ARIZONA ADVOCATE

University of Arizona College of Law Volume Twenty Number Two Fall 1986

Dean Pushing For Bar Exam Changes

Is the Arizona bar exam failure rate too high? Should the exam be less detailed and shorter? Should more educators be involved in the exam process?

Dean Paul Marcus thinks so, and thanks in part to his efforts and those of ASU Dean Paul Bender, the Arizona State Bar is expected to name a commission this month which Marcus hopes will lead to some major revisions in the bar exam in those areas mentioned above.

In an interview with the "Arizona Advocate," Marcus explained that on his and Bender's recommendations, the Arizona Supreme Court recently agreed unanimously that it is time to take an in-depth look at the bar examination process, something that apparently has not been done for at least 15 to 20 years.

"The Arizona bar exam is an unusual bar exam," Marcus said. "It's changed a lot in the last 20 to 30 years. Many subjects have been added, and it is now one of the longest in the United States, if not the longest." But, he added, while the number of exam takers has increased substantially, the pass rate has dropped "rather dramatically over the past 15- to 20-year period," from pass rates in the mid-80s to the current 60 to 65 percent annual average.

Typically, Marcus said, students from both state law schools perform "two to three points to ten points above the state average, but of course that means a significant number of people from both state schools are not passing the bar the first time around. And one thing we want to know from the commission, if we're doing something wrong, in not stressing the right courses or whatever, then I think we ought to know about it, and make changes. I doubt that that's going to be the commission report because the pass rate for our students who take it out of state is well over 90 percent and very, very few don't pass after they take it a second time in Arizona, which leads me to believe that there's no defect there."

Marcus, who came to Arizona from Illinois four years ago, said that that state had a variety of law schools, "some of which were in the same league as ASU and UA, some of which were not." But the bar exam in Illinois was "short and essentially designed to test minimal competence." So he was surprised upon his arrival here four years ago to find that Arizona, "a place with two very good law schools, with lots of lawyers coming in from very good law schools to the big firms here," offered such a long bar exam with such a low pass rate.

So Marcus and his faculty, together

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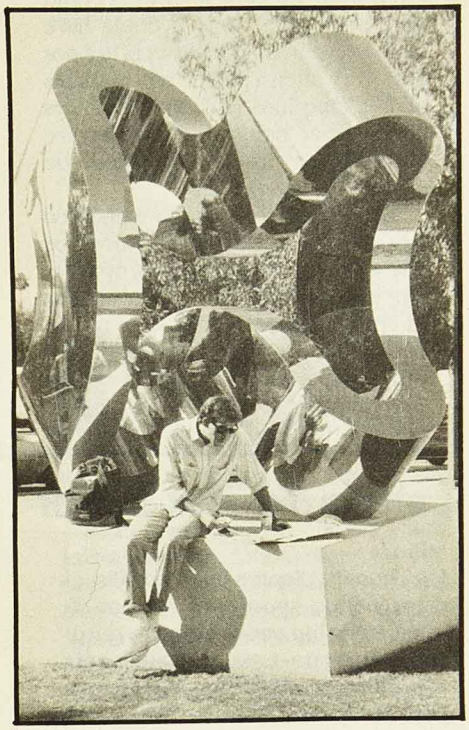

CLS—Martyrs Or Misfits?

In an 18-to-4 vote the Christian Legal Society, comprising 16 University of Arizona law students, lost its most recent bid for recognition by the Student Bar Association.

The CLS sought status equal to that of such student organizations as the Law Women's Association, Phi Delta Phi scholastic fraternity and the Minority Law Students' Association. Privileges attendant upon recognition include assigned office space adjacent to the student lounge, funding for activities and overhead, and a voting seat in the SBA's House of Representatives.

Constitutional Questions

The SBA vote turned on interpretations of the First Amendment and of sections 80-002(A) and 80-002(B)(5) of the SBA constitution.

Citing *Widmar v. Vincent*, 454 U.S. 263 (1981), Lynn Goar (2nd year) of the CLS argues that a state university providing an open forum for student groups may not constitutionally deny access to religious groups. In *Widmar*, the defendant university had withheld the use of classrooms, hallways, and bulletin boards from the plaintiff while permitting such use to other student groups. Goar identifies the offices contiguous to the student lounge as such a forum.

SBA member Mary Ryan (3rd year) distinguishes the present case in that the local CLS already has the access sought in *Widmar*. She states that refusal of SBA recognition and office space is not comparable to university denial of access in at least two ways: (1) the SBA itself (separate from the university) does not provide an open forum; and (2) the privileges conferred by SBA recognition exceed

Editorial Page

In Memorium

It has been over a month since the death of Bill Newton. During that time many of us have probably forgotten about his passing away, or given the incident little thought. Others — those who knew him, those able to understand the causes that lead a person to commit suicide — have given some thought as to what could have been done, how it could have been prevented. The answers are not easy. Very often a person will mask his or her emotions and not let others know what pains or troubles are gnawing away inside, how close one is to giving up on it all.

Some of us have probably wondered whether the problems produced by law school are worth putting up with, whether we might be happier in a less intensive career. For most of us the choice has not been difficult; but for others the answers are not as simple. The pressure to succeed in a highly competitive field can override such important factors as health, happiness and relationships. Helping each other to maintain a proper perspective can be beneficial for all. For those with spouses or families, such support can come from home; but for those on their own such reassurance must come from friends.

It is sad that Bill Newton took his life, and our sympathies go out to his wife, family and friends. Yet, perhaps we can learn from his death, become more sensitive to the needs of others and how they are coping with the pressures of law school and work. As finals approach it is important for us to take the time to listen to others. Often all that is needed is some response — a touch, a smile — some gesture to say "I know how you feel."

Acts such as Bill's are few and far between. But that they do happen is enough for us to try and prevent them from occurring again. We owe it to ourselves and our friends.

Letters To The Editor

Editor,

On Thursday, September 3, the Placement Office sponsored an out-of-town clerkship panel, wherein third-year students talked about their experiences with summer law clerk jobs outside of Tucson. The panel discussed the process of finding such jobs, the nature of the work, the benefits and detriments of the various locations, and generally, the world of summer associates outside of Tucson.

The panel was very poorly attended. I believe one plausible hypothesis for the poor attendance is not lack of student interest, but instead, lack of effective communication of news and information within the College of Law. Are other people as frustrated as I am at trying to sort through important and unimportant, old and new notices posted here and there or somewhere? All too often meetings or deadlines are missed because of random information overload, conflicting scheduling, or lack of planning ahead, or failure to see the notice in the appropriate restroom. This newspaper is one solution. A controlled bulletin board or television monitor (a technique used successfully in other law schools) in the upstairs lobby featuring daily events is another. Something more than near random papers posted on doors or walls, or nearly illegible messages written on classroom boards is needed. A weekly newspaper of major events to supplement a semester-long calendar of firmly-scheduled events is another option.

If the poor attendance at the clerkship panel resulted from lack of interest, or inertia, then students are short-changing themselves by not taking advantage of help and guidance in difficult career decisions. If, instead, it resulted from a simple lack of effective communication, then multiple solutions are possible. Any other suggestions?

Sincerely,
Maureen O'Connor

Editor,

Kudos to Tom Mauet, Kenney Hegland, Fred Dardis, and anyone else involved in securing a third advanced trial practive class. Without getting into the theory vs. practice controversy, I appreciate the expenditure of time and effort in response to a demonstration of student requests.

But there is a nagging issue that should be put to rest. Those of us that were not initially selected, whether by choice or by lot, still believe that the criteria used in the entire process should be common knowledge. This will allow future students interested in advanced trial practice the luxury of adjusting their preregistration tactics accordingly.

Finally, the schedule of the new section leaves me with mixed emotions. While I'm delighted to see a thrid class added, the meeting time of Saturday morning, from 8:30 a.m. to 12 noon, is a tad discouraging. Moving from orphan to step-child leaves me unimpressed.

Dennis J. Clancy

Governor-Elect Mecham,

You're wrong! Martin Luther King, Jr. is a great man! He spoke of justice. He spoke of law with compassion. Dr. King is a role model to many blacks who struggled for those rights and liberties granted by the U.S. Constitution which previously had only protected the privileged. We resent your callous and insensitive attack on his memory.

We, the law students at the University of Arizona respectfully request that you honor Martin Luther King.

Roger Hurwitz
President, Student Bar Association
George Barnett
President, Minority Law Students Association
Alison Paige
President, Christian Legal Society
Kathy Frye
Student Chapter, National Lawyers Guild
Sylvia Goodwin
Chairperson, Law Women's Association

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Minority recruitment a problem at UA Law School

Robert Langford

The University of Arizona College of Law has a recruiting problem: minorities.

