The Real Paper

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DONNA SUMMER'S DISCO DREAMS

Fantasies for our times

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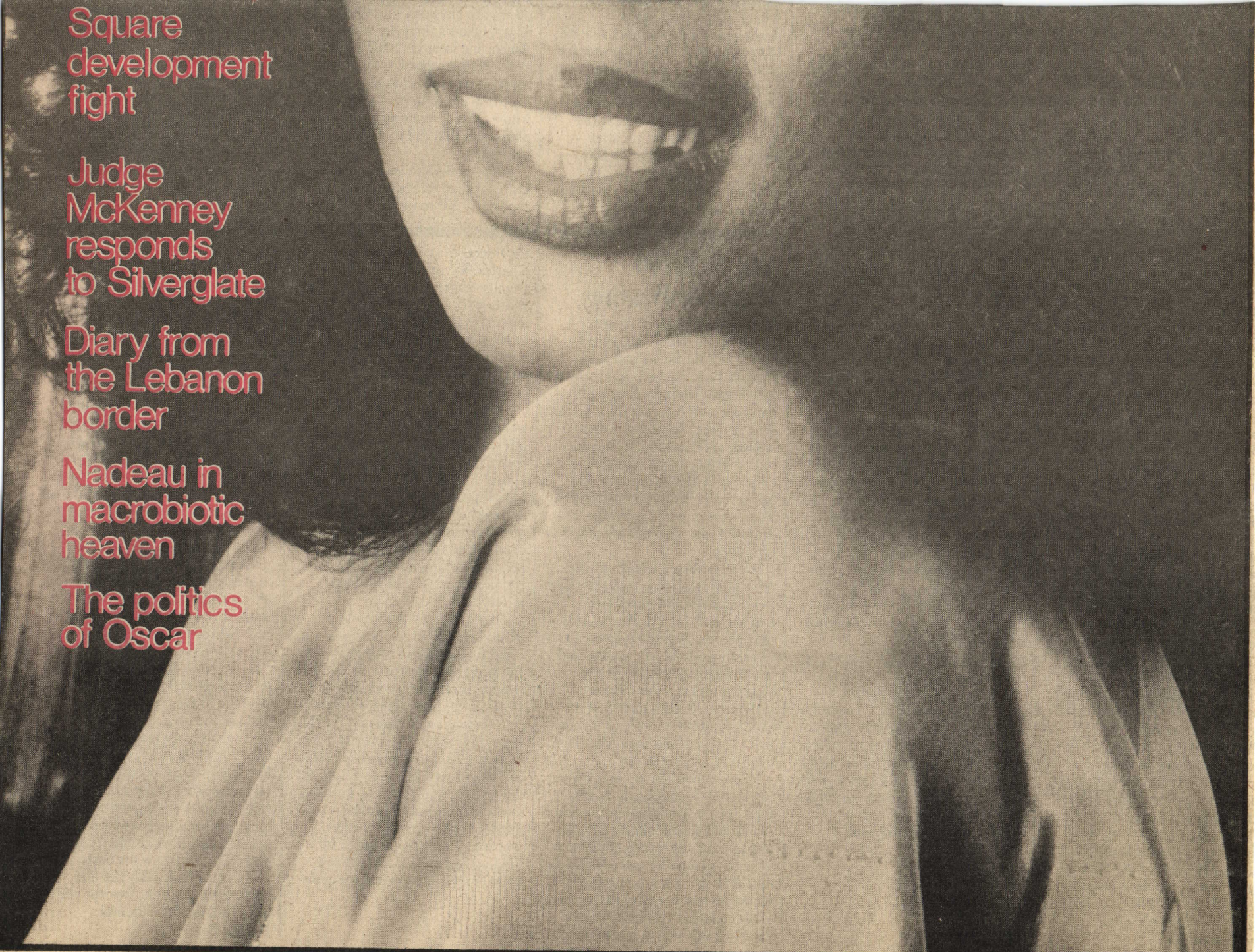
The Harvard



