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Law Quadrangle

Notes

Spring, 1967, vol. 11, no. 2

QUAD BRIEFS

Postgraduate Program Aided by Humphrey Gift

The University of Michigan has received \$250,000 from George M. Humphrey, former secretary of the treasury and a U-M alumnus, to finance a graduate program in law and economic policy.

The gift was received as part of the University's \$55-Million Program, which is seeking private gifts to help provide the "margin of excellence."

Law School Dean Francis A. Allen said Humphrey's gift will be used primarily for postgraduate fellowships at the Law School. They will be awarded for study and research in the areas of governmental regulation of business enterprise. The program will be directed not only to technical legal problems but also toward "critical evaluation of the policy of the law and study of the impact of governmental regulation on various aspects of American life," Dean Allen said.

The fellowships will be of two kinds. One group, to be awarded for periods of one or two years, will be for young law school graduates who are candidates for advanced degrees. The second group will provide awards to distinguished scholars who wish to

spend a year at the Law School engaged in research.

In addition, the funds will be used to bring lecturers to the campus from the fields of law, economics, and business.

Humphrey's gift is to be expended over about five years, and it is hoped that the first fellowships can be awarded for study beginning next September, Dean Allen said.

Born in Cheboygan, Mich., in 1890, Humphrey is a 1912 graduate of the U-M Law School. He practiced law in Saginaw for seven years before moving to Cleveland, where in 1929 he became president of the M. A. Hanna Corp. He served in the cabinet of President Eisenhower as secretary of the treasury.

A grandson, George M. Humphrey III, is a senior in the Law School.

Fall I.L.S. Conference Is Successful

The Law School's International Law Society, the Institute of Continuing Legal Education, and the American Society of International Law co-sponsored a conference on November 19 on "Economic and Legal Developments in the Changing Environment of the Atlantic Area," held at the Law School.

The conference was one in a series of programs and activities conducted by the International Law Society, a student group headed by Robert J. Faux, '67 Dec., and advised by Professor Whitmore Gray. Alan J. Polansky, '67, served as the Conference Co-ordinator.

A morning and an afternoon panel examined two different aspects of the conference's theme. The first panel discussed "The Role of the International Corporation in Atlantic Relations," with Professor Alfred Conard of the Law School faculty serving as moderator.

Mr. John Andrews, Vice President of Ford Motor Company in charge of the European Automotive Group, spoke on the relationship between an American parent and its subsidiaries in Europe in view of regional marketing blocks, new corporation laws, anti-cartel legislation, and the lack of a "European" corporate form. In his opinion, the technology and automation advances in Europe are often far ahead of those in America, so far so that they have outstripped the existing corporate structure.

"What is needed is a revolution in the attitudes of European businessmen and lawyers, away from a restricted inward-looking approach to an expansive and creative one," Mr. Andrews said. "Probably only a new generation of business and financial leaders could provide this."

Professor Raymond Vernon of the Harvard Graduate School of Business Administration examined the international corporation from an economist's viewpoint. He pointed out the apprehension of national governments to these multi-national enterprises, because they are supposedly unresponsive to national economic goals and may bring about a withdrawal of capital and "brain drain" in favor of the parent firm.

Professor Detlev Vagts of the Harvard Law School talked about several methods of providing legal incentives to corporate investment, and the controls placed on it which often run counter to corporate planning.

Professor Eric Stein, who was instrumental in securing many of the conference speakers, served as the moderator of the afternoon panel

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Professor Yale Kamisar, publications chairman, University of Michigan Law School. Student Editor, George A. Dietrich; student reporters, Arthur Dulemba, Sam Tsoutansis, Jay Witkin, James Schwab, Robert Faux; student photographer, Kenneth Stein. Edited in the University Publications Office.

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which discussed "Current Negotiations for the Removal of Trade Barriers Within the Atlantic Area."

Mr. Louis Krauthoff, Chairman of the Trade Information Committee of the Executive Office of the President of the United States, after reviewing the organizational structure of trade development stated that GATT still did not have the total commitment from its members which is necessary

(Continued, page 19)

Legal Aid Clinic Helps Indigents

A woman in a federally financed apartment building was told to leave because she had another child, although larger families lived in duplicate apartments.

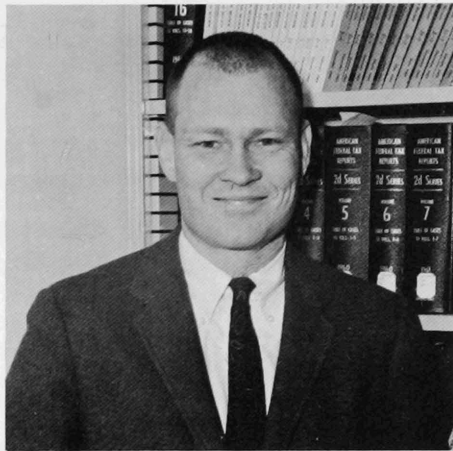
A university student went with some friends to an apartment shared by a group of girls who left their door open and had a standing invitation for visitors night and day. The student and his friends were arrested for illegal entry on the complaint of one of the girls.

Both of these people in trouble earned less than \$2,000 a year. Both needed legal aid and both turned to the Washtenaw County Legal Aid Society.

More than 900 persons have sought the help of the society, which was established less than two years ago after a Michigan Supreme Court ruling on aid to indigents. The ruling allowed law students to advise the poor and to negotiate and appear in court in civil and criminal matters under the guidance of practicing attorneys.

About 100 University of Michigan law students, juniors and seniors, are manning the Legal Aid Clinic office at 201 North Fourth Avenue in Ann Arbor. A second office will soon be opened in nearby Ypsilanti.

"Our purpose is to take anyone as a client who can't afford a lawyer," said John Waters, a senior from Birmingham, Mich., who is chairman of the student group. "Under our by-laws we consider a person's debt load and other factors, of course, but as a general rule the client must earn \$2,000 a



James J. White

year or less, plus \$500 per dependent."

About 65 per cent of the cases handled by the students are divorces and family problems. Many of the clients are women seeking restraining orders, support payments, or simply an understanding of their problem.

There have also been landlord-tenant debt cases, paternity claims, income tax evasion, negligence, and welfare cases.

Although the students represent some persons accused of major crimes before counsel is appointed, most of their criminal cases involve minor crimes.

Under the direction of the Law School and with the enthusiastic support of the Federal Prison Authority, the students have also begun a program of advising prisoners at the Federal Correctional Institution at nearby Milan, Mich. Since September, when this service began, the students have talked to more than 50 prisoners and have received letters from prisoners in institutions as far away as Texas, Georgia, and Florida. In one case, the letter writer was a condemned murderer.