Approximately 165 students are enrolled in this year's entering class. Of that, only 15 have minority status. It is a problem that has not gone unnoticed by the faculty, staff or students. Not surprisingly, the Minority Law Students Association (M.L.S.A.) is concerned and hoping that something will be done this year to see that next year's class is more representative of the population base that the college draws on. Minorities comprise about 38 percent of the Arizona population.

George Barnett, M.L.S.A. president, would like to see several changes in the recruiting process to better aid enrolling minority students. Most importantly, he would like to see a permanent seat, with voting privileges, reserved for a minority law student on the admissions committee.

"We need a vote," Barnett said. "Two years ago the M.L.S.A. had a voting member on the committee. But then one faculty member and one minority student member were taken off the committee. If you aren't represented when the vote is taken — you lose."

Dean Paul Marcus is opposed to the idea of having a designated spot strictly for a minority student on the admissions committee, although the Dean said he might favor expanding the committee in order to gain more diverse representation.

"I think an admissions committee ought to be admitting the whole student body and not focusing on one group or another," Marcus said. "I think we ought to make special efforts, and we do, and intense efforts, for minority students among others. But I think it would be a mistake to have separate groups."

Prof. Rob Williams sees the minority student representative as not necessarily having a great impact on the count of the vote, but having a tremendous impact on input given the committee from a minority viewpoint. Williams will be an ex officio member of the admissions committee this year and plans to be deeply involved with the minority recruitment process. To this end, he has already suggested several strategies to be implemented by the M.L.S.A.

First, the M.L.S.A. has formed a committee which will review all applications earmarked with minority status. The committee's purpose will be to review each candidate on the basis of academics as well as what that candidate will bring to the law school in terms of community background. Then the committee will suggest acceptance or denial of the applicant.

Second, the M.L.S.A. will be involved with personally contacting minority students who have received letters of acceptance into the law school, to encourage them to attend the UA. Williams believes this to be one of the most effective recruiting tools the college has. Of the 45 minority candidates the law school accepted last spring, only 15 enrolled this year. "That's a very poor yield," Williams said. "Part of that is because other schools are going after the same candidates we're going after. But, we haven't made as aggressive an effort as we could have to contact all those 45 to advertise the advantages of going to the UA.

"Terry (Holpert) and Amy (Shiner), the assistant deans, have been very good at letting all those 45 know what we have to offer. But, they're assistant deans, and a lot of minority students view them as 'hired guns — that's what they're supposed to be telling us.' The assistant dean's office, no matter how hard it works, probably couldn't do a better job. Empirical studies show that the most effective tool for recruiting minority law students is other minority law students. They can give a level scoop on what it's like to be a Black law student at the UA or an Hispanic student."

The M.L.S.A.'s second goal is to see a new administrative position created — that of an assistant dean for minority affairs. All of those interviewed for this article favored such a position, noting that the efforts that such a dean would make would help every person at this school. They noted that the effort that this person would make, whether in recruiting or financial aid, or structuring tutorial programs, would free up other assistant deans to pursue various aspects of their own jobs.

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Constitutional Celebration Gets Underway

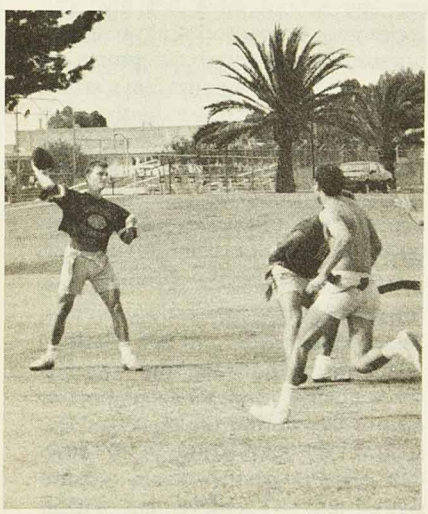
Neal Eckel

The UA Law School kicked off its Constitutional Celebration activities on Nov. 19 with an appearance by the nationally renowned criminal law expert, Prof. Wayne LaFave, of the University of Illinois. LaFave's visit consisted of two speeches, open to the public, and meetings with the faculty and students of the law school.

LaFave, who has written the seminal work *Search and Seizure* as well as numerous casebooks on criminal law and procedure, devoted his Nov. 20 speech to a discussion of the Fourth Amendment, paying particular attention to the reasonableness of police search techniques. Commenting on recent court cases, LaFave expressed concern over decisions granting the police greater powers of surveilance. Such concessions to expanded police power can, according to LaFave, create serious inroads into an individual's constitutional right of privacy; without proper limitations on police authority, an individual's expectation of privacy will be greatly reduced.

In an interview with the *Advocate*, LaFave expressed alarm over Attorney General Ed Meese's statements that Meese does not feel bound to follow Supreme Court decisions in his interpretation of the law. LaFave stated that Meese's position is akin to that of a member of the Flat Earth Society speaking before a group of geologists. Hopefully, LaFave said, Meese will have little influence on the law.

Malpractice Bowl



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open access and intrude into the area of support. Constitutional separation of church and state, Ryan continues, would be violated if university funds provided an office and financial support for an organization the nature and goals of which are avowedly religious.

The First Amendment question was addressed in 1978 by Professor Charles Ares as a "special master" at the request by then-dean Roger Henderson. The document prepared by Ares was adopted by the faculty and remains the statement of departmental policy on the matter; further study is not contemplated.

Ares determined that the SBA is "acting under color of state law" when it allocates funds or assigns office space in a state building. He applied the three-pronged *Lemon* standard of constitutionality of financial support by a state to religious organizations. Support is allowed if the group (1) has secular purposes(s); (2) neither advances nor inhibits religion; and (3) does not foster excessive government entanglement with religion. The CLS did not pass the *Lemon* test.

Regarding availability of office space under *Widmar*, Ares remarked that "equal access cannot be assured because of the duration of the exclusive assignments" of space. Thus allocation of office space to an organization is necessarily "promoting that organization over other(s)," including alternate religious organizations, and constitutes a detriment to such competing organizations. Such an act could not avoid "excessive entanglement with religion."

In a subsequent letter (September 14, 1984), Dean Marcus added that the law school must not give the appearance of sponsoring any religious organization through assigning an office with the organization's name on the door or by disseminating that organization's recruiting literature in Law School packets to new applicants. However, maintenance of a table at orientation exercises may come under the *Widmar* definition of equal access, and has been permitted.

What's It All About?

The Conflict

According to Goar, the CLS has three goals: (1) member support of each other during the rigors of law school; (2) "networking" with Christian lawyers in the world outside school; and (3) achievement of local and nationwide political goals shared with the other 96 student chapters and the professional CLS chapters in the United States. Its intent is to relate the members' religious faith to legal education and law practice issues, in order to meet the legal and ethical problems facing Christians practicing law today. Secondary purposes are educational (e.g., the CLS co-sponsored a lecture by a Sanctuary workers last year), and social (secular activities such as hayrides, open to all law students, have been sponsored). Goar holds that official recognition plus possible financial support of secular activities, would help the group maintain the necessary cohesion to attain its goals.

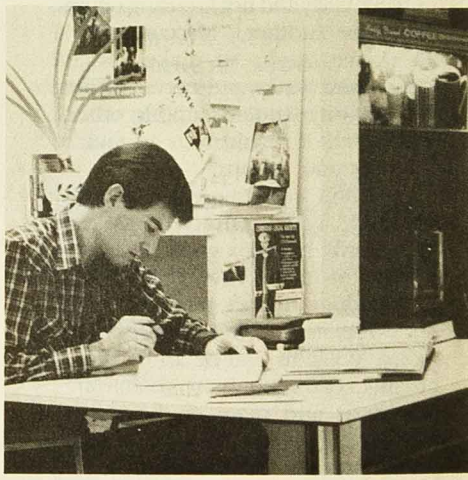
Paul Gattone (2nd year) of the National Lawyers' Guild finds no fault with the goals—all of which, he claims, can be pursued effectively without SBA recognition. As a Christian who is not affiliated with the CLS, he feels there is no access problem, that "the CLS has all the access it is constitutionally allowed to have." Instead, he claims, the CLS is seeking privileges that go beyond freedom of expression and access. Gattone cites Oliver Thomas of the CLS's National Advisory Board, with whom he recently met, as agreeing with Ares that the privileges sought would represent direct state sponsorship of one religious group—the very establishment of religion the Constitution guarantees against.

