3-4-1982

The Opinion Volume 22 Number 9 – March 4, 1982

The Opinion

Clinic Instructor Gerken Is Advocate For Disabled

by Larry Spielberg

When Professor Joseph Gerken became a member of the Law School faculty last fall, he was surprised by the energy of students enrolled in the various clinical courses.

"I spent three years working at Neighborhood Legal Services. Many of the staff attorney's there were frustrated by the budget crunch and the fact that you lose so many of these cases, whereas second and third year law students are eager to go out and do something in the face of many obstacles."

As a staff attorney at Neighborhood Legal Services Mr. Gerken established and operated the Western New York Protection and Advocacy Program. He represented developmentally disabled clients in individual and class action litigation, working primarily in the areas of special education, employment discrimination, access to public transportation and public services and provided training and back-up services for attorneys and other advocates.

Professor Gerken's interest in disabilities law began in 1975 when he visited what was then the only hostel in Western New York for retarded persons, operated by PEOPLE — Services To the Retarded Adult in Erie County, Inc. Soon thereafter he joined their staff. During his two and a half years in association with PEOPLE, the community residence program was expanded from one to six community residences, each serving between eight and twelve residents.

U.B. graduate returns as clinical instructor (Moran)

Although initially hired to teach the Mental Health Law Clinic, Professor Gerken is now also teaching a clinic in Developmental Disabilities Law, his specialty.

"What impresses me about the setup here at U.B. is that there is a lot of flexibility as far as coming up with innovations. I was hired to do mental health law and yet it was very simple to add a clinic in developmental disabilities and help Professor Newhouse teach his seminar. In a more traditional setting this would have been tough."

Professor Gerken is a 1975 U.B. law school graduate . His first two years at the law school were spent at the Old West Eagle Street location adjacent to the various courts. And how does the new location compare? "Ironically," he notes, "the one big difference is that students today are a lot more sophisticated about how the law works; they know how the courts work."

A jogging enthusiast, Professor Gerken can usually be found sporting his running shoes. "Occasionally I jog home from Amherst to my apartment on Buffalo's west side when I find it inconvenient to wait for the bus." Gerken also enjoys jazz music and has an extensive record collection which includes punk rock as well.

Non-Profit Organization
U.S. Postage
PAID
Buffalo, New York
Permit No. 708

Opinion

"The function of a free press is to comfort the afflicted and afflict the comfortable."
—H.L. Mencken

Opinion
John Lord O'Brian Hall
SUNY/B. North Campus
Buffalo, New York 14260

Volume 22, Number 9 | State University of New York at Buffalo School of Law | March 4, 1982

Law Student Alan Rosenfeld Arrested and Suspended

by Barbra Kavanaugh

Third-year student Alan Rosenfeld plans to bring a §1983 suit against former Univeristy President Robert Ketter and others, claiming that his automatic suspension following arrest for criminal trespass was a deprivation of his constitutional right to procedural due process.

Rosenfeld was acting as a non-participating legal observer at the sit-in and demonstration at Squire Hall on Friday night when he was arrested for refusing to leave the building at the request of U.B. security and insisting that he be allowed to observe the arrest of thirty-eight demonstrators. At the request of Save Our Squire (S.O.S.) representative Craig Fields, Rosenfeld had organized eight law students to act as legal observers at the sit-in.

"Essentially, it was important for us to be non-participating and to be available as 'potential witnesses, if necessary. I was also hoping that our presence might decrease the chance of unintentional violence. Everyone, students and security, was acting very tense and paranoid. Our role was to function as witnesses in case any violence broke out, also to calm diffuse people, and to diffuse any violence by our presence." The legal observers, including Frank Butterini, Barbra Kavanaugh, Ward Oliver, Shelly Reback, Andy Sapon, John Ziegler, and Rosenfeld, all wore bright badges and carried law student I.D.s as well as copies of a letter to Public Safety Director Lee Griffin which identified them as participant legal observers.

"I never actually got a letter into Lee Griffin's hands until Friday night," said Rosenfeld, "but Dr. Ketter said that he knew on Friday afternoon that the observers would be there as non-participants and he made a decision to have us arrested. That decision was made during the day, so there isn't really any doubt about notice problems. Ketter knew about it and made a decision."

Rosenfeld spoke to Ketter on Saturday morning when he demanded that either the suspension be reversed or that an immediate hearing on the issue be scheduled. Ketter agreed to meet at 1 p.m. that afternoon.

"He had an attorney there in the room, and I had a tape recorder," said Rosenfeld. "He acknowledged on tape that he knew in advance that the law students would be there as legal observers; he knew in advance of my efforts to diffuse the situation and to prevent violence, but that didn't change his mind."

"I talked to him about his power to suspend someone from school prior to a hearing in which the student has the protection of due process of the law: the right to confront and bring witnesses, to present evidence and have an impartial body make the decision. The Trustees' Rules and Regulations allow him to suspend someone prior to a hearing only when that individual presents a continuing "clear and present danger" to public safety and administration of the University. I explained to him that it was an extraordinary power that he had which was only to be used with students who threatened people with weapons or start fires and certainly was not applicable to myself, as I merely wanted to exercise my responsibility of attending the public protest as a non-participating legal observer."

"I told him all I wanted was the right to go to classes, go to the library and work in the clinic office, and there is no conceivable way he could imagine that I would be a danger to public safety. He said that since I broke one rule by not leaving Squire Hall when I was told to do so by Lee Griffin, he couldn't tell what else I might do. So he saw me as a "continuing clear and present danger" and upheld his own suspension of me!"

"These issues have to be resolved, at least within the University: the students' right to have people with them while they're being arrested and the students' right to have non-participating legal observers at public protests. By arresting me, Ketter gave me the standing to take the issue to court, which I intend to do even if the suspension is lifted," said Rosenfeld. Ketter has scheduled a hearing on March 20 before the Presidential Committee in order to examine the issue of Rosenfeld's suspension, despite the fact that the Trustees' Rules and Regulations require that all suspension hearings be held within ten days of the incident. At press time, there was still some confustion as to what difference Dr. Sample's arrival as University President could have with regard to Rosenfeld's case or in regard to the cases of any of the other arrested protesters.

Rosenfeld cited several examples of the importance of having non-participant legal observers at a demonstration. A man was pointed out to him by a student as having attended a meeting of S.O.S. on Thursday afternoon and having talked about violence and sabotage. Another student claimed to have seen the same person in a Buffalo police uniform.

