DELAWARE LAWYER

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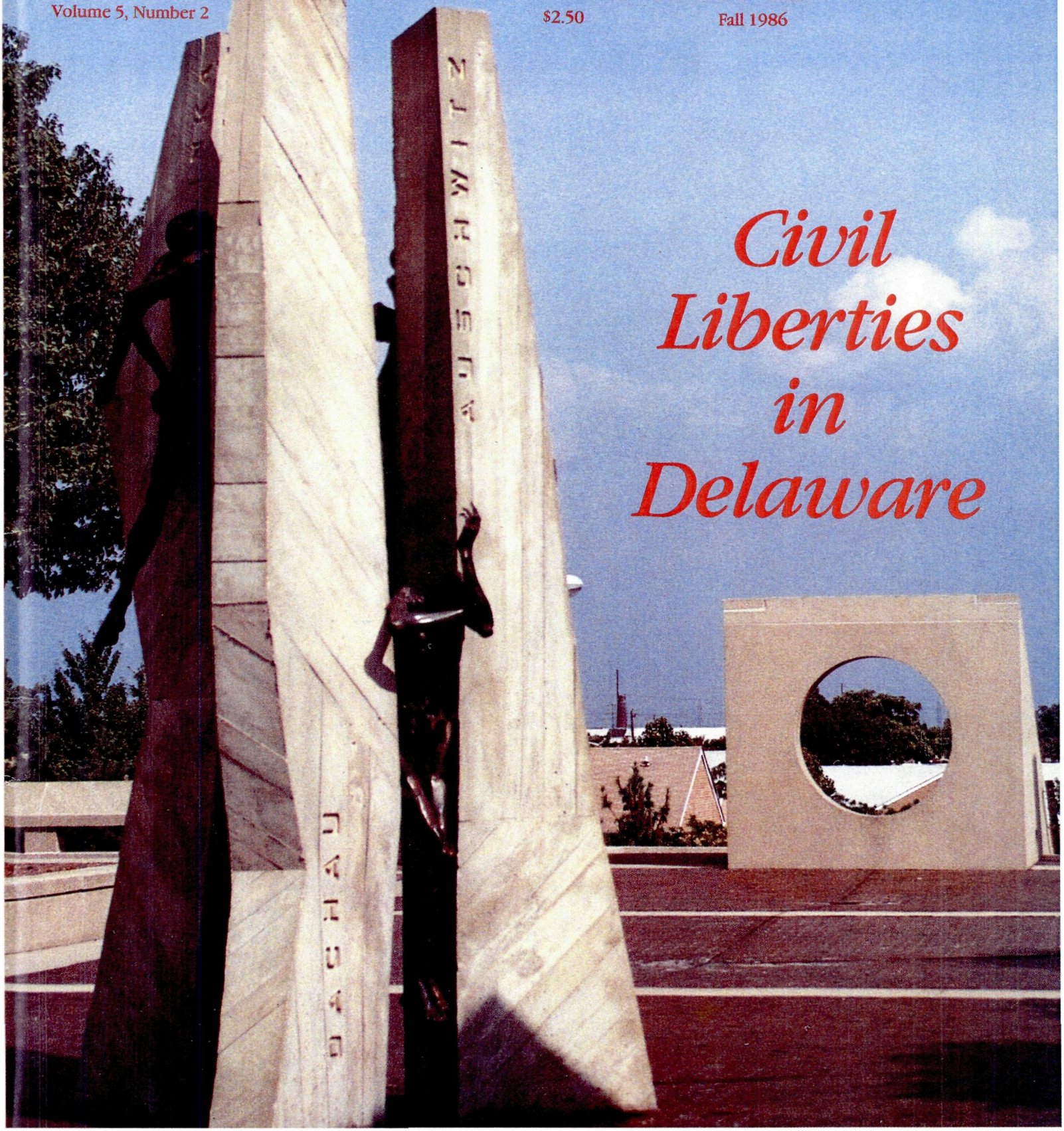
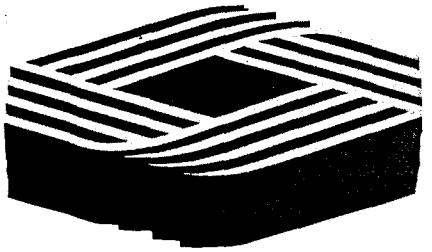


Civil Liberties in Delaware



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Contents

Cover: In Wilmington, halfway between the Carvel State Office Building and the City/County Building stands an eloquent reproach for the grossest denial of liberty and life ever committed by a "civilized" government: the Holocaust. It is a wholesome thing for those who govern to be thus reminded of their obligation to the governed. In this issue we recount the works of civil libertarians who confront authority abused.

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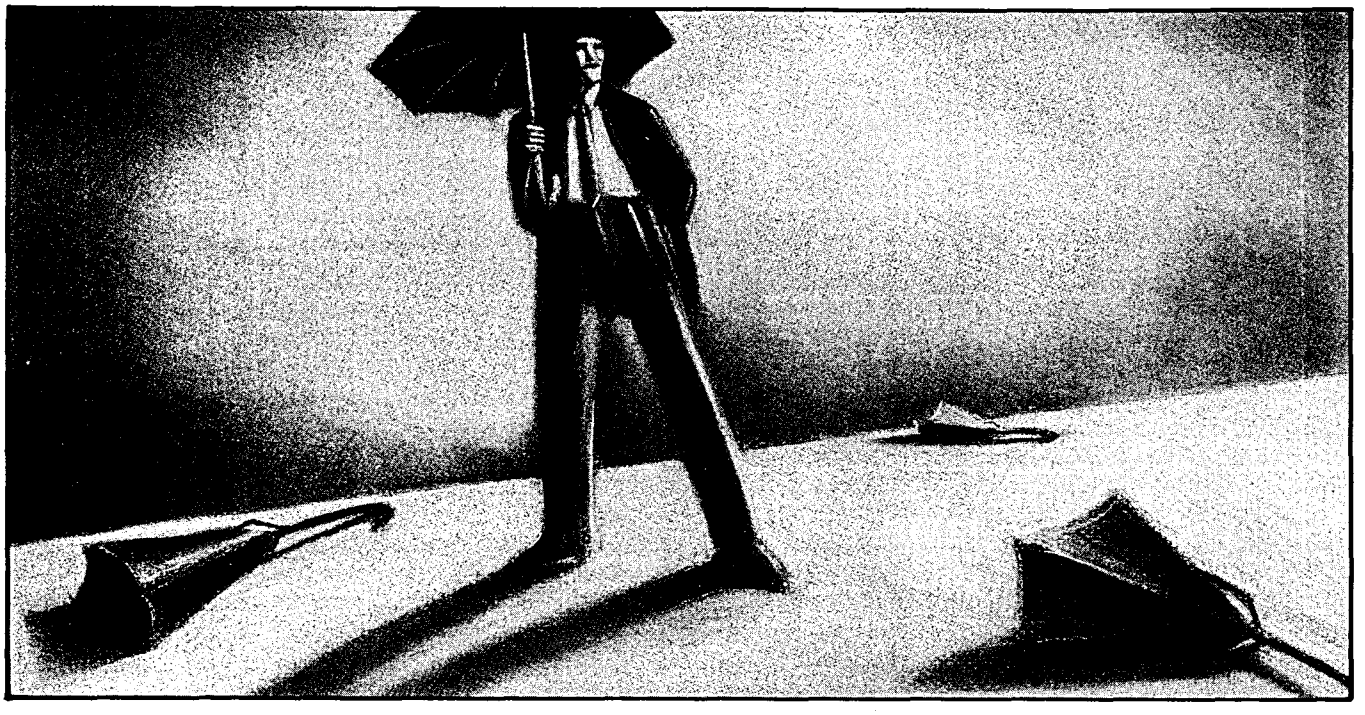
EDITORS' PAGE

There are many more vivid ways of celebrating freedom than of preserving it. On the weekend of the Fourth of July this year we enjoyed a succession of visual treats on television, as the Statue of Liberty shone forth again. It was a major spectacle, beautiful, stirring, and productive of honest sentiment. But on Independence Day I took a much deeper patriotic satisfaction in learning that a Federal Judge had ordered Edwin Meese and his merry men to cut out their sinister practical jokes at the expense of the publishers of *Playboy* and the folks who operate the 7-Eleven Stores. That fine ruling drew a lot less attention than the Tall Ships, but it was far more important to our always menaced right to say, to print, and to read what we please.

Freedom has many celebrants, but few soldiers. The soldiers appear in this issue. Their articles testify to an extraordinary amount of hard work, scholarship, and courage in defending constitutional freedoms in the face of unenlightened hostility. Much of this would go unnoticed if we did not periodically remind ourselves that a few dedicated people maintain the eternal vigilance to which the rest of us pay lip service.

The opening paragraph of one of the articles in this issue annoyed me a little, but stimulated what I hope is a useful reflection. In this issue Professor Bill Conner and Selma Hayman, describing the ACLU presence at Delaware Law School, suggest a conservative antipathy to civil liberties. Presumably, conservatives are those who chuckle evilly every time the Florida electric chair lights up and who refuse to buy Paul Newman's salad dressing because he once appeared on President Nixon's list of enemies. For all I know these stereotypes have swaztikas on their pajamas. Well now, really! When the Delaware Affiliate of the ACLU put on a membership drive last year, it employed an acute slogan: Join The Most Conservative Organization In America. The preservation of two hundred year old liberties is conservative. There is nothing more conservative (or libertarian) than mossback insistence that government, no matter how superficially benevolent in the spread of its welfare tentacles, keep the hell off our backs. Joan Rosenthal, until recently Executive Director of the Delaware Affiliate, tells me that many Republicans are active members. The Republican candidate for Congress this year, Tom Neuberger, who is not exactly the darling of the New Left, has done splendid work for civil liberties. Integrity transcends slipshod ideological labeling. This is a peculiar excellence of the American experience. People of highly diverse political views who espouse liberty can be courteous over minor differences because they are united in core principles. Alexis de Tocqueville is doubtless smiling in heaven.



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A Brief History of the ACLU in Delaware

Ellen S. Meyer

Ellen Meyer, a member of the Bars of Delaware and Pennsylvania, practices in Wilmington. She is a member of the Boards of Directors of the Delaware affiliate of the A.C.L.U., Jewish Federation of Delaware, and Child and Home Study Associates. Consistent with her interest in the rights of children and women, she has been an active member of the Delaware State Bar Association sections on Family Law and Women and The Law.

For many years the directory of American Civil Liberties Union (ACLU) representatives throughout the United States listed only one representative in Delaware, the late William Prickett, Sr. In those days, Delaware did not have a chapter or branch, let alone an affiliate directly linked to the national organization. For territorial purposes, Delaware was deemed part of ACLU's Greater Philadelphia affiliate, which received a portion of the dues paid by members of the ACLU residing in Delaware. Fortunately for Delaware, the Executive Director of the Greater Philadelphia affiliate in the late 1950's (and for many years thereafter) was Spencer Coxe, one of the most gifted and devoted professionals laboring in the civil liberties field in this country. For some time before 1961 Mr. Coxe had been urging Irving Morris and other noted Delaware civil rights advocates to form a chapter here to address local needs. From an organizational point of view, the chapter would remain a part of the Greater Philadelphia affiliate, but with its own board of directors and officers chosen by Delaware ACLU members.

Hopes for a Delaware chapter became a reality on March 2, 1961, when the first meeting of the Delaware chapter was held at the YMCA on Delaware Avenue and Washington Street. The meeting was attended by Irving Morris, Gilbert and Sonia Sloan, L. Coleman Dorsey, Jacob Kreshtool, Ruth Kolber, and Joan and Joseph Rosenthal, among others. They elected a seven-member board of directors, with Louis Finger as the first president.

Irving Morris and Jacob Kreshtool, respectively, succeeded Mr. Finger as president. Monsignor Thomas Reese, then Director of Catholic Social Services, followed them and, as Irving Morris claims, the Delaware chapter became "the only ACLU chapter in the country with an active member of the Roman Catholic hierarchy as our president." Thomas Hughes was the next president, and, in 1971, Gerald E. Kandler began what would become a 14-year tenure as president until his untimely death in 1985. The huge void left by his death has been filled by Max S. Bell, Jr., the current president.

Membership grew, along with the number and magnitude of controversies handled by the Delaware ACLU and its cooperating attorneys. (Some of those controversies are described elsewhere in this issue.) Spencer Coxe and leaders of the Delaware chapter began to explore the feasibility of establishing a separate affiliate in Delaware. There were extensive deliberations to determine whether Delaware could support its own affiliate, without the financial and administrative backing of Philadelphia. The optimists prevailed and, on January 1, 1978, the Delaware chapter was reborn as the newest affiliate of ACLU. Kendall Wilson was named Executive Director and Joan Rosenthal, Administrative Director. On March 10, 1982, Ms. Wilson resigned as Executive Director and Ms. Rosenthal was appointed in her place. She served until this past summer when Judith Mellen became the first salaried Executive Director. Ms. Rosenthal has been elected to the board of directors and will concentrate her efforts on a newly-formed special task force.

Gerald E. Kandler, the long-time president of Delaware ACLU, and in many ways "Mr. Delaware ACLU", died of leukemia in October, 1985. The highlight of the 25th Anniversary Dinner of the Delaware ACLU, to be held October 1, 1986, will be the first presentation of the Gerald E. Kandler Memorial Award. The honorary co-chairmen of the dinner, Charles Welch and Richard Heckert, head a dinner committee comprising a Who's Who of leading citizens from all walks of life.

Today, Delaware ACLU has about 700 members. They share a 25-year commitment to civil liberties in Delaware, proud of the foundation they have built to give meaning to the guarantees promised by the Bill of Rights. ■

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Irving Morris

For more than a generation Irving Morris has practiced law in Delaware with great distinction. He is best known for his corporate practice, but he and his partner, Joseph Rosenthal, have been among the most ardent and skillful defenders of civil liberties in Delaware.

In 1976 Joseph F. McInerney sought the Democratic nomination for United States Senator. The nomination went to another and Mr. McInerney decided to form an independent party ("The Delaware Party") and continued his run for the Senate. Following McInerney's nomination by the new party, the General Assembly passed and the Governor signed a statute of dubious constitutionality designed to keep the Delaware party and McInerney off the ballot. The would-be Senator went to Court. Here is what former Attorney General Joseph Donald Craven has to say about Mr. McInerney's lawyers:

> The firm of Morris and Rosenthal, engaged by Mr. McInerney, is nationally known for its success in handling civil litigation, particularly cases protecting the rights of minority stockholders. But their success as corporation lawyers had not lessened the interest and concern of Irving Morris and Joseph Rosenthal in assisting Delaware citizens whose civil rights had been denied or endangered.

McInerney won his case and his name appeared on the ballot. Mr. Craven observes, "If it were not for McInerney and his lawyers, the people of Delaware might still be politically strangled by an unconstitutional law." A fuller account of this litigation appears in Mr. Craven's book, ALL HONORABLE MEN—The Anti War Movement in Delaware 1965-1966.

The statutorily compelled reading of verses from the Bible and saying of the Lord's Prayer as part of the daily opening exercises in public school classrooms in Delaware never struck me as the burning issue of my time. The School Prayer case was offered to me when I served as President of the Delaware Chapter of the American Civil Liberties Union ("the ACLU") in the early 1960's. I use the word "offered" in a special sense. Doris, my wife, and I were guests on a friend's power boat when a discussion arose as to the propriety and constitutionality of school prayer in the public schools. Several other guests said they thought I should bring an action attacking the constitutionality of the statutes. Although I immediately expressed my judgment that school prayer was undoubtedly a violation of the First Amendment to the Constitution, I went on to emphasize that, given other major issues the Republic faced (i.e., resolution of the problems of race, which threatened and still threaten to divide our people, the achievement of peace in the world, etc.), I thought that I should devote my time and attention to matters other than the recitation of verses from the Bible and the saying of the Lord's Prayer in public schools. Thus, I rejected the "offered" opportunity to take up the cudgels and flail away at school prayer.

Henry W. Sawyer, III, and the ACLU Chapter in Pennsylvania held a disparate view from mine about school prayer and went forward to challenge the practice prevalent in the public schools across the country. On June 7, 1963, in the case of *School District of Abington Township, Pennsylvania v. Schempp,* 374 U.S. 203 (1963), the case which Sawyer brought, the United States Supreme Court ruled that mandatory prayer in public schools was unconstitutional. I did not disagree with the opinion which, I thought, in keeping with the First Amendment of the Constitution, was a resounding proclamation of everyone's freedom to practice religion or not as one chose.

In Delaware some officials promptly acted in a way to distort the meaning of what the Supreme Court had ruled and make political capital in the process. When newspaper people asked David P. Buckson, then Attorney General of Delaware, his view, he answered that he would issue a ruling to the State Board of Education to the effect that prayer should continue in Delaware's public schools since the specific Delaware statutes had not been before the Supreme Court in the *Schempp* case. On August 17, 1963, Attorney General Buckson issued his opinion to the State Board of Education in which he made clear that the Delaware statutes required the reading of the Bible and repeating of the Lord's Prayer in the public schools. George R. Miller, the Superintendent of Schools, in turn, directed Delaware school administrators to obey Attorney General Buckson's ruling.

Although I was fully prepared to ignore school prayer as a litigable issue (I wonder at times what would have happened had those who were so concerned about school prayer first addressed the matter in the various legislatures to convince elected representatives of the unconstitutionality of mandatory prayers in public schools rather than to use the courts as the forum for the effort), I was not at all prepared to have the chief law enforcement officer in Delaware abandon the rule of law, which is the essence of the social compact. If Delaware were free, as Attorney General Buckson suggested, to ignore the ruling of the Supreme Court, not only each State but every citizen was then free to observe each statute or case decision as whim dictated. Attorney General Buckson's opinion set an example for the people of the State of Delaware to follow, which, I thought, would have put us on the road to anarchy; I would have none of it.

When newspaper people asked me, as the President of the Delaware Chapter of the ACLU, what the Chapter intended to do about Attorney General Buckson's position and school prayer given the Supreme Court's decision in *Schempp,* I said that the ACLU would consider going forward with an action should any citizen ask that we do so. Within a day after the newspaper article correctly quoted what I had said, I received two calls. One was from W. Harry Johns, Jr., of Dover,

Delaware, and the other was from Gary DeYoung of Middletown, Delaware. Both offered themselves as plaintiffs.

I promptly met separately with both Mr. and Mrs. Johns and Mr. and Mrs. DeYoung. I explained to them the harassment that undoubtedly would come their way should they become plaintiffs. I did not think of the harassment that would come my way. Not until many years later did my daughter, Debbie, share with me the abuse she took under the taunting of her schoolmates in whose eyes my stand appeared to be against prayer and, therefore, against God. She endured it at a time when she mourned and tried to understand the death of Jonathan, her six and a half year old younger brother. As devastating as was our son Jonathan's death upon Doris and me, I never really comprehended how terrible the loss of the brother they loved must have been to our daughters, Debbie, not quite ten, and Karen, only four and a half. Both coped. I did not help Debbie by taking on the school prayer case.

With knowledge of the problems ahead, the Johns and the DeYoungs said they were still willing to come forward as plaintiffs. The situation of Mrs. DeYoung was particularly sensitive since she herself was a teacher in the public schools of Middletown. We prepared a complaint and filed it, confident of success. After all, there are not many cases a lawyer initiates in a professional lifetime backed by a United States Supreme Court decision hot off the press.

I went forward with the preparation of the case. Through my clients I secured the names of their children's teachers at their schools in Dover and Middletown. Particularly through Mrs. DeYoung, I was able to enlist several of her colleagues to come forward as witnesses. The trial, I was certain, would be a piece of cake.

Meanwhile, the local newspapers published articles about the forthcoming trial. Prayer in the public schools was an emotional issue. My experience is that more emotion is generally accompanied by less understanding. It certainly was true in the school prayer case.

The day of trial finally arrived. At that time, the law required a three-judge court since a State statute was under attack as a violation of the United States Constitution in a federal court. Chief Judge John Biggs of the Third Circuit presided with Chief Judge Caleb M. Wright and Judge Caleb R. Layton of the District Court joining him. I had assembled my witnesses, subpoenaing each of the teachers I wanted to testify to make certain that they would appear. For their own protection in their jobs, I wanted to compel the presence of the teachers so that the school authorities could not accuse them of cooperating with the plaintiffs by appearing voluntarily. The school authorities themselves were under pressure by many people in their communities to find ways to oust anyone who was against the saying of prayers in the public schools. For the teacher witnesses I developed a standard set of questions, the answers to which would readily establish that the reading of the verses was part of the required daily school exercises and that the children bowed their heads in prayer assuming a reverential attitude as they said the Lord's Prayer following the reading of verses from the Bible.

My patterned questions led to one of the more embarrassing moments I have had in a courtroom. As I went through my questions with each teacher, I received the expected answers. The questioning was brief and Attorney General Buckson, who personally tried the case, had no questions in cross-examination. Finally, one teacher took the stand whose answers to the first few questions followed the "script" as I had anticipated the testimony would come forth. Thus, the teacher's answers established that under the mandate of Delaware's statutes, she saw to the reading of at least five verses from the Bible each morning at the start of the school day and that the children in the classroom said the Lord's Prayer following the reading. I then asked, as I had with the other teachers, if the children bowed their heads in prayer as they recited the Lord's Prayer. "I wouldn't know," came the unexpected reply. "Why wouldn't you know?" I foolishly asked without hesitation, ignoring the almost axiomatic rule that a lawyer should never ask a witness "Why?" without knowing the answer in advance. "Because my head is bowed in prayer too," said the teacher. I had no immediate further question to the forthright answer to break the stunning silence pervading the courtroom. There was no place I could go to hide. But the teacher's testimony was not my most embarrassing experience in the school prayer litigation.

The testimony of Harry Johns and Mrs. DeYoung went off uneventfully. The testimony of Gary DeYoung was something else again. Gary DeYoung, a

Of Power and Prayer

poet, was a free spirit with a strong commitment to the rights of the individual. He held other views as I was to learn during the cross-examination by Attorney General Buckson.

On direct examination, I had no reason to fault Gary DeYoung's testimony. On cross-examination, I found myself again looking for some place to hide. I am not at all certain how Attorney General Buckson came upon his opportunity, but in short order I was listening to the Attorney General explore with Gary DeYoung some of his more exotic views. Before I had a chance to object to the lack of relevancy to our proceeding of Gary DeYoung's views, I heard him opine that all priests and nuns of the Catholic Church were sexual perverts. I knew immediately what the newspaper would seize upon for its headline. I was not mistaken.

