THE UNIVERSITY OF MICHIGAN OFFICIAL PUBLICATION

Law Quadrangle Notes

FALL 1969
VOL. 14, NO. 1

Law Quadrangle Notes / Fall, 1969

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Law Quadrangle Notes

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Vol. 71, No. 15 August 20, 1969

Entered as second-class matter at the Post Office in Ann Arbor, Michigan. Issued semiweekly July and August and triweekly September through June by The University of Michigan. Office of Publication, Ann Arbor, Michigan 48104.

Faculty Votes to Include Students On Law School Standing Committees

For the first time, many of the Law School's standing committees will have student members as a result of a series of resolutions adopted by the faculty last April. The action came after a long and careful deliberation by an ad hoc committee, which included four student members, on the question of student participation in Law School committees.

The following resolutions, recommended by the ad hoc committee, were adopted:

—Unless otherwise provided, student members of faculty committees will be selected by a committee of the Lawyers Club with the approval of two-thirds of the Board of Directors; but no student shall be appointed to more than one standing committee of the faculty. On committees having three student members, one shall be appointed each year for a two-year term.

—The Curriculum Committee shall consist of seven members, three of whom shall be students.

—The Admissions Policy Committee shall consist of seven members, three of whom shall be students. The chairman of the committee will be responsible for excusing student members from deliberations requiring the use of sensitive information about persons who may become fellow students or professional associates of those members.

—The Scholarship Awards Committee shall consist of five members, two of whom shall be students. Two students will be selected as alternate members to sit in the place of one or both student members if they find it necessary to recuse themselves on account of bias. Student members and alternates will be selected by the chairman of the committee from the second- and third-year classes by means of a lottery drawing. The chairman of the committee will be responsible for excusing all student members from participation in decisions which require the use of sensitive information about fellow students.

—The Graduate and Research Committee shall include one graduate student member, who shall participate in the committee's deliberations and decisions regarding the graduate program. The graduate student shall be selected by the Dean. For the purpose of awarding fellowships for foreign study, the Graduate and Research Committee shall add to its membership the student members of the Scholarship Awards Committee. If either or both of these students recuse themselves for bias, the chairman of the Graduate and Research Committee shall select alternates by lot from the second- and third-year classes. The chairman of the committee will be responsible for excusing all student members from participating in decisions which require the use of sensitive information.

—The Faculty Personnel Committee shall (a) provide the Student Personnel Committee information regarding candidates who are being seriously considered for appointment (other than merely as members of the summer faculty or as visitors); (b) afford opportunity when feasible for the Student Committee to observe or meet with such candidates; and (c) receive and communicate to the faculty written comments of the Student Committee regarding such candidates and regarding other candidates and personnel needs which the committee may wish to bring to the faculty's attention.

—The Administrative Committee shall include one student. Any student petitioning the committee may strike the student member from the committee for the purpose of hearing his petition, either entirely or by substituting another student who shall be chosen by lot to participate in the single decision. The student chosen by lot will be excused from service only if he asserts that he is incapable of dealing fairly with the matter in hand. (*Editor's note:* This committee is principally concerned with the application of academic and disciplinary regulations.)

—A Committee on Academic Standards and Incentives shall be created to include seven members, three of whom shall be students. (*Editor's note:* This committee is expected to deal with the formulation of school policy toward honorific academic programs and related matters. The Administrative Committee has exercised a nominal jurisdiction over policy-making with respect to academic standards, but generally this task has been performed by ad hoc committees.)

—It is the policy of the faculty that committees confronting issues or suggestions of general interest which are suited to public discussion should hold public hearings for the purpose of permitting all interested students to express their views.

—An ad hoc committee of faculty and students shall be appointed by the Dean in cooperation with the Lawyers Club to consider measures to increase the availability of information to students. This committee is encouraged to report in time for its suggestions to be implemented by the beginning of the fall term of the current year.

Dean Allen Elected

Francis A. Allen, dean of the University of Michigan Law School, was elected to the Council of the American Law Institute last May.

The prestigious council consists of some 40 of the nation's prominent judges, lawyers, and law teachers. Six other persons were elected, including Prof. Paul Freund of Harvard, Prof. Charles A. Wright of the University of Texas, and Dean J. B. Fordham of the University of Pennsylvania Law School.

The American Law Institute was founded in 1923 "to promote the clarification and simplification of the law and its better adaptation to social needs, and to encourage and carry on scholarly and scientific legal work." The institute's membership is elected and includes 1,500 judges, lawyers, and law professors. The group undertakes a wide variety of legal projects.

As reported in the last issue of the Law Quadrangle Notes (No. 117, Vol. 70, April, 1969), an experiment in computer-assisted instruction in law was conducted at the Law School this spring. The experiment, which essentially involved a dialogue between the computer and a student, was conducted under several different conditions. Some students worked singly with the computer, as shown in the top photo. Some were in groups of three each, giving the computer collective responses. The same method was used by larger student groups, 15 to 20 in each, with a discussion leader, as shown in the bottom photo. Profs. Arthur R. Miller and Layman E. Allen, assisted by Research Associate Prudence Abram, conducted the experiment.

Over 400 Students Receive $510,000 In Financial Aid From Law School Funds

How does the Law School assist its students financially?

Here, as revealed by the Scholarship Committee Report (Feb. 1968–Feb. 1969), are some of the answers:

"Of the total known aid—$903,399—received by law students, 56 per cent—$510,874—came from Law School scholarship and loan funds. The latter represented assistance to 41 per cent of the students, or 440 of 1,073 students.

"The average amount of financial aid per student from Law School funds was $1,150. (A typical expense budget for the nine-month school year for an unmarried student was about $4,000 for a non-resident, who paid $1,740 in tuition. For a resident it was $2,800, including $680 tuition.)

"The nature of the assistance ranged from the short-term, 60-day, non-interest bearing loan to the gift scholarship of substantial amount plus long-term loan at three per cent interest.

"Loans to students from Law School loan funds have remained at a fairly constant level in recent years for the simple reason that this reflects full utilization of available funds. Available scholarship funds were also fully utilized for the 1968–69 year.

Amounts Received from Law School Scholarship and Loan Funds

LOANS	
Loans from Law School Loan Accounts (305 students benefited from 540 loans)	$183,475
Loans through the Bank Loan Program (41 students)	30,520
SCHOLARSHIPS	
Moral Obligation Awards (217 students)	155,800
Gift Scholarships (94 students)	133,954
Prizes (25 students)	5,585
DeWitt Awards (Filipinos) (3 students)	1,540
TOTAL AID from Law School Funds	$510,874

Amounts Received by Students from Other Known Sources

State and Federal guaranteed college student loans received from various hometown banks	$242,000
NDEA loans to 29 students made by U-M Financial Aids Office	32,880
Loans made by Mellinger Foundation to 26 students	15,645
Grants, scholarships and loans from private foundations	13,000
Veteran benefits under "G.I. Bill" to 69 students totaling approximately	89,000
TOTAL AID from *non*-Law School sources	$392,525
TOTAL AID from *all* known sources	$903,399

Five-year Comparison of Expenditure of Law School Funds:

1964–65	*1965–66*	*1966–67*	*1967–68*	*1968–69*
Loans				
142,501	219,925	204,965	204,845	213,995
Moral Obligation Awards				
93,085	109,225	109,100	130,580	155,800
Scholarships and Prizes				
90,923	81,843	112,815	148,400	141,079
Totals				
326,509	410,993	426,880	483,825	510,874

"Financial aid to 53 freshmen entering in the summer and fall 1968 included the following: Grants of full tuition to those whose admissions credentials indicated a probability of superior scholarship, on a half 'moral obligation' scholarship and half loan basis. In addition, grants in amounts substantially exceeding tuition, as indicated by the need, were made to selected applicants of exceptional promise. Also substantial grants—either as a gift scholarship or a combination of scholarship and loan—were made to newly-admitted black students as determined by their need.

Comparison with Previous Admissions Awards:

1964–65	*1965–66*	*1966–67*	*1967–68*	*1968–69*
Amount				
34,185	23,120	47,830	49,175	87,475
Number of Students				
30	20	46	40	53

"Junior and senior students continued to be awarded financial aid in accord with the guidelines of past years. This included the award of gift scholarships up to the amount of tuition to students with need serving on the *Law Review* and *Prospectus*, and other juniors and seniors receiving aid half as a 'moral obligation' scholarship and half as a loan.

"Four new scholarship accounts were created: the Clifton M. Kolb Law Scholarship Fund; the George H. Heuble Foundation Fund; the Arthur Webster Memorial Fund; and the Arthur M. Smith Memorial Scholarship Fund.

"The over-all contribution of monies by the 1968 Law School Fund to both the scholarship and loan accounts (for endowment principal and current use) totalled $119,240.

"In the fall term 1968 the University, acting to alleviate the hardships of recent tuition increases, increased from $27,600 to $62,600 the amount available to the Law School for General University Scholarships for law students.

"One new loan account, the Clark B. Montgomery Loan Fund, was established.

"The total amount of loans outstanding in the Law School accounts at June 30, 1968, was $734,733. Repayments of outstanding loans during the fiscal year ending on the same date was $124,242, making this the major source of newly loanable funds."

Prof. T. E. Kauper on Loan To Department of Justice

Prof. Thomas E. Kauper was granted a year's leave of absence, June 1, 1969, to become first deputy attorney general in the U.S. Justice Department's Office of Legal Counsel.

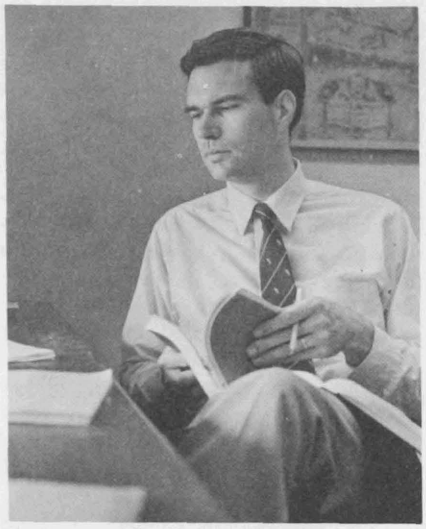
Prof. Kauper, former law clerk to Supreme Court Justice Potter Stewart, has been a faculty member since 1964.

The chief responsibility of the Office of Legal Counsel is to provide legal advice to the U.S. Attorney General, and thus directly to the White House. The office is also charged with resolving inter-agency disputes and with developing the Justice Department's legislative program.

Janis Berzins, 82, Dies

Janis T. Berzins, who came to work at the Lawyers Club in 1966 and soon became a well-known figure on the Law Quad, died last July at the age of 82. A native of Latvia and former executive director of the Latvia State Bank, he was named Senior Citizen of the Year in Ann Arbor in 1966 when he came to the Lawyers Club. Among the many helpful acts he performed for students was organizing occasional Law Students Music Hours.

Chambers, Vining Join Law Faculty



G. Joseph Vining

One of the professors new to the University of Michigan Law School faculty this fall is G. Joseph Vining, who will teach criminal law and the law of corporations.

Vining likens his decision to enter law to a sudden conversion on the road to Damascus. At the time, he was doing research in embryology, his Yale undergraduate major, at the Woods Hole Oceanographic Institute.