"I asked Don Shonn, attorney for Sub-Board I, Inc., what he thought should be done about the individual and he suggested that I assign one of the observers to stay near the possible provocateur. That's what John Zeigler was doing. If it did turn out that this individual was a police officer, and was observed inciting violence in which students were hurt, it would have been critically important that the observers were there and were able to testify. Another student had been pointed out as being slightly irrational and unpredictable and Andy Sapon was assigned to stay near and to watch that person's behavior.

One man had his camera pushed into his face by what appeared to be a plainclothes officer, who retreated into the building when asked for his name. An observer was promised by another uniformed officer that the man would be identified, but when she asked about it later, outside of the building, the uniformed policeman denied any knowledge of the incident.

Other observers, who were among the very last to leave the building of their own volition, reported that a tense situation was created when the police started to forcibly push the crowd out of the building. Another woman began to stumble and fall, as U.B. public safety officers pushed the crowd out of the building. But when two legal observers shouted to the officer, who was pushing the person in back of her, to stop, he did not. He was not wearing any visible identification, and did not respond when asked for his name or badge number and continued to push. Another policeman began swinging at students' arms with his utilityflashlight in order to break their hold on the doors.

Subsequent to his arrest and suspension, Rosenfeld on March 1 requested of Dean Headrick that he make a personal intercessionary phone call to the new University President, Steven Sample, on his behalf.

Rosenfeld, who, as a suspended student, is subject to arrest for trespass should he be found on school grounds by U.B. security staff, was told by Dean Headrick that such a phone call was "inappropriate," and was also told by the Dean that he would decline to give an opinion to the new president on the Rosenfeld arrest. Headrick could not be reached before presstime for comment on this matter.

Robin Romeo, President of the Student Bar Association, has written a strongly worded letter to President Sample's office protesting Rosenfeld's arrest. A number of other students have written Sample as well, asking for clemency for Rosenfeld, in view of his legal observer status.

Opinion

Vol. 22, No. 9 **March 4, 1981**

Editor-in-Chief
Ralph W. Peters

Managing Editor
Larry Spielberg

News Editor: Barbra Kavanaugh
Feature Editor: Earl Pfeffer
Photo Editors: Gary Gaines, Kevin Moran
Business Manager: Frank Bolz

Contributors: Captain Arthur Garfinkel, Winsteadi Lome, Ward J. Oliver, Jill Paperno, Alexander Plache

Staff: Wendy Anne Cohen, Marc Ganz, Steven Getzoff, Marty Miller, Rick Roberts, Robin Romeo, Joe Ruh, John Stegmayer

Reinstate Rosenfeld

The arrest last week of law student Alan Rosenfeld at the hands of university authorities and his subsequent suspension are indicative of the cavalier attitude the administration has displayed in the closing of Squire Hall.

Mr. Rosenfeld and other law students had been asked by student organizations protesting the closing of Squire to be present at the Union Friday night as legal observers. The students were anticipating that the high level of emotion and tension surrounding the building's final hours might cause tempers to flare when security forces cleared the building, possibly resulting in abusive treatment of the protesters.

This was a legitimate concern in light of behavior exhibited by police in confrontations with students over the past fifteen years. A two-week occupation of the U.B. campus by Buffalo City Police in 1970 represents a lamentable example of harsh treatment and overreaction.

The *Opinion* believes that the seven U.B. law students who were in attendance Friday night as legal observers were fulfilling a responsibility and obligation to the U.B. student community by their presence. As future attorneys and as individuals familiar with the legal process, these students were best suited to be watch-dogs of Campus Security's behavior.

Mr. Rosenfeld's refusal to leave Squire until *all* students being arrested had been processed does not make him a "continuing clear and present danger" to the U.B. community (to use former President Ketter's words justifying Rosenfeld's suspension), unless of course the University Administration believes that efforts to secure people's civil rights are dangerous.

The *Opinion* hopes that the new administration is not ready to take such a harsh and undemocratic position.

We strongly protest this ill-advised display of autocratic force and believe that the administration here at the Law School should intercede in Mr. Rosenfeld's behalf.

SBA President Robin Romeo has sent a strongly worded letter to President Sample asking that charges against Rosenfeld be dropped. We applaud Ms. Romeo's actions.

We sincerely ask that Dean Headrick take a position on this matter. If the Dean believes that one goal of the educational process at the Law School is to impart to students a sense of courage and a commitment to principle, then there is no better way for him to express his convictions than by setting an example in defending Mr. Rosenfeld's rights.

The Onion is Coming!!

Make All Submissions by March 24.

Librarian: 'Smoking, Si; Eating, No'

To the editor:

Every so often it becomes important for us to review and revise some procedures that the Law School and student body are familiar with here in the Law Library. Students have long wanted a smoking area in the Law Library and we have decided to establish the O'Brian Room as the smoking area for a test period. The O'Brian Room is the conference room off the study area on the main floor.

The library is having a mouse problem, and we would appreciate your cooperation in refraining from bringing foods and liquids into the library. We realize it is convenient to be able to munch and sup while studying, but unfortunately you are not the only creatures munching and supping in the library. The mice are often enticed into the building during the cold weather, and it is always a problem to get them out.

The final item I would like to bring to your attention is the library's receipt policy. The library does not formally recognize receipt of a library book unless you fill out a receipt at the circulation desk. All the University Libraries have this policy and it protects your claim of having returned an item if our records show it missing.

Kathy Carrick
Director of Law Library

Law Review Invites Competitors

The annual law review Spring Competition will be discussed on Thursday, March 11 in room 106 at 3:30 p.m. Each spring, all first year students are invited to compete for associate membership with the Buffalo Law Review. First year students wishing to compete will be required to write a modified casenote using a case furnished by the Law Review. The case may be picked up from the Law Review starting March 18. Competitors will have 10 days to complete the casenote. Further details of the competition will be provided at the meeting above. All interested first year students are also invited to the Law Review's open house on Monday, March 15, from 10 a.m. to 4 p.m.

The Buffalo Law Review is a student run organization which produces significant student and professional articles for publication. Incoming members will be required to produce a publishable casenote or comment during their junior year. As associates, members will also participate in the publication process.

The Review welcomes participation from all first year students in the Spring competition.

