Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

The Lawyering Controversy

TO THE EDITOR:

There was a time when, as a journalist, I believed democratic capitalism was being strangled by errant journalists—"nattering nabobs of negativism." I don't think so any more. Journalists are a medium of exchange between the electorate and the political class, helping politicians determine what it is the voters desire, advising voters what it is the politicians offer. Their influence is passive, not active, in the sense that a telephone system influences communication between callers.

Now comes Laurence Silberman —in "Will Lawyering Strangle Democratic Capitalism?" (*Regulation,* March/April)—with the argument that it is his profession, not mine, that is strangling democratic capitalism. Alas, I believe he is as wrong as I was and that we must look elsewhere for the cause of capitalism's heavy breathing. Lawyers are also a medium of exchange, in the lubricating sense. They don't cause friction. They relieve friction, friction caused by a political class that is deficient in determining the desires of the voters. Lawyers necessarily multiply during periods of economic contraction, there being more friction in a squeeze. Without lawyers, the pain of contraction would be so unbearable that democratic capitalism would be impossible. No, we must look to the political class itself to find the fingers around our system's throat, to the Oval Office and to Capitol Hill. Give us politicians who can give us growth and the ocean of lubricating lawyers will recede of its own.

Jude Wanniski

TO THE EDITOR:

Laurence H. Silberman's observation that America suffers from excessive legislation, litigation, and "lawyering" in general is well taken. But I wonder about his application of Say's Law—namely, his call to tighten legal profession entry limitations and legal advertising restrictions.

What Jean-Baptiste Say said, as translated from the French, was that "a product is no sooner created than it, from that instant, offers a market for other products to the full extent of its own value." The key word here is value, and value—whether for soap or lawyers—is determined in the marketplace through supply and demand. Restricting legal profession entry and advertising has all the earmarks of monopolization.

To be sure, lawyers dominate Congress. Some 250 congressional committees and subcommittees grind out legislation almost daily. Some 20,000 bills are dropped into the House and Senate hoppers annually. A listing of all the *new* legalistic U.S. rules and regulations imposed over business in the course of 1976 required 57,027 pages of fine print in the *Federal Register.*

So the solution, it seems to me, lies not in limiting the number of lawyers or the volume of legal advertising. Better that law schools incorporate economic training in their curricula, as Professor Henry Manne has been doing at the University of Miami School of Law. And better that Mr. Silberman advocates relimiting our now virtually unlimited government along the lines of the model laid down by the Founding Fathers.

William H. Peterson,
Campbell College

TO THE EDITOR:

Joining forces with Chief Justice Burger and President Carter . . . Laurence Silberman sharply attacks lawyers and caustically criticizes the legal process. He blames ever-increasing government regulation of business on lawyers and claims that the legal process, with its reliance on judges far removed from the political process, is a cancer that "threatens the vitality of our forms of capitalism and democracy."

As is frequently true with messengers of alarm, Silberman has obscured his real message and overstated his point. For he is not complaining, as the chief justice does, that lawyers are too often incompetent; nor does he say, with the President, that the profession frequently misdirects its resources. What Silberman does, rather, is to identify one of the costs that inevitably flow from government intervention in the marketplace. In our system, government action that may adversely affect individual life, liberty, or property must comport with the requirements of due process. Thus the real culprits of Silberman's story are not the ones he blames—the lawyers and the legal process—but rather those who have unthinkingly, unknowingly, or erroneously fostered the unwise government regulatory programs so commonplace today.

While lawyers and the legal process necessarily play a role in government regulation, they are not responsible for its growth—except insofar as lawyers play other significant roles in our society as legislators and executives. Government regulations are not hatched by the devil and delivered by modern-day witches called lawyers. They are developed by administrative agencies and executive departments in response to laws written by legislatures. Nor are these laws born in heaven. They result from public demands, usually supported by the affected interests and often the very businesses that later complain so loudly. This phenomenon is most vividly illustrated by the farmers' appeals for increased price supports—appeals that are forgotten when the price supports are not needed but the regulations remain. However the political process is viewed, it is clear that government regulation is not imposed against the will of the electorate.

