The First Monday in October

September 24, 2007 Britton Harwood

Our club meets next on the first Monday in October. This date is familiar enough in American culture for Paramount Pictures to have risked using it in August 1981 as the name of a comedy starring Walter Matthau as a justice of the Supreme Court and Jill Clayburgh as the first female justice. As a piece of language, "the first Monday in October" does not point out that it is a metonym for the first work week in October that will always follow September 29. September 29 is the feast of St. Michael, Michaelmas, the day that begins the fall term for courts in England, when the English judiciary processes from Temple Bar to Westminster Abbey for a service. The coincidence in the United States of the first Monday in October and Michaelmas may give the First Amendment a bit of gooseflesh. The Cathedral of St. Matthew the Apostle in Washington, D.C., is the scene of an annual Red Mass celebrated on the last Sunday before that first Monday. That may worry the First Amendment a little more, even though the congregants, who on this occasion traditionally include the chief and associate justices, insist they attend as private individuals, not as officers of government.

Michaelmas term is the first of four, of course, the others being Hilary, Easter, and Trinity terms. Starting in the fourteenth century, English law courts were required to sit quarterly, and they have followed these particular four since at least the eighteenth century. Within the last year or so, this practice drew a complaint in the Irish parliament. The complaint will have a certain familiarity for you but may be hard to place. I want to use the complaint to make two points, the second of them dependent on the first. The first is a fact probably well known to all of you, and the second is a theory that, I'm sorry to say, has had its doubters.

Anyway, a certain Mr. O'Malley rose in parliament to rail as follows: "Neither the Bill, nor the Minister's speech, addresses the matter of vacations. Judges sit for approximately seven and a half months of the year in the High and Supreme Courts. There ate four vacations which take up between four and four and half months. If some judges, even only half, sat during the vacations, it would do much to clear the arrears in some areas about which we hear. The four terms are Michaelmas, Hilary, Easter, and Trinity, which had some relevance about two hundred years ago, but the public now is not aware of the difference between them or the reason these lengthy vacations, during which virtually everything comes to a halt, are compulsory. It would make a great deal more sense if the courts sat on a more logical and less historical basis."

It is hard to hear this and not think of the questions raised about school calendars in our

own country: why can't school facilities be fully used twelve months a year? Aren't teachers paid well enough when you consider that they work only eight or nine months of the year? These questions arise from the fact of a rough congruence between the legal and the academic calendars, which you can verify with a glance at the quarter system at The Ohio State University or the University of Cincinnati. These institutions lack a fourth quarter as Cambridge University lacks a Trinity term. But otherwise they proceed in parallel with the British courts.

I mention this not because I can hope to say how this came to be. On the one hand, law schools presuppose the existence of law courts, and the first university—Bologna in Italy—evolved from a law school. But saying that no more than insinuates something about a calendar. On the other hand, perhaps in the nineteenth century universities and law courts came to sit and rise virtually in tandem because both their calendars may have been affected at a distance by the immemorial English business calendar—the quarter days on which debts and rents were due, pensions were paid, and the like. Quarter days occur close to ember days, the four days of repentance and abstinence marking the turn of the seasons, brought into England by St. Augustine. Historically that would get us quite a way back. But neither quarter nor ember days are very close to all the starting dates for the law courts and the academy. Christmas, for instance, a quarter day, is not very close to January 14, the feast of St. Hilary.