Tax Tourney This Weekend

The Moot Court Board at the U.B. Law School will once again host teams from all over the country in the Ninth Annual Mugel Tax Moot Court Competition. The tournament, named after Albert Mugel, a U.B. law professor and partner in the Buffalo firm of Jaeckle, Fleischmann and Mugel, will have 32 teams competing this year, an all-time record number. The problem, written by tax professor Kenneth Joyce, faculty moderator of the Board, focuses on the issues of trusts and interest free loans. Professors Joyce and Louis DelCotto co-authored an article on this subject in the 35th volume of the Tax Law Review in 1980.

The competition will take place on March 5th and 6th here at the Law School. Preliminary rounds will be held on Friday, March 5th at 2 and 4 p.m. The quarter-final rounds will be on Saturday, March 6th at 10 a.m., the semi-final rounds at 1 p.m. and the final round, in the Alden Moot Court Room will take place at 3 p.m. Judges for the final rounds include, among others, Professor Mugel, Stephen Miller, Chief Counsel for the I.R.S. in Washington, D.C., and Agatha Vorswanger, I.R.S. Director for the Northeast Region. The public is cordially invited to attend all of the rounds.

The Moot Court Board will be represented on the Respondent's side (the I.R.S.) by the team of Brian Lewandowski, Matthew Newman and Lawrence Paul. The Petitioner's side will be represented by Bradley Bennett, Joseph DiGennaro and Benjamin Zuffranierri.

BPILP Sponsors Interns

In the Spring of 1979, students on Law Review and members of the Student Bar Association, motivated by a personal commitment to social justice and perceiving the need for programs in which students could get paid for public interest legal work, combined their own personal funds with those of the SBA to finance summer employment for two law students at Legal Services for the Elderly of Erie County.

The Buffalo Public Interest Law Progam, Inc. has continued to be successful because students and professionals in the commnity have remained committed to the original vision and have pledged financial support to programs which try to ensure that all members of this society have access to legal assistance.

Law Review has continued to be committed to the program's success, as has the SBA. Each organization places a representative on the Corporation's Board of Directors. Tim Brock (SBA), Chris Desmond (Law Review), Anne Carberry, Rick Juda and Earl Pfeffer comprise the current board.

The program has grown over the past three years and is now incorporated. BPILP was able to fund four interns last year in legal offices throughout Western New York.

May McHale worked at Prisoners' Legal Services of New York where she assisted in legal challenges to disciplinary proceedings against inmates. David Milliken worked at Chattauqua County Legal Services, where he studied the workings of the New York State unemployment insurance system and assisted laid-off workers at unemployment hearings.

Alan Ferster worked at Client Advocacy Service, a program provided by the Mental Health Association of Erie County, where he aided clients with problems relating to housing, consumer fraud, workers' compensation, and Social Security Disability Benefits. Earl Pfeffer was employed by Legal Services for the Elderly where he maintained his own caseload, assisting clients who faced utility shutoffs, terminations of medical assistance, and possible evictions.

BPILP hopes to fund at least as many internships this year. Students will be invited to submit resumes sometime this month. Yet the success of the program depends on the generosity of contributors.

The organization realizes that most students are strapped for funds, especially with cutbacks facing them next year. But it strongly believes that if students are committed to a legal system which guarantees everyone legal representation in principle, then they should do what they can to guarantee such representation in fact.

Starting the week of March 8, a table will be positioned outside the library where BPILP members will solicit contributions.

Please be generous. A $5 contribution from every student would be enough to fund three interns next summer.

Faculty-Student Board Investigates Misconduct

by R.W. Peters

Students at UB Law are sometimes tempted to do things which they ought not to do. Generally, these transgressions occur coincident with finals' time. Cheating, plagiarizing, and forbidden collaboration, while not rampant, do occasionally occur in the hallowed testing chambers of O'Brian Hall.

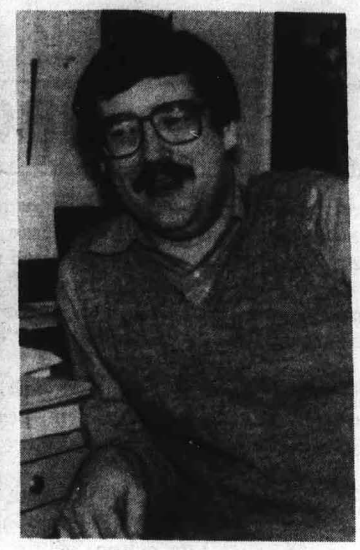
If a student is unlucky or inept enough to get caught, there is a great likelihood that his or her case will appear before the Faculty Student Relations Board (FSRB).

The FSRB is the faculty-student committee that handles the delicate task of hearing or reviewing disciplinary actions against students accused of violating UB's unwritten honor code.

The Board, constituted in the late 1960's, is composed of three faculty members (Janet Lindgren, Nils Olsen, Andy Spanogle) and three student representatives (Jack Hains, Julie Rosenblum, John Stegmayer). Each member of the board is given one vote. Janet Lindgren is chairperson of the Board, having been elected to that position by its members.

There are essentially two ways in which a disciplinary matter finds its way before the FSRB. In the first scenario, a professor, believing a student has cheated on an exam or plagiarized sources in writing a paper, may give the suspect student an "F" in his course. The professor would usually advise the student, by letter or in person, the reasons for his or her failure. At this point, the aggrieved student may ask for a review of the professor's action by the FSRB.

FSRB members (left to right): Julie Rosenblum, Jack Hains and Nils Olsen



(Moran)

The machinery of the Board may be invoked in another way, wherein a professor may request that the Board meet to consider questionable student activity and that it make recommendations on what it sees fit.

This second method by which a student-related controversy gets before the FSRB is one with which members of the Board are a bit uncomfortable The best established procedures relate to those instances where the Board is meeting as a review panel, not where it is a court of first impression. The FSRB, in such a situation, often faces the difficult task of being both prosecutor and impartial fact finder. Indeed, in past FRSB hearings of this type, it has been necessary for the administration to appoint an advocate for its essentially prosecutorial position, as the FSRB has sometimes chosen to maintain a neutral posture.

Once the FSRB has made its determination, the case is subject to review by the Dean of the UB Law School, Thomas Headrick. The Dean, who up to this point has been insulated from the disciplinary proceedings (to avoid any charges of taint or bias), subjects the Board decision to the usual appellate "substantial evidence" test. If the FSRB recommendations meet this test, they are given the administration's approval.

