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Warren E. Burger and Change in Legal Education

By Dr. Jeffrey B. Morris

Among American Chief Justices perhaps only William Howard Taft and Harlan Fiske Stone have demonstrated as much interest in aspects of American legal education as Warren E. Burger. None has devoted as much effort to nudging legal educators, the bar and the bench towards making significant changes in the law school curriculum. Burger has inspired a major debate over the question of the training of trial advocates, stimulated the growth of courses in trial advocacy taught by active practitioners, and called for the teaching of legal ethics to begin on the first hour of the first day of law school. Burger’s prescriptions have not been abstractions, but rather down-to-earth proposals, leavened by a belief in trying out new ideas as experiments rather than casting them into stone for all time.

Burger’s interest in legal education first received national attention when he addressed the American Bar Association Convention on August 10, 1969, less than two months after he had become Chief Justice. As a Judge of the United States Court of Appeals, however, he had expressed concerns a number of times, most notably in speeches to the American College of Trial Lawyers in 1967 and to the Phi Alpha Delta legal fraternity in 1968.

The Burger critique of the state of American legal education ought to be viewed from the perspective of the standards he believes the bar, the individual lawyer, and the law school ought to meet. He once wrote that a strong, independent, courageous and competent bar is an imperative for a free people (In re Griffith, 413 U.S. 717, 732, 733 (1973)). To Burger, lawyers must also serve as problem-solvers, harmonizers, and peacemakers. They must act as indispensable middlemen in the social process, providing a lubricant for satisfactory disposition of controversies and for gradual change in the law.

Burger is concerned, however, that the legal profession has a monopoly over certain services. He believes, therefore, that lawyers have a special obligation to the public to produce the best system of justice at the lowest possible cost. The operation of a law school is a stewardship. Like other fiduciaries, those running law schools ought to be accountable, in this case -- to the public. Burger believes that the law school is uniquely situated to shape the habits, professional standards and ideals of prospective lawyers.

The Chief Justice has commended law schools for their ability to teach students how to read and analyze appellate opinions as well as for their ability to teach principles of law. But he has argued that “the modern law school is not fulfilling its basic duty to provide society with people-oriented counselors and advocates to meet the expanding needs of our changing world.”

In the tradition of Alfred Z. Reed and Jerome Frank, Burger is sharply critical of the law schools’ insistence on “single-minded, rigid and universal adherence” to the case method, which he calls the ‘opinion’ or ‘appellate’ method. For Burger, exclusive reliance upon the method of Langdell is a form of escapism, taking students far from the realities of life and the grist of daily practice. As a result, students can graduate from law school able to give a lucid “dissertation on refinements of corporate spinoffs or vertical mergers,” but unable “to advise a pregnant unmarried girl, or old people needing help with social security.” Surveys support Burger’s concern that students graduate from law school poorly equipped to deal with facts, draft documents, cope with clients, or negotiate with other lawyers.

While acknowledging the need to improve education in such areas of practice as counselling and negotiation, Burger chose first to seek improvement in the preparation of lawyers for trial work. Although agreeing that America’s best advocates are the equal of any, Burger believes, based upon his experience as a trial judge, that “something less than half of the lawyers who appeared there were minimally qualified to perform their function.”

Although the ordinary person hiring an attorney may well believe that a law school graduate who has passed a bar examination is prepared to perform reasonably well to protect or vindicate his or her rights, Burger has

The innovative moot courtroom is the home of a unique seminar, Art of Advocacy, specifically proposed by the Chief Justice as a prototype of “legal education for the next century” and offered this past year at Marshall-Wythe.
stated that "if the concepts of recall applicable to motor vehicles under government standards were applied to law school graduates, the recall rate would be very high indeed on those who go into the courts without substantial added training."

Surveys of state judges, federal judges and lawyers made in 1978 by the Federal Judicial Center, the American Bar Association, Law School Admissions Council, and the American Bar Foundation gave support for Burger's view that there is a "serious problem" of competence of trial counsel which is directly related to the amount of attention given to trial advocacy-related subjects in law school. The most serious consequences of this problem—inequitable representation, higher costs, and delays—are felt by the 'consumer.'

Burger's views of how lawyers should be trained have been shaped by a number of experiences. They have clearly been affected by his own training at the William Mitchell College of Law where the teachers were largely leading practicing lawyers and sitting judges (among them William D. Mitchell, later Attorney General; Pierce Butler, later a U.S. Supreme Court Justice; and Frank B. Kellogg, later Secretary of State and Judge of the World Court). Later, Burger was himself a faculty member at William Mitchell while he was an active practitioner. Burger's outlook on the training of lawyers was clearly affected by his observations during twenty-three years of practice. Repeated visits to England have deepened his appreciation for the virtues of British legal education. Exposure to the best kind of advanced medical training at the Mayo Clinic, where he was a long-time trustee, has sharpened his views of the value of the more practical training doctors receive. He clearly has been affected by what he observed while sitting by designation as a District Judge in the District of Columbia.

Burger clearly believes that law schools should continue to educate in legal theory and analysis. But they must not stop there. Training in the practical aspects of lawyering should begin in law school and be available to those students who want it. Experienced lawyers and judges should be drawn into teaching, working with the regular faculty. From the outset of legal education, professors should help students to become involved with hard facts and with the real problems of people, for "that is what makes cases."

Like many students and legal educators, the Chief Justice does not believe that it is necessary to devote three years to the learning of the fundamentals of law and the processes of legal analysis. In 1978 Burger proposed to the American Law Institute that three law schools attempt to teach the fundamentals (including substantial advocacy-related learning) in two long years, leaving the third year (a full twelve-month period) comparable to a medical internship, devoted to involvement in every phase of the litigation process under the guidance of skilled trial advocates and law professors.

In the John F. Sonnette Memorial Lecture, which
Student Legal Services: Protecting Students' Rights

In September of 1978 Student Legal Services opened its doors at 153 Richmond Road and began an ambitious attempt to provide assistance with legal problems for William and Mary students. Over the past three years, the program developed and expanded as it continued to provide much needed legal service to the student community. SLS now consists of a sixty member volunteer staff of interested law students from the Marshall-Wythe School of Law. Under the guidance and direction of the program's faculty advisor, Professor John Levy, and SLS attorney Stephen Harris of Williamsburg, the law student interns research and investigate legal and quasi-legal matters for students at the College of William and Mary.

Student interns assist clients with a wide variety of legal problems. Although SLS does not handle criminal action and usually cannot represent a student in court proceedings, the range of situations in which SLS can and does offer aid is extensive. The most common problems brought to SLS by concerned students involve landlord-tenant conflicts, auto repair and merchandise warranty problems, immigration and deportation issues, sales frauds and employment disputes. SLS is extremely active in its attempts to inform students about their own legal rights and the procedures that must be followed to protect those rights. Staff members take personal interest in each client's case and often very favorable results can be achieved in the student-client's behalf.

The SLS Student Rights Branch developed over the last year and has quickly become active in numerous students' rights issues at the College of William and Mary. SLS does not assist in conflicts between students at the college. However, the Student Rights Branch has been actively assisting students in disciplinary hearings, honor code actions, grade appeals and challenges to college policies. SLS interns have represented numerous students before college disciplinary councils and each semester more students turn to SLS for assistance in defending themselves against discipline charges prosecuted by the Dean of Students' Office. Recently, law student interns have been extensively involved with student complaints against college grading policies and faculty hiring policies. The grading policy problems will require continued efforts by SLS interns and college administrators and hopefully, the results will be as successful as the effort put forth concerning the college's faculty hiring policies. The intense efforts of SLS interns and cooperation of college administrators resulted in a new faculty hiring policy being written and published in the 1980-81 Faculty Handbook. Today, more than ever before, student rights issues are being brought to the forefront of legal and academic consideration and the Student Legal Service program expects to continue and increase its participation in advocating student interests and protecting student rights.

For the future, SLS has extensive plans to undertake new endeavors and expand participation in issues concerning students at William and Mary. Aided by funding from the Board of Student Affairs, SLS plans to publish several more pamphlets, similar to the the Landlord-Tenant pamphlet published last semester. These pamphlets will provide students with comprehensive information concerning legal topics that are particularly relevant to college students. Student forums addressing specific areas of the law are being planned to provide students at William and Mary with easy access to information about their own legal problems. In the spring, SLS will sponsor a regional conference at the Marshall-Wythe School of Law. The conference is a culmination of efforts by SLS interns to initiate a communications and support network involving student legal aid programs on college campuses from Maryland to North Carolina. Successful organization of such a program would add new dimensions to the resources and services SLS could provide for students at William and Mary.

The Student Legal Service program at the College of William and Mary has enjoyed a productive and active infancy. With the continued support of the College of William and Mary, the Marshall-Wythe School of Law and the local legal community, SLS will continue to provide students with assistance and guidance in the protection of every student's legal rights.
America's Shield Laws: Twenty-Six Variations of the Newsman's Statutory Privilege

By Philip J. Kochman

Introduction

In 1972 the Supreme Court in Branzburg v. Hayes, declined to affirm the privilege of a news reporter to refuse to identify confidential sources of information to a grand jury. In a five-to-four decision authored by Justice White, the Court opened its opinion with an unequivocal declaration:

The issue in this case is whether requiring newsmen to appear and testify before federal and state grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

The Court refused to grant journalists a constitutional privilege, but it did note that the States were free to implement any sort of “shield law” considered necessary or desirable.

Since Branzburg the focus of the conflict between the newsmen’s claim of confidentiality and the court’s need for information has been the state level. At the time the Court decided Branzburg seventeen states had shield laws, and one, California, has incorporated its statutory privilege into the state constitution. Judicial interpretation of the privilege has also increased sharply in the last eight years. Because Branzburg rejected the constitutional privilege, newsmen have relied more-and-more on the states’ statutory privilege to support claims of confidentiality.

The twenty-six state privileges extend varying degrees of protection to journalists. The laws differ dramatically, offering various answers to the questions of who should receive the privilege, what information should be covered, and what showing, if any, is necessary to overcome the presumption of privilege. Other factors which may affect the application of the privilege include the nature of the proceeding in which the privilege is claimed and whether the information sought has been published. Judicial interpretation of the twenty-six shield laws had let to further variations and unpredictability.

This paper will examine some of these state-created privileges and their application by the state courts in criminal trials. It is in this area that the privilege often runs into direct conflict with the rights guaranteed a criminal defendant by the Sixth Amendment. It is also in this area that the privilege has received its roughest treatment, often yielding because of narrow judicial interpretation of the statutes.

Background

The battle in America’s courtrooms over a newsman’s privilege from testifying about sources and information acquired in the process of newsgathering began in 1848, but did not become a controversial issue until the 1960’s. Under President Nixon the Justice Department sharply increased the use of subpoenas against reporters, beginning with the 1969 trial of the “Chicago Seven” for charges of inciting riot at the 1968 Democratic National Convention. During the 1960’s and early 1970’s newsmen usually based their claim of privilege on the First Amendment, relying on shield laws to a much lesser extent.

In 1972 the Supreme Court addressed this constitutional privilege claim for the first time. In Branzburg, and its two companion cases, United States v. Caldwell and In re Pappus, reporters refused to disclose certain information to grand juries based on a First Amendment privilege. The Court refused to recognize any absolute or qualified privilege which would protect from disclosure, under an agreement of confidentiality, the criminal conduct of a reporter’s new sources of incriminating evidence against them. The Court found that a reporter had the same duty as any citizen to furnish information as a witness. Because the First Amendment does not prohibit the enforcement of other general laws serving a substantial public interest against the press, the Court ruled the government’s interest in law enforcement - the investigation and punishment of crime - was not outweighed by the reporter’s speculative claim of a “chilling effect” on the free flow of news to journalists and the public.

Although the Branzburg opinion dealt with grand jury investigations, dictum in Justice White’s opinion strongly suggest that the majority’s view of the privilege extends to criminal trials as well. When the privilege is asserted in a criminal case the conflicting considerations closely resemble those in the grand jury. The need for obtaining evidence may be more compelling in the criminal trial context since usually a defendant’s confrontation and compulsory process rights are at stake when any privilege against testifying is asserted.
Shield Laws

State shield laws provide the media with the best protection from the forced disclosure of information acquired through newsgathering. Of the twenty-six state privileges, only Michigan's cannot be asserted in a criminal trial. But beyond this similarity, the other twenty-five statutes differ widely in their language and in the scope of their coverage.

Shield laws have been drafted using one of two different means for providing the privilege. The majority state that no reporter shall be compelled to disclose information obtained during newsgathering. The minority, which includes California and New York, have statutes which state that no reporter shall be held in contempt for refusing to testify. The difference in wording has proved extremely important in the courtroom, the minority version has been more resilient to attack.

