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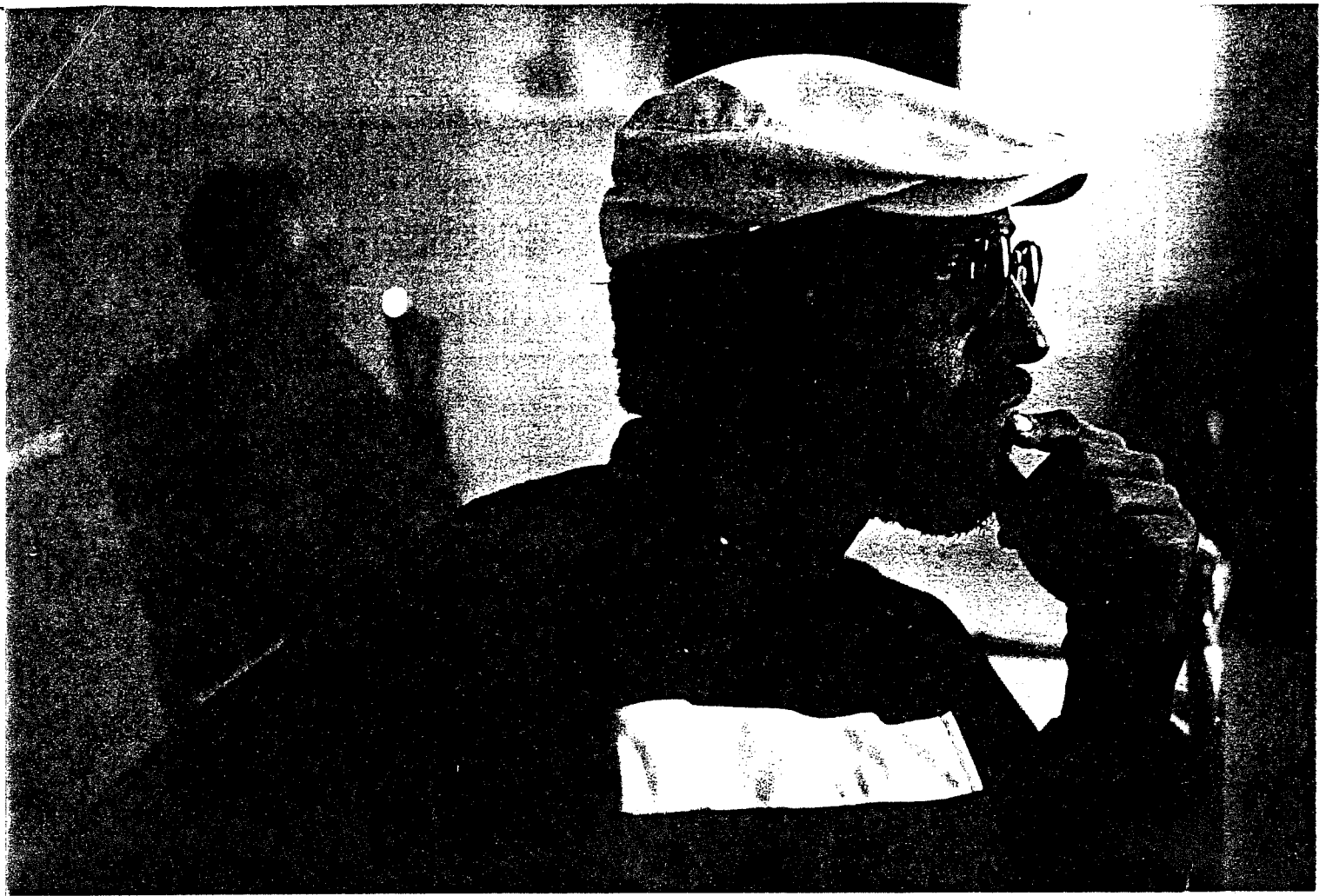
'Social Grace' Case Raises Question of Subtle Sex Bias in Workplace

Al Karsen

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DETERMINED TO BE HEARD

'If it helps others, fine. But
let me first consider
myself. Let me get this yoke
off my back. . . . There's got to
be some life before I die.'

FRANK TEAGUE

*Four Americans and their
journeys to the Supreme Court*

By William Glaberson

THEY ARE THE POWERFUL and the powerless, the popular and the scorned. A guild of stubborn optimists who test the limits of the system for the rest of us, they take their grievances, as they were taught they could in America, as far as you can go: to the United States Supreme Court.

