Whizzer White and the Fearsome Foursome

by Robert Zelnick

As if to give a sign of what Nixon's first term has meant to jurisprudence and to hint what the next four years might bring, the Supreme Court ended its 1971-72 term last June with five major decisions involving the right to speak and the right to hear:

■The Branzburg, Pappas, and Caldwell cases, three of the most important First Amendment cases of recent years, which declared that reporters must either reveal their confidential sources to grand juries during investigations or go to jail;

■*Lloyd Corporation v Tanner*, which allowed the owners of giant shopping centers to keep political campaigners off their premises;

■*Laird v Tatum*, which refused to curb the Pentagon's snooping activities against anti-war activists;

■*Gravel v U. S.*, one of several "Pentagon Papers" cases, in which the Court rejected the proposition that Senator Gravel should be no more subject for questioning about publishing the Pentagon Papers in book form than he would be for reading them in the halls of Congress;

■*Mandel v Kleindienst*, which upheld the Justice Department's decision banning a Marxist scholar from entering the country to speak to an academic group.

Apart from their various constitutional implications, these five decisions made clear a change that had been suspected ever since the eldest of the Warren Court holdovers, Hugo Black, died last year. In each of the cases, Nixon's four appointees—Justices Harry Blackmun, William Rehnquist, Lewis Powell, and Chief Justice Warren Burger—stuck together, choosing government rights over the individual's, protecting property rights against protestors. It is easy to imagine Nixon thinking of them as his Fearsome Foursome, mowing down the opposition of weak knees and bleeding hearts on the way to the goal line. (Last year they voted together 54

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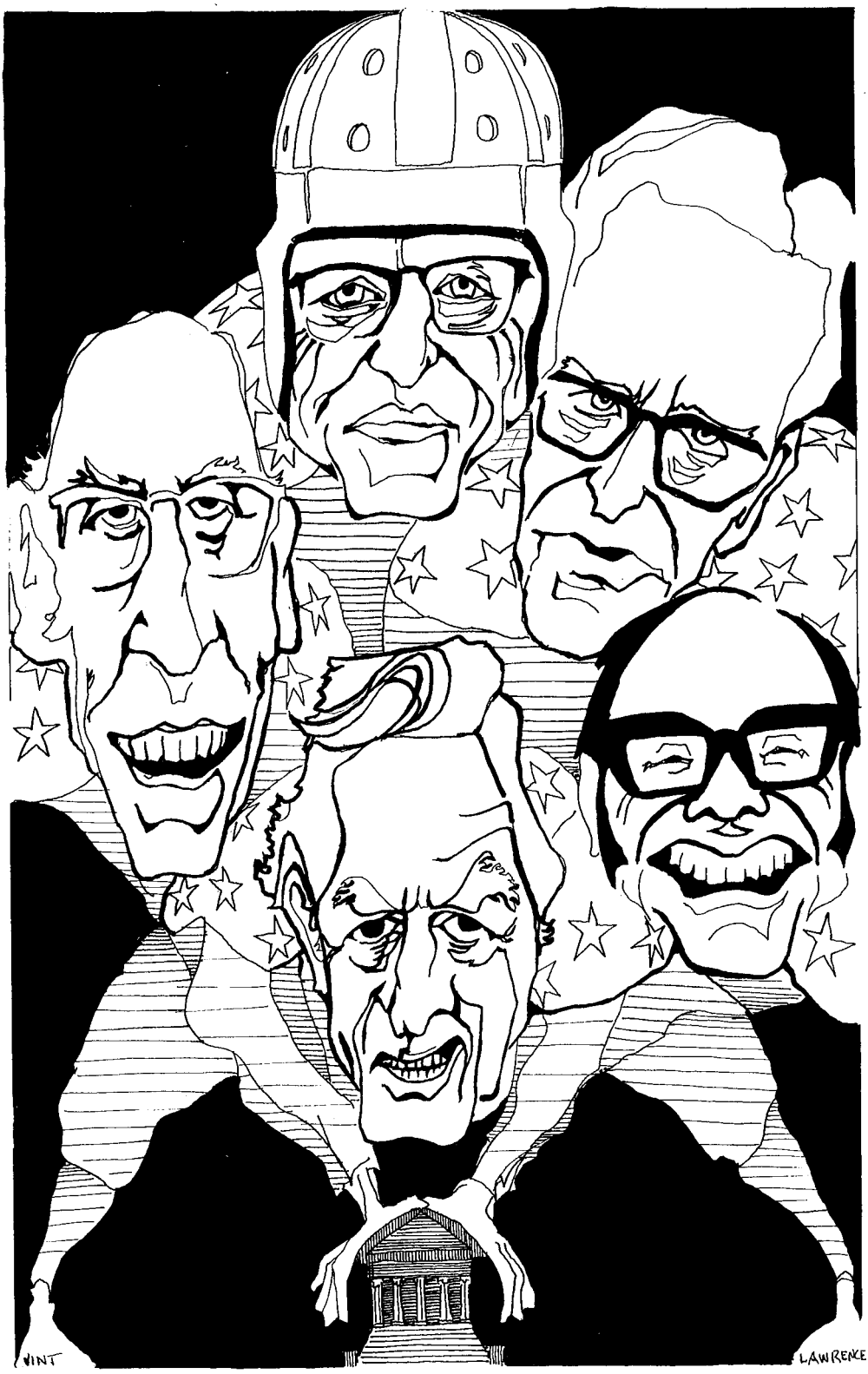