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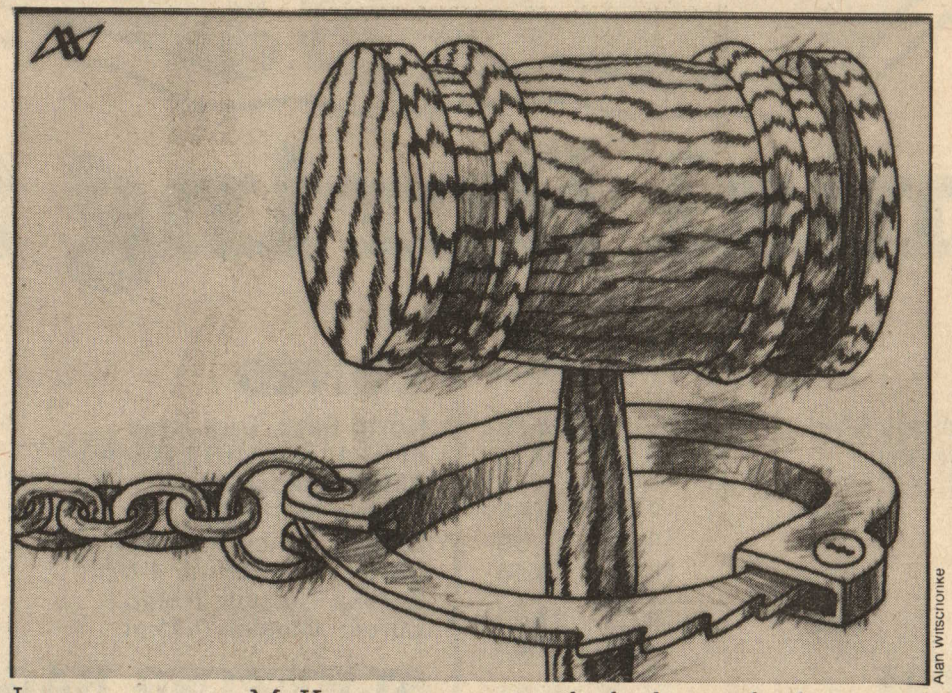
Judge McKenney's Lament

By Harvey Silverglate

Soon after publication in this space of my column attacking the bail practices of Chief Justice Elwood S. McKenney of Roxbury District Court (*The Real Paper*, March 18, 1978), the phone rang. It was McKenney, and he was slightly angry, he said, not so much because of the attack on his practices, but because I did not contact him for his side of the story before writing the article.

I was a bit taken aback by the phone call. To an ordinary intelligent person of common sense there seems nothing wrong with a judge phoning a lawyer/writer to complain of what the judge perceives to be one-sided or unfair treatment. However, lawyers and judges seem to have evolved a code of silence all their own, a code that serves to give judges an excuse for not having to justify their actions to the public and also to inhibit lawyers from criticizing judges. Most writers, especially if they are lawyers, rarely would bother even to try to obtain a judge's comment on something like the judge's bail practices, for most judges would hide behind the Code of Judicial Ethics, and deem it "inappropriate" or "unseemly" to explain their actions in a public forum. This conspiracy between lawyers and judges is largely responsible for the arrogance in and mystery surrounding the judicial system. Judges, to whom we entrust an enormous amount of discretionary power over citizens' lives and affairs of state, are for the most part shielded from public scrutiny and, hence, from public understanding. So, whatever I think of McKenney's bail policies, I respect his willingness to explain what he does and why he does it.

What Judge McKenney had to say was at once startling and thought-provoking. The startling part was that he justified his bail practices on his personal support for preventive detention, a practice prohibited by the Massachusetts Bail Reform Act. The thought-provoking part was the judge's citation of case after case in which his resort to preventive detention probably saved someone's life or in which a higher court's reversal of one of his bail determinations resulted in a death or serious injury.