Should the student or faculty member seek to appeal the FSRB ruling beyond the confines of the law school, they may request a review by the office of the University President. Upon doing so, their administrative remedies are considered exhausted, and they can if they so choose, then initiate an action in state or federal court.

FSRB hearings are for the most part informally conducted, although the increased student retention of professional counsel has led to greater structuring of the proceedings. Evidentiary rules continue to be very loose, with virtually all testimony permitted. The accused party is permitted to introduce evidence and to present and cross-examine witnesses. Members of the Board may ask questions of the various witnesses. The hearings are recorded, and the tapes saved for a number of years.

The FSRB has been functioning effectively for fourteen years. In that time it has heard a number of difficult and potentially divisive cases. In each case, the Board has fairly and humanely heard all of the evidence before it, and has made its difficult but necessary decisions.

Law Student Attends Meeting Of NLG In Santa Fe, New Mexico

by Ward J. Oliver

The National Lawyers Guild held its annual national convention in Santa Fe, New Mexico, February 17 to 21. The meeting drew progressive lawyers, law students and legal workers from all areas of the country to the capital of this southwestern state for five days of meetings, workshops and conviviality.

The theme of the convention — tierra, agua y gente (or loosely translated: land, resources and people) — focused on the struggles of peoples, both at home and abroad, to control their lives and resources. Situated at the base of the Sangre del Christo Mountains, Santa Fe offered a beautiful location in which to meet (and, need I add, to escape a harsh Buffalo winter). Yet, given the importance of land and water rights to the people of the southwest, as well as the relative proximity of Central America, Santa Fe also served as a reminder of the grave issues facing us in the 80's.

Throughout its forty-five year history, the Guild has worked on behalf of oppressed people in the United States and throughout the world. Its members are active in the areas of labor, criminal defense, legal services, and immigration. It is therefore not surprising that the conference program included many topics that affect Guild members in their daily work, as well as the important social issues of the day.

Tony Mazzochi, Vice-President for Health and Safety of the Oil, Chemical, and Atomic Workers Union, delivered one of the keynote speeches. He discussed the industrial health problems faced by American workers in a depressed economic climate, as well as the need for a third political party (labor) to provide a real alternative for the American People. Lila Bird, the other keynote speaker, is from Cochiti Pueblo and a graduate student in public administration at the University of New Mexico. She spoke about the expropriation of natural resources and its effect on the indigenous peoples of the southwest.

Throughout the conference, a series of workshops educated participants on various social and legal problems facing the progressive community. They ranged from "The Retreat of Federal Civil Rights Enforcement and Our Response" to a discussion of the "Political Problems of Collective Law Practice," to "Preemptive Annihilation: Nuclear War, the Military Budget and Reagan's Global Strategy of Intervention."

Perhaps the highlight of the five days was the presentation on Central America, Friday night. The program began with the movie "Attack on the Americas," a right-wing film that attempts to resurrect the domino theory with respect to Latin America. Responding to the film were several speakers who offered a different non-imperialistic perspective. They included Dr. Ernesto Castillo, Nicaraguan Minister of Justice, and Alfredo Monge, labor lawyer and member of the Democratic Revolutionary Front's Diplomatic Commission to the United States.

In spite of the full schedule of events, conferees still managed to find the energy to socialize at the end of the day. A salsa party and a dinner followed by a production of the one-man play, "Clarence Darrow," were among the diversions. In some ways, these social gatherings are as important as the workshops and skills seminars. Besides providing needed recreation, they helped define the Guild's sense of community.

It's reassuring in these times of Reaganomics and the so-called "New Federalism," to know that there are others who think and feel similarly about the injuries being perpetrated upon our country by the present administration. Guild conventions, as much as anything else, help sustain us through the hard times and give us optimism for the future.

Local Attorney Speaks

by Barbra Kavanaugh

Paul Cambria Jr., well-known Buffalo defense attorney, initiated the S.B.A.'s "Practitioners' Forum" series last Thursday night when he spoke to an audience of thrity law students about his experience in Buffalo and before the Supreme Court.

Cambria, a senior partner with Lipsitz, Green, Fahringer, Roll, Schuller & James, is the head of the firm's criminal department and spoke primarily about his work in the areas of First and Fourth Amendment law.

Referring to clients such as Larry Flynt of "Hustler" and Al Goldstein of "Screw" magazine, as well as the "Kenmore Bookstore" cases, he admitted that there is a lot of misunderstanding and time wasted by the media and the courts because of these cases.

"For example, the Kenmore Bookstore case involved a misdemeanor against a clerk, there were no kids involved, no allegations of children being in the store at all. Nonetheless, the store came into a small community and was resented. So much time is spent on a trivial case when so many more important things are going on, including violent crime which is happening in this very city."

"I handle everything from drunk driving to murder, carrying a caseload of 150-160 cases at a time, along with the staff, but the toughest is the Kenmore Bookstore type of case. The most difficult Constitutional issues are involved and there is a high degree of emotionalism on both sides."

'You get involved in a Kenmore Bookstore or Larry Flynt case and everybody hates you. You walk into the courtroom and there is always electricity. People in the gallery shout at you, and you receive phone calls and threats."

Cambria prefers not to be thought of only as a "smut lawyer". He has done a lot of work on Fourth Amendment "search and seizure" cases and has appeared before the Supreme Court in the *New York v. Belton* case.

That case concerned a search and seizure following an arrest. Cambria tried to suppress the evidence found in a zippered jacket pocket which was left in the car when the passengers were arrested.

"We moved to suppress on the grounds that, even though Belton was under arrest and in custody, he did not lose his exception of privacy.

"The trial judge, literally between sandwiches, said, 'Denied. When can you go to trial?' and the Appellate Court found that the evidence was admissible, because the jacket was in the "grabbable reach" of the defendants. But the Court of Appeals, that fantastic court in Albany, reversed 5-2 and said we were right."

However, "the Onandaga County District Attorney also had a recent young graduate in the office who got the idea "Why don't we petition for certiorari in this case?" They did and the day it was granted we knew we were in big trouble. There was no reason for the Court to take the case to agree with the Court of Appeals," and the case was ultimately lost.