Each year, there are fewer than 200 of them. Some are martyrs. Some are scoundrels. Decisions named for them become the law of the land: Dred Scott. Brown v. Board of Education. Miranda.

For the new Supreme Court term that begins tomorrow, the justices have already selected 105 of the cases that they will hear this year. And behind the legalisms of many of them are people who, like the four profiled here, share a belief that their causes are just and the conviction that the system will, with enough persistence, accommodate them. "This is America and you have to believe that what's right will happen in the end," says Melody DeShaney, a Wyoming woman whose case is one of the 105.

With rare exceptions, it takes years for a case to climb its way up the Federal or state court systems. Still, 5,000 or so cases annually raise thorny enough Federal legal questions that they get to the High Court, and the justices then begin their own selection process. Many of the cases — brought by corporations and state and local governments, civic groups and other organizations, as well as individuals — make the justices' final cut because lower courts have worn out legal combatants without developing any consistent national law on a pressing issue.

For some of those individuals who have made it to the High Court this year, perseverance has exacted its cost. Sometimes, says Frank Dean Teague Jr., an inmate in an Illinois prison, he has been overwhelmed by the latest bit of news of his case on the long road to the Supreme Court: "There have been times when I haven't been able to talk, I want it so badly to happen. Then, it's more of the same thing: another continuance, another rejection, another hearing."

And though it is too early for these people to measure, sometimes those who push the system as far as it will go are permanently marked by the experience. The convicted rapist Ernesto Miranda never made much of his life beyond giving his name to the landmark 1966 ruling that declared suspects are entitled to be informed of their rights when they are arrested. But when he died, stabbed in a barroom fight 10 years after the High Court decision, the police found two small cards in his shirt pocket, printed with the rights of suspects. Miranda cards, police call them.

In 1962, the case of a spindly drifter named Clarence Earl Gideon persuaded the Supreme Court that all people accused of serious crimes have the right to be represented by counsel. "I believe that each era finds an improvement in the law," Clarence Gideon wrote to Abe Fortas, the lawyer who argued his case in the Supreme Court. "Maybe this will be one of those small steps forward." Gideon might have been writing for the other members of his small fraternity. He might have been writing for the four people whose stories follow.

"SOMEHOW, I SHOULD HAVE KNOWN," SAYS Melody DeShaney.

It is partly self-punishment, partly penance, as almost everything has been since the phone call in 1984: Her little boy wasn't expected to make it through the night, the voice on the line said.

She had given Joshua to his father after their di-

William Glaberson is a reporter for The New York Times.

'This is America, and you have to believe that what's right will happen in the end... Maybe it is a little bit of a healing process to be able to fight back.'

MELODY DESHANEY



OCT 30, 1988

'I just believe that every person makes a difference.... It's important to how my children see themselves. It's important to how a whole lot of people... see me.'

ANN HOPKINS

voice, just after his first birthday, and then she didn't see him again until it was too late. A few times, she went looking in Wisconsin, where her former husband lived. But it was far from her home in Cheyenne, Wyo., and she says her former husband never told her where he was. For those three years, though, she thought that Joshua was "having a nice kid life," the kind of life that she felt too alone, too poor and too young to give him.

It wasn't a nice kid life. Joshua survived that night, but his brain was so badly damaged by what the authorities say was abuse by his father that he is severely retarded and will need to live in an institution for the rest of his life. His father, Randy DeShaney, always denied causing Joshua's injuries, but he did not contest child-abuse charges. Convicted, he was sent to jail for two to four years. He has recently been released.

In Wisconsin, in the terrible days after the phone call, Melody DeShaney began to learn more than she could bear to hear about Joshua's life away from her. And ever since, she has been trying to make things as right as she can for him. That, for her, is what her Supreme Court case stands for: it is a mother's way of trying to do right by her child.