After graduating from Yale in 1959, and before entering the Harvard Law School in 1961, he attended Cambridge University in England on a Mellon Fellowship to study medieval European and modern English history for an M.A.

In his second year at Harvard, Vining and three fellow *Law Review* editors initiated the Second Year Writing Program, an effort to extend the intellectual experience which derives from written and editorial analysis to students who were not on the *Law Review*. This non-credit activity for a substantial part of the second year class chosen by lot has become a regular feature at Harvard.

Vining did considerable writing of his own as well. In 1963 his note on disclaimers of warranty in consumer sales appeared in the *Law Review*. In it he argued that legal recognition of the usual disclaimer of implied warranty, often signed by the consumer in the belief that he is obtaining something "free," is inconsistent with the emerging rationale of consumer protection through absolute liability.

In his third year he co-authored the chapters on "Temporary Judicial Stays Of Administrative Action Pending Judicial Review" and "Exclusive Jurisdiction and Remand" for Prof. Louis L. Jaffe's treatise, *Judicial Control of Administrative Action*. During law school Vining also sculled, taught French to felons in the Massachusetts prison system, and, in the summers of 1962 and 1963, clerked respectively for the firms of Root, Barrett, Cohen, Knapp & Smith in New York City and Covington & Burling in Washington, D.C.

Vining has been a "doer" as well as a scholar. After delivering a Harvard commencement oration in 1964 with the message that it is just as worthy to act and struggle in the world as to observe and analyze it as a scholar, he went to the office of then-Deputy Attorney General Nicholas deB. Katzenbach as one of a group which worked to realize Robert Kennedy's hope as attorney general that the Department of Justice could develop from a primarily prosecutorial agency into a full ministry of justice on the order of its European counterparts. There Vining participated in developing the Bail Reform Act, President Johnson's National Crime Commission, and the initial Law Enforcement Assistance Office. He also worked on proposals for federal correctional reform, did research into police investigative methods, and wrote drafts of various speeches and presidential messages.

When the Commission was established, Vining became an assistant to its executive director, James Vorenberg (on leave from the Harvard Law faculty). He helped organize its work, hire its staff, and prepare preliminary drafts of its reports. He left the Commission in the summer of 1966 and returned to Covington & Burling.

Vining continued his association with these activities as a consultant to the Department of Justice. He served as a member of Office of Economic Opportunity evaluation teams which visited the University of Detroit's Urban Law Program in the summer of 1967 and the District of Columbia Legal Aid Agency in the spring of 1968. And in the spring of 1968 Vining also handled several cases arising out of the April "riots" as part of the District of Columbia Bar's effort to distribute the load and mitigate the confusion which overwhelms the legal system under such circumstances.

With Covington & Burling, Vining was involved extensively in administrative litigation and negotiation with the Federal Power Commission, the Federal Trade Commission, and the Food and Drug Administration. This is one of several areas of interest he hopes to pursue.

"Where whole industries are involved," he commented, "protracted administrative proceedings, with decade-long life spans, thousands of pages of unused testimony, and frequent forays into the courts, are only one front in a whole range of legislative, political, economic, and legal strategies. Adjudicative decision-making in such situations is more than difficult: the issues are rarely explicit and involve basic public policy, or the factual and legal questions are so interwoven that the problems become unmanageable in the absence of extensive agreement among the participants. The proceedings themselves are affected by extraneous activities and problems in a way that the administrative proceeding, as classically conceived, clearly should not be."

Vining believes that the field of administrative law is just beginning a major period of conceptual development. "We must develop non-economic legal standards for judging and controlling the activity of administrative authorities as they begin to deal with such problems as environmental quality, pollution, atomic energy, and urban recovery. Unfortunately, in these areas it is becoming less and less useful to appeal to economics as the basic standard of rationality.

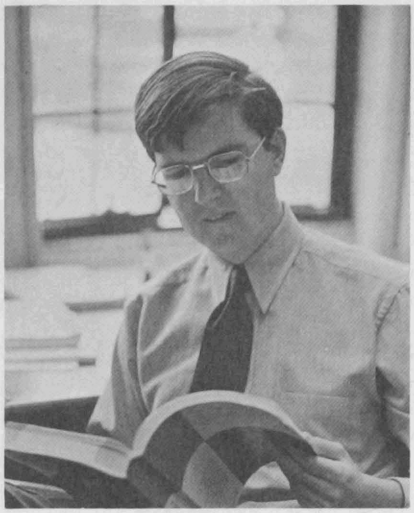
"The same is true of corporations," Vining adds. "The power and activity of corporate management in non-economic matters is producing a critical need for new legal standards of judgment and criticism."

A bit of "icing" in Vining's practice at Covington & Burling was his involvement with that firm's representation of a developing African nation in its negotiations with an international consortium of private companies interested in exploiting the country's resources. Through the avenue of the World Bank's growing investment in such countries, Vining said, government officials of these countries are becoming much more aware of the advantages of the kind of counsel and representation enjoyed by private interests during the process of shaping long-term contractual and financial arrangements.

Mr. Vining carries some of these interests over into his work for the Law Library of the Library of Congress, with its unique international collection, as a member of the A.B.A.'s standing committee for that library.

Tennis enthusiast and art bargain hunter David Chambers also joins the Law School faculty this year to teach criminal law. A colleague of Joseph Vining on the Harvard *Law Review*, Chambers is a native of Indianapolis with a Princeton B.A. in English.

He has spent the past six months ob-



David Chambers

serving and sitting in on the day-to-day decision making of prisons and mental hospitals.

From February to May of this year Chambers served as a full-time consultant to the Department of Health, Education, and Welfare's National Institute of Mental Health. Working at St. Elizabeths Hospital in Washington, D.C., he centered his activities principally in John Howard Pavilion, which houses males accused of felonies who have been found either not guilty by reason of insanity or incompetent to stand trial. It also receives men convicted of felonies who are transferred from the District of Columbia penal system. The District of Columbia courts have been among the most active in the country in re-examining and overturning old notions about the legal aspects of mental illness. John Howard has been thrown into this controversy at every turn, with cases like *Durham v. United States, Bolton v. Harris* (holding unconstitutional automatic commitment after a finding of not guilty by reason of insanity) and *Rouse v. Cameron* (finding a judicially cognizable right to treatment), all involving John Howard patients and personnel.

The Institute hired Chambers to aid him in his own goal of learning more about the inter-relation between illness and crime and the workings of hospitals, but used him for the subsidiary purpose of providing advice on the Hospital's need for full-time legal counsel. On the basis of an unfettered run of the institution, attending countless staff sessions, and holding weekly conferences with a group of patients who had been found not guilty by reason of insanity or transferred from the prisons, Chambers concluded that the Hospital did need full-time legal services for both the Hospital and the patients but that it needed even more a massive infusion of new attitudes, new therapy staff, and new programs.

The Hospital has many problems, now often handled haphazardly or not at all, which an attorney could deal with effectively, Chambers noted. There are daily questions of whether a patient may be released by St. Elizabeths to another jurisdiction, for example, or released altogether. Each of the patients is a "living legal problem," with many of his rights suspended or jeopardized. And the doctors on the staff are constantly required to appear in court, often wasting hours away from the Hospital simply waiting to testify. But Chambers is not optimistic that Congress will authorize funds for the needs of St. Elizabeths. He fears the Congressional attitude toward the Hospital merely reflects that of most states to their counterpart institutions.

To improve his background further for teaching criminal law, Chambers spent six weeks this summer observing how the federal youth correction institution in Milan, Michigan, the Michigan state prisons in Jackson and Ionia, and San Quentin and other prisons in California handle their daily operations. He took particular interest in decisions regarding the classification of incoming prisoners into job training, educational programs, and security levels, the disposition of discipline infractions, and the determinations regarding parole.

Chambers will also use this year's experience to help coordinate an interfaculty seminar among members of the Law School, the School of Social Work, and the Sociology and Psychology Departments to help determine national research priorities in correction for the Department of Justice. He may also offer a seminar on the correction system next spring.

Chambers has additional experience in criminal law from spending a substantial portion of his time at the Washington, D.C. firm of Wilmer, Cutler & Pickering, which he joined upon graduation from Harvard in 1965, working on appeals for criminal indigents.

While in practice, Chambers also worked on tax and antitrust problems and spent considerable time seeking with other lawyers to persuade the federal highway administrator that it would be legally impermissible to approve the proposed route of the New Orleans Riverfront (Interstate) Expressway. Disapproval was necessary in order to preserve the historic French Quarter of that city. Department of Transportation Secretary John Volpe finally rejected the proposed route this summer.

When the 1967 civil disorder erupted in Detroit, Chambers was just returning from three weeks of civil rights work in Mississippi. Chambers then left private practice and joined the staff of the newly-formed Kerner Commission on Civil Disorders as assistant to its executive director, David Ginsburg. There he participated one way or another in every stage of the Commission's life, working closely with its members. "A more engrossing, depressing, illuminating nine months would be very difficult for me to imagine," he remarked. "I wouldn't trade the experience for anything."

In April 1968, when the Commission completed its work, Chambers became counsel to President Johnson's Cabinet Committee on Price Stability. The committee, composed of the secretaries of commerce, labor, and treasury, the Director of the Bureau of the Budget, and the Chairman of the Council of Economic Advisers, was asked to advise on the impact of federal programs on inflation and to reassess federal policies regarding wages and prices.

Chambers served as a general staff administrator, editor, and "lowest-rung White House staff member churning out task force reports." The Committee issued a report in December 1968. The staff issued a second report in January of this year and dispersed with the advent of the new administration.

Shortly thereafter Mr. Chambers began his work at St. Elizabeths and moved to Ann Arbor with his wife, son, and daughter in late April.

Donald E. Shelton (left) and Frank Willis, recent Law graduates, tied for first place in the Philip C. Jessup International Law Moot Court Competition this spring with a Rutgers University team. Willis was also cited for presenting the best oral argument.

Eight teams, including one from France, participated in the competition.

Recruiters to Campus Increase in Number

About 300 recruiters are expected to visit the Law School this school year to interview members of the junior and senior classes. A dozen years ago classes were about two-thirds their present size, but only about 50 recruiters came to campus to talk to prospects for their firms or organizations.

That campus recruitment is the way to find a lawyer seems to be the trend. Two years ago the number of interviewers was 251; last year it reached 272. But the greatest number of opportunities for graduates—recent and experienced—still comes by mail. The Placement Office received 634 notices of openings by mail last year. Of these, 193 were for graduates with some experience. A monthly bulletin with a usual run of about 150 notifies interested Law School graduates of these possibilities.

Law students are lured by higher salaries and a wide range of opportunities to clerk during the summer between their junior and senior years to try out the city and the firm. The big jump in salaries for beginning lawyers came in February 1968. The average salary for University of Michigan Law School graduates in 1969 was $12,143. The range was from $8,400 to $16,000. In contrast, the 1967 average salary was $8,492. In the past it appeared that banks, corporations, and CPA firms offered more than law firms, but as of this year that seems to be no longer the case.

The draft is now more of a problem to graduates, however. Of the 290 members of last year's senior class who reported to the Placement Office, 65 per cent were subject to call. This increases the natural anxiety of students looking for a job with the frustration of uncertainty. On the employers' side it is the small firm that is particularly hurt by the draft since it is much more difficult for it to sustain the loss in work product and money when a new associate is drafted.

