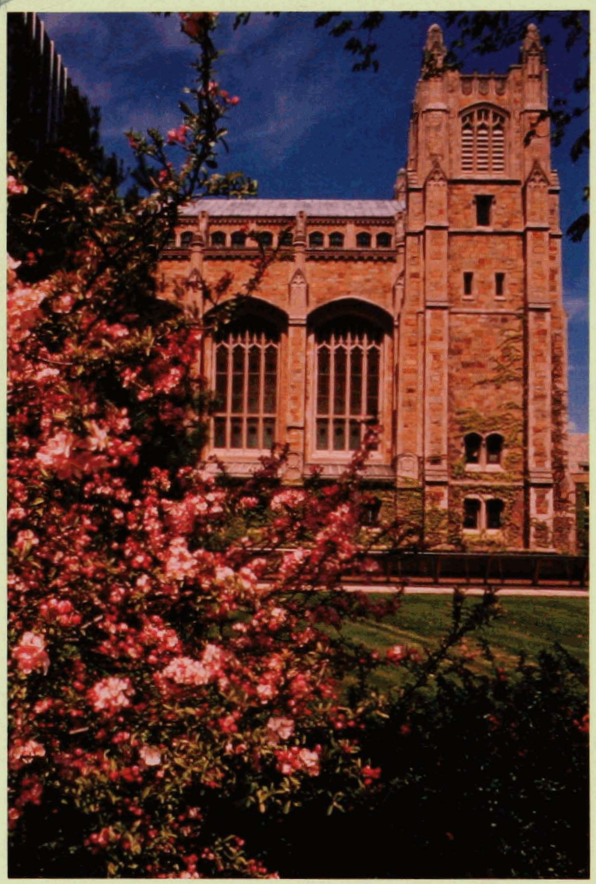
THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 35, NUMBER 2

LAW QUADRANGLE

NOTES



Goldstein's Curse
A curious case of bank fraud

Images of a Free Press
The costs of an autonomous press

CONTENTS

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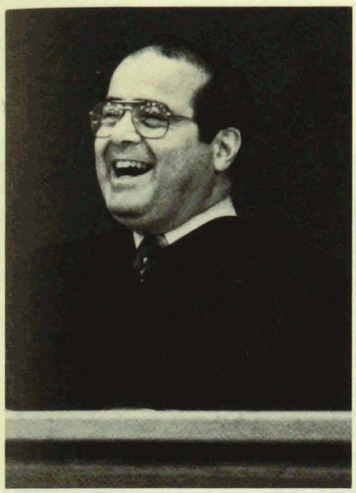
NOTES



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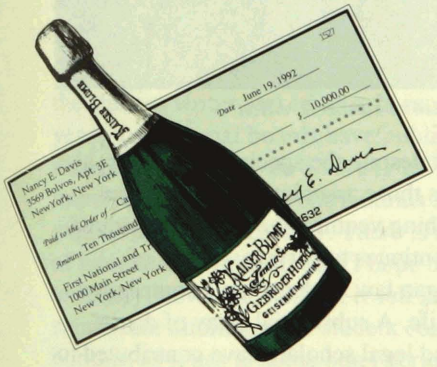

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On coming of age

Twenty-five years of the Journal of Law Reform

The University of Michigan Journal of Law Reform celebrated its 25th anniversary with the publication of its Fall 1991 issue. Since its inception among the turmoil of campus life in 1968, the journal has been widely read, cited, and quoted in the media. In this abridged excerpt from his article in Volume 25:1, former Michigan Law School Dean Francis A. Allen, Edson R. Sunderland Professor of Law emeritus, University of Michigan, and Professor of Law, University of Florida, tells about some of the problems of the early days and how the journal has weathered its voyage.

A generation has grown to maturity since a small group of Law School faculty members, reinforced by the indispensable interest and financial support of Jason L. Honigman of the Detroit bar, founded in 1968 what has become *The University of Michigan Journal of Law Reform*. Asked to pronounce a decanal blessing on the new enterprise, I concluded my benediction in the first issue with typical deanly rhetoric: "It [the new journal] is a lusty infant, and the prospects of sound and healthy growth are good."

Actually, the vital signs were weaker than the brave pronouncement suggests; parturition was accompanied by unusual perils. The gravest of these related to the editorial leadership of the new enterprise. The founders intended to place the *Journal* initially under faculty editorship. Professor Frank E. Cooper, the preeminent and much admired expert on state administrative law and procedure, agreed to take on the task. Professor Cooper's death before the first issue appeared was a sad loss to the school, and created a crisis for the student editorial board that had been appointed to assist him. The ingenuity and improvisations of the student board, led by the Managing Editor, David L. Callies (now a prominent law teacher at the University of Hawaii), gave life to the enterprise. Editorial direction of the *Journal* has ever since been firmly in student hands.

Naming the child created unexpected difficulties. The first issues bore the legend, *Prospectus: A Journal of Law Reform*. The title, it was thought, suggested a forward thrust especially appropriate to a periodical concerned with legal change and reform. Subtlety and nuance, however, are better eschewed when devising labels. Very soon it became clear that the title was causing a misunderstanding among prospective contributors and readers, many apparently believing that the new publication was one devoted to corporate securities regulation. Accordingly, the present designation of the *Journal* evolved in rather short order.

Finally, the emotional environment of the universities in 1968 might have been thought unfavorable to launching a periodical dedicated to social amelioration through reform of law and legal institutions. The first issue of the *Journal* appeared as campus unrest in the Vietnam era neared its crescendo. Voices (perhaps louder than their numbers warranted) denounced law as the tool of oppressors. Law reform is futile, it was said; it serves only to divert attention from the central task of overthrowing a corrupt and unjust social order. The distinguished Association of the Bar of the City of New York, alarmed, issued a volume entitled *Is Law Dead?*

Proffessor Francis A. Allen

Yet despite the special difficulties, as well as those associated with any new publishing venture, the *Journal* survived and continues to survive. Scores of Michigan law students have contributed to its life. A substantial array of distinguished legal scholars have contributed to the *Journal's* pages, including (if my count is correct) some thirty members of the Michigan Law School faculty.

Procreators of both persons and periodicals are often, in the course of time, surprised and sometimes dismayed by what their offspring have become. In the introduction to the first issue, mentioned above, I find myself pointing to two goals: "to report efforts to improve the law and its administration and to stimulate thought and . . . action to this end," and second, "to enlarge the opportunities for law journal experience of students at the University of Michigan Law School."

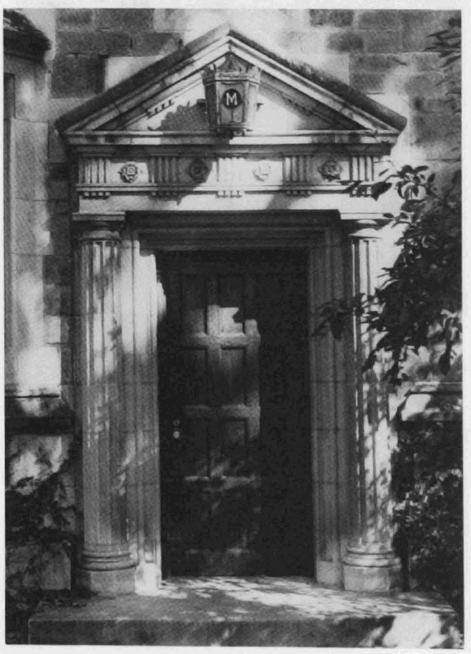
How well has the *Journal* realized its

original purposes and expectations during the part quarter-century? There are, after all, limits to self-immolation and to the patience of readers; and so I shall not offer the meticulous analysis of twenty-four bound volumes of the *Journal* necessary to a fully satisfactory answer. It seems clear, however, that the second objective stated above has been achieved: Opportunities for student participation in law review activities at Michigan have been significantly enlarged.

An extraordinary range of issues and topics has been uncovered and addressed by the students; and with all due deference to the distinguished faculty contributors, much that is most interesting about the *Journal* has been achieved by the student writer and editors. In recent years the editorial boards have published numerous symposia on a variety of important issues with contributions from experts across the country. There is much of interest and value in this. I hope the tendency, however, will not result in significant diminution of student contributions, as it has in some other periodicals. Has the *Journal* sustained its distinctive focus on law reform and social policy and honored the ancillary commitments necessarily implied? One would not be surprised to find some slippage here, some weakening of purpose, with the passage of time. The force of convention and habit, and notions of prestige make distinctive orientations hard to maintain, and move student-edited periodicals to resemble all other student periodicals. There are issues of the *Journal* in past years that appear to be bending to such pressures. Contributions appear that have only tenuous relation to the *Journal's* declared purposes, and the apparently insatiable urge of students to write and publish Supreme Court casenotes seems on occasion to have been too powerful to resist. Yet such detour and deviation do not characterize the *Journal's* history as a whole; the original thrust has lost little of its force. To a surprising degree, the interests and emphases of the *Journal* persist.

Has the *Journal* maintained a steady gaze on social reality, on the actual performance of social institutions? My recollections of the hopes of the *Journal's* founding fathers may still be of some relevance here. It was never the expectation of that hardy band that the new student publication should confine itself to empirical studies establishing the need for law reform or auditing the performance of existing arrangements. Yet I think that most felt such studies should regularly appear in the *Journal's* pages. It was my hope that perhaps each summer a group of student writers could be funded to carry out such inquiry and publish its results in the succeeding volume. The dream has not come to full fruition. Reasons are probably to be found both in the burdensome logistics that such frequent projects impose on the student boards and faculty advisors, and also the tyranny of the "summer clerkship" that since the *Journal's* founding has increasingly preempted students' time between May and August. Nevertheless, a considerable amount of such material has appeared in the Journal's pages, including some excellent work by student researchers. Like Oliver Twist I should like some more.

How does all this add up? Very creditably, I think, to the student editors and writers (who may have received a bit of help from faculty advisors). To a surprising degree (at least surprising to me), the originally perceived purposes of the *Journal* have been kept in view. The *Journal's* interests and commitments, sometimes in unexpected forms of expression, have survived and continue to animate its publication. The interests and commitments are important, and not only to the *Journal's* future. The assumptions on which the *Journal* has operated for a generation are in conflict with certain tendencies in law school research and scholarship. It is good to have publications affirming that there is a distinctive legal subject matter, that in intellectual life law schools need not conceive themselves to be merely colonial outposts of university graduate schools, that "a juster justice and a more lawful law'' is a meaningful goal, and that "the relief of man's estate'' (as Lord Bacon put it) is the ultimate ethical justification for the legal enterprise.

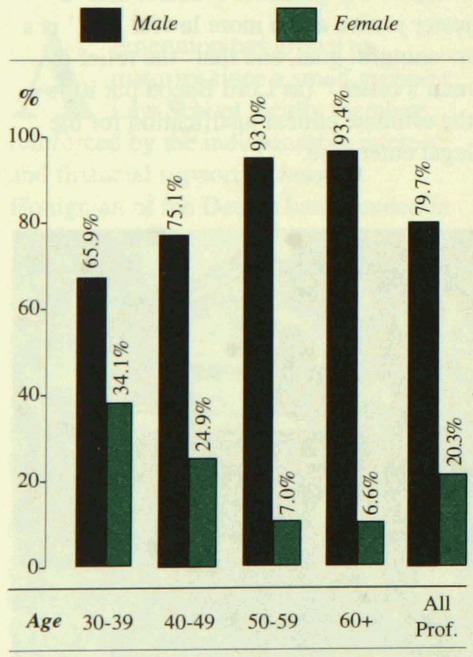


A profile of the nation's law professors

Study shows more women teaching, but not at the top schools

James Barr Ames' appointment in 1873 as an assistant professor of law at Harvard marked the beginning of a new era in American legal education. He represented the first of a new breed of law professor: a law graduate with little or no experience as a practitioner, appointed for his scholarly abilities and teaching potential. Though this divide between those who teach and those who practice exists today, a recent study in the University of Michigan *Journal of Law Reform* has found that an increasing number of professors have experience in the practice of law.

Distribution of Current Law Professors by Age and Gender



This rise — from 67 percent in the mid-'70s to 79 percent in the late '80s — is one of the trends within the teaching profession chronicled in an empirical profile of law professors published in the current issue (Vol. 25:1) of the *Journal*. The note, written by '91 J.D.'s Robert J. Borthwick and Jordan R. Schau, also notes a dramatic change in the number of women entering law teaching — and the continuing dominance of a handful of schools, Michigan among them — in producing the nation's law teachers.

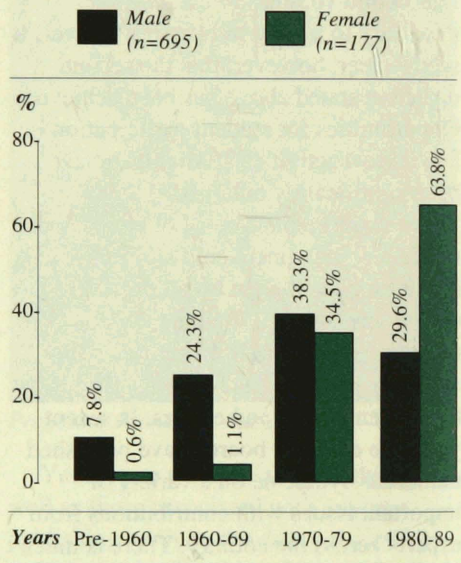
Nearly one-third of all law professors teaching today received their J.D.'s from one of five schools. They were Harvard, Yale, Columbia, Chicago and Michigan, Borthwick and Schau found. The pair worked with data from the AALS Directory of Law Teachers 1988-89.

Borthwick says he and his co-author decided to study law professors' backgrounds after listening to a fellow student muse about the real-world experience — or lack thereof — of law teachers. Indeed, one of their findings was that only one-quarter of professors have more than five years experience practicing law. The pair also found that the number of professors who had completed judicial clerkships increased from 17 percent in 1975-76 to 30 percent today.

Perhaps the most dramatic change occurred in the number of women entering the legal teaching profession. The percentage of female law professors increased from just 4 percent in 1970 to 20 percent today.

Much of that upswing is due to developments in legal education during the '80s — a decade during which 35 percent of all law teachers hired were women.

Decade of First Tenure-Track Position by Gender



The influx of women, however, largely failed to reach the nation's top-ranked law schools, Borthwick and Schau found. Their data show that professors at these schools tend to be slightly older and continue to teach longer than their colleagues elsewhere. But the lower turnover rate at these schools and the fact that women law professors were, on average, younger than their male counterparts, may only partially explain women's low representation at these institutions, Borthwick says. "The more prestigious schools have a reputation as being more conservative," he says, "and, as a result, women may have a tougher time being hired onto the faculties at top schools."

Fellowship gives taste of law school

Now, Washington Post writer wants more

Taking a sabbatical is routine for most professors and a luxury for most journalists. But each year at the University of Michigan, approximately 15 mid-career journalists enjoy a paid leave during which they can regroup, reflect and take advantage of the offerings of a great university.

During the 1991-92 academic year, the Michigan Journalism Fellows Program added one specialty fellowship to four (in broadcast journalism, medicine/health journalism, business reporting and investigative reporting) already in place. Funded cooperatively with the Law School, the Michigan Fellowship in Legal Journalism was awarded to Veronica Jennings, a courts and police reporter with the *Washington Post*. Jennings spent approximately half her time at the Law School, attending classes and working with faculty. The remainder of the time, she attended seminars sponsored by the Fellows Program and sampled classes ranging from swimming to creative writing.

For Jennings, who has worked as a journalist for the last 10 years, the fellowship came at an ideal time.

"I wanted to improve and enhance my knowlegde of covering the judicial system," she said, "and think about career alternatives and advancing my career."

Although she took many classes at the Law School — "The first semester I was like a crazy woman. I could have taken all my courses at the Law School," she said — the most important part of the year was the opportunity afforded her through the School's Child Advocacy Clinic to study Michigan's juvenile justice system. Because Michigan's system allows access to reporters, unlike the system that is part of Jennings' beat in the Maryland bureau of the *Post*, she was able to examine its workings. Returning to the *Post*, her beat has been reshaped to emphasize juvenile justice and the child welfare system, taking direct advantage of the knowledge she gained this year.

Veronica Jennings

On a professional level, Jennings says that the greatest value of the year was the understanding she acquired of the subtleties of the criminal justice system. It also rekindled her interest in furthering her education — and acquiring a law degree.

On a personal level, Jennings' crowning achievement came at the swimming classes she took. "I got over my fear of the water," she said.

Now she's ready to plunge back into work — and into home ownership, a new beat she's added to her life.

Next year's fellow

David Hanners, a Pulitzer-Prize winning reporter from the *Dallas Morning News* has been awarded the Michigan Fellowship in Legal Journalism for the 1992-93 school year.

Hanners, 37, plans to study capital punishment, including media coverage of the death penalty.