Beneath and Beyond

Alison Paige (3rd year), CLS president, argues that beneath the technical arguments the SBA's "hidden agenda" is to prohibit the CLS from (First Amendment) free exercise of religion and ultimately to remove its presence from the Law School. She sees the SBA decision as part of a "nationwide effort to vanquish Christians and other religious people from the general largess of society." Quoting President James Madison's statement that those who wish to enjoy religious freedom ". . . cannot deny the same right to others," Paige claimed that the CLS and its sister organizations throughout the country are fighting for ideological freedom for all people, with even secular groups such as the National Lawyers' Guild as incidental beneficiaries of the CLS's freedom fight. Success, she contends, depends on being able to organize, to have continuity, and to make services available to members and others.

Gattone, however, denies any common purpose of the CLS and other religious or secular organizations. Where CLS members see inconsistency between the SBA's denial of "viewpoint discrimination" and its withholding of recognition to religious groups, Gattone responds that "(i)f true religious freedom is to exist in this country, we have to maintain firm separation of church and state. If we bring government institution of religion into schools, some denominations will certainly be short-changed, which amounts to state sponsorship of the religions represented." He adds that the CLS's style and its demands are not an asset but a detriment to other religious groups in that its visibility has aroused an overall negativism toward Christianity, which can become a burden to non-affiliated Christians like himself.

The root, Paige claims, of nonrecognition of the CLS is humanism—not neutrality, but an alternate morality being pushed onto all of society at the expense of diversity—engulfing and threatening the existence of all "unpopular" ideological groups. "Viewpoint discrimination," she concludes, exists after all, but only toward religious organizations. Ryan replies that changes in the SBA constitution making it more difficult for religious groups to gain recognition simply serve the purpose of aligning that document more closely with federal Constitutional guarantees of separation of church and state, with no concurrent motivation to exclude any particular group from recognition. "We are not a fascist group," adds Gattone, "regardless of what the CLS thinks."



Ethan Fuchs—First Year Student at CLS "Office"

Is the War Over?

Now that the battle is lost, is the war conceded? No, according to Paige: "We cannot hope to change people's attitudes at once; we can only demand the rights the law allows." Goar refers to two basic rights, to participate in the political process and to exercise free speech and religious rights, and pleads that the CLS shouldn't have to choose which are going to exercise; it should have both freely. "The law is my ministry," Paige adds, "and I don't want people to think the law demands that choice." Gattone's response to these pleas is that CLS members as individual law students or members of other groups have every right any other law student has; it is only their organized religious purpose that is not supported, and that support cannot be allowed.

The CLS has begun its appeal. Review has been requested of the SBA Board of Governors, for which the Board must develop for the first time a hearing procedure for appeals. That hearing will be followed by appeal to Dean Marcus, then through the hierarchy of the University to President Koffler.

In the meantime, the CLS has commandeered office space just inside the west door of the student lounge by expeditiously adapting a table as desk, installing a bookcase, and employing the bulletin board on that wall for its announcements and informational materials. "Religious persecution is as old as the hills," claims Paige, "and the most effective response has always been a gentle, relentless pressure."

Phi Alpha Delta wishes to congratulate the following men and women upon their induction into the Knox Chapter at the University of Arizona College of Law.

Eric Baker	Tom Hickey
Kelly Barr	Martin Janello
John Barrow	Pami Kowal
Steve Biddle	Russ Kuchynka
Cheryl Bowman	Robert Langford
Judy Boyle	Laurie Mandel
Paul Britner	Craig Martin
Barbara Buckley	Laurie Martin
Lisa Burger	Diane McCoy
Lauren Cabot	Patricia Mehroff
David Cantor	Alan Merritt
Susan Ciupak	Anna Montoya
Duane Dahnke	Bill Ring
Mary Davidson	Mary Rogers
Teresa Diehl	Kristina Rolle
Todd Dorman	Cole Sorenson
Vicki Driscoll	Vern Spohn
Gary Fletcher	Larry Tinsley
Christine Funkes	Tom Van Flien
Sanford Germaine	Dawn Vens
Leslie Goldberg	Karilee Webb
John Gravina	William Wheeler
Dave Grove	Jerald Wilson

LAW SCHOOL OFFERING STRESS MANAGEMENT

Ray Panzarella

In light of the recent suicide of third-year student Bill Newton, the administration, faculty and students are reexamining their roles here and taking a fresh look at the pressures of law school and ways to reduce it.

Assistant Dean Amy Shiner recently announced that Tucson Psychologist Fred Schindler, who has been offering stress sessions for several weeks now, will continue to meet with students every Monday at noon in room 139 to discuss everything from time management to relaxation techniques and relationships. Shiner said the law school invited Schindler here this year as it has invited others in the mental health field to speak with students in the past. But, perhaps because of poor timing, poor dissemination of information, or a lack of time or willingness to participate on the students' part, the sessions were very poorly attended, Shiner said.

"One problem for us as people is to recognize when a problem exits — to admit it to ourselves and say, 'Hey, I need some help.' I think a lot of denial might be going on, especially among professional students because they have so many outside commitments, such as marriage, etc."

But attendance has been good for Schindler's sessions, Shiner said, with between 30 to 60 students participating in each session, where they are divided up into smaller groups to discuss the issues amongst themselves.

Shiner, a UA law graduate, got some hands-on experience counseling students informally while working as legal advisor for ASUA on main campus for seven years. Here at the law school, Shiner and Assistant Dean Terry Holpert act as counselors as well. "Terry and I feel responsible to try to do something," Shiner said.

"Now more than ever we feel that something as unfortunate as (Newton's suicide) raises the consciousness of all involved," Shiner said. In response, she said she is discussing a proposal with the Advisory Committee intended to strengthen the law school's support system — "To let students know we're here, working together and that we care."

For those interested in other alternatives, Shiner has been passing out pamphlets with information on the Mental Health Services of the Student Health Service, room 235 in Old Main, which primarily offers crisis intervention and brief therapy for students whose personal problems range from anxiety and depression to family and personal relationship difficulties. Most treatments last from five to 10 sessions and appointments are necessary, and up to four visits per year are "free" — prepaid in your student fees — after which there is a nominal charge per visit.

The Section also offers biofeedback to students with physical disorders which are stress-related and preventive workshops in weight reduction, assertiveness training, depression management and other areas. Workshop charges are variable, but kept to a minimum.

For those in need of more immediate help, who feel they can't wait the two to three weeks for an appointment, the emergency Walk-In Clinic is available at the Student Health Service on a first-come, first-serve basis. Contacts there are generally brief and reserved for urgent situations, after which follow-ups may be arranged.

The important thing, Holpert said, is to keep things in perspective. "Plan your schedule, eat breakfast, take time out for exercise or the movies and relaxtion, and realize we're all in this together."

If worse comes to worse, the student handbook outlines the procedure students can go through to seek a change in exam times, for example, where three or more exams have been set for the same day. And there is always the possibility of seeking a one-semester or one-year leave of absense based on "extraordinary need."

"We try to put the word out that we're available," Shiner said. "We try to counsel or talk with students about anything — personal, academic, health problems, guidance, or just to let the students vent or collapse in the chair. We don't hold ourselves out as counselors. When there's a problem we can't deal with, we will refer the students to trained professionals. But the administration in general at this school likes to think of itself as open."

DEAN PUSHING FOR BAR EXAM CHANGES

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with ASU Dean Bender and his faculty, began to look at the exam closely, and "We really were concerned about the length of it and the detail of it, how much specific knowledge you need to have as opposed to general areas of competency."

After getting the state supreme court's approval, the state bar asked Marcus for suggestions. He proposed a mixed composition for the commission, including members of the practicing bar and professional educators to give it "a nice blend of both the theoretical and the practical." Marcus has nominated UA professors August Eckhardt and Theodore Schneyer for membership on the commission.

Marcus suggested the bar look into issues such as the subjects covered on the exam, the length, the pass rate, the input of professional educators, the impact on any particular groups—for example, older students, minority students, and students entering different types of practice.

Marcus has a few suggestions himself on how it should be done.

For starters, Marcus would make the exams much shorter. "I think a bar exam ought to determine basic competence. Once you get into very specific subjects—corporate tax, securities regulations—you're going way beyond basic competence and talking about specialty areas, and I just don't think that's appropriate for the exam. I also think when you have so many questions and so long a test, it ends up being a physical endurance contest, and while that may be appropriate for the person who wants to be a trial lawyer, and has to be in trial five days at a time, that's not true of most lawyers.

Finally, Marcus stresses having professional legal and non-legal educators involved in the review of the bar process. "I don't think they'd (non-legal educators) have any great insights into the subject area, which might be useful to have the practitioners stress that; it's more the technique of how you grade, and after all, that's what we do for a living, and that's not what a practicing lawyer does."

"I would also make the essay questions far less detailed. While there is nothing wrong with the accuracy of the questions, the problem is they're far too detailed. It may be appropriate for a specialty in that particular course, but when we're testing basic lawyer competency, I don't think you want memorization of great detail."