She sued the county welfare department in Wisconsin that was supposedly watching over Joshua. She could have sued under state personal-injury law, but her lawyer told her Wisconsin would limit her damages to \$50,000. Joshua's perpetual care will take much more than that. So, instead, lawyers drafted the Federal suit of Joshua and Melody DeShaney, contending that once the state learns a particular child may be the victim of abuse and takes some action on the child's behalf, a special relationship begins, giving the child a constitutional right to be protected by the state. A few

courts have recognized such a right in cases involving extreme misconduct by welfare authorities. So the state, the lawyers say, by failing to protect Joshua from his father's abuse, is therefore liable. Asking for \$50 million on behalf of Joshua and his mother, they have argued that abused children all over the country need special protection. But defeat has followed defeat in this case; the lower courts have refused to acknowledge a constitutional right for abused children.

For Melody DeShaney, now 29, each twist and turn in the case brings the tragedy back into sharp focus. But even the anguish that the case keeps refreshing, she says, helps her live through the days: "Maybe it is a little bit of a healing process to be able to fight back. At least you're doing something."

Her lawyer, Donald J. Sullivan, says that, from the start, DeShaney focused on the other children her case might help by making welfare workers more attentive. Says Sullivan: "Part of it for her is: 'Even if I can't help Joshua directly, I'm going to make sure that there is not another Joshua.' It's a common symptom of every trauma survivor: 'Never again.'"

The day after she went to the hospital in Wisconsin, Melody DeShaney sat down with a state social-service worker and learned that between January 1982 and the day in March 1984 when Joshua's brain stopped working, the authorities in Wisconsin had recorded Joshua's suffering with bureaucratic precision.

Randy DeShaney's second wife, from whom he is now separated, told the police that Randy hit the boy and Joshua was "a prime case for child abuse." In frequent hospital visits, DeShaney and the new woman he was living with explained that the injured child was accident prone. There were reports from doctors saying they suspected child abuse, and there



PHOTOGRAPHS BY STEVE MCCURRY/MAGNUM

was even a brief time when the Winnebago Department of Social Services took Joshua away from his father.

But Joshua was back soon with his father and the Social Services department continued to compile its careful records. On one visit, Ann Kemmeter, the social worker on the case, noticed a bump on the child's forehead, the notes in the file show. On another, Kemmeter was told that Randy had taken Joshua to the hospital with a scratched cornea.

Once Joshua had "a scraped chin that appeared to me to look like a cigarette burn," Kemmeter entered in the growing file. Later that month, Joshua was treated in the emergency room for a cut forehead, a bloody nose, a swollen ear and bruises on both shoulders. The doctors said they believed he was the victim of child abuse.

On March 7, 1984, Kemmeter made another home visit. Joshua's father and his girlfriend told her that the boy had fainted several days earlier for no apparent reason. They said the boy was taking a nap. "I don't know why," she wrote in her file, "but I did not ask to see Joshua."

The next day, Joshua was unconscious when he entered the hospital. When they conducted the emergency brain surgery, doctors found evidence that Joshua's head had been injured repeatedly over a long period of time. His body was covered with bruises.

"I just knew the phone would ring someday and Joshua would be dead," Ann Kemmeter told Melody DeShaney when they met, DeShaney testified in a pretrial proceeding. Kemmeter, according to her lawyer, denies having said this. Nonetheless, no one from the state had ever called Joshua's mother and no one stopped Joshua's father from taking his son's future away.

For four years now, the legal fight has occupied much of Melody DeShaney's attention. She has, she says, few friends. A second marriage is rocky, and she is not interested in the low-paying jobs she has held. She spends a lot of time fantasizing about the care she will be able to give her son when the case is over. She likes to think about bringing Joshua home to Cheyenne from Wisconsin, where he is currently in a state-supported institution.