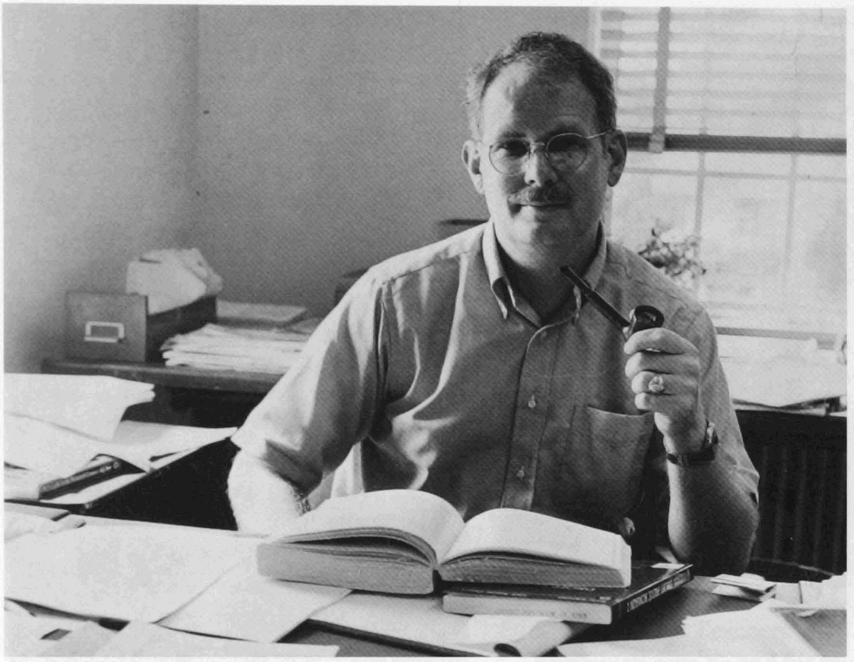
As a special projects reporter at the *Morning News*, Hanners has been investigating the case of Kerry Max Cook, who awaits execution on a 1978 conviction on capital murder. The stories have documented how police and prosecutors in Tyler, Texas, discounted evidence that another person committed the crime, then falsified or embellished evidence to implicate Cook. Last September, after twice rejecting Cook's appeals, the Texas Court of Criminal Appeals threw out his conviction and sentence and ordered a new trial. The district attorney is now trying to decide if there is enough evidence to retry Cook.

Hanners was awarded the 1989 Pulitzer Prize for explanatory journalism for his series "The Anatomy of an Air Crash: The Final Flight of 50 Sierra Kilo,''which followed a National Transportation Safety Board air crash investigation from start to finish.

Hanners graduated from Indiana State University in 1977. He worked in Texas at the *Amarillo Globe-News* and the *Brownsville Herald* before moving to the *Dallas Morning News* in 1982.

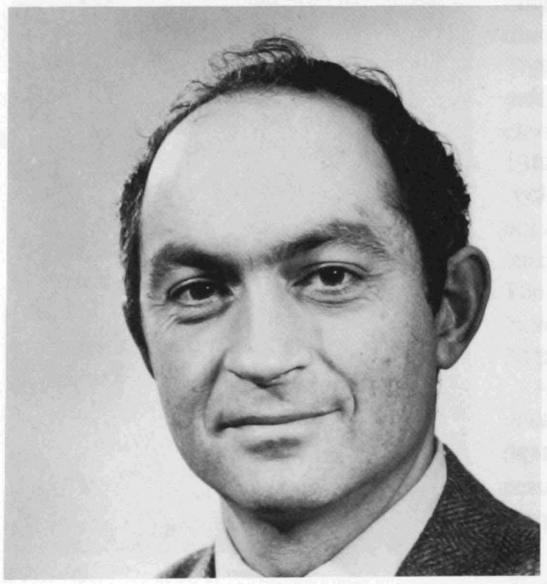
Professors reap honors

Fellowships, grants, a professorship and a Michiganian of the Year



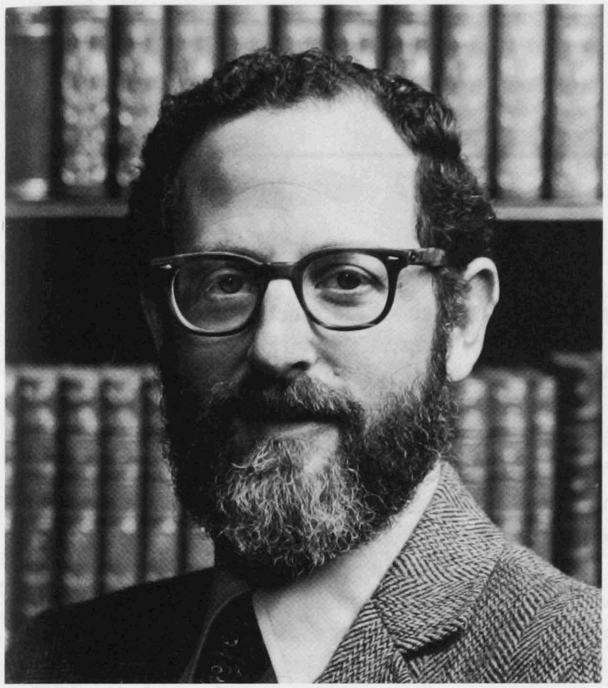
▲ **Professor Bruce Frier** was awarded a National Endowment for the Humanities fellowship that will take him to Princeton University's Institute for Advanced Study. Frier will study the role rhetoric has played in the growth of western legal tradition.

▼ **Professor J.B. White,** the L. Hart Wright Professor of Law, received grants from the National Endowment for the Humanities and the Guggenheim Foundation for his work, the *Rhetorical Constitution of Authority.*



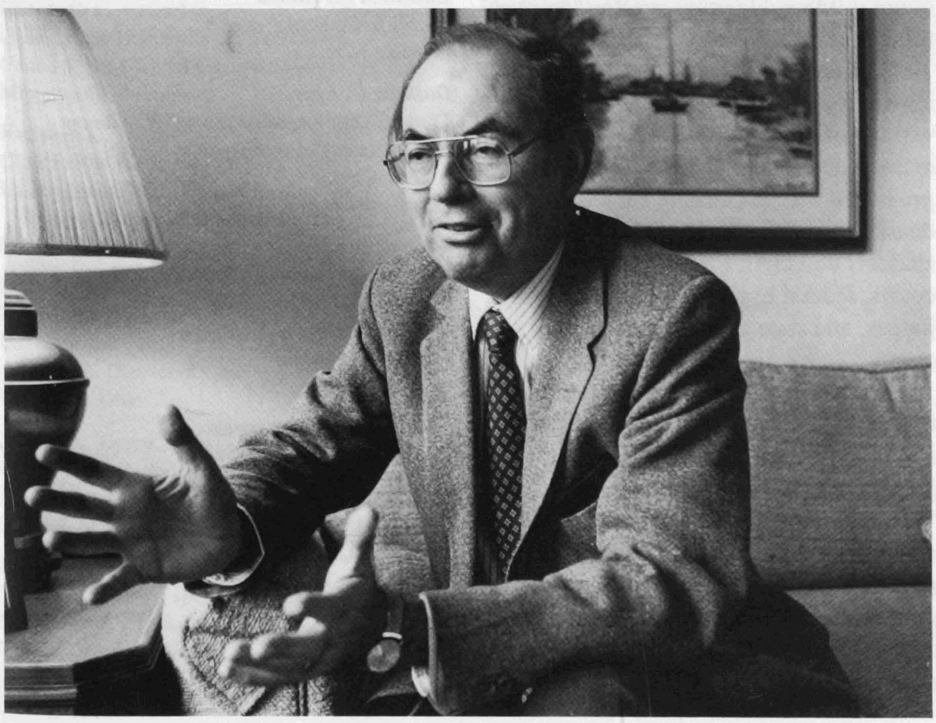
◄ **Professor Jerold H. Israel** will be splitting his time between Michigan and the University of Florida College of Law beginning in January 1993. Israel, who has taught at Michigan for more than 30 years, accepted an invitation from Florida to be the permanent occupant of the school's Ed Rood Eminent Scholar Chair in Trial Advocacy and Procedure. He will teach one semester a year at Michigan and one at Florida.

Israel began his academic career at Michigan in 1961, following a clerkship with Supreme Court Justice Potter Stewart. He is the Alene and Allan F. Smith Professor of Law at Michigan.



◄ **Professor Thomas A. Green**, the John Philip Dawson Collegiate Professor of Law and Professor of History, was awarded fellowships from both the NEH and the Guggenheim Foundation for a legal and intellectual history of the American criminal trial jury since 1800. Green's project will consider both professional and lay views regarding the appropriate scope of the criminal trial jury's authority with special emphasis on Americans' views regarding concepts of freedom.

► **Professor Catharine MacKinnon** was named a Michiganian of the Year by *The Detroit News*. In a series of articles in March and at a banquet in April, MacKinnon and others were given the honor "in recognition of activity pursued with excellence, zest and dedication, thereby making Michigan a more habitable place for all its citizens.''



◄ This fall, **Professor Yale Kamisar**, who now holds the Henry King Ransom Professorship of Law, will become the Clarence Darrow Distinguished University Professor of Law. His new appointment was approved by the U-M Regents in April.

"Professor Kamisar has had an extraordinary impact on the law, on the areas and terms of academic debate about the law, and on generations of students and colleagues who have learned much from him," U-M Provost Gilbert R. Whitaker, Jr. said. "His new appointment is a tribute that fittingly recognizes the honor he has brought to the Law School and to the University.''

The Darrow Distinguished University Professorhip is named in honor of Clarence Darrow, who in 1877 - 78 attended the "Law Department" as the U-M then called its program.

Graduates win clerkships

Faculty, alumni, promote appointments

More Michigan graduates than ever are pursuing jobs with federal and state judges these days, thanks to the double-barrelled encouragement of a tight economy and a faculty anxious to promote judicial clerkships.

More than 50 members of the Michigan Law School Class of 1992 will be working for federal and state judges following their graduation from law school. Even more members of the class of 1993 will be clerking, judging from job offers made to second year students this spring for clerkships to start following their graduation in 1993.

David Meyer, who graduated from the Law School in 1990, will commence a clerkship with Justice Byron White at the Supreme Court of the United States in Summer, 1992. Mr. Meyer, who was a journalist before coming to law school, served as editor-in-chief of the *Michigan Law Review* and was a finalist in the Campbell Moot Court Competition in 1990. After graduating, he clerked for Judge Harry Edwards (J.D. '65) of the United States Court of Appeals for the District of Columbia and practiced law at a the Washington D.C. Sidley and Austin.

During the October 1991 Term of the Supreme Court, which is now drawing to a close, **Audrey Anderson** of the Michigan Law Class of 1990 has been clerking for Chief Justice William Rehnquist. Anderson clerked for Judge Harold Greene, U.S. District Court for District of Columbia in1990-91. During her time at the Law School, she was note editor on the *Michgian Law Review* and a star of the intramural soccer, basketball and volleyball teams. Before entering law school she worked two years a paralegal in a two-lawyer firm in Chicago.

The application and hiring process for judicial clerks continues to be chaotic, according to Professor Kent Syverud, who is the faculty coordinator for judicial clerkships. "Federal judges start interviewing students earlier every year, and until recently Michigan students often applied too late to be considered for the most competitive clerkships."

In 1991, most judges did not start interviewing second year students until late in the spring for jobs to start after graduation. This year, Michigan's second year students applied in January, and most judges had interviewed by February. Syverud predicts that this coming year many students will be interviewed in September or October of their second year of law school. "I hope that some consensus of the judiciary and the law schools will prevent the process from occurring so ridiculously early, but I doubt it, since all previous efforts to slow things down have failed miserably."

Nineteen members of the class of 1992 are clerking on federal courts of appeal, with at least one student going to almost every federal circuit. Twenty-one 1992 graduates will be clerking for federal district court judges. The remaining students will clerk for state supreme courts, federal bankruptcy and magistrate judges, and state appellate and trial courts.

"We have made a real effort this year to steer our students toward Michigan alumni who have clerked or who are judges," reports Professor Syverud. "Many sitting and newly appointed state and federal judges are Michigan graduates, and we are very fortunate and grateful that they have drawn upon the school for some of their clerks." Syverud reports that, with the help of the Law School Placement Office, students interested in clerkships are now given a directory of Michigan graduates who have clerked and who are judges, and are encouraged to contact these alumni for help and advice in the clerkship process. "Many students got clerkships this year because an alumnus helped them out by advising them about judges or by encouraging a judge to interview a particular candidate. If there are alumni out there — judges or former clerks — who would like to help us match up a good Michigan student with a good judge, I would be very grateful to hear from them."

The following August 1991, and December 1991 graduates and May, 1992 tentative graduates have accepted judicial clerkships.

Elizabeth M. Abood
Michigan Court of Appeals
Lansing, Michigan

Danielle C. Agee
Clerk to The Honorable Horace W. Gilmore
United States Court of Appeals for the
Sixth Circuit
Detroit, Michigan

Michael Berg
Clerk to The Honorable Rudy Lozano
United States District Court for the
Northern District of Indiana
Hammond, Indiana

Jill R. Bernson
Michigan Court of Appeals
Grand Rapids, Michigan

Andrew Brenner
Clerk to The Honorable
Norman C. Roettger, Jr.
United States District Court for the Southern
District of Florida
Ft. Lauderdale, Florida

Arthur J. Burke
Clerk to The Honorable Douglas Ginsburg
United States Court of Appeals for the District of Columbia Circuit
Washington, D.C.

Thomas J. Byrne
Michigan Court of Appeals
Lansing, Michigan

Henry R. Chalmers
Clerk to The Honorable Robert H. Hall
United States District Court for the Northern District of Georgia
Atlanta, Georgia

Michael F. Colosi
Clerk to The Honorable J. Edward Lumbard
United States Court of Appeals for the Second Circuit
New York, New York

John E. Connelly
Clerk to The Honorable James B. Loken
United States Court of Appeals for the Eighth Circuit
St. Paul, Minnesota

Elizabeth C. Coombe
Clerk to The Honorable Diana Murphy
United States District Court for Minnesota
Minneapolis, Minnesota

Kathleen L. Davis
Clerk to The Honorable Maurice Cohill
United States District Court for the Western District of Pennsylvania
Pittsburgh, Pennsylvania

Peter Donati
Clerk to The Honorable Frank J. Battisti
United States District Court for the Northern District of Ohio
Cleveland, Ohio

Jeffrey A. Eyres
Clerk to The Honorable Donald Alsop
United States District Court for Minnesota
St. Paul, Minnesota

Robert L. Garrenger
Clerk to The Honorable John C. Lifland
United States District Court for New Jersey
Trenton, New Jersey

Rachel D. Godsil
Clerk to The Honorable John M. Walker
United States Court of Appeals for the Second Circuit
New York, New York

Bruce J. Goldner
Clerk to The Honorable Michael B. Mukasey
United States District Court for the Southern District of New York
New York, New York

James E. Hooper
Clerk to The Honorable J. L. Edmondson
United States Court of Appeals for the Eleventh Circuit
Atlanta, Georgia

James E. Hopenfeld
Clerk to The Honorable Roderick McKelvie
United States District Court for Delaware
Wilmington, Delaware

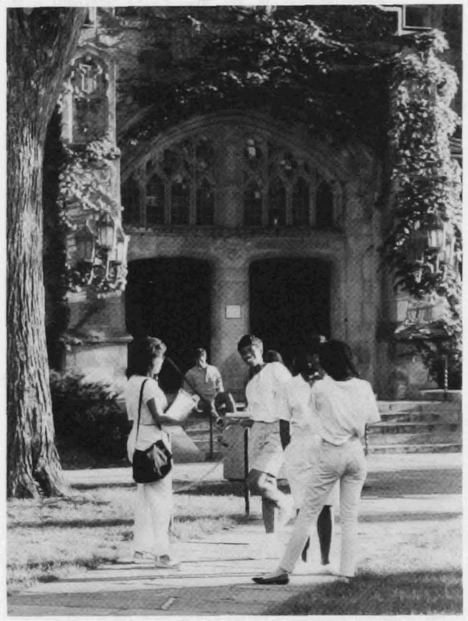
Amy Judge
Clerk to The Honorable Sarah Evans Barker
United States District Court for the Southern District of Indiana
Indianapolis, Indiana (beginning in 1994)

Mary Theresa Kaloupek
Clerk to The Honorable Steven Rhodes
United States Bankruptcy Court for the Eastern District of Michigan
Detroit, Michigan

Melissa L. Koehn
Clerk to The Honorable Steven Pepe
United States Magistrate for the Eastern District of Michigan
Ann Arbor, Michigan (1992-1993)
and
Clerk to The Honorable James L. Ryan
United States Court of Appeals for the Sixth Circuit
Detroit, Michigan (beginning in 1993)

Daniel L. Kresh
Michigan Court of Appeals
Lansing, Michigan

Lydia P. Loren
Clerk to The Honorable Ralph B. Guy
United States Circuit Court for the Sixth Circuit
Ann Arbor, Michigan



Michael L. Mittlestat
Clerk to The Honorable Bernard A. Friedman
United States District Court for the Eastern District of Michigan
Detroit, Michigan

David A. Nacht
Clerk to The Honorable Stewart A. Newblatt
United States District Court for the Eastern District of Michigan
Flint, Michigan

David Newmann
Clerk to The Honorable John W. Reynolds
United States District Court for the Eastern District of Wisconsin
Milwaukee, Wisconsin

Steven W. Pearlman
Clerk to The Honorable J. Edward Lumbard
United States Court of Appeals for the Second Circuit
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J. Daniel Plants
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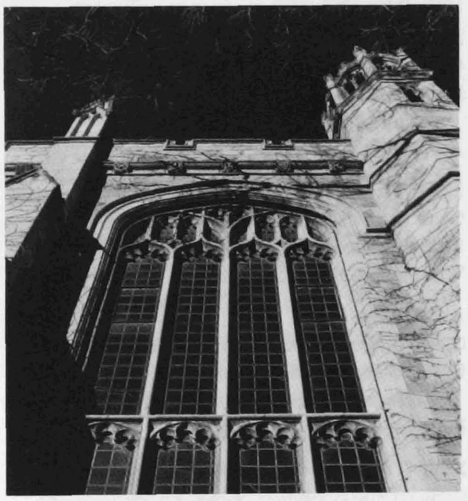
Eastern District of Michigan
Detroit, Michigan

Daniel J. Shonkwiler
Clerk to The Honorable Patricia Boyle
Michigan Supreme Court
Lansing, Michigan (beginning in 1993)



Sylvia A. Stein
Clerk to The Honorable Ann Williams
United States District Court for the
Northern District of Illinois
Chicago, Illinois

Scott T. Stirling
Clerk to The Honorable Donald Young
United States District Court for the
Northern District of Ohio
Toledo, Ohio (beginning in 1993)

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Clerk to The Honorable Helen W. Nies
United States Court of Appeals for the
Federal Circuit
Washington, D.C.