Just as it seems unfair and probably irrelevant to blame all the lawyers for unwanted and intrusive regulation, so it seems unreasonable for Silberman to attack (implicitly) all government regulation without regard to cost or benefit. That is merely to mirror the error of unthinking proponents of government regulation. To me, for example, much economic regulation—

notably CAB regulation of airline routes and rates—seems either ineffective or counterproductive. But I am not so sure the same is true of FAA regulation of airline safety, although I suspect that both overregulation and underregulation exist in that field too. This suggests to me that insofar as Silberman's attack against all lawyers and the legal process is an ill-disguised challenge to all business regulation, it is too far-reaching and undifferentiated to be plausible or persuasive. Would he, for example, go back to the days of uncontrolled freedom to market unsafe food and drugs, unregulated securities, and so on? He slays the wrong dragon and, in the process, appears to slay some useful or productive regulatory species as well.

Another serious deficiency in Silberman's analysis is his charge that "reliance on the legal process contributes to the sum total of [government] intervention." He appears to be complaining that government intervention has been accompanied by a legal process and rules of law. Again he has overstated his argument. True—in many situations the introduction of the legal process will mean delay, additional costs, and bureaucratic cumbersomeness. And not infrequently such consequences are unjustified.

On the other hand, these added costs are also often the price of fairness, decency, and, to be specific, of a civilized community. Arbitrary rules and policies are easier to enforce: imposing requirements without notice and hearings eliminates delay, and giving unbridled power to low-echelon employees may eliminate some bureaucracy and simplify enforcement. The lawyer's role in government regulation, which Silberman decries, is primarily to ensure that government cannot injure or otherwise adversely affect citizens without a fair process. In general this means that a regulatory decision cannot be "arbitrary or capricious," that notice and some kind of hearing must be granted, that written regulations must precede their enforcement, and so forth. One difference between civilized societies and others or, for that matter, between totalitarian societies and ours is a willingness to pay the price of fairness. Lawyers and the legal process are our mechanism for institutionalizing government regulation in accordance with a system of rules.

That lawyers participating in the legislative and executive process have contributed to additional government regulation of business is true. But that is no basis for condemning them or the processes they administer. Nonlawyers too have always been part of the policy-making circle—and to an increased degree in the recent years when the regulatory explosion has occurred. Silberman should have attacked the counterproductive regulatory scheme these policy-makers have produced. Had he done so, I would have been more sympathetic—though I find it unjustified scare talk to suggest that we are at or near the point of danger for our democratic system. Indeed, had he narrowed his charge and dealt with specific examples of where the legal process has been applied unnecessarily and was neither constitutionally required nor protective of citizen interests, he would have made an important contribution.

So construed, Silberman's primary (but hidden) message deserves to be heard. It is therefore particularly unfortunate that he made it so difficult to see and masked it in an unnecessary broadside against a noble profession and a process that protects us from darker ages.

Ernest Gellhorn,
University of Washington
Law School

DUNAGIN'S PEOPLE/*by Ralph Dunagin*

"DON'T TELL ME YOUR TROUBLES... WE LAWYERS HAVE BEEN HAVING IT ROUGH, TOO, YOU KNOW."

TO THE EDITOR:

Laurence H. Silberman says a number of things which deserve our most careful consideration. But he distracts our attention by gross exaggeration and distortion and obvious ideological bias.

Many lawyers, including many thoughtful judges, are disturbed by the "continuing shift of private and public policy formulation to the judiciary." They question the legitimacy, competence, and effectiveness of courts to make and implement important social policies. But Mr. Silberman exaggerates when he describes the shift as "a cancer which threatens the vitality of our forms of capitalism and democracy." It is outrageous for him to attribute the shift to a conspiracy among "a good portion of the American intelligentsia," the American lawyers, the bureaucracies that staff the government agencies, and the law schools—whom he accuses of an anticapitalist and antidemocratic animus.

In this way, Silberman distracts our attention from the causes of the phenomenon he deplores and the alternatives that might be more consistent with a capitalist democracy. Government intervention in the economy, of which judicial activism is only one manifestation, is not the result of the conspiracy Silberman imagines. It is a product of the development of democracy itself.