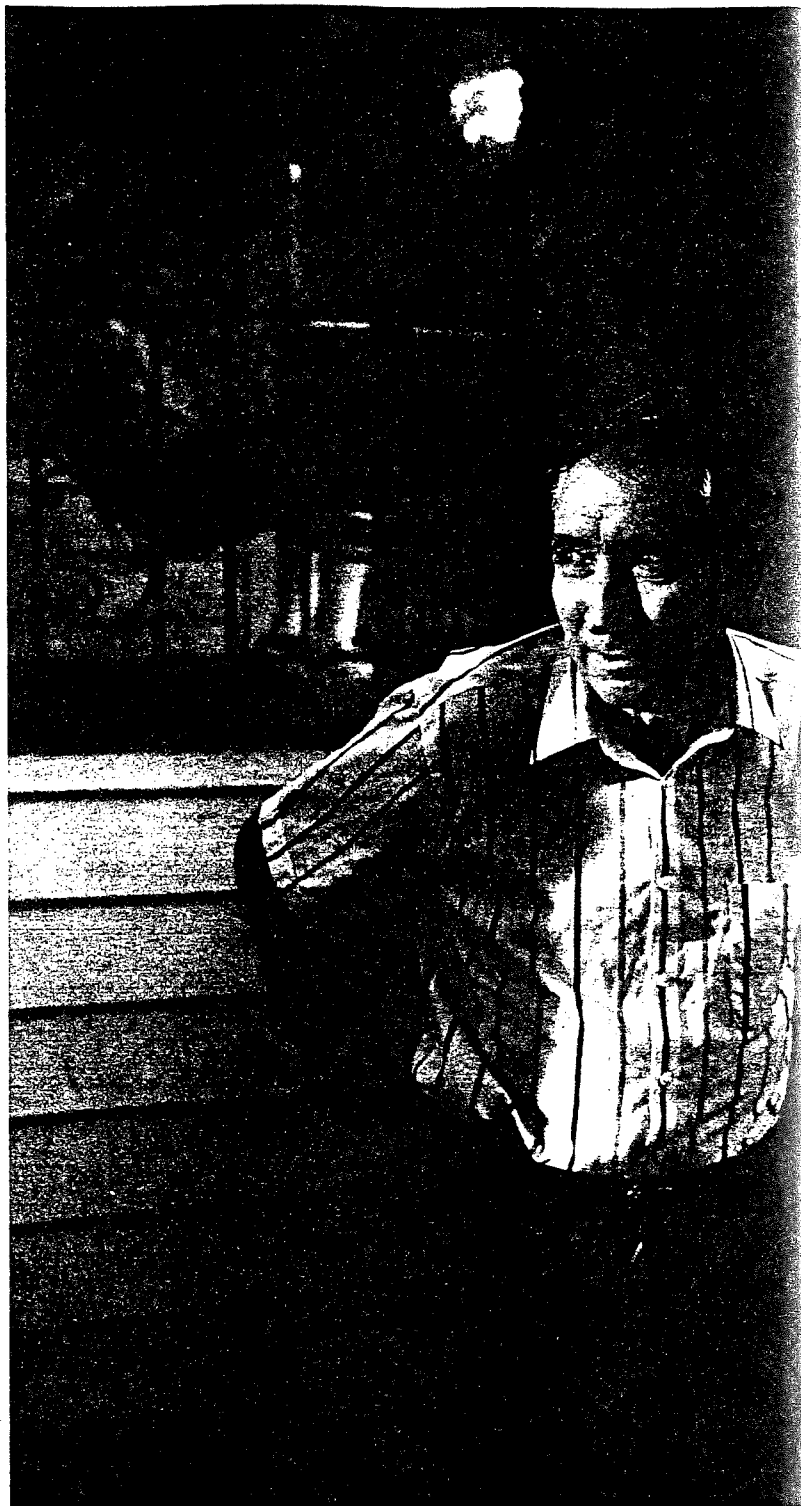
"Josh doesn't even know I'm his mother," she says. "He doesn't recognize anybody. But I still feel in my heart that at least Josh will know that there is someone there that really loves him."

After Joshua's hospitalization, Melody DeShaney received counseling from a therapist in Cheyenne, Linda Brekke, who believes DeShaney's toughest days are ahead of her. One day, Brekke says, the case will end, and one way or the other, the question of Joshua's care will be resolved. And then, when there is no more fighting to be done, Melody DeShaney will have to face something that is even harder than what she has been through already. She is going to have to face the future after the Supreme Court case. "When this is all over," says Brekke, "what happens to Melody? What happens to Melody?"

THERE ARE SOME PRISONERS Patricia Unsinn has represented in her 11 years as a public defender who don't seem to care about their cases. Some have given up on freedom. Some say they can't afford to hope. Frank Teague is not one of those.

In her Chicago office, Unsinn has a foot-wide file of legal suggestions and other notes from the man whose case she is taking to the Supreme Court. In more than six years of work on his appeals, there has hardly been a week that he hasn't called from one correctional institution or another. He'll want an update on his case. Or he'll want to talk about a precedent he has discovered in the prison law library.