Thomas H. Tobiason
Clerk to The Honorable Anthony Scirica
United States Court of Appeals for the
Third Circuit
Philadelphia, Pennsylvania

C. Michael Villar
Clerk to The Honorable George Corsiglia
48th Circuit Court
Allegan, Michigan

Demetria E. Vong
Clerk to The Honorable Gerald Smith
Missouri Court of Appeals
St. Louis, Missouri

Valerie J. Wald
Clerk to The Honorable Joseph Irenas
United States District Court for New Jersey
Camden, New Jersey

Michael D. Warren
Clerk to The Honorable Dorothy Comstock Riley
Michigan Supreme Court
Lansing, Michigan

Mary M. Weitzel
Clerk to The Honorable Benson Legg
United States District Court for Maryland
Baltimore, Maryland

David G. Wille
Clerk to The Honorable Jerry E. Smith
United States Court of Appeals for the
Fifth Circuit
Houston, Texas

Zachary W. Wright
Clerk to The Honorable Deanell R. Tacha
United States Court of Appeals for the
Tenth Circuit
Lawrence, Kansas

Corinne B. Yates
Clerk to The Honorable Richard D. Cudahy
United States Court of Appeals for the
Seventh Circuit
Chicago, Illinois

Betsey T. Yntema
Clerk to The Honorable John Feikens
United States District Court for the
Eastern District of Michigan
Detroit, Michigan

Sarah C. Zearfoss
Clerk to The Honorable James L. Ryan
United States Court of Appeals for the
Sixth Circuit
Detroit, Michigan

Higginbotham has advice for Thomas

Judge delivers "fax from heaven"

A. Leon Higginbotham, Jr., chief judge emeritus of the United States Court of Appeals for the Third Circuit, in Philadelphia, sought two acts of imagination — one from his audience and one from U.S. Supreme Court Justice Clarence Thomas — in his lecture at Honigman Auditorium in February.

Higginbotham, who taught Race and the American Legal Process as a visiting professor at the U-M Law School in 1976, asked his listeners to believe that his remarks, although published under his name in the Winter 1992 issue (Vol. 140, No. 3, Jan. 1992, pgs. 1005-1028) of the *University of Pennsylvania Law Review*, were not really his own.

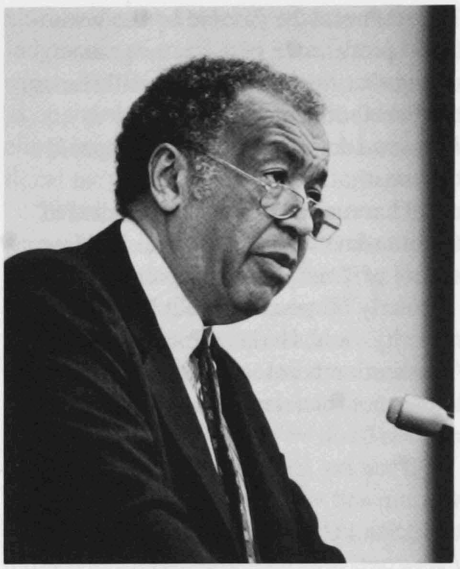
No, he said, they were merely his transcription of a "fax from heaven" addressed to Thomas from the late William Henry Hastie, one of Thurgood Marshall's mentors and a predecessor of Higginbotham's on the circuit court.

"I know there will be much skepticism about my experience," he said, "but you must rely on what I say because I was a professor at Michigan."

And Higginbotham, or Higginbotham-as-Hastie, asked Thomas to imagine what his life would have been like absent the efforts of the civil rights activists he often criticized en route to succeeding Marshall on the Supreme Court.

"Other than their own advancement, I'm at a loss to understand what it is that the so-called black conservatives are so anxious to conserve," Higginbotham said. "Where were the conservatives in the 1950s, when the cause of civil rights needed every fair-minded voice?"

He noted that in 1964, George Bush, then a candidate for the U.S. Senate from Texas, opposed federal aid to education,



A. Leon Higginbotham, Jr.

Medicare, and the Civil Rights Act passed that year, which banned discrimination in voting, jobs and public accommodations. Higginbotham said the Civil Rights Acts was also opposed by Ronald Reagan, then a spokesperson for General Electric, and Strom Thurmond, then, as now, a U.S. Senator from South Carolina.

Bush, Reagan's legatee, nominated Thomas for the High Court, and Thurmond was one of his most vociferous supporters on the Senate Judiciary Committee.

"If, 27 years ago, Reagan, Bush and Thurmond had had their way," Higginbotham told Thomas, "there would have been no position for you to fill as assistant secretary of education, and no such agency as the Equal Employment Opportunity Commission," which Thomas headed prior to the brief judicial service that preceded his Supreme Court nomination.

The tone of Higginbotham's article in the Pennsylvania Law Review was described as "stern, scolding, even scalding" by *The New York Times*, and his Ann Arbor audience got a strong dose of those qualities.

Quoting Justice Oliver Wendell Holmes' observation that "a page of history is worth a volume of logic," Higginbotham reminded Thomas that he would not now be able to live "in a comfortable Virginia neighborhood" with a wife who is white, had it not been for those who worked to overturn discriminatory housing and marriage statutes.

"You could have been in the penitentiary today," Higginbotham said, "rather than serving as an Associate Justice of the United States Supreme Court."

In 1984, Thomas characterized the concerns of civil rights organizations, as "bitch, bitch, bitch, moan and moan, whine and whine."

In 1987, he assailed an article Justice Marshall wrote for the *Harvard Law Review*, on the occasion of the 200th anniversary of the U.S. Constitution, in which he expressed concern about the Supreme Court's direction with regard to civil rights. Thomas has also frequently criticized the activism of the Court under Earl Warren, who was Chief Justice in 1954 when Brown v. Board of Education outlawed "separate but equal" schools.

"These views display a stunted knowledge of history and an unformed judicial philosophy," Higginbotham said, noting that "not one" of Thomas' new colleagues "has ever been called a nigger" and "only one has experienced the difficulty of getting rewards from a culture dominated by white males."

Citing the legacy of such leaders as Justices Marshall, Warren and Louis Brandeis; Clarence Darrow; Constance

Baker Motley; Frederick Douglass; the Rev. Dr. Martin Luther King Jr., and Hastie himself, Higginbotham reminded Thomas that "you did not get where you are by yourself. I know you don't want to be burdened by their sacrifices, but you cannot be allowed to forget them."

"You might not have gone to Holy Cross, but to some state-subsidized college for blacks in Georgia, had not these people, and the groups they led, recast the racial mores of America. And if you hadn't gone to Holy Cross, would you have gone to Yale Law School? If there had been no NAACP pickets in 1960, would Monsanto have opened its doors to you in 1977?"

"You have found a door newly cracked open, and you have escaped."

Higginbotham-as-Hastie warned Thomas not to be dazzled by the institutional provenance of his colleagues, noting that Justice John Marshall Harlan, the famed dissenter in the *Plessy v. Ferguson* decision of 1896 that upheld the constitutionality of "separate but equal" accommodations, had studied at the little-known and long-vanished law school of Transylvania University.

Nearly 60 years before it became the majority view, Harlan wrote that "Our Constitution is color-blind and neither knows nor tolerates classes among citizens."

"If the Ivy League justices had had the wisdom and values of Justice Harlan, there would have been no *Plessy v. Ferguson*," Higginbotham said, "and no need for a *Brown v. Board of Education*."

But just as there is some comfort in the knowledge that Harlan began his career as a pro-slavery Kentucky politician, so Higginbotham sees reason for optimism in both Thomas' youth (he is 44) and that very "unformed judicial philosophy" to which he alluded.

"I believe you have the intellectual depth to reflect upon and rethink the great issues the Court has confronted in the past and to become truly your own man," he said. "You will be judged by how you benefit the weak, the poor, minorities, women, the disabled and the powerless."

And if the Court continues what Higginbotham sees as its retreat from that charge, then the question becomes "Will you, Clarence Thomas, an African-American, be part of that retreat?"

Free Speech Debate

Former solicitor general, Harvard professor face off

Should universities bar racist insults and other discriminatory speech? Do they have a responsibility to tell students that hate speech does not belong on campus.

Students and faculty packed a lecture hall one Friday to hear this question debated. Harvard law professor Charles Fried and Georgetown law professor Peter Byrne presented opposing perspectives on campus speech codes.
Fried was solicitor general during the Reagan administration. Later, he represented the ACLU before the Supreme Court in a successful First Amendment challenge of a federal flag burning law.

Fried's initial comments compared speech codes not to flag burning laws but to a much older form of speech restriction — blasphemy laws in medieval Europe. "Those laws weren't designed to change anyone's beliefs. Rather, they were intended to let people know who had the power, to make sure no one questioned the dominant order," Fried said. Reading from the University of Michigan Interim Policy on Discriminatory Conduct, Fried said it too was designed to reflect the political ascendency of certain groups. "The policy not only refers to discrimination by race but also by age, Vietnam-era veteran status, marital status and so on. This lets everyone know certain groups have achieved power within the university," Fried said.

Professor Alexander Aleinikoff was moderator of the discussion but briefly became a participant to respond to Fried. "I think to imply that Blacks have power

Georgetown law professor Peter Byrne said speech codes can improve universities and be constitutional.

in this institution is to twist reality. The fact is that these codes were inspired by serious incidents of discrimination." Aleinikoff added that although he is sympathetic to the motives behind speech codes he does not believe they are workable in practice.

Byrne not only argued that narrow codes could work, he suggested how one might be drafted. To illustrate his proposal he relied on an old law school standby, the hypothetical.

"What should the law school do if a student in the law quad puts a sign in his window that reads 'niggers suck,'" Byrne said. He argued that the university could sanction the student.

This sanction would not be an attempt to control ideas, Byrne argued. Instead, it would be based not on the racist ideas underlying the message but on the manner in which they were expressed. Universities traditionally make value judgments of about how ideas should be expressed. Sanctioning racial insults — as opposed to racist ideas — would be consistent with an university's educational purpose, Byrne said.

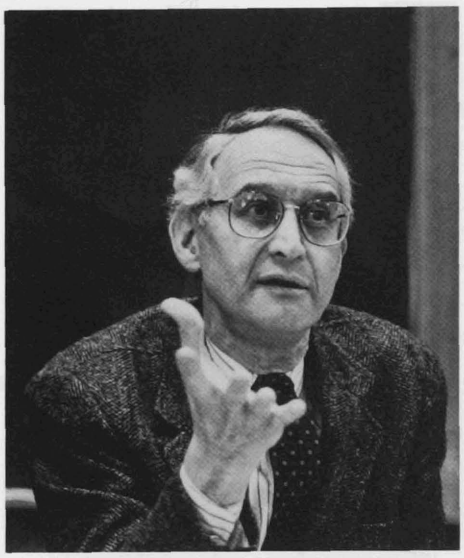
"What is the difference between the sign you described and one that read Blacks are inferior," third-year law student Patrick Seyfarth asked?

Byrne replied that the student's rewording changes the context to one in which debate and discussion can take place. Racist ideas should be discussed, he argued, but racial epithets serve a barrier to this discussion.

As an alternative to a intra-law school judicial system to sanction a student who used racial epithets, Fried argued that the dean could note the incident on the student's bar recommendation.

That solution could be subject to as much or more abuse than a university court said law professor Yale Kamisar — who was in the audience. "Do we want law school deans basing their bar recommendation on a student's views? Under that system deans in the fifties would have been reporting students who belonged to the National Lawyers Guild," Kamisar said.

Another response to Byrne's proposal was that it ignored the fact that using angry, perjorative language itself expresses an idea. In a separate context, the Supreme Court recognized this in *Cohen v. California,* where it permitted an anti-war activist to wear a jacket that read "Fuck the Draft" in a federal courthouse. Even though perjorative language can reflect an idea, Byrne said that universities have a greater interest than legislatures in the quality of speech used to



Harvard law professor and former U.S. solicitor general Charles Fried argued against campus speech codes.

express an idea. Also, Byrne argued that epithets are more likely to make targeted students think that the institution does not accept them as full members.

One of the organizers of the forum was third-year law school student Michael David Warren, Jr. Warren spent much of the Winter term working with the university administration to redraft the current interim speech code.

"I found both speakers very enlightening," Warren said. "And ultimately I think open discussions, like this, are a much better way to raise awareness than speech codes, which strike me as form of thought control."

–By Peter Mooney

Desmond Howard gets help from Alumnus

Richard Sayler helps star pick agent

There was a time when alumnus Richard Sayler, a litigation specialist with Jones Day in Cleveland, thought seriously about getting into the business of sports representation. While he's never acted on his impulse, he has spent a good deal of time lately representing U-M Heisman Trophy winner Desmond Howard as Howard made the decisions that followed the Big One to turn pro.

Sayler, a '69 graduate who handles large intellectual property and commercial cases at Jones Day, met Howard, a Clevelander, through DeBorah Marshall, his secretary at the firm, who just happened to be Howard's godmother.

"Because of my pedigree," Sayler says, "she knew I was interested in Michigan and Michigan football. So was my son, who's a sports nut. As some quasi-legal questions began to arise for Howard about two years ago, I said I'd be glad to talk to him and to his parents."

That willingness has blossomed into an extended personal and professional relationship with Howard, who graduated from U-M this spring and was drafted to play for the Super Bowl champion Washington Redskins.

Sayler's prediction that hundreds of individuals and firms would be after Howard if he turned pro after his spectacular U-M career was borne out by the floodtide of applications that poured in once Howard made the decision in January.

"There are horror stories about the wrong people being selected," Sayler says. His job, as Howard and his family engaged him to be their lawyer in the negotiations, was to make sure this didn't happen.

Three principal areas came under scrutiny: the selection of someone to represent Howard in football contract negotiations; someone to handle his marketing and endorsements; and someone to attend to his financial affairs.

Dick Sayler

Although marketing and contract negotiations are often handled by one person, Sayler felt they should be handled separately. After hundreds of phone calls to athletes, athletes' parents, business people and sports management people — Sayler, Howard, his parents, and Ms. Marshall settled on approximately six individuals or firms to interview in each of the three fields.

Howard's commitment to college as well as to football — Sayler calls him "a studious and intelligent person who behaves as I'd like my kids to do" — meant that many of the interviews occurred on weekends in Cleveland. One, however, took place on the ninth floor of the Legal Research Building, courtesy of Associate Dean Edward Cooper.