The minimum concept of justice in a democratic society requires those who govern to hear and consider—though not necessarily satisfy—the claims made by individuals and groups. Attainment of justice in this sense helps to ensure government with the continuing consent of the governed.

As a result of the economic and social changes brought about by capitalism, new claims are being advanced for legal, that is, authoritative, recognition—claims to a minimum decent life, to gainful employment, to safe and healthful working conditions, to the rights of full citizenship, to a lessening of the degree of inequality in the opportunities open to different individuals, to limits upon the exercise of private economic power, to protection of the individual as a consumer, to the development and conservation of our natural resources, to improvement of the quality of the environment, to fair treatment ("procedural due process") at the hands of government. . . .

On the whole, the decisions on the extent to which these claims should be recognized have been made by Congress and the state legislatures and implemented by administrative agencies created by them. As our society becomes more complex, the satisfaction of these different claims, which often involves trade-offs among them, necessitates increasing governmental

(Continues on page 66)

(Continued from page 3)
intervention into the economy. Since 1970 alone, and under Republican administrations, Congress has enacted at least thirty-two statutes establishing new administrative agencies or assigning additional functions to old ones. Most often, Congress has granted broad regulatory and spending powers to these agencies and relied upon judicial review to guard against abuse. As Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia explained, this "offers to the judge a very tempting opportunity to give vent to his personal views on how the country should be run. . . ." While one may join Judge McGowan in deploring this tendency, it is absurd for Silberman to ascribe it to the lawyers who, he thinks, dominate Congress and the state legislatures.

It is true that activist courts have imposed complex and costly procedural requirements that promote litigation of benefit to lawyers, as for example in the case of OSHA and EPA regulation. But these requirements are often intended to protect the business firms subject to regulation. One may agree that the costs of this protection should not be out of proportion to the costs that the regulatory standards themselves would impose.

The role of the Supreme Court in constitutional litigation raises a different set of issues. . . . Minorities have tended to look to the courts, particularly the Supreme Court, for protection from legislatures governed by majorities they fear will not consider their claims sympathetically. To the extent these fears are justified, freer access to the courts—through the relaxed standing rules and class actions Silberman condemns—has given these groups an opportunity to participate in the determination of fundamental public policy, which can only strengthen their allegiance to our democracy. Indeed, the Supreme Court has recognized litigation by nonprofit organizations as a form of political expression and political association.

Silberman is not averse to resorting to the courts for protection against majoritarian legislation that is claimed to amount to "arbitrary governmental confiscation" of private property or interference with liberty of contract. Why should he oppose resort to the courts by minorities seeking protection against majoritarian acts that violate fundamental rights claimed to be guaranteed by the Constitution? His complaint is that "new rights are constantly asserted and judicially recognized." It would be preferable, I agree, if the legislature created and delimited these new rights. But it is too late in our history to bar the Supreme Court from defining the fundamental values embodied in our Constitution. This effort, too, has become an important part of our quest for social justice and the fulfillment of the promise of our democracy.

Carl A. Auerbach,
University of Minnesota Law School

TO THE EDITOR:

Larry Silberman's article is important. Not offering merely another critique of judicial and administrative excess, it points to a heretofore largely untried strategy for stunting the growth of the regulatory process. It does so by attacking the problem indirectly but at one of its principle roots—the organization, ethics, ideology, and character of the legal profession itself.

"Follow the lawyers," Silberman suggests, as Deep Throat wisely urged his outlets to "follow the money." The payoff is likely to be as handsome.

Reform and alteration of the legal profession *qua* profession are tasks that regulatory reformers should begin to address. The target is ripe for intellectual and political attack, and the legal profession can be changed in ways that would dramatically reduce its role as a major cause of increased regulation.

(1) With law schools now often the sole remaining profit centers of universities, needing as they do but relatively inexpensive libraries and small faculties, increasing numbers of lawyers are being graduated and licensed. Large numbers of unemployed attorneys with major investments in their degrees will, through political and other means, create employment opportunities for themselves. And, more business for lawyers cannot help but lead to increased activity by public agencies, which are by nature most subject to the judicial and administrative process. Thus, society has a stake in the number of licensed lawyers being produced.