In order to analyze the different types of shield statutes and their interpretations in the courtroom, the privileges of four states - New Jersey and Maryland from the majority group, New York and California from the minority group - were selected for close scrutiny. The four laws were selected because the statutes and their interpretations fairly represent most of the variations available among the nation's privileges.

New Jersey

New Jersey had what many people considered the nation's strongest shield law until In re Farber, perhaps the most important case in this area since Branzburg. Now the law has been amended to conform to the New Jersey Supreme Court decision. The privilege was reduced from an absolute to a qualified protection for newsman.

The New Jersey shield law was enacted in 1933, and underwent a liberalization in 1977. The privilege extended to all persons engaged in some aspect of distributing news to the general public. The privilege covered both the source and the information, and both these terms were given broad definitions within the statute. The information did not have to be published to be protected. Finally, the privilege could be asserted in any legal or quasi-legal proceeding or investigative body.

But signs that the absolute status of the privilege was not recognized in the state's court appeared quickly. Barely two months after the 1977 amendments became effective, a state Superior Court interpreted the statute narrowly in rejecting a broad privilege. The court ruled that a newsman's taped conversation with an alleged murderer, part of which was published, was not protected from discovery by the prosecutor. Relying largely on United States v. Nixon the court found that the state interest in obtaining evidence in a criminal trial outweighs the privilege. The court states that since the source was no longer confidential there could be no "chilling" effect. The court also found a waiver of the privilege because a portion of the interview appeared in the Hackensack Sunday Record. The New Jersey court applied a balancing test to the broad legislative pronouncement with the scales heavily tilted in the state's favor. In addition, the court infused a very broad waiver concept into the privilege. The statute did not mention waiver within its provisions.

Within a year after this first decision the New Jersey shield law suffered its total demise. The state's highest court declared the law unconstitutional under the confrontation clauses of the United States and New Jersey constitutions. The case arose when Myron A. Farber, a reporter for the New York Times, undertook a four-month investigation into a ten-year-old unsolved mystery, the suspicious deaths of thirteen persons at a small hospital in Oradell, New Jersey. The results of this effort appeared in the Times. Four months later, in May 1976, a grand jury indicted Dr. Mario E. Jascalevich, former chief of surgery at the hospital, charging him with five counts of murder by poisoning. The grand jury did not call Farber as a witness.

At trial, the defense counsel subpoenaed Farber. He appeared and testified about the access the state had given him to its records during his investigation. He declined, however, to speak about how he had obtained a copy of a previously missing deposition of Dr. Jascalevich claiming a privilege from testifying.

Next the defense demanded inspection of everything.
the parts of the opinion dealing with the state's shield law.

The Court acknowledged that the privilege which Farber asserted was, "as strongly worded as any in the country," and that the legislature clearly intended to extend the press a broad privilege, but that the shield law had to be examined in light of the sixth amendment to the Constitution and article 1, paragraph 10 of the New Jersey Constitution. The court easily resolved the conflict between the reporter's statutory privilege and the defendant's right to evidence in favor of the latter. The court interpreted article 1, paragraph 10, of the state constitution - which uses the exact same language as the Constitution's confrontation and compulsory process clauses - as "affording a defendant in a criminal prosecution the right to compel the attendance of witnesses and the production of documents and other material for which he may have, or may believe he has, a legitimate need in preparing or undertaking his defense." The majority did not attempt to resolve the conflict created between the defendant's rights and other statutory testimonial privileges.

The court ruled that although a full hearing on the issues of relevancy, materiality, and overbreadth of the subpoena should be granted, the Times and Farber had "aborted" it by refusing to submit the materials for in camera inspection. The majority viewed such an inspection as merely a procedural tool to ascertain relevancy and materiality, and not in itself an invasion of privacy. The court did acknowledge that the party opposing the subpoena ought to be afforded a preliminary determination before being compelled to submit the subpoenaed information. To meet this threshold standard the defendant seeking disclosure must show, "by a fair preponderance of the evidence including all reasonable inferences that he has met the requirement of a three-part test derived from Justice Stewart's dissent in Branzburg. The court emphasized that this was not, "a license for fishing expeditions." But it concluded that in this case there was sufficient evidence presented by the defendant to meet this three-part test.

Farber turned what had once been considered a fairly absolute privilege into a qualified protection for newsmen based on a balancing test - a three-part threshold determination of whether the need for the evidence overcomes the privilege. Many commentators argue that the Branzburg Court had such an approach in mind when it noted that state shield laws had to be written within constitutional bounds.

Unfortunately for Farber and the Times the court really avoided using the formula it set up. It decided primarily on a waiver theory that no preliminary hearing was necessary in this case until the material was turned over to the trial judge for in camera inspection. The threshold test, as had been the words of the shield law, could be ignored.

The New Jersey legislature reacted to the Farber decision early last year when it amended the statutory privilege to conform to the opinion. The statute requires that a party seeking enforcement of the subpoena must show by a preponderance of the evidence that there is a reasonable probability that the materials sought are material and relevant, that they cannot be secured through any less intrusive source, and that the value of the material sought outweighs the privilege. A trial court may rule on these questions only after a hearing and it must make specific findings of fact and conclusions of law with respect to its ruling. The legislature also wrote a waiver provision into the amended statute.

This new privilege received an immediate test. A trial court had ordered Robin Goldstein, a reporter, to produce a letter sent to her by a prospective prosecution witness for in camera inspection. Goldstein based her refusal to testify on the 1980 law. The trial judge denied the reporter a hearing on the threshold issue. The state supreme court ruled that the trial court had misapplied the new law. The court found that the defendant had not shown that the information was not available through a less intrusive source. Here, the court pointed out, the witness was a potential source of the relevant and material testimony. Perhaps most importantly as far as the new privilege was concerned, the court pronounced that forced disclosure to a judge prior to a hearing was a violation of freedom of the press and impermissible.

After this ruling the trial judge again ordered the reporter to testify. The New Jersey Supreme Court reversed the judge's order, again on the ground that less intrusive sources could provide the defendant with the information he sought from the reporter. The defense tried to revive a broad waiver theory, but the court was not dissuaded by the fact that the source of the information was not confidential. The privilege to withhold information granted by the shield law: the court stated, "is that of the newsmen and not the source."

New Jersey's statutory privilege for newsmen has traveled a rocky road since 1977. The amendment of that year made it perhaps the broadest privilege in the country. The courts sharply limited the privilege through the narrow interpretation of the statute and the use of a balancing test which appeared heavily tilted in favor of disclosure, either because of the state's interest in investigating and prosecuting criminal activity or the defendant's constitutional rights of confrontation and compulsory process. The shield law's 1980 version may offer a workable compromise. Under the statute the court must provide the subpoenaed reporter with a hearing in which the party seeking disclosure must meet a three-part threshold test. Once the party seeking disclosure produces a preponderance of the evidence on the three questions the reporter must forward the subpoenaed material to the court for in camera inspection. The latest court decision indicates the state's judiciary may work with, rather than against, this version of the privilege. This case indicates that the requirement of a hearing will be strictly applied and that at such a hearing the party seeking disclosure must present more than a simple allegation to meet the standard for overriding the privilege. If the state's courts adhere to this approach newsmen may receive
the protection of the statutory privilege unless the defendant's sixth amendment rights are in jeopardy, at a point at which the New York Times has conceded the privilege must yield.

Maryland

This state's statute is much more limited in its coverage than the New Jersey law. In Maryland, only persons engaged, connected, or employed with a newspaper, journal, radio, or television may assert the statutory privilege. In addition, the privilege extends only to the source, not to the information itself. Finally, the information has to be obtained for the purpose of publication or dissemination in order for any privilege to exist.

The major shield law case in the Maryland courts has been Lightman v. Maryland,12 decided in 1972. A reporter for the Baltimore Evening Sun was summoned to testify before a grand jury13 to testify about his knowledge of suspected illegal drug traffic in Ocean City, Maryland. Earlier the reporter had published an article in the newspaper on the use of drugs in Ocean City, and in it he described in detail an incident which occurred in one of the city's head shops. The grand jury asked the reporter for the location of the shop and a description of the shopkeeper. The reporter refused to answer on the basis of Maryland's statutory privilege. He claimed that the shopkeeper was his source and that disclosing the location would in all probability lead to disclosure of the source. After a hearing the trial court found the reporter in civil contempt, noting that there was no evidence that the shopkeeper knew that he was dealing with a reporter. The trial court determined that the shopkeeper was not a source within the meaning of the statute.

The Maryland Court of Special Appeals, while acknowledging that the statute was absolute within the sphere of its coverage, affirmed the contempt citation. The court ruled that the privilege encompassed any source of news or information without regard to whether the source gave his information in confidence. In addition, disclosure of the source could not be accomplished by requiring the reporter to answer questions aimed, directly, or indirectly, toward ascertaining the source's identity. Finally, the court recognized that the privilege was vested in the reporter, not the source.

But as the New Jersey court did in Farber, the Maryland court in Lightman ignored its broad legal pronouncements on the statutory privilege, and decided the case on much narrower grounds. Here the court ruled no privilege could be claimed:

Where a newsman, by dint of his own investigative efforts, personally observes conduct constituting the commission of criminal activities by persons at a particular location, the newsman, and not the persons observed, is the "source" of the news or information in the sense contemplated by the statute.

The court stated that to rule otherwise would insulate the information itself from disclosure, a result at odds with a strict construction of the statute.

Since Lightman the state's shield law has not undergone much litigation. In 1979 the court's statutory analysis in Lightman was applied to criminal and civil trials.14 In addition the court reaffirmed that confidentiality between reporter and source was not a major factor in determining the existence of the privilege. The state's attorney general's office also offered a narrow interpretation of the Maryland shield law. It issued an opinion in 1978 which indicated that the privilege was limited to the sources of information which was actually published or disseminated.15

The New Jersey and Maryland privileges are quite distinct from one another. While the New Jersey shield law covers a broad spectrum of activities within its purview, its application in every case remains subject to a balancing test. In Maryland the privilege is much more limited in scope, covering just major media organizations and only the source of the information, but this protection is considered absolute. Only further litigation in each state will determine which approach offers journalists the greatest protection.

New York

The New York privilege was enacted into law in 1970 and was amended once, in 1975, to include grand juries. Although the statute was originally considered a fairly strong privilege for newsman, the New York courts, construing the terms of the law narrowly, have severely limited the protection, both in scope and in application.

The New York shield law grants a protection to professional journalists and newscasters from contempt citations for refusing to disclose any news or the source of such news. The information to be protected must be obtained in the course of gathering news for publication by the organization which employs the reporter. The statute's definition of a professional journalist is not as expansive as that of New Jersey's shield law, but not as narrow as many others. The definition of newscaster is quite broad: it includes anyone engaged in analyzing and commenting on news. The media groups within the purview of the privilege are specifically defined, especially with regards to which newspapers' reporters may assert the privilege. Thus the scope of the New York privilege is somewhat narrower than a majority of the other privileges.

The decision that set the tempo for judicial consideration of New York's shield law was Wolf v. People16 decided in 1972. In that case the Village Voice was held in contempt for refusing to comply with a subpoena which ordered the newspaper to produce the original manuscript of a "confession" it received from a prisoner, the defendant in a criminal action for kidnapping and coercion arising out of a prison riot in the Tombs, a New York City jail. The Voice based its refusal to comply with the order on the state's shield law, arguing that the manuscript fell within a broad interpretation of "news". But a state appeals court

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Deep Seabed Resources -
Who Has The Right To Exploit Them

By Ray W. King

In 1872 the British Oceanographic Ship HMS Challenger discovered manganese nodules on the deep ocean seabed. Manganese nodules contain manganese, copper, nickel, and cobalt and lie just below or on the surface of the deep ocean seabed at depths of about three miles. Most are found in waters beyond the jurisdiction of any state. The Pacific Ocean may contain up to 1,500,000,000,000 tons of manganese nodules with 10,000,000 tons being added each year by chemical and biological processes--enough to meet estimated global demand for the metals for many years. Development of this resource came to serious consideration in the 1960's. At present, only a few nations are sufficiently advanced technologically to have the potential capability to exploit the deep seabed, and at best they are ten years away from commercial exploitation.

When the Challenger discovered the manganese nodules there was no doubt that the doctrine of res nullius applied to them: the resources of the seabed belonged to no one and whatever was recovered was subject to national appropriation. Since that time the status of the international law governing the deep seabed and its resources was recognized, a consensus began to develop in the international community that the deep seabed and its resources should be subject to a doctrine of res communis: belonging to everybody and not subject to national appropriation. The belief was that the world community should share the resources and the profits derived from their exploitation. At the same time, the estimated costs for making a mine site commerically productive began to soar. Initial research at a site could cost $150,000,000 and the cost to make it productive could range from $500,000,000 to as much as $1,000,000,000. Naturally, the mining industry began to look for ways to protect its investment.