Alan Witschonke

In many cases, McKenney apparently feels justified in starting the punishment right away, to protect the public without waiting for the niceties of a trial.

By not enforcing the Bail Reform Act, McKenney has pitted himself not only against dozens of criminal defense lawyers but also against the many judges who disapprove of what they perceive as his imposition of improper bail practices on all judges sitting in what he unabashedly terms "my court." But such controversy is nothing new for him. He has always been a tough, intelligent, highly opinionated person who is often found in the center of intense public debate; and he always seems to take the heat rather well. Most judges consider themselves defenseless in the face of criticism by press and public, but McKenney fights back.

Perhaps his hide has been toughened by his background. A graduate of Boston Latin School, Harvard College, and Boston University School of Law, McKenney was appointed by Governor Foster Furcolo as the first full-time black judge in the entire state District Court system. Reportedly, Furcolo offered McKenney, who was the governor's chief secretary and administrative legal assistant at the time, any position he wanted in either the District Court or the Superior Court. McKenney, an idealist and an early NAACP activist, took the lower court and the Roxbury district.

McKenney is an interesting assortment of seeming contradictions. On the one hand, he can appear quite cruel to hapless defendants, especially those charged with crimes of violence or those with a prior record of serious offenses. He tolerates little criticism or dissent in his court, even from his fellow judges. He has clashed with law reform advocates whom he has prohibited from taking notes in his courtroom unless they agree to discuss their recorded observations with him afterward. And he has refused to allow court proceedings to be recorded on court-installed equipment while he is presiding. Not to mention his infamous bail practices.

On the other hand, McKenney has established and fostered the Roxbury District Court Clinic, which is widely considered to be a pioneering example of what can be done to help with the personal problems of people who pass through the courts. Defendants with medical, psychiatric or vocational problems often emerge from their experiences in McKenney's court considerably better off than they were at the start. In addition, McKenney instituted a pretrial diversion program — the first in New England — that has enabled many people to get help and to avoid a criminal conviction in appropriate cases. In conjunction with BU Law School, he created a defender program for indigents in his court. He simply cannot be dismissed as a heartless judge who runs roughshod over the law without regard to individual rights.

Under the Bail Reform Act that McKenney so detests (he claims it was written largely by "a bunch of law reform people and professors" who have no idea what goes on in the streets and who don't understand what bail is for), a judge is required to release pending trial an accused arrestee, without requiring any monetary deposit whatever unless the judge determines that such release on personal recognizance will not likely assure that the defendant will appear for trial. In determining this likelihood, the judge is instructed by the statute to consider three categories of factors: (1) "the nature and circumstances of the offense charged," (2) "the prisoner's family ties, financial resources, employment record and history of mental illness, his reputation and the length of residence in the community, his record of convictions, if any," and (3) "any failure to appear at any court proceeding to answer to an offense."

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Briefcases

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For McKenney, however, the purpose of bail is to "get hoodlums" off the streets when they pose a threat to the public safety. Under American law, this is supposed to be the purpose of a prison sentence *after* conviction. Prior to trial, however, a presumption of innocence surrounds the defendant and determines his legal rights. He cannot be punished until a jury of his peers finds him guilty as charged. While ours is one of the few societies in the world that requires the state to prove guilt, rather than the defendant to prove innocence, this tenet is absolutely basic to our entire criminal jurisprudence, and essential to a free society. (It was the Queen of Hearts in *Alice in Wonderland*, rather than some serious student of jurisprudence, who suggested that the punishment comes first, then the trial, then the commission of the crime.)