Although Cambria's talk was brief, he was warmly received by the student audience, and provided a pace-setting kick-off for the "Practitioners' Forum" series.

	BRC	BAR/BRI
Materials	**Law Summaries** - BRC law summaries are written on the assumption that the student has not had the subject in law school, but are also tightly edited to give you exactly the law needed to pass the Bar Exam. Extensive explanations, examples and bar-type illustrations enhance comprehension and retention and the ability to "spot issues."	The BAR/BRI materials are prepared for "review" purposes only, and are thus far more skeletal than BRC's materials. (All of the Multistate subjects are condensed into one cursory volume.)
	The summaries are authored, edited and updated by outstanding legal educators with personal accountability for substantive quality.	BAR/BRI outlines are "staff prepared", and none of the outlines are signed by its author.
		The BAR/BRI outlines closely parallel the Gilbert outline series, with the exception that they are all "anonymously" written (unlike Gilberts) and edited down significantly.
Testing and Study Program	BRC law summaries are written with the same clarity and precision that have made our *Sum & Substance* series the most effective law school study aids available. A specially designed format features variable typeface print, numbered lines, and caption headings.	
	Capsule Outlines - BRC provides condensed outlines (with wide margins for notes) for *each bar-tested subject*, keyed to page numbers in the law summaries.	BAR/BRI provides a separate volume of condensed outlines keyed to section numbers in the long outline. There is no system provided for their use, and the "Mini" Outlines *only cover Multistate subjects.*
	BRC provides a complete written system of how to use the Capsule Outlines in conjunction with the main summaries, to allow intelligent shortcutting when necessary or desirable.	
	BRC Capsule Outlines, in general, are longer than BAR/BRI's "Mini" Outlines.	
	Mnemonics and Issue Graphs - BRC provides an extensive and unique set of "JIG's" (Josephson Issue Graphs) and various mnemonics as part of the review course.	Nothing comparable.
	BRC students participate in the unique Programmed Learning System (PLS). PLS involves a well-planned study schedule which integrates comprehensive pre-course diagnostic testing, reading assignments, self-testing "reinforcers," problem solving lectures, delayed feedback reinforcement and review tests, and weekly practice exams (individually graded and analyzed).	Although BAR/BRI will provide some essay grading, there is no system of testing and feedback that is designed to provide a paced study approach.
		Stressing the flexibility and non-programmed nature of BAR/BRI, students are required to decide what, if any, study features they should use.
	BRC consciously seeks to direct the student's study time, to build confidence, to channel nervous energy in constructive directions, and to provide a broad range of diagnosis and feedback mechanisms to asure that the student has solid objective information about his/her strengths and weaknesses.	BAR/BRI does offer an objective pre-course exam for Multistate subjects only. The exam, in our view, is far too complex for a pre-test and few students find it worthwhile.
Lectures	N.Y. CPLR lectures are presented in advance of Summer course and at *no* charge for BRC enrollees who want to learn CPLR before the course.	Precourse CPLR program incurs a $45 charge.
	Multistate Substantive Review - Three full days of intensive lectures at the conclusion of the course, highlighting all the substantive law that you need for the New York Exam.	Nothing comparable.
	Problem Integration Lectures - Draw on thirty years of Joe Marino Sr.'s experience in preparing student for all *thirty* subjects that have appeared on the New York exam. The lectures serve to instruct students on how to handle the multistate crossover questions always found on New York's essays.	No single lecturer of comparable stature for New York Exam preparation.
Management and Academic Policy	BRC is a totally independent, closely held company, managed and controlled by the same people who built it into its present position. All decisions affecting any academic component of the course must be approved by its director and founder, Professor Michael Josephson (a full professor of law at Loyola Law School, Los Angeles). Key positions are held by people who have been active participants in the development of BRC programs and the educational philosophy from which all BRC and CES programs spring. In 1975, BRC rejected acquisition attempts by Harcourt-Brace-Jovanvich (which already owned BAR and BRI). BRC is, by far, the largest independent bar reviewer in the nation. In 1978 BRC purchased the Marino Bar Review course, and contracted with Joe Marino, Sr. to continue to lecture for BRC. Marino's thirty years of New York bar exam experience has lent an unparalleled dimension to BRC in New York.	BAR/BRI of New York is a division of the Harcourt-Brace-Jovanovich Law Group, which in turn is a subsidiary of the Harcourt-Brace-Jovanovich conglomerate. This conglomerate owns Sea World, insurance companies, magazines, and other diverse products. The only law school academician involved on BAR/BRI's Board is a professor at ITT/Chicago Kent Law School.

JOSEPHSON

BRC

NEW YORK: BRC, 71 Broadway, 17th Fl., New York, N.Y. 10006 (212) 344-6180

Statutes Of Limitations Restrict Asbestos Recovery

Editor's Note: This is the second in a series of articles examining asbestos, its link to disease and the impact of statutes of limitations on the right to recovery of individuals injured from asbestos exposure.

by Alexander Plache

Today there is no doubt that exposure to asbestos causes serious illness. Futhermore, there is no doubt that the manufacturers of products containing the substance have been aware of the causal connection between asbestos and disease since the 1930's. It is therefore not surprising that in our society , the most litigious in the world, many personal injury and wrongful death actions have been instituted against the manufacturers of asbestos products. It is noteworthy that although actions by employees against their employers are barred in all states by legislative enactment of Workmen's Compensation Laws, there is as of yet no such bar to an action against the manufacturer of an asbestos product who later sold it to the plaintiff's employer. Currently there are from eight to ten thousand cases pending against the asbestos industry. This number is not expected to decline in the near future.

The first asbestos case to be tried to a successful conclusion for a plaintiff was the landmark case of *Borel v. Fibreboard Paper Products Corp., et. al,* 493 F. 2d 1076, (1973). The plaintiff, Clarence Borel, an industrial insulation worker, claimed that he contracted asbestosis and mesothelioma as a result of his exposure to the defendants' products over a thirty-three year period beginning in 1936 and ending in 1969. In *Borel* the United States Court of Appeals, Fifth Circut, affirmed a decision of the District Court which held that manufacturers of products containing asbestos had knowledge of the medical hazards associated with exposure to the substance and were negligent in failing to adequately warn those who came into contact with their products. The verdict for the plaintiff in *Borel* necessitated a finding that the asbestos industry knew or should have known of the dangers of asbestos inhalation by insulation workers. Because the issue of the adequacy of the industry's warnings to those exposed to their products was decided in favor of the plaintiff in *Borel*, defendants since that case have had to redirect their strategies toward other defenses because of the rule of collateral estoppel.