As for the time frame, Marcus suggested, "Let's not rush into it, but let's look at it with dispatch. My guess is that by the end of the calendar year, there will be a commission in order that will be looking at least at some of those things, and I suspect most of them, as well as some other things." Conceivably, an impact could be had on the Class of 1988.

The bar has also broadened the scope of the commission so it will be charged with looking at the character and fitness process as well as the regular exam process, "setting the standards and how you evaluate those standards."

"So I think it really could make some major changes, and I think it could really be a wonderful thing, because so very few states have really looked at the whole thing, and there is plenty of data out there."

Marcus said Arizona's pass rate last year of 61 percent was "low, compared to other states." There are several states that have similar bar exam pass rates, but they typically have schools that are not major law schools, or, as in California's case, the state has numerous nonaccredited law schools. Thus, said Marcus, California's traditionally low pass rate "is a little deceiving because if you take graduates of nonaccredited law schools out of the pool, the pass rate goes up quite dramatically."

"Maybe (Arizona's pass rate) should be that low, but before I would conclude it's appropriate, I'd sure want to take a close look and see what it is we're measuring, what the impact is." Marcus noted that of those UA students who take the bar exam a second time, the pass rate jumps to "well over 90 percent. So my conclusion is, I don't think they're learning a whole lot of law in that six-month period but maybe it's examsmanship techniques, and if that's really what's happening, then I think we really ought to take a close look at it, because if all (the bar exam) is doing for a substantial number of people is deferring their license rather than screening them, I'm not sure that's what the purpose of the bar exam is."

Some argue that the low pass rate is simply a tool that Arizona and other Sunbelt states use to limit their lawyer population, but Marcus disagrees. "I don't think so. The market for lawyers is quite good here in terms of placement and the like, and I would hope that would not be the reason (for the low bar pass rate). I think that's a most unfortunate basis for a bar examination. I think we should be screening competence. If 40 percent of the people taking the bar exam are not competent, well, so be it. Then send them back to school and make them learn their stuff. But I don't think that should be a screening device for purposes of lessening competition among lawyers. I don't think the public is well served by that."

Marcus admits that competence is "extremely difficult to define, but I think that ought to be the question: 'What is a competent lawyer?' as opposed to: 'Do we have too many lawyers?' or 'Are there too many of them concentrating in Phoenix and Tucson?'—those kinds of questions.

"I think you can measure differently and measure competency better than most bar exams do," and if the pass rate goes from 60 to 70 percent, that's not going to result in a rush of lawyers into the state, he said. "I don't think people make their decisions on that basis, or at least not many do."

"The real questions are: 'What is it we're trying to do, what are we trying to measure here, and how do we best do it?'"

Whatever the commission recommends, the Arizona Supreme Court will most likely have the ultimate say in how, if, and when the recommendations are implemented, Marcus said.

Ray Panzarella

The Law Women's Association wishes to thank our members who made the Sixth Annual Wine and Cheese a success.

Special thanks to committee heads:

Julie Van Dyne
Carol Rosinski
Lynne Collins
Michele Schiffer
Claire Lefkowitz

and the members of their committees for their prominent efforts.

We also wish to express our appreciation to all those who supported the Wine and Cheese by their contributions or attendance.

Arizona Insurance Imbroglio

Christine Curtis

Recent decisions by the Arizona Supreme Court have created a furor of controversy in the area of punitive damages awarded against insurance companies for the tort of bad faith. The ramifications of the controversy are alternately described as broad reaching and catastrophic, or a "tempest in a teakettle." If the prophets of doom are correct in their analysis, the decisions may render insurance companies impervious to actions for anything short of outright criminality, in effect opening a floodgate of abuses and inequity. If the abstracted legal minds have perceived more keenly, the decisions will have little effect on the behavior of insurance companies, the true intent of punitive damages will be rescued from a mire of emotion, and individuals found in simple bad faith will be protected from unrealistic, ruinous punitive damage awards.

The Facts

Two pertinent cases reflecting the controversy are *Rawlings v. Apodaca* (filed July 22, 1986 #18333-PR) and *Linthicum v. Nationwide Life Insurance Co.* (filed July 22, 1986 #CV86-0061-PR). The facts and holdings of the cases are as follows:

RAWLINGS. In 1979 a fire caused damage at Rawlings's dairy farm. Farmers Insurance Company of Arizona covered Rawlings in a homeowner's policy, but the $10,000 coverage was inadequate to meet the losses. Rawlings hoped to recover further from his neighbors, the Apodacas, believed to have been negligent in starting the fire. Private investigators commissioned by Farmers assured Rawlings that he would receive a copy of their report and needn't commission his own investigation.

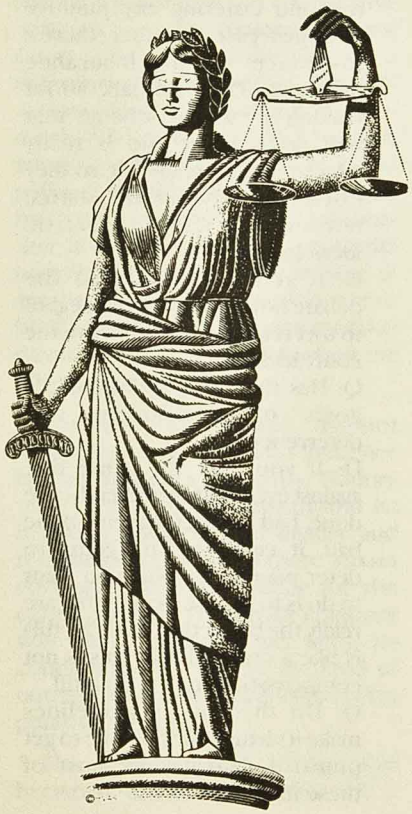
The investigators discovered two things: (1) The Apodacas had started the fire, and (2) the Apodacas carried $100,000 worth of liability insurance, with Farmers. Farmers quickly settled for the Rawlingses' $10,000 policy limit, but stalled handing over a copy of the report. When the Rawlingses' attorney contacted Farmers, the insurance company's representative refused to release the report and denied that it contained anything of interest to Rawlings.

Rawlings sued the Apodacas for negligence and Farmers for breach of good faith. The trial court found for Rawlings and ordered the Apodacas to pay $1,000 in compensatory damages and Farmers to pay $50,000 in punitive damages. The court of appeals affirmed the compensatory award but reversed the punitive damages, finding Farmers not liable for the tort of bad faith.

Upon review by the Arizona Supreme Court, the decision of the Court of Appeals was vacated and the trial court's judgment affirmed, except for the issue of punitive damages, on which the case was remanded for further examination by the trial court.

Justice Stanley Feldman scrutinized two basic issues in deciding the case: first, the sort of conduct which falls under "bad faith" for insurers, and second, the nature of conduct for which punitive damages may be imposed.

Rawlings is the first example of a situation in which the same insurer provides both first party coverage for the plaintiff and third party coverage for the tortfeasor's liability. As such, it is an "issue of first impression" for which there are no specifically governing cases.



Key among the points clarified in the lengthy decision are the following:

1. An insurer may be found to have acted in bad faith (even if it breached none of the express covenants of the contract) if it did not "deal fairly" or give the insured's interests "equal consideration."

2. If the contractual relationship is one designed to offer protection, security, or other benefits beyond mere profit, the courts may imply special duties. As a means of deterrence, the intentional breach of these quasi-fiduciary duties may be actionable in tort rather than in contract.

3. Although bad faith is an intentional tort, punitive damages are not necessarily awarded. Only special circumstances in which injury was intended or the known risk of harm was substantial will rise to the level necessary to find punitive damages.

LINTHICUM. Jerry Linthicum received treatment and consultation in 1979 from a series of five different physicians, all of whom confirmed diagnosis of a benign tumor of the parathyroid gland. The tumor was surgically removed and Jerry appeared to have returned to good health, although his progress was followed on a monthly basis. Seven months later, in 1980, his wife Sandra initiated medical coverage under a Nationwide group policy through her employer. Jerry was covered as a dependent. The policy terms precluded coverage for conditions pre-existing within 90 days of obtaining the insurance. Jerry was seen by his physician for routine follow-up and medication three times during the 90-day period.

Two months after coverage began, Jerry was hospitalized. A month later he was transferred to Los Angeles and operated on. Extensive metastasis of cancer was discovered from the remaining parathyroid gland into the neck and chest. The California doctors determined that the 1979 diagnosis was incorrect and that the tumor had been malignant. In processing the claims, Nationwide followed normal

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procedure for new policies and investigated for pre-existing conditions. The claims were denied, but Sandra had left the employ of the group policy holder and was never notified of the denial.