(2) The ideological bias of many law school faculties (especially at the national law schools) is another key issue, with importance beyond the quality of education received by law students. Most major law review articles propose expanded public intervention. Kristol speaks of the importance of "the war of ideas and ideologies" taking place at the universities—but it is at the law school level where the stakes are the highest. The absence of reasonable ideological balance at law schools, particularly on the part of public and constitutional law faculties, should be publicized so that law schools become more aware of their obligation to find scholars whose perspectives are not quite so uniform.

(3) Allied with the ideological set of law school faculties is the inherent bias with which the legal system deals with public policy issues. As Silberman notes, legal scholarship is today largely involved in a search for "rights," which he properly sees as a process by which government priorities are imposed by government officers (including judges) on unwilling (often majority) interests. The basic decisional mechanism that legal scholarship today honors is the Earl Warren "but is it fair?" test. That test invariably elevates the interests of those who are "unfairly" treated (according to such seemingly moral standards as the right to equal treatment) above the interests of the community at large. Such a system, which focuses on the amelioration of litigants' grievances, only considers questions raised by aggressive lawyers and often assumes that commitments of public resources to deal with litigated problems will have no impact on the resolution of equally pressing, but unlitigated, ones. In that respect, legal scholarship stands in stark contrast to the work of economists, whose conceptual and intellectual tools (for example, cost-benefit analysis) enable them to resist the growth of government beneficence without being cruel and immoral fellows. The ascendency of economics as the central decision-making discipline for public policy will ultimately flow from the law's present biases, but in the "short run" the matter is of course important to those who live under the legal system's current reign.

(4) Silberman fully understands the inherent conflict of interest that predisposes the bar towards expansion of regulatory authority. That it is done under the guise of sympathy for the interests of groups not in a position to retain counsel does not, as Silberman notes, gainsay that lawyers know the side on which their bread is buttered. Lawyers must of course be hired to represent the defendants created by expanded rights and freer entitle-

ments to legal representation. All lawyers, whatever their views of government programs, know that larger budgets for regulatory agencies (of the sort described in *Regulation's* March/April issue) lead to more work for them. Although the bar is pressed to be more "responsive" to the interests of unrepresented groups, its monopoly of access to courts and agencies makes support for broad expansion of rights the *most* self-aggrandizing course that lawyers can follow.

(5) Silberman's article is weak in its suggestion that the "public interest" bar, now a growth industry fast approaching an annual spending rate of $100 million (mostly in tax dollars), is ideologically balanced between "left and right." As he knows, there are but a relative handful of "conservative" public interest law firms, most of them dominated by the needs of business clients rather than by intellectual and ideological impulses. The public interest bar is thus largely comprised of persons with strong ideological commitments towards expanded government power and/or the reduction of private sector power. Public policy must address the need to create diversity in the public interest movement, or at least to be sure that tax and foundation money be spent in a more balanced fashion if it is to be spent at all.

For the future, we might worry less about the EEOC if we are concerned about affirmative action programs, and more about the makeup of the Harvard law faculty. Likewise, we might pay more attention to the work of the judiciary committees of the Congress, for they deal with legislation involving such matters as legal service programs, judgeships, class action bills, and public support of administrative intervenors. Those committees may have more to do with government regulatory activity than committees with seemingly more direct jurisdiction over such matters.

Serious study of the legal profession, until now the subject of enormous disinterest except in unread legal journals and in Nader reports, is of great importance. Silberman's article should provoke further steps in that direction.

Michael J. Horowitz,
Washington, D.C.

LAURENCE SILBERMAN responds:

I am, of course, grateful for Michael Horowitz's letter. He is correct in emphasizing that most public interest law firms press for expanded governmental power. In that sense then, there is not, as he claims, a balance between those of the "left and right." However, I find it particularly troubling that a number of "conservative" public interest law firms tend to advocate judicial activism in pursuit of transitory conservative causes. These law firms, I am afraid, run the risk of abandoning long-term principles for short-run gains.