However, Judge McKenney claims that times have changed. He sits in Roxbury District Court, which processes a higher number of very serious crimes of violence than any other court in the state, and perhaps in the country. He gives the example of a recent case in which two young men attacked a paraplegic in a shopping center parking lot, beat him up with a lead pipe, and stole his wallet and his wheel chair, leaving him helpless and bleeding on the ground. They were caught about a half-hour later by the police, and they still had the wheelchair in the back of their getaway car, presumably on the way to sell it somewhere. In such a case, says McKenney, there is "no question as to guilt," and the presumption of innocence "takes on a different glint" — that is to say, it disappears. In such situations, McKenney apparently feels justified in starting the punishment right away, to protect the public without waiting for the niceties of a trial.

McKenney is right, of course, that the pretrial preventive detention of defendants stops them from committing further crimes while awaiting trial. But what price in terms of liberty does a society pay when it adopts the Queen of Hearts' rationale? McKenney appears to have stopped asking those questions years ago, based upon his own mind-searing experiences.

For example, the judge recalled the first time he failed to take seriously a threat of violence. A husband and wife appeared before him in his early days on the bench, and the wife complained that her husband had beaten her and was threatening to kill her. He decided against holding the husband "preventively" on high bail, and released him pending trial, with no more than a warning to keep his hands off his wife and an admonition to show up for trial. An hour later the police department informed the judge that the husband had just pointed a gun to his wife's head and pulled the trigger, killing her instantly. "I don't want cases like that on my conscience any more," says McKenney somberly.

More recently, McKenney points to a case in which he arraigned the defendant and set bail in the amount of $25,000, an amount he realized the defendant could not meet. The defendant was charged with attacking a *Boston Globe* delivery man in Roxbury during the racial tension generated by the school busing controversy. A Superior Court judge heard the defendant's bail appeal and ordered him released on personal recognizance, for he met the criteria set by the bail statute. That defendant, while out on bail, was accused of murdering an oil delivery man during the recent snow emergency.

Every judge no doubt has an array of "horror stories" as to the seeming failings of one part or another of the criminal justice system. Citizens and lawyers have their own. The issue here is how much of an incursion on liberty and on civilized procedures can be justified in the attempt to prevent every potential repeat crime by persons awaiting trial? How many innocent people are we, as a society, willing to incarcerate for a period of days or weeks or even months while awaiting trial, in order to guard against the risk of a repeat crime? In every group of detained persons, there might be a number who, but for incarceration, would indeed commit crimes while on bail, but there are also certain to be some who one would predict will commit crimes, but who in fact will not. A society that errs consistently and overwhelmingly on the side of public safety in such situations can easily slip into being more and more repressive.

However, the overriding question is whether it is appropriate for a judge to make these kinds of decisions himself. The Massachusetts legislature has seen fit to declare in a duly enacted statute that courts are to prefer release on personal recognizance, and if there is to be error, it is to be error on the side and in the cause of liberty. Judges who do not share that outlook are faced with a most painful dilemma — following the law, or disobeying the law in the name of duty as their own consciences dictate. Judge McKenney, who is, after all, faced with some of the most blood-curdling crimes imaginable, has, out of his experience, opted to protect the citizens within his jurisdiction notwithstanding the costs of doing so.

McKenney is frank enough to recognize that his policy is violative of the spirit and even the letter of the Bail Reform Act. If pressed for a strictly legal justification for effectively denying bail in certain categories of cases, he points out that in the statute one of the factors that a judge may consider is the nature of the crime. McKenney argues that if the crime is serious enough, it overwhelms all the other factors and necessitates high bail. This is the legal defense he would doubtless make of his policy if anyone

should ever file a complaint against him for disobeying the bail statute. But he leaves no room for doubt that he feels in his heart that the protection of the public is sufficient justification for ignoring the law in certain kinds of cases.

Argued on this level, the bail situation in Roxbury is symptomatic of a debate over whether a nation plagued with as much anti-social behavior as this country can "afford" the niceties entailed in enforcing the Bill of Rights, even in hard cases. The trend set by the Supreme Court of the United States under Chief Justice Warren Burger answers the question with a resounding, antilibertarian "NO." On the other hand, the Supreme Judicial Court of Massachusetts (under whose supervision McKenney must operate) takes the opposite position and is scrupulous about protecting liberty at every turn, knowing that once a freedom is lost it is hard to regain, even when the temporary condition that led to its being lost has long since disappeared.