However, the students are permitted to help only residents of Washtenaw county, and they are kept busy with clients referred by lawyers, courts, social workers, and other clients.

An important aspect of the clinic program, according to Waters, is that the client is generally better off after coming to them even if he does not walk away with a clear victory.

"People who would not normally have access to legal advice," he said,

"often discover that somebody cares and understands their problems. Many leave with a new respect for the law."

A good example of this new respect involved a man who was accused of selling alcohol to minors.

He was found guilty, explained John Hartranft, a senior from Dayton, Ohio, and he admitted his guilt, "but he genuinely appreciated the fact that someone stepped forward to help him."

A federal court recently accepted one of the clinic's cases in which a woman was to be evicted from a federally financed apartment building because she had another child.

"Although the rule in the lease about not having more children was intended to keep from creating crowded housing," explained Jack Zulack, a senior from Ridgewood, N.J., "it appeared also to be an attempt to regulate social relationships, especially since there were larger families in similar apartments."

Pat McCauley, a senior from St. Louis, Mo., handled the case of a student who was arrested for illegal entry into an apartment shared by a group of girls. Believing the client had no malintent and convinced that his actions were accepted procedure in that apartment, McCauley took the case to court where it was dropped before it got to the judge.

A full-time legal aid director was recently hired for the clinic, which has been granted \$116,000 in support, primarily from the Office of Economic Opportunity. Hiring of a director will ease the work load of volunteers from the Washtenaw County Bar Association who have been appearing in court for the clinic.

Administering the Student Legal Aid Society is a 19-man board including J. J. White, assistant professor in the U-M Law School, who co-ordinates the student effort. The rest of the board includes 12 lawyers and six indigent residents of the county.

A prominent Ann Arbor legal figure recently described the Legal Aid Clinic as "the largest law firm in the city." The students have proudly accepted the description and are doing their best to also make it the best law firm.

Collective Bargaining and the Antitrust Laws

Excerpts from a speech given at the 19th Annual Meeting of the Industrial Relations Research Association in San Francisco, December 28, 1966

by

Theodore J. St. Antoine
University of Michigan Law School

A central aim of the antitrust laws is the promotion of competition. A central aim of collective bargaining is the elimination of competition—according to classical trade union theory, the elimination of wage competition among all employees doing the same job in the same industry. Given these disparate aims, the antitrust laws and collective bargaining will also inevitably tend to clash. To harmonize them, the type of competition which the law is intended to foster must be carefully distinguished from the type of competition which union-employer bargaining can properly displace. The Supreme Court's last major effort to draw the demarcation line produced the *Pennington* and *Jewel Tea* decisions of 1965. . . .

Earlier, two quite different legal theories were thought to shield labor activities from antitrust attack. First, unions that are "acting alone" and not in combination with non-labor groups are exempt from Sherman Act coverage. Presumably unions "act alone" when they strike, picket, or boycott. When a union enters into a collective bargaining relationship with an employer, however, it hardly seems to be acting alone. Here a second theory limiting antitrust liability may come into play. The Supreme Court has said that the Sherman Act was intended to outlaw only "restraints of trade" as understood at common law, that is, restraints on "commercial competition." But "an elimination of price competition based on differences in labor standards" was not prohibited. . . .

In *Pennington* it was alleged that the United Mine Workers and the major coal producers had conspired

to drive smaller, less efficient operators out of business by establishing a uniform industry-wide wage rate higher than the small producers could afford. . . . Yet the competition which was to be eliminated was competition "based on differences in labor standards. . . ." Moreover, wages are at the core of those subjects about which unions and employers are required to bargain under the National Labor Relations Act. . . . Surely, the unions argued, a matter on which the labor laws compelled bargaining could not be the basis of a prosecution under the antitrust laws!

". . . It is probably easier to say a union and employers may not have a 'predatory purpose' in a wage agreement than to determine . . . what is the purpose . . ."

Inherent in this argument, of course, was the notion that the "purpose" of any wage pact is irrelevant—even if the purpose is to liquidate competitors. This proved the fatal flaw. But the flaw is perhaps more apparent in the abstract than in the concrete; it is probably easier to say a union and employers may not have a "predatory purpose" in a wage agreement than to determine, in any given case, what is the purpose. And the history of judicial assessment of union "purpose" is hardly reassuring.

At any rate, Justice White in delivering the opinion of the Court in *Pennington* was plainly troubled by the union argument, but he didn't buy it. He conceded that the bounds of the duty to bargain under the National Labor Relations Act have "great relevance" in considering the scope of labor's antitrust immunity. He then proceeded, however, to turn the union argument into a boomerang as applied to *Pennington* by introducing the new concept that the statutory duty to bargain exists only on a unit-by-unit basis. Unions and employers must negotiate about the wages and employment standards of workers in a particular bargaining unit, but apparently not about the standards outside a given unit. Thus, a union "forfeits" its antitrust "exemption" when it is "clearly shown" that it has agreed with one group of employers "to impose a certain wage scale on other bargaining units." Moreover, a union is "liable" if it becomes a party to an employer conspiracy to eliminate competitors, even though the union's role is limited to



securing certain wages, hours, or working conditions from the other employers.

This approach immediately raises a fistful of new questions. To begin with, Justice White suggests a distinction between the union's loss of antitrust immunity and its commission of a substantive violation. Does this mean an agreement with extra-unit implications merely removes the exemption, without necessarily resulting in a *per se* violation? If so, what added elements must be shown to establish an offense? As you know, the Supreme Court long ago declared that only "unreasonable" restraints on trade run afoul of the Sherman Act. It may well be that resort to the "rule of reason" will enable the courts to exercise considerable flexibility in dealing with "extra-unit" agreements. A substantive violation might require a "predatory intent," a definite "purpose" to impede or destroy business competitors. The trial court on the remand in *Pennington* in effect so held. I would contend this result is supported by the practical demands of meaningful collective bargaining; as we shall discuss in a moment, there are times when it is simply unrealistic to insist that an employer has no valid interest in the wage scale a union gets from the employer's competitors.