One defense which is invariably raised by defendants in an action for injuries arising form long term exposure to asbestos is that of an applicable statue of limitations. Statutes of limitations present courts with a difficult problem in actions for injuries arising from exposure to asbestos because the injury does not always manifest itself after exposure and because if an injury does occur it typically takes years to show up. In the typical negligence or products liability case there is no problem as to when the cause of action accrues. For example, when a plaintiff gets his hand mangled in an allegedly defective punch press the paintiff's action against the manufacturer of the press accrues at the time of the injury. Moreover, in most jurisdictions, the result is the same even though a number of years have passed since the press was delivered to the plaintiff's employer. It should be noted that a number of jurisdictions have specifically enacted statutes of repose in products liability actions so that if the plaintiff is injured after a prescribed time period has lapsed since the manufacturer relinquished control and possession of it no action can be maintained against the manufacturer. Nonetheless, except for occasional problems with statutes of repose in states which have such a thing, problems rarely arise in determining when an applicable statute of limitations begins to run in the case of a traumatic injury.

However, a product which causes a disease or an injury only after years have elapsed since the plaintiff was exposed to the substance presents courts with a more difficult problem. In such cases courts must decide when an applicable statute of limitations begins to run. Since asbestos related injuries typically take several decades to manifest themselves, if the statute of limitations is found to begin to run at the time at which the plaintiff is exposed to the substance then the plaintiff can be literally barred from maintaining a cause of action before he is aware of an injury. That such a result would be unjust, inequitable and possibly unconstitutional as violation of due process seems obvious, however, there are a few jurisdictions, and New York State is currently among them, which adhere to an exposure theory in such cases.

Every state in the union has enacted a tort statute of limitations. A statute of limitations is a legislative enactment which prescribes the period within which an action to recover for personal injury caused wrongfully by another must be brought. Statutes of limitations are both useful and necessary. The purpose of statutes of limitations is to force a plaintiff to bring his claim within a reasonable time so that the defendant may have timely notice of a claim against him, and so that stale claims and the uncertainty which they produce will be avoided. Such statutes are legislative attempts to prevent faded memories, death or disappearance of witnesses and the loss or destruction of records from unfairly burdening defendants. They afford protection against ancient claims and prevent claims by those who have not timely followed up on their rights. A statute of limitations is a legislative codification of the principle that it would be unfair or inequitable to allow a party to enforce his legal rights after too much time has elapsed between the wrong and the bringing of the action to right it. The statute of limitations is intended to run against those who are neglectful of their rights and who fail to exercise proper diligence in enforcing them.

Worker tends to mechanized weaving process *(graphic by NACLA)*

Miner displays asbestos ore. *(photo by NACLA)*

There are many different possible times at which a particular statute of limitations could begin to run. These may be grouped into two main classes: Those which relate to exposure to the substance and those which relate to manifestations of the resulting injury. Most of the courts which have recently faced the question of when an applicable statute of limitations begins to run in the case of a latent injury which takes many years to manifest itself have adopted some sort of discovery or manifestation theory. Various reasonings are used by courts which have accepted such a theory. One of the early cases applying the discovery rule to a latent disease was *Urie v. Thompson*, 337 U.S. 163 (1949). In *Urie* the plaintiff contracted silicosis from exposure to silica dust which arose from sand materials carried in locomotive sanding boxes. The plaintiff was suing for compensation under the Federal Employers' Liability Act. In *Urie* the U.S. Supreme Court accepted a manifestation rule, holding that the date the plaintiff discovered the disease commenced the running of the statute of limitations. In so doing the court rejected the defendant's argument that each breath of the silica was a separate injury and that the accrual of the cause of action dated from the time the substance was inhaled. In criticizing the position of the defendant the court wrote:

It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute a waiver of his right to compensation on the ultimate day of discovery and disability. . . . We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purpose of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

337 U.S. 163, 183-187.

Many other courts which have faced the problem have reached results similar to that reached by the Supreme Court in *Urie*. In *Borel*, although it was unnecessary for the court to decide the specific issue of when the statute of limitations should begin to run in the case of a worker who has developed an asbestos related disease, the court nonetheless cited with favor the result reached by the Supreme Court in *Urie*. After noting the similarities between asbestosis and silicosis, the *Borel* court wrote:

In cases involving similar injuries resulting from exposures to deleterious substances over a period of time, courts have consistently held that the cause of action does not accrue until the effects of such exposures manifest themselves . . . This principle is analogous to the "discovery rule" applied in medical malpractice cases, which provides that the cause of action does not accrue until the injury is discovered or in the exercise of reasonable diligence should have been discovered.

493 F.2d. 1102

In *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 394 A 2d 299, 1 ALR^{4th} 105 (1978), the Court of Appeals of Maryland adopted the discovery rule in a case involving mesothelioma holding that a plaintiff's cause of action for latent disease, whether framed in terms of negligence or strict liability, accrues when he discovers, or through the exercise of reasonable care and diligence should have discovered, the nature and cause of his disability or impairment. In so holding the court likened the development of a latent disease to the discovery of professional malpractice for which a discovery rule had already been adopted in Maryland. The court wrote:

In our judgment, the critical factor, which precipitated our adoption of the discovery rule in the professional malpractice cases, is equally present in the instant case. We noted in a professional malpractice case against an accounting firm that the rule "gives to the individual exercising reasonable diligence the full benefit of the statutory period in which to file suit, while at the same time protecting the defendant from 'stale claims,' as was intended by the statute." . . . Like the victim of undiscoverable malpractice a person incurring disease years after exposure cannot have known of the existence of the tort until some injury manifests itself. In neither case can the tort victim be charged with slumbering on his rights, for there was no notice of the existence of a cause of action. This feature distinguishes these situations from ordinary tort cases, which require no exception to the general rule that knowledge of the wrong is immaterial, because usually some harm will be apparent to a reasonably diligent plaintiff . . .

—continued on page 8—

Spectre Of Human Rights Violations Haunt Salvador

by Jill Paperno

Mounting concern over U.S. involvement in El Salvador led to visits by three Congressional delegations to that country last week.