I want to set aside this unpromising question of priority by taking the courts and the academy together, by taking the congruence of their calendars heuristically, and doing so by first observing that the prescribed attire for both lawyers and academics is less a uniform than a costume. Barristers wear not only gowns but wigs, for example. And the requirements get rapidly more elaborate: "A Queen's Bench judge trying civil cases in winter wears a black robe faced with fur, a black scarf and girdle and a scarlet tippet; in summer, a violet robe faced with silk, with the black scarf and girdle and scarlet tippet." Academic costume can be as simple as the Oxford requirement for subfusc, 'dark clothing,' when a pupil appears for an examination, but it can approach the fanciful, as in the festal gown for the Cambridge doctor of divinity: "a gown of scarlet cloth lined with dove-coloured silk, that is silk of a turquoise-blue shot with rose-pink; at the back and on each sleeve a black button (22-line flat silk) and 1/8 black twisted cord; black strings: under this gown a black silk cassock should be worn." This is costume not actually for a play but costume that is playful. And here I wish to turn to the classic thesis of the Dutch scholar, Johan Huizinga.

Huizinga had already established a reputation with his Herbstag ('Autumn') of the Middle Ages when, in 1938, he published Homo Ludens, 'Human Beings at Play.' His object there was

"to ascertain how far culture itself bears the character of play," "with its tension, its mirth, and its fun." Culture is created in play, and play "is never imposed by physical [or economic] necessity or moral duty. It is never a task." "Play is distinct from 'ordinary* life both as to its locality and duration." Play may require distinctive clothing— gray when a baseball team goes on the road, for instance. "It is 'played out' within certain limits of time and place." The cancelli. the latticework of the chancel, separates profane from sacred space, where the play element is hidden in liturgy. Likewise, barristers, Queen's Counsels argue within the bar, and dons and pupils argue in campo,, on the field of contest, on campus, which might as well be the football field, where the temporal limits are four quarters, not four terms. Within the boundaries of the campus, the academy is free in the imaginativeness of its play; outside, as outside the bar, there is the ordinary, the serious and earnest, the banal. In Paris when a person or thing is extruded from campus, it is said to be banalise, 'banalized,' made commonplace or trivial.

The necessary conditions for play are that it should be unimposed and pleasurable. But close to universally, play is agonistic—a form of struggle. The courtroom and the campus resemble each other not simply because they have special temporal and spatial limits, or because they are the occasions for such display as festal costumes, or governed by procedure as games are, the canons of proof obtaining within the several disciplines; or because their play is judged. Essentially they resemble each other because in each the play is agonistic, from agon. the Greek word for struggle. The right of the accused to counsel, the general prohibition on hearsay or other testimony that cannot be examined would seem to rest on the belief that we can have no confidence in a proposition unless the opposing view, though unlikely on the face of it and held by even the smallest minority, has been competently and vigorously defended. In many cultures story-telling competitions, like Chaucer's Canterbury Tales, have been an important form of play. The adversarial nature of the trial often and perhaps always takes up that other form of play, story-telling, so far as the forensic discovery of fact generally, and perhaps always, becomes subordinate to the narrative into which the fact is woven.

The classroom was once agonistic, adversarial in a systematic way, and should perhaps become so again. The method of the disputed question, the quaestio disputata, was espoused by Aristotle and dominated universities in all subjects once universities appeared in the twelfth century. A question is set up, opposing answers are given, and a resolution is attempted. Actual scholars sometimes served as the respondents and opponents. Sometimes, as in the most famous now of the quaestionis the Summae of Thomas Aquinas, simply authorities were cited for the opposing positions. The magnitude of the loss of this teaching method in the seventeenth century

when the roundheads subdued Oxford can be gauged by a passage from The Education of Henry Adams, when, in his usual mordant tone, he thinks about the several years he taught at Harvard: "His reform of the system [Adams consistently refers to himself in the third person] would have begun in the lecture-room at his own desk. He would have seated a rival assistant professor opposite him, whose business should be strictly limited to expressing opposite views. Nothing short of this would ever interest either the professor or the student; but of all university freaks, no irregularity shocked the intellectual atmosphere so much as contradiction or competition between teachers. In that respect the thirteenth-century was worth the whole teaching of the modem school."

Here I rest my case. Q.E.D. Next Monday, the first workday after Michaelmas, whether you are taking the bench or facing the first meeting of a class, you should call out, "Play ball!"