out of 67 times.) Starting against them were the four holdovers from the pre-Nixon Court: Justices William O. Douglas, William Brennan, Thurgood Marshall, and Potter Stewart. In four of the five cases they voted together, Stewart defecting to the other team in the Mandel case.

Between these two teams stood the ninth Justice, Byron Raymond "Whizzer" White, finishing his 10th year on the bench since his appointment by John Kennedy. With the new balance of Supreme Court power, White has become the "swing" man. By casting his vote with one side or the other, he can make a 5-4 majority. In these five cases, White was on the winning side every time, and his was the decisive vote in all but the 6-3 Mandel decision.

Ripe for Analysis

After years of uncelebrated service on the Warren Court, White has stepped up for his turn in the spotlight. His importance is clear: if the Court's balance of power stays the same for the next four years (that is, if the four holdovers outlive the Nixon Administration), White will continue to be the swing man, the barometer of the Court's direction and performance. Since last June, the time has been ripe for analyzing White. *The New York Times Sunday Magazine* came through last October 8 with a piece by Lance Liebman, a former law clerk to White and now an associate professor at Harvard Law School. White believes, according to Liebman, that "the country is strong and beautiful, that its people are good, and that the defects and weaknesses they do exhibit will not easily be cured by shimmering phrases coined on a judicial typewriter." This is fine, but not much help in predicting how the Court will deal with criminal rights cases, or what it thinks about newspaper reporters and their secret sources. Again, Liebman tells us of White's belief that "one job of government is to create and preserve an open market—for goods, but also for ideas and people," and that the Supreme Court can help this along by "applying a Constitution that does not answer most of today's questions, but should be interpreted and applied with common sense and good judgment by fallible judges." This, too, will do for a civics class, but has limited application to political-protest cases or other complicated conflicts.

Secret Messages

Liebman's vagueness is probably deliberate. The reason, I suspect, may be traced to the enduring Justice-clerk relationship. The clerk—even when long past working for his patron—continues trying to con the Justice into thinking the clerk's thoughts are his own. Part of the con is writing about what he knows White would like to hear in order to get the Justice in the habit of nodding affirmatively. The clerk can then slip a little of his own gospel in when the nodding has become automatic. Knowing White's respect for tough-mindedness, Liebman butters him up. Don't be fooled, he says, into thinking that White has no ideas or theories; it's just that he is not as dreamy about them as moist-eyes like William Douglas. With his tough, bear-trap mind, White refuses to use inflated theories as camouflage for decisions that are really based on common sense or horse-trading. This Liebman calls a "dislike for formulations that screen the fact that the Court is acting pragmatically," and says it invokes "a process of decision that is open, complicated, personal, individual." What standards does this tough thinker apply? They are, Liebman says, not only the "clarity of the constitutional issue," but also "the importance of the alternative that is proposed, the direction and strength of public feeling, the likely real-world outcome five years into the future." What is this if not the idealism-without-illusion of the old Kennedy years?

This view of the Supreme Court is

unsatisfying because it overlooks the existence of the Bill of Rights, among other things. Moreover, it misinterprets the complaint against White. What people fear is not that White has no theories, but that the theories he has are wrong. In dealing with disputes between the government and the individual, will he automatically place too much stress on the government's rights? This is the question Liebman needs to answer.