Another inquiry is whether the Supreme Court was proposing a special evidentiary standard in declaring that the extra-unit agreement must be "clearly shown." The Court explicitly refrained from passing on the sufficiency of the evidence in *Pennington*. Before a union can be held liable for the acts of an agent, "clear proof" of the authorizing of the acts is required by the Norris-LaGuardia Act, one of the statutory bases of labor's antitrust exemption. I recognize the desirability of finding some way to insulate union-employer bargaining from ill-founded inferences of "conspiracy" by overly suspicious or credulous juries. But I confess I think it takes a bit of stretching to extend Norris-LaGuardia's agency provision far enough to cover the antitrust evidentiary question. Nonetheless, the district court which handled *Pen-*

"... I see no essential difference between permitting discussion and permitting agreement, so long as there is no specific purpose of killing off competition . . ."

nington on remand expressly held that Norris-LaGuardia makes "clear proof" necessary to establish predatory intent. Perhaps it would be more straightforward to say that a proper reconciliation of antitrust and labor policies calls for the Sherman Act to be interpreted, without reference to Norris-LaGuardia, as requiring evidence of an explicit union-employer agreement to force competitors out of business before a case could go to a jury. Mere knowledge that some marginal operators could not pay the prescribed industry wage scale would not, in itself, be sufficient.

The practical implications of *Pennington's* new unit-by-unit bargaining rule are illustrated by the so-called "most favored nation" clause. This is a fairly common

provision in labor contracts, especially in the construction industry, requiring the union to give the signatory employer the benefit of the most favorable terms the union subsequently accords any other employer. In actual operation, naturally, the usual effort is to freeze labor standards at the level of the initial contract. In the language of *Pennington*, the union has agreed, at least impliedly, "to impose a certain wage scale on other bargaining units." This undoubtedly is a form of restraint, but is it not just another way of advancing the accepted labor policy of taking wages out of competition? In any event, a union recently charged an employer with a refusal to bargain under the National Labor Relations Act for insisting on a "most favored nation" clause, and the General Counsel of the National Labor Relations Board issued a complaint "to place the issue before the Board." The General Counsel acted quite correctly, considering Justice White's dictum that mandatory bargaining is confined to working conditions in an individual unit. But the Board should not feel itself foreclosed by *Pennington's* sweeping talk about units (which may command the assent of only three Justices) from making an independent appraisal of the problem.

What, after all, is more natural than for an employer to want assurance that his competitors will have to match any concessions he gives the union? As long as we endorse the policy of eliminating competition based on wage cutting, I see no reason to boggle at a means so well adapted to attaining that end. Indeed, I find it hard to imagine how collective bargaining could stay healthy if discussion were choked off on some of the most vital subjects—the competitive position of various firms in an industry, the demands the union will make in other negotiations, and so on. And I see no essential difference between permitting discussion and permitting agreement, so long as there is no specific purpose of killing off competition. I find unpersuasive Justice White's argument that a union cannot be allowed to "strait-jacket" itself in subsequent bargaining by commitments to "favored" employers in earlier negotiations. Those commitments may be the price the union has to pay to get the concessions in the first place. The employees in the original unit will hardly complain. The employees in the other units are more likely to gain than to lose when a "floor" is placed under wages. In the long run, upholding "most favored nation" provisions would probably do no more than hasten what the labor economists in this group know better than I is the usual result of union organization anyway, namely, the gradual "leveling" of wage rates throughout an industry.

The plight of the employer charged with an unfair labor practice because of *Pennington* underscores another important aspect of this decision. Its impact falls not so much upon organized labor as upon the institution of collective bargaining. Indeed, Justice White stressed that a union acting unilaterally, in furtherance of its own policies, still has the right to seek uniform wages in an industry. It is only when this is done pursuant to a union-employer agreement that antitrust issues arise. But *Pennington* applied literally may seriously hamstring collec-

Bankruptcy Study

Excerpts from talk before section of
corporation, banking, and business law
of the Philadelphia Bar Association,
December 16, 1966

by
Professor Frank R. Kennedy
Reporter for the Advisory Committee on
Bankruptcy Rules of the Judicial Conference
of the United States

tive bargaining as an instrument for coping with today's critical problems in industrial relations. For example, management's need to introduce technological improvements to increase productivity and meet competition is countered by labor's anxiety over the possible loss of job security and craft skills. Reconciling these opposing interests through attritional reductions in force, retraining allowances, and so forth, may be severely hampered if employers cannot be reassured on what will be demanded of their competitors. . . .

In *Pennington* a key question was whether a labor agreement dealing with wages would violate the antitrust laws if its purpose was to put certain competitors out of business. The answer was "yes." In *Jewel Tea* the question was quite different. Was it a violation of the Sherman Act for a butchers' union to compel a grocery chain to agree to a limitation on the hours fresh meat could be sold, after the union had entered into a multi-employer contract containing such a restriction? In essence, as viewed by a majority of the Court, the problem was one of characterization: did this clause involve wages, hours, or working conditions, legitimate subjects of collective

". . . antitrust policy too readily tends to become a special branch of moral philosophy, and involvement with labor questions is likely to aggravate that tendency . . ."

bargaining, or did it constitute a forbidden restraint on the product market?

The Court split three ways, with three Justices in each group. Justice White, Chief Justice Warren, and Justice Brennan found that the marketing hours restriction, which in effect defined the butchers' working hours and their job content, was "intimately related" to labor conditions. Thus the union's effort to secure the provision through arm's-length bargaining in pursuit of its own labor policies, and not in furtherance of a union-employer conspiracy, was exempt under the Sherman Act. Justices Goldberg, Harlan, and Stewart concurred for the same reasons that led them to dissent in *Pennington*. They accepted the union argument that agreements dealing with mandatory subjects of bargaining are wholly outside the antitrust laws. Justices Douglas, Black, and Clark dissented in *Jewel Tea* on the ground the operating hours limitation was an obvious restraint on the product market, and was not needed to fix employees' working hours. The multi-employer collective agreement itself was considered sufficient to show an illegal union-employer conspiracy to impose the marketing hours restriction on the holdout chain. . . .

Pennington establishes that unions and employers violate the antitrust laws when they execute a labor contract whose purpose is to eliminate competitors, even if the agreement deals only with wages, hours, and working conditions. My feeling is that in the absence of such a predatory purpose there should be no substantive viola-

. . . During World War II a relative of mine who lived in Knoxville, Tenn., told of a tremendous project near his town. It seemed not to be a military project because there were no uniforms in evidence, but the influx of people and materials and the pace of activity suggested that there must be some connection with the great national effort we were engaged in. But there were no signs, no newspaper publicity, and indeed no kind of report to appease the curiosity of the residents of the area. The mystery was much heightened by the fact that while much was shipped into this center of great activity, nothing was being shipped out. The speculation was ended on August 6, 1945, the day the bomb was dropped on Hiroshima. The place in Tennessee was the Clinton Engineer Works, Oak Ridge, where the bomb had been manufactured in large part.

