible exception of Pennsylvania—has come close to exercising its police powers in impounding for careful expert scrutiny *the purported losses* and requests for rate increases of any professional liability insurance company doing or seeking to do business in the particular state. This is, of course, a serious indictment of the regulatory department of government for its ostensible failure to protect the public from unjustifiable increases in the cost of health care delivery based upon *fallacious representation* that professional liability insurance, if available at all, is very, very expensive. *(Emphasis supplied.)*

New York has also enacted a revision of the statute to require insurance company reports to the insurance commissioner every six months.

Now if you believe the basic problem to be economic, you would not go much further in legislating. You might embellish the New York and Michigan systems for insuring availability of insurance and keeping the insurers honest.

But if you consider basic deficiencies in the legal system to be the source of the "crisis," you take quite a different tack, as did Indiana and Pennsylvania. Their solutions are drastic ones, providing insurance coverage incidentally but making substantial changes in the legal system relating to medical malpractice.

"[S]omething like warfare developed between the two supposedly learned professions of medicine and law . . . Even bumper stickers appeared."

The Indiana statute requires that prior to commencement of any action for malpractice against a health provider there be a panel review of the complaint. The panel in each case will consist of one attorney and three physicians; the attorney acts in an advisory capacity, is chairman of the panel, but has no vote. The physician members are chosen from all who hold an Indiana license to practice medicine. Each party selects one physician and the two select a third. The parties may agree on the attorney member of the panel; if no agreement is reached the attorney is selected by lot from the list of Indiana attorneys on the rolls of the supreme court; five names are drawn and each pary strikes two.

The evidence that may be considered by the panel is unlimited. The attorney-chairman advises the panel on legal questions and prepares its opinion. The panel's function is to express and expert opinion on one or more of the following aspects of the case:

A. The evidence supports the conclusion that the defendant failed to comply with the appropriate standards of care;

B. The evidence does not support that conclusion;

C. There is a material issue of fact bearing on liability and not requiring expert opinion, to be decided by the court or jury;

D. Defendant's conduct was or was not a factor in the resultant damages. If it was, did plaintiff suffer any disability, its extent and duration, and the permanent impairment or percentage of impairment.

The report of the panel is admissible in evidence at any subsequent action by the claimant but is not conclusive; either party may call any member of the medical review panel as a witness and he or she must testify. A panelist has absolute immunity from all civil liability for any communication or functions as a panelist.

After the panel has functioned, plaintiff may sue. If he does, other changes in the legal process now operate.

A. No dollar figure may be included in the *ad damnum* clause of the complaint; the prayer is to be for such damages "as are reasonable in the premises".

B. The maximum amount recoverable for *any injury or death of a patient* may not exceed $500,000.

C. The total amount recoverable from any one health care provider qualified under the statute is $100,000.

D. Any amount recovered in excess of $100,000 from any health care provider is to be paid from a special fund called the "Patients' Compensation Fund." The Patients' Compensation Fund is collected by the insurance commissioner from all health providers in Indiana on the basis of 10 percent of the cost to each health care provider for the maintenance of financial responsibility. Each health care provider is required to file with the commissioner proof that he is insured by a policy of malpractice liability insurance in the amount

of at least $100,000 per occurrence. When the fund exceeds the sum of $15 million the commissioner may reduce the surcharge so as to maintain the fund at approximately that level.

E. Plaintiff's attorneys' fees from any award made from the Patients' Compensation Fund may not exceed 15 percent of any recovery from the Fund. There is no comparable provision with respect to recovery from the first $100,000 from any health care provider. Thus it will be to the advantage of plaintiff's attorneys to join as many health care providers as possible; e.g. if five health care providers are joined and all five are held liable, an award of $500,000 would be subject to an unlimited contingent fee.

F. There are elaborate provisions for handling settlements that may involve the Patients' Compensation Fund.

Whether the restrictions created by the Indiana law will withstand constitutional attacks remains to be seen. My friends in the Indiana bar assure me such attacks are already in preparation.

Pennsylvania takes a comparable approach. A panel review is required, pre-trial. The panel consists of seven persons: two lawyers, two doctors, and three non-professionals, i.e., consumers. Its proceedings are bound strictly by conventional evidence rules. Its decisions are comparable to those of Indiana. Its decision is admissible in evidence. It is the authors' idea that this system eliminates the constitutional objection to admission of a panel decision based on inadmissible evidence. In effect Pennsylvania's plan provides for *two* trials—a deliberately contrived procedure. But there is no limit on damages.

Measures Relating to the "Long Tail" Problem

Many states have done something about the statute of limitations. As indicated previously the "long tail" problem is what is involved. In Michigan a new statute provides that a cause of action based on a claim of malpractice of a person who is a member of a state-licensed profession accrues at the time a person discontinues treating the plaintiff, regardless of the time plaintiff discovers or otherwise has knowledge of the claim.

Indiana has imposed a two-year statute of limitations which runs from the "date of the alleged act, omission, or neglect" except that a minor under the full age of six years shall have until the eighth birthday to file a claim.

In New York the statute was reduced to 30 months with 10 years in case of disability due to infancy or insanity and with one year from the time of discovery of a foreign body.