Liebman is too fine a lawyer to miss this, and so in the second version of his piece—the passages written in lemon juice between the lines, secret messages to the Justice—he tries to cajole White into a different view. Liebman's point is to show White the way to the middle ground—some safe territory between the wild men of the left (notably William Douglas, with his "willingness to decide in every case which party's heart is purer") and the vigilantes of the right (Law-'n'-order Burger, or Rehnquist and his theories of "radical individualism"). The escape route is for White to lead a new "centrist bloc" on the Court, directing the five other non-doctrinaire Justices into a conciliatory, compromising, common-sense position. Liebman's notion of a centrist bloc containing White, Marshall, Brennan, Stewart, Powell, and Blackmun, seems roughly equivalent to looking at Benjamin Spock and John Schmitz, and then offering Nixon and McGovern as the joint leaders of a political centrist bloc.

In the final flourish to his piece—this part directed both to the Justice and the masses—Liebman indicts the Warren Court's legacy: "The Court did not encourage crime, but it behaved in a way that permitted people to think it did. How much personal freedom was actually secured in the process? And at what price in public support for other liberal causes? The price of Nixon, and the Nixon Court?"

This resume of the Court's record would be more appealing but for two quirks. First, the "personal liberties" Liebman mentions slightingly are harder for a white, educated lawyer like Liebman (or this author) to appreciate than for the people they have protected—accused criminals, welfare recipients, the poor, blacks, those too frightened or ignorant to take full advantage of their equal rights under law.

Second, and even more curious, is Liebman's use of what might be called the McGovern theory of the Supreme Court—the idea that because the Warren Court was too radical, it has only itself to blame for Nixon's election, the nominations of Burger and Rehnquist (not to mention Carswell), and the national backlash against the Court.

The Justice as Police Chief

By pulling back on the reins, Liebman implies, White has at least taken some of the fury out of the backlash. This argument, however, conveniently avoids several points. For one thing, White's dissents from the precedents of the Warren Court era were not limited to the tough criminal procedure cases, but embraced many key civil rights and First Amendment decisions as well. Moreover, some of the most strident and simplistic criticism of the Court's work has come from the pen of White himself. For example, in one of the most famous—and most criticized—criminal rights cases, White set a tone hard to distinguish from that of aggrieved police chiefs.

In *Escobedo v Illinois*, a supposed accomplice put the finger on the defendant, Escobedo, accusing him of murder. The police then hauled Escobedo to the station house, his hands chained behind his back. When confronted with the informer, Escobedo professed innocence and asked to see his lawyer. The police refused, taking him instead to the interrogation room. There they grilled him for four hours, making him stand, manacled, the whole time. Meanwhile, Escobedo's lawyer appeared and asked

to see his client. The police refused him as well, in apparent violation of a state law. Finally, Escobedo knuckled under and "confessed" to the crime. Was this a fair use of police powers? The Supreme Court said no, ruling that the police had to let a man see his counsel once the investigation had been narrowed down to a definite suspect. White disagreed, saying that law enforcement "will be crippled and its task made a great deal more difficult, all, in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution."

In another case, *Robinson v California*, the Court followed enlightened practice by holding that California's statute making drug addiction (as opposed to unlawful possession, sale, or use of dangerous drugs) a crime, violated the "cruel and unusual punishments" clause of the Eighth Amendment. White: "I deem this application of the 'cruel and unusual punishments' so novel that I suggest the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty."

Black and White

White's tendency to sacrifice individual rights when they clash with government actions has not been restricted to matters of criminal procedure. He joined the Supreme Court when the civil rights movement was attempting to implement throughout the South the principles of equality under the law, articulated by the Court during the previous decade. Those active in the movement were regularly subjected to harassment, loss of employment, or worse. White's judicial attitude during these years could most charitably be described as one of icy aloofness. In *Gibson v Florida Legislative Investigative Committee*, for example, where the Court held it a violation of the First Amendment to require the NAACP to provide its membership lists to a state body "investigating" Communist infiltration into the civil rights movement, White dissented, writing, "The net effect of the Court decision is, of course, to insulate from effective legislative inquiry and preventive legislation the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations."