The controversy as to which policy should control the taking of the minerals from the deep seabed has recently come to a head and, as yet, is unresolved. The Third United Nations Conference on the Law of the Sea has recently completed drafting a proposed Law of the Sea Treaty which strongly reflects the res communis concept. At almost the opposite extreme, the United States enacted the Deep Seabed Hard Minerals Resources Act which protects the national interest and reflects the res nullius approach as to minerals recovered. This article will briefly explore how the concept that the deep ocean seabed belongs to everybody relates to the proposed Law of the Sea Treaty and the Deep Seabed Hard Minerals Resources Act and the continuing tension between supporting the concept and wanting to protect national and industrial interests.

The concept that the deep ocean seabed belongs to
everybody was first proposed to the United Nations General Assembly in 1967 by Ambassador Arvid Pardo of Malta. He suggested that the resources of the deep seabed be regarded as the common heritage of mankind and exploitation be conducted only by or under the management of an international organization. The United Nations was quick to approve the concept and included it in General Assembly Resolution 2467 (XXIII) of 1968, U.N. DOC. A/7477 (1968). The resolution called for exploitation of the deep seabed to be carried out for the "benefit of mankind as a whole." Over the next several years, the United Nations passed several resolutions endorsing the concept, among the most significant being the Moratorium Resolution of 1969 and the Declaration of Principles of 1970. The Moratorium Resolution, Resolution 2544 (XXIV), U.N. DOC. A/7630 (1969), restated the benefit of mankind theme and declared, first, that pending the establishment of an international regime there was a ban on all activities of exploitation of the deep seabed, second, it was declared that no claims to any part of the deep seabed or its resources would be recognized. The Declaration of Principles, Resolution 2749 (XXV), U.N. DOC. A/8028 (1970), declared the deep seabed and resources that lay beyond any national jurisdiction to be the "common heritage of mankind" and not subject to appropriation. The Declaration of Principles and subsequent General Assembly resolutions called for the establishment of an international regime to control the development of the deep ocean seabed. When the Third United Nations Conference on the Law of the Sea convened, the establishment of such an international organization was on the agenda.

The United States was one of the prime motivators behind the common heritage of mankind concept and was a strong supporter of the Declaration of Principles. When the Declaration of Principles was before the General Assembly, there was no controversy surrounding support for the general concept and it passed without a single negative vote. The United States, however, did strongly oppose the moratorium provisions of the Moratorium Resolution and made it clear that the United States did not consider itself bound by the resolution. During this time, the mining industry was becoming increasingly concerned about protecting its investment. In 1974 Deepsea Ventures, Inc., a United States corporation, took a dramatic step toward this end. It attempted to establish a right to a manganese nodule mine site in the Pacific Ocean seabed. In a letter to Secretary of State Kissinger, Deepsea Ventures gave notice of its intent to assert an exclusive right to evaluate, develop, and mine the manganese nodules in a 60,000 square kilometer area. The letter asked all entities to respect the exclusive right Deepsea Ventures was claiming; however, Deepsea Ventures did maintain that it was not asserting any territorial claim. The Department of State responded by stating that it did not grant or recognize exclusive rights to the deep ocean seabed and the Third United Nations Conference on the Law of the Sea was the appropriate vehicle for developing the law in this area.

At the close of the ninth session of the Third United Nations Conference on the Law of the Sea the participants had negotiated a draft of a comprehensive treaty dealing with the law of the sea. Part XI of the proposed treaty addresses the "Area"—the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. When dealing with the deep seabed the Conference was governed by the principle that the Area and its resources are the common heritage of mankind and all activities in the Area are to be conducted for the benefit of mankind as a whole. An International Sea-Bed Authority is established to control all activities in the Area. All states parties are members of the Authority and the Assembly, one of the principal organs of the Authority. Much of the actual regulation will be administered by another organ of the Authority, the Council. Seats on the Council are apportioned to assure that groups of states with special interests are represented. The Authority, through another of its organs, the Enterprise, is empowered to carry out activities in the Area directly, including the processing and marketing of minerals recovered.

The treaty establishes policies relating to activities in the Area and sets up a system for regulating those activities. In general the treaty provides:

* Activities in the area can only be conducted pursuant to an approved plan.
* The Authority is the only entity that can grant rights in the Area and it will issue licenses for exploration and permits for exploitation.
* Production ceilings are established to control the depletion of resources and regulate the market.
* Those exploiting the deep seabed will transfer their technology to the Authority and developing states.
* Those exploiting the deep seabed will share their profits with the Authority.

The mining industry in the United States vehemently opposes the proposed Law of the Sea Treaty. The industry believes that the provisions of the treaty are such that should it ever go into effect all incentive to commercially invest in deep seabed mining will be eliminated. The mining industry's objections to the treaty represent a partisan position but they do have some substance and merit attention. First, since the treaty does not contain a clause assuring the recognition of interests already engaged in deep sea mining, it does not adequately protect investments made before the treaty takes effect. The industry contends that there is no incentive to make large capital investments now, when whatever advantage a company gains may be taken away when the treaty goes into force. Second, under the treaty there is no guaranteed access to the manganese nodules. The
mining industry believes that it is essential to the United States' security needs, and of course its own economic needs, to have a guaranteed access to the minerals. Access to the deep seabed is to be granted by the Authority through the Council. United States access to the deep seabed appears rather dim when one considers that the Council can be controlled by the developing and Eastern Socialist nations. Third, the mining industry believes that the transfer of technology and sharing of profits requirements of the treaty mean that it will be supporting and funding a major competitor, the Enterprise. Lastly, the treaty imposes production ceilings thus limiting the profit the mining companies could make and further reducing the incentive to invest in deep seabed mining.

On June 28, 1980, President Carter signed the Deep Seabed Hard Mineral Resources Act. 94 Stat. 553. The stated purpose of the Act is to encourage the successful negotiation of a law of the sea treaty and to establish an interim program to encourage and regulate the development of mineral resources of the deep seabed. The Act establishes a system for allocating access to the minerals of the deep seabed among United States citizens and reciprocating states and sets up a regulatory framework. The basic provisions provide:

* A United States citizen may not engage in activity in the deep seabed without receiving authority to do so by being issued a license or permit under the Act, from a reciprocating state, or under an international agreement.

* The authorizations issued are exclusive.

* When nationals of other states interfere with activities being conducted pursuant to an authorization under the Act, the Secretary of State shall use all peaceful means to resolve the controversy.

* The removal of nodules from the deep seabed is taxed with the revenues going to a revenue sharing trust fund which will be available to Congress to make contributions under an international deep seabed treaty.

* No license or permit will be issued that will interfere with a similar authorization issued by a reciprocating state.

* Congress intends that any international agreement to which the United States becomes a party shall recognize the rights of United States citizens who have engaged in activities under the Act and provide security to those rights.

The United States mining industry supported the Act and believes it provides the security necessary to encourage investment in deep seabed mining. The Act pays rhetorical deference to the common heritage of mankind concept but, except for the tax and revenue sharing trust fund, the provisions represent the interest of the mining industry. When the House of Representatives was considering the Act it concluded that the doctrine of res nullius applied to the resources recovered, and the activities conducted under the authority of the Act were permissible until a law of the sea treaty takes effect and changes the doctrine.

When Congress passed the Act it was considering the national interest as well as the mining industry's concerns. Manganese, copper, nickel, and cobalt have been identified as materials critical to the national interest. They are metals important to the industrial and military needs of the country and it is essential that the United States have a secure supply to avoid dependence on foreign sources in times of national emergency. In passing the Act, Congress was recognizing that there was a need to secure a supply of these metals and that such a supply can be obtained from the deep seabed.

The controversy as to which policy will control the taking of minerals from the deep seabed can be distilled down to a conflict between the national legislation and the international “legislation.” The common heritage of mankind concept is obviously more favorable to the international community as a whole; the continuation of the res nullius doctrine as to the resources themselves is best when there are specific national interests to be served. At the present stage of the controversy, it is highly problematic that the United States will ratify the provisions of the proposed Law of the Sea Treaty that relate to deep seabed mining. Although the United States has endorsed the common heritage of mankind approach, in practical application it has favored continuance of traditional doctrines. The United States probably will not find any agreement acceptable until there are reasonable assurances of access to the resources and some security is provided the investments made by the industry. The practical effect of the United States refusing to ratify the provisions of the Law of the Sea Treaty relating to deep seabed mining could be relegation of the common heritage of mankind ideal to the international archives.

Note: As of this printing, the Reagan administration has decided to block early completion of the Law of the Sea Treaty.

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Constitutional Amendments That Never Were

By Jon Bradley King

The minute globe we inhabit has been partitioned by the forces of language, religion and war into almost 170 nation-states. These sovereign entities, varying widely in size, strength and political system share one common characteristic: each has a body of laws and customs reflecting the collective perception of its citizenry regarding the proper attributes of their government, in short, a "constitution." In some states, such as Great Britain and Saudi Arabia, the fundamental law is not contained in a single written text. In other nations, China for example, the constitution is a veritable laundry list specifying in wearisome detail precisely what the state is empowered to do. While some countries revere their constitutions and view alterations of the basic law with great hesitancy, other states, such as strife-torn Bolivia, have seen one military strongman after another proclaim "constitutions" which endure precisely as long as the current incumbent maintains his precarious grasp on the presidential chair.

In all nations change is a constant. The Brazilians and the Beninese, the Swiss and the Sudanese have each seen fit to alter their constitutions to reflect their changing conceptions of justice and political necessity. If a nation is prone to political upheaval, the internal mechanism set forth in a constitution for the modification of its provisions may never be utilized. However, if a constitution endures for a generation or more the unexpected ambiguities in its text or the changing views of the population will result in calls for constitutional amendment.

Our federal constitution emerged from the Philadelphia Convention of 1787 which assembled with a mandate to amend the flawed Articles of Confederation. In the nearly two centuries since the product of that gathering entered into effect, the demand for alterations in the Constitution has been constant. In twenty-six instances we have concluded that changing our nation's basic law was desirable, if not imperative. The Bill of Rights, the Reconstruction Amendments, Income Tax, Prohibition, Presidential Succession and the Eighteen-Year Old Vote chronicle our country's evolution toward a "more perfect union."

Yet for every amendment ultimately adopted, hundreds have fallen upon infertile ground. Scores have been consigned to the tender mercies of hostile committee chairmen while others, labelled the brainchildren of eccentrics, have been given prompt, if not decent, burials. Amendments have been offered with such diverse goals as prohibiting divorce, preventing filibusters in the Senate, limiting individual wealth to ten million dollars and banning polygamy.

However, certain proposals have received the requisite two-thirds vote of both the House and Senate, yet have failed to win the necessary three-fourths of the states to their cause. This article will discuss these ill-fated measures: the constitutional amendments that never were.

When the Founding Fathers brought forth their work to the waiting world, the result was viewed by some with alarm. Richard Henry Lee of Virginia, proclaiming that a "coalition of monarchy men...aristocrats and drones" had authored the document, proposed a Bill of Rights as "necessary against the encroachments of power upon the indispensable rights of human nature." Several states ratified the proposed Constitution only upon the condition that amendments be adopted to guarantee the rights of states and the people in the new federal government. Alarmed by demands for the convening of a new constitutional convention, Rep. James Madison fulfilled the promises made by his fellow Federalists during the ratification campaign by introducing twelve proposed amendments to the constitution. The ten finally adopted, better known provisions guaranteeing freedom of speech and worship and the right to a jury trial, among others, were well-received by most state legislatures. Virginia's ratification of the Bill of Rights in December 1791, a contribution to the cause of civil liberty perhaps unsurpassed in the history of the Commonwealth, brought the measures into effect. In contrast, Connecticut, Georgia and Massachusetts dawdled until 1939 before cautiously boarding the ratification bandwagon.

“The Lightning Speed of Honesty”
Two of Madison's proposals failed to obtain admission to the constitutional pantheon. The first dealt with the apportionment of the House of Representatives. The sole provision in the original document on that subject was the "3/5 compromise" under which 3/5 of "all other persons" i.e., slaves, were to be included in the census totals utilized to apportion the House. Some states, however, were hesitant to allow Congress to set the ratio between Representatives and the citizenry and urged that the formula of one Congressman for every 30,000 persons be set forth in the Constitution as well. After a series of tedious debates which featured proposals to prevent the size of the House from falling below 175 members, the Congress submitted to the states an amendment reading:

After the first enumeration, there shall be one representative for every thirty thousand until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress that there shall not be less than two hundred representatives nor more than one representative for every fifty thousand persons."