There may be some superficial similarity in the operations of the Manhattan Project and of the Advisory Committee on Bankruptcy Rules. We—the Committee and I as its reporter—have been working for several years now with a considerable input but no comparable output.

tion, regardless of whether antitrust "immunity" is lost because the contract covers labor standards outside a particular bargaining unit.

Jewel Tea indicates that even a direct restraint on the product market is exempt from the antitrust laws if the restraint is also "intimately related" to wages, hours, and other components of the labor market, at least where the union securing the agreement is acting on its own and not at the behest of employers. If the Court is hinting at a possible return to some effort to "weigh" the workers' stake in their job standards against the public's stake in a competitive economy, I suggest there is an urgent need for empirical data to enable the courts to strike a reasonably informed balance. Antitrust policy too readily tends to become a special branch of moral philosophy, and involvement with labor questions is likely to aggravate that tendency. "Weighing" interests here is risky business at best, but at least the operation should be performed with the humbler, and more appropriate instruments of economic analysis.

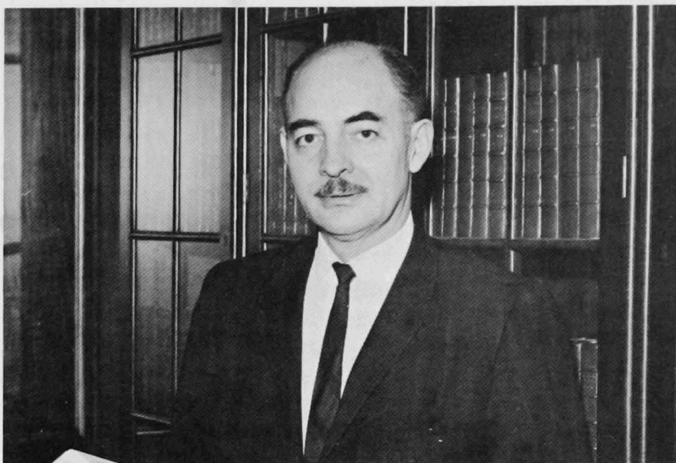
And our operations, while not classified, have not been reported on generally.

Let me hasten now to assure you that the Committee is not fashioning an atomic bomb to be dropped on the bankruptcy courts. It has trained its sights on certain enemies that it has recognized—expense, delay, technicality, and perversion of the purposes and processes of the Bankruptcy Act. The Supreme Court indicated recently in *Katchen v. Landy* that this is shooting in the right direction. The Committee does not suppose that the recommendations which it will make and report to the bench and bar will draw unanimous approval. Indeed if the Committee were animated by a purpose to avoid controversial proposals, not only would it surely shirk the responsibility implicit in the charge it has received from Congress and the Judicial Conference, but it would be sure to suffer disappointment of any hope for universal applause. Progress can seldom be achieved without some cost and at least temporary disadvantage to those required to change their ways. We anticipate the possibility of some minor explosions when the Committee's recommendations land on desks across the land, but we also hope that the expressions of approval, if they do not rise to the level of a roar, at least provide needed assurance that the bench and bar generally believe the proposals workable and worthy of adoption.

The Committee itself is made up of 12 members, including three federal judges: Circuit Judge Phillip Forman of the Third Circuit is its wise and judicious chairman; District Judge Roy Shelbourne of Louisville, Kentucky, and District Judge Edward Gignoux of Portland, Maine; three referees in bankruptcy: Judge Asa Herzog of New York, Judge Estes Snedecor of Oregon, and Judge Elmore Whitehurst of Texas; Edwin Covey, formerly chief of the Bankruptcy Division of AOUSC, now Adjunct Professor of Law at Georgetown University; three practitioners with extensive practice in bankruptcy courts: Norman Nachman of Chicago, Charles Seligson of New York, who is now pretty busy as the trustee for Ira Haupt & Co., the biggest partnership bankruptcy in history, I am sure, and George Treister of Los Angeles, the bankruptcy capital of the world; and two law professors—Stefan Riesenfeld of the University of California at Berkeley and Stanley Joslin of Emory University in Atlanta. I have as an assistant Professor Morris Shanker of Western Reserve University School of Law, who had a number of years of excellent experience in the bankruptcy court in Cleveland.

So we have diversity in geography and in other important respects. Specialists give expertise; generalists give perspective, neutralize bias. Most members came originally to the Committee, I think it fair to say, with a fairly firm conviction that bankruptcy practice and procedure in his court, or the court where he practiced, are the only acceptable model. It was a revelation to some that there is or could be another way in civilized society. The Committee sessions have been a highly educational experience for all concerned.

Since the establishment of the Committee in 1960, 12 meetings have been held in Washington of between two



and four days in duration. In addition there are special meetings of subcommittees which have sometimes extended over three days' time. Attendance and devotion to duty have been exemplary. To the best of my recollection we have never had more than one or possibly two absentees from any meeting.

In addition we have had the benefit of the wisdom and experience of the Chairman of the Committee on Rules of Practice and Procedure, Circuit Judge Albert Maris, who maintains close involvement in what is going on; Professor James William Moore of Yale University, editor in chief of both Moore's Federal Practice and Collier on Bankruptcy and counsel for the trustee for the New Haven Railroad; Professor Charles Alan Wright, who is known to you as the author of the handbook on Federal Courts and the revising editor of Barron & Holtzoff's work on Federal Practice; and Royal Jackson, Chief of the Bankruptcy Division of the United States Courts, often with one or two of his assistants. At least two and frequently all four of these highly knowledgeable people are in attendance and participate in our deliberations.

The Advisory Committee on Bankruptcy Rules is, of course, one of the six committees established pursuant to 28 U.S.C. §331. During the first four and one-half years of its existence, however, the Advisory Committee on Bankruptcy Rules was engaged in formulating proposals for amendments of the General Orders and Official Forms in Bankruptcy. The General Orders and Official Forms were promulgated by the Supreme Court pursuant to former section 30 of the Bankruptcy Act. This section, originally enacted in 1898 and unchanged until repealed, had been construed by the Court to authorize the prescription only of those rules, forms, and orders as to procedure necessary for carrying the Bankruptcy Act into effect, and not to authorize additions to its substantive provisions. One Supreme Court case, *Meek v. Centre County Banking Co.*, 268 U.S. 426, 434 (1925), invalidated old General Order 8 and old Official Form No. 2 because "without statutory warrant." The fact that the rule and form were in fact a very much needed one and quite helpful in dealing with insolvent partnerships did not save them.