Half of the graduating seniors still immediately join law firms, according to Placement Office statistics; an equal number of those reporting take other routes. An increasingly popular route is the judicial clerkship. While two years ago nine graduates chose this opportunity, last year four times as many (36) accepted clerkships with state and federal judges. The number deciding to work for government organizations has dwindled to half the 30 in 1967, however. The number entering corporations has remained about the same—about a dozen.

Notifications of openings in 1968–69 came from 39 states, the District of Columbia, Belgium, and Vietnam. The largest number, not surprisingly, came from Michigan with 221. This year's graduates located in 25 states and the District of Columbia. Of the 245 students reporting definite plans in 1969, 59 returned to their home town and an additional 44 returned to their home state. Fifty-seven 1969 graduates located in Michigan, while 27 went to New York, 22 to the District of Columbia, 20 to Illinois, and 10 each to California and Ohio.

For some cities (such as Seattle, Atlanta, Boston, Houston, Phoenix, and Portland, Oregon) the Placement Office gets more expressions of interest from students than from firms. To help these students, the office this year wrote letters to Michigan Law School alumni in these cities noting the interest of Michigan law students.

The breakdown of definite plans of 245 seniors reporting to the Placement Office as of May 29, 1969 was:

Law Firms		121
Government		16
Federal	15	
State	1	
Corporate		15
Legal	10	
Quasi-legal	1	
Non-legal	4	
Banks		5
CPA Firms		6
Judicial Clerkships		35
Federal	14	
State	21	
Fellowships		20
Foreign	9	
Domestic	11	
Graduate Study		2
Law	1	
Other	1	
Teaching		6
Law	6	
Other	0	
University Administration		2
Military (JAG)*		7
Peace Corps		2
VISTA		8
		245

* Another 8 received commissions.

Below is a breakdown of the states these 245 seniors located in:

Arizona	2	Minnesota	2
California	10	Missouri	5
Colorado	4	New Jersey	3
Connecticut	3	New York	27
District of Columbia	22	Ohio	10
Florida	2	Oklahoma	1
Georgia	1	Oregon	3
Illinois	20	Pennsylvania	9
Indiana	7	Rhode Island	1
Maine	2	Texas	1
Maryland	2	Washington	4
Massachusetts	3	West Virginia	1
Michigan	57	Wisconsin	7

There were 272 employers who conducted on-campus interviews. Of this number, 222 were law firms located in both large and small cities. The following is a breakdown of the size of these 222 firms:

1–10	*11–25*	*26–50*
25	60	72
51–75	*76–100*	*101 & Above*
33	15	17

Most Gifts to Law School To Get Michigan Tax Credit

In 1967 the State of Michigan established an income tax. A 1968 amendment provided for limited credit against the Michigan Income Tax for charitable contributions to institutions of higher learning located within Michigan, but "only if the contribution has been made to the general fund of the institution of higher learning."

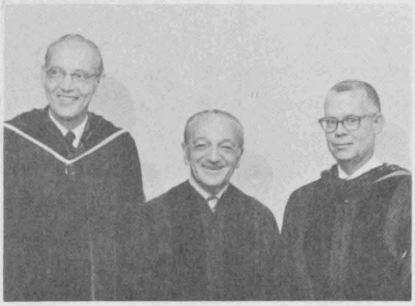
There was considerable confusion as to the meaning of "the general fund." If a donor specified a certain school or college within the University, such as gifts for the "Law School Fund," did his gift qualify for the tax credit?

The Michigan Department of Treasury, at the request of the Law School and the University, ruled recently that gifts to the Law School or Law School Fund, not otherwise limited as to purpose, (as well as similar unrestricted gifts to funds for other schools and colleges in the University) "will be considered as being made to the general fund of the University and, therefore, do qualify for the limited credit provision in section 260 of the Michigan Income Tax Statute."

A more detailed statement about this favorable ruling and the tax credit has been mailed directly to all Law School alumni living or working within Michigan. However, some alumni living or working elsewhere, retired or otherwise, may have income subject to

the Michigan Income Tax or have clients with such income. The School will happily send a copy of this statement to anyone requesting it. Inquiries should be directed to the Law School Fund, Hutchins Hall.

Two Alumni Honored



Two prominent Law School alumni were honored by the University. George A. Spater, president and chief executive officer of American Airlines, received an Outstanding Achievement Award in May. Jason L. Honigman, senior partner of the law firm of Honigman, Miller, Schwartz and Cohn, of Detroit, was awarded an honorary doctor of laws degree in August. Honigman is shown in the above photo with U-M Vice President Allan F. Smith (left) and Law School Dean Francis A. Allen (right).

Judicial Clerkships Acceped by 36 Students

Thirty-six University of Michigan Law School students graduating in May or August 1969 have been offered clerkship positions with federal and state judges, an increase of 20 over the previous year.

Of the 36, 15 will serve state appellate level courts (eight with the Michigan Court of Appeals), while seven each will go to federal appellate, federal district, and state supreme courts.

Salaries to those serving state court judges range from $5,900 to $13,500 and average $9,223, while federal court clerkship salaries average $8,909 within a narrower range of $7,500 to $9,100.

Below is a list of the 36, 1969 Law School graduates receiving judicial clerkships:

James L. Ackerman—The Hon. John P. Cotter, Connecticut Supreme Court, Hartford, Connecticut

A. Victor Antola—The Hon. A. Andrew Hauk, Federal District Court, Central District, Los Angeles, Calif.

Barry B. Boyer—The Hon. Edward Tamm, U.S. Court of Appeals, D.C. Circuit, U.S. Court House, Washington, D.C.

William A. Childress — The Hon. Joseph M. Blumenfeld, U.S. District Court, Hartford, Connecticut

Thomas E. Chittle—The Hon. Stewart A. Newblatt, Circuit Court, Genesee County, Flint, Michigan

Philip R. Fine—The Hon. Joseph H. Silbert, Ohio Court of Appeals, 8th Appellate District, Cleveland, Ohio

Andrew F. Fink—Oregon Supreme Court, Salem, Oregon

George R. Frye—The Hon. Timothy C. Quinn, Michigan Court of Appeals, Lansing, Michigan

Robert E. Gooding, Jr.—The Hon. Walter V. Schaeffer, Illinois Supreme Court, Chicago, Illinois

Lance S. Grode—The Hon. Joseph C. Zavatt, Presiding Judge, Federal District Court, Eastern District of New York, Brooklyn, New York

Ronald S. Grossman—The Hon. Arno H. Denecke, Supreme Court of Oregon, Salem, Oregon

Andrew L. Gutterlaite—The Hon. Leon W. Kapp, Superior Court, Newark, New Jersey

Lawrence E. Hard—The Hon. Theodore S. Turner, Superior Court of King County, Seattle, Washington

Henry M. Hanflik—The Hon. Louis D. McGregor, Michigan State Court of Appeals, Flint, Michigan

David L. Haron—The Hon. T. John Lesinski, Michigan Court of Appeals, Detroit, Michigan

Charles C. Hawk—The Hon. Noel P. Fox, U.S. Federal District, Western District, Grand Rapids, Michigan

Howard C. Hay—The Hon. Frank M. Coffin, U.S. Court of Appeals, First Circuit, Portland, Maine

Bruce H. Hurst—The Hon. George H. Revelle, Superior Court of King County, Seattle, Washington

Ralph L. Kissick—The Hon. Marion T. Bennett, U.S. Court of Claims, Washington, D.C.

Frederick W. Lambert—The Hon. Stanley N. Barnes, U.S. Court of Appeals, 9th Circuit, Los Angeles, Calif.

James A. Martin—The Hon. Harold Levanthal, U.S. Court of Appeals, District of Columbia Circuit, Washington, D.C.

Steven W. Martineau—The Hon. Noel P. Fox, Federal District Court, Grand Rapids, Michigan

Robert M. Meisner—Michigan Court of Appeals, Pre-Hearing Research Division, Lansing, Michigan

Cornelius D. Murray — The Hon. James Gibson, Presiding Justice, Supreme Court Appellate Division, Third Department, Albany, New York

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Litigation and Mediation under Title VII of the Civil Rights Act of 1964

by Professor Theodore J. St. Antoine. Excerpts from speech before section of labor relations law at annual meeting of American Bar Association, Dallas, Texas, August 11, 1968.

Introduction

As time is measured in America's Black Revolution, the Civil Rights Act of 1964 was passed a generation ago. It was a product of what seems today almost like an age of innocence. Title VII of the Act, guaranteeing equal employment opportunity, probably reflected a naive optimism about the capacity of law to place black workers on an equal footing with white workers by outlawing all *future* racial discrimination in employment. At least, Title VII reflected a wistful hope that when the Act became effective the victims of past discrimination would let bygones be bygones and would quietly take their places in the starting gate of the job race, ignoring the long leads their white rivals had built up over the years. Things of course have not worked out that way.

Today the most troubling legal issue confronting the courts under Title VII is the status of job discrimination antedating the Act. More precisely, the question is whether hiring or referral arrangements, seniority systems, and job qualifications or testing procedures, though nondiscriminatory on their face, may violate the Act by perpetuating the effects of *past* discrimination. My talk will concentrate on some 10 federal court cases which have dealt with this problem. These few decisions on the merits represent the end product of approximately 20,000 charges of racial discrimination in employment filed to date with the Equal Employment Opportunity Commission; around 60 or so suits filed by private parties under §706(e) of the Act, following exhaus-

tion of EEOC conciliation efforts; and about 40 suits filed by the Attorney General under §707(a) of the Act, alleging a "pattern or practice" of violations of the Act. . . .

Referral and Seniority Systems

A. Background

Seniority is one of the most important concepts in labor relations. Its essence, of course, is to give a preference to the older, more experienced worker in such employment decisions as layoffs, recalls, promotions, transfers, and so on. In part the notion is that the older employee is entitled as a matter of equity to greater job security than newer recruits. In part the aim is to remove a source of worker discontent by substituting an objective standard for job priorities in place of what might otherwise be an arbitrary, or at least more subjective, decision by employer or union.

Seniority in an industrial plant may take any of several forms. It may be based on time spent anywhere in the plant, or in a particular department, or in a "line of progression," or even in a given job. In the building and maritime trades, where employment is usually temporary and workers must constantly seek new positions through the union's hiring hall, an equivalent of seniority is a system of registration categories which gives certain applicants priority over others for referral to jobs. For example, men who have worked four years with an employer signatory to the hiring hall agreement will receive top priority, and then will follow men who have worked two years with such an employer, persons who have worked two years in the industry in the area, and finally all other qualified applicants.