Three months later Jerry required further hospitalization, but was refused admittance. At this point the Linthicums learned of the denial and Jerry was forced to become a charity patient at a public facility. He subsequently became paralyzed, possibly as a result of the lack of timely private care. Sixteen months later, he died.

Five separate reviews by Nationwide personnel concluded that denial of coverage was justified on the basis of pre-existing conndition.

Sandra sued for breach of contract and bad faith. A jury awarded damages for breach and bad faith as well as $2,000,000 in punitive damages. The court of appeals affirmed breach and bad faith, but reversed the punitive award. The Arizona Supreme Court affirmed the Court of Appeals.

Justice James Cameron's opinion further examined and delineated the standard for finding punitive damages. He addressed the punishment role as well as public policy considerations and deterrence. *Rawlings* was reiterated and bolstered. The mental state of the wrongdoer became paramount, with consciously wrongful or harmful conduct, an "evil mind," as the standard. Ambiguous terminology in past decisions was discarded; it could have led to misapplication of a civil remedy properly reserved for only the most egregious of wrongs.

Aggravated, outrageous conduct and the intention to injure, or disregard for risk, was necessary to find the evil mind. The standard of proof was elevated from a preponderance of the evidence to clear and convincing evidence for punitive damages.

The court addressed the facts in *Linthicum* and found that while it might have been appropriate in some circumstances to award punitive damages in bad faith tort cases, the insurer's actions and intent did not rise to the level of an evil mind. There was insufficient evidence of "aggravated, outrageous, oppressive or fraudulent" behavior.

The Commentary

INTERVIEW. Professors Henderson (H) and Dobbs (D) consented to infuse themselves into the controversy (or teakettle) and discuss punitive damages, their rationale and application.

Q: What is the court trying to accomplish in these cases?

H: The *Rawlings* case is a big step forward in explaining the difference between a mere breach of contract and a bad faith tort case which arises out of a contract. The distinction between the basis for compensatory damages in a bad faith case and the basis for punitive damages is clarified. One thing is obvious: the conduct upon which liability is based has to be more egregious for punitive damages, and that's what Justice Feldman was trying to explain in the *Rawlings* case. The *Linthicum* case really deals only with punitive damages and doesn't add anything to what they said in *Rawlings*.

Q: Is the court trying to accomplish something broader, in terms of perceiving an insurance crisis in the state?

D: I wouldn't read it narrowly to deal with insurance problems. They talk about punitive damages, I think, with the idea that they're going back to original theory on this and covering any punitive damages case whether there's insurance or no insurance involved. They do talk about making a rational scheme that will really deter and is really effective and is really fair, so they obviously have some justice notions and some pragmatic ideas in mind.

H: If you're referring to the debate now going on with regard to tort reform, I don't believe the court had that in mind.

Q: Has the court facilitated the goals of punishment and deterrence?

D: If you levy the same fine against everybody whether they've done bad or they haven't done bad, it certainly isn't going to deter people. So what you want to do is to get the people that are really the bad actors. After all, this is like a criminal fine, this is not compensation for the plaintiff.

Q: Do the court's guidelines make it virtually impossible to get punitive damages in most of these insurance cases?

D: It's the state of mind that's most important, not just bad conduct. There's nothing new in that. That's a common theme in almost all punitive damages cases.

Q: So the fact that Jerry was paralyzed for the last year of his life, possibly because he was denied proper treatment initially . . .

D: That wouldn't indicate state of mind. If you knew you were going to do that to him, it would indicate state of mind. But I suppose that the whole point of saying we are not using the strict liability system in this country, we're using a fault system, is to say we hold no person responsible unless he's at fault. It's a basic rule of criminal law. Focusing on what the defendant did wrong, not on the plight of the plaintiff. And I think that's very fundamental. Some courts have said punitive damages is the exception, compensatory damages is the rule.

Q: In *Linthicum* they not only narrowed down what they would apply punitive damages to, but they narrowed the standard itself, from "preponderance" to "clear and convincing". . .

D: That was a change . . .

H: I don't think that makes it "virtually impossible" to get a punitive damages award. It just means the plaintiff has to come up with more evidence. As a practical matter, the jury will be instructed to look for a preponderance of the evidence to establish bad faith, but will have to find clear and convincing evidence to award punitive damages.

D: The clear and convincing standard is used in a lot of different kinds of cases. It is used in some libel cases, for example. Most jurisdictions use it for fraud cases. So we shouldn't let this phrase disturb us. It's particularly appropriate to state-of-mind-type proofs. Before you hold a person liable, and especially criminally liable, where you've vested the power of the state in a private prosecutor, it calls for something kind of special. There are several recent cases which have used the clear and convincing standard. It's one of those issues that's just now coming up, and I suspect other states will use this

standard.

H: In fact, if you look at the broader picture, the focus of punitive damages in the last few years has been on the fact that they are like a criminal penalty . . . there's a lot of argument that we ought to apply the criminal standard of burden of proof.

Q: What are the elements of the previous abuse that may have been felt by the court? Whom is it protecting?

D: I would say it's pretty unjust to hold a person liable for damage he didn't cause unless he has been an intentional or conscious wrongdoer.

H: At one time it was almost universally the rule that liability insurance would not cover punitive damages, even though the policies said nothing about it, because the courts said it was against public policy to insure these people. Then, in the last ten years or so, a number of decisions have said that if the provision wasn't excluded, then it's covered. And what they were doing was putting more emphasis on the contract and less emphasis on public policy. Now the insurance industry is starting to come back and put exclusions in, so you're not talking about some insurance company getting zapped, you're talking about the person. This is a big burden for any individual to have to cough up a fair amount of money as punishment. So now I think the courts are getting more concerned about that impact . . . The court was asked to focus in on this and give it very careful consideration, and they did.

D: I think the court was quite right in the *Linthicum* case. It's too easy in a case that's been used for political arguments, like this, to get a distorted slant of it . . . I don't think blowing it up out of proportion would be a good idea. It would be easy to overrate what's going on here in an ideological way. The long tradition of punitive damages is to require some bad state of mind, and the real lawyer problem is how to express that state of mind. These two cases taken together are a very sophisticated piece of expression, better than most courts have done. That would be my slant on it.

Pro
Tilting At Windmills

Robin Mellor

What a shame. The insurance industry finally got to Feldman. Now insurance companies will be retaining premiums in one sweaty little hand and swatting the insured around with the other. There is no incentive to pay off claims, since at worst the company will be forced to pay compensatory, not punitive, damages. All is lost.

The problem with decisions like *Rawlings* and *Linthicum* is that they create a panic for a while as attorneys read them line by line, searching for a foothold.The above decisions are viewed either as a panacea with which the courts will cure what the insurance industry has been able only to diagnose, or as a deep slice to the plaintiffs'attorneys' throats — immediately painful and hard to recover from. Realistically, though, the companies are not being given immunity from punishment, and the attorneys are not being robbed of their favorite arena for creativity, the punitive damage awards.

Part of the problem with misreading the direction of the court is that *Rawlings*, a worst-case scenario, has not been adjudicated on the punitive damages issue. The Arizona Supreme Court has remanded the case for a determination of whether Farmers' actions meet the "evil mind" requirement. If this new standard is to mean anything at all, Farmers must be found guilty of having an evil mind. It must have deliberately concealed information from one insured to protectits own financial stake in the liability of another insured.There must not have been negligence or innocent mistake: Farmers must have meant to cheat the client and succeeded.

Linthicum, by contrast, did not involve wanton, malicious behavior by the insurance company, Nationwide. The company investigated its insured's prior medical history and reasonably believed that there was no coverage under the policy for the existing disease. Though the company was found guilty of bad faith, its conduct did not rise to the level of outrageous conduct needed to bring punitive damages.

The supreme court distinguishes between the proof needed for a finding of bad faith — an intent to do the act — and that needed for an award of punitive damages — an evil mind behind the evil hand. Clearly, Nationwide intended not to pay the claim, but its motivation was business sense, not malice toward its insured. The court recognizes that "Nationwide follows a tough claims policy but it is not 'aggravated, outrageous, oppressive or fraudulent.'"

The question is whether an insurance company will have to roll over every time a claim is submitted, or whether it can trust its business instinct and routinely deny claims that on their face seem illegitimate. The insurance industry is not a social organization, it is a business. There are not many corporations we would ask to operate at a 120 percent loss ratio every year in order to protect consumer expenses; yet that is what the public requires of the insurance industry.