When the afternoon session ended and I returned to my office, I found my mentor and partner, Philip Cohen, with the afternoon newspaper before him on his desk. Gary DeYoung's views were front-page news, as I thought they would be. The minutes were painful as I unsuccessfully tried to explain to Mr. Cohen why I was consorting with a person who held such offensive views. Freedom of speech and freedom of religion at the cutting edge threatened to tear apart the eleven-year-old partnership of Cohen and Morris. I am certain Mr. Cohen's concern was motivated by a desire to protect me. Nonetheless, I knew that I could not ignore the testimony of Gary DeYoung and Mr. Cohen's reaction to it. Before the evening was out, I spoke to my friend, Father Thomas A. "Father Tom" Reese. (He remained Father Tom to almost everyone even after he was designated a Monsignor.) I asked Father Tom to do what he could to assemble a group of clergymen who would write a letter or letters to the News Journal attesting to their knowledge that I did not personally hold the views that my client, Gary DeYoung, had expressed about priests and nuns. Within a few days, the *Evening Journal* carried a letter signed by eight local clergymen (all known to me) who gave the approbation I needed. I do not believe Mr. Cohen was much mollified.

Attorney General Buckson was no fool. For purposes of his career, the litigation I had brought could not hurt him. No one expected him to win in the face of

the United States Supreme Court's decision in *Schempp.* Meanwhile, he had taken a stance in favor of God. Were he to win, the public would perceive him as a miracle worker. Once engaged in a fight, his nature would not permit him either to back off or give up. But if he were going to lose, it would not be without his having made the effort to win. Early on Attorney General Buckson embarked upon a search for an expert who would support the view that the reading of verses from the Bible in the public schools was a "good thing". His search ended when he found Bishop James A. Pike, who was to be Attorney General Buckson's star witness.

Bishop Pike had an established presence in liberal circles. His initial training had been in the law. After graduation from the Yale Law School, he served with the Securities and Exchange Commission. With another scholar, he published a standard text on the securities laws. Upon turning to a religious vocation, his career was again marked by repeated successes. Although I had not met him, I knew about him. Bishop Pike, as the leader of the Episcopal Church in the Northern District of California, had his main quarters in San Francisco. My brother, Herbert, a Rabbi whose congregation was in San Francisco, California, frequently worked with Bishop Pike in community affairs in the Bay area.

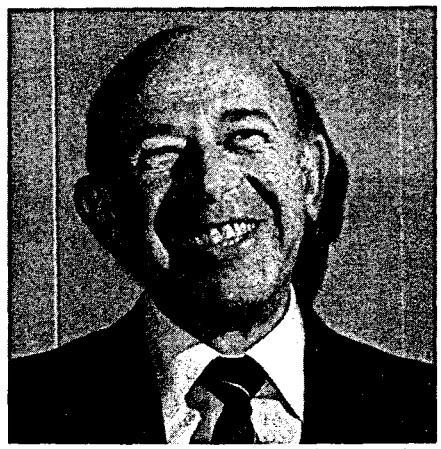
In agreeing to testify in the school prayer case for the Attorney General, Bishop Pike certainly did not do so for money since he charged no fee. He used the hotel room the Attorney General had reserved for himself and did not charge for travel costs since he was on the East Coast on other work. Whatever variation in purpose Attorney General Buckson and Bishop Pike may have had in the one's asking and the other's agreeing that resulted in Bishop Pike's testimony, there was one purpose to which both apparently subscribed: neither shied away from publicity.

While Bishop Pike was in Delaware for the hearing, Channel 12, the local public education television station, invited Attorney General Buckson and Bishop Pike to appear to discuss the school prayer case on a panel show. When the Channel 12 people called me and told me that Attorney General Buckson and Bishop Pike had agreed to appear and invited me and my clients to join the panel, I was not at all pleased that the forum for the legal debate was about to shift from the courtroom to the airways. What I should have done at the time was to call my friend, Attorney General Buckson, and make an effort to convince him to abandon his agreement to appear upon the televised panel. Instead, I agreed to appear with one of my clients, Harry Johns. Thus, in the midst of the hearing, Attorney General Buckson, Bishop Pike, Harry Johns and I taped a show for Channel 12. The television broadcast was uneventful. Nonetheless, before the proceedings in court began the following morning, Chief Judge Biggs asked Attorney General Buckson and me to appear in Chambers, whereupon he told us that the Court frowned upon the appearance of lawyers before the media during the course of the trial. I did not bother to explain to the three members of the Court that I was not about to permit the legally trained Bishop Pike and my able adversary, Attorney General Buckson, to debate the merits of the school prayer case with my clients, Harry Johns and Gary DeYoung.

Upon the conclusion of the hearing, the Court set a brief schedule. On behalf of my clients, I submitted the shortest brief I ever filed. The entire Argument section of the brief consisted of one sentence which read:

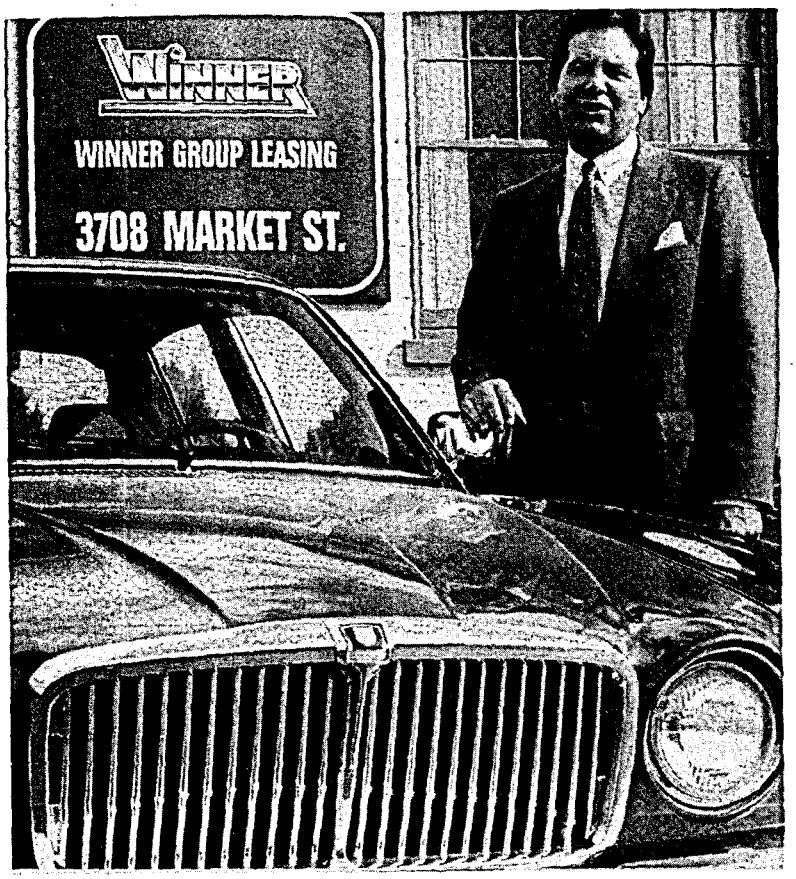
> *In the opinion of plaintiffs, there is no legal issue arising out of the uncontested facts enumerated heretofore which was not considered and resolved by the Supreme Court of the United States adversely to the contentions made by the defendants herein in the cases of* School District of Abington Township, Pennsylvania, et al. v. Schempp, et al. *and* Murray, et al. v. Curlett, et al., *374 U.S. 203, 83 S. Ct. 1560 (1963).*

When all of the briefs were in, the three-judge Court heard oral argument. Sometime before the argument, Doris and I had taken the children to the Washington Monument. As a parent, I always believed in teaching by doing. Thus, with the children I climbed the steps of the Monument to its top. At the third landing of the Monument there begins the listing of the States in the order of their admission to the Union, with the seal of each State and its motto or other appropriate inscription appearing beneath the seal. Since Dela-



Irving Morris, author of this article.

Former Attorney General Buckson



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ware was the first State to ratify the Constitution, on December 7, 1787, Delaware's seal and inscription occupies the third landing. I used the inscription that appears beneath the Delaware seal as the central theme of my argument to the three-judge Court in the school prayer case: "The first to join her shall be the last to desert her."

The thrust of my position was not so much that a State could not compel students to engage in prayer in the public schools (the Supreme Court had so held), but, rather, that no State had the right to repudiate the ruling of the United States Supreme Court and, in effect, desert the Constitution. By Attorney General Buckson's ruling that the United States Supreme Court's decision in the *Schempp* case need not be observed in Delaware, the Attorney General of the State of Delaware had said as a practical matter he would take Delaware out of the Union.

At the argument, the bantam size, feisty, powerful David Buckson, the Attorney General of the State of Delaware, took on the tall, autocratic, powerful John Biggs, Chief Judge of the Third Circuit, who presided over the panel. Chief Judge Biggs acted in a peremptory manner (he was to this manner born in my view) and left no doubt as to who was in charge when he was present. At a particular point in the argument, Chief Judge Biggs interrupted Attorney General Buckson with a question. Attorney General Buckson's unusual response was to the effect, "I do not choose to talk about that matter." Back came the immediate response from Chief Judge Biggs, "You will talk about anything we want you to talk about." Even Attorney General Buckson was cowed. He responded. On Chief Judge Biggs' turf, Attorney General Buckson had met his match.

After the briefing and the argument but before the decision, the Middletown School Board told Mrs. DeYoung that the Board would not renew her contract for the coming 1964 school year. The Board's action was obviously motivated by Mrs. DeYoung's participation in the case. Since she did not have tenure, we would have had quite a struggle to block the Board's action. Nonetheless, I was willing to undertake the fight for her and told her so. She then confided in me that she was not planning to teach during the coming school year anyway since she was pregnant. She and Gary had decided to return to Minnesota where they had family. Reluctantly, since they no longer would have standing to maintain the suit as Delaware residents with children in the public schools, the DeYoungs withdrew as plaintiffs in the case.

In due course, the three-judge Court's unanimous opinion,which Chief Judge Biggs wrote, came down supporting the position my clients and I had taken that the compulsory reading of the five verses of the Bible was a violation of the Establishment Clause of the First Amendment citing *Schempp. Johns v. Allen,* D. Del., 231 F. Supp. 852 (1964). Prayer in the public schools of Delaware thus ceased and the rule of law prevailed. My concern about the rule of law, which prompted my taking and trying the case, never surfaced in Chief Judge Biggs' opinion. I still regard the silence as a missed opportunity Chief Judge Biggs or one of the other judges should have seized to educate the citizenry on the responsibilities of all of us, particularly those in power, to abide by the law.

The school prayer case held a third embarrassment for me although not one that occurred in the courtroom. Out of the case arose the only complaint to my knowledge ever made about my professional conduct as a lawyer to the Censor Committee of the Supreme Court of Delaware as the Court's disciplinary committee was then known. Since the proceedings of the Censor Committee that did not entail any action by the Censor Committee or the Supreme Court were kept confidential, my third embarrassment did not become public.

John Zebley, a balding, portly, retired man, made the complaint. Zebley headed an organization called "Defenders of the Republic." The Defenders consisted of Zebley and a small coterie of like-minded persons whose views were on the far right of the political spectrum. My hope for the health of the Republic is that there are only a few who would hold and act on the views Zebley held. I had heard of Zebley when he participated in an unsuccessful effort to block the appointment of Alexander Greenfeld as United States Attorney in 1961. After the school prayer case, I was to have more experience with Zebley when he attended court sessions in the school

desegregation litigation and from time-to-time tried to participate in the proceedings. (He eventually succeeded when the Third Circuit permitted Zebley, a non-lawyer, to appear and argue the cause of "grandparents" on one of the State's unsuccessful efforts to block the desegregation of the public schools in New Castle County.)

What Zebley did was to seize upon the comments I had made in response to the reporter's inquiry after the *Schempp* decision came down and Attorney General Buckson had publicly made known his views. Zebley claimed that I had committed an act of barratry (i.e., stirring up litigation) by saying that the Delaware Chapter of the ACLU would consider the bringing of an action should anyone come forward and ask that it do so. Zebley's claim was that, in effect, I was soliciting a client to bring the action. Since the United States Supreme Court had already held in *National Association for the Advancement of Colored People v. Button,* 371 U.S. 415, 432-438 (1963), that there was no violation of professional conduct in what I had done, it was nonsense for the Censor Committee to take Zebley's complaint seriously. The ACLU had a commitment to civil liberties, including the freedom of religion. Attorney General Buckson's comment clearly put everyone on notice that he intended to have Delaware infringe freedom of religion as it is protected by the First Amendment to the United States Constitution—and as the United States Supreme Court precisely had held—and ignore the mandate of the High Court and, thus, the rule of law. The ACLU and I as the President of the Delaware Chapter had every right to solicit a person to come forward to challenge the Attorney General's position and that of the State of Delaware in a courtroom. The master fact was, of course, there was no profit motive in the litigation for me or any other lawyer who would act for a plaintiff since ACLU lawyers in the field serve as volunteers without compensation.

The fact that someone had made a complaint about me for the first time in my career, of course, disturbed me even though I knew it was a baseless one. The fact that the Censor Committee took Zebley's complaint seriously was even more disturbing.

The Censor Committee was then under the chairmanship of James L. "Jim" Latchum, a partner at Berl, Potter & Anderson, Delaware's oldest law firm, from whose ranks came a number of judges during my days at the Bar: Daniel F. Wolcott and Collins J. Seitz to the Court of Chancery (Wolcott went from Chancery to the Delaware Supreme Court, first as an Associate Justice on the first separate Delaware Supreme Court and then as Chief Justice succeeding Clarence A. Southerland; Seitz went from Chancery to the Third Circuit Court of Appeals eventually becoming its Chief Judge); Paul Leahy (for whom I served as law clerk for almost two years) to the United States District Court as its Chief Judge; Clarence A. Southerland to the first separate Delaware Supreme Court as its Chief Justice. Jim Latchum knew me as did most, if not all, of the members of the Censor Committee. How they could fail to recognize the baselessness of Zebley's claim angered me then and it still angers me.

The Censor Committee never asked me to appear before it. In response to a letter from Edmund N. "Ned" Carpenter, a member of the Censor Committee in charge of investigating Zebley's complaint, I wrote a letter commenting upon Zebley's complaint and provided Carpenter and the Censor Committee with the citation to *NAACP v. Button,* which made clear the propriety of my conduct. Some months later, I received a telephone call from Jim Latchum in which he told me that he was pleased to inform me that the Censor Committee had "cleared" me of any charge of professional misconduct. Having had some time to reflect upon the matter (one might call it an extended "slow burn"), I told Jim Latchum what I thought of the fact that the Censor Committee had taken seriously Zebley's nonsense. Zebley, of course, had a right to make any complaint he wanted to make about me or anyone else. But the Censor Committee had the obligation to exercise its judgment in distinguishing between substantive and frivolous claims. Prompt word from the Censor Committee to Zebley that his complaint was without even a semblance of merit was what I thought the Censor Committee's tack should have been. My friend Jim Latchum was kind enough to listen to me with patience. He took the brunt of my belated (and perhaps unfair) attack without a

single word of displeasure or, indeed, of defense of the Censor Committee's handling of Zebley's complaint. I think that the charge of barratry against me was the only such charge in the entire history of the work of the Censor Committee. It is a distinction I could have done without.

After he left office as Attorney General, Attorney General Buckson went on to serve as a Judge of the Family Court. He had already served as Lieutenant Governor of Delaware under Governor J. Caleb Boggs and briefly as Governor of Delaware during the few days between Governor Boggs' resignation in order to be sworn in as a United States Senator in January, 1961, and the expiration of Governor Boggs' term. Jim Latchum in 1968 joined the other luminaries of his firm who had ascended the Bench when he was named a United States District Court Judge. He subsequently served as Chief Judge of the District Court. A few years after the school prayer case, Bishop Pike wandered with his wife, but without a guide, into the Judean wilderness west of the Dead Sea. He met a painful death when, after his vehicle ran out of fuel, he left his wife with their car in a vain effort to make his way back and bring help. An Israeli search party found her in time to save her.

At the time of Bishop Pike's death, I recalled the conversation he and I had had when we were together at the Channel 12 studio for the panel discussion. When we were apart from others, I asked him how he, a steadfast defender of many liberal causes, could espouse the view that State-compelled school prayer was constitutional. Bishop Pike leaned toward me and in a confidential, conspiratorial tone shared with me the fact that adoption of this conservative position helped him tremendously with the likes of United States Senator Strom Thurmond when he appeared before congressional committees to testify in support of liberal positions. Bishop Pike certainly had his own way of doing things. ■

Prayer in the Public Schools

Jack B. Blumenfeld and Lawrence A. Hamermesh

The First Amendment to the United States Constitution declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... " It has long been established that this provision applies to the States as well, by virtue of the due process clause of the Fourteenth Amendment. *See, e.g., Cantwell v. Connecticut,* 310 U.S. 296 (1940).

A provision of the Delaware Constitution tracing back to original statehood mandates that "no man shall or ought to be compelled to attend any religious worship...against his own free will and consent, ...nor [shall] a preference [be] given by law to any religious societies, denominations, or modes of worship." Constitution of 1897, Article I, Section 1.

A fundamental corollary of these constitutional provisions is that teachers and other officials at public schools must not promote one particular set of religious beliefs or impose observance of them upon students who do not share them. Yet there have been—and continue to be—repeated efforts to use the public schools as a forum for the promotion of religious observance. These efforts have been rebuffed in the courts, particularly in the last twenty-five years. In response, the proponents of school prayer have now turned their attention to the constitutional amendment as a means to accomplish their goal.

The Supreme Court Precedents

The United States Supreme Court has considered the effect of the Establishment Clause on school prayer on three occasions—each time striking down the state action at issue.

Engel v. Vitale, 370 U.S. 421 (1962), examined the requirement by a New York state school district that the following prayer be said aloud by each class at the beginning of the school day:

> *Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers, and our Country.*

That prayer, composed by state officials, was recommended for public schools as part of a "Statement on Moral and Spiritual Training in the Schools." The parents of several students brought suit in state court challenging the constitutionality of mandatory recitation. The New York courts upheld the power of the State to use the prayer in public schools so long as no student was compelled to participate. The Supreme Court reversed in a 6-1 decision. Justice Black wrote for the Court:

> *We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity...[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.*
> 370 U.S. at 424-25

Remarkably, the Supreme Court did not cite a single legal authority. Instead, the Court relied on "a matter of history": the practice of government-composed prayers was one of the reasons many colonists left England and sought religious freedom in this country. The Court concluded that the First Amendment was added to the Constitution to guarantee that government have no power to control prayer. Because "government...should stay out of the business of writing or sanctioning official prayers..." 370 U.S. at 436, the fact that the prayer was voluntary and denominationally neutral could not save it.

In holding that government officials could not compose official prayers for recitation in public schools, the Supreme Court left open the question of whether the states could require the reading of traditional religious texts in public schools. It addressed that issue the following term in *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963).

Schempp dealt with a Pennsylvania statute and a Baltimore school commissioners' rule requiring that schools begin each day with readings of verses from the Bible and the recitation of the Lord's Prayer. As in *Engel v. Vitale,* such readings were voluntary in that no student would be compelled to participate. Stressing the "neutrality" that the government must accept in matters of religion, the Supreme Court struck down the Pennsylvania statute and the Baltimore rule in an 8-1 decision. It held that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222. Justice Clark concluded that the challenged actions could not pass that test because the states were endorsing, not acting neutrally with respect to, religion:

> *Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in union. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools... [S]uch an opening exercise is a religious ceremony and was intended by the State to be so... Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.*

The Supreme Court did not decide another school prayer case until 1985. *Wallace v. Jaffree,* ____U.S.____, 86 L.Ed. 2d 29 (1985), challenged the constitu-

tionality of three Alabama statutes. The first authorized a one-minute period of silence "for meditation" in all public schools, the second a period of silence "for meditation or voluntary prayer". The third authorized teachers to lead "willing students" in the following prayer:

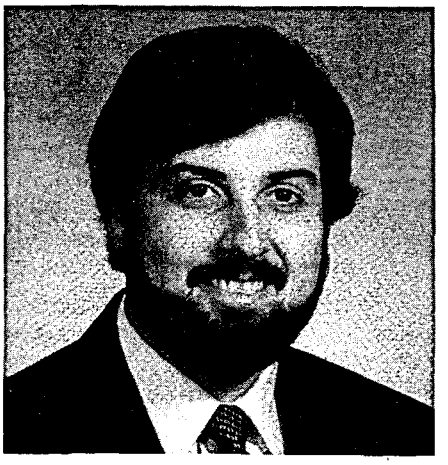
> *Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.*

By the time the case was decided by the Supreme Court, only one of the statutes remained at issue. The first statute, authorizing a moment of silence, was no longer challenged as unconstitutional. The third statute, authorizing the prescribed prayer, had been summarily held to be unconstitutional. *Wallace v. Jaffree*, 466 U.S. 924 (1984). The narrow question remaining was whether a statute authorizing a period of silence "for meditation or voluntary prayer" violated the Establishment Clause of the First Amendment. In a 6-3 decision, the Court held that it did.

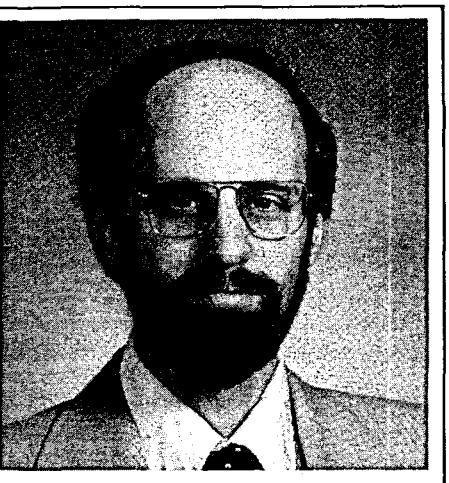
The Court held that in order to survive the constitutional challenge, the statute would have to have "a clearly secular purpose." 86 L.Ed. 2d at 43. The sponsor of the Alabama legislation had testified that the bill was an "effort to return voluntary prayer to our public schools...[I]t is a beginning and a step in the right direction." Relying primarily on that testimony, the Court concluded that "the statute had no secular purpose." 86 L.Ed. 2d at 43-44. By endorsing religious activities, Alabama had violated the Establishment Clause. Justice Stevens also noted that this was not "an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority", 86 L.Ed. 2d at 46. He stressed the potential influence on school children (quoting *McCollum v. Board of Education*, 333 U.S. 203 (1948)):

> *The law of imitation operates, and non-conformity is not an outstanding characteristic of children.*

Separate concurring opinions written by Justices Powell and O'Connor in *Wallace v. Jaffree* suggest (as does Justice Stevens) that some state moment-of-silence statutes may be constitutional. A majority of the Court recognized that a moment of silence in schools is not inherently religious. As Justice O'Connor wrote:



Jack Blumenfeld and Larry Hammermesh are partners with Morris, Nichols, Arsht & Tunnell. Jack's areas of practice include intellectual property and corporate litigation. He is a director of the Jewish Federation of Delaware and he is the chairman of the Jewish Community Relations Committee.