Assume, now, that prior to July 2, 1965, the effective date of Title VII for employers and unions having 100 or more employees or members, Negroes were entirely excluded from a particular plant, or were segregated in certain departments, or were restricted to menial jobs, or were denied the use of a hiring hall. On July 2, 1965, all active discrimination on the basis of race ceased. A black employee or job applicant will be treated exactly the same as a white employee or job applicant *having the same qualifications.* But the obvious difficulty is that the black worker moving into the formerly lily-white plant or department or line of progression or hiring hall starts with zero seniority. He will be the first laid off, the last recalled, and the last promoted. Or if he registers with a hiring hall, he will necessarily fall into a low-priority category. The racial discrimination of the past prevented the black worker from earning the all-important seniority credits, and now their absence hobbles his efforts to step into positions from which the racial bars have been removed. A Negro may even have worked in a particular plant for 20 years, but if he transfers into a more attractive, previously all-white department where job or departmental seniority prevails, he will find himself junior to a raw recruit hired just two weeks ago. The legal issue is whether Title VII outlaws a seniority system that produces such a result. Section 703(a) and (c) simply makes it an "unlawful employment practice" for an employer or a labor organization to "discriminate against any individual" in employment or membership "because of such individual's race. . . ."

B. Judicial Approaches

The courts have taken several different approaches to the question of whether seniority systems which are otherwise nondiscriminatory violate the Act by perpetuating the effects of past discrimination. I have grouped the decisions, not too scientifically, into three general categories, classifying the courts (for descriptive, not perjorative purposes) as either "strict" constructionists, "loose" constructionists, or "flexible" constructionists.

1) Strict Construction. The *Sheet Metal Workers* case from the Eastern District of Missouri reflects a "strict" view of Title VII. The court started with the proposition, supported by the legislative history, that Title VII applies prospectively only and not retroactively. From this it concluded that a referral system which was operated nondiscriminatorily following the effective date of the Act did not violate the Act even though it gave priority to applicants with work experience under union contracts. Presumably Negroes lacked such experience because of pre-Act discrimination barring them from union membership. Nonetheless, the combination *in fact* of the pre-Act exclusion of Negroes from union membership and the post-Act preference for union members in job referrals was not enough in the court's eyes to establish post-Act discrimination on the basis of *race.*

2) Loose Construction. Federal district courts in Virginia and Louisiana and the Fifth Circuit have adopted a markedly more relaxed attitude toward the statute. In their view a referral or seniority system, while racially neutral on its face, violates the Act if it continues in the present the effects of pre-Act racial discrimination, or at least if it continues the effects of a "pervasive pattern" of pre-Act discrimination.

In the *Quarles* [E.D. Va. 1968] and *Papermakers* [E.D. La. 1969] cases, the vice was the existence of "departmental" and "job" seniority systems, respectively. At one time certain departments and certain jobs were segregated. Even after the formerly lily-white positions were opened to all applicants without regard to race, long-time Negro employees of the firms were handicapped because they had no seniority in the newly available departments or jobs. Upon transfer they would have to start acquiring seniority in these posts from scratch. The courts showed no hesitancy in coming to grips with what were described as the "present consequences of past discrimination." The remedy was to require the substitution of plant-wide seniority for the departmental or job seniority. Similarly, in the *Asbestos Workers* case, the Fifth Circuit ordered the elimination of referral preferences based on work experi-

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ence gained under pre-Act discriminatory conditions.

3) Flexible Construction. A third approach of the courts is harder to pin down because the opinions are chary about being too precise in their reasoning, and instead place great emphasis on the peculiar facts of the particular case. Thus, in *Dobbins v. IBEW Local 212* [S.D. Ohio 1968], the court began by conceding that Title VII's operation is prospective, not retroactive; that only post-Act conduct can constitute a violation, although pre-Act conduct may be used as evidence; and that affirmative action to correct pre-Act discrimination may itself be unlawful discrimination. But then the court announced that seemingly innocuous standards in a referral system may become currently discriminatory simply by virtue of the fact of past discrimination.

Having laid that theoretical groundwork, the court proceeded to draw a practical distinction. Where there are a substantial number of competent, qualified persons who are disadvantaged by referral priority standards, it said, the entire referral system should be eradicated. But where, as in *Dobbins* itself, there are only a few such persons, the system may be revised to eliminate the objectionable features. The latter would apparently include such items as preferences for registrants who have worked for a union contractor.

The court in the recent *H. K. Porter* case [N.D. Ala. 1968] was likewise skittish about "dogmatic" or "mechanistic" approaches based upon such "theoretical concepts" as retroactivity, and stressed the importance of "particular facts," but otherwise the results were quite different from *Dobbins*. In *Porter* the court rejected the contention of the Attorney General that plant-wide seniority should replace departmental seniority in a firm where Negroes had been largely confined to less appealing jobs prior to 1962 and were now allegedly "locked in" them by the departmental seniority system. The court purported to distinguish cases like *Quarles* by emphasizing that in *Porter* many Negroes had been able to move to, and advance in, the better departments since 1962. Thus there was no demonstrated need to dismantle the existing seniority structure. Despite the court's disclaimer of any disagreement with *Quarles,* however, its attitude actually seems closer to the "strict" constructionist thinking of the *Sheet Metal Workers* case.

C. Comments

There is no serious argument, at least in theory, about the proposition that Title VII's operation is prospective only and not retroactive. This is confirmed by section 701(b) and (e)'s provisions for "staggered" effective dates, depending on the size of the employer or union involved, and by the clearest kind of legislative history. Even the "loose constructionist" courts like *Quarles* and *Asbestos Workers* do not contest this point in the abstract. The dispute is whether it is present discrimination for a seniority or referral system to give current effect to work credits acquired under pre-Act discriminatory conditions.

This precise issue was the subject of much heated debate when the Civil Rights Bill was before Congress in 1964. The original bill proposed by the Kennedy Administration did not contain an equal employment opportunity title. Civil rights groups and influential elements in the labor movement, including the national AFL-CIO, lobbied strenuously for the inclusion of such a provision. Foes of the legislation then sought to rally grass-roots union opposition. Senator Lister Hill of Alabama, a long-time champion of organized labor, distributed literature to local unions all across the country, warning that enactment of Title VII would "destroy" the hard-earned seniority rights of many workers. The AFL-CIO, the Justice Department, and such supporters of the bill as Senators Joseph S. Clark, Clifford P. Case, and Hubert H. Humphrey responded by assuring union members and the Congress that Title VII would have no adverse impact on acquired seniority.

Perhaps a Justice Department memorandum, prepared for and placed in the Congressional record by Senator Clark, is most explicit on the problem under consideration:

> First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. *This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.* Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. (Emphasis supplied.)

The *Quarles* court contended that at most the legislative history sanctioned "employment" seniority, but not "departmental" seniority, where the result was the perpetuation of past discrimination. I find no basis for such a distinction. The operation of seniority, and its purposes of protecting the equity of older workers in their jobs and providing an objective standard for employment preferences, are essentially the same whether the seniority is linked to a particular job, or a given department, or a whole plant. Indeed, departmental or job seniority is more

often the rule in industry, especially for promotion purposes. Ordinarily, employers seek the narrowest seniority unit possible, since this increases the likelihood that the employee entitled to advancement will be qualified for the job. The proponents of Title VII would thus have been only half-answering Senator Hill—and incidentally deceiving the labor movement—if their remarks on seniority did not have general applicability. Certainly there is not a whisper of anything affirmative to support the *Quarles* distinction. I conclude that the legislative history fully sustains the "strict" constructionists in upholding otherwise nondiscriminatory seniority systems, even though they give credit for work done under pre-Act discriminatory conditions.

A more straightforward argument on behalf of the "loose" constructionists is that section 703 by its terms outlaws the present consequences of past discrimination, and that the legislative history represents an unsuccessful attempt to *except* from Title VII conduct which would normally fall within its coverage. The effort is branded a failure on such variegated grounds as the inherent unreliability of all legislative history; the presence of only a few legislators on the floor when Senator Clark and others explained seniority; the absence of any discussion in the form of a committee report (there was no Senate or Conference Committee report on the bill); and the omission of any statutory language to override the plain meaning of section 703's prohibition.

This brings us to the central issue: Is a post-Act layoff, promotion, transfer, or other employment action that takes account of seniority acquired under Pre-Act discriminatory conditions a *present* discrimination "because of . . . race" within the meaning of section 703? There is undoubtedly a present disparity in the treatment of different individuals. Moreover, it can be shown in many cases that but for pre-Act racial discrimination, the black employee who now has the lesser seniority credit would have had the greater. Nonetheless, as I see it, the present disparate treatment is *not* based on race as such, but on the quite independent factor of seniority. A white worker who lacked such seniority, for whatever reason (for example, the personal hostility of a foreman), would be in exactly the same position as the black worker. True, the black employee was deprived of the opportunity to earn seniority because of pre-Act racial discrimination. At that time, however, the discrimination was not violative of Title VII. Assuming the discrimination ceased on July 2, 1965, we simply have an employee who cannot be prejudiced by racial considerations, but who remains subject to all other legitimate employment classifications. To go behind July 2, 1965 to strike down what would otherwise be a valid basis for an employment preference, such as seniority, is giving the Act the bald-

> "If a wedge is . . . driven between labor . . . and . . . civil rights . . . if the lower-middle class worker turns . . . right . . . disaster awaits . . . social legislation. . . ."

est kind of retroactive application. For me, this is the natural reading of Title VII. But if there is any possible ambiguity, the legislative history resolves it.

It is important to keep in mind that we are not dealing here with some shoddy kind of "grandfather clause," calculatingly designed to perpetuate racial discrimination by a mere shift of labels. As explained earlier, seniority is a fundamental concept in labor relations, with a long and honorable history behind it. To allow seniority to continue to govern certain job determinations seems to me not essentially different from a couple of other situations which I trust no one would regard as involving a violation of section 703. For example, would we not let a white worker, but not a black, claim a pay check after the effective date of Title VII for pre-Act work performed by the white on a job from which the black was barred because of his race? Would we not let a highly skilled job be awarded to a qualified white rather than an unqualified black even though the black had been prevented from acquiring the necessary skills because of pre-Act racial discrimination practiced by the same employer? Like the work performed in fact by the white and not the black, or the skill learned in fact, seniority is a credit or status (legitimate in itself) acquired in fact by the one and not the other. And it is the existence of that seniority credit or status which justifies the post-Act disparate treatment, regardless of the pre-Act circumstances of its accrual.

Somewhat analogous is the NLRB's handling of union hiring halls under the National Labor Relations Act. Needless to say, a referral system that by its terms or by necessary implication gave priority in job placement to union members over nonmembers would be illegal. But a system of priority categories, otherwise nondiscriminatory, is not unlawful merely because it has the effect in actual operation of preferring union men over nonunion men, for example, by favoring registrants who have had experience with union contractors or who have passed a union qualification test. So too, I should say that a violation of section 703 cannot be made out merely because a seniority system in application results in a preference for white workers over black.

Section 703(h) of the Act, which expressly authorizes different terms of employment pursuant to a "bona fide seniority . . . system," is consistent with this analysis, but I should not want to place too much independent weight on this particular provision. There is a proviso that the differences in employment terms must not be "the result of an intention to discriminate because of race. . . ." Should a court become convinced, as did the court in *Quarles*, that the general prohibitory provi-

sions of section 703 have been violated, section 703(h) can easily be disposed of by saying that the seniority system is not "bona fide" or that the proviso applies. At any rate, section 703(h) establishes that seniority was within the contemplation of the whole of the Congress, and not a mere handful of Senators, when the general language of subsections (a), (b), and (c) was enacted. If disparate treatment on the basis of seniority does not fall naturally within the rubric of discrimination "because of . . . race," the courts should not struggle to place it there to make up for some supposed congressional oversight.