If punitive damages are to be assessed each time a company exercises its business judgment, then the need for malice is eliminated: a finding of bad faith automatically will result in punitive damages, with no distinction made between clearly abusive actions and a merely "tough claims policy." The spirit of the punitive damages award is to act as a deterence to the company in question and to other companies who might attempt the same practices. If the message being sent out to the industry is that all claims should be paid despite the weakness of the case, then the result will be an insurance crisis far exceeding its present magnitude. As it is, many insurance companies have ceased writing commercial risks because of the broad concomitant liability; if property and casualty risks are to be afforded similar broad liability, the insurance industry will be forced to take drastic measures to protect itself. Drastic measures usually include spreading costs to each insured, so instead of the insurance company using both hands to swat around the customers, it is the customers who will be giving with one hand and taking away with the other. Feldman has not lost his mind. He's just lost some friends.

Con

The Darth Vadar Standard

Bill Sheldon

The two Arizona Supreme Court opinions released this summer may have a substantial impact on tort law in Arizona. In *Rawlings v. Apodaca* and *Linthicum v. Nationwide Life Insurance*, the Court introduced the "evil mind behind the evil hand" standard for awarding punitive damages, adding that the level of proof required to award punitive damages would henceforth be "clear and convincing evidence."

In *Rawlings*, the Court stated:

> "It is only when the wrongdoer should be consciously aware of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others that the evil mind required for the imposition of punitive damages may be found . . .
>
> The evil mind which will justify the imposition of punitive damages may be found in two ways. It may be found where the defendant intended to injure the plaintiff. It may be found where, although not intending to cause injury, the defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others."

What point must be reached before "substantial risk" or "tremendous harm" is inferred is difficult to ascertain. Since the court sent *Rawlings* back to the trial court, it apparently considered that the insidious behavior of Farmers in interfering with its insured's right to collect may have been sufficient. Yet, Nationwide's bad faith denial (the bad faith judgment itself was upheld) coupled with findings of "fake reviews" of the file conducted by the insurance company to stave off media attention, its refusing to provide Mrs. Linthicum with a copy of the policy, and its "knowing the harm a denial would cause the Linthicums and denying the claim anyway," did not rise to that level.

The Linthicum opinion refined the *Rawlings* language further, as follows:

> "While the necessary 'evil mind' may be inferred, it is still this 'evil mind' in addition to outwardly aggravated, outrageous, malicious or fraudulent conduct which is required for punitive damages. We hold that before a jury may award punitive damages there must be evidence of an 'evil mind' and aggravated and outrageous conduct . . .
>
> We conclude that recovery of punitive damages should be awarded only upon clear and convincing evidence of the defendant's evil mind."

Thus it is not the outrageousness of the defendant's conduct, as it might seem from *Rawlings*, that gives rise to the inference of evil mind. It is something more, something which must be proven not by the ordinary tort standard of preponderance of the evidence but by the higher evidenciary standard of "clear and convincing evidence."

It seems from the *Linthicum* opinion that an insurance company's bad faith denial of medical payments coupled with the knowledge of "the harm that denial would bring" is not enough to justify punitive damages. It may be, however, that the court found that the evidence of Nationwide's evil mind was simply not enough to reach the clear and convincing standard. Based on the fact that the punitive award was overturned in a passage dealing with evil mind (not in the passage announcing the new evidentiary standard), we may assume that the insurance company's knowledge (that its tortious conduct could result in Mr. Linthicum's inability to obtain necessary medical treatment in a life-threatening situation) is not sufficient to constitute both outrageous conduct and evil mind. Perhaps later cases will clarify the court's intentions.

In the meantime, Arizona lawyers representing plaintiffs are faced with a new quandary. Until now, the threat of a lawsuit for bad faith, with its attendant risk of punitive damages, has been a powerful incentive for an insurance company not to delay or deny a claim absent a legally valid reason. The *Linthicum* opinion, however, for reasons that seem entirely mystical, stated just the opposite. One of its reasons for raising the standard to "clear and convincing" was,

> "When punitive damages are loosely assessed, they become onerous not only to defendants but the public as a whole. Additionally, its deterrent impact is lessened."

It is beyond comprehension how an increase in the standard of proof will uphold the deterrent value of punitive damages against insurance companies. Here the Court, apparently in deference to public dismay over large punitive damage awards, has attempted to save the tort system by virtually trashing its most powerful weapon. The effect will be an increase in insurance bad faith. Companies previously used to delaying or denying claims (intentionally or carelessly up to the point where bad faith was threatened) will now be free to delay as long as they please, provided they conceal any evidence that would indicate their outrageous conduct was motivated by an "evil mind."

It is well established that "exemplary or punitive damages are those damages awarded . . . to punish the wrongdoer and deter others from emulating his conduct." *Linthicum*, slip at p. 10. The social policy reason, therefore, would seem to be to deter outrageous conduct which the community at large finds wholly unacceptable. Yet the Arizona Supreme Court has overturned that public policy. It is not enough that an insurer act in an outrageous fashion. It is not enough that harm is suffered because of the intentional delay or denial of a claim for benefits — even ongoing medical treatment — contracted for and paid for by the insured. Now it must be proven that the insurers were more than outrageous, more than unacceptable to the community at large, in fact, evil in their intentions. Victims of insurance bad faith are usually already victims of some catastrophe, either by the tortious conduct of another or by bad health. Now they must additionally suffer outrageous treatment by their own insurance companies — treatment that cannot be deemed punishable unless the victims can peer into the minds of the insurance personnel and prove evil by clear and convincing evidence. Perhaps later cases will shed light on *Linthicum* and *Rawlings*, but for now it appears that the Court has set an impossible standard.

LA Law—There Ought To Be A Law

Robin Mellor

In the original version of this review, I said there was good news and there was bad news, and the good news was that producer Steven Bochco had shown some restraint and not cast his whiny wife Barbara Bosson (formerly Fay Furillo on *Hill Street Blues*) in another role. I spoke took soon. She's back. Hide the children.

The show hasn't decided what it wants to be yet. It started out as a cross between *Hill Street* and *St Elsewhere*, with realistic story lines and black humor. Now the show seems to be sinking into that fatal ignominy of soapdom. There is more emphasis on the strange love stories, and less on the even stranger nuances of the law.

The supervising producer, Terry Louise Fisher, is a former attorney. She should know better than to trivialize the profession by including such corny dialogue as: "I'm not against earning a buck, Leland, as long as we don't sell off our humanity in the process." Leland's reply, by the way, was, "The law may not be pretty. . ." Give us a break. At least when the doctors on *St Elsewhere* say stupid things like that we know we're allowed to laugh.

But the show isn't all bad. There are some great characters in the firm. Corbin Bernsen plays the cunning anti-hero Arnold Becker, a divorce attorney who has a true love for the dirt he dishes. Victor Sifuentes (actor Jimmy Smits) takes in pro bono work, while the disapproving Douglas Brackman (played by producer Bochco's brother-in-law Alan Rachins) worries about legal pad expenses for the firm. Jill Eikenberry plays Ann Kelsey, the noble yet touchable partner who is having an affair with short, rosy-cheeked Stuart Markewitz (Michael Tucker), a man who makes Tax seem adventurous, rather than a last stop before hell.

Besides Barbara Bosson, who many of us hope will have but a brief part and will never be heard from again, there are two actors who must meet with some dread disease before the season ends. They seriously defeat the entertainment value of the program. One is Richard Dysart, a pleasant enough actor, but here given a weak role. He is as exciting as meat on the rack. He is the one going around saying the law isn't pretty. He needs to find another line of work.The other truly annoying person is Michele Greene, who plays an associate in the firm. I thought she might be Bochco's way of punishing us for not wanting his wife on the program, but now it looks like there must be another reason for having her there. She has to be related. She is always on the verge of tears, and can't seem to pull her life together. She needs to use some concealer under her eyes and go find a good therapist.

Bochco has tried to duplicate his original modern couple — Frank Furillo and Joyce Davenport — by pairing the hero Michael Kuzak (played by Harry Hamlin, a man who obviously finds himself more attractive than he really is), with deputy D.A. Grace VanOwen (played by former *Partridge Family* pianist Susan Dey). This romance was interesting in the beginning, but ever since Kuzak showed up at VanOwen's wedding in a gorilla suit, the whole thing has gotten out of hand. They're too cute to be apart, but they're sickening together. Maybe someone will clean up the script soon and that storyline will be worth something again.

It probably isn't fair to give Kuzak such a hard time, since he is the character given all the ethical dilemmas. Sometimes his problems read like an Ethics textbook: should he tip off the D.A. after his seedy client robs him? Should he blackmail his client into taking a settlement so that Kuzak won't have to argue perjured testimony to the jury? Should he expose his client for concealing evidence in discovery? The answer to all of these is yes. Would the Bar approve? As Mr. Excitement Richard Dysart says, "I might argue your ethics . . ., butI admire your conscience." Would professor Ares approve?