While it is important to solve the long tail problem, it is possible that these statutes, particularly the Indiana statute, may be too restrictive; conceivably, in the case of a patient who did not discover the foreign body for a period of more than two years (and there have been such cases) it could be held unconstitutional.

The most extreme device for solving the long tail problem is the "claims made" policy. Such a policy pays for only that liability manifested by a lawsuit during the year in which the policy is in force; any lawsuit brought after the policy year expires will not be covered.

This arrangement is in contrast to the "occurrence policy" which covers liability for any incident that occurs as a result of treatment during the policy year.

The "claims made" policy has been highly touted in certain quarters of the insurance industry as a solution to the long tail problem. It is probably a delusion and a trap, however. It is a delusion because it is represented as a way to cut the cost of premiums. But that cost is sure to rise from year to year as the tail begins to build from previous years' insurance. It is a trap because once a physician purchases such a policy it will be impossible for him to convert to an "occurrence policy" without spending additional funds to cover the tail left over from the "claims made" policy. Furthermore, at his retirement, disability, or death, he or his estate will have to purchase insurance coverage for the tail. In the case of some physicians (e.g. those who give prenatal care) this could run for eight years and nine months in Indiana.

The Indiana statute provides:

> Only while malpractice liability insurance remains in force are the health care provider and his insurer liable to a patient, or his representative, for malpractice to the extent and in the manner specified in this article.

This may mean that there can be only "claims made" coverage in Indiana; it may mean there can only be "claims made" liability. The language is strange and Indiana lawyers with whom I have talked do not fully understand what it means.

Miscellaneous Measures—Some Good, Some Not So Good

In many states provisions were enacted designed to reduce the amount of malpractice by incompetent practitioners. These include provisions for continuing medical education; investigation of complaint; reporting disciplinary actions to appropriate registration and licensing boards; providing confidentiality to information received by licensing boards; assuring civil and criminal immunity for persons providing information to licensing boards; fingerprinting applicants for medical licenses; creating penalties for failure to comply with subpoenas; and so on. In some laws the disciplinary power of the licensing boards is expanded. Measures of this kind are responsive to the conviction held in some quarters that the reason medical malpractice litigation has increased so sharply is that there has been a sharp increase in medical incompetence attributable in part to laxity of the medical profession in policing itself.

The theory is debatable. Malpractice claims are not limited to (or even largely concentrated on) quacks; it is often the most competent who are successfully sued.

Among developments that I would consider favorable are statutory provisions enacted in New York to reestablish traditional safeguards around the malpractice cause of action that has come to exist under the name "informed consent." In general this type of lawsuit is based on the theory that the physician has failed in his duty to inform the patient of collateral risks attendant upon a planned medical procedure. Properly safeguarded it is a legitimate cause of action. In the late 1960s and early 1970s half a dozen courts of last resort in the country have deleted the requirement of expert testimony for establishment of breach of the physician's duty and placed decision of that issue in the hands of the jury. The only guideline for the jury under these decisions is whether the patient, as a reasonable person, would have wanted to know of the collateral hazard, and whether the patient as a reasonable person would have gone ahead with the surgery had he known of the collateral risk. This has opened the potential for malpractice litigation considerably and it is a rare malpractice complaint these days that does not have a count on informed consent with almost uncontrolled discretion in the jury. New York's new statute creates several limitations. First, such cases may be brought only after non-emergency therapy or diagnostic procedures that involve invasion or disruption of the integrity of the body. Second, expert medical testimony is required and the burden is on the plaintiff to prove lack of informed consent. Third, it sets up four defenses (common knowledge of risk; patient's willingness to take the risk or unwillingness to be informed of it; consent not reasonably possible; reasonable expectation of adverse effect of disclosure) not always recognized by courts. It is my view that the New York statute is an improvement in the situation. However, I admit to a bias, having been very suspicious of this entire cause of action from the time it developed in the late 1950s and disturbed by the way it has been unjustifiably exploited in certain instances.

An example of the legislation not helpful but not harmful is Michigan's amendment of the so-called "Good Samaritan" act. That statute, in general, provides that if a physician or registered professional nurse renders medical aid at the scene of an emergency he or she is not liable for ordinary negligence but only for gross negligence or wilful and wanton misconduct. Thirty to forty states have legislation of this kind. Its need has never been established and it is the result of a sort of "legal spook" which has haunted the medical profession since the early days in the post-World War II era. Under the recent legislation in Michigan the benefits of that statute are extended to persons who give emergency aid in life-threatening situations at a hospital when their duties do not require them to act. Included in the benefits of the statute are dentists, podiatrists, interns, residents, licensed practical nurses, registered physical therapists, clinical laboratory technologists, inhalation therapists, certified registered nurse anesthetists, X-ray technicians, and paramedicals.

"[A 'claims made' policy, which] pays for only that liability manifested by a lawsuit during the year in which the policy is in force . . . is probably a delusion and a trap . . ."