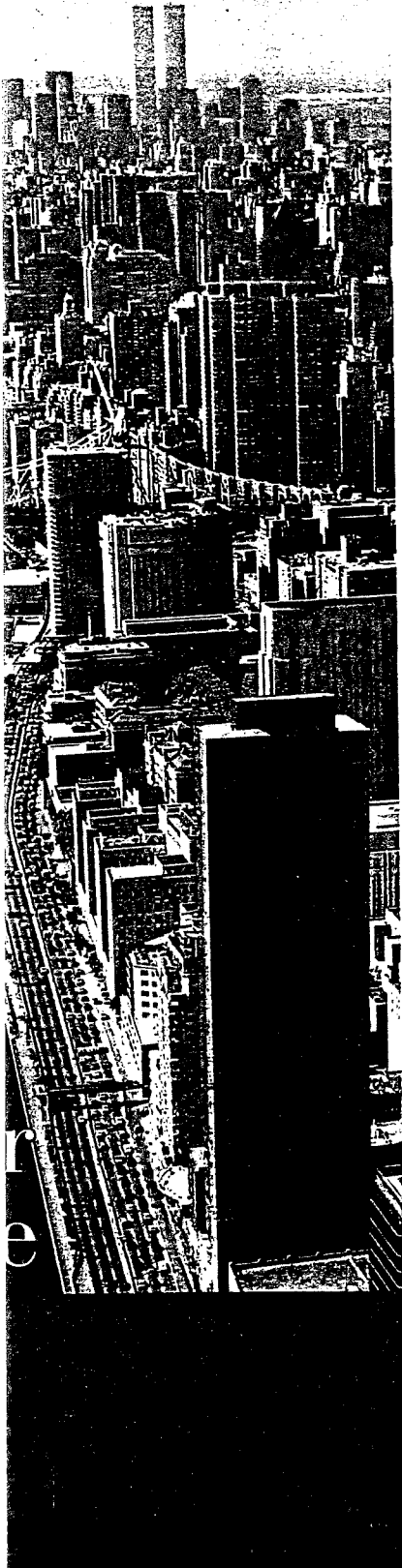
"It's probably an obsession," she says. And Teague



'I've been one of those fellows
who believed you
would win if you just hang in
there long enough and
do the right thing.'

CHARLIE BROYLES

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Clarence Gideon in 1964, two years after winning his landmark case, in which the Supreme Court held that all defendants accused of serious crimes have the right to legal representation.

doesn't quarrel with that description. His Supreme Court case, and a half-dozen other lawsuits he has filed on his own for wrongs he claims he has suffered at the hands of the Illinois Corrections Department, are what his life is about at the state correctional facility in Dixon. "That is my life in here," he says.

Frank Teague first went to jail 20 years ago, when he was 22. Except for nine months of freedom, during which he committed the armed robbery for which he is now in jail, he has spent his adult life surrounded by the gray and steel of places like the Federal penitentiary in Leavenworth, Kan., and Illinois's maximum-security Stateville prison, in Joliet.

He has been in jail so long that the prison world has changed around him. He is, he says, a convict, not an "inmate" or a "resident." The new language of the jailhouse obscures too much, for his taste, the lines between the prisoners and the imprisoners.

The convict lives by a code, he says; he watches out for himself and he doesn't curry favor with the guards, as so many of the young men do these days: "When I started, you stayed out of the Man's face. If you congregated with him, you were branded automatically a snitch, and that wasn't healthy."

The oldest of three children, he was raised in comfortable surroundings in Moline, Ill. His was one of the few black families in the middle-class city in those days.

So the young Teague, who was already a bit of a loner, had very little in common with the big-city street kids he met in jail.

In prison, he stuck to himself and slowly learned the techniques of the jailhouse "writ writers," other men who were, like him, articulate and able to make their points with the written word. A friend everyone knew as Rizzo taught Teague how to do legal research and how to draw up papers that would get read in court.

After seven years in jail, a Federal appeals court ruled that Teague's first conviction, for the armed robbery of the Citizens Savings and Loan Association in Chicago, had been based, in part, on the false testimony of a key witness. Teague himself drew up the original legal argument, of which the court said: "We doubt that an attorney could have stated his contentions much more precisely." A lower court then reversed his conviction. Though there had been other witnesses who said they were sure Teague was the man with the shotgun that day in 1968, the prosecutors did not retry him.