Despite all its problems, though, the program is fun to watch at times, especially after a long day of reading real cases. You'll notice no one in the show ever has to research anything — it's all either common knowledge or magically absorbed into the attorneys' heads. It's nice to be able to watch something like that. Some of you may be reluctant to watch the show because it is on opposite*Starman* and *Falcon Crest*. Rest assured, *LA. Law* is no less a fantasy.

And once again, Bea Arthur was a dream as the devil-may-care Dan Dobbs groupie.

Film Forum

Kit Cramer

In a never-ending effort to bring the insights of the humanities into the study of law, Assistant Dean Kenney Hegland has re-introduced the Law School Film Forum. The Forum will be held throughout the year, presenting movies, documentaries and discussion on the interplay of law and life.

On Oct. 9, a group of some 50 professors, students, and Tucson citizens viewed Bill Moyer's CBS Reports: One River One Country—The U.S. Mexican Border, which was followed by a panel discussion mediated by UA law professor Andy Silverman. Panel members were Boris Kozolchyk, a UA legal expert on economic development; Michael Meyer, the director of the Latin American Area Center; Isabel Garcia-Gallegos, a Tucson immigration attorney; and Keith Rosenblum, an Arizona Daily Star reporter in northern Mexico.

The documentary presented a concise account of the pressing problems on our country's southern border. Moyers examined crucial border issues through personal interviews with citizens of both countries, including American managers working in US-Mexican border industries. The overall picture Moyers conveyed was of a frighteningly depressed northern Mexican economy, portions of southwestern America impacted by that depression, and American's self-perpetuating ignorance of these problems.

Panel members' reactions to the documentary were as interesting as the show itself. Kozolchyk criticized the show as a superficial attempt to deal with a multifaceted problem. He said that the answers provided were inadequate in light of the overall inequities perpetuated by the Mexican government. Garcia-Gallegos agreed with Kozolchyk's criticism, but said the show was nevertheless an effective vehicle for conveying information on the border situation to the American public.

Panel members discussed the bilateral jingoism prevalent in U.S-Mexico relations. Meyer and Rosenblum disagreed on the extent of Mexican anti-American bias. Meyer recounted the anti-American demonstrations in southern Mexico; Rosenblum countered with the more positive situations he witnesses daily in Hermosillo and other parts of northern Mexico.

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The idea has only one drawback—the expense. School officials say there are no funds available for such a position. And while the administration and faculty members have applied to various funding bodies including the Law School Admissions Council, the UA itself and the state legislature, they say it will take some time before the decisions are made and money becomes available, if it ever does.

School officials and students agree that the long-term answer to the minority recruitment problem is to increase the minority applicant pool in size and quality. The problem is how to accomplish that goal.

While Silverman acknowledged that there are alternative ways for minorities to affect the admissions committee, (ie. subcommittee review of files or having a minority student as an alternate to the standing admissions committee), he said he favored a permanent position for a minority student on the committee. "It does ensure that they will continue to have input, and there is a certain perspective that they can bring to the committee that non-minority faculty and non-minority law students cannot, even though I think those people can be very caring and committed."

Silverman was concerned that the law school not misunderstand the committee's emphasis on minority recruitment. "I don't want anyone to feel that the sole emphasis of the recruiting committee is minority recruitment. We're going to be doing some creative things regarding non-minority recruitment as well. Our emphasis will always be on recruiting qualified students of all races. I don't want people to believe that that is going to take second chair to minority recruitment."

THANK YOU:

Cheryl Bowman	Mala Lenox
Bridget Burke	Julie Long
Lauren Cabot	Frances Lynch
Lynne Collins	Eve Maassen
Christine Curtis	Nancy March
A.P. Davis	P. Mehrhoff
Lisa Glow	Joyce Montes
Sylvia Goodwin	Jill Nelson
Kevin Helm	Kathy Rigg
Judy Jacobi	Judy Stinson
Laurie Johnson	Kari Webb
Jennifer Kimble	Elaine Williams
Renée Kotovsky	JoAnn Zirkle

for your outstanding performance on the LWA Wine & Cheese solicitation and invitation committees.

Julie Van Dyne Carol Rosinski

The International Legal Fraternity

Phi Delta Phi

Congratulations to our Fall 1986 Initiates:

Tim Burkart	Tim Connell
Laura Cardinal	Greg Droeger
Sylvia Goodwin	Frances Lynch
Alison Paige	Judy Stinson
Nancy Kendall	David Udall

Sing A Song Of Individual Legal Activism

Kit Cramer

Even here in the College of Law, it is the pursuit of *justice* which motivates us. I believe in the fundamental individualism that our Constitution established. I believe in intelligent individuals knowing and defending the basis of their freedom. Law schools participate in that protection by providing a forum for pursuing this justice through knowledge. A belief in protecting fundamental individual rights drives us to learn the basis of such rights: to learn the rules, justifications and policies dictating what each individual must give up to live in a civilized world.

I like to listen to music. It takes me on long, faraway walks through Gershwin's Paris, Coltrane's Central Park West, and The Clash's Brixton. But far from espousing escapism, musicians often seem ahead of the game in recognizing, and speaking out about, those citizens who have had to give up too much for their society. To this day, the law is catching up to the enlightenment of many singers. Louis Armstrong ("My only sin is in my skin; what did I do to be so Black and blue?") and Billie Holiday ("Southern trees bear a strange fruit"), for example, denounced racism a quarter century before constitutional law addressed segregation (see *Brown v. Board of Education*, 347 U.S. 483 (1954)).

Gil-Scott Heron's poetry and music take his listener for a walk along the road of racism and inequality in America. His words are harsh, but they command respect with their accuracy. In a poem written about a 1978 instance of police brutality in Houston, Heron speaks of a reality which some minority group members face each day, today, and which killed Jose Campos Terres:

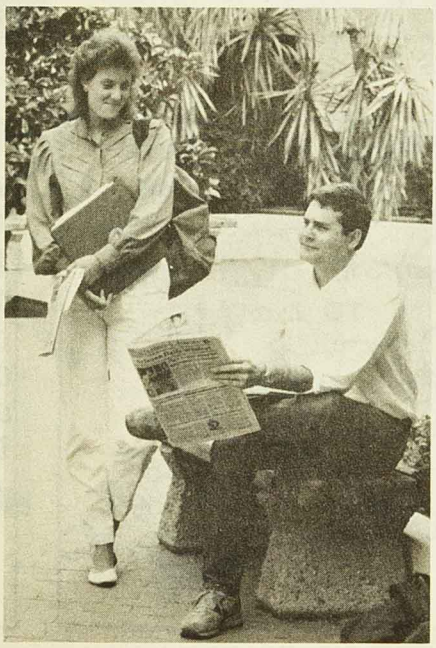
> I said I wasn't going to write no more poems like this, but the battlefield has oozed away from the stilted debates of semantics, beyond the questional flexibility of primal screaming. The reality of our city jungle streets and their gustapos has become an attack on home, life, family, philosophy; total. It is beyond the question of the advantages of didactic niggerism, the dogs are in the streets. In Houston maybe someone said Mexicans were the new niggers, in L.A. maybe someone said Chicanos were the new niggers, in San Francisco maybe someone said Asians were the new niggers. Maybe in Philadelphia and North Carolina someone decided they didn't need any new niggers. I told myself I wasn't going to write no more poems like this.

On a similar note, the Tom Robinson Band supports the Rock Against Racism campaign in England, singing about economic racism as well as color-based racism. Robinson was quoted on the back of his 1977 album *Power in the Darkness* (Capitol Records):

> . . . for everyone who hasn't got a cushy job or rich parents . . . to stand aside is to take sides. If music can ease even a tiny fraction of the prejudice and intolerance in this world, then it is worth trying. I don't call that "unnecessary overtones of violence." I call it standing up for your rights. And if we fail, if we all get swallowed up by big biznis before we achieve a thing, then we'll havta face the scorn of tomorrow's generation. But, we're gonna have a good try. Fancy joining us?

This example of Robinson's lyrics, from his 1977 song *Power in the Darkness*, conveys that he is not just a rock-headed anarchist but an enlightened poet:

> Stand up for your rights. Freedom, we're talking about your freedom. Freedom to choose what to do with your body, freedom to do what you like. Freedom for brothers to love one another, freedom for black and white. Freedom from elitism, male domination, freedom for the mother and wife; freedom to believe what you like. Freedom from big brother's interrogation, freedom to live your own life.