Larry's practice is primarily devoted to corporate takeover and stockholder class and derivative litigation. He also serves on the Board of Directors of the Delaware Affiliate of the American Civil Liberties Union.

Prayer in Public Schools
(Continued)

By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period...Even if a statute specifies that a student may choose to pray silently in a quiet moment, the State has not thereby encouraged prayer over other specified alternatives. Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray. Similarly, the face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer. The question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of particular statute to determine whether it operates as an endorsement of religion.

Engel v. Vitale and *School District of Abington Township v. Schempp* proscribe state-sponsored recitation of either state-composed or traditional prayers in the public schools as violative of the Establishment Clause because of state endorsement of religion. *Wallace v. Jaffree* suggests that the legality under the Establishment Clause of a statute requiring a moment of silence in public schools would turn upon whether the purpose or effect of the statute is the endorsement of religion.

The Delaware Statutory Scheme

From at least the early 1920s until 1971, Delaware had a statutory regulation mandating prayer in public schools. *See* 32 Del. Laws, c. 182; 34 Del. Laws, c. 179; Code 1935, §2758; 14 Del. C. 1953, §4101; 58 Del. Laws, c. 162. For example, a 1925 statute provided:

> *In each public classroom in the State, and in the presence of the scholars therein assembled, at least five verses from the Holy Bible shall be read at the opening of such school, upon each and every school day, by the teacher in charge thereof...*34 Del. Laws, c. 179, §2.

However, in 1971, the reading from the Bible was replaced by a moment of silence. The statute (14 Del. C. §4101) was amended to provide:

> *Pupils in the free public schools of this State shall be given the opportunity to devote, during the initial period of classroom time each school day, a moment for moral, philosophical, or patriotic meditation.*
> 58 Del. Laws, c. 162.

In 1975, Section 4101 was amended again to permit "two or three minutes" for voluntary participation "in moral, philosophical, patriotic or religious activity." 60 Del. Laws, c. 50. In 1978, it was amended to make clear that such "religious activity" included prayer. Thus, as of 1978, Section 4101 provided:

> *During the initial period of study on each school day all students in the public schools of Delaware shall be granted 2 or 3 minutes to voluntarily participate in moral, philosophical, patriotic or religious activity. For purposes of this section, "religious activity" shall include voluntary prayer at the beginning of each school day.* 6 Del. Laws, c. 547.

Eight days after the Supreme Court's 1985 decision in *Wallace v. Jaffree,* the General Assembly recognized that the Supreme Court had "invalidated an Alabama statute which could be construed as a State endorsement of prayer activities" and that "Delaware has never intended, nor does it now intend, to mandate any activity which is violative of the First Amendment." At the same time, the General Assembly determined that "a brief period of quiet reflection at the beginning of the school day...is an appropriate pause between the rush to school and the activities of the day," in that "it promotes an orderly environment conducive to learning." Accordingly, 14 Del. C. §4101 was amended to read:

> *During the initial period of study on each school day all students in the public schools in Delaware may be granted a brief period of silence,*

not to exceed two minutes in duration, to be used according to the dictates of the individual conscience of each student. During that period of silence no other activities shall take place.

There can be little question that the current version of Section 4101 conforms to First Amendment requirements as set forth in *Wallace v. Jaffree.*

A Proposed Constitutional Amendment

In contrast to the response by Delaware General Assembly to *Wallace v. Jaffree,* proponents of school prayer in the United States Senate have chosen simply to press for constitutional change. That change, embodied in Senate Joint Resolution 2, would add to the Constitution the provision that:

Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of prayer or reflection.

Read literally, this proposal appears superfluous: under the Constitution as it is now interpreted, individuals and groups are free to pray silently in public schools. Opponents of the proposal, however, fear that it is a pretext to permit state and local authorities to establish prayer as a norm. They point out that proponents of S.J. Res. 2 view it as a device to "restore discretion to State or local authorities to structure a religious exercise," including exercises with prayer cards and rosary beads for students who wish to use them.

In explaining his dissenting Judiciary Committee vote against S.J. Res. 2, Senator Howard Metzenbaum summarized his perception of the threat posed by S.J. Res. 2 as follows:

The sponsors of this amendment argue that the wording of the provision prohibits the Government from coercing any child to pray. But how is an eight year old to respond when the teacher conducts "an organized religious activity" each morning in which other children are involved?

What if the great majority of the class uses written prayer cards prepared by a particular denomination? What if the teacher discusses the types of prayer students may wish to give without "encouraging" a particular form of prayer? What if the school officials provide that students who do not wish to be a part of the morning devotional event must leave the room? All these types of conduct are apparently allowed by this amendment, but it is ludicrous to argue that these situations are "neutral" in regard to religion.

Such Government-sponsored activity in a public school classroom inevitably promotes religion. Moreover, in most cases it will promote a particular type of religion—the religious practices of the teacher and the majority in the community. It is impossible to believe that a child whose religious faith differs from majority of his classmates will not frequently feel embarrassed, coerced or ostracized when these Government sponsored religious activities occur.

The wisdom of a constitutional amendment relating to school prayer will be debated, perhaps for years to come. In the meantime, the experience in Alabama reviewed in *Wallace v. Jaffree* demonstrates the importance of vigilance by groups like the American Civil Liberties Union and their recourse to the courts.* In 1981, the Alabama legislature authorized public school teachers to lead students in vocal prayer—even though such a measure had been invalidated by the United States Supreme Court nearly twenty years earlier in *Engle v. Vitale.* The Alabama vocal prayer legislation even survived scrutiny by the Alabama District Court—a result the Supreme Court, with exemplary restraint, characterized in *Wallace* as "remarkable." Only on appeal did the courts restore the rights previously announced in *Engel.* As well as any incident, the 1981 Alabama school prayer legislation demonstrates that consitutional rights cannot be vindicated without constant attention and dedication to the task.

*The American Civil Liberties Union submitted an *amicus curiae* brief in *Wallace v. Jaffree.* The ACLU or its affiliates have appeared in numerous other cases successfully challenging state and local efforts to promote school prayer. *E.g., Walter v. West Virginia Bd. of Educ.,* 610 F.Supp. 1169 (D.W. Va. 1985); *Alabama Civil Liberties Union v. Wallace,* 456 F.2d 1069 (5th Cir. 1972); *Lubbock Civil Liberties Union v. Lubbock Indep. School District,* 669 F.2d 1038 (5th Cir. 1982); *American Civil Liberties Union v. Albert Gallatin Area School District,* 307 F.Supp. 637 (W.D. Pa. 1969), *aff'd* 438 F.2d 1194 (3d Cir. 1971).

The Other Side Of Equity

The Court of Chancery and Civil Rights

Carolyn D. Mack

When most people hear mention of the Court of Chancery, they think of the Court's role in groundbreaking corporate litigation. They think of the big takeovers, of T. Boone Pickens's forays, and of the Revlon, Household International and Shell Oil cases. Many (including attorneys outside of Delaware) think that Chancery does only corporate work, and do not realize that it has full equitable jurisdiction.

Even in Delaware, among both lawyers and non-lawyers, we take pride in our equity court because of its national leadership in the corporate sphere. Although we look to Chancery for equitable relief in disputes over real property and contracts, it is corporate jurisdiction that is always emphasized. But Chancery has a record of innovative civil rights opinions unique among state courts. The Court was in the vanguard of the 1950's and 1960's civil rights litigation, which forced this country to begin to reverse its shameful treatment of non-white minorities and of black people in particular. In following the best traditions of equity to act as "the Daughter of Truth and the Sister of Justice," the Court of Chancery has remedied discriminatory practices in public schools, in private businesses located on state property, and in privately-established, state administered trusts (among a multitude of civil rights cases which the Court has addressed in its role as judicial guardian of individual rights and freedoms).

I. On January 31, 1948, the Board of Trustees of the University of Delaware adopted a resolution providing for the admission to the University of black students resident in Delaware and who wished to pursue a course of study leading to degrees not available to them at any state college for blacks. Pursuant to this resolution, blacks were admitted to the Engineering, Graduate, and Summer Schools because there were no comparable programs at Delaware State College, at that time the only institution of higher education in Delaware open to blacks.

In January 1950, several black residents of Delaware requested application blanks so they could apply for admission to the *undergraduate* school at the University of Delaware. Their requests were denied in reliance on the 1948 resolution. Counsel representing the applicants[1] wrote to the Trustees of the University, pointing out that Delaware State College had lost its accreditation and that the University and the College were *not* equal. They asked the Trustees (1) to make application forms available to their clients, (2) to consider and act upon these applications without reference to the race or color of the applicants, and (3) to notify each applicant of the action taken upon his or her application. By resolution dated February 18, 1950, the Trustees formally denied the requests, once again relying on the 1948 resolution and the fact that the potential applicants wished to pursue courses of study leading to degrees offered by the College.

These young black people who had been denied even the opportunity to *apply* to the University of Delaware brought suit in the Court of Chancery. They sought a permanent injunction restraining the University and the members of the Board of Trustees from (1) denying plaintiffs and those similarly situated application forms for admission to undergraduate study at the University, (2) considering and acting upon the applications upon grounds relating to the color or ancestry of the applicants, and (3) enforcing a resolution, custom or usage excluding plaintiffs and others similarly situated from admission to undergraduate work at the University.

On August 9, 1950, then Vice Chancellor Collins J. Seitz[2] handed down an opinion in favor of plaintiffs and the class of those similarly situated. *Parker v. University of Delaware,* Del. Ch., 75 A.2d 225 (1950. He began by sweeping aside defendants' arguments that this was not a proper class action:

> *Conceding that the right involved is a personal one, I cannot agree that the right here sought to be determined cannot properly be the subject matter of a class action. It seems to me, on the contrary, that a class action is particularly appropriate here because of the question to be determined. The basic question to be decided involves the application of one of the great guarantees of the Constitution of the United States—the equal protection of the laws.*
>
> *I am prepared to take judicial notice of the fact that there are a substantial number of Negroes in Delaware whose positions are similar to those of the plaintiffs. Many of the students at the [Delaware State] College and many of the June graduates of the Negro high schools may properly be considered to be in this class. Yes, the class is real enough.* 75 A.2d at 227.

After discussing the evolution of the University of Delaware and determining that it was, indeed, a state rather than a private institution, thus implicating equal protection guarantees, Chancellor Seitz tackled the question of whether the defendants' position regarding the plaintiffs' right to apply to and be admitted by the University was constitutionally tenable. The plaintiffs asserted that Delaware State College was inferior to the University of Delaware because, as a segregated school, the College could not be an equal school and, in any event, the College was markedly inferior to the University.

In view of *Sweatt v. Painter,* 70 S.Ct. 848 (1950) and *McLaurin v. Oklahoma State Regents for Higher Ed.,* 70 S.Ct. 851 (1950), decided by the United States Supreme Court only two months before Chancellor Seitz's opinion, in which the Supreme Court declined to review the "separate but equal" doctrine of *Plessy v. Ferguson,* 16 S.Ct. 1138 (1896), Chancellor Seitz stated: "I do not believe I am entitled to conclude that segregation alone violates [the equal protection] clause." 75 A.2d at 230. Undaunted, he went on to compare the various attri-

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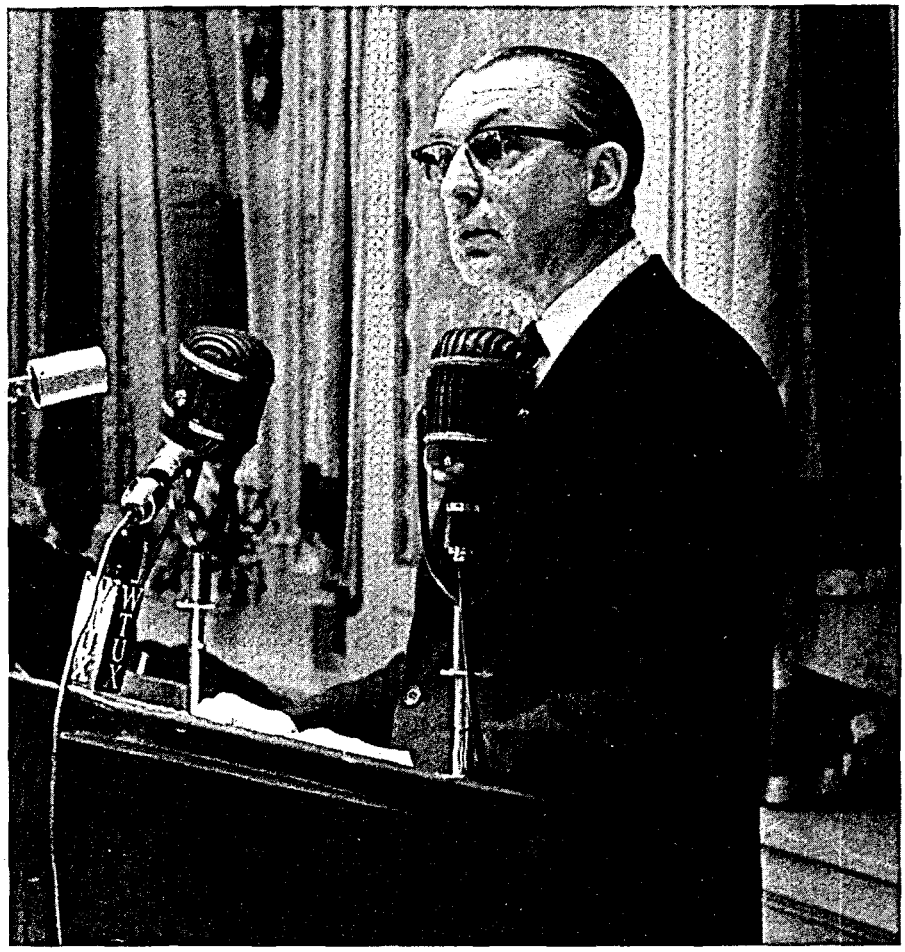
The Other Side Of Equity
(Continued)

butes of the University of Delaware and Delaware State College, finding in each instance that the College was greatly inferior to the University. He compared the capital assets of the two institutions and found that the *per capita* assets of the University were about double those of the College, and he cited uncontradicted expert testimony that two schools with such a disparity in capital assets could not be expected to be equal because of the correlation between capital assets and educational opportunities. He also relied upon his own physical inspection of both institutions, concluding that "the physical facilities at the College are vastly inferior to those at the University and that such inferiority has no relationship to the sizes of the respective student bodies." 75 A.2d at 231.

Chancellor Seitz also compared the curricula, faculties, and libraries of the two institutions. On the curricula offered at both institutions, he commented: "One is struck by the gross disparity between the richness and variety of particular courses offered at the University and at the College." He noted that the University offered a large number of seminar courses, the College none: "It is rather shocking that at this stage in the progress of higher education in Delaware many of its citizens do not have available to them in their college work anything resembling seminar courses."

In comparing the faculties of the two institutions, Chancellor Seitz found the faculty at Delaware State College to be grossly inferior to the faculty at the University in number of instructors, training, scholarship and compensation. He observed: "The testimony before me demonstrated that the salary scale at the College was so low that the College could not compete successfully with the local public school system." He also remarked on the "shocking lack of tenure at the College."

As for the libraries at the two institutions (as he put it, the "heart" of any educational institution), he noted that the University library had more than 140,000 volumes compared with 16,000 at the College, with similar disparities in periodicals and other services. It also appeared that the College did not even have adequate space to house what



Judge Seitz addressing the legal profession.

volumes it possessed. He concluded critically that "[i]t would be a waste of time to amplify the overwhelming inferiority of the library at the College to the library at the University. Indeed, the College library was originally designed as a chapel." 75 A.2d at 232-233.

This did not conclude his catalog of inequalities. The College lacked accreditation, a serious impediment to employment and graduate school opportunities for its graduates. The University outshone the College in administration, student employment placement, infirmaries and medical staffs, maintenance staffs, and athletic facilities. The State of Delaware had by statute created certain chairs of learning at the University, none at the College. Furthermore, the State had established scholarships and prizes at the University including some 33 funds. There was only one scholarship fund at the College.

Chancellor Seitz concluded that the University and the College could not be considered equal and that the plaintiffs should have the relief requested. In view of his careful and unexceptionable treatment of the issue of claimed inequality between the two institutions, it is not in the least surprising that the defendants did not choose to appeal his decision.

II Chancellor Seitz followed up *Parker v. University of Delaware* a little over a year and a half later with *Belton v. Gebhart,* Del. Ch., 87 A.2d 862, decided April 1, 1952. Few realize that *Belton* was the only case among those before the United States Supreme Court in *Brown v. Board of Education of Topeka,* 74 S.Ct. 686 (1954), and *Bolling v. Sharpe,* 74 S.Ct. 693 (1954), when *Plessy v. Ferguson,* 16 S.Ct. 1138 (1896), was overruled insofar as its "separate but equal" doctrine related to public primary and secondary education, in which those who denied the right to a desegregated education were appealing the decisions of the courts below rather than the complaining minority representatives. Nor do many realize that *Belton* was the only case before the Supreme Court in *Brown* on appeal from a state court rather than from courts in the federal system.

In a decision touching primary and secondary public education which this author believes is unique in the United States, Chancellor Seitz found in *Belton* that the public schools in New Castle County designated for attendance by black children were unequal to those attended by whites. His findings were again carefully reasoned and were almost wholly accepted by the Delaware Supreme Court which affirmed in a decision which is also unique in pre-*Brown* American appelate jurisprudence.

Chancellor Seitz's opinion in *Belton* foreshadowed the United States Supreme Court's rejection of "separate but equal" in Brown. He said:

> *[I]n our Delaware society State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.* 87 A.2d at 864-865.

He added: "I believe the 'separate but equal' doctrine in education should be rejected, but I also believe its rejection must come from [the United States Supreme Court]."

The United States Supreme Court, of course, accepted that invitation in *Brown* and upheld Chancellor Seitz's finding that separate cannot be equal in primary and secondary public education.

III. Most textbooks on constitutional law prominently feature and analyze a case which achieved considerable notoriety on the Delaware scene in the late 1950's and early 1960's. At that time, Eagle Coffee Shoppe, Inc. operated a restaurant in space leased from the Wilmington Parking Authority at Ninth and Shipley Streets in Wilmington. It refused service to William H. Burton solely because he was black. (A little known irony of the *Burton* case is that as a member of the Wilmington City Council, Mr. Burton had attended the opening of the restaurant.) Mr. Burton, represented by Louis L. Redding, Esquire, filed suit in the Court of Chancery to enjoin the restaurant from engaging in discriminatory practices. Then Vice-Chancellor William Marvel (subsequently Chancellor) determined that although the restaurant was privately operated, the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution applied because the rent paid by the tenant was an integral part of the financing of the public parking facility and the lease required the tenant to occupy and use the leased premises "in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority." *Burton v. Wilmington Parking Authority,* Del. Ch., 150 A.2d 197 (1959). Chancellor Marvel stated:

> *[D]espite the Authority's disclaimer of control over the policies and practices of the Eagle Coffee Shoppe, I am satisfied that the Fourteenth Amendment to the Constitution of the United States is applicable to the operation of all aspects of the structure here involved, and that it forbids discriminatory practices in the restaurant in which plaintiff seeks to establish class rights.*
>
> *Plaintiff is entitled to a declaratory judgment to such effect.*
>
> 150 A.2d at 199.

The Delaware Supreme Court did not agree with Chancellor Marvel's finding of state involvement. Del. Supr., 157 A.2d 899 (1960). On appeal, the United States Supreme Court, however, agreed with Chancellor Marvel and reversed the Delaware Supreme Court's decision that the Eagle Coffee Shoppe's racially discriminatory policy was exercised in a purely private capacity. *Burton v. Wilmington Parking Authority,* 81 S.Ct. 856 (1961). The United States Supreme Court found that the Wilmington Parking Authority was a state entity and that "the commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. 81 S.Ct. at 861.

IV. In 1969 Chancellor William Duffy and in 1970 Chancellor Marvel reformed privately funded but publicly administered charitable trusts so as to eliminate racial discrimination.

In *Bank of Delaware v. Buckson,* 255 A.2d 710 (1969), Chancellor Duffy construed a testamentary trust established under the Will of Dr. Joseph P. Pyle who died in 1917. The trust was to be used to fund the " 'Dr. Joseph P. Pyle Scholarships' for the benefit of the young men of Wilmington." 225 A.2d 711. A scholarship committee received and passed upon applications for the scholarships. The committee consisted of the principal of Wilmington High School, the Chief Justice of the State of Delaware, and the President of the Equitable Guaranty and Trust Company, the predecessor to Bank of Delaware. If these persons were unable to serve, the President of Delaware College (by then the University of Delaware), the Chancellor of the State of Delaware, and the Vice President of the Equitable Guaranty and Trust Company could be substituted. The trust specified the applicant pool to be "white youths or young men residing in the City of Wilmington who shall have attained the age of seventeen years and whose age shall not exceed twenty-one years, who shall have graduated at the Wilmington High School or at any other school in the City of Wilmington at which young men were prepared for college." 255 A.2d at 712. Up to the time of Chancellor Duffy's opinion the Scholarship Committee had always been composed of successful Chief Justices of the State of Delaware, principals of Wilmington High School, and officers of Bank of Delaware. The Committee had accepted applications only from young white men because it considered this to be the mandate of the trust. On at least one occasion the Committee had rejected a non-white applicant. Because of the changing social and legal climate, the trustee, Bank of Delaware, sought instructions concerning the quoted language and the acceptability of applications by non-whites.

Carolyn Mack, a native of Maryland, graduated from the George Washington University National Law Center and came to Delaware when she was appointed clerk to The Honorable Maurice A. Harnett. After serving a year in that capacity she became an associate of the firm of Morris and Rosenthal, where her work now consists principally in corporate litigation.

Chancellor Duffy pointed out that in only one place in a rather long description of the trust and the scholarships did Dr. Pyle's Will refer to "white youths" and that the reference was in the disjunctive "white youths or young men." He reasoned that this language had to be consistent with the general charitable purpose and intention of Dr. Pyle's Will which was the creation of scholarships to benefit young men in the community. Chancellor Duffy went on to find, although he did not consider it necessary to disposition of the case, that because of the composition of the Scholarship Committee including the principal of a public school and a Chief Justice of the State of Delaware, the Committee engaged in state action, even though the trust was privately established.

Chancellor Duffy also pointed out that when Dr. Pyle executed his Will in 1914, only approximately 10% of the Wilmington population was non-white, but by the time of his decision it was 40%. Furthermore, the percentage was growing, and it was even greater in the public schools (61% of the students enrolled in Grades 10 through 12 in public schools were non-white). He concluded that it would frustrate Dr. Pyle's purposes in establishing the trust if the Committee were to limit its consideration of applicants to 39% of the male public school graduate pool:

> *[I]t is also true that the percentage of the population from which the Committee may make its selection is vastly more limited than it was in Dr. Pyle's day, and that it is a circumscription here which he could not have visualized. The population turnabout is dramatically, and somewhat ironicallly,*

demonstrated by the fact that one of the Committee's members (and a State official) whom Dr. Pyle specifically included, the principal of Wilmington High School, is himself a Negro. 225 A.2d 174.