During the first year of its existence the Advisory Committee prepared revisions of the General Orders and

Official Forms to bring them into harmony with recent legislation and with current and approved practice. These amendments, involving nearly 50 general orders and official forms, became effective in July, 1961.

The desirability of broadening the rule-making power in bankruptcy to that already applicable in the areas of civil, criminal, and admiralty practice was recognized by the Committee at its first meeting, and the bill which eventually became 28 U.S.C. §2075 was introduced at the instigation of the Bankruptcy Rules Committee five years ago on Wednesday of this week. The bill passed the House forthwith, but a proposal to enhance the powers of the Supreme Court in any respect was apparently regarded with some suspicion in the Senate Judiciary Committee. So it didn't go through until in some mysterious

procedural provisions; 2) The Act assigns extensive administrative functions to the courts of bankruptcy so created.

It has been recommended to the Committee in the published literature and otherwise that the objective ought to be to integrate bankruptcy practice into the Federal Rules of Civil Procedure as the admiralty practice has been, and the Committee has considered a set of drafts of amendments of the Civil Rules of Procedure which undertakes to merge bankruptcy practice into those rules. The ideal of a single set of rules within the covers of a portable, paper-back book which would guide counsel through the mazes of any federal court and the processes of federal civil litigation has a powerful attraction. Assuming the ideal is as attainable as any ideal is,

“. . . there have been . . . no rules or guides of national scope covering the rule-to-show-cause practice, reclamation proceedings, turnover proceedings, and determinations of counterclaims, and 'Katchen v. Landy . . . gives a green light to a rather extensive jurisdiction in the Bankruptcy court over counterclaims . . ."

and magical way it passed muster in the Senate Committee in October of 1964 and was enacted pronto.

The very considerable body of rules and forms which had been prepared by the Committee within the enforced limitations imposed by the Bankruptcy Act now required reconsideration in the light of a new dispensation. It has developed during the process of re-examination thus far that some rules and forms will be little changed; others, however, have been scratched and a new approach undertaken.

It is to be noted that although section 30 of the Bankruptcy Act is repealed, there is no repeal or invalidation of previously prescribed rules, forms, or orders. Existing general orders and official forms thus remain in effect unless and until the Supreme Court itself abrogates them in the exercise of the new power given by 28 U.S.C. §2075. While the Supreme Court promulgated the general orders and forms, including the amendments of 1961, without submission to Congress, they can no longer be amended except in accordance with the procedure prescribed by the third paragraph of section 2075, or by Congressional enactment itself. In the meantime procedural provisions of the Bankruptcy Act including those enacted by Congress since October 3, 1964, are entirely valid and effective.

The Bankruptcy Rules statute is patterned in its phraseology on the statutes conferring rule-making authority in the other areas where the Court promulgates rules. The experience gained in the rule-making process over the course of the last 30 years is thus highly relevant. In a general way one may say that the Bankruptcy Rules will bear the same relation to the Bankruptcy Act as the Federal Civil Rules bear to the Judicial Code. There are two aspects of the Bankruptcy Act, however, which differentiate it from the Judicial Code: 1) The Act includes a body of private substantive law with many interrelated

there are nonetheless two difficulties: 1) Referees and bankruptcy practitioners will not wish to sacrifice the clear advantages of expedition and economy now sanctioned by the general orders and the Bankruptcy Act merely for the sake of achieving a conformity with civil practice in other kinds of proceedings; 2) members of the bench and bar, on the other hand, will generally not wish to see the Federal Rules cluttered with exceptions and additions to deal with particular needs and problems that are pertinent only to bankruptcy practice. The rule-making process is of course more complicated when it is necessary for different Advisory Committees to agree on the form as well as the substance of changes in the rules. That these difficulties are not insuperable and may be well worth the effort required to resolve them is demonstrated by the monumental accomplishment represented by the amendments which become effective on July 1, effecting a substantial unification of admiralty with federal civil procedure. It still remains to be seen whether a like unification is feasible in bankruptcy. The Committee later this month will examine an alternative approach.

As I have intimated, the Committee proposes to go well beyond a mere reduction of the procedural provisions of the Bankruptcy Act and the General Orders to the format of rules. There have been as a matter of fact no rules or guides of national scope covering the rule-to-show-cause practice, reclamation proceedings, turnover proceedings, and determination of counterclaims, and *Ketchen v. Landy*—recently handed down by the Supreme Court—gives a green light to a rather extensive jurisdiction in the bankruptcy court over counterclaims. The Committee has given extended consideration to proposed rules authorizing mail service in bankruptcy

(Continued, page 19)

"Who Will Watch the Watchers?"

Professors Julin and Israel featured in U-M Television Center production examining law enforcement problems in light of recent Supreme Court decisions

As part of the continuing effort of the Law School to use television to bring about a general understanding of the reasons for and the implications of United States Supreme Court decisions, the school recently joined with the University of Michigan Television Center in producing the series "Who Will Watch the Watchers?"

Beginning with an examination of the implications and impact on law enforcement of the Supreme Court decisions in the *Escobedo* and *Miranda* cases, the ten-program series features Law School professors Joseph R. Julin and Jerold H. Israel along with a selected guest on each show.

The series deals with a broad range of law enforcement problems upon which Supreme Court decisions have had, and will have, an effect. These include arrests, search and seizure, wiretapping and eavesdropping, entrapment, and crimes of vice. It concludes with three programs in which the private citizen's rights and relations with public enforcement bodies are discussed.

The series has been distributed to an over-50-station commercial network which carried it in most of the large cities throughout the country. Response thus far has been quite favorable. This is the third time Professor Julin has been involved in a major TV series on legal problems. The first, entitled "A Quest for Certainty," released in 1964, received the American Bar Association 'Silver Gavel Award for Outstanding Social Service' in that year.

The 1964 series, Julin's first extensive work before the camera, utilized a large amount of graphic material in aid of the aim of acquainting the viewer with the law generally.

By contrast, the present series used a panel-discussion format, mainly because of the greater complexity of the questions which were to be dealt with.

"I was kind of the 'contrary' panel member," Israel laughs, "since I al-

ways tried to present the other side whenever an argument was advanced. This was because we wanted to stress the balancing of considerations which is so important in the law enforcement area."

Each program featured Julin and Israel with a guest panelist in a discussion of a specific problem or area. Among the guest panelists were Law School Dean Francis A. Allen, Professors B. James George, Jr., Yale Kamisar, Marcus L. Plant, and Edmund F. Devine of the Law School, Professor Albert Reiss, Jr., chairman of the University of Michigan Department of Sociology, and Vincent Pier-sante, Chief of Detectives for the Detroit City Police Department.