I would impose two qualifications on my view that otherwise nondiscriminatory referral and seniority systems should not be held violative of the Act, even though they give effect to seniority acquired as a result of pre-Act discrimination. First, the system must not be designed or retained for the *purpose* of perpetuating the effects of Pre-Act discrimination. For example, I would consider highly suspect the substitution of "job" seniority for "departmental" seniority at the time an employer desegregates a department where the better jobs had formerly gone to whites and the menial ones to blacks. Although I can conceive of valid business motives for the change in the seniority basis, it sounds as if the employer wants to favor white employees who may have less time than blacks in the department but more time in the attractive jobs. Second, I would strike down seniority systems that contain "artificial distortions" not justified by legitimate business considerations. An illustration would be an employer's continuation of separate seniority lists for two separate lines of progression, formerly segregated by race but now desegregated, in a situation where all the jobs are functionally related and the normal pattern would call for a single line of progression with "line of progression" seniority. Here the *only* reason for the maintenance of two lines would appear to be the desire to "lock" the black workers into their old line by requiring them to start with zero seniority if they move to the formerly all-white line. (By the "normal pattern" of seniority practices, I mean the customary arrangements of a particular firm, or industry, or area, where racial considerations have not influenced the structuring of the system.)

Throughout this discussion I have paid small heed to the larger policy concerns. I would not deny for a moment that Congress might properly have concluded that, important a value as seniority is, it would have to yield to the paramount public goal of advancing black workers into jobs for which they are or can be qualified. (Indeed, one hopes that enlightened unions may do something along these lines on their own. Thus, the UAW has proposed that certain senior employees be laid off before recently hired hard-core jobless in Detroit's auto plants.) My point is simply that the Congress of 1964 did not decide to subordinate traditional seniority interests, and the courts should respect that legislative judgment. Even a good cause does not excuse impairing the integrity of legal institutions.

Despite my protestations, however, the current direction of judicial thinking is obviously toward a much more expansive reading of the statute. I would not place any wagers against the continuation of this trend. Most of the decided cases, a majority of which favor a broad approach to Title VII, come from federal district courts in the South. Past performance suggests that the courts of appeals and the United States Supreme Court will be at least as liberal on a civil rights issue. Naturally, the possibility of more conservative Nixon appointees to the bench serves to becloud this picture.

D. Fair Representation: Another Way to Skin the Cat

Concentration on Title VII as a means of reaching the present consequences of pre-Act discrimination may obscure an important point. The same results sought by the "loose" constructionists could be achieved in many seniority cases, without violence to congressional intent, through resort to the long-standing doctrine of fair representation, as developed under the Railway Labor Act and the National Labor Relations Act. In essence, this doctrine holds that a labor organization, as a concomitant of its power of exclusive representation, has the obligation to represent all the employees in the bargaining unit fairly and impartially, without regard to race or other irrelevant considerations. Employers who join in a union's unfair representation are also liable. The duty of fair representation has even been extended to prevent a white union from destroying the jobs of black employees in another union and another unit. I should not think it much of an additional leap to find a violation where a union denied black applicants a job within the unit. . . .

Employment Tests

While the Civil Rights Bill was pending in Congress, Illinois FEPC proceedings involving the Motorola Company focused attention on the question of "culturally biased" employment tests. According to many experts, minority groups suffering from cultural deprivation are placed at a competitive disadvantage in taking standard aptitude tests. Congress was not sympathetic, however, to the notion that an employer would violate the statute by giving an otherwise fair test which some groups might find easier than others. Senators Clark and Case commented:

> There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

To clarify this matter, Congress included in section 703(h) a provision that it would not be unlawful for an employer to give a "professionally developed ability test" provided it is

not "designed, intended or used to discriminate because of race. . . ."

One court has held that a union qualification exam, though administered evenhandedly to whites and blacks, may violate Title VII if it has no reasonable relationship to the abilities needed for a particular trade in actual practice, and instead is intended to "chill" the interest of Negro applicants. In view of the motivation behind the test, this decision seems self-evident. But other issues regarding testing procedures are considerably more difficult.

The Equal Employment Opportunity Commission has published guidelines interpreting a "professionally developed ability test" to mean "a test which fairly measures the knowledge or skills required by the *particular job or class of jobs which the applicant seeks.*" In *Griggs v. Duke Power Co.* [M.D. N.C. 1968], the court disagreed with this ruling and held an employer is entitled to rely on general intelligence tests. Moreover, the court refused to accept the contention that an employer may not lawfully use an aptitude exam until it has been scientifically validated as a predictor of performance on the job.

On the face of it, the court in *Griggs* would appear to have the better of the argument with EEOC. The Commission is pursuing a hard line on testing that Congress seems deliberately to have eschewed. Yet I should think there is a proper role for EEOC to play in fleshing out the statutory skeleton. What is needed is a factual demonstration that tests unrelated to the skills required for a particular cluster of jobs almost invariably have a racially discriminatory purpose. This sort of demonstration might well support a presumption of illegality in any case where such tests were at issue. It would then be up to the employer or union to prove a nonracial basis for its insistence on an over-qualified work force. In any event, the Commission should profit from the example of the NLRB, and be wary about substituting *per se* analysis for a careful weighing of the evidence in each individual case.

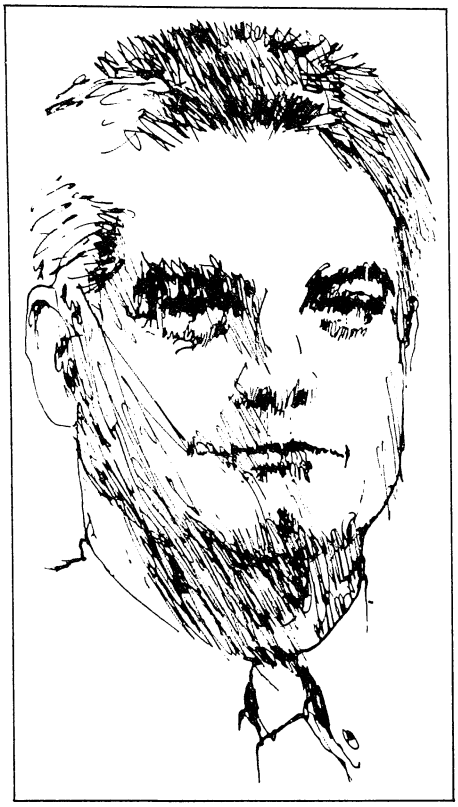
Conclusion

Title VII of the Civil Rights Act of 1964 may provide a classic confrontation between law and policy—between the rule which a lawyer, applying the traditional tools of legal analysis, would conclude the Congress has laid down, and the rule which an omniscient sage would conclude was best calculated to do justice in the affected community. The lawyer would insist that Congress did not intend to reach the post-Act effects of pre-Act racial discrimination in employment. The sage would maintain that a whole generation of black workers cannot be left hobbled by the wrongs of the past. In today's climate of judicial activism, one might assume, as I have suggested earlier, that the sage would prevail over the lawyer with ease.

Yet perhaps there is room for a small quibble. If the lawyer can make any unique contribution to society, it surely is his notion of fair procedure. I do not think he can claim any special wisdom in the formulation of substantive standards. But I do think he has a peculiar sense of the need for effective participation by all interested groups in the development and application of those standards. In our country today, with its sadly increasing polarization of attitudes, I suspect no group feels more alienated and spiritually dispossessed than the lower-middle class working whites. Not only does the current moral revolution imperil the ancient values of this generally conventional class; now, in addition, its hard-won material prosperity seems threatened by the taxes needed to finance our burgeoning welfare programs, and its precious job security appears jeopardized by an influx of newcomers to the labor market. At least in relation to the great engines of the federal government, even the disadvantaged black worker has more reason at this moment to regard himself as part of the powerful forces that shape history.

There is, however, an ominous message in all this. As Bayard Rustin has told us, the civil rights movement through the years has invariably depended for broad political support upon the labor movement, and the backbone of the labor movement is lower-middle class. If a wedge is fully driven between the labor movement and the civil rights movement, and if the lower-middle class white worker turns sharply toward the right in politics, then I think disaster awaits today's progressive racial and social legislation. In the long run, we need not fear the romantic revolutionary, whether black or white; he has neither enough votes nor enough guns. The real threat to an enlightened society would be a reactivated right – hurt, resentful, and hungering to repeal the 1960's. In my view, an unduly extended interpretation of Title VII helps to fuel the bitterness of the working class white, and to hasten the day of a resurgent right.

Now, I should be naive to think that the white worker would be all that gracious about accepting displacement from his position on the seniority ladder, if only he could be persuaded that it was truly the intent of Congress! Most laymen are far more concerned about the impact of the law than about the integrity of legal doctrine. Even so, it remains part of my lawyer's faith that one of the greatest functions of the law is to teach—among other things, to teach our vast and pluralistic community of the necessity for a rational accommodation of diverse interests. I have seen both unions and management come to accept the initially unpalatable, once they were convinced of the essential fairness of the process by which they lost. But the critical element is that the game be played according to the rules. In applying a federal statute, I take it the central rule is not to fly in the face of a clearly expressed congressional intent. With all deference to those who disagree, I think that is the basic issue here. And so I must take my stand with the lawyer, not the sage, and conclude, almost shamefacedly, that the writ of the Civil Rights Act runs back to July 2, 1965, but not beyond.



Could the Legal System Be More Humane?

As part of the BBC-Radio Third Program Series on the theme of "What's Wrong with the Law?" the following lecture was broadcast in Britain in December, 1968.

by Andrew S. Watson, M.D.
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To explore the question of "humaneness in the law" presents a fine challenge to a social psychiatrist. It requires the analysis of a social institution which deals with issues of morality and authority, and which engages the intellectual and emotional involvements of lay clients with professional lawyers and judges. Every aspect of this complicated situation lends itself to psychological scrutiny.

The lawyer with his concern for legal abstractions such as "justice," "liberty of the subject," "equity," as well as a multitude of others, by necessity sets himself at some distance apart from personal considerations. The "rule of law" and concepts like the doctrine of precedent, which provide stability and a reasonable predictability to the law, by their very nature tend toward human remoteness. At the same time, it is vital that the members of society governed by the rule of law have a deep conviction that the issues brought to law will be disposed of with justice. In Britain you have a lovely way of putting this which demonstrates high awareness of the emotional aspects of the problem. You say that "not only must justice be done, but it must appear to have been done." This pays close attention to the public's concerns and attitudes.

Laws and legal procedures by their very nature are so technically complex, that at best, laymen can only grope for their meanings. This of course is a characteristic of the work of *all* professionals. The professional person owes a special duty to make the client's best interests his primary concern, particularly because his professional activities are to a great extent performed behind the scenes, out of sight of the client, who is normally unable to evaluate the quality of the work done. *But,* the professional lawyer also has a duty as a member of the bar and the legal profession, to further client interests only *within the limits of the law.* We see at once that this produces a potential conflict of interests with the inevitable result that it may create emotional tension for both the client and the lawyer. An example of this occurs in a criminal trial where defense counsel may and should use every legitimate defense tactic for his client, though he is under an obligation as a member of the bar to avoid obstructing legitimate prosecution procedures. If this tension is not dealt with, the predictable result will be that the client will feel he has been dealt with unjustly, and the lawyer will feel he has not done his job well. A successful lawyer must therefore possess the psychological skill to help his clients resolve such tensions. Whether he be solicitor, barrister, or judge, it should be a matter of professional duty to make at least an attempt to do this. What tools do lawyers possess at the present time to carry out this difficult task?