Jude Wanniski, one of the foremost advocates along with Professor Laffer of cutting tax rates to permit greater economic growth (a position which I, generally, support), tends to forget that even in Lafferian terms government regulation (as well as excessive tax rates) forms part of the "wedge" between work and reward. Lawyering, as I tried to show, has shifted its focus from a lubricating agent between private parties to a lubricating agent between government and private parties and is thus an integral portion of the regulatory process. Further, there is no empirical evidence to support his claims that lawyers "necessarily multiply during periods of economic contraction"; indeed, the evidence is to the contrary. Increased lawyering—litigation and regulation—are, in my view, in part the cause of our economic malaise, although probably not as significant a cause as stifling tax rates. In any event, I did not mean to suggest that the legal process's growth is the *only* threat to democratic capitalism.

Professor Peterson challenges me on a point on which I am somewhat tentative—that the supply of lawyers tends to generate demand for lawyers. Admittedly, the point runs counter to conventional economic theory and I should like to see more work done by economists on the issue. But he does agree that lawyer-dominated legislatures —because they are insufficiently attentive to the costs of the legal process—tend to prefer legalistic or regulatory solutions to those that are compatible with economic principles (incentives and disincentives).

Dean Auerbach dislikes my reference to a triple alliance among lawyers, bureaucrats, and intellectuals supporting the unbridled growth of the legal process; he accuses me of charging a "conspiracy." I would not, however, go that far. If legal terminology is desired, perhaps "semi-conscious parallelism" would be more appropriate.

As to his claim that my article reflects an ideological frame of reference, I plead guilty. I stand—as my article openly disclosed—for democratic capitalism and, therefore, am "biased" against other adverse ideologies, including that apparently held by Dean Auerbach. He would pursue "social justice," a term used by those who wish the legal process to reach out for and resolve all conflicting social, economic, and political claims. Not surprisingly, then, he unabashedly defends judicial "determination of fundamental public policy" ostensibly in the interest of minorities whose claims are rejected by legislatures too responsive to majorities. In that sense, of course, there is virtually an infinite number of shifting minorities. (I take it that he is not limiting his theory to judicial intervention to protect racial minorities against *real* discrimination—which I indicated in my article that I support.) I would submit that whatever is the proper description for the Dean's ideology, it "ain't" democracy.

Dean Gellhorn, by contrast, is troubled by the profusion of "unwise government regulatory programs," but argues that I should be more discriminating in my analysis by focusing on those regulatory programs which he believes unjustified. Certainly I would agree that some regulatory programs are more meritorious than others, but even if all could be supported—and each has its proponents—I think it important to note that the sheer bulk, the cumulative growth of the legal process, is itself harmful.

But Dean Gellhorn sees the legal process as moderating the impact of government intervention by ensuring fairness. Therefore, he further objects to my conclusion that reliance on the legal process contributes to the sum total of government intervention. However, he ignores the fact that much government intervention comes from the courts, without regard to legislative or even administrative agency initiatives, through the recognition of new "rights" that then require judicial protection.

To be sure, the legal process often indispensably protects Americans against arbitrary government action. In that regard, economists are particularly prone to reach for disguised regulatory solutions—like wage and price controls through operation of the tax code—to avoid paying a necessary legal process price. (That shows that even economists are susceptible to the attractions of a free lunch.) Still, I be-

lieve that the legal process often serves primarily to disguise enormous accretions of governmental power. If, for example, the government is given price-fixing authority —whether of energy or bread— couching that quasi-legislative delegation (as opposed to enforcement authority) within a legal process framework of adversary hearings tends to obscure the central fact that, no matter how many "views" are presented in elaborate briefs, private decision-making has become governmental.

As to the charge of lèse majesté— Dean Gellhorn describes the law as a noble profession—I confess I do not see the practice of law as morally or functionally superior to any other legitimate occupation. Dean Griswold used to tell the entering class at Harvard Law School that they were embarked on a life's business of fashioning those wise restraints that make man free. My argument, in essence, is that we have passed the point at which additional restraints detract from, rather than add to, freedom.