I have yet to see a case in which any of the people described was sued because of negligence in an emergency situation in a hospital; nor have I ever seen any data that suggests that such persons were deliberately withholding emergency aid in life-threatening situations because of the fear of medical malpractice suits. Nonetheless it does no harm to have such legislation on the books and possibly it may do some good. It surely is not a landmark of progress.

Another such measure is a Michigan enactment which prohibits the provision, offer to sell, or sale of information relating to the treatment of a person under the care of a physician without the consent of the physician or patient. Again, I question whether there was much of a problem or whether many malpractice suits were generated through the sale of information of this kind. If it were indeed something that needed attention, it would seem that there was adequate authority in the supreme court and in the bar association to discipline the attorneys who were engaging in this type of practice, much as it is within the province of the court to correct ambulance-chasing in automobile accident cases.

Indiana has provided that liability cannot be imposed on a health care provider on the basis of an alleged breach of contract, expressed or implied, unless the contract is expressly set forth in writing and signed by the health care provider or authorized agent. The door to charlatan abuse is opened wide.

Advance payments made by a defendant health care provider are not to be construed as an admission of liability for injuries or damages suffered by plaintiff or anyone else. Such advance payments may reduce the ultimate amount payable under any judgment that is rendered in an action.

Long Range Solutions—The Arbitration Alternative

The last mentioned enactments are patchwork—attempting to plug a leak here and there—"straightening the deck chairs on the Titanic." The medical malpractice problem has been developing for at least two and perhaps three decades. Other basic changes have long been advocated.

A compensation system similar to workmen's compensation is one proposal. No state has ever come close to adopting it. There was one drafted for introduction in the Indiana legislature last December—I have a copy of the 10th draft put together by lawyers for the Indiana State Medical Society. It was rejected by the legislature.

A number of so-called no-fault systems have been proposed. One attracting attention recently is that of Professor Jeffrey O'Connell of the University of Illinois Law School which is based on mutual agreement; he has a statute fully drafted to implement it. Again I do not get the impression that it is being given very serious consideration anywhere, through Professor O'Connell's effectiveness is not to be discounted.

The system that I think holds considerable promise is the one adopted by the Michigan legislature in July 1975 (and rejected in Pennsylvania) which provides for voluntary arbitration of any dispute arising out of health care. The statute authorizes the health care provider to offer the patient an agreement to arbitrate. It may not be made a prerequisite to treatment, so there is no compulsion; furthermore it may be revoked by the patient (but not by the health care provider) within 60 days after execution by a notice in writing.

Within the Bureau of Insurance there is created an arbitration advisory committee which is to review operations of the system, suggest changes, generate a pool of arbitrator candidates, and so on. If this committee is not stung to death by gnats and does a good job the system has great promise.

One reason I am sanguine about this kind of system is that a very similar system has been working successfully in Southern California. Under a joint contract between the California State Medical Association, the California Hospital Association, and the American Arbitration Association, a number of hospitals in Southern California have been offering patients entering the hospitals an agreement to arbitrate, although not requiring that they execute it. They have a place on the form in which the patient may indicate that he does not wish to arbitrate. The patient may revoke the agreement within 30 days after leaving the hospital. So far, out of over 400,000 patients entering the participating hospitals in the Los Angeles area, less than 200 to 300 patients have either refused to sign or later rescinded within the 30 day period (mostly lawyers, their wives, or secretaries). Over 400,000 patients have agreed to arbitrate and have not revoked. The arbitration procedure has been employed only twice since 1969; there are at present four or five other cases contemplated. This means that there has been better than 99 percent acceptance, which is simply a magnificent achievement, especially in Los Angeles or anywhere else in California!

It should be added that coupled with the arbitration system there is a sort of low gear mediation service that is afforded when disputes arise. The mediation service screens and resolves the bulk of the complaints.

The Southern California plan is the brainchild of a San Francisco lawyer named Howard Hassard and his associates. He has been the source of a number of creative ideas in this field. While it may be too early to draw any final conclusions, the results so far have been extremely promising. It is for this reason that I was happy to see the Michigan legislature open up this kind of system. Businessmen long ago found that it was to their advantage to arbitrate rather than to litigate. The arbitration procedure works well with respect to disputes arising under labor contracts. I see no reason why it should not work well in the medical malpractice field, particularly if it is aided by some kind of a mediation system.

Of course the problem may be solved by changes in the health care delivery system. Some of the large health systems (e.g. the Kaiser-Permanente plan in California) require as a condition of membership in the plan an agreement to arbitrate and this has been upheld by the California Supreme Court. Health maintenance organizations are on

the rise; we have a rather elaborate Michigan statute to foster the growth of such organizations and lawyer friends of mine in the field are busy breaking new ground in setting up such arrangements. No reason seems to exist why a person who wants to join a health maintenance organization with a provision for prepaid medical service could not be required to agree to arbitrate disputes arising out of the service rendered.

If we ever get a national health system it is almost certain to include provision for compulsory arbitration of disputes. Senators Kennedy and Inouye have already introduced a bill that would promote mandatory arbitration of medical malpractice claims to be enacted by the states under federal guidelines.

Above all what we need is regular, detached study of the problem with decision for change made after deliberation and quiet reflection. We have had enough of oratory and crisis.

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