"In many instances we felt that our discussions were much clearer and more cogent than they would have been had we been conversing privately simply because we knew that we were attempting to get points across to laymen," Julin remarked.

However the program certainly could not be termed one which the everyday television bug would find interesting, since the inherent complexity of the area made some familiarity with the subject matter almost a necessity.

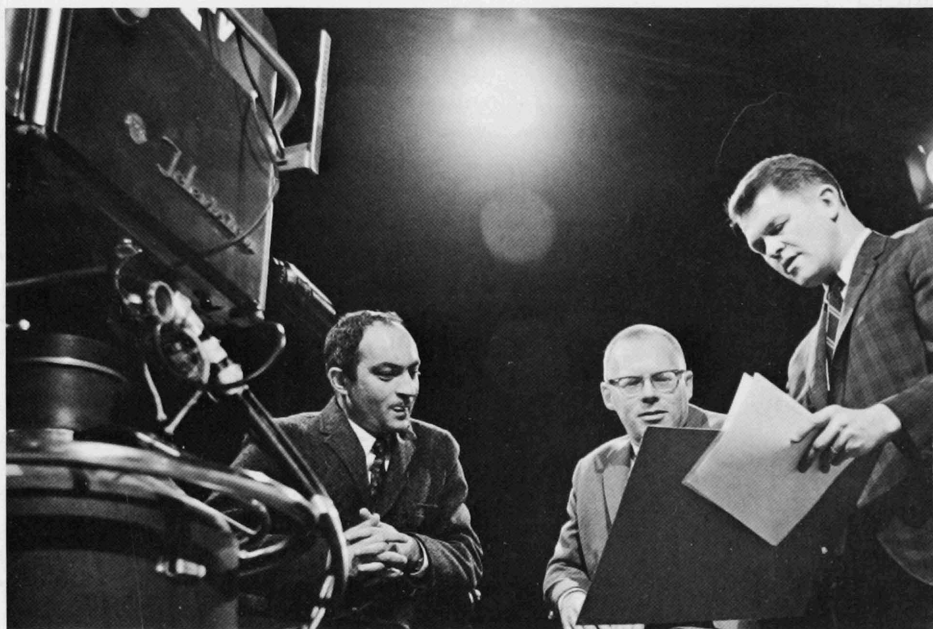
"I suppose you would say that it is aimed at the 'intellectually curious' and those with some familiarity with the general area," Israel explained. "Some of the questions we dealt with, like those concerning confessions and interrogations, would, of course, not be new to most persons, but many of the other shows dealt with subjects which only the more sophisticated could appreciate."

Israel found the shows dealing with the private citizen and his relation to present-day law enforcement problems especially interesting.

"Many people have never thought of this aspect, and I found that the questions of the rights of the innocent,

(Continued, page 19)

Professors Jerold Israel and Joseph R. Julin discuss the format of a program with Lee (Mack) Woodruff, producer of the U-M TV Center's "Who Will Watch the Watchers?" series.



The Computer and Individual Privacy

Excerpts from testimony before U.S. Senate Subcommittee on
Administrative Practice and Procedure, March 14, 1967

by

Professor Arthur R. Miller
University of Michigan Law School

The computer, with its insatiable appetite for information, its image of infallibility, its inability to forget anything that has been put into it, may become the heart of a surveillance system that will turn society into a transparent world in which our home, our finances, our associations, our mental and physical condition are laid bare to the most casual observer. The same electronic sensors that can warn us of an impending heart attack can be used to locate us, track our movements, and measure our emotions and thoughts. The identification number given us at birth might become a leash around our necks and make us the object of constant governmental surveillance. Even the idea that there is no place in the world where we cannot be reached through our number is somewhat frightening. Finally, a high degree of information centralization gives those who control the recording and preservation of data a degree of power, which, if abused, might make the alleged "credibility gap" of today look like a bridge table bidding misunderstanding. . . .

This investigation is most timely in view of the clarion in some quarters of the federal government for increased computerization of information and the establishment of a National Data Center. I am concerned, however, that the focus of the discussion and inquiry to date has been too narrow. In light of the enormous societal implications of the new technology, both for good and evil, the privacy issue should be examined in terms of the possible misuse of a communications medium that ultimately will be of national, and later international, dimensions, and not simply from the perspective of the possible abuse of a particular machine or group of machines operating in a building in Washington, D.C. Cognizance also must be taken of the fact that this new medium will consist of numerous subsystems, all having a capacity to injure our citizens and invade their privacy. Yet, almost all of these subsystems will operate under the aegis of state and local governments or private organizations rather than the federal government. The analogies between the need for comprehensive national regulation of computer communications, whether of a federal or nonfederal origin, and the need for national regulation of the airlines, railroads, radio, and television seem obvious.

To date, the proposals for a National Data Center have been modest and have suggested little more than the creation of a *statistical* center to enable federal agencies to compile and process facts and figures from governmental files and records on an aggregate basis; suggestions that an individualized *intelligence* center is in the offing have been disabused. Since the development of a compre-

hensive computer dossier on an individual basis is both technologically possible and may prove to be logical and economic, it would be unwise for this Subcommittee to evaluate the proposed Center's potential impact on human privacy in terms of the current suggestions or on the assumption that the Center will be a static institution. In the fullness of time, even the most innocuous of centers could become the heart of an individualized, computer-based federal record-keeping system.

Moreover, this Subcommittee should not deliberate in terms of computer capability as it exists today. The world of information transfer and data storage and retrieval is evolving at such a rapid rate that assertions that maintaining a computer file on every American is impractical, unfeasible, or uneconomic may soon be proven erroneous. New generations of computer hardware are constantly being spawned, machine storage capacity and speed is increasing geometrically, and costs

". . . risks to privacy created by a National Data Center lie not only in the misuse of the system by those who desire to injure . . . but in the proliferation of people having capacity to inflict damage through negligence, sloppiness . . . and sheer stupidity . . ."

are declining. Thus, at this time we cannot perceive the dimensions, the sophistication, or the intrusive abilities of the National Data Center ten or twenty years from now. Nor can we prognosticate the caliber of the techniques that may be developed to break the safeguards shrouding the Data Center or to manipulate, falsify, or extract information stored therein. . . .

Inasmuch as the problem of privacy permeates such basic questions as who should control the operations and policies of the Center, what information should it record, who should have access to it, what protective systems should be built into the Center's hardware and software, and what types of transmission media should be used, the privacy and technical implications of these queries must be dealt with before the Center is built.