These interviews — conducted very much in the Socratic method, Sayler says — resulted in the selection of California attorney Leigh Steinberg to represent Howard in contract talks, and in the choice of attorney David Falk of the Washington, D.C., firm ProServe Basketball and Football to handle the marketing and endorsement side. Sayler continues to function as general counsel of the effort and is continuing to help Howard secure financial management, which will likely include lawyers, CPA's, and professional investment managers.

From time to time, Sayler says, the question arose of his being Howard's only representative for these functions. His answer was a firm no. "I don't have the hands-on experience or the Rolodex to manage the pre- and post-draft contacts with a host of NFL teams. Also, I don't have detailed knowledge of or the going rates in endorsements and marketing" as specialists do.

Nor does he intend to use his involvement with Howard as a springboard into the player representation field.

"I got into this on a personal basis," he says. "Ultimately I'm more interested in getting out the story of how to go about selecting quality representatives for athletes than in becoming one. Often the decisions are hasty. Not all of them work out badly, but it's a very important time in a young athlete's life — a time to move carefully and to make well-reasoned decisions. I'm convinced Desmond Howard did that."

—By Susan Isaacs Nisbett

Wilmer, Cutler & Pickering give gift

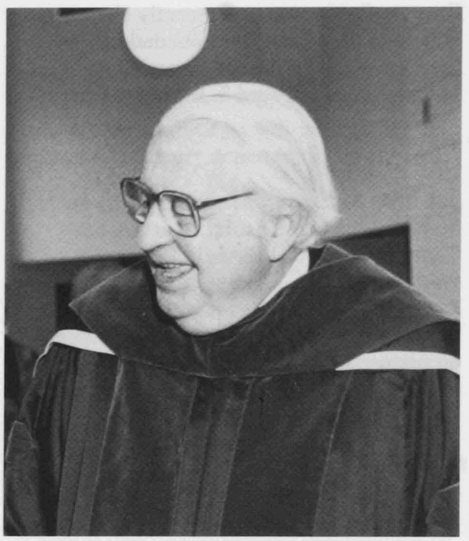
On his firm's 30th, scholarship endowed to honor Pickering

Wilmer, Cutler & Pickering, a prestigious Washington, D.C., firm, announced May 1 it would estalish a $500,000 endowed scholarship at the U-M Law School to honor one of its two surviving named partners, John Pickering. Pickering graduated from Michigan Law School in 1940.

The endowment was created on the 30th anniversary of Wilmer, Cutler & Pickering. A similar scholarship fund was created at Yale Law School to honor the firm's other surviving named partner, Lloyd Cutler, who received his LLB degree from Yale in 1939.

The Pickering Scholarship will provide annual tuition for at least one student each year. Selection of Pickering Scholars will be based on financial need, academic excellence and a student's pro bono and public service record. As is the case with the firm's lawyers, Pickering Scholars must be committed to dedicating at least 10 percent of all their future professional efforts to pro bono work or public service activities.

John Pickering has been an active Law School alumnus, and has served on the Committee of Visitors and as chairman of the Law School's Development Committee. In 1979 he was honored with the U-M's Outstanding Achievement Award for service to the University. He has also been awarded a Helen L. DeRoy Fellowship.



John Pickering

Class Notes

1937

Charles W. Allen was recently elected a Fellow of the Maine Bar Foundation. He is a partner in the firm of Pierce, Atwood, Scribner, Allen, Smith & Lancaster in Portland, Maine.

1939

Earl C. Townsend, Jr. was recently honored by the Indiana Trial Lawyers Association at their Fourth Annual Lifetime Achievement Seminar.

1955

John R. Heher was cited in the fourth edition of *The Best Lawyers in America.* He is a partner with Smith, Stratton, Wise, Heher & Brennan of Princeton, New Jersey, where he specializes in health care law.

Harvey M. Silets was named one of the ten most successful trial lawyers in the country by the *National Law Journal.*

1957

Martin M. Doctoroff has been unanimously elected chief judge of the Michigan Court of Appeals for a two year term.

1958

Hanley M. Gurwin was presented the Lifetime Achievement Award by the family law section of the State Bar of Michigan. He is a partner with Hill Lewis in Birmingham, Michigan.

1959

John W. Gelder has been elected to a two-year term as a managing partner of the law firm of Miller, Canfield, Paddock and Stone. He is based in the firm's Detroit office, principally practicing in corporate law.

John Jackson has been selected by *Columbia Journal of Transnational Law* and the Columbia Society of International Law to receive the 1992 Wolfgang Friedmann Memorial Award. The award is given annually in recognition of outstanding, lifelong contributions to the field of international law. He is a professor at the Law School.

1960

Robert Emmons, chairman and chief executive officer of Smart & Final, has been honored as Food Industry Executive of the Year by the food industry management program in the School of Business Administration at the University of Southern California.

1961

Calvin A. Campbell was named President and CEO of Cyprus Minerals Company. He will work out of Cyprus' offices in Denver.

Francis C. Marson was recently elected a Fellow of the Maine Bar Foundation. He practices with the firm of Eaton, Glass, Marsano & Woodward in Belfast, Maine.

1963

Joe Billy McDade was confirmed by the U.S. Senate to the U.S. District Court for the Central District of Illinois in Peoria.

Lee D. Powar has been named chairman of the American Bar Association's subcommittee on partnerships in bankruptcy. He is a partner in the Cleveland, Ohio law firm of Hahn Loeser & Parks.

Lawrence Waggoner was the Joseph Trachtman lecturer for the American College of Trust and Estate Counsel. His lecture topic was "Marital Property Rights in Transition". He is a professor at the Law School.

1966

Robert E. Gilbert has been reelected to a two-year term as a managing partner of Miller, Canfield, Paddock and Stone. Based in the firm's Ann Arbor, Michigan office, he practices in the areas of public and private finance including real estate development and finance.

1967

James B. Boskey has been a professor at Seton Hall Law School since 1971 and is currently teaching courses in Dispute Resolution and Family Law.

Michael R. Levin is a partner with Levin & D'Agostino, an investment lending law firm in Hartford, Connecticut.

Jim Pendergrast practices tax, legislative and regulatory law in the Law Department of Travelers Insurance Company in Hartford, Connecticut.

Judy R. Potter was recently elected a Fellow of the Maine Bar Foundation. She is a professor at the University of Maine School of Law.

W. Robert Reum was elected director of AMSTED Industries Incorporated. He is chairman, president and chief executive officer of The Interlake Corporation, Lisle, Illinois.

Eli J. Segal retired, sold his company and moved to London for one year. He returned to Massachusetts and now owns and publishes *Games* magazine.

1968

Ronald R. Glancz has joined the Washington, D.C. firm of Venable, Baetjer, Howard & Civiletti as a partner and head of the Washington Bank Regulatory Practice.

1970

Ralph G. Wellington was elected to a three year term on the Executive Committee of Schnader, Harrison, Segal & Lewis. He is a member of the firm's litigation department and chairs its Aviation Law Practice Group. He practices in the firm's Philadelphia, Pennsylvania office.

1971

David McKeague was confirmed by the U.S. Senate to the U.S. District Court for the Western District of Michigan in Lansing.

1973

Robert E. Hirshon was recently elected a Fellow of the Maine Bar Foundation. He is a partner with the firm of Drummond, Woodsum, Plimpton and MacMahon in Portland, Maine.

1975

Scott Bass has become a partner in the New York office of Piper & Marbury, where he is in charge of the firm's Food & Drug Law Practice. He was also elected Chair of the New York State Bar Association Section on Food, Drug and Cosmetic Law, and has recently authored the chapter on "Enforcement Powers of the Food and Drug Administration" in the Food and Drug Law treatise (FDLI 1991).

Lawrence A. Moloney has become a shareholder of Doherty, Rumble & Butler, Minneapolis, Minnesota. He practices in the area of environmental law with an emphasis on complex litigation.

1976

Robert A. Bunda announces the formation of Bunda Stutz & DeWitt in Toledo, Ohio.

Thomas W. Linn has been reelected to a two-year term as a managing partner of Miller, Canfield, Paddock and Stone. Based in the firm's Detroit, Michigan office, he practices in the areas of municipal law and securities, commercial, and banking law.

1977

David C. Crago has been appointed assistant professor of law at Ohio Northern University in Ada, Ohio.

Raymond R. Kepner has joined Morgan, Lewis & Bockius as a partner in its Los Angeles, California office where he will continue to practice in labor and employment matters.

1978

Duncan Davidson has been promoted to Vice President, High Tech Practice of Gemini Consulting in Morristown, New Jersey.

Stephen A. Edwards has been elected a director of the National Association of Bond Lawyers. He is a partner in the Philadelphia, Pennsylvania office of Morgan, Lewis & Bockius.

Nancy Olah has been appointed as vice president and associate general counsel of The Maryland Insurance Group in Baltimore.

1979

Mark A. Sterling was re-elected to serve as President of HospiceCare of the District of Columbia. The organization provides home health and supportive services to D.C. residents who face life-threatening or terminal illnesses. He practices in the Washington, D.C. office of Hogan & Hartson.

G. Steven Stidham has been appointed by Oklahoma Governor David Walters to the Scenic Rivers Commission.

1980

G. A. Finch was appointed by Illinois Governor Jim Edgar to a three-year term as a member of the Illinois Human Rights Commission. He was also appointed to the new Board of Advisors of Niles College by the Archbishop of Chicago, Joseph Cardinal Bernardin. Mr. Finch is an attorney with Querrey & Harrow, Ltd. in Chicago.

Beatriz M. Olivera has formed a new law firm, Boyle and Olivera, in Chicago, Illinois. The firm's practice will focus on business litigation with an emphasis on insurance matters.

1982

Brian H. Boyle has formed a new law firm, Boyle and Olivera, in Chicago, Illinois. The firm's practice will focus on business litigation with an emphasis on insurance matters.

Stefan B. Herpel has become a partner in the law firm of Miller, Canfield, Paddock and Stone. Located in the firm's Detroit, Michigan office, he will practice in commercial litigation, including nuclear power plant litigation.

Portia Moore has returned to Seattle as managing partner for a new office of Morrison & Foerster.

1983

Keith J. Hesse has been elected to partnership in the Orlando, Florida law firm of Foley & Lardner where he specializes in litigation.

1984

Gary A. Rosen has become a shareholder in the Philadelphia, Pennsylvania law firm of Hangley Connolly Epstein Chicco Foxman & Ewing. His practice is concentrated in commercial litigation, appellate litigation and bankruptcy. He is also a contributing author of *Emerging Problems Under the Federal Rules of Evidence*, (2d ed. 1991).

Kurtis Wilder was appointed to the Washtenaw County Circuit Court by Michigan Governor John Engler.

1985

Kent Koji Matsumoto has joined Semmes, Bowen & Semmes of Baltimore, Maryland. He practices in the firm's international and environmental law departments.

Ronald M. Yolles has become a Chartered Financial Analyst (CFA) as designated by the Trustees of the Institute of Chartered Financial Analysts.

1986

Mark Nussbaum has relocated to the West Palm Beach, Florida office of Honigman Miller Schwartz and Cohn where he practices primarily in hospital and health care law.

1988

Daniel H. Golub has joined the Philadelphia, Pennsylvania office of Schnader, Harrison, Segal & Lewis where he will practice in the intellectual property department.

1989

Oscar Gonzalez and **Ruth R. Rodriguez** have formed the new firm of Braumiller and Rodriguez in Dallas, Texas.

Yvonne D. Powell has become associated with Bunda Stutz & DeWitt of Toledo, Ohio.

1991

Todd W. Grant is an associate with Cox & Hodgman in Troy, Michigan.

Alumni Deaths

'20 Morse D. Campbell

'21 Carl Axel Sorling

'29 Waldo K. Greiner
Henry C. Salveter

'32 William R. Althans

'38 Albert D. Matheson

'41 Richard S. Roberts

'48 Glenn E. Kelley
Stewart Edward McFadden

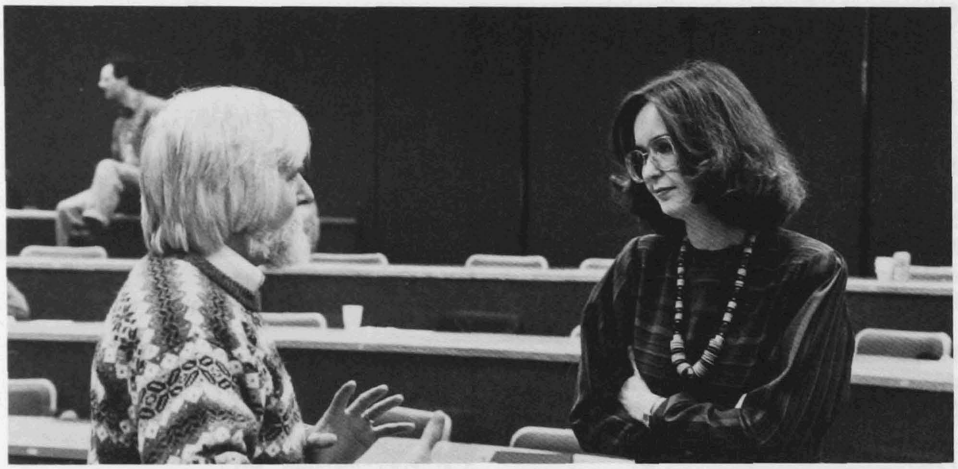
'50 Joseph G. Egan

'52 Robert W. Porter

'55 James J. Carras

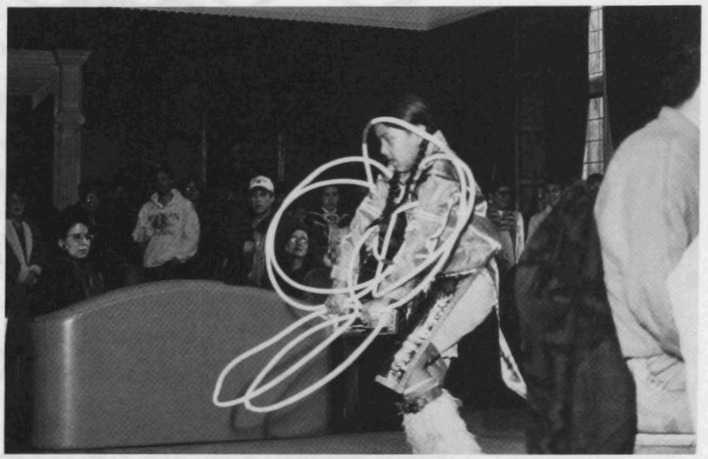
'70 Richard N. Lowen

IN CAMERA: '91-'92 Events



In February the Journal of Law Reform organized a symposium on preservation of minority cultures. Students heard panels on repatriation of Native American Artifacts; Indigenous Peoples: Institutionalizing Political Power; and Religious Minorities: Federalism, Pluralism, and Neutrality. Joseph H. Carens, professor of political science, University of Toronto (left), delivered a talk titled, Democracy and Difference: The Case of Fiji. U-M Law Professor, Marie Deveney, on leave at Dykema, Gossett, Ann Arbor, participated on the panel.

Supreme Court Justice Antonin Scalia brought the 68th Annual Campbell Moot Court Competition finals a full house and an overflow crowd that watched the action on big-screen television. The case argued in the finals was a hypothetical involving claims that a minority business enterprise plan and an affirmative action plan violated the Equal Protection Clause and that the petitioners were entitled to relief under the Civil Rights Act. (Left) The winners, counsel for the respondents, Dan Plants (top) and Arthur Burke (bottom) argue their case. (Above, left to right) Judges were Dean Lee C. Bollinger, Helen Nies, Chief Judge of the United States Court of Appeals for the Federal Circuit, Scalia, and Patricia Boyle, Associate Justice for the Michigan Supreme Court. Not shown, Professor Theodore St. Antoine.



The annual Native American Law Day, held in March, brought nationally recognized Native American leaders to the law school to discuss the issue of Indian land development. The event was sponsored by the law school's Native American Law Students Association. (Top left) The Whitefish Bay Drum Group from Ontario. (Top right) Jonathon Windyboy, an Ojibwe-Cree hoop dancer. (Left) One of the speakers, University of Ottawa Law Professor Patricia A. Monture-OKanee, of the Mohawk tribe.

Former U.S. Attorney General Edwin Meese III visited the law school in March to speak about "Freedom, Law and the Constitution." In his lecture, sponsored by the Federalist Society, Meese urged an original intent view in interpretating the Constitution. While saying freedom of speech "can be negated when the subject of the speech is strongly antithetical to the mores of society," he criticized campus speech codes for violating the "tenets of the university community, which are open inquiry and debate."