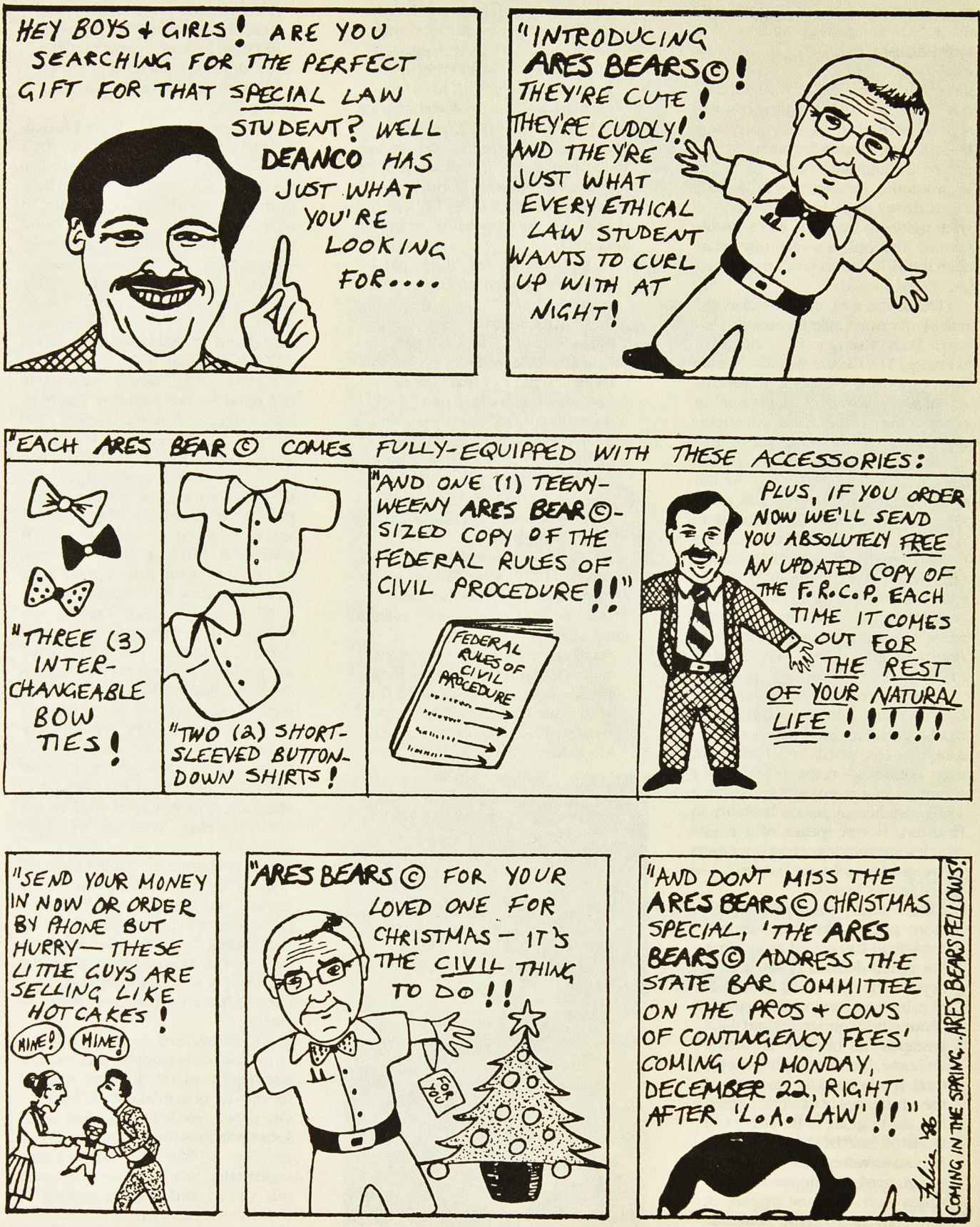
These poignant words are particularly appealing in light of our country's conservative legal response to institutional racism. Even *Brown*, which purportedly outlawed segregation in public schools, has not been reinforced by subsequent legal history (for example, see *Milliken v. Bradley*, 418 U.S. 717 (1974); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); and *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976)).

Brown was never expressly extended by the Supreme Court to such subjects as public housing (see Banks, cert. denied, 347 U.S. 974). More important, our courts have narrowly construed individual rights in many other areas, too (e.g., this past summer's case involving personal-sexual preference rights, *Bowers v. Hardwick*, 106 S.Ct. 2841. So Heron and Robinson still have a prima facie case for singing out for activism.

All kinds of racism exist in our country. It perpetuates inequality. Even the judiciary has perpetuated inequality (e.g., the Supreme Court in *BrownII* allowed the states to implement desegregation, knowing that the states would stall). Yet conscientious, legally trained citizens have fought and challenged aspects of inequality in our system. Thurgood Marshall, Robert Carter, and others are inspiring symbols of legal activism.

Our goal, then, is to gather knowledge of the law while preserving a sense of individual justice. If you feel you're losing this sense while briefing the holding in *Korematsu*, the jurisprudence in *Mount Laurel III*, or the rationale of the Sanctuary case, step out and listen to some soul, blues, or rock.

We are warned to relinquish our emotions while studying the law. The warning has merit. However, the real feelings we hear in music *are* relevant. Our job is to fashion logical, legal substantiations for the songs of injustice that we hear. We must advance on injustice, using the Constitution as our sword and singing a song of individual legal activism.



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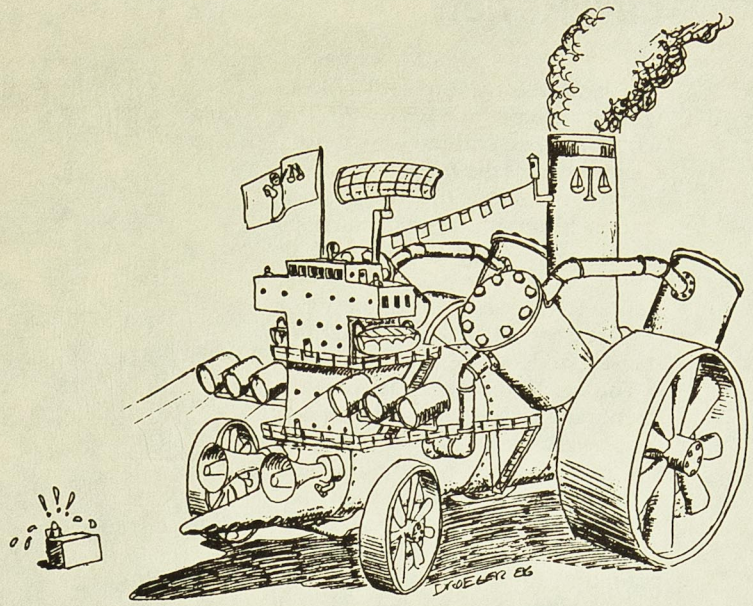

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The Anarchist **by Greg Droeger**

Club News

PDP

Phi Delta Phi initiated ten new members on the evening of Oct. 9, 1986. Serving as chancellor of the evening was Sam Crutchfield, the Executive Director of PDP, here from Washington, D.C. Other Benchers included faculty advisor Prof. Mark Ascher; Prof. John Strong, Prof. Teresa Gabaldon, and Province President Alex Sierra. A reception was held at the Plaza Hotel immediately following the initiation.

The new members are Tim Burkart, Laura Cardinal, Sylvia Goodwin, Alison Paige, Nancy Kendall, Tim Connell, Greg Droeger, Frances Lynch, Judy Stinson, and David Udall.

PDP plans a second initiation in the spring for its pledges and others interested in joining.

PDP activities for next semester include a series of video presentations on ethics and comparative law, with discussion led by PDP alumni, an all-school party in January and a panel discussion on lawyering skills featuring local attorneys.

Additionally, PDP's annual event, the small section photo session, will take place in mid-November. Information to first year students about the time, date, and place (as well as what you should wear) will be announced in the respective small section classes. The photos will be on sale in December.

Law Review

The *Arizona Law Review* will hold its write-on competition Jan. 16-20. The write-on is one of three ways to gain membership to the *Review*. Members are also selected on the basis of small section professor recommendations and end of first year grades. In 1986, 13 members were selected on the basis of the write-on. Eight were selected in 1985. First year and transfer students are eligible.

The write-on problem will be distributed Friday, Jan. 16 and is due on Tuesday, Jan. 20. The problem requires a short essay (no more than 1500 words) analyzing cases or an area of law. All research material is provided. No additional research is permitted.

Questions may be directed to Editor-in-Chief Tom Kelly or Special Projects Editor Geri Mose Mahrt.

CLS

The Christian Legal Society will continue to have general meetings in Room 126 on each and every Wednesday at Noon, except every third Wednesday of the month when they have a luncheon downtown with practicing CLS members.

Misdemeanors Football Team

The Arizona Advocate
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