The outside was intoxicating. He married quickly, took two jobs and tried courses at a junior college. "I wasn't accustomed to living on a weekly budget, like most people," he says now. "I wanted more. I wanted it now." On Feb. 5, 1977, the police caught Teague after a gunfight that left him and a police officer

wounded. The police had pulled up outside the Chicago A&P store where witnesses said he had held his gun very steadily as he demanded money.

At the trial, Teague pleaded the insanity defense. A psychiatrist said he had been in a "hysterical fugue state," provoked, perhaps, by his desperation to make up for all his lost time.

But as soon as they started to select the jury, Teague says, he knew that he didn't have a chance. Out of 11 blacks on the jury panel, the prosecutor used his peremptory challenges, for which no explanation is required, to excuse all but one. The 11th was excused by Teague's lawyer because she was married to a police officer, and thus was potentially biased in a case involving the shooting of a policeman.

"I saw a hanging jury being put upon me," Teague says. He felt that "another black person, perhaps, would have been more inclined to give more attention to both sides." Ever since his conviction, Teague has been pressing appeals and suits contending violations of his rights, including the chance to be judged by a jury of his peers.

In 1986, the High Court ruled that it is a denial of equal protection of the law for a prosecutor to use race as a ground for excluding blacks from juries. But the court also ruled, in a later case, that many black prisoners who had raised the jury issue while the 1986 case was pending could not take advantage of it to have their own convictions reviewed.

Teague's case gives the court the opportunity to reconsider whether its earlier ruling should be applied retroactively to what are believed to be hundreds of cases in which black inmates raised the issue but completed their appeals before the 1986 ruling came down. And Patricia Unsinn has raised another issue that could provoke an opinion that grapples with exactly what the jury system is and how it is supposed to work in a modern society. She argues that a prosecutor's use of challenges to keep any identifiable group off a jury violates not just the equal-protection clause, but what legal precedent has said is the defendant's right to be tried by a "fair cross section" of the community. If the High Court agrees, the case could trigger a major re-examination of the rules of jury selection.

For Frank Teague, the Su-



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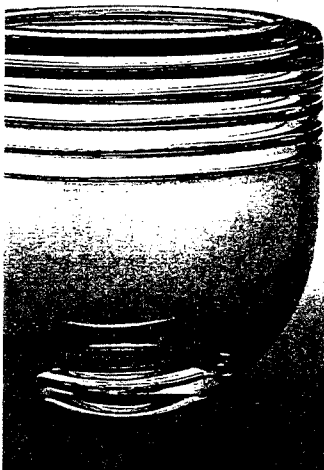
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preme Court case is the ultimate expression of his convicts' code: You keep to yourself, you work for yourself, you do everything you can to get out. If his case comes to mean something to someone other than Frank Teague, convict A93456, that's all right with him. But that is not what it is all about, he explains: "As I told my mother a few weeks ago, if it helps others, fine. But let me first consider myself. Let me get this yoke off my back."

"There's got to be some life before I die," he says. "That's one of my prayers before I go to sleep every night: Don't let me die in this hellhole."

ANN B. HOPKINS IS finally comfortable. It is almost four hours into a conversation in her well-appointed town house in Washington. Her three young children have been running in and out the whole time. The woman whose name is likely to stand for one of the major sex-discrimination decisions in years has a cigarette in one hand and a beer in the other. And the words are coming faster than they did at first, when she kept herself, as she usually does, to herself.

Now, she is surer. Her speech is peppered with her own peculiar blend of Texas-army-brat "can do" and the Fortune-500-speak that has become the national language of the ambitious: Setbacks are "opportunities to manage." There are always "downside risks" but, in business, as in life, there are "hills to die on" for people who have the grit to get things done. "I think of myself as tough-minded, which is different than tough," she says. "To be tough-minded is to challenge whatever the assertions are."

Hopkins, in other words, is being the person whose shrewdness and self-confidence impressed her bosses as she made her way up the ranks of one of the mainstays of the financial establishment, the Big Eight accounting firm of Price Waterhouse. Six years ago, at 38, she was nominated for partnership because, her supervisors said: "Her strong character, independence and integrity are well recognized by her clients and peers."