White consistently voted to uphold the trespass convictions of civil rights workers testing the legitimacy of racial discrimination at public eating places. And in *Cox v Alabama*, where civil rights demonstrators were told by one local official that they were free to assemble opposite a courthouse and then were promptly arrested by another for violating a local ordinance prohibiting assembling in the designated area, White disagreed with the Court majority decision that ruled the demonstrators had been entrapped and reversed their convictions.

In a case which one day may be the stuff of a good Southern Gothic novel, White came down on the Gothic side. In *Swain v Alabama*, a black man went to trial in a Southern courthouse, charged with rape. His prospects started to look worse than usual when the prosecutor used his peremptory challenges to clean out all black people from the prospective jurors list. The man was convicted, and White wrote the Supreme Court opinion which upheld the conviction.

White's judicial record has not, of course, been one of total insensitivity to human freedoms. He has, for example, consistently voted with the Court majority to accord indigents the full quotient of procedural rights available to all others. For the most part he has gone along with the "one man-one vote" decisions. When the Court (in *Griswold v Connecticut*) overturned a state ban on distributing birth control information, White agreed. His opinion noted that the supposed reason for the law—to discourage illicit activity—was not enough to justify the alleged "serious

interference" with family relationships. White also wrote a ringing dissent to the astonishing decision in *Palmer v Thompson*, where the Court permitted Jackson, Mississippi, to shut down its public swimming pools rather than integrate them.

But even in those cases where White has gone along with the liberal majority (including recent death-penalty and wiretap cases), he often finds the most constricted, niggardly grounds for doing so. During the 1971 Pentagon Papers case, in which the Justice Department tried to stop *The New York Times* and *The Washington Post* from publishing excerpts, White went along with the 6-3 majority in favor of the newspapers. But he did so not because of any general objections to pre-publication censorship, but because the government had not proved that the series would "surely result in direct, immediate, and irreparable injury to our nation and its people."

The Five Cases

The five right-to-speak, right-to-hear cases decided last June amount to an affront to James Madison's warning that "a popular Government, without popular information or the means of acquiring it, is but a Prologue to a farce or tragedy, or perhaps to both." The question in the Branzburg, Pappas, and Caldwell cases was whether reporters could refuse to answer questions about the confidential sources they had cultivated. A fair argument could be made for absolute protection of reporters' sources, on the grounds that there is no other way to maintain a healthy press. If reporters had to turn over their information to the government—if, in effect, they were turned into unsalaried arms of the police and FBI—they would soon run out of contacts.

Paul Branzburg had collected information on marijuana traffic while working on a series of articles for the Louisville *Courier-Journal*. Pappas had learned about militant anti-war activity while working for the *Providence Journal*, and Caldwell covered the Black Panthers for *The New York Times*. The Court said the reporters would have to talk. White's concurring opinion stated:

> [W]e cannot accept the argument that the public interest in possible future news about crime from unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group which relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public.

Laird v Tatum led to another opinion alarming in its implications. Tatum was an anti-war activist who discovered that the Pentagon had been up to its old tricks in an effort to keep track of Tatum and his colleagues. The Pentagon's tactics included: keeping files on the memberships, beliefs, programs, and practices of nearly all activist groups in the country; using government agents to infiltrate the groups and find their confidential files; resorting to cameras and electronic bugs to eavesdrop on individuals and their political activities; and setting up a collection-and-distribution system for this information, which eventually was deposited with police agencies.

Catch-22 in Court

The Pentagon never denied these practices, nor did they challenge Tatum's claim that they "chilled" dissenters' activity. Rather, snatching a page from *Catch-22*, they claimed that since Tatum had been bold enough to sue, he obviously had not been "chilled."

In the Gravel case, Justice Douglas, dissenting from the majority, contended that Senator Gravel and his aides should be insulated from grand

jury "inquiry covering the Pentagon Papers, and Beacon Press from inquiry concerning publication of them, for that publication was but another way of informing the public as to what had gone on in the privacy of the Executive Branch concerning the corruption and pursuit of the so-called 'war' in Vietnam."

White, speaking for the majority, viewed the papers as stolen property and said that a grand jury had the right to question Gravel and his assistants in regard to the crime. There's not a single sentence in the White opinion that recognizes a congressman's duty to inform the public about such vital matters as the content of the Pentagon Papers.