The apportionment amendment came within a single state of meeting the 3/4 ratification requirement. Although only one state actually rejected the measure, four states including the amendment's erstwhile supporter, Massachusetts, failed to even consider it. Historians have generally viewed the defeat of the amendment as beneficial due to the undesirable rigidity it would have imposed upon representation in the House during an era of rapid demographic shifts and a burgeoning population. Imagine the glorious vision of Congressmen more responsive to constituent needs and better able to represent the remarkably varied American electorate. It should also bring forth the nightmarish image of more than 7500 representatives (to serve the 226 million of us in 1980) spilling forth from the Capitol Office Building into the streets of Washington in a vain search for a desk or parking space with the vague hope of introducing some legislation should they ever have the opportunity to visit the floor of the House. It seems likely that when the Framers voiced concern regarding "mob rule" they never entertained the notion that the lower chamber of the legislature might meet the criteria for that concept.

The second amendment offered by Mr. Madison would have prohibited members of Congress from granting themselves a raise "until an election of representatives shall have intervened." Since the first Congress provided only a modest per diem allowance for its members, the need for this amendment was dubious. Nonetheless, six states saw fit to ratify it while five rejected it. The issue died down until 1816 when the House voted itself the luxury of an annual salary. The response from the electorate was a Nixonian firestorm. Those representatives who dared seek reelection were lucky to escape the tar and feather. Henry Clay himself waged a battle for his political life by admitting that he supported the measure. Since that era, the experience of Congressmen indicates that many would be quite content if the inconvenient matter of salaries was settled by a constitutional provision taking into account the vagaries of constituent pressure and the ravages of inflation.

The next abortive addition to our Constitutional scheme sprang from the meteoric career of Napoleon Bonaparte. In 1799 the Corsican corporal ousted the Directory, a band of lawyers whose shortcomings would likely have defied the descriptive power of our current Chief Justice. Firmly in control of France, Bonaparte embarked on a campaign of conquest that radically altered the face of Europe. Dynasties which had reigned for centuries and an Empire which had endured for a millenium tottered and fell within a decade. In 1804, after a series of assassination attempts had forcefully reminded him of his own mortality, Napoleon adopted the hereditary principle and proclaimed himself Emperor. Since an empire requires a nobility, the accession of the corporal to the throne mandated the elevation of his friends and relatives to lofty positions. In addition, Napoleon instituted the Legion of Honor to reward valor. Soon a new nobility had been established atop the ruins of the Bourbon monarchies.

At this juncture, love and money entered. Finance had proven a problem for American negotiators at the French court, principally due to their failure to grasp essential function in the diplomacy of the Napoleonic era. A conversation between Livingston, the American ambassador to France, and Talleyrand, Napoleon's foreign minister, will illustrate:

Livingston: "Can we sign a commercial treaty with you?"
Talleyrand: "Have you money?"
Livingston: "Money? But . . . but" (sputtering)
Talleyrand: "The point is, do you have a lot of money? You see, in my country it's very hard to do business. Think about it."

(from Jean Orieux's Talleyrand)
government was unduly sympathetic to French foreign policy. The Federalist hoped that by introducing an anti-nobility amendment they would arouse Republican opposition which they could then exploit by publicizing their opponents' ties to the Bonapartes. The concern that American diplomats might be corrupted while abroad and the xenophobia present during the period preceding the War of 1812 encouraged their design.

In 1810, Senator Reed of Maryland introduced the anti-nobility amendment. The measure was to supplement a clause in the original Constitution (Art. I, sec. 9, cl. 7) which prohibits officials from accepting titles or gifts from foreign governments without the consent of Congress. As passed, the amendment read:

If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honor, or shall, without the consent of Congress, accept or retain any present, pension, office or emolument of any kind whatever from any emperor, king, prince, or foreign power, such person shall cease to be a citizen of the United States and shall be incapable of holding any office of trust or profit under either of them."

The Jeffersonians failed to take the bait. Viewing the amendment as harmless, they supported it. Several states quickly ratified the proposal, which soon was but one state short of meeting the 3/4 requirement.

The final chapter of this amendment's history is fully in keeping with its convoluted origin. The South Carolina Senate ratified the amendment and sent it to the lower chamber for a vote. Had the South Carolina House adopted it, the anti-nobility amendment would have been enshrined in our Constitution. Instead, it was misplaced. The federal government, believing the ratification process complete, included it in the official copy of the Constitution distributed to the 15th Congress. Although the error was detected after some investigation, the damage was done. It was printed in several popular textbooks and, as a result, two generations of American schoolchildren were taught that the anti-nobility amendment had been incorporated into our fundamental law.

As for Jerome Bonaparte: he abandoned his American wife and returned to aid Napoleon at the Battle of Waterloo, thus demonstrating his exquisitely bad sense of timing. His wife died in a Baltimore poorhouse in her 90's. Talleyrand died full of wealth and honors. C'est la vie.

In 1860 America was tottering on the verge of civil war. A series of secret conferences was held in the interim between Abraham Lincoln's election and inauguration in the vain hope of preventing secession and armed conflict. The product of these furtive attempts at compromise was a series of proposed constitutional amendments designed to reassure the Southern states that a Republican federal government would not pose a threat to the status quo.

One particularly curious amendment was proposed by Rep. Clement Vallandigham of Ohio, who urged that the nation be divided into four regions: North, South, West and Pacific. Under his measure, each region could have vetoed the election of an individual to the Presidency or any piece of legislation antithetical to its interests.

The ultimate fate of Congressman Vallandigham may be worthy of reflection. In 1885, Vallandigham, then a private citizen and practicing attorney, was defending a client charged with murder. He planned to maintain in his closing argument to the jury that had his client handled the pistol in the manner alleged by the prosecution, his client would have undoubtedly shot himself, not the murder victim. In a rehearsal the night before his scheduled address to the jury, Vallandigham used a loaded gun and produced dramatic, albeit tragic, evidence to support his assertion.

The lame duck session of Congress which convened in December 1860 witnessed a series of attempts to halt the plunge toward war. Representatives from the Border States, who were particularly concerned that their homes might serve as battlegrounds, introduced a series of proposed statutes and constitutional amend-
ments designed to produce a compromise between North and South. Most of these measures sought to clarify the federal government's power to regulate slavery or the rights of states to leave the Union.

In February 1861, Representative Corwin introduced a constitutional amendment which would have prevented any attempt to abolish slavery in the Southern states. It read:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or to interfere within any state with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state.

The House passed the measure on February 28, 1861. When the Corwin amendment was introduced in the Senate, one Northern member sought to add a clause denying the right of secession. The alteration was defeated and on March 2, the Corwin amendment passed the Senate with precisely 2/3 of its members in support.

The legislatures of Ohio and Maryland ratified the amendment. Illinois adopted it by way of convention, the first state to employ this method of ratification. However, the New England states resoundingly rejected it, thus sealing the amendment's fate. The shelling of Fort Sumter in April 1861 reduced the hopes of compromise to ashes, and slavery perished in the conflagration of civil war.

In the "Gilded Age" following the Civil War, America lost its exclusively agrarian character and launched the beginnings of its Industrial Revolution.

By the turn of the century, industrial centers had sprung up throughout the Northeast and Midwest. Relying on a huge pool of cheap labor composed primarily of newly arrived immigrants from the Mediterranean and Eastern Europe, the owners of factories reaped tremendous profits.

The Progressive movement sought to halt the abuse of labor and the pervasive political corruption which resulted when private fortunes bought their way into government. A series of constitutional amendments were adopted due to the efforts of these reformers; the income tax, the popular election of Senators, and prohibition of factories were just a few of the efforts made.

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The 1960's witnessed another series of constitutional amendments on a wide variety of topics: presidential voting in Washington, D.C.; the abolition of the poll tax; presidential disability; and the eighteen-to-twenty-one year old vote. However, the wave of reform crested and ebbed in the 1970's. Two constitutional amendments proposed by Congress aroused opposition in conservative states, and at this writing, have failed to win ratification.

The Equal Rights Amendment (ERA) passed in the House and Senate in 1972 without strong opposition; within three years 35 of the required 38 states had ratified it. At that point, the amendment's progress halted. Opposition in the South and Southwestern states, grounded on the perceived threat of the ERA to "protective" employment and marital legislation prevented the measure from winning approval in additional state legislatures. Although the ERA came within two or three votes of ratification in Florida,
Georgia and Missouri, and though the deadline for state approval was extended to June 1982, it appears all but certain that the Equal Rights Amendment will join the ranks of the constitutional amendments that failed to garner the necessary support of 3/4 of the states.

In 1978, Congress adopted an amendment providing representation for the District of Columbia. The measure was passed over the opposition of those who contended that it was contrary to the principle of federalism to make the seat of government the equivalent of a state. This amendment read:

1. For purposes of representation in the Congress, election of the President and Vice-President, and Article V of this constitution, the District shall be treated as though it were a state.
2. The exercise of the rights and powers conferred under this article shall be by the people of the District . . . as provided by the Congress.
3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.
4. This article shall be inoperative, unless it shall have been ratified . . . within seven years from the date of its submission.

By 1981, eight states had ratified the proposal, but bickering among District politicians lobbying for its adoption, and the success of a referendum proposal advocating statehood for the District cast doubt on the amendment’s prospects.

By mandating rigorous requirements for amending the constitution, the Framers sought to discourage us from altering its provisions in the heat of political passion, to the detriment of all. The adoption of a mere twenty-six amendments in almost two centuries of constitutional government is not merely testimony to the wisdom of that cautionary device, but a tribute to a citizenry which has come to view the amendment process as the appropriate channel for efforts to make our Constitution more accurately reflect our fundamental values.

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**Burger. . .**

authorized pilot programs in representative districts, so that possible standards for the federal courts could be assessed by evaluating the results from such differing requirements as an examination on federal practice subjects, a requirement of prior trial experience, and a peer review procedure. An Implementation Committee on Admission of Attorneys to Federal Practice to oversee and monitor these pilot programs was created by the Judicial Conference. The Committee Chairman is Judge James Lawrence King of the Southern District of Florida.

In the same year, 1979, a Task Force of the Section on Legal Education and Admissions to the Bar of the ABA, chaired by Dean Roger C. Crampton of Cornell Law School, made a series of recommendations including that law schools offer instruction in basic litigation skills to all students desiring it, and that they make more extensive instructional use of experienced and able practitioners.

Chief Justice Burger has expressed concerns about law school training in professional responsibility. He has asked whether it is “sound educational policy to train people first in the skills of a professional monopoly and leave it to some vague, undefined, unregulated, undefined future to learn the moral and ethical precepts that ought to guide the exercise of such an important monopoly?” Law schools cannot make up for all shortcomings in early ethical training in the idealistic men are given substance as proposed amendments to the Constitution. Most fall victim to ideological opposition or to the more pragmatic philosophy embodied in the old saw, “If it ain’t broke, don’t fix it.” For the few that surmount the hurdles in Congress, the state ratification process serves as the arena where the measure’s opponents can battle against adoption in the fifty statehouses across our nation.

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Dr. Jeffrey B. Morris was a Judicial Fellow in the United States Supreme Court in 1977-78, and has continued as special research associate to the Chief Justice.
For more than 260 years--from early in the eighteenth century to the final quarter of the twentieth--there has been a traditional relationship at the College of William and Mary between advanced studies in “liberal learning” and the professional preparation for the practice of law. The bicentennial of the formal chair of law in 1779, observed in a series of academic events during the 1979-80 year and climaxing in the occupancy of the new law building in the summer of 1980, may best be understood as a watershed--on the one hand, offering a perspective back to the earliest days of the College itself, and on the other hand, looking to the changing professional needs of the future.

Part of the uniqueness of the new Marshall-Wythe building derives from this retrospective and prospective character. Dominating the main foyer of the building are the two colored-glass panels representing Sir William Blackstone and Sir Christopher Wren, gifts of the faculty of law at All Souls College, Oxford, in recognition of the bicentennial of American legal education. Through the doorways between these panels, themselves reminders of the beginnings of legal education, may be seen the National Center for State Courts, a unique agency committed to the study of practical means of improving the administration of justice in all of the states for the future.

Blackstone and Wren are former fellows of All Souls with close ties to the William and Mary story: Wren, the great English architect, is credited with the basic sketches for a “colledge” building which were then “adapted by certain gentlemen of the country” (i.e., colonial builders). Blackstone, the first occupant of the Vinerian chair of English law, and author of the classic Commentaries on the Laws of England, was, along with his chair, the model in large part for the pioneer chair of law at the Williamsburg institution 21 years later. A small brass plate adjacent to the “Oxford windows” describes the circumstances under which the All Souls faculty arranged to make the gift of the windows early in 1978.