But this is also the person, two lower courts have held, who was blocked by a double standard. In 1983, 88 people were eligible to become partners of Price Waterhouse. Ann Hopkins was the only woman among them. Forty-seven of the men made it. Her

bid for entry into the partnership failed at least partly, the courts have said, because the very assertiveness that made her successful in the lucrative management consulting arm of the firm challenged men's stereotypes of the way women are supposed to behave.

She was, some Price Waterhouse men wrote, "macho," "a somewhat masculine hard-nosed manager" who "may have overcompensated for being a woman." She was "universally disliked" and needed a "course at charm school."

When she was passed over, her boss gave her some pointers for improving her chances in the future. He told her, the court found, that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry."

To Ann Hopkins, it just didn't make sense. The daughter of an army career officer who disapproved of army wives working, she was nevertheless also the daughter of a nurse who had always considered her career important. Her mother, she says, taught her that "when you shake hands, you should always shake hands firmly, and when you walk into a room, you should walk in as if you owned it."

Ann Hopkins had never been much for social causes and, though she had been interested in the women's movement, she had been too busy getting a graduate degree in mathematics and then working at a succession of consulting firms to bother much with it. She hadn't felt part of anything bigger than her own career. So, when she decided to sue Price Waterhouse, it wasn't because of a movement. It was to try to win the place she thought she deserved, or at least to understand why she had suddenly stalled.

The case, she feels, has given her the answers. At the trial in 1985, she says, she finally understood what had happened as she listened to the testimony of her side's expert witness, Dr. Susan Fiske, a psychologist at the University of Massachusetts.

Dr. Fiske talked about the work she had done studying sexual stereotyping and the conditions under which she believes it flourishes. When there are just a few women among many men, she said, forceful personalities are often seen as abrasive, and some men's negative reactions can be extremely intense.

But even if Ann Hopkins felt vindicated by her new insights, the case she had started could not end. Both sides appealed different parts of the trial-court ruling. Hopkins won her legal points, but the judge did not award her damages, saying she had left the firm voluntarily after she had been informed her partnership application was "on hold." (Even if the Supreme Court upholds the claim that Hopkins was a victim of sex discrimination, how much she might be entitled to in damages is a separate legal issue.)

When she won in the appeals court, Price Waterhouse decided to go to the nation's highest court, arguing that its decision to deny Hopkins a partnership had been, at worst, one of mixed motives. If there had been some unconscious sex stereotyping, the firm said, there were also legitimate reasons. She lacked personal and leadership qualities, the firm said, and those barbed comments, "far from reflecting stereotypical thinking, accurately described the reality of Hopkins' behavior."

A close friend, Ruth Hopper, says she has seen the case become increasingly taxing on Hopkins as it has grown longer: "It's gotten more and more difficult for her, because of the nature of the things in the Price Waterhouse briefs." And the stresses of fighting the case, Hopper says, have added to the burden of Hopkins's marriage breaking up over the last few years.

To Hopkins, who now works for the World Bank as a budget planner, the battle remains intensely personal: "It's important to how my children see themselves. It's important to how a whole lot of people I may not know very well see me."

And it has become important, too, for reasons that have nothing to do with her. Price Waterhouse wants the Supreme Court to rule that in "mixed motive" cases it is up to the employee to prove that legitimate motives were not the employer's true reasons for making a negative hiring or promotion decision. The Court of Appeals ruled that it was enough for an employee to show discrimination; then, the court said, it was up to the employer to show that it had made its decision solely on permissible grounds.

Many of Hopkins's supporters say it would be very difficult for a woman who is the object of discrimination to prove exactly what was be-



GIDEON LI

Bill Blass

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hind an employer's decision. If Hopkins loses, many of her supporters say, the decision could stall many of the so-called "second generation" of women in business who want not only to get in the door but want to get their names on it as well.

Increasingly, the case is bringing national attention to Hopkins as a symbol of the women's movement. And that, says her friend Ruth Hopper, "is not a cloak that she wears easily."

Says Hopkins, settling into her living-room chair: "I just believe that every person makes a difference. And the fact that it's not part of a movement, or doesn't appear to be part of a movement, doesn't matter very much. Some people have hills to die on, and some people don't." At 44, Ann Hopkins has found hers and, slowly, she is growing comfortable there.

IT HAS BEEN 30 YEARS since Charlie Broyles moved his family to the neighborhood of neat working-class houses on Chicago's North Side, where he now spends his days. But even after all this time, there is West Virginia in the round, musical sound of his words.