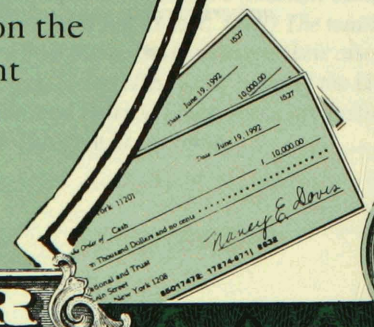
FEDERAL RESERVE NOTE

GOLDSTEIN'S CURSE

A curious case of bank fraud

by James J. White

On April 16, 1980, a man using the name Marvin Goldstein opened a bank account at a Baltimore branch of Union Trust Company. He deposited $15,000 in cash. He told the branch manager that he planned to establish a Baltimore office of his father's New York business, "Goldstein's Precious Metals and Stones." Goldstein identified himself with a New Jersy driver's license and gave a bank reference from New York. On May 6, Goldstein deposited a check for $880,000 at another Union Trust branch near the branch where he had opened the account. Words on this check indicated that it was drawn on the account of Metropolitan Investment Corporation at First Pennsylvania



WASHINGTON

ONE DOLLAR

Bank, a large Philadelphia bank. Unbeknownst to the Union Trust officers, the fractional numerals in the upper right hand corner of the check identified Albany State Bank as the payor, and the numerals at the bottom of the check were gibberish: they identified no bank at all. Apparently Goldstein had altered the numerals at the bottom for they were not magnetic numerals, were of the wrong size and were nonsensical. On most checks the name of the drawee, the fraction in the upper right hand corner and the Magnetic Ink Character Recognition ("MICR") — encoded numerals on the bottom — all identify a payor.

Because the numerals on the bottom were not magnetically encoded, the Union Trust machine could not read them and the check had to be sent for collection manually. Accordingly, Union Trust transferred it by courier to Philadelphia National Bank (PNB). In apparent reliance on the numerical indication in the fraction, PNB sent it to the New York Federal Reserve processing center in Utica, New York on May 7; Albany State received the check on the morning of May 9. On May 10, Albany returned it to the Utica center stamped "Sent in Error," and on May 13 it was returned to the New York Federal Reserve Bank's New York City office. The New York Federal Reserve Bank then sent it on May 14 to the Federal Reserve Bank of Philadelphia for collection at First Pennsylvania. It was presented on May 14 at 9 a.m. at First Pennsylvania; First Pennsylvania notified PNB of dishonor at 9:45 on the morning of May 16. PNB sent word of dishonor to Union Trust in the middle of the afternoon on May 16.

Unfortunately, Goldstein had come to Union Trust on May 15 to withdraw $95,000 in cash and to direct a wire transfer of $660,000 to the account of a Maryland coin dealer. On May 16, Goldstein picked up his coins and disappeared. No one has heard from him since.

Goldstein's curse is the inability of the banking system to distinguish between legitimate payment orders and fraudulent ones.

THE CURSE

Goldstein's curse is the inability of the banking system to distinguish between legitimate payment orders and fraudulent ones. When checks were not widely used, and when bank employees knew each depositor and recognized each signature, it would have been impossible for Goldstein to have escaped with $800,000.

To understand why the curse rests upon our system and why we will not be able to exorcise it, consider the qualities that are necessary for its existence. First is a high volume of transactions. The American system handled more than forty-seven billion checks in 1987, and the two principal wire payment systems, Fedwire and Clearinghouse Interbank Payments System ("CHIPS"), transfer about one trillion dollars per day. If each of those transactions had been handled by one with a comprehensive knowledge of the practical and legal consequences of each act, the system could not have worked. The volume of transactions demands that a larger and larger share of the work be done mechanically and electronically and that the human labor come in a form that is highly specialized and semi-skilled.

Because most of the work must be done electronically or mechanically, there must be a way to distinguish mechanically or electronically between one account and another, one bank and another, and one transaction and another. Whatever their intelligence in the hands of a clever programmer, computers — even those that can handle a large volume of transactions — are notoriously rigid and highly restricted in their adaptability to new information.

A second quality of our funds transfer system that feeds the curse is its complexity. Few of the people associated with the funds transfer system fully understand its operation. A person who MICR encodes the dollar amounts on the check in the basement of the depositary bank may be highly efficient at doing that but is unlikely to be able to distinguish a drawer's from an indorser's signature or to understand the legal consequences of either. The person who operates the photographic and sorting machine at the payor bank may have a detailed knowledge about how the machine can become

jammed or the camera can breakdown, but is unlikely to understand that her bank will be liable if it holds a check beyond the midnight deadline. Those at the receiving bank who routinely enter electronic funds transfers into various accounts identified by number are blissfully ignorant of the fact that even though the number on the electronic fund message and on the account may be identical, the names on the two may be different. The complexity, the volume, and the necessary compartmentalization of the human activity in the system all feed Goldstein's curse.

Nor is the system likely to change in ways that will allow us to be rid of it. Consider three events that have occurred within the last twenty years that have magnified the impact of the curse. First is MICR encoding. Almost all preprinted checks have MICR encoding to identify the payor bank, the drawer's account, the location of the payor and the type of instrument. At the depositary bank, the payment amount is manually MICR encoded at the bottom of the check. The check is then fed into a machine that automatically sorts it, reads the dollar amount, credits the proper account, debits another, and sends the check toward its apparent payor. Thereafter, the check may never again be manually handled. This MICR encoding is now universal and means that there is usually no human intervention in the transfer of funds after the check goes through the first step in the process at the depositary bank.

The bank officer should have been put on notice when Goldstein appeared at the bank with an expensive bottle of champagne to speed the bank's approval of his withdrawal of the funds.

A second recent change is the imposition of dollar cutoffs below which banks do not examine drawers' signatures. Although banks do not advertise this behavior, few banks now check all signatures. Failure to check signatures is a direct response to the volume and to the need for speed, but that omission, of course, removes all possibility with respect to such checks that a forgery will be discovered by comparing the signature on the check with the true signature of the depositor.

A third event is check truncation. Truncation is the destruction of the check before it reaches the payor bank. Currently truncation is practiced by many credit unions which hire banks to collect their checks and which allow the banks to destroy the checks and send the information to the credit union electronically. Almost certainly truncation will spread to banks generally and then turn upstream to occur at the depositary bank. In the twenty-first century, checks will be photographed and then destroyed at the depositary bank and all of the information will be transmitted only electronically.

Each of these three events speeds the transaction, but each diminishes the possibility that a human being will intervene to distinguish between a legitimate and a fraudulent transfer. Projecting this experience into the future, we can predict that the damage wreaked by Goldstein's curse will grow, not diminish, and that those in charge of the payment system will have difficulty merely to maintain the system's current ability to distinguish legitimate from fraudulent transactions.

FOUR EXAMPLES

Before I examine the legal doctrines that allocate the losses arising from Goldstein's curse, I will finish Goldstein's story and describe three other common frauds to give an appreciation of the scope and nature of the problem.

The civil debris left by Goldstein's crime fell at the feet of Judge Haight in the Southern District of New York. In *United States Fidelity & Guaranty Co. v. Federal Reserve Bank of New York ("Union Trust"),* Union Trust argued that the various collecting banks downstream from it, namely PNB, Albany State, and the Federal Reserve Bank of New York were agents and were liable to it under section 4-202 for negligent handling of the $880,000 Goldstein check. They also argued that First Pennsylvania had liability for holding the check beyond its midnight deadline. Judge Haight rejected all of those arguments and left the loss on Union Trust.

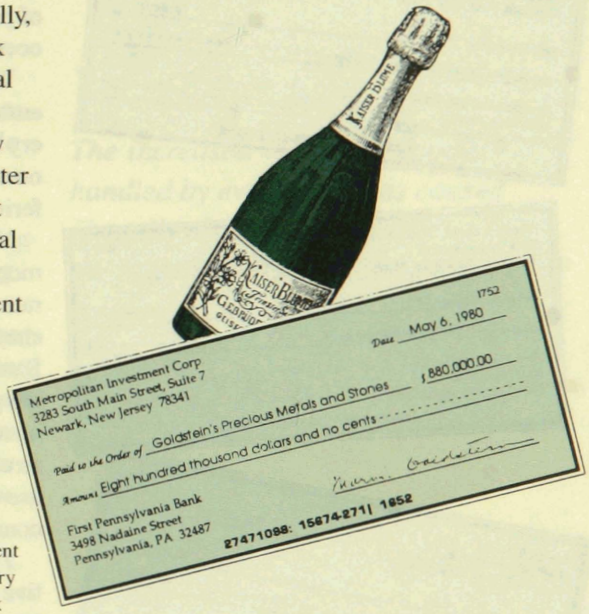
The Judge rejected the invitation to apply a comparative negligence standard. Rather, he applied section 3-406 by analogy to the behavior of Union Trust. Union

Trust had done a variety of acts with respect to Goldstein and the Goldstein check which showed it to be a "substantial contributor to the loss." In the first place, the teller failed to put a hold on the $880,000 check of the kind that the bank procedures normally required. In the second place, the Bank's own check processing machine spit out the check because the letters at the bottom were not magnetically encoded. Despite its obvious deficiencies (the numerals were not only not MICR encoded, but they were the wrong size and shape), the check was sent on for manual collection. Union Trust failed to record Goldstein's alleged banking association in New York and so was unable to check on it. Had it inquired with the New York banking reference, there Union Trust would have found no knowledge of Goldstein. When it did check with credit bureaus and with First Pennsylvania, it was told there was no account in the name of the drawer on the $880,000 check and that the credit bureaus had no knowledge of Goldstein. Finally, the bank officer should have been put on notice when Goldstein appeared at the bank with an expensive bottle of champagne to speed the bank's approval of his withdrawal of the funds.

The assistant branch manager who ultimately authorized the wire transfer, on May 15, apparently believed that the check had been paid because the Union Trust computer treated the funds as "collected." Evidently that employee did not realize that the fact that an item is shown as "collected" in the computer memory does not mean that final payment has occurred, but is merely a reflection of an assumption that is itself built into the computer program about the *expected* time it should take for the final payment of a check. For all of these reasons, Union Trust was properly regarded as far more negligent than any other party in the transaction; surely it was the least cost-risk avoider in this case and should have borne the loss.

That was exactly the outcome that Judge Haight required. He did so by applying 3-406 by analogy to the behavior of Union Trust. He commented as follows:

> The depositary bank, like the drawer of the check, is well situated to protect the system against MICR fraud. The depositary bank has an opportunity to examine the check free of time pressures which prevent collecting banks from giving checks more than a cursory glance. Perhaps more important, the depositary bank is in the unique position of being able to examine both the depositor and the check. No other bank in the collecting chain can examine the depositor, a crucial advantage given the seeming difficulty of detecting this type of fraud.



The Judge pointed out that there may be cases of MICR fraud in which the depositary bank should not bear the loss but where the collecting bank should be liable under section 4-202.

My second example deals with a most ancient and common form of check theft — forging the drawer's signature. This case shows the impact of the curse even on conventional frauds. In *Medford Irrigation District v. Western Bank,* a bookkeeper forged the name of her employer on a number of checks which were cashed at the defendant bank. For the purpose of summary judgment, the plaintiff conceded its negligence in not supervising the bookkeeper, not auditing the accounts, and in failing to review the bank statements. It also conceded that its negligence substantially contributed to the forgeries. Nevertheless, plaintiff argued that the bank did not follow "reasonable commercial banking standards" or exercise "ordinary care" because it failed to examine signatures on checks for amounts of less than $5,000.

The appellate court affirmed the summary judgment for the plaintiff. Because it found the bank to be negligent, it ruled that the depositor's negligence in supervising the embezzler was irrelevant.

Rhode Island Hospital Trust National Bank v. Zapata Corp. is indistinguishable from *Medford Irrigation,* but the First Circuit comes to the opposite conclusion. There, an embezzler stole a number of blank checks from Zapata, forged its signature and entered amounts between $150 and $800 on each check. Between March and July 1985, the

payor paid $109,247.16 of these forged checks. Relying on section 4-406, the court of appeals affirmed a judgment for the bank as to the checks presented for payment more than two weeks after Zapata had received the first bank statement reflecting the forgeries. A banking expert testified that most banks do not examine drawers' signatures on checks under a certain dollar amount; he also testified that this practice had not caused any significant increase in forgery losses. The court concluded that such behavior was not negligent.

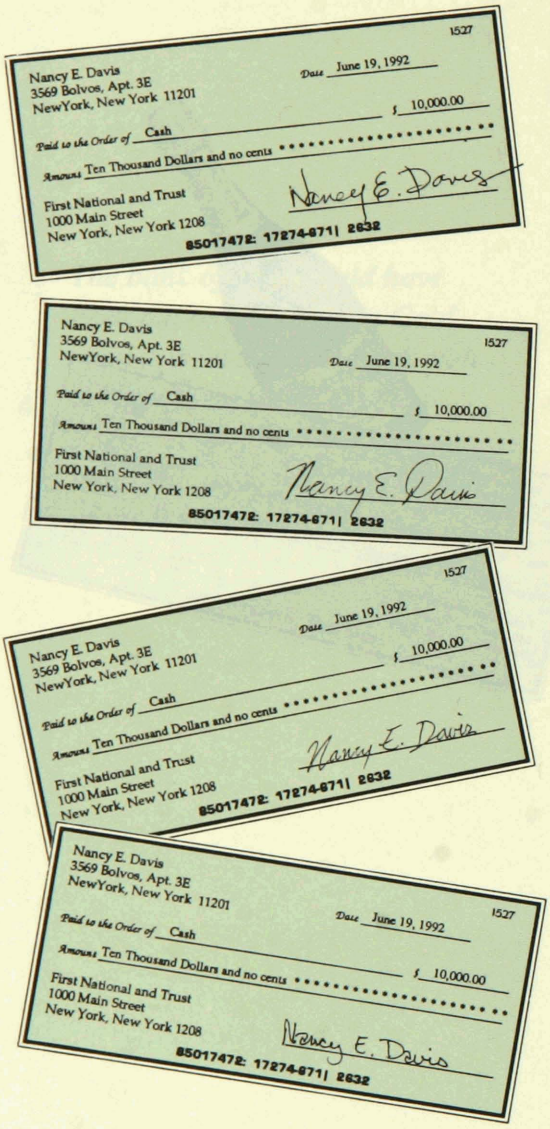
In concluding that the payor's failure to examine was not negligent, the court made explicit reference to Judge Hand's famous definition of "duty" in *United States v. Carrol Towing Co*. There, Judge Hand recognized that one can fail to take certain plausible and possible precautions and yet not be negligent because of such failure if the burden of precaution is large compared with the gravity of the harm and the probability of its occurrence.

What is new about *Rhode Island Trust* and *Medford Irrigation* is not the acts of the embezzlers; it is the acts of the banks. The increased volume of checks handled by every bank has caused virtually all banks to abandon the practice of examining signatures on every check. The differing outcomes in these two cases exactly demonstrate the differing responses to Goldstein's curse.

My third case is a common theft that has been described in appellate decisions for more than 100 years. An unfaithful corporate employee first procures a proper corporate signature on a check payable to the order of a bank. The thief then deposits the check in his own account at that bank or receives cash on the check's presentation. Bank employees are accustomed to treating checks payable to their bank as though they are payable to cash, and recognize them as a means by which depositors withdraw their own funds. Routinely, therefore, tellers and bank operations employees follow the instructions of persons in possession of such checks because they confuse this fraudulent use of the check with its legitimate use. Here the thief takes advantage not of the computer's ignorance, but of the ignorance of the bank employees.

J. Gordon Neely Enterprises Inc. v. American National Bank of Huntsville is illustrative of these cases. In that case, a Huntsville Midas Muffler shop was operated by the Neelys. In 1976, the Neelys hired Louise Bradshaw as a Kelly Girl. Louise stayed on to help Mrs. Neely learn how to "keep the corporate books." Among other things, Louise suggested that the Neelys open a bank account at American National Bank and that funds be put in that account by checks drawn on their regular account at First Alabama. The American National account was to be used for payroll and certain other purposes. In 1977, Louise Bradshaw made out nineteen different checks payable to the order of American National Bank for the signature of Mrs. Neely. Louise left large gaps to the left of the amount written on the designated line, but Mrs. Neely signed them anyway. Louise would then add a digit or two to the left of the original amount or raise the first digit by using liquid erasure. She then made a split deposit at American National by putting the original amount into Neely's American National payroll account and depositing the rest into her own account. Louise saw to it that she got possession of the checks when they were returned to the Midas Shop and she covered up her defalcation by again using liquid erasure on the checks to return them to the original amount and by reconciling the accounts by herself or doing so with Mrs. Neely in a way in which Mrs. Neely never saw the statements.

When a new accountant was hired in the latter part of 1977, he quickly discovered embezzlements of $17,005.18. The Neelys sued American National for conversion. They argued that, although the bank had been directed to make payment to itself ("pay to bank" the checks had said), instead it had paid more than $17,000 to Louise Bradshaw. Relying upon the bank's expert testimony to the effect that banks normally treat such checks as "payable to the order of cash," the court treated the checks as bearer paper and found American National neither negligent nor guilty of conversion.