But the association of advanced studies and professional training goes back earlier than that, as a companion brass plate indicates. At the end of the seventeenth century, when the College was first chartered, the Virginia colony was emerging from its raw frontier character into something of a settled tidewater society, with growing commercial economy and the need for professional leaders in law and government. For those who could afford it, and had the ambition to do it, the reading of law at one of the Inns of Court in London was a logical means of getting a “head start” in what was beginning to be a highly competitive society. Taking advantage of the new
n the History of Wythe

S. Swindler

educational institution—a "grammar" or preparatory school complemented by what was a standard two-year course of university-level study—that colonials could go to London equipped to hold their own with students from Oxford and Cambridge also enrolling at one of the Inns of Court.

One of the earliest William and Mary students to undertake this sequence of preparation was John (later Sir John) Randolph, one of seven sons of William Randolph of "Turkey Island," who attended the William and Mary preparatory and, probably, university courses of study between 1705 and 1713. Randolph then traveled to London and entered Gray's Inn on May 17, 1715. His "pre-legal" education, as well as some practical legal experience he had between 1713 and 1715, paid dividends; Randolph was called to the bar of the Inn two years later, well ahead of the normal three-year study period; and by 1718 he was back in Virginia ready to take his place among his professional peers.

The Randolph tradition—one family's example among others—substantially contributed to the identification of advanced study and the law at William and Mary. Sir John's sons, Peyton the Patriot and John the Loyalist, both followed their father's example of study at the College and qualification for the bar at the Inns of Court. His grandson Edmund—later to become the first Attorney General of the United States—also attended the College, but read his law under his father and uncle; for now, on the eve of Independence, there were changes in the common law as practiced in Virginia which foreshadowed the need for an "Americanized" course of study.

In the Jefferson (rare book) Room of the law library are portraits of Sir John Randolph and his grandson, Edmund, visually commemorating the earliest association of law and education at William and Mary. Also in this room are representations of Thomas Jefferson and John Marshall (both Randolph kinsmen), in whose careers the transition to an "Americanized" law and a course of study in "Americanized" common law was to begin. Jefferson recognized that the knowledge of the English parent stock was essential; in writing about reading for the bar, early in the nineteenth century, he urged four treatises as fundamental—Bracton, for the common law as it was epitomized in medieval times; Sir Edward Coke, for the beginning of the Stuart age; Matthew Bacon, for the state of the law after the Restoration; and Blackstone, for the "modern" law.

But Jefferson also recognized that an American law was essential for practical legal study—and who better to offer instruction in such law than his own mentor, George Wythe, who with Jefferson had been
responsible for most of the famous “revisal” of the common law after the Revolution? So Wythe, an experienced tutor for a generation of aspirants to the bar before the chair of law was established, was the logical choice to be the first professor of law in the United States. Marshall, one of his first students, read his law from Bacon, one of Jefferson's recommended books—and St. George Tucker, who succeeded Wythe a decade later as second professor of law, would prepare the first American notes to Blackstone.

The Jefferson Collection in the rare book room will, when it is completed, replicate the law library of Jefferson himself, much of it undoubtedly collected under the guidance of Wythe. But the rare book room will also preserve the artifacts and mementoes of earlier legal studies associated with William and Mary—photostats of the admissions of Sir John Randolph and his sons to the Inns of Court, and eventually a facsimile reproduction of the Randolph “commonplace book” used at Gray’s Inn in 1715.

The William and Mary chair was quite consciously modeled after both the Vinerian chair at Oxford, and the practical training offered by the Inns of Court. St. George Tucker—who had been originally intended for enrollment at the Middle Temple—in his 1803 introduction to the “American Blackstone,” wrote that until the Commentaries were published, “the students of law in England, and its dependencies, were almost destitute of any scientific guide to conduct their studies.” He added that “even in those Inns of Court whither those who sought to acquire a knowledge of the profession, generally repaired for instruction,” teaching materials were sparse.

Since the pragmatic American approach, of necessity in colonial times, had been to merge activities which in the mother country had developed separately—law and equity actions were heard in the same court, although on different court days; and the distinction between solicitors (office practitioners) and barristers (trial lawyers) was never followed—it was logical to merge the two elements of legal education. Thus the university-level study of law introduced at Oxford in 1758, and the formal apprenticeship represented in such centers as Gray’s Inn or the Temple, simply became two parts of the same program in the William and Mary law curriculum. This was quite clearly set out in the formal university “statutes” for the law degree, which stipulated a course of study embracing history, law and government as well as practical examinations in specific subject-areas of the profession.

The demand for instruction in the new American law began to spread in the generation after independence; Justice James Wilson of the Supreme Court offered a series of lectures, primarily on the Constitution, at the University of Pennsylvania; Tapping Reeve’s famous proprietary school at Litchfield, Connecticut, appeared soon after the William and Mary chair; law was an element in the opening curriculum of the University of Virginia in 1819; and the most famous chair to be occupied by a jurist was probably the Dane Professorship at Harvard, expressly created for Joseph Story in the early 1830s. For twenty years there was a renowned proprietary law school in Cumberland County, Virginia, founded in 1821 by Judge Creed Taylor; and another was operated in Winchester by one of St. George Tucker’s sons, Henry.

Another Tucker son, Beverley, brought the pre-Civil War law program at William and Mary to its apogee in the 1830s and 1840s. Beverley, a committed states-rights constitutionalist, indeed gave his name to the so-called “Southern school” of legal education in this ante-bellum period. The curriculum was as exacting as ever; the catalog for 1839-40 stipulated required reading in Vattel’s Law of Nations, the famous Federalist essays on the Constitution, St. George Tucker’s American notes on Blackstone, Kent’s Commentaries, Stephens on Pleading and Starkie on Evidence. In addition, said a course description: “A sort of moot court is contrived by devising cases which the students are required to conduct to issue; and which are generally so managed as to lead to an issue of law; on which briefs are handed in, argument heard, if necessary, and judgments pronounced.”

The crippling effects of the Civil War on the College in general, and the law program in particular, forced a hiatus of sixty years in the historic law program. The modern period dates from a revival in 1922. The third century began with the opening of the new building in 1980.

Tremors of a New Beginning

By Larry D. Willis

Many changes have accompanied the moving of the Marshall-Wythe School of Law from its historic setting on the old William and Mary campus to the new facility one mile away. Most of the differences are readily apparent: modern building, spacious library, comfortable classrooms. Other, more subtle, changes include better cooperation with the legal community, higher student morale, and an effect on the surrounding neighborhood.

"The plusses outweigh the minuses overwhelmingly," says Dean William Spong. "Library space is our most important addition. We now have the capacity to seat every student; the collection is divided and displayed to facilitate research; and the acoustical classrooms better lend themselves to teaching. In short, the whole atmosphere for instruction is better."

Dean Spong cites other beneficial aspects of the new facility including an innovative moot courtroom which he believes contributed to the success of this year's National Moot Court teams.

The moot courtroom itself is, in addition to providing an fine teaching forum, attracting considerable attention from the legal community. Many curious attorneys and judges have toured the facilities which are as technologically advanced as any in the country. Already, administrative hearings have been held there, and state hearings are imminent. These and other contacts with the practicing bar in Virginia are establishing relations which will benefit Marshall-Wythe students now and in the coming years.

Another legal relationship with far-reaching possibilities exists between the law school and the National Center for State Courts. Each is, in a large measure, responsible for the presence of the other. The National Center was formerly based in Denver but was swayed in its search for new headquarters by the idea of close cooperation with a good law school. To be effective, the two needed to be very close. The only available tract of land large enough for two such buildings was the former site of Eastern State Hospital, given to the college when that institution moved to Dunbar. The National Center leased its grounds from the college for a nominal sum and started construction in May of 1976. With such a commitment as the actual construction, William and Mary finalized plans for the new law school and broke ground in the Fall of 1977.

Relations between the two institutions have been pleasant and productive. A joint committee is studying areas of cooperation and has already hosted a very successful symposium on "State Courts and Federalism in the 1980's." They are also sponsoring an essay contest for Marshall-Wythe students and are adding to the curriculum in the realm of judicial administration. Many current students work "next door" and value both the experience and convenience of their jobs there.

Student life has changed dramatically with the law school's change of venue. Gone are the ivy-covered walls, tree-lined brick sidewalks and convenient access to the main campus. "Everything is under one roof here," is a common remark. The four-building approach of the on-campus days, including Old Rogers, James Blair and Camm, did not promote a sense of unity. It was difficult to think of a building with classes in it as a body of students. First year students were gone by noon every day; the upper-classes seemed to meet in the afternoons; and very few of either group chose to stay any longer than they had to. There was little interaction between students outside of class. The majority of students took little interest in changing the situation.

Expanded and more pleasant surroundings are now causing more people to spend more time at the law school. The distance from other facilities results in dinners to heat and eat in the lounge. Individual lockers make it possible to keep books and other personal belongings close at hand. Generously donated oriental rugs and comfortable chairs create a relaxed atmosphere in the main lobby - fine for studying, better still for not studying. The two factors combine to bring a diverse group of 450 law students closer together.

In the air-conditioned comfort of an elaborate edifice, it is much easier to have a positive attitude toward
Marshall-Wythe as a fine institution for the study of law than it was in the flooded basement of an inadequate library. This new found pride in a mere building has carried over into pride in what the school has become, what it has the potential to achieve. Physical plant can often affect attitudes and it has done so in this case. More students are interested in what happens in and with their school, as evidenced by larger voter turnout in student elections, more involvement in special events and a willingness to work to make the school better still.

There is a general feeling that the new law school building is improving the academic life at Marshall-Wythe. Apart from the obvious advantages of well-designed lecture rooms and outstanding library facilities, the professional atmosphere which pervades the building almost creates an eagerness to study. Long hours of reading, briefing and researching are made as painless as possible in a place which actually seems to be designed for utility.

There is a general feeling that the new law school building is improving the academic life at Marshall-Wythe. Apart from the obvious advantages of well-designed lecture rooms and outstanding library facilities, the professional atmosphere which pervades the building almost creates an eagerness to study. Long hours of reading, briefing and researching are made as painless as possible in a place which actually seems to be designed for utility.

Few people in the law school community realize the profound effect that the new building has had, and will continue to have on the surrounding neighborhood. Not much thought has been given to the repercussions resulting from the intrusion each day of hundreds of students, faculty and visitors.

Picture South Henry Street before 1976. Small amounts of traffic travelled what more closely resembled a country road than a city street. It was a quiet neighborhood, traditionally and predominantly black, nestled on the outskirts of town. Even the presence of Eastern State Hospital failed to disrupt the area.

It is 1981 and things have changed. Traffic is steady now on that same road, the curb lined with overflow from the school parking lot. Cars are, in fact, the most visible and most resented aspect of the school. Resident complaints of nuisance and minor property damage led to the proliferation of "no parking" signs along the sidestreets and beside driveways. Even now, students deprive many from parking in front of their own homes or receiving personal visitors who might drive by.

South Henry Street, from Francis Street to South Boundary, is presently zoned for limited business and it is expected that several private offices will join Southern Bank and C&P Telephone Co. along that side of the street. From South Boundary Street on past the law school, South Henry Street is now zoned "Residential C." This is a medium-density rating satisfied by apartments and townhouses. Currently, there are no apartment building or townhouses on South Henry Street.

In the years since construction of the National Center for State Courts and the law school, property values have increased dramatically. The average assessed value of all land in Williamsburg has increased between twenty-five and thirty percent in the last few years. The neighborhood surrounding these bastions of higher education contains parcels which have increased 200, 300, even 400 percent in some instances. The city real estate assessor predicts another twenty percent increase this year.

Increasing property taxes and the possibility for capital gains will force many landlords to make other use of their property, and even many homeowners will be unable to remain in this immediate area because of its rising costs. Townhouse units are nearing completion on South Boundary Street, less than a block from the law school. It is only a matter of time before the tight housing market in Williamsburg makes similar construction a reality on South Henry Street, displacing people who, in many instances, have lived there all their lives.

The construction of the new law school building has enriched the experience of the students by providing better facilities and closer relations with the practicing bar. The benefits are abundant and widespread, but they are not given free of charge. Marshall-Wythe's future, and the impending commercial development of the surrounding neighborhood, will come at a great expense to those who know nothing of Moot Court or Federalism in the 1980's. Increased comfort and spacious surroundings for students will eventually bring about discomfort and a change in surroundings for the current neighborhood residents. The costs and benefits have been weighed and the residents have lost. Their involuntary sacrifice will further the goals of urban development and academic excellence, leaving a debt for Marshall-Wythe students to repay through service to the community.