Privacy has been relatively easy to protect in the past for a number of reasons: 1) large quantities of information about individuals have not been available; 2) the available information generally has been decentralized and has remained uncollected and uncollated; 3) the available information has been relatively superficial; 4) access to the available information has been difficult to



secure; 5) people in a highly mobile society are difficult to keep track of; and 6) most people are unable to interpret and infer revealing information from the available information. The testimony elicited by this Subcommittee in its earlier hearings on privacy and a recent book authored by its distinguished chairman present an astounding, and disheartening, panorama of the ways in which the intruders in our society, aided by modern science, have destroyed our traditional bastions of privacy. Revelations concerning the widespread use of the spike microphone, a variety of gadgets for electronic eavesdropping, and cameras equipped with modern optical devices have shocked us and demonstrated that we do not necessarily enjoy privacy in our homes or offices, on the street, or while sipping martinis. . . .

We can assume that one consequence of a Data Center is that many federal agencies will go beyond current levels of inquiry and begin to ask more complex and probing questions, perhaps into such subjects as memberships in organizations, association with other people, location at different points of time and space, medical history, and attitudes toward various institutions and persons. This simple magnification of recorded information is certain to increase the risks of: 1) errors in reporting, recordation, and indexing; 2) information distortion caused by machine malfunctioning; 3) misuse of information by persons working with the data; 4) misuse by people who are at a distance from the data but who have access to it through remote terminals; and 5) violation of an individual's understanding that information furnished a particular federal agency or official would not be disclosed to others.

There are additional risks lurking in the ever-increasing reliance on recorded information and third party evaluations of a person's past performance, rather than on personal observations of his work. As information cumulates, the contents of an individual's computerized dossier will appear more and more impressive and impart to the user a heightened sense of reliability, which,

coupled with the myth of computer infallibility, will make it less likely that an independent evaluation or an attempt to verify the recorded data will be made. This will be true despite the "softness" or "imprecision" of much of the data in the computer file. Our success or failure in life ultimately may turn on what other people decide to put in our file and the programmer's ability, or inability, to evaluate, process, and interrelate information. The record of our endeavors will be a hearsay narrative prepared by a computernik, much the way our knowledge of the Trojan War and the travails of Ulysses has depended on Homers filtration and distillation of earlier chronicles.

These prospects are made even more depressing by the realization that the great bulk of the information likely to find its way into the Center's files will be gathered and processed by relatively unskilled and unimaginative people who will lack the discrimination and sensitivity necessary to warrant reliance on their judgment. Finally, a computerized file has a certain indelible quality—adversities cannot be overcome with time absent an electronic eraser and a compassionate soul willing to use it—and there are many who will utilize the record in an unthinking and heartless manner. Small wonder that people are concerned over the incessant recordation of information about them.

But there is more. The very existence of a National Data Center magnifies the risks to individual privacy by providing a fruitful and central source of information for federal officials and may even encourage their penchant for questionable surveillance tactics. For example, in the future optical scanners may be used for mail cover operations. Perhaps the information drawn in by the scanner will automatically be transferred into the investigation subject's file in the National Data Center. Then, with a press of the proverbial button, the files of all of the subject's correspondents will be produced, examined, and appropriate entries—"associates with known criminals," perhaps—made therein. These tactics, as well as

the possibility of coupling wiretapping and computer processing, undoubtedly will be extremely attractive to over-zealous law-enforcement officers. Similarly, the ability to transfer quantities of information maintained in nonfederal files—*e.g.*, credit information, educational information from schools and universities, local and state tax information, and medical records—into the National Data Center will facilitate and encourage governmental snooping. . . .

In still another respect the risks created by the Center are not simply those of expanding access and increasing

“. . . it has long been technically ‘feasible,’ and from some perspectives, ‘desirable,’ to require . . . passports when moving through the country or to require universal fingerprinting. But we have not done so . . .”

reliance on greater quantities of detailed personal data. The centralization and compilation of information from widely divergent quadrants of the government by unskilled or semi-skilled personnel create serious problems of accuracy of the information. At this juncture I am not simply speaking of the accuracy of what is input and recorded. Information can be entirely accurate and sufficient in one context and wholly incomplete and misleading in another. For example, the bare statement of an individual’s marital status has entirely different connotations when examined by the selective service, a credit bureau, the internal revenue service, and the social security administration. Consider the different embellishment on an unexplicated computer entry of “divorced” that is necessary in each of those contexts to portray an accurate picture of an individual’s personal situation.

Understandably, there is considerable concern that information recorded in the Center will be used in ways that are irrelevant to the purpose for which it originally was gathered. The question of context is most graphically presented in terms of one of the most dangerous types of information—the unexplained and incomplete arrest record. Is it unlikely that a citizen whose file contains an entry “arrested, 6/1/42 convicted felony, 1/6/43; three years, Leavenworth” will be given federal employment or be accorded the governmental courtesies given other citizens. Yet our subject may simply have been a conscientious objector. . . .

The risks to privacy created by a National Data Center lie not only in the misuse of the system by those who desire to injure others or who can obtain some personal advantage by doing so. There is a legitimate fear of the over-centralization of individualized information and the proliferation of people having capacity to inflict damage through negligence, sloppiness, thoughtlessness, and sheer stupidity. These people are as capable of damaging others by unintentionally rendering a record inaccurate, or losing it, or disseminating its contents to unauthorized people as are people acting out of malice

or for personal aggrandizement. It is unrealistic to expect subtle standards of care and basic principles to be understood or implemented by people in clerical positions. . . .

The only completely effective guardian of individual privacy is the imposition of *strict* controls over what can be input into the National Data Center. None of the procedural and technical safeguards described below is immune from abuse by governmental and private personnel or mechanical failure. To insure the preservation of our traditional and cherished freedom from governmental intrusion, Congress must establish reasonably precise standards regarding the information that the Center can record in the legislation authorizing the creation of the Center.

Certain types of information should not be recorded even if it is technically feasible to do so and some legitimate administrative objective would be served thereby. It has long been technically “feasible” and, from some perspectives, “desirable” to require citizens to carry and display passports when moving through the country or to require universal fingerprinting. But we have not done so because these encroachments on our liberties are inconsistent with the philosophical fibre of our society. By the same token, absent an absolutely overpowering demonstration that the preservation of sensitive or highly personal information in a central, computer-based, federally operated, data bank is essential to some fundamental national policy, the scrivener’s hand should be stayed and the data permitted to be lost to man’s memory. Prohibitions against recordation are especially necessary in areas in which the testimony before this Subcommittee demonstrates a risk of abuse. Thus, for example, medical and psychiatric information (particularly the results of tests such as the Minnesota Multiphasic Personality test when administered by a government office) should not be permitted in the Center unless those who advocate its recordation can show that human life depends upon doing so. . . .