The final case dealing with government rights versus individual liberties, *Mandel v Kleindienst*, was reported far more prominently and with more incredulity in Europe than in the States. It involved Ernest Mandel—a Belgian Marxist, prominent economist, and editor of the left-wing publication *La Gauche*. He had been invited by Stanford University to speak at a 1969 conference on "Technology and the Third World." As he had done on two previous visits to the U. S. in 1962 and 1968, Mandel applied to the American Consul in Brussels for a six-day non-immigrant visa.

Because of a clause in the Immigration and Naturalization Act of 1952 which bars, among others, aliens who advocate "the economic, international, and government doctrines of world communism," Mandel's visa required a special waiver from the Attorney General. Usually this is a routine matter—as it had been for Mandel before—but the visas require visiting communists to follow a strict itinerary.

Late in 1969, Mandel discovered that this time Richard Kleindienst would not approve his visa. The putative reason was that, on his last visit, Mandel had broken the rules: he had gone to a party in New York City to raise money for the Paris street

demonstrators. This, Kleindienst said, "went far beyond the stated purpose of his trip... and represented a flagrant abuse of the opportunities afforded him to express his views in this country."

The case turned on whether the Justice Department's decision had violated private rights. The rights in question were not Mandel's—as an alien, he had none—but those of the Stanford students who wanted to hear him. The lower courts had ruled in the students' favor, but the Supreme Court overturned them. The majority opinion, which White joined and Blackmun wrote, said "we hold that when the Executive exercises this [waiver] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion or test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." Marshall's dissent: "No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule."

What made the majority's holding particularly obnoxious was that the Justices well knew that Kleindienst's "facially legitimate and bona fide" reason for rejecting Mandel's visa application was a fraud. In fact, on the two earlier visits, Mandel had not been told about any of the special waiver provisions and had no way of knowing he was breaking the rules. The State Department admitted as much in a letter to Mandel's New York attorney, saying Mandel "may not have been aware of the conditions and limitations attached to the visa."

Property Rights

While most of these cases dealt with classic struggles between government and individual, the question in *Lloyd Corporation v Tanner* was whether the owners of enormous shopping malls can consider their tracts as overgrown versions of the old corner store, subject to the same degree of personal control and property-owners' tyranny that usually prevails on private property. The Tanner group had wanted to hand out anti-war, anti-draft leaflets at a "private" shopping center, and the owner's security guards turned them away.

The shopping mall in question was nearly a city by itself—50 acres in all, 20 of them covered with parking lots and the rest with 60 stores—and it had a tradition of being used as a public meeting place. Football pep rallies and high-school parades had taken place there, and on Veterans Day the mall owners invited "patriotic" organizations to march through the mall with flags, drummers, and color guards and to present speakers on patriotic themes. At the trial, the owner explained that "veterans... deserve support."

In the lower courts, all this evidence led to rulings that anti-war groups should have the right to hand out their leaflets, since the "mall is the functional equivalent of a public business district." The Ninth Circuit Court of Appeals upheld the decision, drawing on a Supreme Court ruling in the earlier Logan Valley case, which seemed identical in its circumstances. When the case hit the Supreme Court, however, the protestors lost. This situation was different from Logan Valley, the Court (including White) ruled, since in this case the demonstrators had "alternate" means of handing out their information. What alternate means? Well, said the Court, they could station themselves by the parking lot entrances, wait as the cars slowed, and then dash to the car and try to ram a leaflet through the window.

To White, even this derring-do alternative was not necessary. He had disagreed with Logan Valley, too, reasoning that private property was private property, and a man shouldn't have to give up his rights just because

he owned 50 acres and let some veterans march through now and then. In the Logan Valley dissent, he said, "In no sense are any parts of the shopping center dedicated to the public for general purposes. . . . The public is invited to the premises, but only to do business with those who maintain establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot except as an adjunct to shopping."

One-Way Swinger

If these cases do not make White into Nixon's fifth Justice, they at least suggest that he feels much more comfortable in the Court Nixon has built than he ever did with the libertarians of the Warren era. This provides little cheer to those who had hoped that White would at least swing both ways in choosing between Burger and Douglas in the next few years.

The few threads which can be drawn from White's philosophical tangle confirm this impression. First among these themes is White's reluctance to disturb any state or federal actions unless they step on individual rights in a particularly obvious way. In the Palmer case, for example, White would not let the city of Jackson, Mississippi, close down its pools rather than integrate them. But the subtler discriminations of state welfare systems were circumspect enough to pacify him. Had Florida's Red-hunting group tried to outlaw the NAACP, White would certainly have stopped them; but when they tried to do their work through red tape and bureaucratic harassment, he was willing to let them go ahead.