In Britain, and for the most part in the United States, it is sheer chance if counsel possesses these skills. We can not readily "blame" them, however, for there is nothing in the formal training of lawyers to develop their potential capacity to

". . . there is nothing in the formal training of lawyers to develop their potential capacity to deal with the psychological aspects of law practice. . . . Lawyers are taught and urged to distrust and to eliminate emotions from their work."

deal with the psychological aspects of law practice. While great lawyers have this skill to an impressive degree, the vast majority seem to lack even what might be called commonsense awareness of their clients' emotions. This I attribute to a *negative* effect of legal education, as well as to some of the personality traits in those who choose to practice law. Lawyers are taught and urged to distrust and to eliminate emotions from their work—as if this were possible! They might as well attempt to fly with their hands.

In Britain, the division of the legal profession into barristers and solicitors provides an interesting potential for helping clients to understand and express themselves freely about what happened in the course of their contacts with the law. When an issue goes to trial, the aloof and intellectual barrister will carry out his function of advocacy according to law, insulated, as it were from the client. He can fulfill the community-oriented objectives of the law, leaving the task of restoring the equanimity and understanding of the litigents to the solicitors. This has the effect of forcing the solicitor to be a kind of diplomat-conciliator. His effectiveness in the community depends on his carrying this out, and his self-interest in keeping his clients happy provides the guarantee that he will do so. I have also gained the impression that the frequently differing social backgrounds of solicitors and barristers tends to fit them to carry out these different roles. Solicitors seem to be drawn from a sector of the community which makes them a bit more able to identify with, and be responsive to, the personal concerns of their clients. On the other hand, barristers, generally educated at the older universities and drawn from families more familiar with abstract social concerns, quite naturally fit into the more formal atmosphere of courtroom pleading and consultative work.

This division of labor facilitates a deliberate approach to the dual task of helping the community *understand* the law, at the same time as the *rule* of law is maintained in relatively remote, but logical verbal abstractions. The two kinds of lawyers can carry out these different goals. If at some future time the profession should alter its present structure, for example by unifying its two branches, these distinct functions will still need to be handled, and their importance recognized, by appropriate training measures.

Of course we must acknowledge that most Englishmen's experience with the law takes place in the magistrates' courts and the county courts. Here there is less of the magical aura cast by the professional lawyers than in the higher courts. In fact, litigants in the magistrates' court are usually not even represented by counsel. The atmosphere there is more informal. There seems to be a recent trend of appointing members of the magistrates' bench from a broader spectrum of society which should improve the rapport between the community and the law. It is a commendable trend. Nothing better improves community acceptance and understanding of the law than the reality of involvement, as for example, in the obligation to serve on a jury. I might note in passing that such involvement in community activities is to me one of the impressive characteristics of British society.

Another aspect of British legal procedure which is psychologically important and which deserves extension and emulation is the concept of making most of the elements which enter into the court's decision-making highly visible to the observer. Everything the judge uses and considers is heard in open court. There are no written arguments for judges to evaluate in private. This promotes community participation and evaluation, even though not as extensively as one would wish. This effect could be heightened through further clarification of some of the more abstruse legal issues as they arise in the courtroom. Thus, judges might view themselves as having an educative role as well as being interpreters of the law. The distance between interpretation and education is small. Ways should be found for making their views on important public matters more widely known. Today's communication media should make wide dissemination of important decisions a relatively simple task.

I suppose one would have to say that to most of the community, law and lawyers are viewed as being related to matters Olympian, or as contemporary remnants of a society dominated by the upper classes. Most laymen do not fully, or even partially, understand the well-tuned beauty of legal processes and the way in which they protect the hard-earned cultural gains of a society. They do not appreciate the subtle checks and balances of legal procedures which make law the relatively effective social instrument it is, notwithstanding a multitude of deficiencies. Rather it is seen as a mysterious and threatening apparatus, ever hovering just out of sight, ready to envelop and punish one for real or imagined misconduct. It speaks with Jovian wrath, ready to smite Evil and uphold Good. Such imagery is similar to the imagery of a child's conscience and as such it works to impede the rational development of the law both in terms of public acceptance as well as in the behavior of many who work in the legal profession. It is just this kind of imagery which stands in antithesis to a "humane legal system."

In primitive as well as relatively

"It should always be borne in mind that it is relatively unimportant that the lawyers believe that everything has been clarified and settled, if the parties do not."

recent legal systems the principle of an eye-for-an-eye, tooth-for-a-tooth was viewed as just. Even today, when we are greatly frightened by some heinous crime, such as the Shephard's Bush shooting of three policemen in 1967, there is an immediate impulse to revive the death penalty and other severe punishments. This response is "explained" as an effort to deter those vicious characters among us who would commit such crimes. In our more rational moments, however, we can often recognize such retributive impulses as merely the biological responses to fear. They do not prevent such crimes and indeed many people realize that persons who commit such violent acts seem to have something grossly wrong with them. This kind of awareness on a broad social scale has gradually produced the feeling and belief that to punish there must be evidence of a "guilty state of mind," what lawyers call *mens rea.* The introduction of this idea into the law has been a step in the "humanizing" of the law. It is closely akin to the moral belief of "turning the other cheek" and reflects a stage in the evolution of a humane law and a humanistic society. In other words, humaneness includes the psychological need to understand *why* a crime is committed and it reflects a trend in society's belief that only those who freely *choose* to behave criminally should be subjected to a retributive counter-assault by society. This evolving awareness of the nature of man's inner psychological behavior and its relationship to social control brings in its wake a conflict between the *biological* attribute of self-protective vengeance, and the *social* insights that there are some whom punishment will not deter, and that carrying out punishment on them often makes the punisher feel bad. This conflict lies at the heart of a multitude of social and legal problems which may be resolved rationally only through application of the insights of modern psychological and social theories.

The most direct way this might be done is to transport some of this knowledge about human behavior into the training of lawyers. It is ironical and even deplorable that those who have so much to do with the shaping of law and legal institutions have so little formal contact with this knowledge. It is tantamount to training an engineer without the use of mathematics, yet this is what is done in most countries. Ideally, every lawyer's education should include at least a grounding in human psychology. He should learn what we know about interviewing skills. What happens when a client sits down with an authority figure such as his lawyer? What are the psychological forces operating between the parties to such a conversation that may obscure issues and produce failures of communication? How can a sensitive interviewer avoid these risks or dispel them when they exist? The answer to such questions is to be found in the substance of the psychological sciences; before long, we should view it as a matter of neglect if they are not included in the routine training of all lawyers.

Another place where modern psychological knowledge could and should be used to make law more humane is in relation to the procedures of the law. For example, we *know* that a person confronted with the massive power of the State may do things that appear suspicious or as evidence of guilt, even when he has done no wrong. Concern about psychological reactions to such situations would help to promote interest in ways of avoiding or at least minimizing the danger that the system may make mistakes because of such misleading behavior. This is especially worrying in criminal cases. The legal rules protecting defendants against self-incrimination were intuitive responses developed by the Common Law hundreds of years ago to take account of the psychological phenomenon. We are now in a position to improve upon these procedural rules, to increase the level of understanding of what is going on in legal proceedings, civil as well as criminal.

Another place where there is room for more sensitivity to the human aspects of legal procedure is to be found in defended divorce cases. If these proceedings were made more informal, it would help the parties to understand more fully what is happening to them. They could ask questions right then and there which would help to eliminate subsequent confusion and especially to avoid further agony between the warring parties. This kind of procedural method should be explored and tried out.

Another sort of use for psychological knowledge in legal procedures may be seen in relation to such questions as eye-witness reliability. The widely accepted hunch that emotions can seriously distort the accuracy of eye-witness evidence has now been scientifically proved. Such data should be used to improve the efficiency of legal fact-finding. A need to believe in the accuracy of the facts used in legal procedures is not only connected with the community's sense of justice, it promotes humaneness as well.

Under present rules of procedure, the parties to an action are ordinarily the passive recipients of the results. Often they are left with many unsettled questions, and indeed delusions, as to what happened to them in court. It should always be borne in mind that it is relatively unimportant that the *lawyers* believe that everything has been clarified and settled if the parties do not. So far as they are concerned, the matter has *not* been justly settled. Means must be found for using the formidable power and authority of the court setting to improve and facilitate the communication between the litigating parties. While such changes might prolong the proceedings somewhat, the over-all social efficiency would be greatly increased. Such considerations are another example of how psychological knowledge about people might be used to make the proceedings and imagery of the law more humane.

I have been much impressed with the image of dignity and justice

which is present in the British High Courts. Even the wigs and robes foster this. Side-by-side, however, there is often a kind of icy aloofness which does not foster effective communication. We now know a great deal about the effects of gestures, voice inflection, and body postures on communication. In fact, such non-verbal means of communication are probably at least as important as the words used. It should be possible for judges to learn this new knowledge about the processes of communication, as well as how their own personalities affect the ease of witnesses, the impact of their words on juries, and their effectiveness in communication generally. This could help to make clear that they are humanly in touch with the people before them. Some judges already have this proficiency and it does not appear to erode their judicial authority or objectiveness. Perhaps ways can be found for fostering changes in this direction, through such means as the recent development both in America and in your country of judicial training conferences. Surely it is not disrespectful to suggest that there are some special skills needed by judges which they will not automatically have gained through their previous work as barristers.

Finally the legal profession should utilize its prestige to educate the public in the ways of justice. As I remarked earlier, few laymen understand the nature of the judicial process. They will give away valuable liberties by inadvertence and ignorance, even as they believe that they are making gains for their own security. I would say that lawyers are the possessors of some very heady and exciting knowledge. They should make a greater effort to help us know what they are doing and how they do it. Some few have already done this in books, plays, and public lectures, but it is far from enough. With all of the capability of modern communications media, lawyers should share the excitement of their concerns with us. Let us see, too, how deeply concerned they are with our welfare. This will automatically make the law more humane, because it will make it more understandable.

. . . One of the psychological paradoxes about the law is that in all of our society there is no other group more concerned than lawyers about basic human values. Yet because of the technical complexity which surrounds it this concern all too often remains largely invisible to the public. Thus lawyers and judges do not get full credit for their efforts and are widely misunderstood. May I suggest that we would all benefit from vigorous attention to this matter by the legal profession. We the public would feel more secure with our legal institutions, while the members of the legal profession would receive the satisfying reward of public admiration in return for their efforts.

". . . one of the psychological paradoxes about the law is that in all of our society there is no other group more concerned than lawyers about basic human values. Yet because of the technical complexity which surrounds it, this concern all too often remains largely invisible to the public."