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Legal Scholarship and the Mission of a Law Faculty

By Charles Koch and Frederick Schauer

People who wish to comment pejoratively on the values that prevail in an academic institution often refer to the phenomenon of “Publish or Perish.” By contrast, one never hears reference to “Teach or Perish” as a case of misplaced values. The clear implication is that scholarly publication is little more than an extra, and that academic institutions that consider it vitally important have in some way mislaid their priorities. Since this and other law schools of equivalent prominence require scholarly publication as well as excellence in teaching from their faculties, it seems that either much of the popular wisdom is wrong, or that all of the country’s major law schools have in some way gone off the rails. Because we believe in the importance of scholarship and research by law faculties, we felt that it might be useful to explain the sources of this belief.

In a way it seems bizarre that two academics should have to defend the need for research and scholarship. If we worked in a physics department or a chemistry department we would find that the value of pure research or pure thinking was recognized instantly. Why then must law professors accept a challenge to defend what in almost any other discipline would be considered the backbone and the very currency of the academic environment? The answer, perhaps fortunately and perhaps unfortunately, is complex.

Some students, some practitioners, and, interestingly, some law professors often ridicule expansive and abstract thinking and writing by those who teach in law schools. Legal education, it seems to many, should produce mechanics, and thus legal educators should engage themselves entirely in diagramming the functioning of the machinery. No one doubts that transmitting the technicalities, the language, and occasionally the secrets of the guild is a legitimate part of legal education. The mistake comes in assuming that it is the only part.

Though lawyering is not an art form in the same way that painting or sculpture is, some analogy to the visual arts may help us to explore the relationship between the trade school and the academy. Within the visual arts we can characterize two types of practitioners—craftsmen and artists. Often the artists are craftsmen, and sometimes craftsmen produce art, but the two operate at different levels on the production of a pleasurable visual experience. The craftsmen perform with great technical skill and dexterity. What he produces may be valuable and indeed enjoyable to look at regardless of whether it displays any creativity or imagination. The value of the work produced by the craftsman thus varies directly with the extent of the craftsman’s skill. An artist also provides visual pleasure, but the pleasure is derived from a different source. It is a mental and emotional experience of a wholly different kind from that produced by the competent craftsman. Some artists, like Picasso and Magritte, have been highly competent technical craftsmen as well. For others, such as Van Gogh, the technical skill is almost totally absent; but the artistic experience and pleasure is still very much there. While the artist’s ability to produce pleasure does not necessarily rely on mechanical gifts, mechanical aptitude often makes it easier for the artist to express his creative ideas. Conversely, although a craftsman relies foremost on his technical skill, he surpasses the boundaries of that skill when he adds to his product that which we call artistic. Thus even in teaching the craftsman one must nurture the artistic intuition. In expanding the level of technical skill, one must fold in new and different intuitive notions.

If we are to teach craftsmen we must concentrate on the skills that craftsmen need. But these skills are relatively easy to transmit, especially since we take pains to find those with particular aptitude for learning those skills. But it is the creative side of the law that is much more difficult to teach. Indeed, the creative aspect is often thought to be almost completely intuitive. Yet to a great extent the creative side of the law is passed on from generation to generation. Through this process the state of the art is advanced, the societal benefit from the law increases, and the advances in the art pass quickly into advances in the craft. These advances are important even to and perhaps especially to the individual craftsman because these advances allow the craftsman to reach beyond the boundaries of pure technical knowledge. Strong evidence exists for the proposition that the very best practical lawyers are those who are both highly skilled in their craft but who never ignore the potential for creativity.

A major problem for the law teacher is how to convey this creative element of the law; how to bring the creative craftsman in touch with the creative aspects of the craft. This educational goal is unfortunately resisted by some elements of the craft guild of lawyers today, yet it is an important facet of the training of those who will soon be members of that guild.

Since the creative aspect of the law is nurtured rather than transmitted in a simple fashion, the teacher must have a sense of it in order to be able to nurture it in others, particularly students. Legal scholarship, which at its highest form is the search for new and creative analyses of real problems, is the practice of legal creativity in its purest form. A legal educator who actively engages in creative scholarship is by definition
engaged in advancing beyond the frontiers of settled law. Engaging in legal scholarship therefore trains the legal educator to pass on the element of creativity to the next generation of lawyers. Furthermore, since creativity comes easiest when there is technical fluency, scholarship requires the teacher to develop technical skills in both teacher and student as the necessary foundation for creativity.

Faculty scholarship has other direct effects on the quality of the instruction that is offered to students. The faculty member who is a productive scholar in the areas in which he or she is teaching is best able to deal with and convey a sense of the most important contemporary problems in the field. Closely allied to this is the fact that scholarly necessity requires the scholar to be conversant with all of the relevant materials and sources. Thus, active scholarship produces the teacher who is best able to teach the issues of today and of the future, and therefore best able to prepare students to practice today and in the future. Moreover, the teacher who is engaged in active scholarship is inevitably enthusiastic about that area, and can therefore exhibit and impart that special enthusiasm for the subject that is essential for a successful learning experience. It is, for all of these reasons, a major mistake to view classroom teaching and important scholarship as mutually exclusive. In most cases the two activities are mutually supportive.

Although scholarship is therefore a fundamental part of successful teaching, it cannot be evaluated on this basis alone. Teaching is only part of the job of the academic, and for that reason society grants to us what is mistakenly characterized as "free" time. This free time, however, is not really ours. Society gives us this time so that it can be devoted to advancing the law. Members of a law faculty, unlike most practicing attorneys, have the time as well as the experience and expertise to contemplate broader issues. In few other fields of scholarly endeavor do academics have as much influence on the development of the field. Treatises and law review articles are frequently relied upon and cited by the courts. Law professors are usually prominent on committees dealing with rule and statutory revision, restatements, and broader proposals for law reform. Academic criticism often exercises a significant influence on the development of case and statutory law. While historians rarely make history, it is clear that law professors quite often make law.

For these reasons, a reputation of a law school is highly correlated with the reputation of the scholarship produced by its faculty. Law schools that generate impressive scholarship also produce the complete law graduate: those who have been grounded not only in the technical skills, but who also have had nurtured that part of lawyering that parallels the creative aspects of the artistic intuition. It is far from a coincidence that students from the law schools best known for faculty scholarship go on to the best and most challenging legal positions. This is true even though some of these law schools do not concentrate on technical knowledge. As between technical skills and creative talents, any deficiency in the first is easily remedied in the early years of practice, but a deficiency in the
second is virtually beyond remedy throughout the course of legal practice. An increase in scholarship thus justifiably increases the marketability of the students that a law faculty sends out into the profession.

It is the duty of a law faculty to devote much of its time to activities that enhance the profession and that further the service the profession performs for society. This public duty is especially important in the law. Unlike the sciences, which set their own pace for development, the law must parallel society. It is inevitable that society will continually change, and law must change with society or it will fail to fulfill its societal function. A law faculty that fails to participate in this process of legal change has failed its public trust.

Scholarship is therefore important to any law school in enhancing the learning experience of its students, in aiding the students and alumni whose careers ride on the reputation of the school, and in performing the function assigned to the institution by society. It is also a crucial factor in the ability of this school to continue to attract a highly qualified faculty and to retain the highly qualified faculty it now has. Faculty visibility and reputation also attract highly qualified students, on which so much of the school depends. Consequently, it is in the best interests of the entire law school community and those it serves that scholarship be encouraged and enthusiastically supported.


intraprison rules or state and federal law. Recently, P-CAP members have been allowed to represent prisoners in parole or immigration and naturalization hearings and the third year practice program permits P-CAP to offer even more extensive student representation of an inmate under the supervision of a practicing attorney.

The directors of P-CAP have made a concerted effort in the past year to retain a flexible format for the program, while providing students with more definite guidelines within which to structure their project work. Three directors assume responsibility for the project: a Program Director, an Administrative Director and a Research Director. This tripartite directorship controls P-CAP functions under the careful supervision of faculty member Professor John M. Levy. In addition, P-CAP has hired a part-time attorney-consultant, Ms. Christie Cyphers, to provide students with practical advice concerning the more difficult problems P-CAP encounters.

Although students are given a great deal of leeway within which to handle their caseloads, promptness in responding to prisoner complaints is emphasized strongly. The major focus of the program is on the efficient, competent and timely processing of and response to prisoner complaints, rather than satisfying any rigid course requirements. Faculty participation allows this clinical program to be offered as a credited course at the Marshall-Wythe School of Law. The only curriculum mandate is that the project members provide forty hours of service over the course of the semester and attend several mandatory seminars. These service requirements may be allocated to the project member’s various prisoner complaints as the circumstances warrant or in accordance with the student’s interests. The course is given on a pass/fail basis, allowing a student to obtain one credit hour for participation in the program.

P-CAP provides students with first-hand research experience accrued from participation in the program, but more significantly, it provides students with an invaluable opportunity to obtain clinical experience and to imbue past course work with a sense of practicality. In addition, valuable lessons are to be learned by all prospective lawyers who anticipate doing pro bono work or court appointed service. Common problems encountered by project members in interviewing inmates are communication barriers and the prisoner’s defensiveness. In their eagerness to seek release by any means possible, inmates sometimes have been known to distort the facts or, at least, omit those facts most damaging to their interests. If nothing else, students learn to elicit the essential facts despite the communication barriers and they learn to overcome their fears of visiting a penal institution. On the whole, most inmates are sincere in their request for assistance. Therefore, P-CAP students are particularly frustrated by the prospect of delivering negative results from their legal research. However, the most satisfying aspect of P-CAP is the ostensible gratitude of prisoners for the services provided by the Marshall-Wythe students.

Over the past year, greater emphasis has been placed on versing project members in the major areas of applicable substantive law and in familiarizing them through group seminars, with available research tools. A number of seminars are scheduled each semester to aid students in developing necessary skills and knowledge. Seminars presented last semester included an interviewing techniques seminar; a lecture on relevant library resources: a film on a New Mexico prison made shortly before a major inmate riot; a lecture by Federal Judge Calvitt Clarke, of the Eastern District of Virginia, on habeus corpus petitions and 1983 actions; and a discussion with prison inmates on the rehabilitative and nonrehabilitative aspects of prison life. Similar seminars are scheduled for this semester including discussions with a local Prosecuting Attorney and a U.S. Parole Commission representative. Seminars are open to the public and uninhibited discussion is encouraged. While presenting a discussion on the trials and tribulations of prolonged prison life last semester, a group of inmates addressed the stigmatization attached to imprisonment and openly confronted participating students about their personal views with regard to the moral character of inmates.

P-CAP provides an essential service to both federal and state inmates. The Project eliminates false hopes created by jailhouse lawyers and assists inmates in obtaining their full legal rights. Furthermore, the Project serves to educate and experience prospective lawyers about the realities of dealing with our penal system. And, hopefully, P-CAP provides, in at least a limited fashion, a tool for facilitating change and improvement in the federal and state correctional systems.
The Fourth Amendment protection against unreasonable searches and seizures has always generated a great deal of judicial controversy and confusion. The judicial struggle continues as law enforcement agencies begin to use complex electronic surveillance devices. The problem arises in determining when an actual search or seizure has occurred. Attention will be given here to one of those devices, the beeper, and to the determination of whether its placement and monitoring constitutes a search and seizure within the meaning of the Fourth Amendment. Different judicial approaches will be compared and the effect of recent court decisions will be explored.

In applying Fourth Amendment rights and protections, the courts originally relied upon concepts of property law and trespass. A literal two step approach was followed. First, the protection was limited to searches involving an actual trespass and to seizures comprising the taking of material objects. Second, for a search to have occurred, a physical intrusion into a constitutionally protected area was required. Although this early doctrine was expressly repudiated in Katz v. United States, 389 U.S. 347 (1967), it may not have been completely abandoned. The nature of the intrusion and the area alleged to have been searched still appear to be important factors.

In Katz, government agencies attached a listening device to a public telephone booth to monitor the conversations of a suspect. The United States Supreme Court held that such a nontrespassory invasion constituted a search and seizure because it violated the privacy upon which Katz justifiably relied while using the telephone. The Supreme Court's emphasis shifted from protecting places to protecting the individual's reasonable expectation of privacy. The Supreme Court interpreted the Fourth Amendment in a more abstract, flexible manner. Mr. Justice Stewart's majority opinion stated:

The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not the subject of Fourth Amendment protection... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Cases applying the Katz rationale have consistently adopted the twofold test in Justice Harlan's concurring opinion finding comfort in its well-defined guidelines and ease of application. Under Harlan's test, an individual must have exhibited an actual subjective expectation of privacy, and this expectation must have been one that society was prepared to recognize as reasonable. Besides focusing upon the actual search and seizure, the Court considered individual expectations and societal norms in applying Fourth Amendment protection. Factors the courts have considered in ascertaining whether the situation meets the test include the nature of the premises or activity, the extent of personal interest in the premises, society's characterization of the place or activity, and the steps taken by the person to maintain privacy.