U.S. representatives met with Defense Minister Guillermo Garcia in an effort to determine whether human rights violations by the El Salvadoran military and paramilitary forces have continued, despite President Reagan's January 29 assurances that they had stopped.

Reagan's claims were made in an effort to comply with stipulations set out in the December "Congressional Conditions on Military Aid to El Salvador". The "Congressional Conditions" stipulated that the President certify that the government of El Salvador was meeting a number of requirements before it would receive further aid. Among the criteria which were stipulated were the verification of significant efforts by the Salvadoran government to control human rights violations, to control its military forces, to hold free elections and to make continued progress in land, economic and political reform.

Reports of continued violations, including a December massacre of over 700 civilians, has led Congress to question the President's assertions. On February 3 Representative Gerry Studds introduced Resolution 399. This resolution would nullify President Reagan's certification of progress on human rights, and suspend all aid until Congress recertifies that the human rights conditions have been met. This proposal has so far received the support of seventy-three representatives. In addition, twenty-nine representatives have initiated a lawsuit in federal district court to suspend U.S. military aid to El Salvador. They claim the American involvement in El Salvador is in violation of the War Powers Resolution, the Foreign Assistance Act and the Universal Declaration of Human Rights.

General Wallace Nutting, the head of the Southern command in Panama, met with Salvadoran officials this week. Nutting has insisted on increased military assistance in the past. Several weeks ago he stated that it might be necessary for U.S. "advisors" to accompany Salvadoran soldiers on combat missions.

Current Administration plans include over $100 million in military and economic aid for El Salvador in 1982. Plans to increase the number of Salvadorans being trained in Fort Bragg, North Carolina and Fort Benning, Georgia are also being considered. Although Secretary of State Haig recently denied the Administration intends to send American troops to El Salvador, he added that he would not rule out any possibilities.

Expansion of the role of U.S. advisors has also been sought by Salvadoran officials. On February 7 the *New York Times* reported that, according to a non-American diplomat, "the Salvadoran government cannot win without troops from the United States — or from somewhere." On February 21 the *Times* reported that Secretary of State Haig had urged President Reagan to warn that the United States will do "whatever is prudent and necessary to protect El Salvador from foreign-backed subversion."

Repeated assertions of Cuban and Nicaraguan involvement in El Salvador have remained unsubstantiated. When questioned by reporters about evidence of Cuban and Nicaraguan arms Alan D. Romberg, deputy State Department spokesperson, said, "I don't have anything specific for you at the moment other than to indicate that the statement represents a clear consensus by those accumulating and assessing data."

The Administration faced similar difficulty in substantiating its assertions of Cuban and Nicaraguan intervention in last year's "White Paper."

Claims that these two countries have supplied arms have been investigated by various reporters on assignment in El Salvador. Their findings do not support the Administration's allegations. According to an interview by Raymond Bonner of the *New York Times* with a Salvadoran rebel, Commander Jonas, guerrillas had received no arms from Cuba or Nicaragua, and Jonas stated that in fact the biggest arms market was in the United States. In a February 21 *New York Times* interview another top guerrilla commander denied the presence of Cuban and Nicaraguan supplied arms, stating, "the government of the United States is interested in having a political justification for intervention." In his address to a Nicaraguan crowd on February 21 President Jose Lopez Portillo of Mexico stressed that the rebellions in Central America were the result of "misery, tyranny and oppression," and were not caused by East-West or capitalist-socialist conflict.

On February 21 the National Conference of Catholic Bishops expressed its opposition to increased military aide in El Salvador. Through the period of conflict the church has steadfastly remained one of the organizations opposed to further U.S. military intervention in El Salvador.

El Salvador's Archbishop Rivera y Damas, when discussing foreign intervention, stated "foreign countries in their zeal to dominate the world, supply the arms, and the Salvadorans supply the bodies." Archbishop Rivera y Damas is the replacement for Archbishop Oscar Romero, who was killed on March 24, 1980, just one day after his condemnation of Salvadoran military and paramilitary forces. Major Roberto D'Aubisson, leader of Salvadoran death squads and candidate for President in the March 28 elections, is believed to be linked to Romero's death.

This spring's upcoming elections have been supported by the Reagan administration, although they will be boycotted by the opposition groups of the Democratic Revolutionary Front (FDR). The FDR, an umbrella organization for numerous trade unions, professional workers, university students, peasants, teachers, clergy, armed rebels and others, has claimed that El Salvador's history of fraudulent and violent elections will not permit the free political expression of the people of El Salvador. This position is supported by many, including the Directorate of Salvdoran Federation of Lawyers.

Lawyers in this country have sought to aid Salvadoran refugees who being generally classified as illegal aliens, are being deported. Yet, according to Kathy Rimar, Clinic Instructor, only one Salvadoran refugee was accepted into the United States in 1981. Ms. Rimar stated that permitting the refugees to remain in the United States would be a "slap in the face to the Duarte government." Approximately 1000 Salvadorans are being sent back each month to face probable death in a country where an estimated twelve thousand people were killed last year.

Precocious Puck Pusher Picks Apart Sabres' Defense

by Steve Getzoff

Although a glance out the window wouldn't indicate as much, it is the month of March. Past experience indicates that it is now time for the NHL's annual game of musical playoff spots, where numerous teams scramble to avoid being among the five left out in the second season. This season the league has done away with the wild free-for-all and replaced it with a four ring circus, with very little action in any of the rings. Not only have virtually all the playoff qualifiers been determined already, but the NHL has compounded its past stupidity (allowing 16 of 21 teams to qualify) with some serious inequities. For example, Toronto, Detroit and Hartford all have better records than the L.A. Kings, yet L.A. will make the playoffs, courtesy of its inferior division.

Practically the only position of significance still in doubt is the coveted 21st spot. This is referred to as the "Bellows Cup" since it is accompanied by the first pick in the draft which will undoubtedly be future superstar Brian Bellows. The leader to date, Colorado, and several contenders, including Hartford and L.A. have assigned their rights in the first round to Boston, Philadelphia and Buffalo respectively, the first two for rather substantial consideration. Only Washington is in contention for these honors on their own behalf.