Second, there is in White a positive distaste for the workings of a free press—perhaps a throwback to his days as a gridiron star. Then (as he has told close friends and an occasional reporter), he was so constantly badgered by journalists that he could barely pry them loose to live his own life. This does not mean that his views are totalitarian or that he would prefer to see the First Amendment overturned. But it may make him look on the free press more as a nuisance than a necessity, and on the First Amendment as an unavoidable fact of life rather than an ideal to defend at all costs. White's opinions in both the Pentagon Papers case and the reporters'-privilege cases support this view. In any event, his pain threshold for crying out against Executive interference with the press is distressingly high.

Third, as Liebman correctly notes, personal experiences play a large role in White's judicial philosophy. White grew up in the tiny Rocky Mountain town of Wellington, Colorado. He won personal success as an athlete and a scholar. He fought crime in the Justice Department. Each of these has pressed its mark onto White's brain, and the results appear in his decisions. As one illustration, his frontiersman's conviction that (in Liebman's words) "a good idea, like a good man or a good mousetrap, does not need absolutely ideal and equal conditions; if it is good, it will make it" has its reflection in the *Lloyd v Tanner* decision (if the kids' cause was right, they would be willing to risk their hands shoving leaflets through car windows, or at least the people could read them through the glass) and various welfare-rights decisions. White once told a reporter that in Wellington "everybody worked for a living. Everybody. Everybody." The fact that similar situations may not prevail in the rest of the country has not seemed to penetrate.

Finally, White's opinions fairly snarl with a lack of sympathy for the underdog, a failure to understand that one law can affect many people in brutally uneven ways. Anatole France wrote that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." One can well imagine Byron White quoting France, with no recognition of the irony intended. ■

WORK IN AMERICA:

Do Entrepreneurs Have More Fun?

by Suzannah Lessard

Richard Safford's enthusiasm in the pursuit of his ambition is contagious even if you don't care much about the ambition itself. Achieving his dream is of paramount importance to him, but he clearly loves the chase for its own sake as well, and that is what makes him contagious. Like a poet, he makes little distinction between work and leisure, not because he's always thinking shop but because he engages with the challenge in some way at all apparent levels of his personality. Oddly, this effort doesn't burn him out, but on the whole it seems to rejuvenate him, just as his ambition seems not only to endure but actually to become more compelling in defeat. The dream is to make a lot of money. Richard Safford is an entrepreneur.

As work life in America becomes an issue of study and concern, the annoying and useless catchword "meaningful" is relied on more and more heavily to express what work ought to be. The brutal vacuity of assembly-line work has held the most attention: there the possibilities of infusing "meaningfulness" would seem, by the built-in limitations of the work, to be restricted to making mass-production systems bearable. Now the white-collar world, where work actually can be an asset in people's lives, is also becoming a cause for concern, as ennui, aimlessness, timidity, loss of pride, listlessness, a sense of entrapment, and any number of other desiccations of the spirit permeate work life, particularly in the mega-bureaucracies of both government and its doppelganger, big business. The causes of the trouble are more obscure than in the mass-production world, and so the search for that elusive "meaningfulness" is even less defined.

Entrepreneurs provide useful foils for the amorphous afflictions of the white-collar world because they are unusually engaged in what they do, they attach great significance or "meaning" to their endeavors, and most often their dissatisfaction with work in conventional structures has been an important factor in their choice to go out on their own. Safford is exceptionally clear-hearted about his work; others have a muddier sense of involvement. But the three very different personalities portrayed here all tell something about what the significance of work can be to people. (Names, places, and business particulars have been changed to protect the subjects. Otherwise all information presented as fact is undoctored.)

Though Safford's playing field, oil exploration rights, is one of the semi-rarified zones of capitalism, he is not out of the slick, whiz-kid mold. His involvement is emotional. He is, first of all, shamelessly romantic about the oil business. "I like oil. It's a man's business. I like the rigs and the machinery. And the people fascinate me--some of the strongest personalities I have ever met. It's a masculine world. Oil men are men's men. It's very challenging and there's a chance to make a lot of money. It's a

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