Accordingly, the Chancellor instructed the trustee to accept and the Committee to consider applications without limitation as to race, stating: "Everything in Dr. Pyle's Will indicates that he was more interested in getting the right man than he was in that man's color. And it is in keeping with that intention to remove the racial restriction." 225 A.2d at 717.

In *In re Will of Potter,* Del. Ch., 275 A.2d 574 (1970), Chancellor Marvel addressed a similar problem in construing the Will of Colonel Benjamin Potter who died in Kent County in 1843. Colonel Potter had set up a charitable trust whereby trust income was to be distributed "to and for the use, support, maintenance and education of the poor white citizens of Kent County generally." The distribution was to be made by agents appointed by the Orphans Court or the Levy Court of Kent County. The agents for the trust had, however, always been appointed by the Chancellor of the State of Delaware, who had also named the first and all successor trustees. The agent sought instructions: might she distribute trust income to residents of Kent County who were not white or was she bound by the terms of the Will to confine her distributions to white residents of Kent County?

Chancellor Marvel ruled that the Fourteenth Amendment barred the persons charged with administering the trust from excluding non-whites as beneficiaries. His opinion was based upon several facts implicating the State in the affairs of the trust, including: the Chancellor appointed the trustee and the agents of the trust; the Court had been involved in the sale and investment of trust assets, by statute and judicial decree; furthermore, The Farmers Bank of the State of Delaware, 49% of which was owned by the State, was the trustee at the time the petition for instructions was filed. Under these circumstances, Chancellor Marvel found governmental involvement in the trust to be "established and pervading." Rather than strike down the trust, the Chancellor decided that the better course was to effectuate the intent of Colonel Potter "to aid the poor citizens of his county." This he did by reforming the trust to make it racially neutral and directing that it be administered thereafter without regard "to the color of any applicant's skin."

Chancellor William Duffy and student at Law Day luncheon.

The Court of Chancery has zealously protected the civil rights of Delawareans, often taking stands which other courts might well have eschewed. It is my hope that when we proudly read or hear about the Court's accomplishments in resolving boardroom battles, we will bear in mind that the Court is no less a judicial titan in matters affecting the most fundamental relationships among the citizens of this State.

[1] Among other honors, Louis L. Redding, Esquire, one of the applicants' counsel, received an Honorary Doctorate from Delaware State College in May 1986. Now in his 80's, Mr. Redding has just retired from private practice but still serves the underprivileged in our society as a consultant to Delaware Volunteer Legal Services, Inc., the *pro bono* arm of the Delaware Bar Association.

[2] Judge Seitz is now, of course, a much respected senior member of the Third Circuit Court of Appeals, but Delawareans are justifiably proud to call such a distinguished jurist their own, and I shall refer to him hereinafter as Chancellor Seitz.

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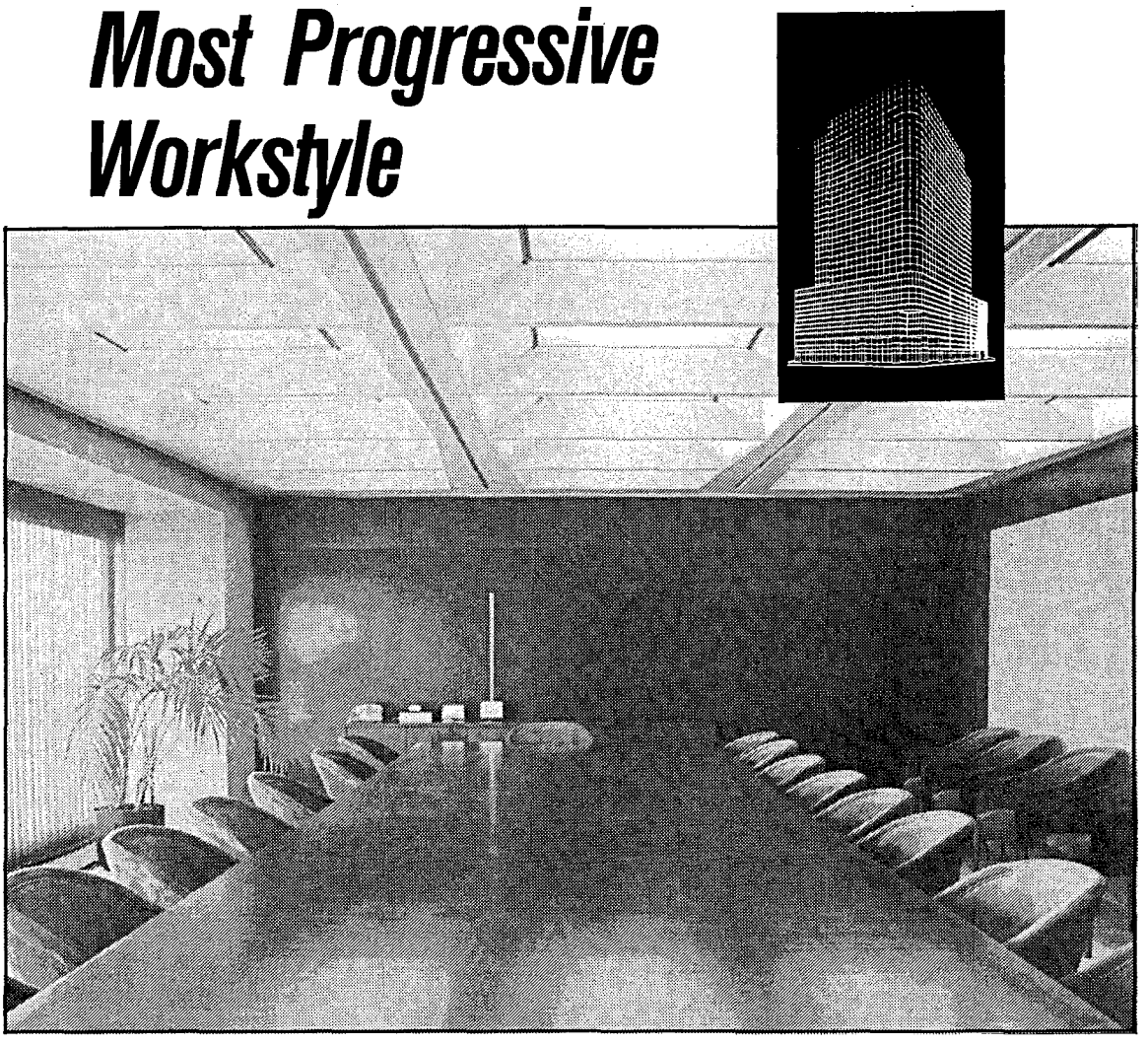

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ACLU vs. ACLU
A House Against Itself

Gary W. Aber

On Sunday morning, September 23, 1973, Father William F. Keegan and Father Michael Szupper, Catholic priests assigned as Chaplains to the University of Delaware student body, conducted worship services on the driveway outside the Commons Room of the Christiana Towers, a University residential complex. This unusual location was required when the Commons Room had been locked to prevent the celebration of Mass for the Catholic residents of the Towers, who had requested and who had participated in such Masses on the preceding weekends. The University administration had decided that the use of University property for religious purposes was contrary to the University Charter, Delaware statutes, and the United States Constitution. Thus, the conflict between the free exercise of religion and the prohibition against the state establishment of religion was joined. It would eventually rise all the way to the United States Supreme Court with the Delaware Chapter of the American Civil Liberties Union at the loggerheads with the National American Civil Liberties Union.

Many persons conceive of the American Civil Liberties Union as a monolithic organization, all of whose members march in lockstep to the same drummer. In reality, it is as diverse as any other organization. Perhaps, because of the interests sought to be preserved and safeguarded, the tenacity of its members and the strength of their convictions, any internal differences tend to be magnified. These differences are numerous, they occur with great regularity, and they are usually fought out with heated discussions within the organizations to determine whether any given complaint is covered by the protection of the United States Constitution.

We need only recall the controversy surrounding the threatened demonstration in Skokie, Illinois, to witness an example of such an internal conflict. In that confrontation, the Illinois Chapter of the American Civil Liberties Union supported the First Amendment right of the American Nazi Party to peaceably march in a residential district where many survivors of the unspeakable Nazi brutality, which had come to be known as "The Holocaust," resided. The Illinois American Civil Liberties Union felt that First Amendment rights to free speech and to peaceable demonstration protected the proposed march. A large number of members, not only of the Illinois American Civil Liberties Union, but members of the American Civil Liberties Union nationally, felt that the intentional instigation of calculated mental distress on the survivors of the Nazi brutality was equivalent to yelling "fire" in a crowded theater and was not constitutionally protected. Although the Courts resolved the conflict in favor of the right to demonstrate, the American Civil Liberties Union in Illinois, nationally, and even in Delaware lost numerous members who resigned in protest for the support given to the demagogues descended from Adolf Hitler. It is only today that some of those members have rejoined their organizations.

The strong emotions that Skokie stirred prevent a critical examination of the legal conflicts between the various factions of the American Civil Liberties Union.

The Delaware ACLU was at one time at loggerheads with the National Board of the American Civil Liberties Union. There was a real likelihood that opposing briefs would be filed in the United States Supreme Court by the Delaware ACLU on one side, and by the National ACLU on the other. This is the analysis of that conflict.

At the beginning of the 1973 school year, Reverends Szupper and Keegan were requested by several Catholic students to hold Masses on Sunday mornings in the Christiana Commons. The Dean of Students informed the priests that such action would violate University policy, but the priests felt duty-bound to serve their students. The *Morning News* headlined the edition on September 24, 1973 with "Mass Held On Driveway In U.D. Ban On Worship", as the University administration threatened to arrest and prosecute the priests and students if they continued their efforts to hold religious services on University property. After jokingly asking the 75 students on that morning whether they knew what was on the jail menu, the priests decided not to jeopardize the students' standing with the University. Ultimately, the University filed an action in the Delaware Chancery Court seeking to prohibit the holding of religious services on University property. The defendants filed a Crossclaim seeking a declaration that their right to hold such services was protected by the First Amendment.

The stage was now set for battle over one of the less precisely drawn portions of the Constitution. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." United States Constitution, Amendment I.

A cast of characters had also gathered. The University was represented by John P. Sinclair, and Phillip B. Kurland, (Kurland also was later to represent the State in the more recent desegregation battle). The individual defendants, Fathers Keegan and Szupper, were represented by Arlen B. Mekler, and James P. Collins, who was allowed to intervene on behalf of Bishop Thomas J. Mardaga of the local Archdiocese. The American Civil Liberties Union joined the battle as an Amicus Curiae, represented by Joseph A. Rosenthal, and later on appeal by Thomas S. Neuberger, John S. Grady, and Christopher Hall, of California.

The University relied upon the prohibition against the establishment of religion, contained in the First Amendment and provision of the University Charter codified as 14 *Del.C.* §5103, which states: "The University shall never be managed or conducted in the interest of any party, sect, or denomination."

Vice Chancellor William Marvel heard the case initially at the trial level. At the early stages, on October 5, 1973, he entered a temporary restraining order

(Continued on page 30)

Gerald E. Kandler

C. E. Welch and Geoffrey Gamble

"Sweet are the uses of adversity,
Which, like the toad, ugly and venomous,
Wears yet a precious jewel in his head;
And this our life, exempt from public haunt,
Finds tongues in trees, books in the running brooks,
Sermons in stones, and good in every thing.
I would not change it." (As You Like It, Act II, Scene 1)

Shakespeare could have been commenting on the life of Gerry Kandler. Adversity produced a wise counselor, but there are many of those. It produced in Gerry much more: a devoted husband and father, a formidable advocate for civil liberties, an inspiring teacher, an indefatigable worker on behalf of the mentally retarded, and a caring friend. Since his untimely death a year ago, he has been sorely missed. Adversity and his own magnificent spirit made Gerry much more than the sum of his parts.

He was born Gerhard Ernst Kahn in Stuttgart, Germany, to a comfortable Jewish middle class family whose roots in the area stretched back at least to 1529. His grandfather developed one of the first linen factories in Germany, and his father continued in this family business.

All this changed for Gerry at a time in life when most of us experience the utmost in security. As a boy of six, he heard the shattering of glass on Kristallnacht. Shortly thereafter, he and his brother were kicked out of school, following a Gestapo search of the family apartment. The Nazis confiscated the linen factory, and his father and both of his grandfathers were arrested and sent to Dachau.

In late 1938, Gerry's father had the good fortune to be released from Dachau. His parents, having tasted the horrors that lay ahead for millions of others, tried desperately to leave Germany. The waiting lists for most countries, however, were years long. After much agonizing, they decided to send Gerry and his brother to an aunt in England. This was possible because children were exempt from the usual visa restrictions. The two boys left Germany in January, 1939, never expecting to see their parents again. In fact, they weren't reunited with them for half a decade.

England meant relative safety for the seven year old boy but was a strange place with a new language. In September, 1939, when Britain declared war on Germany, Gerry and his brother were not only foreigners in England but labeled enemy aliens as well. They were shipped from place to place, school to school, as the war and bombings progressed.

In 1941, his parents managed to get to the United States. Gerry and his brother were reunited with them in Philadelphia in 1944. It was here that they all changed their family name to Kandler to fulfill a promise made to their grandfather in Dachau and to signal a new beginning in a new land.

It was a frightening and lonely childhood. Instead of becoming cynical and filling up with hatred, or dwelling morbidly upon it and expecting sympathy, Gerry chose a different path. He appreciated the opportunities and made the most of them. In his last days in the hospital, he spoke of having had a good life and of having made the right choices in that life.

Following his immigration, Gerry became an American with a passion. He was a good student and he worked hard. There was Central High School in Philadelphia, then a degree in economics from Antioch College followed by the University of Pennsylvania Law School, and, in 1959, a master of comparative law degree from the University of Chicago. Gerry also went back to Germany for a year to study German law at the University of Frankfurt on a Ford Foundation Fellowship.

His professional career began with the Antitrust Division of the U.S. Department of Justice. Gerry's responsibilities included trial work in civil and criminal antitrust cases and the drafting of legislation and testimony to be given before Congressional committees. It was here that he continued to develop his life-long professional love of comparative law and gained experience with the application and interpretation of the antitrust laws to foreign commerce.

In July, 1965, Gerry moved to Wilmington and joined the Du Pont Company Legal Department. For almost twenty years, he was counsel in various capacities to the International Department. He became a mainstay in advising on legal aspects of the great international expansion program upon which the Du Pont company embarked beginning in the sixties.

Beyond his very considerable international work, Gerry also advised several of Du Pont's operating departments on general legal matters and became so well known and effective with his guidance that one department used to refer to having its papers "Kandlerized". This meant that when Gerry reviewed a document he did it quickly, efficiently, and always constructively.

Although he had a very successful career at Du Pont and was regarded by all his colleagues as a superb lawyer, his life and his influence extended far beyond the corner of Tenth and Market. At the time of his death, Gerry was president of the Delaware Affiliate of the American Civil Liberties Union—a position he had held for over a decade. It was upon his recommendations that students were guaranteed their constitutional rights as citizens, and that due process with appeal procedures was established to deal with students accused of wrongdoing. His efforts resulted, in 1971, in the State Board of Education's

adopting a resolution endorsing the establishment of clear and precise policies on student rights and responsiblities.

Gerry was also a superb *constitutional* lawyer. He recognized in 1978 that a proposed consolidation plan for state school districts that excluded Wilmington was unfair to minorities and unconstitutional as well. This realization led to the desegregation of county schools, to increased opportunities for all of our students, and ultimately to the benefit of all Delaware citizens. Throughout his years in Wilmington, Gerry repeatedly found the help and the lawyers that were needed for those in our community whose liberties and rights were in jeopardy. Gerry was not only always concerned, he was always there.

Since 1974, he had been a member of the board of directors of the Camphill Special Schools in Glenmore, Pennsylvania. Camphill is a village for mentally retarded children. Gerry later became president of Camphill as well as a member of the Beneficiaries Committee of the Delaware Foundation for Retarded Children. Gerry's concern for the mentally handicapped was personal and intimate. Under his guidance, the Camphill curriculum was enlarged to include older students in the 18-21 age group in work experiences and prevocational training.

Gerry loved to teach. He was a popular and dynamic Adjunct Professor in the MBA program at Widener University. He taught the role of government in business and especially enjoyed analyzing the relationship between industrial states and the military-industrial complex, and how conglomerate mergers affect market structure.

Last and most important, Gerry was proud of his family and very devoted to them. He married Joan Desiderio in 1958 and they were blessed with three children, Susan, Brian, and Hilary. Even during his last days in the hospital, his primary concern was for Joan and how difficult his illness was for her and their children.

Few of us have been confronted with the dramatic forces that shaped Gerry Kandler's life. Few of us will have the opportunity to make those fundamental and irrevocable interior choices, as he did, that lead to an abundance of community spirit he possessed. This spirit made him return hatred and neglect with love and concern. It caused him to offer to those forces in the world, that would abridge our rights, a vigorous protection and defense of those rights. And that, perhaps, is the hidden tragedy of Gerry's untimely passing. Who among us, in our complacency, will take up his work? Most of us care. Few of us are willing to transform Gerry's caring into action for those less fortunate than we are.

A House Against Itself
(Continued)

prohibiting the University from interferring with the religious services. Subsequently, on March 28, 1974, the Vice Chancellor reversed his earlier position and issued an opinion supporting the University's position. *University of Delaware v. Keegan,* Del. Ch., 318 A.2d 135 (1974). He recognized the unique and unprecedented conflict presented in the case:

> *While the parties to this litigation concede that they have been unable to find a precise precedent in support of their respective positions, opposing counsel, relying on the provisions of the First Amendment reached directly opposite conclusions. Thus, the University contends that the establishment clause of the First Amendment compels it to ban worship services on its property, while the defendant and intervenors argue that the free exercise clause of the same amendment guarantee them the right to hold and/or participate in the worship services..."*
> University of Delaware v. Keegan, supra., at 138.

The Court incorporated the triparte test mandated by the United States Supreme Court in *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973). Three hurdles had to be cleared: first, the governmental decision must reflect a clear secular purpose; second, its primary effect could neither advance nor inhibit religion, and, finally, it must prevent excessive government entanglement with religion. Vice Chancellor Marvel concluded that the University, in furnishing such facilities, was not furthering religion, and, what is most important, it was not dealing with a young, impressionable, or captive audience. The banning of all religious services was not discriminatory and there was only an insignificant burden on religion, which did not run afoul of the "free exercise" clause. The Court concluded:

> *(T)hat to compel the plaintiff to permit Roman Catholic worship services to be celebrated in the Christiana Towers merely in order to suit the convenience of the students, intervening defendants, and others, would be unwarranted,*

(Continued on page 31)

it being clear on the present record that Roman Catholic Masses are regularly celebrated in two churches situated in the City of Newark. University of Delaware v. Keegan, supra., at 142.

Not unexpectedly, the priests and the students appealed. Justice John J. McNeilly writing for the Delaware Supreme Court differed with the lower Court's view of the conflict. It had been established that all university students and organizations were given free use of University space for meetings. The University had sanctioned various religious organizations, and allowed them quarters for business and social purposes. The Court concluded that allowing religious groups the same rights as other University organizations would not run afoul of the "establishment clause" and would be a "lawful accommodation". From this it followed that the University must exercise neutrality in the face of the students' desire to conduct religious services. The Court differed expressly with Chancery over the burden placed upon the students by having to go off campus for religious services. The Court noted that the students lived and studied within the University: Any burden upon them would constitute a violation of the "free exercise" clause:

> *Once the individual demonstrates some constitutional burden, whether substantial or incidental, direct or indirect, upon his free exercise of religion, the State must show a 'substantial interest' sufficient to sustain its acts.* Keegan v. University of Delaware, Del. Supr., 349 A.2d 14, 17 (1975).

Instead of measuring the amount of burden, absent a factual record the Supreme Court regarded the University as having discriminated against a religious organization, or as the Court questioned:

> *Can the University prohibit student worship in a common area of a University dormitory which is provided for student use and in which the University permits every other student activity?* Keegan v. University of Delaware, supra., at 17-18.

The Delaware Supreme Court remanded the case for the Court of Chancery to determine in light of its holding that the banning of the religious services created an unconstitutional burden whether there was any "compelling" state justification for such a burden.

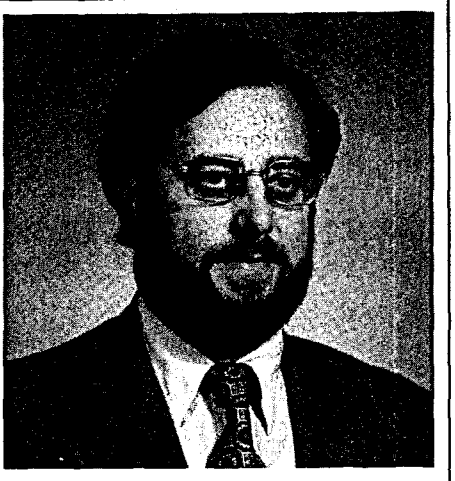
The *News Journal* papers, editorialized at this point that the University should treat everyone the same, or as the papers phrased it: "In Plainer Terms, Treat Everyone Alike." However, the University felt constrained to take the issue to a higher level, and sought to file for certiorari to the United States Supreme Court. On December 23, 1975, *The New York Times* noted the national implications of this case in reporting the appeal.

The stage was now set for the conflict between the Delaware ACLU and the National organization. At that time, the Delaware ACLU was acting as an affiliate of the Philadelphia Chapter of the American Civil Liberties Union. (Subsequently, the local organization voted to form its own independent chapter.) As a part of operating procedures, the Delaware ACLU needed Philadelphia Board approval to litigate in the United States Supreme Court. Philadelphia approved, but upon learning of the Delaware Chapter's position, the National Executive Committee expressed concern that Delaware's position violated the National Board's position. Several meetings were held to discuss the matter. Finally, the National Executive Committee, in February, 1976, voted to authorize the National ACLU to file an amicus curiae brief setting forth the "establishment position" before the United States Supreme Court. If the Supreme Court decided to hear the matter, the Delaware Chapter was going to continue to support the priests' and students' on the "free exercise" position. Thus, the very real possibility of finding the Delaware ACLU and the National ACLU in opposition was on the horizon.

As fate would have it, the battle was never joined between the respective ACLU bodies. The United States Supreme Court on February 23, 1976, voted to deny certiorari, *University of Delaware v. Keegan,* 424 U.S. 934 (1976). Justices Brennan and Blackmun were noted as having voted to grant certiorari.