Despite the lack of intensity approaching the stretch, several events have made the 1981-82 season a most memorable one. I am referring primarily to the demise of two records that were once thought to be as perpetual as a professor with tenure. First, the New York Islanders with the help of four victories over Pittsburgh won 15 straight to break the 40 year old record of 14 set by the Bruins. Ironically, it was Pittsburgh who halted the streak at that point. Even more ironic was the fact that Colorado, the leader for the Bellows Cup, who had stopped the Canadiens' win streak at 12, came within 47 seconds of ending the Islanders' streak at 14.

The other development was the shattering of Phil Esposito's record of 76 goals by Wayne Gretzky, with the record breaking 77th, 78th and 79th coming in Buffalo last week. On hand to congratulate hockey's newest superstar was Esposito himself, taking time off from his broadcating duties with the Rangers.

The Islanders are not the only N.Y. team on a tear in recent months. The Rangers, despite an injury list that could stretch from one end of the rink to the other have lost only five since Christmas (The Sabres lost more than that in 2 weeks) and are virtually even with the Flyers in the battle for home ice advantage in their eventual first round playoff confrontation. In a similar situation are the Sabres and Boston, and Vancouver and Calgary. While it may be somewhat advantageous to gain this home ice advantage, history has taught us that the team who goes all out for the edge is usually flat when the series commences and loses rather quickly (i.e. Boston losing 3-0 to Minnesota last year). Another warning that is particularly directed at the Sabres concerns the matter of goaltending, which will to a large extent determine the success of every playoff contender. Don Edwards has played more games in the nets this season than any other goaltender in the league, and at the rate he is being used is likely to participate in close to 60 contests by the time April arrives. The plight of St. Louis and L.A. last year taught us (and hopefully Bowman and Roberts) that a goaltender who plays such an overwhelming majority of the games during the regular season is not capable of performing up to expectations in the playoffs and the team is quickly eliminated. It is essential that Edwards be well rested for the playoffs, even if it means finishing third in the division.

Asbestos . . .

—continued from page 5—

Avoiding possible injustice in such cases outweighs the desire for repose and administrative expediency, which are the primary underpinnings of the limitations statute . .

394 A2d 299

The court in *Harig* based its decision to adopt a discovery rule in asbestos related injury cases on the inherently unknowlable character of the latent occupational disease and on the peculiarly harsh consequences of adherence to the general rule of accrual from the time of the wrong.

Because one of the essential prerequisites necessary to successfully maintain a cause of action is the existence of an injury or some damage, it seems logical that a cause of action cannot accrue until some legally recognized damage has occurred. The court in *Karjala v. Johns-Manville*, 523 F.2d 155 (1975), recognized this idea in opting for a discovery rule under Minnesota law. In *Karjala* the court wrote, ". . . under Minnesota law, an instruction on the statute of limitations must be couched in terms of when damage has resulted from the alleged breach of duty, that is, the time when a claim could be brought in a court of law without dismissal for failure to state a claim; in a personal injury action this occurs when some harm or impairment has manifested itself which can be shown to have been caused by an act or ommission for which the defendant would be liable." 523 F2d 155, 160.

The court in *Karjala* seems to opt for more than a mere discovery rule. Rather the court suggests that a causal connection between the substance and the injury must be indicated before the cause of action accrues. The court stated, "It is when the disease manifests itself in a way which supplies some evidence of causal relationship to the manufactured product that the public interest in limiting the time for asserting a claim attaches and the statute of limitations will begin to run." 523 F.2d 160 and 161. Clearly the court is stating that more than mere discovery of an injury is needed to begin the running of the statute of limitations. Instead what is required is some understanding in a reasonably diligent plaintiff that the injury was related to the substance he was exposed to.

Other courts have excepted this "extended discovery" rule also. In *Raymond v. Eli Lily and Co.*, 371 A2d 170 170 (NH) the New Hampshire Supreme Court, in an action to recover damages from the manufacturer of an oral contraceptive which allegedly caused the plaintiff to become blind, wrote, "A cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered *not only that he had been injured but also that his injury may have been caused by the defendant's product.*" [emphasis added] 371 A. 2d at 174. The court in *Raymond* recognized the fact that a period of time may pass between the time the plaintiff discovers his injury and the time he is able to ascertain its causal relationship with the product.

Next Issue: How New York has rejected the discovery rule in asbestos litigation.

UB Law Hosts Jessup March 13th and 14th

Winsteadi Lome

UB Law School will soon be hosting the Jessup International Moot Court Competition for the North-Central Region. Teams from the University of Pittsburgh, the University of Pennsylvania, Duquesne, Cornell, Syracuse, Albany, the University of West Virginia, Dickenson, and the University of Indiana will be convening at O'Brian Hall on March 13th and 14th.

This year's problem deals with several human rights issues. The rights of refugees and foreign nationals are key issues in the upcoming competition.

Representing UB in the oral competitions are third year student Glenn Pincus, and second year students Ashram Dial, Ellen Sinclair, and Jim Wilder. All are preparing thoroughly for arduous oral rounds ahead.

All of those interested in international law or human rights should make an earnest effort to sit in on several of he arguments. The number of well known and highly qualified judges, contacted by Jessup Administrator Jim Newman, will also serve to make the event both educational and memorable.

UB Law Hoops Team Travels To Tourney

by Captain Arthur Garkinkel

On March 6, fourteen men dressed in shorts, tee-shirts, and sneakers will step onto a basketball court in Springfield, Mass. to represent our law school at the seventh Annual Western New England School of Law Invitational Basketball Tournament.

Forty well-built and not so well-built law students attended two grueling days of tryouts. The remains are: Captain Arthur Garfinkel, Pete Hogan, Mark Sacha, Dan Zahn, Bob Heftka, Jim Kelleher, Dave Nelson, Greg Miller, Mike Crosby, Steve Getzoff, Dan Welch, Rod DeWitt, and Ron Olson. This Spartan group will be coached by Julian "Corny" Johnson.

Thirty law schools, including Harvard, N.Y.U., University of Alberta, Temple, and defending champion Fordham will participate in this year's tournament. The level of play is *high* and legal beagles take the games seriously as Katz's Federal Courts.

University of Buffalo Captain Arthur Garfinkel is touting this year's team predicting at least a semi-final showing. Team members Dan Welch, Dave Nelson, and Greg Miller seem perturbed over Captain Garfinkel's statement thinking it will conflict with the partying atmosphere of the tournament.

OPINION editor Ralph Peters contemplates his future (Moran)