There is no explicit provision in the current versions of articles 3 or 4 that deals with cases like *Neely.* The majority of the courts have disagreed with the *Neely* outcome and have concluded that the bank should bear liability for its failure to follow the customer's order.

The case demonstrates that Goldstein's curse is not merely a problem of rigid and unintelligent computers, but inheres also in the inability of human actors with limited skill and understanding to distinguish honest from fraudulent transactions. Louise Bradshaw — and many before her and many to come — instinctively appreciate that the meaning which a bank teller or the bank operations person places on a check payable to the "order of the bank" is different from the meaning that a lawyer or a sophisticated banker might apply to that same instrument. To the low-level employee, that check means "pay this amount as the bearer says." To the lawyer (and sometimes to the courts) it means "pay this amount to the bank and, where that seems not sensible, investigate."

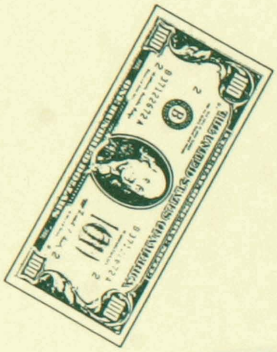
My fourth and final case shows that the most modern transactions are at least as susceptible to the curse as the ancient ones are. It involves an electronic funds transfer. In this case, the thief instructs a bank (over the forged signature of the depositor, the true owner of the account) to make payment to its own depositor but into a numerically identified account at another bank. The success of this fraud depends upon the sending bank's necessary ignorance of the significance of the account number at the receiving bank. It is aided by the fact that the sending bank regards the transfer merely as the shifting of funds by its own depositor to an account at another bank also owned by the same depositor. Finally, it depends upon the knowledge that the employee at the receiving bank will disregard the name on the incoming message and the name on its account and will simply deposit funds into the account at its bank whose number corresponds with the number on the electronic funds message. In effect, the thief understands that the outbound message will be treated as a message identified by name and that the inbound message will be treated as a message identified by number.

The increased volume of checks handled by every bank has caused virtually all banks to abandon the practice of examining signatures on every check.

In *Bradford Trust Co. of Boston v. Texas American Bank – Houston,* two persons using the names of Hank and Dave Friedman sent a forged letter and a stock power to Bradford Trust, the agent for a mutual fund. This letter directed the liquidation of $800,000 from the mutual fund account of Frank Rochefort. The authors of the letter instructed Bradford to wire the $800,000 to the account of Frank Rochefort, account number 057141, in the Texas American Bank – Houston. Bradford instructed its bank, State Street Bank of Boston, to wire the funds to Texas American, and it did. The employee at Texas American ignored Rochefort's name and put the $800,000 in account number 057141. That account belonged to Colonial Coins, not to Frank Rochefort.

Prior to the receipt of the funds, the Friedmans had arranged to buy coins worth $800,000 and had told Colonial they would soon be depositing the purchase price in Colonial's account at Texas American. When the money appeared in its account, Colonial released the coins and the Friedmans disappeared with them. Here we see a variation on the curse that combines elements of the "pay to the order of the bank" transaction and the MICR encoding fraud. The thieves anticipated that the transmitting party would be put at ease by the fact that their own customer Rochefort was to be the recipient of the money. Moreover, they anticipated that neither Bradford nor State Street Bank could easily find out the true owner of the account numbered 057141 at a Houston bank. They also anticipated that the machine operator in the basement of the Houston bank would identify the recipient by number and number only. Because that operator would be doing hundreds of such transactions per hour, they assumed that she would not take the time to compare the name on account number 057141 and the name of the intended recipient on the incoming message. Thus, the system treats the outbound message as one for Rochefort and the inbound message as one for 057141.

In *Bradford Trust,* the trial court applied the Texas comparative negligence statute



and apportioned the loss equally between Bradford and Texas American Bank. Both banks appealed; each argued that the other should bear the entire loss. The appellate court concluded that the loss should fall on Bradford Trust Company of Boston because it had failed to follow its own procedures, procedures that would have stopped the loss had they been followed. Because of an earlier fraud, Bradford had a procedure requiring that requests for wire transfers of large dollar amounts be verified by a senior supervisor at the bank. Bradford's procedure apparently also required a phone call to Rochefort, which, of course, would have uncovered the fraud. The court also noted that Bradford had dealt with the thieves, but Texas American had dealt only with its own customer, Colonial Coin.

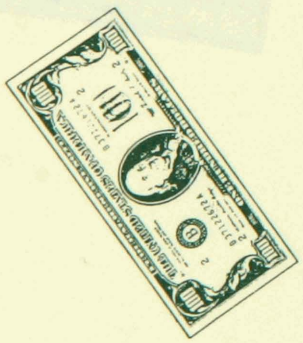
The court's reasoning about who could most easily avoid the loss, therefore who should bear it, seems persuasive. Like Judge Haight in the *Union Trust* case, the court makes a sensible and conventional judgment about who could most easily have avoided the loss. Moreover, the court properly declined to find that the sender of the message should always bear the loss as opposed to the recipient. Under *Bradford Trust,* it would always be open to the sender in a later case to argue that the receiver of the message was the one most at fault.

WHAT THE DRAFTERS HAVE PROPOSED

The specific problems that I have suggested above are well known to commercial lawyers, and *a fortiori* to the bright commercial lawyers who are drafters of the newly proposed article 4A and of the amendments to articles 3 and 4. It is not surprising, therefore, to find that three of the four specific problems that I have suggested are dealt with in these amendments. First, I will discuss the specific sections in article 4A and in the amendments to articles 3 and 4 that will touch upon each of the four examples that I have suggested. Then I will raise the question whether those responses are the wisest and most sensible responses that could be made to these problems. Specifically, I will address the question whether the drafters should behave like repairmen who replace a shock absorber and an occasional bent A-arm or whether they should design a new vehicle with stronger A-arms and better shock absorbers.

Recall that Judge Haight applied section 3-406 by analogy to *Union Trust*. Section 3-406 is usually used to estop a payee or a drawer from proving that his signature is not his own because he "substantially contributed" to the making of the forgery. That section did not apply to Union Trust for its signature was not forged; yet the court used the section by analogy. I see nothing in the amendments to article 4 and in article 4A that would directly apply to the *Union Trust* case. If the case were to arise again, a bank in Union Trust's position could assert the same claims against the downstream banks for negligence under 4-202, just as Union Trust did. If the court concluded that Union Trust should bear the loss, it would have to go through almost the same kind of analysis that Judge Haight used in that case.

There is, however, one twist in the proposed amendments; they incorporate a rule of comparative negligence. Proposed section 3-406 provides that the "loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss." If the judge were to apply section 3-406, by analogy under that regime, presumably he would have to determine whether the New York Federal Reserve, the Albany State Bank, the Philadelphia National Bank, or First Pennsylvania Bank had "substantially" contributed to the loss and, if they had, allocate a percentage of the loss to them. Beyond that change in section 3-406, the amendments leave the judge free to reason by analogy and give him little or no guidance.



The second example, the forged signature dispute illustrated by *Rhode Island Hospi-*

tal Trust and *Medford Irrigation District,* is explicitly resolved by section 4-406(6) that reads as follows:

> Whether the bank failed to exercise ordinary care is determined by reasonable banking standards at the time and place where the check was paid. Reasonable banking standards do not require a payor bank to examine an item that is processed for payment by automated means if the failure to examine did not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from reasonable procedures followed by comparable banks.

The proposed comment three explicitly refers to the two cases and states that it is rejecting the latter and adopting the rule of the former.

The third example involving the "pay to bank" case is apparently resolved by the addition of a new section 3-307, Notice of Breach of Fiduciary Duty. Section 3-307(d) states that one who takes a check from a fiduciary (including an agent) has notice of a breach of a fiduciary's duty, if, among other things, the check is "deposited to an account other than the account of the fiduciary, as such, or an account of a represented person." Untwisted, this means that if a thief deposits the check to his personal account — as opposed to an account held "as" agent or trustee — it is not deposited to an account of the fiduciary "as such" and the very deposit in the personal account gives notice to the bank of the breach of duty. Because the bank is on notice of the breach of the fiduciary duty, it cannot be a holder in due course and it is presumably left open to the claims of the true owner of the money, namely, those of the thief's employer.

The dispute between those who seek to minimize costs by mere repair and those who seek grand improvement at higher risk occurs everywhere.

Name and number conflicts are dealt with explicitly in section 4A-305. That section authorizes the receiving bank to "treat the person identified by number as the beneficiary of the order, if the bank does not know that the name and number identify different persons." Although there are some other qualifications to the rule and some uncertainties inherent in it, the rule generally puts the burden on the sender of an electronic message, not on the receiver. Basically it authorizes the receiver of an electronic message to cast a blind eye on the name and to rely exclusively on the account number. Presumably that is exactly what receiving banks will do henceforth and the burden will fall on the sender, not on the receiving bank.

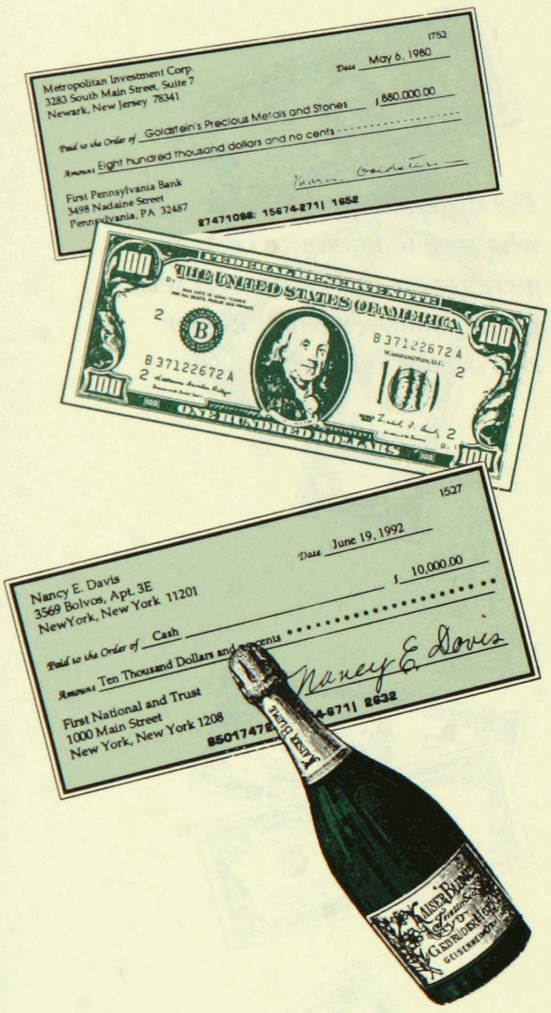
To give the drafters their due, I should point out that they have responded to certain aspects of Goldstein's curse in other, somewhat more expansive, ways. For example, sections 4A-202 and 4A-203 authorize a bank and its customer to establish commercially reasonable security procedures. With limited exceptions, those provisions allow the enforcement of even fraudulent transfer orders that are made in compliance with those security procedures. The rules embodied in sections 4A-202 and 4A-203 are as close as the drafters come to a general recognition of the problems associated with the curse and, in my view, the rules that are set out are the correct ones.

With the exception of sections 4A-202 and 4A-203, I think it is fair to say that the drafters' actions are more in the nature of repairs, replacement of shock absorbers, not in the form of redesign of the A-arms. The dispute between those who seek to minimize costs by mere repair and those who seek grand improvement at higher risk occurs everywhere. There are, of course, good arguments on both sides of the repair or redesign argument, and I am not certain that I am right and that the drafters are wrong.

WHAT THE LAW SHOULD BE

In conclusion, I turn to an evaluation of article 4A and of the proposed amendments to articles 3 and 4 as those proposals apply to Goldstein's curse. As one will see, I have one significant criticism and I accuse the drafters of a few peccadilloes.

To evaluate the response of article 4A and the new amendments to Goldstein's curse, I begin with three assumptions. If any of these is incorrect, my criticisms of article 4A and of the amendments to articles 3 and 4 are also defective.



My first assumption is that Learned Hand was right. I assume that society is best served by placing losses on those who could best have avoided them. I believe that we should not label one as negligent merely because he could avoid a loss at some price. We should compare the cost of avoidance with the probability of occurrence and the magnitude of the injury. I assume that placing the loss on the lowest cost-risk avoider will cause that person to take the most appropriate steps to avoid or minimize it and those steps would be less expensive by hypothesis than those that could or would be taken by others. Therefore, I assume that the overall cost to society of Goldstein's curse will be minimized by placing all or most of the losses associated with it on the one who could least expensively prevent those losses.

Second, I assume that the curse cannot be exorcised. I assume that speed and high volume in a payment system is antithetical to reflective intelligence. I assume that the number and amount of payments will grow in more or less its current form, but with paper gradually giving way to electronics. I assume, therefore, that the system's day-to-day supervision will be in the hands of persons who understand only a small part of the process and who are largely unskilled and unsophisticated except in the operation of their own small parts of the larger system. I assume that an increasing share of all transfers will be without human intervention of any kind, accomplished by computers, by MICR encoding and by the reading of electronic messages. Therefore, I assume that the opportunity for the Goldsteins and others will grow, not shrink.

Third, I assume that the person who can most cheaply avoid the losses is nearly always someone outside the banking system or at its margins. In the embezzlement case, I assume that the employer of the embezzler can almost always avoid the loss at lower cost, by hiring and supervising the employee, by examining check statements, and by maintaining sensible business practices.

Where, as in Goldstein's own case, the thief is not an embezzler, it is more difficult to predict who can most easily avoid the loss. Surely Judge Haight's judgment is persuasive that Union Trust was the villain in Goldstein's case, but one can imagine other cases, done by more clever thieves than Goldstein, where it might be a Federal Reserve or a collecting bank who could most easily discover the loss. Because the bank's pockets will often be the deepest and it the most obvious object of the court's disapproval, I fear a natural inclination of some courts to put the loss on the banking system in the misguided notion that the banks can most easily avoid the loss and most easily spread it among their customers.

If one accepts my three assumptions, that losses will be minimized by putting them on the lowest cost-risk avoider, that Goldstein's curse cannot be exorcised, and the persons outside the banking system are most often the least cost-risk avoiders, one can find significant fault with article 4A and with the proposed amendments to articles 3 and 4.

First, consider three peccadilloes. As I have indicated above, section 3-307 would appear to decree that the depositor is the winner and the bank the loser in the "pay to bank" check case described above in *Neely.* One reaches this conclusion because 3-307 states that the bank is *ipso facto* on notice and, having notice, is not a holder in due course. Presumably, therefore, it is open to the claims of the true owner of the check for conversion. If the three assumptions under which I am proceeding are correct, this section will sometimes absolutely foreclose the correct outcome. In cases like *Neely,* I assume that the operator of the Midas Muffler Shop who deals with the embezzler on a day-to-day basis, who fails to use proper business practices, and who would know of the embezzlement with only ten seconds' examination of the bank statement, is the least cost-risk avoider. He is the one who should bear the loss — just as the court held in *Neely.* To the extent that section 3-307 invariably places the loss on the bank, I believe it is wrong.

On the other hand, I would not argue that the customer should always bear the loss in these cases. There may be many cases in which there are only a limited number of

checks involved and in which the procedures of the customer are adequate. In such cases, the bank may well be the one who should bear the loss as many courts have found in cases analogous to *Neely.*

The second peccadillo lies in sections 4A-204 and 4A-304. Each of these deals with the duty of the customer or sender to report unauthorized (4A-204) or erroneously executed (4A-304) payment orders. Unlike section 4-406, where the customer bears at least his share of the loss if he fails to examine the bank statements and make timely reports, these sections give the customer a mere slap on the hands. They deprive the customer of interest on the amount that was erroneously or improperly debited, yet they permit the negligent customer to recover the principal amount. If the customer is obliged to examine his statement that shows the payment of checks and if his failure to report improper payments shown on such statements renders him liable for subsequent withdrawals, I fail to understand why a similar obligation should not be imposed on the customer where the payment is done electronically. Indeed, with check truncation — where even check transfers are concluded electronically — any justification for a distinction for a different rule in sections 4-406 and 4A-204 and 4A-304 is more uncertain. In many such cases the customer will surely be the least cost-risk avoider and in such cases he should report the altered check to the bank or suffer the consequences.

My third complaint, and one that I assert with less confidence than the others, has to do with the introduction of a comparative negligence standard in sections 3-406 and 4-406. On the one hand, these rules may facilitate the allocation of losses arising out of the curse in ways consistent with my argument. Under the current sections 3-406 and 4-406, the bank can throw the loss back on the customer only if the bank itself is not contributorily negligent. If the bank failed to follow reasonable commercial standards or was contributorily negligent, it throws none of the loss on the customer; it bears it all. Comparative negligence standards will almost certainly permit the allocation of a larger share of the loss to the customer than is true under the current regime. Given my view about who is most likely at fault in such cases. I indorse that outcome. That is a virtue of the comparative negligence standard.