In retrospect, it is difficult to determine whether the final outcome of this case rests with the liberal or conservative camps in the ongoing controversy over religion and public education. Given the Justices who voted for Supreme Court review, and the potential reversal of the Delaware Supreme Court decision, it might be argued that the Delaware ACLU supported the conservative camp. *Keegan v. University of Delaware, supra.,* has been cited as authority to require state institutions to permit voluntary prayer: *Brandon v. Board of Education of Guilderland Central School,* 635 F. 2d 971 (2nd Cir., 1980).

Several years after the *Keegan* case was put to rest, the federal court system was called upon to analyze the same issues. In *Chess v. Widmar,* 480 F.Supp 907 (W.D.Mo., 1979), the trial court faced a virtually identical set of facts that had infringed the Delaware Courts. Called upon to consider *Keegan,* the Federal District Court explicitedly rejected the Delaware Court's analysis, recognizing that the facts were "indistinguishable". The Court critized the Delaware Supreme Court's conclusion that allowing religious groups the same rights as all other student groups was a "lawful accommodation" and further, such a conclusion was made "without analylsis" of *Tilton v. Richardson,* 403 U.S. 672 (1971).[1] On appeal, the Eighth Circuit of Appeals reversed, *Chess v. Widmar,* 635 F.2d 310 (8th Cir., 1980), holding that the University of Missouri's ban infringed the free exercise clause. The case was then appealed to the United States Supreme



As evidenced by other articles in this issue Gary Aber has fought the good fight for freedom. Gary practices trial litigation in Wilmington, with a particular interest in personal injury cases and civil liberties.

Gary is a native downstate Delawarean, born and raised in Milford. He is a long time member of the Board of Directors of the Delaware affiliate of the A.C.L.U. and a Vice President of the affiliate.

A House Against Itself
(Continued)

Court. *Widmar v. Vincent,* 454 U.S. 263 (1981). The Supreme Court upheld the right of students to use University facilities for religious purposes. Unlike the Courts below, the Supreme Court did not confront the conflict of "The Establishment Clause" versus the "Free Exercise Clause". Rather, the Court found that the lower courts had "misconceived" the issues and ruled: "The question is not whether the creation of a religious forum would violate the "Establishment Clause." *Widmar v. Vincent, supra.,* at 273. The Supreme Court chose to view the issue as a violation of the students' First Amendment rights of free speech and association. Since the University had allowed all other student groups free access to its facilities, the prohibition as applied solely to religious groups was just such a violation.

> *The basis of our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion on religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.* Widmar v. Vincent, supra., at 277.

As a consequence of the Supreme Court's decision the competing interests have been resolved, but the competing religious questions of "establishment" versus "free exercise" have not. One may assume that the Supreme Court, in expressly basing its decision upon the right of free speech and association, sought to avoid the quagmire of religion and public education.

Although the factual controversy faced by the Delaware Courts has been resolved by the United States Supreme Court on the side of the Delaware ACLU position, the exact conflict in competing issues remains unsettled and in all probability never will be. Whether the local Delaware ACLU or the national ACLU organization was correct, will never be known. The local chapter's position has prevailed, and only the imaginations of the members can visualize the reaction of the United States Supreme Court with the American Civil Liberties Union appearing on both sides of the same case.

[1] In *Tilton,* the United States Supreme Court had held that state monies could not be used to provide facilities for religious teachings at institutions of higher learning.

ACLU at Delaware Law School

William J. Conner and Selma Hayman

Delaware Law School was founded and in its early days largely staffed by politically conservative figures. Consequently, the students, heard mostly conservative views. The principal student organization devoted to matters of policy and public affairs was the Delaware Law School Chapter of the Federalist Society, which tended to bring to the campus persons espousing conservative viewpoints, such as Clarence Pendleton, Chairman of the U.S. Civil Rights Commission.

When Selma Hayman enrolled in law school in 1983, she realized that a forum for more liberal views was conspicuously lacking. Since she had been a member of the board of the Delaware Affiliate of ACLU for nearly ten years, she undertook to organize an offshoot of that organization, the Delaware Law School American Civil Liberties Project. She found support among the student body and several faculty members, notably Professors William J. Conner, Esther F. Clark, and John C. Landis. Joan Rosenthal, Executive Director of ACLU DE, Inc., also gave invaluable support, including procedural and substantive advice.

ACLU vs. Federalist Society Debates

In addition to supplying independent programs, one obvious role for the ACLU Project was to serve as a foil for the conservative philosophy of the Federalist Society. ACLU/Federalist debates under the sponsorship of the Student Bar Association began in April 1985 with a debate on capital punishment.

The ACLU panelist, Professor Fletcher R. Baldwin, Jr., of the University of Florida Holland Law Center, opposed the death penalty as an "organized concept of vengeance" that morally diminishes society. The Federalist Society panelist, Professor Ernest van den Haag, John M. Olin Professor of Jurisprudence and Public Policy at Fordham University, supported it as clearly authorized by the Constitution and consistent with the purposes of justice.

The highly successful first event led to establishing the annual debates.

Meese vs. Brennan Quasi-Debate

In the fall of 1985 Associate Justice of the Supreme Court William J. Brennan, Jr. in a speech at Georgetown University (reprinted in 19 U.C. Davis L.R. 2 (1985)) and Attorney General Edwin Meese III in addresses before the American Bar Association and the D.C. Chapter of the Federalist Society (reprinted in 19 U.C. Davis L.R. 22 (1985)) expounded their views about constitutional interpretation. Attorney General Meese argued for a "jurisprudence of original intention", an interpretation that adheres as closely as possible to the wishes of those who developed the document.

In striking contrast Justice Brennan described "a debate...about constraints on what is legitimate interpretation." He dismissed interpretation according to "original intention" as "arrogance cloaked in humilitiy" and said that the Constitution must be read by adapting "its great principles" to the twentieth century.

The 1986 Debate On Constitutional Interpretation

The issue joined by Meese and Brennan reflect fundamentally different visions of the role of the Supreme Court in twentieth century America. Ms. Hayman realized that the presence of the two student organizations, the Federalist Society and the ACLU Project, made it possible to obtain nationally known authorities to debate the issues of judicial review and constitutional interpretation.

A debate entitled "The Constitution at 200: The Framers' Intent or Evolving Rights?", funded in part by the Delaware Humanities Forum, reenacted face to face the Brennan-Meese disagreement. It brought to the Law School Campus two distinguished intellectual antagonists. Professor Lino C. Graglia, Rex G. Baker and Edna Heflin Baker Professor of Constitutional Law at the University of Texas Law School, had last visited Delaware when he testified against court-ordered busing for the desegregation of New Castle County schools. Last fall President Reagan nominated him to the 5th Circuit Court of Appeals. Professor Burt Neuborne, a professor at the New York University School of Law, has served as Legal Director of the ACLU. He is considered a leading advocate before the U.S. Supreme Court.

The moderator, Professor Rodney Smith of the Delaware Law School, teaches constitutional interpretation and is the author of the soon-to-be published book, *Public Prayer and The Constitution.* He introduced the program by saying that the discussion would concern not just how constitutional law is made, but how it *ought* to be made.

Interestingly enough, Professors Graglia and Neuborne agreed on the fundamentals. Professor Graglia asked, "Should basic social policy be made by elected representatives of the people or by the nine justices of the Supreme Court?" His answer was emphatically that law should be made only by elected representatives. He said that proponents of judicial activism have two tasks: first, make the Constitution go away; second, invent a new more abstract Constitution. To him there was no difficulty in interpreting the Constitution. He said that unconstitutional laws are almost never enacted. One need simply follow the plain words of the document.

Professor Neuborne described judicial review as one of the greatest achievements of political science. However, he agreed that it is an undemocratic process that must be limited by constraints. He expressed his delight in participating in the debate because he considered it vital that we discuss what judicial review means and when it is appropriate to use it. According to him, the conservative approach to judging is a mechanistic device that uses statutes, administrative provisions, *stare decisis,* and the Constitution to "find" the law. Although this method is usually correct, he said there are occasions when it fails, particularly when the problem is one that the founding fathers could not have foreseen. He believes that Professor Graglia's "literalist" approach fails because it is not clear which framer's intent should be used and because the words them-

This is Professor William Conner's second appearance in these pages. In the Fall 1985 issue he wrote in his capacity as Chairman of the State Advisory Committee to the Civil Rights Commission. His long record of public service, including the first Executiveship of New Castle County make him very well known to our readers. His co-author, Selma Hayman, is a highly accomplished addition to our roster of contributors. She began her career as a scientist. (She holds a doctorate in biochemistry.) In May 1986 she received her J.D. degree from Delaware Law School and now applies her combined expertises as a research associate for Biotechnology Law Report.

Ms. Hayman has a record of more than ten years service in civil rights causes. As a law student she worked on the lead paint case described in Mary McDonough's article, which appears elsewhere in this issue. She was instrumental in bringing the ACLU to the Delaware Law School campus, and she served for many years on the Board of Directors of the Delaware affiliate of the ACLU.

ACLU at Delaware Law School
(Continued)

selves have multiple possible meanings. Therefore, literalists are actually being subjective when they claim that they are reading the Constitution objectively.

Neuborne cited three reasons for judicial activism: (1) To protect "discrete or insular minorities" incapable of protecting themselves; (2) to protect conditions that reinforce democracy, such as free speech and fair elections; and (3) to safeguard "fundamental" values of society absent a compelling state interest. The last is the most controversial because it requires a balancing test to determine whether a state interest is sufficiently compelling to outweigh individual rights.

Professor Graglia retorted that the Constitution has nothing to do with most comtemporary problems. If we want restraints on the majority, he said, we should write them into the Constitution. He felt most questions should be decided on the state level.

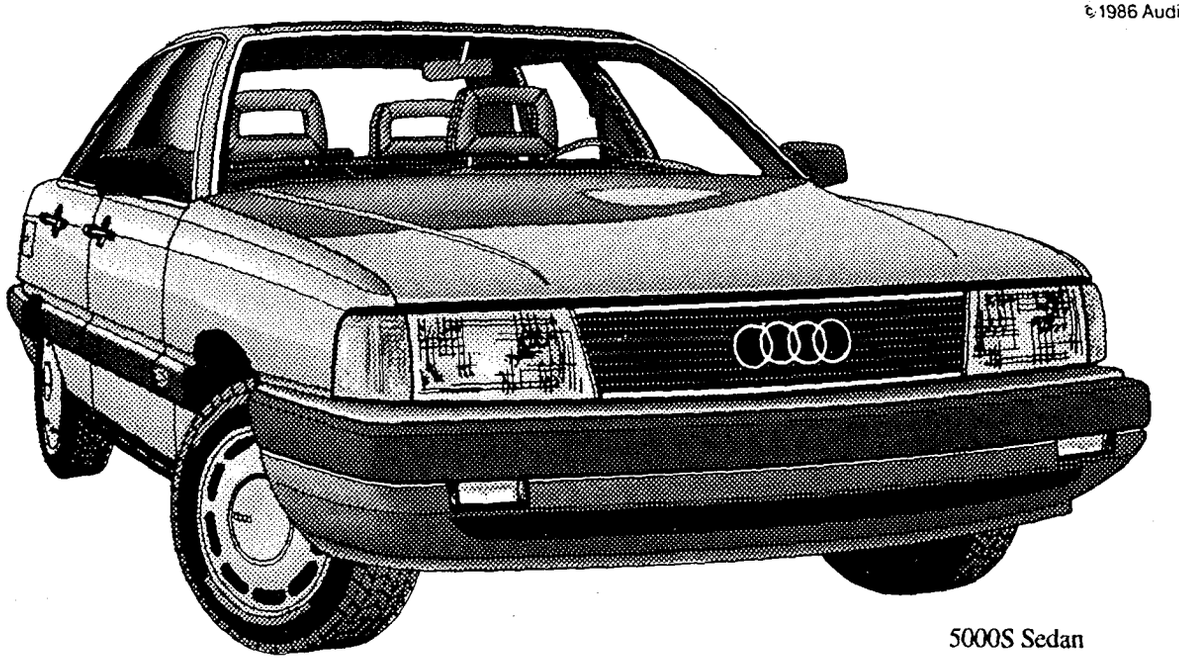
In response to a question, Professor Graglia said that the equal protection clause of the 14th Amendment does prohibit school segregation. To him this amendment means that we may not disadvantage Blacks, and because school segregation did harm Blacks it could be barred. In contrast, he believes that the 1st Amendment which starts "Congress shall pass no laws" has no application to the states.

Professor Neuborne observed that Professor Graglia's view that the Bill of Rights has no application to the states would, if accepted, undo thirty to forty years of precedent that the due process and equal protection clauses of the 14th Amendment incorporate by reference the Bill of Rights and make it applicable to state action. He conceded that Professor Graglia's position was a legitimate viewpoint, as was his own, and that we should choose between them.

One questioner asked Professor Graglia why, if the judges' decisions have been so bad, Congress has not stopped the Supreme Court. He responded that groups like the ACLU have been strong enough to prevent congressional action. Another member of the audience asked why the justices of the Burger Court, many of whom were appointed by Republican presidents, had not reversed the holdings of the Warren Court. Professor Graglia said the Court is still clearly acting against the wishes of the majority but did not explain why this was so. He reiterated his belief that the only proper judicial function is statutory interpretation.

Professor Neuborne agreed with a questioner that the existence of judicial review does tend to encourage legislative irresponsibility because of a feeling that a poorly drafted law can be corrected by the courts. He stated, however, that when the majority has invaded the rights of a minority, judicial intervention is essential. He agreed that, while the legislative body should be paramount, the judiciary has a vital role in using the written Constitution to limit the oppressive power of the majority.

The addition of an ACLU project to the Delaware Law School Campus has enriched the quality of legal education and stimulated a more reflective examination of our governing interest on the eve of its 200th anniversary.



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Something For Everyone!
Federally Funded Discrimination

Lynn D. Wilson

Alarmed by the Supreme Court decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), Congressional leaders of all persuasions rallied to restore the anti-discrimination provisions of civil rights laws, which have been taken for granted since they were enacted. Two bills[1] aimed at affirming the original intent of that legislation are stuck in committee, though not for lack of support. Said Senator Dole, "I don't know of any senator who doesn't want to reverse the *Grove City* decision."

What precipitated such unanimity in the Senate? The Court's reversal of the simple proposition that federal funds should not subsidize discrimination.

Congress first stated this principle in Title VI of the Civil Rights Act of 1964 42 U.S.C. §2000d-1, which prohibited racial discrimination "in any program or activity receiving Federal financial assistance." Title VI was the model for three other laws, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 prohibiting sex discrimination in education programs, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, prohibiting discrimination founded on disability, and the Age Discrimination Act of 1975, 42 U.S.C. §6101, prohibiting discrimination based on age. Because Congress intended that all four laws be interpreted similarly,[2] the Court's narrow reading of Title IX in *Grove City* cuts across the whole spectrum of civil rights protections.

The controversy centers on the Court's construction of the Title IX provision prohibiting sex discrimination in "any education program or activity receiving Federal financial assistance."[3] Grove City College challenged the regulatory authority of the Department of Education under this statute.

Grove City College is a private coeducational college, which neither applied for nor received any direct federal funds. It did, however, enroll students who paid their tuition with money obtained through Basic Educational Opportunity Grants ("BEOGs"). This persuaded the Department of Education that the school was a recipient of federal financial assistance. The regulations under Title IX required that a recipient sign an Assurance of Compliance stating that it did not engage in gender discrimination. The College refused. Threatened with termination of students' financial aid, the College and the students sued the Department.

The Supreme Court first determined that the school was indeed a recipient of federal financial assistance. The Court noted Title IX not only prohibited sex discrimination but created the federal student-aid programs. Since one of the primary purposes of this aid, including the BEOGs, was to assist institutions of higher learning, the College qualified as a recipient through the tuition payments made possible by the BEOGs. By not differentiating between direct and indirect federal assistance, the Court addressed the assisted program rather than the mode of assistance.

The broadening effect of recognizing indirect aid as federal assistance was virtually destroyed by the Court's interpretation of "program or activity". Rejecting institution-wide coverage, the Court held that only the College's financial aid office was subject to Title IX since "in purpose and effect" BEOGs represented federal financial assistance to this program only. 465 U.S. at 4573. This was so even though the Court recognized that these funds found their way into the College's general budget just as any other tuition payments. In effect, the College was free to discriminate except in the financial aid program.

Before this decision, the agencies charged with enforcing the civil rights laws and most courts assumed that once an institution received federal funds, the anti-discrimination provisions applied to the entire institution.[4]

Senator Cranston lamented that *Grove City* "was a novel, suprisingly narrow interpretation and an ominous precedent that threatens to restrict severely the coverage of the... civil rights laws."[5] Another source commented that the decision "effectively eliminates institution-wide coverage under Title IX and related statutes and renders impractical civil rights enforcement efforts."[6] Indeed, within four months of the decision, it was reported that under Title IX alone, 28 anti-discrimination complaints had been closed and the investigational scope of another 18 had been narrowed in light of *Grove City*.[7]

There are over 1,000 private educational institutions which, like Grove City College, receive federal assistance only in the form of student grants or loans.[8] Many no longer view themselves as found by the anti-discrimination provisions of Title IX.[9] Immediately after the *Grove City* decision, the Department of Justice announced that the program-specific interpretation would apply to the other civil rights statutes. Thus, thousands of noneducational institutions, including hospitals, prisons, local governments, and corporations that receive federal funds may no longer be prohibited from discriminating predicated on race, disability, and age.

To make matters worse, several lower courts have narrowed the *Grove City* holding. Before *Grove City*, the Supreme Court applied Title IX to employees of education programs.[10] *Grove City* recognized that employees of an education program were protected by Title IX even if their salaries were not federally funded. 465 U.S. at 571, n.2d. Recently, however, a New York district court dismissed a Title IX complaint brought by a woman who taught in the design department of the Fashion Institute of Technology.[11] The school received federal funds, but the plaintiff could not establish a nexus between her department and the federal financial assistance.

Under Title IX, women's athletic programs have improved dramatically. Even so, as recently as 1981, Temple University spent only 13% of its intercollegiate athletic budget on women, although 42% of the athletes at Temple were

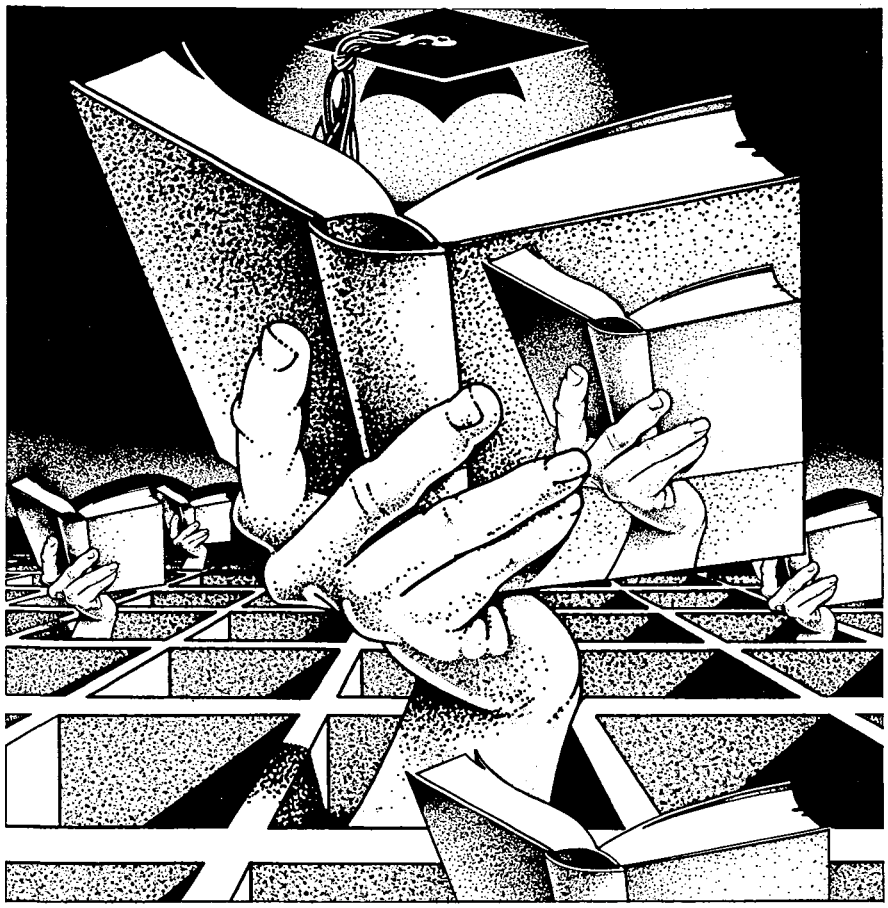
women.[12] This unequal treatment was remedied under Title IX.

Grove City has dealt a serious blow to women's athletics. Today Title IX would not reach Temple's athletic department since the department was not a "program" receiving any of the millions of federal dollars coming to the University. Because virtually all college athletic departments operate on a budget separate from the institution's general budget and because athletic programs usually do not receive federal funds,[13] such a department will rarely if ever qualify as an "education program or activity receiving Federal financial assistance" under the *Grove City* formulation, and thus, can freely choose not to comply with Title IX's prohibition against sex discrimination.

This option was foreshadowed by a Michigan district court, which held that a high school did not have to establish a girl's golf team even though girls were excluded from the boys' team.[14] Since the high school's athletic program did not receive federal funds, the golf team was not within the reach of Title IX.

In a particularly niggling decision out of the Nebraska district court, *O'Connor v. Peru State,* 605 F. Supp. 753 (D. Neb. 1985), a private action alleging sex discrimination in a college physical education department was dismissed in part, because the court determined the department was not a recipient of federal funds.[15] Even though the court conceded there was evidence of discrimination and evidence that the department had received some federal grant money, the court ruled that compliance with Title IX was required only in "the selection of research projects and the distribution of funding for those projects." 605 F. Supp. at 761.

Even though the plaintiff was to work in a research project using federally funded equipment, the department was not deemed a recipient of federal funds since the plaintiff could not show the specific source of the project's funding and the department did not have exclusive control over the federally funded grant equipment. Although the Federal grant application was approved before the allegedly discriminatory decision not to renew the plaintiff's teaching contract, the court was impressed that the grant application had not been signed and the grant equipment had not arrived until after the decision not to rehire. Now it appears that protection of one's civil rights may depend on distinguishing between the date the federal grant application was approved and the date the application was signed.



Only the program actually receiving funds need operate in a nondiscriminatory fashion. The rest of the institution can discriminate while it benefits from resources freed up by federal funds.

If this case exemplifies the level of quibbling required merely to establish jurisdiction under the civil rights laws, then the discovery process alone would discourage all but the most persistent plaintiff. Valuable litigation resources must be wasted on the tedious tracking of federal funds before it can be determined if the real issue of discrimination can be addressed. And while the agencies are mired in such jurisdictional questions, enforcement of the civil rights laws is on hold.