Although what appears to be paramount in Katz is that the government invade an individual's legitimate expectation of privacy, more is required than the mere violation of individual privacy. A search and seizure must also be involved. This conclusion is supported by the recognition in Katz that, "the Fourth Amendment cannot be translated into a general constitutional right to privacy." The Court did not abolish the requirement that a search be involved; it merely shifted its emphasis from the actual search to the invasion of individual privacy. In Katz, by listening to and recording Katz's words, the government violated the privacy upon which Katz justifiably relied, and by acquiring the information, searched and seized the actual content of his conversation.

In attempting to resolve whether the placement and monitoring of a beeper is a search within the Fourth Amendment, the courts have used varying and inconsistent approaches. The problem lies in determining which of these approaches best interprets the Fourth Amendment. The Fifth and Ninth Circuits have arrived at completely opposite decisions.

In United States v. Holmes, 521 F. 2d 859 (5th Cir. 1975), the Fifth Circuit held that monitoring a beeper was a search and seizure. Government agents had attached an electronic beeper to defendant's van while it was located in a public parking lot. The beeper ultimately enabled the agents to locate illegal drugs in the defendant's possession. The court found a search and seizure within the meaning of the Fourth Amendment because the defendant possessed a valid expectation of privacy while in his vehicle. The court reasoned that although an individual may expect surveillance when he drives his vehicle, he can reasonably expect to be alone in his vehicle. Essentially, the Fifth Circuit extended the Katz rationale to monitoring the movement of motor vehicles.

At the other end of the spectrum is the Ninth Circuit's determination in United States v. Hufford, 539 F 2d 32, cert. denied, 429 U.S. 1002 (1976), that the monitoring of a beeper in a motor vehicle is not a search. In Hufford, a beeper was placed in a drum of caffeine legally purchased by the defendant. A second device was attached to the defendant's truck enabling government agents to locate a garage where they seized illegal drugs. The Ninth Circuit held that the monitoring of the beeper on the truck was not a search because there was no reasonable expectation of privacy.
The court equated the use of the beeper with visual surveillance since the beeper only augmented what could be done by visual surveillance alone.

Despite first impressions, the differences between the Fifth and Ninth Circuits' decisions are not fundamental. The major distinction lies not with the determination of when a search occurs, but with the determination's application to vehicular movement. The courts arrive at different results when applying the Katz reasonable expectation of privacy standard to movement. The difference springs from the analysis of the Katz statement that "what a person knowingly exposes . . . is not a subject of Fourth Amendment protection." The Ninth Circuit considers movement on a public thoroughfare as something that one could reasonably expect to remain private. This appears to be a far too narrow reading of Katz. The Fifth Circuit approach embodies the entire context of the Katz rationale. Katz also stated that "what an individual seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Thus, although an individual may anticipate visual surveillance on public roads, he may also reasonably expect not to have his every move traced by an electronic device.

Other circuit court decisions have further confused the issue. In United States v. Clayborne, 584 F. 2d 346 (10th Cir. 1978), through the aid of a beeper placed in a drum of chemicals, government agents discovered defendant's clandestine laboratory. The court followed the Ninth Circuit view that the beeper merely facilitated visual surveillance, and hence no search was involved. The Tenth Circuit reasoned that since the clandestine laboratory in a commercial establishment was somewhere between a home and a motor vehicle, the defendant did not have a reasonable expectation of privacy. The court also considered the fact that the police had probable cause to believe that the illegal activity was taking place.

A decision that resolves these apparently inconsistent approaches is United States v. Moore, 562 F. 2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978). In Moore, government agents placed one electronic device in a chemical container and another on defendant's truck. The beepers were used to monitor the individual's movements and to keep track of the chemicals in defendant's possession. The First Circuit distinguished between the use of a monitoring device to track a vehicle and the use of such a device to monitor the presence of chemicals in the house. Use of the former beeper was not considered a search because of the reduced expectation of privacy associated with motor vehicles. The court also considered the fact that the agents had probable cause for believing a criminal enterprise was underway. On the other hand, the beeper placed in the container was a search because it was an invasion of the privacy of the home. The court specified that the chemicals were not contraband or otherwise wrongfully in defendant's possession, and that the government had no right to monitor the continued presence of noncontraband goods in defendant's home. When the defendant withdrew from public view, taking the chemicals inside the house, he had every right to expect that his activities in the house would remain private. Since the defendant had a justifiable expectation of privacy, the continued monitoring of non-public information constitutes a search.

The most recent case to confront the beeper issue is United States v. Bailey, 628 F. 2d 938 (6th Cir. 1980). In Bailey, government agents posing as suppliers of precursor chemicals, agreed to deliver the chemicals to the defendant. A beeper was placed in one of the drums which enabled agents to trace the drum to an apartment complex, and later after losing and regaining transmission, to another apartment building. The signal was pinpointed to a locked storage room in the complex basement. After seventy-five days, when the beeper's signal began to weaken, the agents secured a warrant, later declared invalid, entered the complex and seized the chemicals. The defendants were then indicted for conspiracy to manufacture phencyclidine. The Sixth Circuit concluded that the government's use of the beeper for surveillance of noncontraband personal property in the private areas was a search and seizure in violation of the Fourth Amendment. Although the Sixth Circuit claimed to use Katz's justifiable expectation of privacy standard, the court invoked a unique analysis in reaching its decision.

In Katz, because the individual legitimately expected the information or material the government acquired to remain private, the acquisition constituted a search and seizure for Fourth Amendment purposes. Katz did not hold that every invasion of individual privacy formed the basis of a Fourth Amendment violation. Although a fine line existed between the two, Katz required both an invasion of privacy and a search and seizure. Therefore, the Fourth Amendment protected privacy only to the extent that it prohibited "unreasonable searches and seizures of persons, houses, papers and effects."

On the other hand, the Sixth Circuit appears to equate search and seizure with a government intrusion of an individual's reasonable expectation of privacy. The court in Bailey considered irrelevant whether a particular government intrusion was classified as a search and seizure, but focused only upon whether the government acts violated an individual's legitimate expectation of privacy. This general holding requiring only an invasion of individual privacy for a search and seizure to occur is far too broad and ignores past search and seizure requirements. Such analysis translates the Fourth Amendment into a general constitutional right to privacy which is precisely the fear Justice Black expressed in his dissent in Katz. Black feared the Court's use of a broad, abstract and ambiguous concept of privacy as a substitute for the Fourth Amendment's guarantee against unreasonable searches and seizures.

The decision in the Bailey case may, however, still be correct, and a comparison of the decision with past approaches is helpful. The approach taken by the Fifth
Circuit in United States v. Holmes, that the monitoring of a beeper in motor vehicles is a search and seizure, appears to be harmonious with and goes beyond Bailey. The court in Bailey did not address the monitoring of movement issue. The monitoring in Bailey took place within an apartment, a traditionally protected area. The only real difference between the cases is the analyses used, and Bailey adds little to the Holmes decision.

The approach of the Ninth Circuit in United States v. Hufford, while in conflict with the Holmes decision, is consistent with Bailey because it is distinguishable on the facts. The Ninth Circuit confined its consideration to the beeper attached to the truck which enabled the agents to locate the garage, and failed to address the beeper in the chemical drum. As such, the court was only concerned with the beeper's role in monitoring movement. If the truck had been parked outside the garage, the court would have been correct in confining itself to the monitoring of movement issue. Yet, because the beeper actually intruded into the confines of the garage, the beeper not only searched defendant's movement, but also his property.

On the other hand, the court in Bailey concerned itself with the beeper's intrusion into a private place, defendant's apartment. Although an individual may have a lesser expectation of privacy in a motor vehicle operated in public, he has a justifiable expectation of privacy within his apartment. In Bailey, since there could be no plain view of the object, the government would have been unable to acquire information not otherwise publicly available without the aid of the beeper. Therefore, Bailey presents a situation in which the Ninth Circuit may follow the Fifth Circuit and reach a similar result—the monitoring of an electronic tracking device in one's home is a search in violation of the Fourth Amendment.

The Tenth Circuit decision in United States v. Clayborne appears more difficult to reconcile. In Clayborne, the court relied partially upon the fact that the government had a probable cause belief that illegal activity was taking place. The government in Bailey may also have had a strong probable cause argument. If Bailey had relied on probable cause alone, a contrary result may have been reached. But, the Sixth Circuit, like most courts, did not address the issue of probable cause in determining whether the beeper was a search.

Also, Bailey may be distinguished from Clayborne on the facts. The laboratory in Clayborne was a commercial establishment that was susceptible to outside viewing and accessible to the public. Therefore, it is arguable that the defendant in Clayborne had no reasonable expectation of privacy. In Bailey the government intruded into defendant's apartment thus satisfying both the Katz requirements since it was a private establishment in which no illegal activities were occurring.

Finally, Bailey appears to be totally consistent with the decision of the First Circuit in United States v. Moore. Both cases involved the placement of a beeper in a drum of noncontraband chemicals and monitorization of the beeper within a private area. Both courts concluded that there was a justifiable expectation of privacy under such circumstances. Bailey, however, confronts only one of the issues presented in Moore—the status of a beeper installed in a container that is later taken into a private area. It is unclear whether the court in Bailey would have followed the lesserened expectancy of privacy in motor vehicles approach. The Bailey opinion states that it did not "establish a blanket rule that beeper monitoring of individual movement always brings the requirements of the Fourth Amendment into play," although a concurring opinion strongly urged that the privacy of movement is protected. As these comparisons show, the Bailey result is entirely consistent with past decision.

At this point, an analysis of the root of the problem, the interpretation of the Fourth Amendment is in order. The Fourth Amendment states that, "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . . " The crux of the problem lies with the proper definitions of search and seizure. A search is defined as a prying into of that which one has a right to and intends to conceal. A seizure implies a taking or removal of something from the possession, actual or constructive, of another. The primary question is, then, whether a beeper is to be classified as an aid to visual surveillance or as an unreasonable search and seizure.

The contrasting view of the Fifth and Ninth Circuits stem from this categorization of electronic tracking devices. The Ninth Circuit in Hufford equated the beeper with visual surveillance, and since visual surveillance did not constitute a search, an electronic tracking device furnishing similar information also did not constitute a search. Alternatively, the Fifth Circuit considered the tracking device much more intrusive than mere visual surveillance; its characteristics of attachment, continuity and duration of monitoring, and ability to trace location in private and public areas distinguished it from visual surveillance and made it a search.

In support of the conclusion that the beeper is equivalent to visual surveillance, it is argued that the beeper is capable of revealing only location and movement and, therefore, is no more intrusive than traditional visual tailing. The only location information the beeper conveys is that the monitored item entered specific private property. Thus, the government intrusion stops at the door of the constitutionally protected area. In this light, the beeper is similar to binoculars, tracking dogs, radar and search lights. The counterargument is that the beeper does much more than facilitate visual observation. Because the beeper goes where the law enforcement officer cannot go without violating the Fourth Amendment and acquires information not publicly visible, the beeper's location
within a constitutionally protected area is a search.

It is difficult to perceive how the use of the beeper in Bailey cannot be considered a search and seizure. The beeper physically intruded into a place protected by the Fourth Amendment, and it acquired information not publicly visible in which the defendant had a reasonable expectation of privacy. The defendants exhibited an actual subjective expectation of privacy by bringing the monitored drum into the apartment's locked storage room. Since the drum contained noncontraband chemicals, the defendants expectation was one that society should recognize as reasonable. Also, the beeper's physical intrusion and acquisition of private information constituted requisite search and seizure to fulfill the Katz requirements.

In search and seizure cases, the court must balance the individual's right to privacy with the government's right of lawful intrusion necessary to enforce our nation's laws. A holding that every private invasion is a search and seizure tips the scale too far in favor of individual privacy interests since every type of government surveillance would constitute a privacy invasion and, hence, a search and seizure. The specific holding in Bailey that beeper surveillance of noncontraband property in private areas constitutes a search and seizure strikes a justified balance. The decision does not foreclose government opportunity to use a beeper, but only requires that a valid search warrant be obtained before a beeper is installed.

Most courts will probably continue to follow the Katz rationale requiring both an invasion of individual privacy and a search and seizure to invoke Fourth Amendment protection. Nearly all courts will consider electronic tracking devices taken into constitutionally protected areas as searches and seizures. However, the cases indicate that some courts are unwilling to afford Fourth Amendment protection to the movement of motor vehicles. Whether the alleged privacy invasion occurs in a home, automobile or telephone booth, Fourth Amendment protection may be involved. In order for the Katz pronouncement that, "the Fourth Amendment protects people" to have any substance, Fourth Amendment protection should be invoked whenever a search and seizure is involved and an individual's reasonable privacy interest is invaded.