Comparative negligence standards will almost certainly permit the allocation of a larger share of the loss to the customer than is true under the current regime.

Yet, I have a fear about the practical effect of the comparative negligence standard. It is possible that the standard will cause allocation of some losses away from the least cost-risk avoider and contrary to what I have above predicted. Would courts in cases such as *Rhode Island Trust* be more likely to find that a bank (which had failed to examine any signature under a certain dollar amount) was itself partly at fault and so had "substantially" contributed to the loss and thus should bear some part of it? If that is true, the power of the loss allocation system to stimulate socially appropriate behavior will be diminished and the dead weight loss arising from litigation will be further increased by the hope of transferring some of the loss to those who are now regarded as not at all at fault. In effect, I suggest that the use of a comparative allocation rule may have the unintended consequence of also changing the standards by which one measures negligence, that it may have the consequence of altering the Learned Hand calculus and of imposing duties where before none existed. That, of course, is not the purpose of a comparative standard, but it is plausible to think that it could have that consequence.

One other fault in the comparative negligence standard lies in its potential for stimulating litigation where none would now exist. If there are now many cases that are settled without litigation because one party finds itself hopelessly at fault and understands that it will bear the entire loss, and if those cases would be litigated in a comparative negligence regime out of a hope of recovering at least a part of the loss, the comparative negligence standard may bring with it a dead weight loss in the form of litigation expense that will outweigh its virtues. Whether that will happen is impossible to predict. The data on the impact of comparative negligence on the torts system in this respect are equivocal.

My final and most serious complaint is one that probably could have been directed at the drafting committee of each of the articles of the Uniform Commercial Code and certainly at the drafters of every set of amendments to any of the articles. That is the complaint that there is no explicit rule that deals with the problems posed by Goldstein's curse when none of the specific rules apply. The drafters should be applauded for their recognition of specific issues in sections such as the amendments to sections 3-406 and 4-406. Indeed, in sections 4A-202 and 4A-203, the drafters have come quite close to a general recognition of the problems arising from the curse, at least in electronic funds transfer cases. Yet, there is no general rule of default in article 4A or in the amendments to articles 3 and 4. Worse, the proposals for the use of comparative negligence in sections 4-406 and 3-406 may leave the courts confused about the appropriate analogy. Some courts are likely to conclude that they should copy sections 3-406 and 4-406; other courts may follow the direction of section I-103 into the common law and so apply traditional rules of negligence and contributory negligence.

Of course, if the specific sections of articles 3, 4 and 4A have dealt with every case that could arise from Goldstein's curse, my concerns are unfounded. To show that that is not so, consider three cases that are not covered by article 4A or by the amendments to articles 3 and 4. First is Goldstein's own case. There Judge Haight refused to allow Union Trust to recover from the downstream banks under section 4-202 by applying 3-406 by analogy to Union Trust. Neither the current section 3-406 nor the proposed reaches the *Union Trust* case. No Union Trust signature was at issue and so the bank could not be estopped to deny its signature. Nothing in the amendments changes this outcome and even after the amendments a judge would be called upon to make his own law.

If anything is certain, it is that the imaginations of honest lawyers and law professors are much more impoverished than the imagination of the Goldsteins.

The second case that will soon come to the court, if it has not already, arises when the sending or receiving bank "helps along" a fraudulent electronic fund transfer. Assume, for example, that a thief successfully breaks a security code and somehow acquires most, but not all of the proper identification of the depositor's account. The thief then sends a message instructing a withdrawal (or a deposit if it is done at the receiving end) to an account numbered 55555. Unbeknownst to the thief, the sending (or receiving) bank account contains a letter at the end of the numerals, i.e., 55555E. Is the sending or receiving bank who unintentionally assists the thief in committing a fraud by adding the "E" to the "55555" itself engaged in negligence? If fraudulent transfers are more likely than non-fraudulent ones to have small defects and if such defects would put a reasonably prudent banker on notice, should not the bank be held negligent and bear the loss? It seems so to me, yet I see nothing in article 4A that would allow that result.

Consider yet another form of apparent negligence practiced in an actual case that did not come to court. In that case an American and a group of Colombians — all apparently in the drug trade — stole several millions of dollars by use of the name-number discrepancy now covered by section 4A-305. They ultimately attempted to withdraw the money by appearing en masse in a foreign, non-Spanish speaking country, to carry away their funds in cash in paper bags. According to the testimony given in that case, the appearance of a wild-eyed group seeking to take more than $10 million in cash in a paper bag, would put any reasonable bank on notice of something amiss. If the bank ignored that notice, should it not bear the loss? I believe it should, but there is nothing in article 4A that would allow it.

If anything is certain, it is that the imaginations of honest lawyers and law professors are much more impoverished than the imagination of the Goldsteins. Therefore, we can safely predict that there are frauds now secretly at work and others soon to occur that are well beyond our imaginations.

How should the courts then deal with my three examples and with the scores of others that Goldstein's curse will present to the courts over the next twenty years? Are the courts simply to apply the rules in articles 3, 4 and 4A and to ignore the fact

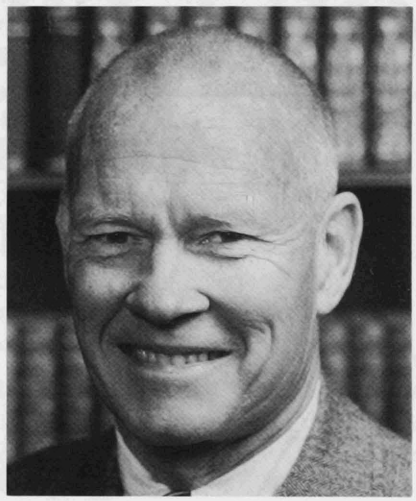
that those rules require the loss to fall on someone who may not be the least cost-risk avoider? If not that, then what? Should the courts apply section 3-406 by analogy? Should they apply the common law via section 1-103?

Here the drafters have failed us. We need a specific section. In my view this section should direct the court to place the loss on the one most seriously at fault who, by hypothesis, could most cheaply have avoided the loss. I believe that the section should be supported by commentary that would spell out the three assumptions that I have above posed.

Absent such a rule, I foresee not only the probability of bad law, but also of non-uniform law. Because my three assumptions are indorsed only by implication and by inference to be drawn from sections such as 4A-202 and 4A-203, those rules will not be obvious to judges who are not as thoughtful as Judge Haight. Moreover, some courts will erroneously conclude that the banking system as a whole should bear the loss because they believe that system is a better risk spreader and because they believe it can most easily avoid future losses. Finally, even well-intentioned courts may seize on different elements of different rules and apply them by analogy. The modest bow to comparative negligence in sections 3-406 and 4-406 invites this lack of uniformity.

In conclusion, I applaud the incremental recognition of Goldstein's curse by the drafters of the amendments to articles 3 and 4 and article 4A. I predict that the system's ability to distinguish between fraudulent and honest transactions will not improve and is likely to decline. I believe, therefore, that Goldstein's curse will be with us for the foreseeable future and that the civil law problems it will present to the courts will increase. I hope that I am not a Cassandra and that at least the courts, if not the drafters, will agree with my three assumptions and so place the losses arising from Goldstein's curse on those who can most easily avoid them. And I hope that is so, even though those losers will most often be persons outside of or at the margins of the bank payment system.

James J. White is the Robert A. Sullivan Professor of Law. He began his academic career at Michigan in 1964. He has written widely on commercial law and published Handbook of the Law Under the Uniform Commerical Code, 3d ed. (with Summers), in 1988.



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IMAGES OF A FREE PRESS

The Costs of an Autonomous Press

by Lee C. Bollinger

In Images of Free Press, 1991 University of Chicago Press, Dean Lee C. Bollinger, presents what Floyd Abrams has called a "subtly reasoned and powerfully argued attack on much of the received wisdom about First Amendment theory and law." In this excerpt, Bollinger considers the principle of press autonomy initiated by the country's seminal libel case, New York Times v. Sullivan. The case was brought by L.B. Sullivan, an elected commissioner of Montgomery, Alabama, who, while unamed in the challenged articles, said his reputation had been damaged by published errors. The Court found for the New York Times. Bollinger argues that while the press autonomy created by Sullivan and its sequels may be the best system available, much more thought needs to be given to weighing the risks and costs of the present system.

The idea of journalistic autonomy can be criticized on many different grounds. The most obvious is that this degree of press freedom requires too great a sacrifice of competing *social* interests. This leads us to ask what those interests are and whether the Court has properly assessed them. If it has not, we then will want to know what explains this undervaluation or misjudgment.

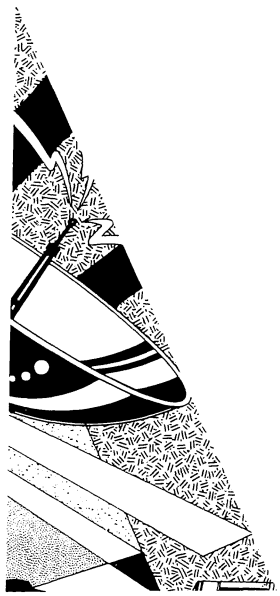
Let us begin with the most conventional form of criticism of press autonomy. It is possible to claim — and some have done so — that the Court has purchased press freedom at too high a price of human pain suffered by individuals who, for example, have their reputations sullied by defamatory statements or by disclosures of private personal facts. If the price has indeed been too high, one possible explanation might be that (taking the libel area) the Court got off to a bad start when it established a general rule based on the particular facts of *Sullivan*. *Sullivan* was surely not a representative libel case. It seems doubtful that Mr. Sullivan's reputation was seriously damaged by the allegedly false statements in the *New York Times* advertisement. Indeed, given the time and the place, it is not inconceivable that his reputation was enhanced by it. It is a commonly observed fact among lawyers that the outcome of a case may depend upon the special features of the litigants before a court (creating the "central image," as it were, of what the world is like for purposes of a particular ruling). It is highly desirable, psychologically, to have a sympathetic client. And when the *Sullivan* case was called before the Supreme Court, Sullivan's lawyer must have known he didn't have one. Because not every public official is a Sullivan, it is reasonable to ask whether in adopting the rules it did covering public debate generally the Court's judgment about the human costs involved was distorted by the peculiar facts before it at the time.

There is a further sign in the libel case law that this has in fact occurred. The Court has continued to insist that public officials and figures cannot legitimately complain about the lack of legal protection against defamatory statements under *Sullivan* because they have "voluntarily" chosen to enter the arena of public debate and have, therefore, "assumed the risk" of nasty commentary. This, however, is an unfair ploy by the Court, an avoidance maneuver by which it tries to minimize the degree to which we should care about the pain inflicted under our rules. Essentially, the Court has said that, since these individuals have freely chosen a public life, what happens to them is their own doing, just as it is for a man who breaks his leg while hiking in the wilderness. Putting aside for the moment the fact that we also have an interest in encouraging people to enter public affairs, it simply is wrong to suppose that the pain inflicted by defamatory statements about public officials and figures is not our responsibility or concern. It should always be open to people to object to the way the world works under the rules we create, and not be dismissed by the claim that they have chosen to continue living in that world and, therefore, can be taken as having assented to it.

There are several other examples of the Supreme Court undervaluing the private costs of press speech. Consider the Court's analysis of the privacy interests at stake in *Cox Broadcasting* and *Florida Star*. The Court there intimated that states had no serious cognizable privacy interest in preserving the anonymity of rape victims in the context of the mass media once the information about identity was made available to any member or segment of the public. The Court thus seemed to indicate that any disclosure eliminates all privacy interests at stake. But a Court sensitive to the privacy costs involved surely would have noted that to a normal person there is a great difference between having a humiliating and embarrassing fact recorded in a transcript housed at the local courthouse and having it become the headline of the local newspaper or television station.

These and similar instances suggest that we should worry about whether the Court has been sufficiently attentive to the competing human costs wrought by the principle of an autonomous, unregulated press as it has evolved in recent decades.

But as important as this concern is about the minimization of the private interests sacrificed to the principle of press autonomy, there are even more serious matters to worry about. We must also consider how press freedom might, instead of enhancing public discussion and decision making, actually prove to be a threat to it — a threat to quality decision making, a threat to *democracy,* a threat to the very values the First Amendment (as defined by *New York Times v. Sullivan* and its successors) is supposed to further.



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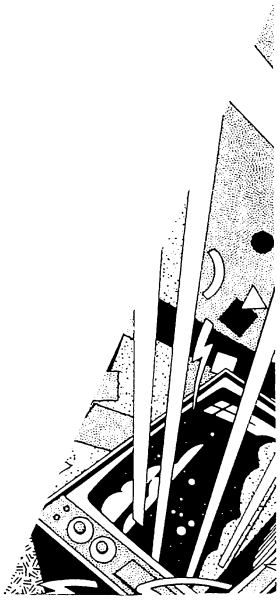


There is no guarantee that the press will not abuse the freedom it possesses under the autonomy model. And there are many ways in which it might do so.

There is no guarantee that the press will not abuse the freedom it possesses under the autonomy model. And there are many ways in which it might do so. The press can exclude important points of view, operating as a bottleneck in the marketplace of ideas. It can distort knowledge of public issues not just by omission but also through active misrepresentations and lies. It can also exert an adverse influence over the tone and character of public debate in subtle ways, by playing to personal biases and prejudices or by making people fearful and, therefore, desirous of strong authority. It can fuel ignorance and pettiness by avoiding public issues altogether, favoring simple-minded fare or cheap entertainment over serious discussion. Even if the pressures for low-quality discussion come from the people themselves, as to some extent they do, the press acts harmfully by responding to those demands and hence satisfying and reinforcing them. It matters not whether the press is the instigator of what is bad or the satisfyer of inappropriate demands originating in the people. In either case, the press can be an appropriate locus point for reform.

Of course, all these concerns become more serious as the number of those who control the press become fewer, and as more and more members of the general population turn to a few outlets for information about the world — both phenomena having undeniably occurred in the twentieth century. The value the First Amendment places on many speakers is not based on a premise that more speakers result in less bias in any one, rather it is assumed that more speakers mean more people who have a self-interest in correcting the biases of others, despite the fact that they are biased themselves. As the number of those who control the gateway to public discussion decreases, this natural corrective is lost. It is, of course, a widely known fact of this century that, for example, the total number of daily newspapers has declined sharply and that the number of towns and cities across the country with competing papers has been reduced to a mere handful. Coupled with this phenomenon is the increased reliance by citizens on massive media enterprises for information about the world.

These would seem to be the sorts of worries that ought to command our attention.

Shortly after the Second World War there appeared a major report on the condition of press freedom in the United States. *A Free and Responsible Press* is a notable document, remarkable for the distinction of its authors, for its willingness to be critical of the press — and for its neglect by the contemporary world.

Published in 1947, the report was the work of the Commission on Freedom of the Press, a commission chaired by Robert M. Hutchins, the famous chancellor of the University of Chicago. The commission was formed in 1943, with grants from Time, Inc., and Encyclopaedia Britannica, Inc., administered by the University of Chicago. Serving on the commission (in addition to Hutchins) were twelve eminent educators and public officials including Harold Lasswell (professor of law at Yale), Reinhold Niebuhr (professor of ethics and philosophy at Union Theological Seminary), and Beardsley Ruml (chairman of the Federal Reserve Bank of New York). The leading First Amendment scholar of this century, Zechariah Chafee, Jr., served as vice-chairman. The commission "heard testimony from 58 men and women connected with the press. The staff has recorded interviews with more than 225 members of the industries, government, and private agencies concerned with the press. The Commission held 17 two-day or three-day meetings and studied 176 documents prepared by its members or the staff." Its aim was to study "the role of the agencies of mass communication in the education of the people in public affairs."

Elegant, intelligent, and concise, the commission's report is as good a statement as we have of why the press is so important for the quality of our political system and why its freedom may be in jeopardy due to its inadequacies and abuses.

The report opens with a central question: "Is the freedom of the press in danger?" "Yes," it answers, and for three reasons:

> First, the importance of the press to the people has greatly increased with the development of the press as an instrument of mass communication. At the

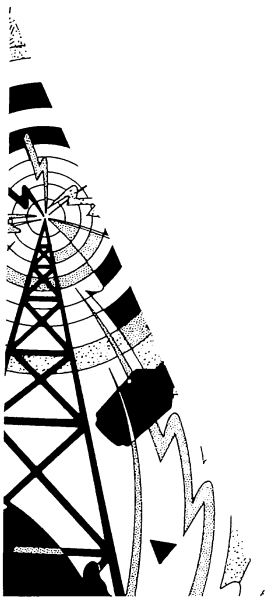
same time the development of the press as an instrument of mass communication has greatly decreased the proportion of the people who can express their opinions and ideas through the press.