It will be remembered that one of the most persuasive arguments used by opponents of the ERA was that women's rights can best be achieved by statute. After *Grove City,* this assurance is not comforting.

Critics of the *Grove City* decision charge that the Court not only ignored its own precedent and years of broad administrative application of the civil rights laws but the original intent of the legislation.[16] Some of the proponents of the legislation seeking to reverse *Grove City* were present when Title IV and the related civil rights statutes were enacted. In their view, *Grove City* is diametrically opposed to the legislative intent of these statutes.[17]

Researchers have traced the "program" language back to the debates over Title VI in the early Sixties. It is suggested that in the emotionally charged atmosphere of the times, the program-specific language was necessary to assuage the opponents of the bill, who feared wholesale termination of federal funds whenever discrimination was found. If a state was found to discriminate in education, for instance, it was thought that all federal education funds could be terminated as well as funds for unrelated projects such as highway construction. To avoid such a result, the "program" language was employed to distinguish between institutions, not between discrete parts within an institution.[18]

Something For Everyone
(Continued)

Another view of the "program" language maintains that the compliance provisions of the statutes were meant to apply to the entire institution but the termination sanctions only to the particular offending program.[19] In other words, if an institution or any part of it received federal funds, the entire institution was expected to comply with the anti-discrimination provisions of the statutes. But if discrimination was found, only the funds to the offending program within the institution could be cut off. What *Grove City* did was to limit the compliance provisions to the termination provisions. Only the program actually receiving funds need operate in a nondiscriminatory fashion. The rest of the institution can discriminate while it benefits from resources freed up by federal funds.

In answer to the concern about the agencies' unbridled authority to terminate federal funding, as of 1982, termination was applied only once under Title IX and only six times under the Rehabilitation Act of 1973.[20] Furthermore, the statutes provide other less drastic remedies such as injunctions and private actions.

As further evidence of legislative intent, commentators point to the institutional approach of the post-enactment regulations implementing Title VI and the related civil rights laws 465 U.S. at 592. For instance, HEW promulgated regulations respecting athletics, which applied to "every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance."[21] Congress had numerous opportunities during the "laying before" process to invalidate such broad regulations. In addition, any misinterpretation of the "program" language in Title VI could have been clarified during the passage of the three subsequent civil rights statutes, which contain almost identical language.

The most troublesome gap in the *Grove City* decision is the Court's failure to redefine "program", while narrowing the meaning of the statutory language. The Court expressly left this task to the lower courts. From the bizarre responses, it appears the courts need a bit more guidance.

In particular, a more logical explanation of a "program" would clear up the conflict over non-earmarked funds, such as block grants or impact aid, which is provided to replace tax revenues where there is a large federal presence. Some courts have held that non-earmarked funds can never be reached by Title IX since there is no "program" receiving the funds.[22] In other instances where educational institutions have received non-earmarked funds, courts have defined the entire institution as the "program."[23] Before *Grove City,* federal student-aid funds were generally considered non-earmarked.

In view of the Court's finding in *Grove City* that the student-aid funds went into the general budget of the College and that the purpose of federal student aid is to assist colleges and universities, it would have been more reasonable to conclude that the recipient of the funds was the entire institution. The Court's conclusion suggests that Congress created student aid programs to enhance only the institution's student aid office and not the school as a whole. In an attempt to avoid the obvious illogic of its decision, the Court characterized student aid as "sui generis."

Following the program-specific rationale of *Grove City* can lead to absurd results. When an educational institution receives other forms of non-earmarked funds, the treasurer's office may be the only part of the institution deemed a "program," and thus the only part of the institution prohibited from gender discrimination. A treasurer's office acts as a conduit for funds just as the student aid office does at Grove City College. Another equally unappealing possibility is that the program-specific approach as applied to non-earmarked funds, which are not labeled "sui generis", may require the near-impossible task of tracing the funds through every program throughout the institution. In any event, it now seems possible for an institution receiving federal funds either to limit its compliance with the civil rights laws by isolating the funds in a discrete "program" or to avoid compliance by spreading non-earmarked funds throughout the institution.

The Court's decision is such a distorted departure from its previously broad reading of the civil rights laws that

the lower courts are faced with the choice of either giving meaning to the civil rights laws or attempting to follow the rationale of *Grove City*. Without guidance as to the meaning of "program" the agencies charged with enforcing the laws are unsure of the scope of their regulatory powers, as evidenced by their retreat from the field.

The Supreme Court missed an opportunity to rectify the havoc created by *Grove City*. A recent decision, *United States Department of Transportation v. Paralyzed Veterans of America*, 54 U.S.L.W. 4854 (U.S. June 24, 1986), rev'g 752 F.2d 694, not only adds to the confusion but further restricts the coverage of the civil rights statutes.

Relying on the Court's recognition in *Grove City* that indirect aid is nonetheless federal financial assistance, a District of Columbia circuit court determined that commercial airlines were subject to the Rehabilitation Act, because they were indirect recipients of billions of federal dollars provided to airports through the Airport and Airway Trust Fund. The Supreme Court reversed, holding that the only recipients are the airport operators. The meaning of "program" was never reached. Unlike the college in *Grove City*, the airports, said the Court, are not conduits of aid to the intended recipients. And, unlike the College in *Grove City*, the airlines are not indirect recipients but mere beneficiaries of the assistance. As a result, the nondiscrimination provisions of the Rehabilitation Act apply to airports but not airlines, "to the threshold of the plane but not beyond." What consolation is it to the handicapped that they enjoy nondiscriminatory accommodations throughout the airport but may be denied access to an airplane?

Rather than await the long judicial journey required to make sense out of *Grove City*, the best solution is remedial legislation designed to return the civil rights laws to their original institution-wide coverage. The Civil Rights Restoration Act of 1985 [25] would define "program" so that the laws would apply to institutions once again. It is ironic that a battle must be waged in the 1980's merely to regain rights that many thought were self-evident. What President Kennedy said in 1962 applies equally to discrimination based on sex, disability, and age. "Simple justice requires that public funds to which all taxpayers of all races contribute not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."[26]

[1] S.431,99th Congress, 1st Sess. (1985); H.R. 700. 99th Congress, 1 st Sess. (1985)
[2] Comment, The Discrimination Statutes and the Supreme Court's Program for Confusion: *Consolidated Rail Corp. v. Darrone, Grove City College v. Bell, North Haven Bd. of Educ. v. Bell*, 17 Conn. L. Rev. 629 (1985).
[3] 20 U.S.C. §1681 (a) (1982).
[4] *See generally* NAACP Legal Defense and Education Fund, Inc. and American Civil Liberties Union, *Justice Denied: The Loss of Civil Rights After the Grove City College Decision (1986)*.
[5] 131 Cong. Rec. §1305 (daily ed. Feb. 7, 1985).
[6] Comment, *supra* note 2, at 637 n.35 (quoting Committee on Education and Labor).
[7] 130 Cong. Rec. H7039 (daily ed. June 26, 1984).
[8] Note, *Title IX of the 1972 Education Amendments: Harmonizing its Restrictive Language with its Broad Remedial Purpose*, 51 Fordham L. Rev. 1043, 1044 n.18.
[9] 130 Cong. Rec. H7053 (daily ed. June 26, 1984).
[10] *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).
[11] *Zangrillo v. Fashion Inst. of Technology*, 601 F.Supp. 1346 (S.D.N.Y. 1985).
[12] *Haffer v. Temple University*, 688 F.2d 14, 15 n.1 (3d Cir. 1982).
[13] Note, *The Application of Title IX to School Athletic Programs*, 68 Cornell L. Rev. 222, 223 (1983).
[14] *Othen v. Ann Arbor School Bd.*, 507 F Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 303 (3d Cir.1983).
[15] *O'Connor v. Peru State College*, 605 F Supp. 753 (D.Neb. 1985).
[16] *Grove City College*, 465 U.S. at 581 (Brennan, J., dissenting).
[17] 130 Cong. Rec. H7039 (daily ed. June 26, 1984).
[18] Note, *Undermining Civil Rights Enforcement in Education: Grove City College v. Bell*, 19 U.S.F.L. Rev. 53, 59 (1984).
[19] *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 785 (2d Cir. 1980), *rev'd*, 456 U.S. 512 (1982).
[20] Note, *supra* note 18 at 56 n.23.
[21] 34 C.F.R. §106 (1985).
[22] *See, e.g., Bennett v. West Texas Univ.*, 525 F.Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (5th Cir. 1983); *University of Richmond v. Bell*, 543 F.Supp. 321 (E.D. Va. 1982).
[23] *See, e.g., Haffer v. Temple, supra.*
[24] *Paralyzed Veterans of America v. C.A.B.*, 752 F.2d 694 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3270 (U.S. Oct. 21, 1985) (No. 85-289).
[25] S.431, 99th Cong., 1st Sess. (1985).
[26] *Cannon v. University of Chicago*, 441 U.S. 677, 720 n.2 (White, J., dissenting) (quoting President Kennedy's message).

Since graduation from Delaware Law School, Lynn D Wilson has served as a judicial law clerk for Family Court and Superior Court (Kent County). She is a member of the Delaware Bar, the Board of the Delaware Affiliate of the ACLU, and the State Advisory Committee to the U.S. Civil Rights Commission.

A Balanced Privacy

Phyllis T. Bookspan

...this man who stands before you here, this Alpha-Plus to whom so much has been given, and from whom, in consequence so much must be expected, this colleague of yours—or should I anticipate and say this ex-colleague?—has grossly betrayed the trust imposed in him. By...his refusal to obey the teachings of Our Ford and behave out of office hours, even as a little infant, he has proved himself an enemy of Society, ...For this reason I propose to dismiss him, to dismiss him with ignominy from the post he has held in this Centre...

Aldous Huxley, *Brave New World*

Drug testing in the American workplace is occurring with such increasing frequency that soon it may be commonplace. This phenomenon is corporate America's response to the pervasive use of illegal drugs in all strata of U.S. society. According to an August, 1985 article in *Fortune,* as many as 25% of all Fortune 500 companies have some form of drug testing for employees and job applicants. Three years ago this figure was 10%. Some market analysts predict that by 1988, 50% of America's largest companies will test employees.

In its report issued in March, 1986, the President's Commission on Organized Crime recommended all federal agencies establish "suitable drug testing programs." The Commission also declared that government contractors should test their employees or forfeit their contracts. The Commission further urged state and local governments and private employers to follow suit.

Since wide scale drug testing may be inevitable, it is important that we stop and take a close look at the substantial legal and ethical issues posed by this trend. Although employers have legitimate interests in drug testing employees, the programs are prone to abuse, and encroach on the privacy and liberty of employees. Because of these countervailing concerns, comprehensive legislation regulating drug testing and the use of information obtained thereby is desperately needed.

The Employer's Perspective

Drug use potentially saps the energy, honesty, and reliability of employees. Employees who use drugs are ten times more likely to be absent, late, or both, and three and a half times more likely to be inattentive to necessary job details than nonsubstance users. The costs of abuse range from increased on-the-job accidents, theft, and bad decisions, to decreased productivity. In high risk industries, such as transportation and utilities, the need for worker screening is particularly compelling. A recent *Time* article states that since 1975, about 50 train accidents, with 37 dead and $34 million in damages, have been attributed to drug or alcohol impaired workers. The Nuclear Regulatory Commission has a "fitness for duty" policy that requires that employers control drug and alcohol abuse at a facility. Although, the NRC has not issued a formal testing policy, it does monitor individual company initiated policies.

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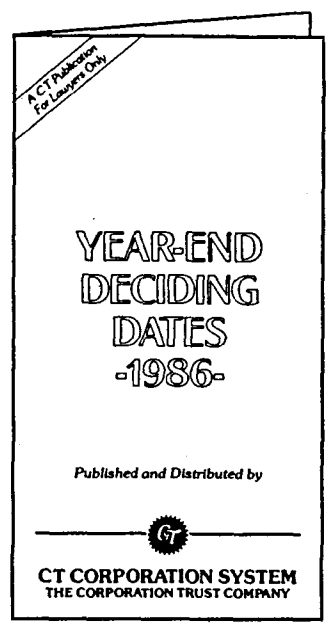

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An impaired employee is a danger to himself and those around him. Employers have a duty to provide a safe environment for all employees and the general public.

The Employee's Perspective

Drug tests are an invasion of privacy. Employees may be asked to perform the humiliating act of exposing their genitals and voiding in the presence of another person. In addition to detailing whether a person has used certain substances, tests reveal a host of private facts, such as whether the person is diabetic, epileptic, has venereal disease, or AIDS, or is pregnant.

If an employee refuses to submit to a test, he/she may face termination. A case presently before the National Labor Relations Board concerns four employees at Georgia's Vogtle Power Plant who were fired when they refused to submit to testing. The employees claim they were asked to take drug tests in retaliation for making repeated safety complaints to supervisors at Vogtle Plant and finally to the Nuclear Regulatory Commission. They state that although they did not use drugs, they refused the tests on principle.

Furthermore, drug tests are unreliable. They poorly differentiate certain substances, and cannot distinguish at all between an occasional user and an addict. An employee's reputation and whole career can be jeopardized by a positive test result.

Drug Testing in Delaware

In light of a national trend toward employee drug testing, I surveyed Delaware's 25 largest employers to determine how serious an issue this is here at home. Employers were asked to respond to a questionnaire designed to elicit a general picture of drug screening use and procedures.

Unfortunately, the response rate as of press time was insufficient to draw statistically significant results. Nonetheless, some individual responses reveal how some of the largest employers in Delaware are approaching this issue.

E.I. du Pont de Nemours and Co., Inc. (the largest Delaware employer) instituted drug testing this past March. All job applicants are asked to submit to urinalysis; anyone with a positive test will not be hired. In-service employees are screened upon reasonable suspicion, although individual plants may determine their own policies. Employees who test positive are required to enter a rehabilitation program or face termination. At certain Du Pont work sites, however, employees may be automatically terminated upon a confirmed positive test.

Hercules, Inc. and Draper King Cole, Inc. also employ drug screening. Both companies screen all job applicants and will not hire anyone who tests positive. Draper King Cole does not retest a positive result; Hercules will submit a positive test for more sophisticated analysis. Current employees also are tested, and may be screened at random. A positive test can be cause for disciplinary action including dismissal.

General Motors will be discussing drug testing with union personnel later this year. The Medical Center of Delaware, Perdue Farms Inc., and Townsends, Inc. all showed interest in initiating drug screening in the near future. The Medical Center of Delaware stated that it would follow the local and national legal situation. Wilmington Trust Co. and Sears Roebuck & Co. do not perceive a need for screening their employees.

Information on the structure of corporate rehabilitation programs was limited. Du Pont and Hercules have rehabilitation programs, and will pay most of the costs for treatment at an approved facility. Generally, employees who volunteer to seek help will be exempt from any disciplinary action (including termination) for a reasonable period of time. At Du Pont the drug using employee will be retested after one year. At Hercules retesting is done after completion of the rehabilitation program.

Problems With Testing

Constitutionality. The most immediate legal question is whether employee drug testing is constitutional. The Fourth Amendment protects citizens from unreasonable searches and seizures, and provides that no warrants shall issue but upon probable cause. Article 1, Section 6 of the Delaware Constitution provides similar protections.

All courts that have addressed the issue have determined that urine tests are searches within the meaning of the Fourth Amendment.[1] In *Shoemaker v. Handel,* 619 F. Supp. 1089 (D.N.J. 1985), the court found that breathalyzer and urine tests "implicate the interests in human dignity and privacy" that emanate from the Constitution. The question then becomes a balancing of the individual's right to privacy against the need for the search.

A person's privacy interests vary with the intrusiveness of the search. Just how intrusive are the particular procedures? Saliva and breath tests, which involve no physical bodily intrusion, may be found minimally intrusive; blood tests, which involve a forced extraction of bodily fluid, are intrusive but have been upheld in other circumstances;[2] urine tests, which require a person to void into a container, vary in their level of intrusiveness depending upon the procedures used. Factors to be considered include the location where the person must give the sample, who if anyone is present when the sample is provided, and whether an individual who cannot provide a sample on demand is detained.

Privacy interests of state employees are balanced against the compelling need for the search and its level of intrusiveness. Some police, fire, and correctional officers already have been subjected to drug testing. Policies based on individualized suspicion and not random testing, have passed constitutional challenge. In *Turner v. Fraternal Order of Police,* 120 LRRM 3294 (D.C. Cir. 1985) the court upheld a District of Columbia Police Department Order whereby all members of the force may be required to submit to urinalysis if "suspected of drug use" by a departmental official. The court was careful to state that "suspected' drug use does not grant the Department *carte blanche* to order testing on a purely subjective basis. Rather, suspicion must be a reasonable, objective basis for medical investigation through urinalysis." In *McDonell v. Hunter,* 612 F. Supp. 1122 (S.D. Iowa, 1985), the court upheld a regulation permitting the Iowa Department of Corrections to demand a blood, breath, or urine specimen for chemical analysis only on "reasonable suspicion based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or

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controlled substances." In *Turner* and *McDonell,* therefore, the courts have upheld drug testing of civil servants on a *Terry*[3] type suspicion.

Employees in the private sector are not protected by constitutional notions of privacy. Absent state action, constitutional mandates are advisory, at best. Private actors can, however, be bound to even higher standards than the federal constitution by application of special federal or state laws. At least two states—California and Louisiana—have ruled that their state constitutional equivalent to the Fourth Amendment applies to private business. Thus, private testing programs in those states must meet constitutional requirements.

Reliability. Another serious issue is the reliability of drug testing. Depending on variables such as the type of test used, the substance tested for, the laboratory employed, the handling of the sample, and the taking of the sample, results vary tremendously. The most commonly used test is called EMIT (Enzyme Multiplied Immunoassay Technique), which is a screening assay for certain metabolites in bodily fluids. Gas chromatography and mass spectrometry are two more accurate (and more expensive) tests.

In 1981, the military initiated a drug testing program using primarily urinalysis. The numbers of false positives, mixed up samples, or both, was overwhelming. In 1984, Army and Air Force labs improperly processed 35,000 specimens. In 1982 and 1983 a total of 9,100 Army employees were given dishonorable discharges. The Pentagon later tried to track them down to apologize for convicting them on faulty evidence. Problems ranged from inadequate specimen collection and handling to poor quality control at testing labs.

Additional unreliability results from poor differentiation of certain compounds. Present tests easily confuse poppy seeds for opiates, cold medications for amphetamines, antibiotics for cocaine, and aspirin for marijuana. The National Centers for Disease Control did a secret study of selected laboratories. The results, published in the *Journal of the American Medical Association,* indicated the worst laboratories came up with false positives as often as 66% of the time. Only one lab in the study was found acceptable for cocaine testing.

Reliability is also significantly affected by handling of the specimen tested. Part of the problem with the military testing discussed above, was the lack of proper procedures to preserve and prove chain of custody. Documentation of how and by whom a sample is handled from the time it is taken to the time when final assay results are tabulated is critical to reliability.

Finally, unreliability results from the recent and hurried growth of the testing industry, which is only likely to grow in coming years. One market consultant quoted in *Fortune* last year projected that the demand for drug screening would reach 2.5 million tests. That would put annual revenues for the industry between $50 million and $100 million for tests alone. At present test manufacturers and drug testing laboratories are unregulated.

Confidentiality. General principles of privacy and fairness raise the issue of confidentiality. Test results may be used and disseminated in such a way as to humiliate an employee, damage reputations, and do irreparable harm to the ability to earn a living. Employers who intentionally or negligently reveal information may expose themselves to legal liability. Providing test results to spouses, medical personnel, law enforcement agencies, and prospective employers of former employees all could have severe repercussions.

Other Problems. Drug tests are inaccurate predictors of on-the-job use. Tests show nothing about previous, much less future, behavior at work. Marijuana, for example, will show up in a person's metabolites for up to one week or more after use. Cocaine and heroin, the drugs that some employers express most concern over, will only appear if tested within 48 hours. And, alcohol passes through the blood stream so quickly, that one must be tested while inebriated to produce a positive result.

Testing also may affect morale and company loyalty. Employees are likely to feel "guilty until proven innocent," as opposed to the other way around. Dismissal of employees who fail drug tests, particularly seasoned workers, may prove costly.

Litigation. Employees may challenge drug screening programs on a variety of legal grounds including: civil rights violations under 18 U.S.C. §1983, common law invasion of privacy, public disclosure of private facts, defamation, intentional infliction of emotional distress, wrongful discharge, and false imprisonment (if someone is detained until able to provide a specimen).

Invasion of privacy incorporates notions that there are certain areas in one's life that are legitimately kept private. In *McDonell v. Hunter,* the court concluded "[o]ne clearly has a reasonable and legitimate expectation of privacy in...personal information contained in his body fluids."[4] Generally, an employee's right to privacy will be weighed against the interest in providing a safe workplace.

Defamation actions may result from the publication of results that later turn out to be false. Public disclosure of private facts could result from publication of anything deemed to infringe one's reasonable expectation of privacy. Indeed, publication solely in an intra-company memorandum may constitute sufficient public disclosure to trigger liability.[5] Discharge of an employee for refusing to submit to a drug test may be branded "wrongful".

Remedies include job reinstatement with lost salary, money damages, and public apology. Employees may also seek declaratory judgments that particular testing programs are unlawful and injunctions prohibiting use of them. For example, in *Local 1900, IBEW v. Potomac Electric Power Co.,* No. CA 86-0717, slip op. (D.D.C. March 18, 1986), the court issued a TRO against random drug testing for all employees on the theory of a possible invasion of privacy. A preliminary injunction was later denied, but upon condition that the company return to its previous policy of no generalized random testing except for employees on disciplinary probation. Although no injunction issued, the plaintiffs successfully employed litigation to achieve their goal.

Need for Legislation. Present forecasts are clear—drug testing in the workplace will increase within the next few years. And Delaware, home to corporate America, is perhaps at the forefront of the trend. Our legislature should address this issue now and enact laws ensuring that employee drug testing will be conducted as fairly as possible. Presently five other states—California, Maine, Maryland, Michigan, and Oregon—have either enacted or are in the process of considering such legislation. The following proposals should be considered in any legislation:

1. The standard for employee drug testing must be nothing less than reasonable suspicion. If an employee is performing well on the job, that is all that is required, and he/she must be left alone. The final measure is performance. What an employee does during leisure time is private and must so remain. Reasonable suspicion should be based upon objective, articulable facts of absenteeism, lateness, job performance, and accidents. Anonymous tips are insufficient cause; other tips must be investigated and supported by independent corroboration.

Further, I propose that:

2. Do-it-yourself tests must be banned—what they save in costs is lost in accuracy.

3. There should be no in-house testing. Everything must be done to insure the appearance of propriety, and to discourage allegations of discrimination or retaliation.

4. Drug testing laboratories must be licensed by the state to ensure honesty and accuracy. They should be inspected randomly, but at least twice a year.