Mandatory Retirement

TO THE EDITOR:

George Horwich's "Regulating Retirement (your May/June issue) makes the unassailable contention that the long-term economic impact of prohibiting mandatory retirement earlier than age 70 is not knowable. Were that Professor Horwich's sole point, I would not comment on his essay. But he also attacks the public policy basis of the 1978 amendments to the Age Discrimination in Employment Act by advancing two propositions that are untenable.

The first is that mandatory retirement is not a discriminatory employment practice. This argument is, of course, specious. Honest folk may differ as to whether mandatory retirement is the sort of invidious and arbitrary discrimination that ought to be forbidden by the equal protection clause or by statute. But a system that inflexibly requires the dismissal of a competent and productive individual solely on the grounds of chronological age is, by definition, discriminatory. Even the federal courts that have upheld compulsory retirement practices in the face of legal challenges concede its discriminatory nature.

Horwich's second untenable proposition is that mandatory retirement is not imposed upon unwilling workers but rather represents "individual and private market decisions." This simply doesn't wash. Millions of federal, state, and local government employees are governed by retirement statutes imposed by legislative decisions, many made years ago when the economic pressures to drive older workers out of the labor market were nearly irresistible. Millions more employees of private institutions are not consulted about the age-related retirement plans covering them; they are simply told what management has decided. Even ratification of collective bargaining agreements imposing compulsory retirement reflects, as the professor surely recognizes, not individual approval of the system, but the continued use of retirement age as a negotiating chip between management and labor. The 1974 Louis Harris study reported that trade unionists overwhelmingly oppose forced retirement. It is disingenuous to translate acquiescence in a system on the part of those who are powerless to change it into approval of that system. This notion has as much basis as the now discredited belief that blacks chose segregation or that women freely accepted lower pay than men.

Neither of Horwich's two contentions was advanced before Congress by opponents of the recent amendments to the age law. I find it surprising that he proposes them now, unless, of course, his ideological mindset clouds his perceptions of reality.

Lauren Selden,
American Association of
Retired Persons

GEORGE HORWICH responds:

The assertion that I found the long-term economic effects of the law prohibiting mandatory retirement before age 70 unknowable surprises me. It is hard to see how Mr. Selden inferred this from my article. Reasoning from economic theory, I was explicit in my conclusions on the distorting effects of the new law: It will deprive management of what appears to be a cost-reducing tool. And it will tend to reduce wages in the economy as a whole, to discourage hiring of middle-aged workers, to alter the character of goods and services in the direction of older employees' productive advantage, to particularly penalize firms whose products require the skills and up-to-date technical training characteristic of younger workers, and to form the basis for a general transfer of wealth from the population at large to older workers who will need only threaten to continue working to age 70 in order to receive higher pensions or other inducements to early retirement. Some outcomes, relating to changes in the size of the work force or in relative wages, are contingent on unknown worker or union preferences, and were qualified accordingly. But the general impact of the legislation is entirely predictable.

The issue, from management's point of view, is the legitimacy of using a statistical procedure entailing an across-the-board age ceiling as a substitute for individual employee screening in the retirement decision. By labelling this process discriminatory, Selden reduces the discussion to an emotional level. He also throws into question any statistical procedure, such as limiting jobs to college graduates or other certified individuals when in fact some who are not college graduates or not appropriately certified may be equally qualified. From both the private and social point of view, the justification for statistical rules has to be that the net additional benefits exceed the costs. Economic analysis suggests that mandatory retirement contracts can be strongly supported on this basis. This is especially true since most workers may not have been opposed to these contracts, and since those who were, if sufficiently numerous, would, in the market context, have been compensated by higher lifetime wages.

Selden's claim that workers under mandatory retirement are the helpless pawns of their employers or unions is simply implausible. In the actual world, firms or unions that ignored workers' wishes in this regard would be unable to attract sufficient labor or sufficient membership and would eventually disappear. It is significant that not all firms adopted mandatory retirement—only those having the technological characteristics described in my article. It is also significant that the practice appeared mainly in the more skilled and higher income-generating sectors of the labor market. This is hardly an area where greedy company, union, and government "bosses" could impose their unrestrained will on workers who had no alternative employment opportunities. . . .

Selden's lament. . . . is the plea of the special-interest lobby anxious to grab its share of the public pork barrel. . . . ■