Second, the few who are able to use the machinery of the press as an instrument of mass communication have not provided a service adequate to the needs of the society.

Third, those who direct the machinery of the press have engaged from time to time in practices which the society condemns and which, if continued, it will inevitably undertake to regulate or control.

In the commission's view, it was a sad fact of modern life that, although an "extraordinarily high quality of performance has been achieved by the leaders in each field of mass communications," when we look "at the press as a whole" we must "conclude that it is not meeting the needs of our society." Yet the public seemed unaware of this general failure.

> What is needed, first of all, is recognition by the American people of the vital importance of the press in the present world crisis. We have the impression that the American people do not realize what has happened to them. They are not aware that the communications revolution has occurred. They do not appreciate the tremendous power which the new instruments and the new organization of the press place in the hands of a few men. They have not yet understood how far the performance of the press falls short of the requirements of a free society in the world today. The principal object of our report is to make these points clear.



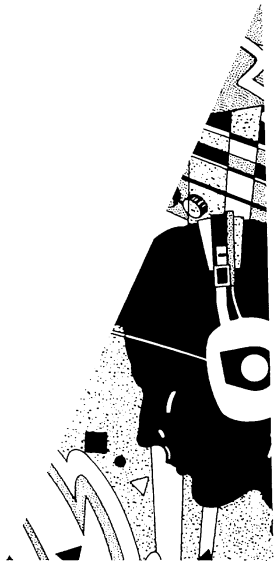
The press has become a massive enterprise, slouching toward monopoly.

The commission said the problems with the modern press stemmed from the fact that the nature of the press has changed dramatically, that a "communications revolution has occurred." The central characteristics of that revolution are the concentration of ownership and control in fewer and fewer hands and the growing dependence of the public on the press agencies for information about the world. When the First Amendment was adopted, and for many decades thereafter, there were so many outlets that "anybody with anything to say had comparatively little difficulty in getting it published." "Presses were cheap; the journeyman printer could become a publisher and editor by borrowing the few dollars he needed to set up his shop and by hiring an assistant or two. With a limited number of people who could read, and with property qualifications for the suffrage — less than 6 percent of the adult population voted for the conventions held to ratify the Constitution — there was no great discrepancy between the number of those who could read and were active citizens and those who could command the financial resources to engage in publication." Each publisher could indulge his or her prejudices, without harm to the public weal, because "in each village and town, with its relatively simple social structure and its wealth of neighborly contacts, various opinions might encounter each other in face-to-face meetings; the truth, it was hoped, would be sorted out by competition in the local market place."

But today things are different. The press has become a massive enterprise, slouching toward monopoly. Even at the time of the commission report, more than forty years ago, "[n]inety-two percent of the communities in this country, all but the bigger cities, have only one local newspaper."

The power of the few to reach so many was the product of many converging forces: the invention of communications technology that increased the size of the reachable audience; the "advantages inherent in operating on a large scale using the new technology" (what we refer to as economies of scale); the personal interest in power of press managers; and the practice necessity of very large enterprises to undertake the tasks of reporting on equally large enterprises, the largest, of course, being the government.

This state of affairs in modern communications could be used for either good or bad purposes. Intrinsically, it was not one or the other. But to evaluate press performance



Many forces contending for control of content steer the press away from performing its important social role.

you have to know what you want. The commission thought we ought to want "first, a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning; second, a forum for the exchange of comment and criticism; third, a means of projecting the opinions and attitudes of the groups in the society to one another; fourth, a method of presenting and clarifying the goals and values of the society; and, fifth, a way of reaching every member of the society by the currents of information, thought, and feeling which the press supplies." Two features of the commission's report should be especially noted here. For the second requirement of a good press, noted above, it recommended that the "great agencies of mass communications should regard themselves as common carriers of public discussion." In an ideal world, it said, there would be "general media, inevitably solicitous to present their own views, but setting forth other views fairly," and then "[a]s checks on their fairness, and partial safeguards against ignoring important matters, more specialized media of advocacy." As to the third requirement, the commission specifically recognized the phenomenon of the central image and of the press's power to shape it. Mass media, it argued, must present a balanced and full portrait of groups within the society because "[p]eople make decisions in large part in terms of favorable or unfavorable images. They relate fact and opinion to stereotypes. . . . When the images [that the media] portray fail to present the social group truly, they tend to pervert judgment."

What, then, for the commission, was the level of performance of the press as measured on this scale of values? How close had it come to meeting the needs of society? Technologically superior, reaching a wider audience, the American press was "less venal and less subservient to political and economic pressure than that of many other countries." And the "leading organs of the American press have achieved a standard of excellence unsurpassed anywhere in the world." But examined as a whole, society's needs are not being met:

> The news is twisted by the emphasis on firstness, on the novel and sensational; by the personal interests of owners; and by pressure groups. Too much of the regular output of the press consists of a miscellaneous succession of stories and images which have no relation to the typical lives of real people anywhere. Too often the result is meaninglessness, flatness, distortion, and the perpetuation of misunderstanding among widely scattered groups whose only contact is through these media.

Many forces contending for control of content steer the press away from performing its important social role. The "economic logic of private enterprise forces most units of mass communications industry to seek an ever larger audience," with the result being "an omnibus product which includes something for everybody." "The American newspaper is now as much a medium of entertainment, specialized information, and advertising as it is of news." "To attract the maximum audience, the press emphasizes the exceptional rather than the representative, the sensational rather than the significant."

> Many activities of the utmost social consequence lie below the surface of what are conventionally regarded as reportable incidents: more power machinery; fewer men tending machines; more hours of leisure; more schooling per child; decrease of intolerance; successful negotiation of labor contracts; increase of participation in music through the schools; increase in the sale of books of biography and history.
>
> In most news media such matters are crowded out by stories of night-club murders, race riots, strike violence, and quarrels among public officials. The Commission does not object to the reporting of these incidents but to the preoccupation of the press with them. The press is preoccupied with them to such an extent that the citizen is not supplied the information and discussion he needs to discharge his responsibilities to the community.

Additionally, the media were continuously exposed to the undesirable and self-serving pressures of groups within the audience, of their own biases as "big business," and of advertisers. And by "a kind of unwritten law the press ignores the errors and misrepresentations, the lies and scandals, of which its members are guilty."

The commission stopped short of calling for government regulation. But such involvement clearly was not unthinkable. Freedom of the press, it said again and again, ought to be viewed as a "conditional right," one extended by society because of the advantages an autonomous press might provide. For press freedom to work, the society must possess a certain *"public mentality"* — "a mentality accustomed to the noise and confusion of clashing opinions and reasonably stable in temper in view of the varying fortunes of ideas." But while these psychological conditions must exist in the society, they may be destroyed as well as created by the press itself. Press freedom has, the commission argued, both "moral" and "legal" dimension, and they need not be coextensive. Although the "moral" right might be "forfeited" through lying or other irresponsible speech, the "legal" right might still be "retained." Life with a cure may be worse than life with the disease. Circumstances, however, may change. The "legal right will stand unaltered as its moral duty is performed." But "[n]o democracy, . . . certainly not the American democracy, will indefinitely tolerate concentrations of private power irresponsible and strong enough to thwart the aspirations of the people."

The commission recommended the self-regulation be tried first. At the time, the press was engaging in little internal regulation. To have a "profession" is to have a collective conscience, the commission observed. Yet, unlike the professions of law, medicine, and divinity, the press had not organized itself to define and cultivate its own standards. Journalism schools were failing in this, too.

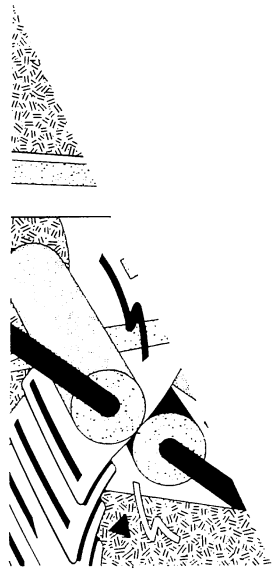
The commission rejected the argument that the press could do no more than meet the demands of its audience, whatever they may be. "The agencies of mass communication," it argued, "are not serving static wants. Year by year they are building and transforming the interests of the public. They have an obligation to elevate rather than to degrade them." The root of the dilemma, the commission warned, lay in "the way in which the press looks at itself." It must view itself as "performing a public service of a professional kind," and understand that "there are some things which a truly professional [person] will not do for money."

To this general recommendation for self-reform, the commission added a few suggestions here and there, calling in the end for the creation of an independent body, funded privately, that would investigate and evaluate the performance of the press and issue reports of its findings and conclusions.

Such was the distinguished commission's analysis of the state of affairs in the postwar press and of what was needed to create both a free and responsible press.

The report of the Commission on Freedom of the Press is not unique in modern times either in its warnings or in the remedies it proposed. There have been other, similar reports and critiques. But the commission report is one of the most forcefully presented, and it reflects the considered judgment of a highly respected group of individuals. It also emerged at the beginning of the post-World War II era, which is of primary concern here, for that is when the phenomenon of mass communications took a giant leap forward, when people suddenly became intensely conscious of the potential totalitarian uses of mass communications, and when the Supreme Court itself began dealing with a variety of government regulations that had a special or exclusive effect on the press. It was also a time when a major body of social science scholarship began to develop, one that continues to this day, seeking to understand how news media "construct" the news, how news production is affected, or skewed, by the economic structure of the society and the media, by the internal organizational structure of the media, and by broad cultural forces. It is important to understand how the Supreme Court addressed and evaluated these concerns about the press as it set about developing the principle of autonomy.

To inquire into this matter is to confront the surprising fact that in virtually none of



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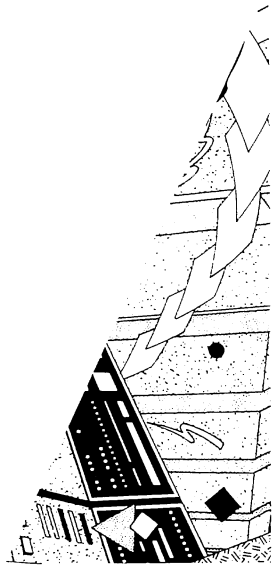


The Court in Sullivan *began to develop an understanding of the psychology of speech behavior.*

the major First Amendment cases is there any serious treatment of the kind of concerns about the performance of the press one sees discussed in the commission report. The Court's failure to address these matters was not for want of opportunity. Indeed, in many cases it seems to have gone out of its way — to the brink of misrepresentation — to ignore the risk that the press can become a threat to democracy rather than its servant. All things considered, the Court's narrow-minded performance in this respect seems nothing short of astonishing.

Two areas of the law governing the press that display this tendency of judicial avoidance are libel and privacy. In cases like *Sullivan* and *Cox Broadcasting,* it will be recalled, the Court has treated the costs of speech that is defamatory and invasive of privacy as purely *private,* the infliction of pain and suffering on individuals whose reputations in the community are tarnished by falsehoods or truths. The state's interest in prohibiting such speech is said to derive from the individual interest at stake.

While individual interest in the areas of libel and invasion of privacy should not be belittled, to conceive of this as the only interest jeopardized by such speech is to ignore the relevance of other strong social interests in the quality of public discussion. The Court in *Sullivan* began to develop an understanding of the psychology of speech behavior that is relevant to thinking about the First Amendment implications of such laws as those concerning defamation. Recall that the Court offered two competing images — the image of citizens reluctant to enter politics, and the image of them as uncontrollably aggressive when they do engage in political debate. Yet, despite the fact that the Court itself assumed these behavior patterns to be common, and despite the belief that both personality types might produce harmful effects for public discussion and decision making, a situation with ramifications well beyond the mere generation of libelous remarks, the Court gave no hint of recognition of that dimension of the problem, no hint of recognition that it might be dealing with an aspect of behavior that could thwart democracy unless curtailed. One would think that, given the premises about human nature the Court assumed, it would have been alerted to the fact that it was touching upon deeper and more complex issues.

In cases like *New York Times v. Sullivan,* therefore, the Court has essentially *privatized* the injury of speech behavior. But it does not take a great deal of imagination to discover why a concern with the quality of public discussion and decision making ought to extend to libelous utterances. We all have an interest in not being misled by falsehoods, including those about public officials or public figures. Otherwise, good public officials may be wrongly voted out of office or lose their capacity to persuade and lead those they represent, and the public may be led to make incorrect political judgments, all because the press reported a defamatory accusation. Journalism unrestrained by defamation law also may discourage citizens from entering political life, because they know they will have to bear the risk of libelous falsehoods without recourse against those who, though undeterred now from entering public debate, are similarly undeterred from making false accusations due to the lack of a potential action for damages. Those who choose to remain on the sidelines of public affairs may well be better people than those who become political actors.

No mention of these concerns is to be found in the Court's opinion in *New York Times v. Sullivan,* or for that matter in any of its subsequent decisions. In *Sullivan* itself, the tremendous power of the institutional press is rhetorically avoided by not mentioning the press and analyzing the case in terms of the far less menacing image of the "citizen critic." Even First Amendment analysts sensitive to the need for quality public discussion seem intent on avoiding the issue of the adverse effects on public discussion of uninhibited defamatory statements.

This neglect of the public interest has also occurred in the Court's limited foray into the law prohibiting publication of private facts, although here the story is somewhat more complicated and, in a sense, more interesting. I noted earlier that the Court's characterization of the cost of this kind of speech has been essentially that it is a matter of private pain and suffering. Yet, if one returns to the origins of the privacy concept, a

very different analysis is found of the reasons for legal restrictions on privacy invasions. In 1890, Samuel Warren and Louis Brandeis published the first plea for the creation of a right of action for invasions of privacy. Their essay was not an obscure law review article when it was published, nor is it now dusty with time and long forgotten. It was widely influential in its own time and even today is often described by many as the most famous law review article ever written. In it, Warren and Brandeis were concerned about providing legal redress to those individuals whose privacy was invaded by the publication of personal facts. That is how the Court, in *Cox Broadcasting,* referred to it. But Warren and Brandeis also argued that the real destructiveness of the publication of private facts lay in its impact on *social* thought. Their condemnation of this kind of speech on public interest grounds is so powerful that it justifies lengthy quotation:

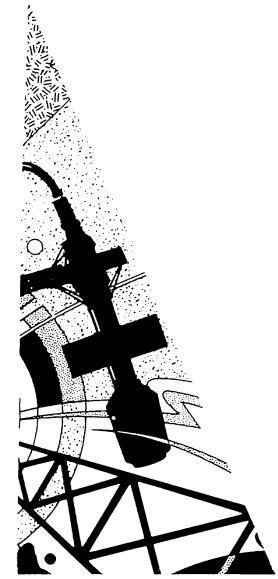
> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. . . . When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and the thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feelings. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

Despite this powerful thesis, the Supreme Court today seems intent on ignoring the public dimension of the harmfulness of this kind of speech. The costs are regarded as exclusively private.

Together these cases seem to reveal an important feature of the Court's treatment of laws governing the press — namely, a strong disinclination to raise and address concerns about the adverse effects of some press speech on the quality of public discussion, concerns expressed at the beginning of this chapter and described in detail in reports such as that of the Hutchins commission. In only case, *Miami Herald v. Tornillo* in 1974, has the Court even referred to such concerns. There it noted the State of Florida's argument that the circumstances of the press had changed radically since the adoption of the first amendment: as the Hutchins report had noted, the nation had changed from a place where newspapers proliferated, and there existed an abundance of available information and opinion to one in which a few giant organizations effectively control the marketplace of ideas. Guaranteed access for persons criticized by newspapers is, the state argued, essential to quality public debate. But, though the Court took note of these concerns, it did not in the end directly address them. It simply concluded that Florida's law constituted an inappropriate "intrusion into the function of editors."

Why has the Court seemingly been so oblivious to the risks to democracy of a more or less completely free press? It would be difficult to make the case that the need for active judicial review has been replaced by a system of collective press self-regulation, something the commission strongly recommended. Indeed, in the years since the commission report, there have been very few efforts in that direction. One was the creation of the National Press Council, the purpose of which was to mediate private complaints against the press. A wholly private and voluntary affair, the council eventually disbanded because several major newspapers (the *New York Times* among them) refused to participate on the ground that to do so would compromise their independence.

The key problem has been with the Court's analytical methods. To minimize private



Why has the Court seemingly been so oblivious to the risks to democracy of a more or less completely free press?

injury inflicted by press speech is bad enough, but to treat the injury as an exclusively private matter is worse. Has the Court done this because it is ignorant of the risks?

Perhaps the Court is itself the unconscious victim of the tendency it observed in the *Sullivan* opinion about the distorting influence of our beliefs on the way we understand the world. Once it decided that the best course was to protect the press, the Court may have succumbed to the tendency Mill observed (and the Court quoted) to "argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion."

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