The School Desegregation Cases in Retrospect

Some Reflections on Causes and Effects

Excerpts from a Foreword to Argument: The Complete Oral Argument before the Supreme Court in Brown v. Board of Education (L. Friedman ed. 1969) (Chelsea House).

by Professor Yale Kamisar

Each Lawyer "According to His Own Lights"

As the transcript of the oral arguments amply illustrates, many able lawyers participated in the five school segregation cases. But the principal antagonists were John W. Davis and Thurgood Marshall. Davis, the Democrats' nominee for President in 1924, was a magnificent legal advocate. If he lost the school segregation case, it was only because in 1954 no lawyer could have won it. And although he lost, he left no doubt why he was reputed to be *the* leading advocate of his time. This is a sample:

> [I]t has been accepted that where there is a pronounced dissent from previous opinions in constitutional matter, mere difficulty in amendment leaves the Court to bow to that change of opinion more than it would of matters of purely private rights.
>
> But be that doctrine what it may, somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance.
>
> That is the opinion which we held when we filed our former brief in this case. We relied on the fact that this Court had not once but seven times, I think it is, pronounced in favor of the separate but equal doctrine.
>
> We relied on the fact that the courts of last appeal of some sixteen or eighteen States have passed upon the validity of the separate but equal doctrine vis-a-vis the Fourteenth Amendment.
>
> We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia.
>
> We relied on the fact that 23 of the ratifying States . . . had by legislative action evinced their conviction that the Fourteenth Amendment was not offended by segregation, and we said in effect that that argument—and I am bold enough to repeat it here now—that in the language of Judge Parker in his opinion below, after that had been consistent history for over three-quarters of a century, it was late indeed in the day to disturb it on any theoretical or sociological basis. We stand on that proposition.
>
> * * *
>
> Let me say this for the State of South Carolina. It does not come here as Thad Stevens would have wished in sack cloth and ashes. It believes that its legislation is not offensive to the Constitution of the United States.
>
> It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools, and it thinks it a thousand pities that by this controversy there should be urged the return to an experiment which gives no more promise of success today than when it was written into their Constitution during what I call the tragic era.
>
> I am reminded—and I hope it won't be treated as a reflection on anybody—of Aesop's fable of the dog and the meat: The dog, with a fine piece of

meat in his mouth, crossed a bridge and saw the shadow in the stream and plunged for it and lost both substance and shadow.

Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?

It is not my part to offer advice to the appellants and their supporters or sympathisers, and certainly not to the learned counsel. No doubt they think what they propose is best, and I do not challenge their sincerity in any particular period but I entreat them to remember the age-old motto that the best is often the enemy of the good.

As Justice Harlan noted some years ago in an article on the role of oral argument, "each lawyer must proceed according to his own lights." Although (along with tens of thousands of other lawyers) his organization was not nearly as tight as Davis' nor his presentation nearly as polished, in his own way Marshall, too, was a powerful advocate. This was especially so on rebuttal where, perhaps stimulated by the sting of his opponents' argument, he really seemed to warm to his task. The following is an example of his earthy, homey touch:

> Those same kids in Virginia and South Carolina—and I have seen them do it—they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school.
>
> There is some magic to it. You can have them voting together, you can have them not restricted because of law in the houses they live in. You can have them going to the same State university and the same college, but if they go to elementary and high school, the world will fall apart.

Marshall was no less aware than Davis that, particularly in a great case, the advocate must always "go for the jugular vein." If Davis the master craftsman told the Court *how* to write an opinion reaffirming *Plessy*, Marshall, spokesman for an oppressed race, never let the Justices forget *why* they had to overrule it. Nor was he about to let the Justices forget that the Court and the Constitution, as well as his own cause, were on trial. This is a sample:

> They can't take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion, despite the fact I made it clear in the opening argument that I was relying on it, done anything to distinguish this statute from the Black Codes, which they must admit—because nobody can dispute, say anything anybody wants to say, one way or the other—the Fourteenth Amendment was intended to deprive the States of power to enforce—deprive them of Black Codes or anything else like it.
>
> We charge that [the challenged state laws] are Black Codes. They obviously are Black Codes if you read them. They haven't denied that they are Black Codes, so if the Court wants to very narrowly decide this case, they can decide it on that point.
>
> So whichever way it is done, the only way that this Court can decide this case in opposition to our position, is that there must be some reason which gives the State the right to make a classification that they can make in regard to nobody else but Negroes, and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings.
>
> Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why of all of the multitudinous groups of people in this country you have to single out Negroes and give them this separate treatment.
>
> It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man.
>
> The only thing it can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for. . . .

"Some Fancied Question of Racial Prestige" or Symbol and Catalyst for a Revolution in Race Relations?

One line of Davis' powerful argument would have been better left unsaid: "Shall ['equal,' albeit separate, education] be thrown away on some fancied question of racial prestige?"

Many a White must have regarded this question quite appropriate. Disrupt long-established customs and life patterns for what? Just to accommodate some status-seeking Blacks? (No, to afford them the minimal dignity and respect to which every American is entitled.) Whites, certainly Northern Whites, are much less conscious of their color than are Blacks of theirs—and the stigma it connotes. The many Whites who more or less take their whiteness and treatment as full human beings for granted—who have never felt, if they have even thought about, what it means always to be confined to the back of the bus—may well have wondered: Why do Blacks get so worked up about mere social amenities? Why do they rave so about their rights? Why are *they* so sensitive?

Marshall's rebuttal was:

> I understand the South's lawyers to say that it is just a little feeling on the part of Negroes—they don't like segregation. As Mr. Davis said yesterday, the only thing the Negroes are trying to get is prestige.
>
> Exactly correct. Ever since the Emancipation Proclamation, the Negro has been trying to get what was recognized in *Strauder* v. *West Virginia* [1880], which is the same status as anybody else regardless of race.

Of course, racial prestige was not the only thing at stake in *Brown*—but it was a great deal. As sociologist Joseph Gusfield has pointed out in his illuminating study of Prohibition and Temperance, the instrumental effects of governmental action may be slight compared to the response which it entails as a symbol. So long as men's regard for status,

respect, honor, and prestige are real and important, symbolic action will be real and important. And, though he treated this aspect flippantly, Davis knew it every bit as well as Marshall. It is because political symbolism may affect the status order—may contribute to a glorification or degradation of one group in opposition to others within the society—that, as Gusfield has pointed out, "the struggle to control the symbolic actions of government is often as bitter and as fateful as the struggle to control its tangible effects."

White Southerners and Black Men, as do *all* men, live by symbols. And in large measure the school segregation cases were so fiercely contested and then so bitterly resisted because school segregation is a special symbol. Indeed, to the Southern Black this racist institution must have seemed the epitome of American hypocricy. Had not Horace Mann called education "the great equalizer of the conditions of men"? Had not Justice Frankfurter called the public school "the symbol of our democracy and the most pervasive means for promoting our common destiny"? Were Blacks supposed to be less aware than other Americans that "education is a fetish of our country; we have believed it somehow to be a magic cure-all." [R. Wilkins, in *What the Negro Wants* (1944)].

The Blacks understood, no less than did White Southerners, that for the latter—or more accurately, for Whites *everywhere*—to treat them as though they were outside the community of man—it was essential to nourish and preserve the stereotype of Blacks, the stereotype, as Professor Louis Lusky has described it, that—

> depicts Negroes as relatively unteachable, and therefore ignorant; as insensitive to the demands of abstract ideals, and therefore less troubled by discrimination than the white man; as motivated solely by appetite for the creature comforts, and therefore appeasable with access to fried fish, liquor, and women; as devoid of moral fibre, and therefore predisposed to crime . . . [and] that segregation's significant function is not to deliver an insult but to preserve the group stereotype by minimizing contact between the races in situations where they would necessarily see and deal with each other as individuals, and by putting the official imprimatur on the proposition that Negroes and whites differ in a legally material way.

Similarly, Anthony Lewis has observed:

> That racial separation should carry more emotional weight in schools than elsewhere was understandable: Attendance was compulsory, and in school children of an impressionable age were exposed to a culture. Intermingling of the races could not help but affect their outlook. Putting it another way, any breakdown in school segregation necessarily endangered the perpetuation of the Southern myth that the Negro is by nature culturally distinct and inferior. And there was the fear—surely felt deeply by many in the South, however others regarded it—that school integration was a step toward intermarriage.
>
> It was these reasons that led Holding Carter, one of the most enlightened voices in Mississippi, to write a year before the School decision that a Supreme Court ruling against segregation would be "revolutionary" in character.

"If Davis . . . told the Court **how** to write an opinion reaffirming **Plessy,** Marshall . . . never let the Justices forget **why** they had to overrule it."

"Revolutionary in character"? Has it really turned out that way?

Up through the 1962–63 school year, less than one per cent of Black students attended school with Whites in the eleven states of the old Confederacy. In the 1965–66 school year—in no small measure as a result of the Civil Rights Act of 1964 and guidelines promulgated by the United States Department of Health, Education, and Welfare—the percentage increased to six per cent. Local resistance has occasionally taken the form of spectacular open defiance, but far more effective have been the less flamboyant "guerilla activities" of public officials.

The pace of desegregation, of course, has been most uneven. During the 1966–67 school year, although more than 90 per cent of Black pupils still attended *all-Black* schools in the Deep South states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina, more than 80 per cent attended schools which were less than 95 per cent Black in the Border States of Delaware, Kentucky, and West Virginia. Indeed in Kentucky, a majority of Black children attend schools which are less than 20 per cent Black. Although the rate of desegregation has accelerated almost everywhere in the South in recent years, and the pace has been heartening in some states, the grim facts are that more Black students still attend all-Black schools in Southern and Border states than they did at the time of the first *Brown* decision—and this amounts to more than 75 per cent of all Black students in such states. Is this the stuff of "revolution"?

Even in the North, because of housing segregation, most Blacks, although legally eligible to attend white schools, are still in segregated ones. Indeed, in too many Northern communities, because Whites are moving away or sending their children to private or parochial schools, we are experiencing "resegregation." And most of the relatively few Black students who are no longer "separate" are not yet "equal" or meaningfully "integrated."

The statistical story is disappointing, but it is only a small part of the whole story. The consequences of *Brown* cannot begin to be measured by cold statistics. Nor, although the Supreme Court quickly applied (or extended) the principle of its 1954

ruling to other public facilities, such as public transportation, parks, and beaches, can its consequences be measured by the number of times it has been cited in other judicial opinions. Regardless of its practical, tangible direct effects, and its judicial progeny, the symbolic quality of the decision was immeasurable; as Robert Carter, former NAACP general counsel has observed, "the psychological dimensions of America's race relations problems were completely recast;" the "indirect consequences" "awesome." It stimulated men everywhere—corporate executives, union officials, clergymen, hospital administrators, university executive officers, and faculty members—to rethink and, sometimes at least, to reshape their policies. As Professor John Kaplan has pointed out, the decision's "educative and moral impact in areas other than public education and, in fact, its whole thrust toward equality and opportunity for all men has been of enormous importance." This impact and thrust, for example, contributed mightily to the enactment of the Civil Rights Acts of 1957, 1960, 1964, and 1968 and the Voting Rights Act of 1965—demonstrating once again that constructive political action "flows in no small part from an awareness of basic principles concretely illustrated in court decisions and constantly explained in opinions circulating among a wide audience" [Judge Wyzanski, in *Government under Law* (1956)]. And it greatly accelerated, perhaps even precipitated, the "revolution" in constitutional-criminal procedure. As Dean A. Kenneth Pye has pointed out, "it is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process."