In his less philosophical moments, McKennedy seeks to justify his bail policies on a less grandiose level. For example, he said that, contrary to what I wrote, he did not base his refusal to allow "cash alternative" bails in his court on the lack of a safe in the clerk's office. (Cash alternative bail allows the defendant to make a modest cash deposit with the court, which is returned to him after trial, instead of having to pay a bail bondsman a nonrefundable fee for writing a surety bond, assuming that a bondsman can even be found to write the bond.) McKenney said that the Roxbury Court indeed has a huge safe, but he does not want more than a million dollars worth of cash bails running through his court, lest it tempt the less honest among the court's employees.

At some point it is possible that the conflict over McKenney's bail policies will result in someone seeking a directive from higher authorities that the Bail Reform Act be fully implemented in Roxbury and elsewhere. If such a case is brought, it will be interesting to see whether all sides argue their cases and make their decisions with the same candor exhibited by McKenney. Regardless of what one thinks of his policies and justifications for them, he has at least dragged the important policy discussion out into the open. Practicing lawyers are well aware that there are a lot of judges who agree with McKenney and who secretly practice what he preaches, but who seek to justify their bail decisions by claiming that they are following the dictates of the statute.

Judge McKenney has performed a public service by his candor. But in this case candor is not enough. Unbridled judicial discretion in setting bail might seem like a good idea when the mugger caught with the wheelchair in his car is kept in jail before the trial — the Queen of Hearts would do it in every case. But the preservation of freedom for each of us as potential defendants or as just plain citizens rests on the preservation of it for all. And that demands judges willing to obey the law, no matter how distasteful in a particular case, and a society willing to take the risk of erring on the side of liberty, rather than repressive security. ■

Out to Lunch

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tea taste, you know), Lemon Mist and Red Zinger are available. The latter two are sweet-flavored herb teas from Celestial Seasonings. The former are the old caffeine and tannic acid kind.

The hippy sweet tooth is fairly under control here. I tried an apple crisp "à la mode" ($1). The apple crisp part was unseasonably delicious and crispy enough for anyone. The mode de macrobiotic is with a scoop of "tofu creme." Tofu creme is floury-sweet tasting, like an unbaked pastry dough, and adds little to the dessert.

A carob brownie was very delicious. It had a dark chocolaty color, which is hard to achieve with carob. But the flavor was the actual, datelike flavor of the carob pods I used to chew as a child. We called it buksor, or boksor, perhaps. I've never seen the word written out, so I don't know how to spell it. I remember chewing up the pods and spitting out the seeds on car trips to and from New York City.

The inside of the restaurant has been restored considerably from White Tower hospital decor. The counter has an attractive surface of quarry tiles. Unfortunately, the carpenters neglected the overhang, and there is no where to put one's legs. Tables are too close together (the whole place is too close together), but comfortable enough once you get shoehorned into place. Tables are wood; noise is not bad at all.

I wish the owners would ban smoking. Indeed, I would rather have them serve Hostess cupcakes than allow smoking, because then I could *not order* the cupcakes. No restaurant this small, regardless of philosophy, should allow smoking. Certainly not one that serves as a drop-in center for the entire Cambridge new-age movement. All that discussion of how macrobiotics are really getting popular now; all that smoke.

Service is another problem. On three visits it was consistently hypobiotic. I don't mind waiting for food to be cooked to order. I do mind waiting through conversations about how macrobiotics are really getting popular for my little piece of the action to get started. Excellent Muzak helps a lot (was that really Jimmy Giuffre and Bob Brookmeyer?).

It is hard to stay cross with the cooks, two handsome young brothers. Actually they're 92 and 104. They just look young because they eat right. ■