Coal country is in his thoughts these days, too. Now that he is, at 66, too sick to work, he often catches himself making a picture in his mind of the dirt farm where his parents raised him and where he brought his own wife when they were starting out. "It's a valley surrounded by a mountain with trees," he says. "To me, it's a very beautiful picture."

All of Charlie Broyles's associations with home are not kind, though: coal country is in Charlie Broyles's lungs too; black lung, they call it now, pneumoconiosis. His breath is shallow and he grows tired if he walks too quickly across the room. During his six years in the mines in the 1940's and 50's, just across the Virginia border from home, they called it miner's asthma, the wheezing and coughing that came from breathing the coal dust. The black air was so thick in the deep tunnels, Broyles remembers, that sometimes it felt as if he couldn't breathe at all.

The way Charlie Broyles sees things, it all ought to be simple: His doctors' reports show that he has black-lung disease in addition to a heart condition. There is a Government program that is supposed to compensate miners with black lung. He figures

he's entitled to the benefits. "What I can't get through my head," he says, "is why the Government will have you tested to see if you have black lung, and they find you have it, and then they fight you."

The very first case to be heard this term by the Supreme Court will be Charlie Broyles's plea for black-lung benefits. Beginning tomorrow, 12 years and two weeks since Broyles first filed his claim, his case, and another with which it has been paired, will determine whether some 155,000 miners who say they have black lung will be able to reopen claims the Government has denied.

The coal and insurance industries have joined the Government in fighting the case. They say a victory by the miners will make it possible for undeserving claimants to win benefits, costing the two industries as much as \$6 billion. Charlie Broyles, the opposition says, is sicker from his heart ailment than from black lung.

The case will test whether the law can be fair to people who have very little, says Gary H. Lester, the executive director of the Chicago Area Black Lung Association, an organization of 700 former miners, who, like Charlie Broyles, moved north to find jobs outside of the mines. "They feel they worked in the mines and they are disabled from working in the mines and they are entitled," says Lester, himself the son of a miner. "Unfortunately, in order to get justice, we have to fight every inch of the way."

The federal black-lung program began in 1969, awash in the good intentions of legislators. But since then, the program has become emblematic of tangled social programs that are buffeted by changing political winds.

Two separate Federal agencies, the Social Security Administration and the Labor Department, have, at different times, been responsible for the black-lung program, which is now paid for mostly by the coal industry. Each of the Federal agencies had different rules.

Under Social Security's rules, miners like Charlie Broyles had to show simply that they had black lung and that it came from their work in the mines. Then, the rules said, it was up to the Government to prove that they weren't disabled. Otherwise, the miners qualified for benefits that amount to \$517.20 a month for a married couple.

But under the rules implemented by the Labor Department in 1978, miners are presumed to be disabled black lung only if they worked in the mines 10 years or more. For others, like Broyles, who were in the mines for less than a decade, the change made it almost impossible to win their case, their lawyers say. The lawyers also say the Labor Department rule violates one many new pieces of legislation the Congress has passed to try to clear up the black lung muddle. The provision the lawyers cite declares that the new rules cannot be any "more restrictive" than the previous, Social Security rules.

Charlie Broyles is proud of the three girls he and his wife raised. And he is proud that he made his way from the coal fields to a good job in Chicago factory that helps him and his wife own the home. But he may be proudest of the four years he spent in the Pacific in World War II.

What he does not understand, he says, is how the country that he fought for can deny him and all the other miners simple justice. He says, though, that he is not religious a person to feel angry about what has happened. But he does allow with a tinge of bitterness that "the people who are going to judge you on the black lung should have five or six years' experience in the mines the way it used to be with the shovel and the pick and the hammer."

The benefits he seeks would help him and his wife afford to move out of Chicago where the pollution makes it hard for him to catch his breath if he leaves the house and back, perhaps, to West Virginia.

But it is not only for himself, he says, that he has fought the case. It is for the other miners, too, who shared his long, dark days under the earth when they were all young. And although he has now lived with the case longer than he worked in the mines, he doesn't quite understand some of the other miners he knows who decided not to fight: "Some say, 'The heck with it, I'm never going to get it no way, so why waste my time with it?' But I've been one of those fellas that believed you would win if you just hang in there long enough and do the right thing. I guess you could call that a streak of stubbornness." ■