White America was never to be the same after *Brown*. Nor was Black America. As author Louis Lomax put it:

> It would be impossible for a white person to understand what happened within black breasts on that Monday. An ardent segregationist has called it "Black Monday." He was so right, but for reasons other than the ones he advances: That was the day we won; the day we took the white man's laws and won our case before an all-white Supreme Court with a Negro lawyer, Thurgood Marshall, as our chief counsel. And we were proud.

That the case generated a feeling of hope and momentum is evidenced by such Black responses to a national poll, years later, as: "It started the ball rolling;" "the Supreme Court gave us heart to fight."

Last year, looking back at the School Desegregation cases, in which he played a major role, Robert Carter sadly observed that *"Brown* has promised more than it could give." Yet few commentators have better articulated how much it did give [Carter, *The Warren Court and Desegregation,* 67 Mich. L. Rev. 237, 247 (1968)]:

> Blacks were no longer supplicants seeking, pleading, begging to be treated as full-fledged members of the human race; no longer were they appealing to morality, to conscience, to white America's better instincts. They were entitled to equal treatment as a right under the law; when such treatment was denied, they were being deprived—in fact robbed—of what was legally theirs. As a result, the Negro was propelled into a stance of insistent militancy. Now he was demanding—fighting to secure and possess what was rightfully his. The appeal to morality and to conscience still was valid, of course, but in a nation that was wont to describe itself as a society ruled by law, blacks had now perhaps the country's most formidable claim to fulfillment of their age-old dream of equal status—fulfillment of their desire to become full and equal participants in the mainstream of American life.

Southern conservatives understood perhaps better than Northern liberals that revolution feeds on itself and that the time to stop one is at the beginning, not the end. But they couldn't. That is why *Brown* is a momentous decision.

Southern conservatives knew, too, that one Black success would lead to other Black demands. "They were undoubtedly wrong in thinking that they could hold the line by opposing all Negro demands, but the Northern liberals were probably equally wrong in thinking that they could contain the Negro revolution by legal concessions." [James Reston, in *Sketches in the Sand* (1967)].

I realize that revolutions do not begin at a particular point in time; that revolutions are not made; they come—out of the past. Nor am I unaware that many factors were working for change in American race relations on the eve of *Brown*. "But revolutions require a spark, a catalyst. For the revolution in American race relations, this was the School Segregation case":

> The struggle to carry out the Supreme Court's decision created a climate that encouraged the Negro to protest against segregation on buses, to demand coffee at a lunch counter, to stand in long, patient lines waiting to take a biased test for the right to vote. It was easy to say, as many observers did during the [1954–64] decade, that it would be more logical for Negroes in the South to concentrate on obtaining the ballot because political power would open the way to all other rights. But that was only true in the abstract. In the real world the right to vote was too remote an idea to arouse the Negro of the South from apathy and fear. It took the drama of school desegregation, and then of the protest movements, to make the possibility of freedom come alive; then Negroes began demanding *en masse* the ballot to which the law had said they were entitled.

"... more Black students still attend all-Black schools in southern and border states than they did at the time of the ... **Brown** decision ..."

However discouraged one may be at the continuing reality of discrimination, he should remember that this country is at least on the right course —and that the law put it there. A. Lewis, *Portrait of a Decade: The Second American Revolution* 8–9 (1968).

On Thrusting Black Children "Into Hells Where They are Ridiculed and Hated" and Making the World Better for Those Who Stay in Separate" Schools.

In the course of his spirited defense of the "separate but equal" doctrine, John W. Davis turned for support to Dr. W. E. B. Dubois—

> "perhaps the most constant and vocal opponent of Negro oppression of any of his race in the country. Says he:
>
> " 'It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their children to 'fight' this thing out,—but, dear God, at what a cost!' "
>
> "He goes on:
>
> " 'We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated.' "

The irony of it! For the South to cite one who had been called "the most vital and compelling figure in the Negro world"—one who, a full half-century earlier, had warned Booker T. Washington and other Black leaders that "the way for a people to gain their reasonable rights is not by voluntarily throwing them away and insisting that they do not want them"—for the proposition that Black people did not want desegregation.

If Davis was implying, as he seemed to be, that if the militant DuBois were opposed to school desegregation, then surely so were virtually all other members of the Black race, he was plainly wrong. From the White South's viewpoint, the best that could be said was that Blacks were divided on this issue. Indeed, DuBois himself had pointed out that "in this matter of segregation I was touching an old and bleeding sore in Negro thought. From the eighteenth century down the Negro intelligentsia has regarded segregation as the visible badge of their servitude and as the object of their unceasing attack." [DuBois, *Dusk of Dawn* 305 (1940)].

Why are Blacks more fungible than Jews or Irishmen—or White Protestants? There are *some* prominent members of nonconforming minority religious groups, no doubt, who do not (or pretend not) to mind religious instruction in public school classrooms or the invocation of "official prayers" there, but how can they bind those who do object? How can any Black, however eminent, speak for *the* Black? How can any Black, however renowned, prevent other Blacks from asserting *their* constitutional rights? Did not the Court have to tear down the wall, regardless of the number of Blacks determined to climb over the rubble? It seemed sufficient, therefore, to remind Davis, as Marshall did, that "if all of the people in the State of South Carolina and most of the Negroes still wanted segregated schools . . . any individual Negro has a right, if it is a constitutional right, to assert it."

Inasmuch as many Black activists view DuBois as a "symbol of dedicated, uncompromising militance," however, it may be profitable to dwell for a moment on what his views really were on school segregation—and why.

To begin with, his apparent preference for segregated schools was essentially a product of despair, not choice. In the long run, DuBois, too, wanted all color bars down, but that day would only come when "the majority of Americans were persuaded of the rightness of our course" [*Dusk of Dawn* 304], and, he eventually became convinced, the white world was so resolutely opposed to racial equality that that day was far away—"many years, perhaps many generations." [*Ibid.*] The long run was too long. In the long run, DuBois and his contemporaries would be dead—and their children graduates of segregated schools.

In the meantime, his people had to come to terms with the brutal facts of racism. They had to fight for a fair share of public funds for Black schools—transform them, if possible, from "simply separate schools, forced on us by grim necessity" to "centers of a new and beautiful effort at human education" [DuBois, *Does the Negro Need Separate Schools?*, 4 J. Negro Ed. 328, 334 (1935)]—and otherwise develop their own facilities and resources as best they could. In the meantime, they had to do more than dream the impossible—Davis lived long enough to see the school desegregation case of 1954 and to exclaim: "I have seen the impossible happen."

Once "the present attitude of white America toward Black America" is recognized, insisted DuBois in 1935, "there is no room for argument as to whether the Negro needs separate schools or not. The plain fact faces us, that either he will have separate schools or he will not be educated." [*Fd.* at 328–29].

The NAACP, he maintained, "was not, never had been, and never could be an organization that took an absolute stand against race segregation of any sort under all circumstances. This would be a stupid stand in the

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face of clear and incontrovertible facts. . . . What we did say was"—

> no increase in segregation; but even that stand we were unable to maintain. Whenever we found that an increase in segregation was in the interest of the Negro race, naturally we had to advocate it. We had to advocate better teachers for Negro schools and larger appropriation of funds. We had to advocate a segregated camp for the training of Negro officers in the [first] World War. We had to advocate group action of Negro voters in elections. We had to advocate all sorts of organized movement among Negroes to fight oppression and in the long run end segregation.
>
> . . . So long as we were fighting a color line, we must strive by color organization. We have no choice. [*Dusk of Dawn* 309–11]

In the very article John W. Davis quoted, Dubois made plain that he would "welcome" a time when "racial animosities and class lines will be so obliterated that separate schools will be anachronisms"—twenty years later he was to "rejoice" at the overruling of the "separate but equal" doctrine—for he was well aware that—

> Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.

Lest we too hastily congratulate ourselves on the great distance we have traveled since 1935, the year DuBois made these grim observations, consider the sobering remarks of *New York Times* columnist James Reston, some 30 years later and 10 years *after* the School Desegregation case [*Sketches in the Sand* 165–66]:

> It will not do to wait for total racial integration to make substantial improvement in the schools still predominantly Negro. . . . [A] vast and expensive new effort will probably have to be made to make the predominantly Negro schools "equal" even if they are still largely "separate." This is opposed by some Negro leaders in the belief that making the predominantly separate Negro schools "equal" will weaken the fight against keeping them "separate."
>
> Yet it is fairly clear from the history of the last 10 years that the fight for legal equality is insufficient. Educational equality must go with it, or at the end of another 10 years we shall have a Negro generation with equal rights to jobs but few jobs, free access to restaurants and housing but no means to enjoy them, equal opportunity to vote but little understanding of the purpose of voting.

A Double Irony

Although DuBois never realized how near at hand was the 1954 Supreme Court decision, his estimate of the "living hell" many a Black child would experience on entering a previously all-white school was closer to the mark. But for the South this brutal factor was to backfire badly. Not only did it fail to stay the Court's hand in 1954, it was to strengthen its hand in the grim, tense years which followed. If there was irony—when the principle had not yet been announced—in the South drawing on DuBois' writings for support, there was more irony—when the viability of the principle was still in doubt [as it was in 1956–57, see, e.g. Bickel, *The Least Dangerous Branch* 256–58 (1962)]—in the Black cause thriving on the visibility of the White racism which DuBois had foreseen.

For Southern Black families, two Black psychiatrists have recently told us [Grier & Cobbs, *Black Rage* 124 (1968)], "school . . . was seen in a very special way. Beset on all sides by a cruel enemy, school was often primarily a refuge—a place of safety for those who were to be protected—and in a sense it was a case of women and children first." But after *Brown* little Black boys and girls left their "refuge" to face the "cruel enemy."

The courage of these little "pioneers of school desegregation" inspired Blacks everywhere. And at a time when not a few Northerners must have been growing a bit tired of it all—here as elsewhere people may go to great lengths to gratify reformers "in principle" only to find it rather tedious of them to insist on carrying principle to the point where it really bites—the ridicule, harrassment and hatred of the White adults who confronted these Black children mobilized Northern opinion in support of the Court's decision.

Few Northerners would be misled any longer by "the entirely sincere protestations of many southerners that segregation is 'better' for the Negroes, is not intended to hurt them;" rather, as Professor Charles Black has pointed out, many would now understand "that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future." On seeing the fury of the mobs and hearing "the ugly, spitting curse 'NIGGER!'," the abstraction of racism was "concretized" on millions of television screens and the "moral bankruptcy" and "shame" of the thing finally grasped. [See Bickel supra at 266–67; Lewis, supra 7–12] The North was roused. And an North meant an aroused Federal Government.

Many campaigns of the Black Revolution remain to be won—for example, de facto segregation and massive educational and economical issues. But on the fifteenth anniversary of *Brown,* in large part thanks to those who did not spare us the gory details of "The Southern Way of Life," the outcome of the campaign against legal, formal segregation of schools and other public facilities is no longer in doubt.

There remain, to be sure, pockets of resistance, some discouragingly large, many bitterly defended. Flushing them all out will take not a few years and in the process, no doubt, more hate will be spewed and more blood spilled. Nevertheless, now there remain only pockets of resistance. Now *this* campaign is a mopping-up operation.