5. Trained specimen handlers should be employed, and detailed chain of custody procedures must be mandatory.

6. Companies must provide notice of their policies in writing to all employees. Notices should disclose who has authority to order tests, and the exact procedures to be followed.

7. Tests results must be held in the strictest confidence. They may not be revealed to anyone other than an authorized representative of the employer without the written consent of the employee.

8. Companies employing more than twenty five employees must provide voluntary treatment programs for all employees, and any employee must be permitted to enroll in a treatment program before being dismissed. These programs should be structured as employee assistance programs (EAPs), and financed by employers. Participation in EAPs must be kept confidential.

Let us deal with employee drug screening now, in a balanced and compassionate manner that reflects concern for both the individual worker and the corporate employer. Only then can we avoid unnecessarily destroyed careers and ruined reputations, while protecting the safety of the workplace and society.

Phyllis T. Bookspan is an Assistant Professor of Law at Delaware Law School of Widener University, where she teaches Criminal Law and Procedure, Juvenile Justice, and Sentencing. She received her J.D. from Georgetown University Law Center in 1983, and is due to receive an M.L.A. (Masters of Law in Advocacy) from Georgetown this year. Before coming to Delaware Law School in 1985, she held an E. Barrett Prettyman Fellowship in Washington, D.C., where she represented adults and juveniles charged with misdemeanors and felonies. She was also supervising attorney of the Georgetown Juvenile Justice Clinic.

In May of this year Professor Bookspan was invited by Senator Roth to be a member of a panel at the Delaware Youth Fair discussing drug testing in the workplace.

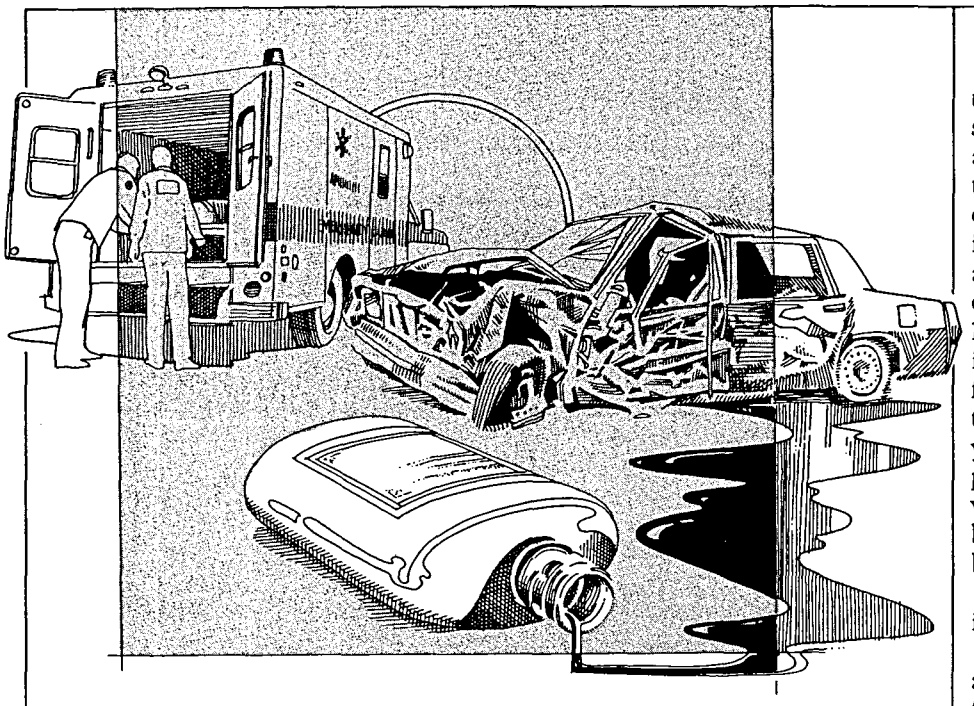
1 See, e.g., *Shoemaker v. Handel,* 619 F. Supp. 1089 (D.N.J. 1985); *Allen v. City of Marietta,* 601 F. Supp. 482 (N.D. Ga. 1985); *Division 241 Amalgamated Transit Union v. Suscy,* 538 F. 2d 1264 (7th Cir. 1976), *cert. denied,* 429 U.S. 1029, 97 S. Ct. 653 (1976).

2 *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Extracting blood from a suspect without a warrant was found permissable where it was a search incident to a valid arrest and there was no time to secure a warrant.

3 *Terry v. Ohio,* 302 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). Police officer may stop a person on less than probable cause when he has reasonable, articulable suspicion to believe, in light of all the facts and his experience, that criminal activity is afoot. He may conduct a limited pat down search of outer clothing if he reasonably believes the suspect is presently armed.

4 *McDonell v. Hunter,* 612 F. Supp. 1122, 1127 (S.D. Iowa 1985).

5 *Bratt v. I.B.M.,* 467 N.E. 2d 126 (Mass. 1984).



An Intimate Liberty

Anonymous

Most people would be surprised—perhaps even doubting—that alcoholism is the third leading cause of death in the United States.[1] Alcohol is this nation's most widely used—and abused—drug and it is one of our most serious public health problems.[2] In 1983, alcoholism cost the economy $116.7 billion.[3] It is estimated by these same sources that this figure is significantly higher in more recent years.

In addition to being a direct cause of death, alcohol contributes to other fatal illnesses, including cardiac myopathy, hypertensive diseases, pneumonia, and several types of cancer. A recent article in the *New York Times* described alcoholism as "an affliction that alters the lives of 70 million Americans."[4] Chronic brain injury caused by alcohol is second only to Alzheimer's disease as a known cause of mental deterioration in adults.[5] Twenty percent of national expenditures for hospital care are alcohol related. Motor vehicle accidents related to alcohol are the leading cause of death among persons between the ages of 15-24.

How does all this disturbing information affect the legal profession—specifically Delaware lawyers? Experts estimate that ten percent of the population of some 181 million over age 16 is alcoholic.[6] More serious for lawyers is that the incidence of alcoholism among the professions—lawyers and doctors in particular—is 15%.[7] Since the latest information shows there are some 543,000 lawyers[8] in the United States, if we accept this figure, somewhat over 81,000 lawyers are alcoholics. There are more than 1400 lawyers admitted to practice in Delaware.[9] Thus, even if it is assumed that the percentage of impaired lawyers in this state is less than the national average, it is nevertheless apparent there are some Delaware lawyers in need of assistance.

Perhaps it is more than a coincidence that the second member of Alcoholics Anonymous was a doctor and the third member a lawyer. Through AA both of them were able to return to their careers and continue their lives as sober and useful members of society.[10]

Alcoholism Is a Disease

It is easy to pass off statistics about the terrible consequences of alcoholism; it is more difficult to define alcoholism. The definition of an alcoholic from Alcoholics Anonymous is widely accepted: he is a person who is powerless over alcohol and whose life has become unmanageable.[11] The National Council on Alcoholism describes an alcoholic as a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern.[12]

Moreover, no one any longer seriously doubts that alcoholism is a disease. In times past a doctor here and there dared say alcoholism was an illness. For example, in the late eighteenth century the famous United States Surgeon General, Dr. Benjamin Rush, expressed the idea that alcoholism was a disease and attempted to interest the authorities in establishing an Institute for Inebriety.[13] But it was not until 1956 that the American Medical Association announced its finding that alcoholics suffer from a treatable disease.[14] For thousands of years, alcoholism was considered a moral problem; that the alcoholic was a person with no will power; and, if not a Bowery bum, at least an individual who resembled one.

Recognizing alcoholism as a disease implies several things.

First, the illness can be described. The alcoholic's compulsion to drink is manifested in drinking habits that are inappropriate, unpredictable, excessive, and constant.

Second, the course of the illness is predictable. Over a period of time the disease leads inevitably toward greater and more serious deterioration. This degeneration can be physical, mental, and spiritual, or all three.

Third, it is a primary disease. For many years the medical profession, particularly psychiatrists, treated alcoholism as though it were a symptom of emotional or a psychological disorder. The idea was that if the doctor could determine what was really wrong with the alcoholic, there would no longer be a need to drink. This is now recognized as wrong; alcoholism causes other mental, emotional, and physical problems. The alcoholism must be treated first.

This view is supported by, among others, Dr. George Vaillant of Dartmouth Medical School, a psychiatrist who once believed that alcoholism was caused by psychological disorders. He changed his views after analyzing the 40-year history of 600 men from two groups—one from Harvard University and another from a poor inner-city population. He concluded that those who developed alcoholism did not have prior problems. Instead, once the person lost control over alcohol, the problems began.[15]

Fourth, the disease is permanent. Once you have it, you have it. An alcoholic can't learn to drink like a lady or gentlemen. The only solution is to stop drinking—the sooner the better.

Fifth, the disease is terminal. An alcoholic who does not succeed in arresting

the disease will surely die. Death certificates use many euphemisms for death from alcoholism—heart failure, pneumonia, kidney failure. But friends and acquaintances of the victim in most cases know the real cause of death.[16]

The Alcoholic Lawyer

Alcoholic lawyers often are persons who achieved a superior law school record and who started a career in a law firm with early promise of becoming a partner and a future leader of the bar. This great expectation, however, was interrupted by alcoholism.

There are hundreds of stories of lawyers in trouble with alcohol who have made it back to successful practices and useful lives. Many of these tales are retold because of the inspiration they offer to other alcoholic lawyers to take their first steps to sober and productive lives.

As I said before, the third member of AA was a successful lawyer and a community leader. He first had his bouts with alcohol while in college. He enlisted in the army during World War I to "run away" from alcohol. He nevertheless continued to drink after the war and progressed into the advanced stages of his disease. He would stay away from his office for two or three weeks at a time. He was hospitalized several times for intoxication and actually shackled to his bed. During the last of these episodes the co-founders of AA came to visit him in the hospital. They spent several days talking to him, telling him their stories and giving him encouragement. He left the hospital a free man never to drink again.

There is a more modern story of a young lawyer who graduated from college with highest honors and who attained a 4.0 average in graduate school even though his alcoholism was then in its beginning stages. The Vietnam War was at its height and the word at the time was "tune in, turn on, and drop out." This was his excuse for drinking.

He managed to make it through law school despite increasing problems with alcohol and other drugs and was hired by a distinguished law firm in a major city in the midwest. Fortunately the firm had a partner who sent him to a hospital for treatment, and he was able to resume what in his early law school days promised to be a brilliant career. He has continued in that law firm as a sober and productive partner.

Another story concerns an alcoholic judge. His alcoholism began while he was in college and continued in law school where he served as an officer in most of the student associations and as an editor of the law review and, despite his drinking, received awards for scholastic excellence.

He became a judge after practicing law for several years. Despite his excessive drinking he managed to perform his duties, but his problems were growing and he described his personal life as a "mess". His wife left, taking their two children. This event resulted in even more abuse of alcohol. Finally he admitted he was an alcoholic and that his life had become unmanageable. After being hospitalized in a treatment center, he joined AA and has since returned to his judicial duties. He says he has no dread of facing life and that he has established a trusting relationship with his children.[17]

Unfortunately, not all the stories have such fortunate endings. As one of the founders of AA stated, there are some men and women "who are constitutionally incapable of being honest with themselves" and therefore fail to recover. These persons, even though help has been extended, continue to drink until they die.[18] Oftentimes they tragically destroy the lives of their wives and children and many ultimately take their own lives.

Following the lead of states such as Illinois, New York, New Jersey, Florida, Maryland and many others, on September 20, 1985, the Executive Committee of the Bar Association approved a Lawyers Assistance Program for Delaware.

The report to the committee included recommendations that the Association retain the part-time services of a trained counselor and establish a hot line number for lawyers in trouble with alcohol.

The December 1985 Newsletter of the Bar Association announced the establishment of the program and the retention of the services of a professional counselor, Frank Lawlor, a former corporate consultant on alcoholism and drug abuse for the DuPont Company:

> *Mr. Lawlor's extensive and successful work in corporate substance abuse programs, his discretion, tact, and humanity make him especially well qualified for this important role in serving the profession. Reputable scientific surveys show that as many as fifteen percent of all pro-*

fessionals are confronting alcohol problems. There is an urgent need to be met nationally, and therefore in Delaware too. We believe that with the establishment of this program we are now in a position to deal more effectively with that need."

The Newsletter, Delaware State Bar Association, December, 1985

In addition to Frank Lawlor, members of the Bar Association active with the Lawyers Assistance Program stand ready to act in a confidential way when fellow attorneys or members of their families ask for help.

The program has a threefold purpose:

1. To help the attorney return to a sober and productive life.
2. To provide confidential help to him and his family.
3. To aid in establishing follow-up programs.

As for confidentiality, the Delaware Supreme Court is considering a recommended rule that will give assurance to the attorney and his family who ask for help that the matter will be treated in confidence.

It is appropriate to conclude this article with a story of a lawyer in difficulty with alcohol and how help for him was initiated by the local Lawyers Assistance Program.

It was around 10 a.m. and the lawyer had just phoned his office. He told his secretary he would be working at home that day and asked her to inform his client that the afternoon meeting would have to be postponed. He thought to himself that he'd be lucky if the client didn't ask for his files after he had lost his "cool" with him on the day before. The knot in his stomach was paralyzing and he said to himself, "If I could just relax a bit, I could think straight."

At the bar in the family room he finished off a half glass of warm vodka and waited those few precious moments for the tension, the fear, and the guilt to disappear. Slowly he regained his composure.

He was to argue for an extension of a case before a judge that morning. But with the regained confidence he believed he could make the filing date. He would go in to his office on Sunday and work on it a few hours. Also, he would push the deposition to be taken in another city next week back a month or two. He would get on that tomorrow.

Two more drinks and he had organized his schedule for the next couple of days. What he needed now was some sleep. A good days rest and he'd be over the flu that had slowed him down the past few days.

Later that evening his wife called to him. "There are some people here to see you." Downstairs the lawyer's partners, his family, and two members of a lawyers intervention team were in the living room. His partner told the lawyer that they were there to talk to him about his drining problem.

This is called intervention. To the lawyer full of denial and anger and who will not admit to the terrible consequences of continuing his excessive use of alcohol intervention probably will be considered an unwarranted intrusion into his personal affairs.

We do not know whether this intervention will result in a successful treatment of the lawyer's disease. We are certain, however, that if he does not agree that he is ill, and that he needs treatment for his disease, he will lose everything, including his life.

It is this troubled lawyer to whom the Lawyers Assistance Program offers help. At least there are those in the program who are anxious and willing to assist attorneys like the one in the story to return to a sober and productive life.

[1] F. Asma, M.D., "Alcohol and Drug Abuse—A National Health Problem", 73 *Illinois Bar Journal* 24 (1984).

[2] National Council on Alcoholism, Inc. (hereinafter National Council), *Facts on Alcoholism and Alcohol Related Problems*, Feb. 1986.

[3] National Council.

[4] Frank Abrams, "A New Attack on Alcoholism," *New York Times Sunday Magazine* p. 47 (1986).

[5] National Council.

[6] 73 *Illinois Bar Journal* 20 (1984). The figure for the number of people over age 16 is from the U.S. Bureau of Census "Estimates of Population of the United States, by age, sex and race: 1980 to 1984." *Current Population Reports*, Series p. 25, No. 965, Washington, D.C.

[7] Recent studies in California and Washington indicate the percentage of lawyers is at least twice the national average.

[8] U.S. Bureau of the Census.

[9] Office of the Clerk, Supreme Court of Delaware.

[10] *Alcoholics Anonymous*, third edition, 182-189 (1976).

[11] First of the 12 steps of Alcoholics Anonymous.

[12] National Council.

[13] Jellinek, *The Disease Concept of Alcoholism*, pp. 1-174 (1972). Also conversation with Dr. Donald Gill of the Philadelphia Institute.

[14] *Journal of the American Medical Association*, October 20, 1956.

[15] Frank Abrams, "A New Attack on Alcoholism," *New York Times Sunday Magazine*, p.47, 61 (1986).

[16] *Alcoholism, A Treatable Disease*, Johnson Institute (1972).

[17] These stories have been taken from Alcoholics Anonymous n. 10, *The Illinois Bar Journal*, n. 6.

[18] Alcoholics Anonymous, note 10, p.

WHA Finally Got The Lead Out

Mary McDonough

Stephen Jackson, like most five year olds, loved to make believe. In Stephen's magic world of pretend, the front porch of his family's modest public housing unit was transformed. Here Stephen could be anything he wanted. Some days he was a fire chief speeding to help someone in distress. At other times he was a race car driver wildly careening his Matchbox sports car around curves. The railings of the Jacksons' porch became race tracks and super highways as Stephen used his active five-year-old imagination to play. And, as with many young children, Stephen's toys often ended up in his mouth.

Stephen Jackson is now permanently disabled—the victim of lead paint poisoning. The chipping paint from his porch railing, which contained lead, had become imbedded in the grooves of the wheels of his toy cars. Stephen ingested it and sustained permanent damage. Stephen now has serious learning disabilities requiring special education as well as impaired motor control and speech problems requiring weekly therapy sessions at the Curative Workshop. At least, Stephen's lead poisoning was not fatal.

I became aware of Stephen's story in August, 1980, when, working as a Legal Aid attorney, I received a call from Stephen's mother, Ima Jean Jackson, requesting help in getting her landlord, the Wilmington Housing Authority (WHA), to remove the lead paint from her house. Stephen, diagnosed as suffering from lead poisoning, had been hospitalized a week earlier. He could not be released from the hospital to return home the following week as planned unless its lead paint had been removed. Despite repeated requests by Mrs. Jackson and public health staff, WHA had not even begun the lead paint abatement process. Mrs. Jackson hoped that a telephone call from a lawyer would bring a different response.

My repeated telephone calls to WHA failed to resolve the problem. WHA did start to remove the lead paint from the Jacksons' house but it did so at such a slow pace (one maintenance worker spent only a few hours a day during his sporadic appearances) that the lead paint removal was not even halfway done by the end of the following week. Consequently, when his doctor was ready to release Stephen from the hospital, the child could not return to his own home. Fortunately, his aunt offered to let Stephen recuperate at her house, which was tested and found to be free of lead paint. Weeks passed, however, and the lead paint remained at Stephen's house.

Stephen's mother then faced a difficult decision. She had to decide whether to sue her landlord to compel compliance with the federal lead paint law. She also had the choice of bringing an individual lawsuit strictly on her own behalf or a class action suit on behalf of all similarly situated public housing tenants living in WHA units.

Ima Jean Jackson had never been involved in a lawsuit of any kind before and was frightened at the prospect of suing her landlord. She worried about the risk of retaliatory eviction or at least harassment if WHA labelled her a troublemaker. She was also concerned that her part-time job might be affected if the lawsuit generated publicity. In sum, as a public housing tenant who juggled her family responsibilities with her minimum wage job, she was concerned that both her job and her family's housing could be jeopardized.

Mrs. Jackson wanted to know what I thought she should do. I explained to her that because she, not I, would suffer any possible personal consequences from initiating a lead paint lawsuit, she alone had to make this decision. I asked her to take a few days to really think it over and to discuss the matter with her family before deciding.

Mrs. Jackson resolved that she must sue WHA for injunctive relief, not just on her own behalf but for the protection of other children living in WHA family units. Her religious beliefs convinced her that she had an ethical obligation to do so. As Mrs. Jackson explained, the damage of lead poisoning had already been done to her child but she felt obliged to try to prevent it from happening to any other children living in public housing. Her motivation was simple and remained unswerving throughout the course of the litigation. She summed up her decision: "I don't want any more lead poisoned Stephen Jacksons to happen again in WHA housing."

In late September, 1980, Mrs. Jackson filed a civil rights suit against WHA, HUD, and the City of Wilmington's Department of Licenses and Inspections (L&I).[1] The suit was brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, to seek redress from the deprivation under color of State law[2] of plaintiffs' federal Constitutional rights under the Fourteenth Amendment. The defendants' failure to provide plaintiffs with the protection of the laws designed to prevent lead poisoning subjected their children to the continued threat of loss of health and even of life in violation of the Due Process Clause of the Fourteenth Amendment.

Violations of federal statutes and regulations dealing with the health hazard of lead paint poisoning were also alleged

as pendent claims to the federal Constitutional claim. We relied primarily on the Lead-Based Paint Poisoning Prevention Act of 1973 (LPPPA), 42 U.S.C. §4822 and HUD's 1976 lead paint regulations, 24 C.F.R. §35, designed to enforce the LPPPA. Pendent claims under the Delaware Landlord-Tenant Code and the Wilmington Housing Code were also raised. Mrs. Jackson filed this suit as a class action on her own behalf and on behalf of those of the 1636 WHA family-unit tenants whose houses contained lead paint in violation of applicable federal, state, and local law. The relief sought was strictly declaratory and injunctive: mandatory compliance by federal, state and local governmental entities and their officials with duties prescribed by applicable laws designed to protect the health of plaintiffs' children by preventing lead paint poisoning. No monetary relief was sought.

One seemingly minor aspect of the filing of this lawsuit provides insight to Mrs. Jackson's approach throughout the litigation. When told that the federal filing fee was $60.00 but that her family's financial position qualified her for filing an *in forma pauperis* motion for a fee waiver, she immediately replied that she wanted to pay the filing fee herself. She did so, virtually depleting her family's savings account in the process, and she paid this fee to start a lawsuit in which she did not stand to gain a penny. Instead, she spent a great deal of time including vacation time in attending hearings and negotiating sessions.

From beginning to end this has been Ima Jean Jackson's case. She read every piece of paper sent to her and asked questions about any legal terms that she did not understand. Her level of commitment remained high throughout—and no wonder. She had seen firsthand the consequences of lead poisoning in her own child and, instead of indulging herself in pity or resentment, had made a conscious decision to channel her anger constructively into preventing recurrence of this harm to other children. As I later learned, Mrs. Jackson had always considered the prospect of a public housing tenant's winning a case like hers a long shot at best, but she felt compelled at least to try to achieve her goal of protecting other children.

After suit was filed, WHA completed the removal of lead paint from the Jacksons' house to the satisfaction of the state public health officials, and Stephen returned home. But his mother's goal of preventing lead poisoning in other children of WHA tenants remained to be achieved.

Unfortunately, Legal Aid lost one-third of its federal funding during the year after the lead paint suit was filed. Consequently, this law firm had to lay-off many staff members. I was one of them. I took the only Legal Aid position vacant at that time, that of a community education paralegal. Because of restrictions on the funding for that position, I was unable to handle litigation, including the lead paint case. This required my filing a request for an indefinite continuance pending resolution of my job status at Legal Aid. The motion was granted and Mrs. Jackson's case remained in limbo for almost a year.

The lay-off not only delayed the litigation; it removed any incentive for WHA or HUD to negotiate a resolution of the case. It made tactical sense for the defendants to wait and see if this lawsuit would bite the dust, should the Administration succeed in eliminating the Legal Services Corporation (LSC), Legal Aid's primary funding source. Fortunately, Congress has consistently thwarted efforts to dismantle LSC, and Legal Aid was able to resume prosecution of the lead paint case.