Shield Laws...

ruled that the phrase "in the course of gathering or obtaining news for publication" qualified the definition of "news". The court reasoned that only information upon which published stories are based fall within the statutory protection. The court, in addition, attached a requirement of confidentiality with the source. Here, the court ruled, the manuscript was not obtained under "a cloak of confidentiality." The court also found that in this case the privilege had been waived via publication of the letter itself.

The court also established a positive burden of proof for a reporter who claims the privilege:

In order to raise successfully the claim of privilege, two essential elements must be established: first, this information or its source must be imparted to the reporter under a cloak of confidentiality, i.e., upon an understanding, express or implied, that the information or its source will not be disclosed; and second, that the information, or its sources must be obtained in the course of gathering news for publication.

The court, through its narrow interpretation of the statutory language, created a rebuttable presumption against the privilege. The reporter could only overcome this presumption by meeting the two-part test.

Within three years of Wolf the New York courts began questioning the constitutionality of the shield law. In People v. Monroe 17 the court questioned whether the shield law represented an unconstitutional interference by the legislature with the contempt powers of the court, a violation of the principle of separation of powers. This attack against the shield law which only granted a protection from contempt had been coined by the California Court of Appeals in 1971. The New York court also raised the possibility that the shield law was an unconstitutional defiance of the Bronzburg ruling. The 1975 amendments placed the law's validity "in greater doubt than ever before," the court stated.

The most recent judicial pronouncements on the statutory newsmen's privilege focus primarily on the issues of confidentiality and waiver. In each of the last four years a New York Supreme Court has ruled that a reporter may not claim the privilege unless he can show by a preponderance of the evidence that the information or its source was imparted to him under a cloak of confidentiality, i.e., an expressed or implied understanding. Of secondary importance, because it was easier to prove, was the required showing that the reporter had been gathering news for publication when he received the subpoenaed information.

In each of the four cases the privilege was ruled to have been waived for various reasons. In one case the privilege was waived when one source met with members of the prosecutor's staff and the other spoke to reporters at public meeting in the town hall without an
expressed or implied understanding of confidentiality. In two other cases the privilege was deemed waived when the reporter's source testified either at trial or before the grand jury. In the most recent case the court considered the reporter's intention to write a book on the incident a waiver of the privilege.

The New York courts also took an increasingly narrow approach to the scope of the words "professional journalist." In People v. LeGrand the individual who claimed the privilege was an author of books, magazine articles, documentary films and news broadcasts and a winner of the 1967 Peabody Award for television journalism. He was subpoenaed while preparing a television special on organized crime. The court refused to recognize him as a professional journalist under the statute. The correct test for who qualifies as a professional journalist focuses on who the claimant's employer is, not the content of the material or the background of the claimant, the court stated. The court may have been trying to avoid the impermissible examination of the content of the publication, but in doing so, set up a narrow test based on employment. This approach assures only that the state's "establishment press" can seek the protection of the privilege and it may, in fact, exclude many others who should be protected in keeping with the statute's policy of encouraging a robust dialogue.

New York may be the home of the country's most respected newspaper, but in the state's courts, neither the press nor the privilege receive much respect. The statutory privilege has been severely deflated by the courts, and may be declared unconstitutional in the future. The institution of a strong privilege in New York can only occur through two scenarios: the amendment of the present statute, perhaps along the lines of New Jersey's new law, or, following California's lead, the addition of the statutory language to the state's constitution. Neither seems likely in the near future.

California

In California the newsmen's privilege was enacted into law in 1965. As in New York, the legislative mandate soon suffered a series of setbacks in the state's courts. But in California the legislature and general populace responded to the courts' attacks on the privilege, and elevated the reporter's protection to the constitution by adding it to the state's first amendment in last June's primary.

California's original shield law only protected the source of any information procured for publication or broadcast and actually used in this manner. But the statute was rather broad in its coverage. Any publisher, editor, reporter or other person connected with or employed upon or by a newspaper, press association, wire service, radio or television could claim the privilege. The privilege could be asserted anywhere, but was necessarily qualified in that it only protected reporters from citation for contempt.

The law's protection was expanded and its strict publication requirement eased through amendment in 1974. Under the amended shield law, in addition to the source, the reporter was protected from disclosing any unpublished information obtained while gathering information for communication to the public. The requirement in the original law that the information related to the reporter by the source had to be published or broadcast was deleted. These amendments placed the California shield law in line with some of the other more progressive laws.

The first major court test of the California shield law occurred in 1971. This case grew out of the prosecution of Charles Manson and his co-defendants for two sets of multiple murders. Early in the proceedings the court issued an Order re Publicity, prohibiting any attorney, court employee, attache or witness from releasing for public dissemination the content of any testimony that might be given at trial. Farr, a reporter for the Los Angeles Herald Examiner received copies of prospective testimony of a prosecution witness from three persons involved in the litigation. Much of the information contained in the leaked testimony was printed by the newspaper, despite the fact that most of it was not admitted as evidence at trial.

After judgment the court convened a hearing to determine the source of the Herald Examiner story. Farr took the stand and acknowledge that two of the sources were among the six attorneys-of-record in the trial. Farr refused to identify the third source, even though he admitted that this person was also subject to the court order. Farr based his refusal to answer on the state's shield law, but the trial court cited him for contempt.

The California Court of Appeals, in affirming the contempt citation, found no need to determine the proper construction of the language of the shield law. It ruled that to grant Farr an immunity on these facts would countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers. The court stated:

The power of contempt possessed by the courts is inherent in their constitutional status. While the Legislature can impose reasonable restrictions upon the exercise of that power or the procedure by which it may be exercised, it cannot "declare that certain acts shall not constitute a . . . contempt.

The court reasoned that the extension of the privilege to Farr by the legislature would violate the principle of separation of powers because it would severely impair the trial court's performance of a constitutionally compelled duty to control its own officers. Here the court had attempted to protect the defendant's constitutional rights by issuing the order. Once issued, the court was bound to explore any violations of its order by its own officers. And without the ability to compel Farr to reveal his source the court would be powerless to discipline violaters. In conclusion the court added that the Supreme Court's mandate that the trial courts control prejudicial publicity emanating from "court sources," could only be properly discharged.
if the courts are able to compel disclosure of the origins of such publicity.

The result in Farr was followed in Rosato v. Superior Court. The court ordered the jailing of three Fresno Bee staff members for refusing to answer questions about a series of articles in the paper quoting passages from a sealed grand jury transcript. The court ruled that the privilege, although still valid, was not applicable when the questions asked the reporter tend to identify who, if anyone, among those subject to a court order, may have violated it. The judge cited the Farr reasoning; that the separation of powers doctrine prohibited the legislature from telling the courts that certain acts did not constitute contempt. Cases in two of California's other appellate districts also went against newsmen basing their refusal to answer questions on the statutory privilege.

The results in these cases led proponents of an absolute shield law to seek the inclusion of the newly-amended law in the state constitution. The result of this effort was Proposition 5, which took the amended version of the law and elevated it to a part of the state's first amendment. Proposition 5 appeared on the ballot in June. Proponents of the measure contended that the constitutional amendment solved the court's separation of powers argument. Opponents argued that the amendment was defective in two respects; first, it did not specifically state that court control of the contempt power is not paramount to the amendment's protection, and second, that the amendment does not guarantee that its provisions cannot be overridden by the fifth and sixth amendments of the Constitution. The state's voters approved the amendment in June by a three-to-one margin (4.3 million to 1.5 million).

The California courts, like those in New York had effectively circumvented the legislatively mandated privilege with a separation of powers argument. The elevation of the privilege to the state's first amendment can be considered a signal to the state courts that public policy supports an absolute newsmen's privilege. But how effective the constitutional privilege will be in practice is not yet clear. The impact of Proposition 5 has yet to be tested, in the California courts.

Conclusion

This survey of various state approaches towards granting a testimonial privilege to reporters and the judicial interpretations of them seems to lead to only one indisputable conclusion: the protection afforded reporters from disclosure of confidential sources and information varies depending upon the jurisdiction. Journalists across the country face differing degrees of judicial interference with their newsgathering activities.

The statutes themselves differ markedly. Thirteen of them protect only the source. The others protect information and sources. Six statutes require publication for the privilege to exist. Fifteen do not require it, and the other laws are silent on the matter. Shield laws quite narrowly, often depriving reporters of their protection.

The twenty-six laws differ with regard to persons and media covered and in other qualifications to the privilege. But a discernable trend at the state level indicates that the nation's privileges may have one common feature. Generally, the state courts are interpreting the

To alleviate the inconsistencies among the state privileges, some have suggested the adoption of a federal shield law based on either the interstate commerce clause or the enforcement of the First Amendment through the Fourteenth Amendment. The proposal's major positive attribute is uniformity. Critics charge that any attempt to further legislate the privilege might encourage additional attempts by the government to regulate the press. Others argue that drafting such legislation would be an impossible task because of the problems of definition, balancing, and scope. They claim a workable result is impossible. Since the Congress already declined to pass a federal testimonial privilege when it promulgated the Federal Rules of Evidence, it is very unlikely that a federal shield law will be passed by Congress in the near future.

About forty years ago Justice Hugo Black wrote, "Free speech and fair trials are two of the most cherished policies of our civilization and it would be a trying task to choose between them." Black acknowledged that in a criminal trial these two freedoms often conflict, and that the only test a court could apply to safeguard both was one based on balancing.
Where a reporter refuses to answer questions in a court of law, the press' first amendment right to gather news and the public's right to be informed must be balanced against the interests of the defendant and the public in a fair trial. Only a case-by-case balancing approach, perhaps something along the lines of that suggested by Justice Stewart in Branzburg, will accommodate the conflicting interest. New Jersey's shield law - legislatively mandated balancing - offers a good example of one approach. It remains to be seen whether other states follow this approach though. No clear trend as to the future of the newsman's privilege is presently apparent.

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FOOTNOTES


2. Reporter Branzburg also claimed privilege under the Kentucky shield law, KY. REV. STAT. 421.100 (1972). The Kentucky Court of Appeals construed the statute as protecting only the source of the information and not the personal observations of a reporter. Branzburg v. Pound, 461 S.W. 2d 345 (Ky. 1970).

3. Justice White: Fair and effective law enforcement... is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process... We perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.


4. See United States v. Libby, 354 F. Supp. 208, 213, n. 13, 215 (D.D.C. 1972) in which Chief Judge Sirica argues that the Branzburg reasoning extends to criminal trials because the public interest in assuring a fair trial is even greater than in the grand jury context.


8. Id. at 332. Farber was also fined $1000 for criminal contempt and $5000 a day until he complied. The Times was fined $100,000 for criminal contempt and $5000 a day until Farber surrendered his materials.


10. In dissent in Branzburg, Justice Stewart wrote:

(When a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

The New Jersey court made some alterations. It made the test applicable to all parties seeking disclosure from a reporter. In addition, the court significantly eased the burden on the party seeking disclosure must show (1) there is a reasonable probability or likelihood that the information sought is material and relevant; (2) the materials cannot be secured through any less intrusive source; and (3) there is a legitimate need to see and use the information. Farber at 336.


19. Farr v. Superior Court, 22 Cal. App. 3d 60, cert. denied, 409 U.S. 1011. Of course, this decision only dealt with the original statutory privilege.


Editor's Note:
Legal education in America has entered its third century, the law school has moved into a new building and, on a grander scale, the law itself is changing. Perhaps the most fascinating aspect of the study of law is its perpetual change; the law is not static. This magazine attempts to capture that mixture of past and future which determines the present state of our law at any given time.

On a local level, articles examine the new law school and its impact on students and neighbors.

On a national level, we explore the use of electronic tracking devices, a technological development the Founding Fathers could never have imagined yet, somehow, seem to have provided for in the Fourth Amendment. The amazing responsiveness of the U.S. Constitution to a burgeoning society and society's efforts to live with that vital document are themes of other articles.

On an international perspective, rights to deep seabed resources are considered in relation to a proposed United Nations treaty regulating the use of such resources.

To play some role in the development of such law is the goal of students at Marshall-Wythe. Their role, their activities and the role of the faculty in preparing them to meet this challenge are the subjects of the balance of this issue. We offer the views of students and faculty from Marshall-Wythe, and the thoughts and statements of Chief Justice Warren Burger of the United States Supreme Court as compiled in an article by his research assistant, Dr. Jeffrey R. Morris.

This issue of The Colonial Lawyer is our first effort at such a publication. We have learned much in the course of creating it, and we look forward to returning the magazine to semi-annual publication next year. The world is indeed a transitory place and the law is an ever-changing part of man's world. We hope to have captured a few relevant moments of it for you.

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