During 1982, a staff position had become vacant at Legal Aid that permitted me to resume litigation work. I became Executive Director and reactivated the lead paint case, this time with the assistance of Thomas Motter, an attorney assigned to Legal Aid by a public interest law fellowship program. When Tom Motter moved to another staff position at Legal Aid, his co-counsel role was filled by Marjorie Deska, another attorney selected by the same national public interest fellowship program. The Delaware Chapter of the American Civil Liberties Union agreed to assist as co-counsel in this civil rights case. C. Vincent Scheel, Barry Willoughby, and Sheldon Sandler served as co-counsel in the discovery and trial phases of the litigation.

WHA had consistently admitted in written discovery responses that it had not conducted inspections for lead paint. The resources needed for a systematic lead paint inspection of WHA family units were great and the HUD regulations clearly placed the burden on WHA to conduct such an inspection. Accordingly, plaintiffs' lack of funds for even

an extensive random sampling of paint conditions in WHA's 1,636 family units did not appear to harm our prospects of prevailing.

Volunteer investigators had collected close to 50 paint samples from WHA family units during the summer of 1982, but we lacked the money to have them chemically analyzed for lead content. We did pay for the analysis of 6 samples, which had been collected in the Fall of 1982 by a volunteer law student. All 6 showed high levels of lead. We also had circumstantial evidence: 26 documented instances of children who had suffered elevated lead blood levels while living in WHA units. In preparing for trial we relied most of all on WHA's repeated admissions of failure to inspect for lead paint in any fashion.

At trial in 1983, however, WHA presented a different position. The WHA witnesses testified that under a newly hired Executive Director, WHA now checked for chipping paint conditions in regular annual inspections. The third WHA Director in as many years since the suit was filed was nothing new, but the WHA about face on lead paint inspection was a staggering surprise. We scrambled to rebut but lacked the time or resources to do so well.

In June 1983 the District Judge Walter K. Stapleton issued a decision enjoining WHA to comply with HUD regulations requiring notification to tenants of the hazard of lead paint. He denied however the primary injunctive relief sought by plaintiffs requiring (1) WHA to inspect for and to eliminate lead paint hazards and (2) HUD to monitor and to enforce WHA compliance with HUD regulations. Judge Stapleton observed, "During the 1970's and throughout 1980, it appears that WHA was simply insensitive to the hazards which so concerned Congress. The most dramatic example of this is, of course, the experience of the Jacksons. Despite being notified of a lead paint problem in the Jackson home, and of the fact that a child's health was at risk, it took approximately eight months for WHA to completely remove the lead paint from the house." The Court concluded that plaintiffs had "demonstrated that prior to the filing of this lawsuit in September, 1980, WHA's practices with respect to inspection for an elimination of immediate lead paint hazards did not comply with the requirements of federal law." However, Judge Stapleton was "persuaded that WHA's current practices do satisfy those requirements. Further, while this compliance came only after WHA's management was goaded into action by this suit, I have been persuaded by WHA's new management that there is little likelihood of a return to the neglectful practices of the past."

Mrs. Jackson and her lawyers reacted differently to this decision. While Legal Aid staff members were disappointed, Mrs. Jackson accepted the news with resignation. She said that she had never really expected to win—that public housing tenants would be foolish to expect to beat WHA, let alone HUD. She said that just as "you can't beat city hall", you certainly can't beat WHA and the federal government. She then thanked us graciously for our work and especially for caring about what happened to the children of public housing tenants. The element of truth in her observation about the prospect of victory was painful. Goliath often does win and for the wrong reasons. Second, her sincere gratitude for our concern for public housing children was troubling. Why shouldn't the risk of brain damage in public housing kids spark the same level of concern as it would for other kids? Implicit in her remarks was the notion that there is, indeed, a differential standard. In Mrs. Jackson's experience, that was the nature of things.

I explained to Mrs. Jackson that Judge Stapleton quite reasonably believed that WHA had changed its practices to conform with the law and that we had simply not been able to produce enough evidence to demonstrate the contrary. I assured her that we would file a Motion for Reargument and that, if the Judge reopened the case, we would somehow prove the merit of our position. She politely humored me but asked that the Legal Aid staff not be too disappointed if we lost the Motion.

We knew that lead paint, contrary to WHA's assertions at trial, was pervasive in its family units. We also knew that Judge Stapleton had reasonable grounds for ruling that we had not adequately demonstrated WHA's current violation of the Lead Paint Poisoning Prevention Act.

The roadblock to producing the needed evidence appeared to be the lack of resources, not an altogether novel problem for Legal Aid. At least, however, the resource of *time* was on our side. When Judge Stapleton granted our Motion for Reargument on September 14, 1983, he originally scheduled the Reargument Hearing for two weeks later. Fortunately, the Justice Department lawyer representing HUD had already planned a month long vacation in Europe and requested a continuance until the end of October. Of course, plaintiffs did not oppose the request, and the Judge granted it. Now, we had six weeks before the Reargument Hearing in which to come up with sufficient evidence for an offer of proof that would show the fallacy of WHA's trial position.

My bemoaning our lack of resources with two strong willed women helped make a successful lead paint investigation possible. Joan Rosenthal, the local ACLU Executive Director, pledged whatever was needed to pay for analysis of paint samples as well as other litigation costs. She said that if the ACLU Foundation could not cover the costs, she would conduct her own fund raising campaign starting with herself and her equally public spirited husband, Joe.

All we needed now were enough investigators to canvas as many of the 1,636 WHA family units as possible in the next six weeks. Told of this human resources problem, the second woman, Marjorie McDonough, (my mother) responded "no sweat". She signed up as the first recruit and drafted her other children for weekend tours of duty. They, in turn, enlisted the aid of their friends, including several teammates from a local semi-pro baseball team.

My colleagues at Legal Aid along with their family members responded with equal enthusiasm for the weekend lead paint inspection tours. Nine different Legal Aid attorneys and paralegals spent several Fall weekends in 1983 going from door to door in Riverside, Eastlake, and Southbridge as well as the scattered-sites to collect paint samples and tenant affidavits regarding chipping paint conditions. Legal Aid President, Dirk Durstein, served as our official photographer of chipping lead paint conditions in WHA family units.

The Legal Aid staff and their assorted friends and relatives were industrious inspectors. They even resorted to healthy competition to see who could canvass the largest number of houses in each three hour shift. At one time, however, the numbers dropped precipitously during a World Series game when the baseball fan/inspectors lingered at WHA houses to catch the latest score along with their paint samples. Also,

until the word spread throughout the WHA projects about who this motley crew were many tenants were understandably suspicious of strangers at their doors in quest of chipping, flaking paint.

The one problem with this volunteer crew was that it was only available on weekends and we were losing precious inspection time from Monday through Friday. When only three weeks remained before reargument, panic set in. Solution: the Emmanuel Dining Room operated by the Capuchin religious community. Brother Ronald Giannone, Treasurer of Legal Aid and founder of the Dining Room, allowed us to recruit his guests at the Dining Room. This unorthodox approach paid off. Several homeless men demonstrated concern as well as reliability in conducting lead paint inspections. In fact, two Emmanual Dining Room recruits, Stewart and Jimmy, showed up seven days a week to conduct inspections and attended subsequent court hearings. During their whirlwind tour of inspection, they said that they hadn't felt so good in a long time because they were able to help others for a change.

When it came time to prepare the witness list for the Pre-Trial Order, Stewart and Jimmy presented a concern. When asked for their addresses, Stewart answered, "Ma'am, it depends on the season. In warm weather, we stay in Rodney Square. In cold weather, it's vacant buildings." I could just imagine the field day a Justice Department lawyer would have on cross examination.

Our volunteers ended up canvassing almost half of WHA's 1,636 family units to collect paint samples, affidavits and photographs of chipping painted surfaces. We assembled affidavits to the presence of chipping paint at 800 different WHA addresses. Chemical analysis of paint chips collected from 152 houses showed that 86% of them contained lead paint levels far in excess of federal standards. In over three quarters of those homes, the lead content exceeded the federal limit by 100%.

Armed with this offer of proof, we explained to Judge Stapleton at the reargument hearing that we had not conducted this extensive lead paint inspection before trial because we had not believed it necessary in light of WHA's discovery responses. WHA had consistently admitted that it did not inspect for lead paint. The HUD regulations place the burden on the public housing authority to conduct lead paint inspections and, lacking the resources for a systematic inspection, we had not undertaken one. Consequently, we had not been able to effectively rebut WHA's trial position that it was currently in compliance with HUD regulations. Now, however, we had documented WHA's wholesale noncompliance in stark contrast to its trial position.

Judge Stapleton granted our motion for reargument, withdrew his previous decision, and reopened the record, because he found that "they [plaintiffs] were subjectively misled by WHA's discovery responses, because plaintiffs seek only an injunction and a new suit could be instituted for such relief if there are continuing violations of federal law in WHA housing and, most importantly, because this is a class action involving a public health issue."

An unexpected chain of events followed the issuance of Judge Stapleton's Opinion. The day after he reopened the case, WHA officials notified several of the WHA tenants who had cooperated with our lead paint investigation that they would be *permanently* transferred from their units supposedly so that the lead paint could be removed. One tenant was told to move all of her belongings out of her house that afternoon. When she explained that she would be unable to pack and have her furniture moved on a few hours notice, she was told that a WHA maintenance crew would be at her house at 6 a.m. the next day, a Saturday, to move her.

I learned of this development late on Friday afternoon and hurriedly placed a series of calls to WHA officials as well as their counsel to request that WHA call off the planned eviction. Under the Delaware Landlord/Tenant Code, any eviction requires more notice than that provided this tenant and beyond that, retaliatory eviction is illegal. Those facts, however, fell on deaf ears as WHA indicated that it would proceed with the planned Saturday morning eviction. By this time, all of the Courts were closed except the Justice of the Peace Courts. And so on a Friday night we found ourselves in JP Court #12 seeking a temporary restraining order against WHA's eviction of this tenant and the others who had received notices to vacate. At 1 a.m. on Saturday morning, Judge Niedzielski granted that relief.

Sure enough, a WHA maintenance crew showed up with a big truck to move the tenant's belongings out of her house at 6 a.m. on Saturday. With some trepidation, she showed them the court order. They phoned the WHA Executive Director, who shortly arrived on the scene. To the amazement of my client, WHA backed down and drove its big truck away—empty. For the WHA tenants assembled in Southbridge that morning, this experience provided reassurance that the phrase "equal justice under the law" is not just an inscription on the United States Supreme Court building.

After that weekend, the tenants filed a motion for a preliminary injunction in Federal Court. Judge Stapleton enjoined WHA from moving its tenants on short notice. He wrote that such moves "could reasonably be interpreted to be in retaliation for complaints about lead-based paint hazards and it is likely to be so interpreted by WHA tenants."

Shortly after this episode, perhaps chastened by its own inspection (which corroborated our results) WHA expressed a willingness to negotiate a settlement. Extensive sessions followed in all of which Mrs. Jackson participated actively. At length the parties agreed to the terms of a draft consent order, which was forwarded to Judge Stapelton. On March 9, 1984, following notice to all 1,636 members of the plaintiff class, Judge Stapleton approved the order. It required WHA to conduct a systematic lead paint inspection of all of its family units by September, 1984. It then required WHA to remove all lead paint, without regard to the height of painted surfaces, from intact as well as chipping surfaces in those of its 1,636 family units found to contain lead paint. These standards are stricter than those contained in HUD's current or proposed regulations. The consent order further requires WHA to complete the lead paint abatement of its family units by January 1, 1987.

The advantages of the consent order are many. First, the stringent requirements provide greater protection than that afforded by HUD regulations. Second, because the attorneys on both sides of the litigation were subsidized by federal money, avoiding a second hearing saved tax dollars. Finally (and this is purely selfish), it spared me the embarrassment of proceeding to trial with a witness list composed of my family, my coworkers, and homeless men. The prospect of an episode of the "Waltons Go To Federal Court" was not at all appealing.

The lead paint inspections conducted by WHA pursuant to the consent order found that 1,476 of it 1,636 family units, or 90%, contained lead paint. The incidence of lead paint in WHA's project units (Riverside, Eastlake, and Southbridge) was 99%, far greater than that found in its scattered-site units (dispersed throughout the City of Wilmington), which was 68%. Overall, 1,152 of WHA's 1,161 project units and 324 of its 475 scattered-site units required lead paint removal.

In 1984, the year when the consent order took effect and these WHA inspections were conducted, HUD approved $1 million for WHA use in lead paint abatement. The following year HUD allocated an additional $4.1 million to WHA for completion of the lead paint removal and for repainting of the family units. Because HUD had finally allocated adequate money for compliance with the consent order, plaintiffs moved to dismiss as moot our pending claims against HUD. This Motion was granted in June, 1985. At last, all claims raised by Mrs. Jackson's lawsuit in 1980 had been resolved.

The Court has retained jurisdiction to monitor compliance with the order, requiring WHA to submit monthly reports to the Court and to the plaintiffs on the status of lead paint abatement. WHA compliance has been timely and made in good faith. As hostile and recalcitrant as WHA was during the course of the litigation, it has been just as cooperative and diligent during the compliance phase of this case. This transformation should be credited to the current WHA Executive Director, Mary Ann Russ, who was hired shortly after the consent order took effect. She takes the lead paint health hazard seriously and has quickly moved to remove it from WHA's family units. In fact, under her leadership, WHA will complete compliance ahead of schedule. The deadline for the complete removal of lead paint from all WHA family units was January 1, 1987. WHA finished the job before this issue went to press.

Six years after the filing of her lawsuit, Ima Jean Jackson's goal of lead paint-free WHA housing has been realized. Slow as that pace is, WHA, according to its Executive Director, is the first public housing authority in the country to complete a removal program. Had Mrs. Jackson not had the courage to bring a lawsuit and the perserverance to stick with it, even after she and her family moved out of public housing, this would not have happened.

Jacksons vs. HUD and WHA was the first case to litigate the application of the LPPPA in the context of public housing. (There was an earlier case in Philadelphia dealing with enforcement of the LPPPA but it concerned the sale of HUD-owned properties.) *Jackson* was followed shortly by a Washington, D.C. case, *Ashton vs. HUD and the D.C. Housing Authority* that went well beyond the scope of our lawsuit. While *Jackson* sought the enforcement of the HUD regulations, *Ashton* challenged the *adequacy* of the regulations, alleging that they were deficient because they failed to include "tight or intact" lead painted surfaces along with "chipping, peeling and flaking" painted surfaces in the definition of an illegal health hazard requiring abatement. Both the D.C. District Court and the D.C. Court of Appeals agreed and directed HUD to revise its regulations accordingly.

When HUD responded to the *Ashton* judicial mandate by issuing an "advance notice of proposed rule making" on May 4, 1984, it did propose the inclusion of "tight" paint in the definition of illegal lead paint hazards requiring abatement. At the same time, however, HUD completely undercut that expanded protection for childrens' health by proposing its so-called "health" approach to replace the regulation's current "housing" approach. The "housing" approach involves inspection of all public housing for lead based paint and the removal of such paint where found, regardless of age and blood lead level of the inhabitants. The "health" approach would require the removal of lead paint from a public housing unit only when a child resident's blood screening revealed an elevated lead level. A public housing authority would not be required to remove a known hazard until a child's health had been harmed.

The term "health" approach moves beyond euphemism to cruel charade. An "illness" or "brain damage" approach would be more accurate terms for HUD's proposal. Instead of relying on machines to inspect for lead paint hazards, this federal government agency actually considered using children (specifically, their blood lead levels) as the litmus test for identifying unacceptable lead paint hazards requiring abatement. Upon learning of HUD's lead paint proposal, Dr. Cyrus Sroog, a board member of the Delaware Association for Retarded Citizens, responded with an apt analogy, "We used to use canaries in the mines to test for toxic gas. Have we reached the point when we will use children to test for toxic metal?"

The "health" approach reflects a callous disregard for the value of human life. One sadly wonders if such a change would ever have been considered if these were not children of public housing tenants, who are by definition low income and who are also often members of minorities and not registered voters. I am reminded of an observation made by my client, Mrs. Jackson, after one of her trips with Stephen to the Johns Hopkins University Clinic for the treatment of lead poisoning. She said that she did not want to offend me but that she had noticed when she looked around the waiting room that every lead poisoning patient there was Black. Mrs. Jackson sadly questioned whether that had anything to do with the failure of government at all levels to take this public health problem more seriously.

The "health" approach doesn't even make good economic sense. While it would indeed cost less money in the short term to require the removal of less lead paint, it would carry high long term governmental costs in the form of special education and disability benefits as well as judgments in personal injury lawsuits.[3]

The fundamental objection to HUD's proposed change is that elevated lead levels, even short of lead poisoning, can be extremely dangerous to children, resulting in serious consequences, ranging from learning disabilities to impaired motor control. More sophisticated medical research is discovering an increased range of damage to the central nervous system as a result of low level lead ingestion. It has been demonstrated that lead begins to be absorbed by the brain at very low lead blood levels and is retained in the brain as the lead blood level falls, similar to lead metabolism of other soft tissues. Consequently, in light of the physical and mental damage that can occur in children as the result of even low level lead absorption, use of that standard as the testing mechanism to trigger lead paint abatement would represent a perversion of the LPPPA. The Lead Paint Poisoning Prevention Act (emphasis added) clearly intends lead paint abatement to be preventive, not remedial.

For these reasons and because HUD's

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Mary McDonough, Executive Director of Community Legal Aid Society, Inc., was admitted to the Delaware Bar in 1978. She joined "CLASI" after working for Superior Court President Judge Albert J. Stiftel. Today less than ten years out of law school she heads a major provider of poverty law services, functioning efficiently in all three counties of the state. Not surprisingly, Mary received The New Lawyers Distinguished Service Award from the Delaware State Bar Association at the annual Bench and Bar Conference in 1983.

Notice in the Federal Register misrepresented the status of the *Jackson* case (referring only to the 1983 unsuccessful Decision and failing to add that this Decision was later withdrawn and a consent order approved), I submitted comments to HUD to clarify the record and oppose adoption of the "health" approach. I also sent copies of these comments to the members of the Delaware Congressional delegation. Representative Carper and Senator Biden responded, expressing strong concern about the consequences of HUD's proposal. Together, they launched a national initiative to block the so-called "health" approach and worked vigorously on legislative amendments to HUD's Authorization Bill to accomplish that end. Their collaborative efforts produced a final measure, which survived the House and Senate conference process and effectively blocked the "health" approach, retaining the current "housing" approach with an expanded scope of protection. The final amendment, however, failed to carry the Carper/Biden proposal of a required minimum HUD allocation level for lead paint abatement. Senator Biden and Representative Carper intend to continue monitoring HUD's policies and procedures regarding lead paint abatement and the federal funding allocated for it.

The past six years of advocating the prevention of childhood lead paint poisoning yields a kaleidoscope of widely varying perceptions. Some evoke cynicism and disillusionment, while others spark a heightened respect for our judicial and legislative processes and their ability to respond to the needs of the less powerful. In the context of one narrow issue, that of the health hazard of lead paint in public housing, one WHA tenant was able to make a difference by virtue of courage and perseverance. On the down side, the cliche that the lack of money has a decided effect on the progress of litigation was clearly demonstrated in this case. My lay-off as a staff attorney and the lack of a Legal Aid litigation fund certainly resulted in delay in successfully resolving this litigation. These factors were, however, undoubtedly compounded by my lack of previous federal court litigation experience, which stymied the quick and effective dispatch of my responsibilities in prosecuting this case.

Another negative aspect has been the cynical response to the problem of childhood lead poisoning by some government agencies such as HUD as well as by some public officials. For example, in speaking several years ago with a municipal elected official about a funding mechanism for lead paint abatement in private rental units, he told me to come back and talk to him when the parents of these kids (who are exposed to lead paint) are registered voters.

On the up side there were the generosity and concern shown by the Delaware Chapter of the ACLU and especially Executive Director Joan Rosenthal. These traits were also demonstrated in full measure by my colleagues at Legal Aid, who, along with family members and homeless men, formed a crackerjack inspection team of volunteers.

Judge Stapleton's treatment of this case and its litigants was another bright spot. Though many lawyers advised that it would be futile to file a motion for reargument because such motions are rarely granted, Judge Stapleton demonstrated an open mind and withdrew his previous Decision. Throughout the course of the lawsuit he never failed to treat the litigants with courtesy and respect, patience and good humor.

Finally, the genuine concern and enthusiastic advocacy on the part of Representative Carper and Senator Biden has been in sharp contrast to the cavalier approach taken by HUD and the previously described local government official. They and their staffs have invested much time and energy in legislative efforts to insure greater protection for the health of children living in public housing. They are working on behalf of a constituency that is neither powerful nor wealthy. It is the merit of the cause that carries clout with them. This serves to reaffirm one's faith in the ability of the political process to protect the interests of our less powerful citizens.

The final bright, even luminous image emerging from this kaleidoscope of widely varying impressions is that Ima Jean Jackson's goal has been reached. Her dream that no more children living in WHA family units would be exposed to lead paint in their homes, a health hazard from which her son, Stephen, suffers permanent damage, has become a reality. When Mrs. Jackson sees children playing with their toys on the front porches of public housing units, she can be reassured that such an innocuous scene will not result in their hospitalization for lead poisoning. Thanks to Mrs. Jackson, those children may have a better chance to fulfill their dreams when they grow up. ■

[1] Plaintiffs contended that L&I had seriously breached its duty prescribed by the Wilmington Charter and Housing Code to enforce the lead paint provisions of that Code. When our suit was filed in 1980, L&I did not even have a machine to test for lead paint even though the lead paint ban had been part of the Wilmington Housing Code since 1968. We later, however, stipulated to the dismissal of our claims against L&I because of its defense of prosecutorial immunity. L&I has since acquired and continues to use two lead paint inspection machines.

[2] WHA was established pursuant to 31 *Del. C.* §4301 as a state agency. It also receives federal funding from HUD and is thus subject to federal laws and regulations governing HUD-subsidized housing.

[3] The Jacksons filed a personal injury lawsuit against WHA, which was recently settled. WHA agreed to pay $150,000 for Stephen's medical and special educational expenses related to lead poisoning. The Jacksons were represented by the firm of Jacobs and Crumplar.

IMPORTANT ANNOUNCEMENT

Working in close cooperation with CNA and its National Managing General Agent, Poe & Associates, PLI has arranged for CNA to become a filed carrier for Lawyers Professional Liability Insurance in the State of Delaware. Special thanks should go to David Levinson, Insurance Commissioner, and the Delaware Insurance Department for their expeditious ratification of CNA's presence.

The Delaware Bar Association should also be commended for its support and guidance in facilitating CNA's entry into the Delaware marketplace which requires the presence of a Lawyers Professional Indemnity underwriter of the quality and experience of CNA and Poe.

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