Given the extensive governmental efforts at electronic eavesdropping and related activities, attempts undoubtedly will be made to crack the security of any Data Center that maintains information on an individual basis. Thus, it would be folly to leave the Center in the hands of anyone who might fall prey to pressures exerted by other federal agencies or to place the Center in any agency whose personnel have been shown to engage in anti-privacy activities. Similarly, policy control over the Center must be kept away from governmental officials who are likely to become so entranced with operating sophisticated machinery and manipulating large masses of data that they will be insufficiently sensitive to the question of privacy.

To me the conclusion is inescapable; control over the proposed Center must be lodged outside the existing administrative channels. As repugnant as it may sound in an era of expanding governmental involvements, it is necessary to establish a completely independent agency, bureau, or office that can establish policy under legislative guidelines directing the Center to insure the privacy of all citizens. . . .

Faculty News

In this issue the Law Quadrangle Notes continues its interviews with new faculty members, this time talking with Joseph Sax and Stanley Siegel, and adds one with an interesting visiting professor, Rev. David C. Bayne.

Sax Fights for Natural Resources

It is only recently that society in general and the lawmakers in particular have begun to look past the economic consequences of the tampering with and destruction of our valuable natural resources, and it now remains for action to be taken to prevent more waste, stated new Michigan Law School professor Joseph L. Sax recently.

"I find it encouraging that ecological considerations have begun to play a part in the handling of our precious natural resources," Sax commented, "but much more remains to be done."

He asserts that the lawyer can play an important part in assisting legislatures, industries, and municipalities in this endeavor, and is teaching a seminar on the subject in hopes that Michigan graduates may participate in some way.

It is hard to imagine that one who grew up in Chicago, graduated *magna cum laude* from Harvard in 1957, and edited the University of Chicago *Law Review* would be keenly interested in such an area, but that's only until he talks of Sunday morning hikes along the Huron River and walking a mile to school every day no matter what the weather.

"I never have to worry about shovelling out the driveway before I can come to school in the morning, or getting stuck on the way, or finding a place to park when I get here," Sax muses.

He does admit that some of his interest stems from a period as a member of the law school faculty at the University of Colorado in Boulder, where threats to the abundant natural resources quickly arouse controversy, but adds that he has always enjoyed "the open."

Sax is presently reorganizing a casebook on Natural Resources, which he compiled on a western-oriented basis while at Colorado, for publication sometime in early 1968.

"We are now beginning to see that it is around natural resources that some of the most significant large scale planning is being done. Thus a casebook on the field may be of value," Sax explained.

"When you begin changing resources you initiate a chain reaction with effects far beyond what could have been expected," he continued. "It was only after disastrous consequences in many circumstances that this came to be realized."

As an example, Sax cited the spraying of crops with insecticides which resulted in the death of fish a thousand miles away.

"Until recently we just haven't explored fully enough the possible consequences of actions and inquired as to whether there were safer alternative means of attaining comparable ends," he emphasized.

He refuses to place the blame for the over-a-century of exploitation on any single group; instead, he looks hopefully at the recent strides.

One of the reasons that Sax came to Michigan was that it is the home of one of the leading schools of natural resources, in addition to having an excellent law school.

"I was very much impressed by the quality of the faculty here, and my experience so far has borne this out," he explained.

Sax has, of course, taken full ad-

vantage of the presence of the School of Natural Resources, having participated in seminars there, and by including several students of the school in his own seminar on the field.

"I was delighted, and a little surprised, to discover how easily the students from Natural Resources accommodated themselves in a legal setting. Moreover, their experience and perspective have been extremely valuable in the seminar," Sax commented.

In addition he is teaching a freshman section of torts, and, like most teachers, finds this a stimulating experience.

Mr. and Mrs. Sax are the parents of three daughters, Katherine, five, Valerie Beth, two and one-half, and Anne Marie, two months.

High Quality of School Impresses "Rookie" Prof.

From Harvard to the Pentagon to Ann Arbor. This is the route of the Law School's youngest professor, 26-year-old Stanley Siegel, who teaches Business Associations, Corporations, and a seminar in Business Planning.

Because Harvard grads apparently take care of their own, Siegel got his welcome to Michigan from Professor Arthur Miller through the ceiling between their two class rooms. On cue, Miller had his class stomp their feet above the startled Siegel's head as the neophyte was presiding over his initial class session here last August.

Shaken but undeterred, Professor Siegel now has a full term under his belt and achieves rapport with his students through a wry sense of humor that elicits widespread laughter. He uses humor as a device to keep students interested in his courses and says he structures his courses with student interest an important consideration.

At this point in his new career, Siegel calls teaching "the greatest thing in all the world. It has its terrific frustration and it has its great pleasures. It's what I want to do." Even so, he likens the amount of work he's had to do since becoming a professor to that he did as a first year law student at Harvard. "There's a lot of hard work involved. You feel the need to



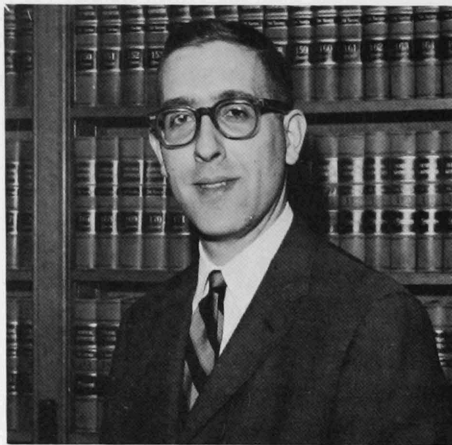
Joseph L. Sax

be able to answer any question that might arise, so you look up all the leads and consume a great deal of time doing so."

Siegel has great respect for the other faculty members. He finds the school's faculty exceptionally strong, each field being covered by men of remarkable ability. "In all our fields we have people making significant contributions, and if some of these people aren't in the 'star' status now, they're incipient stars," he says. "This is an active and meaningful faculty. People are involved here." Siegel elaborated on this by pointing out that faculties may move on theoretical levels, practical levels, or both. The theoretical level includes writing law review articles. "The practical level includes," Siegel says, "not just thinking about computers but working with them, not just thinking about land use planning but actually doing some." It is the movement and performance of the faculty along both levels that Siegel finds so impressive.

The caliber of the faculty however was only one of the factors that led Siegel to Michigan. Other factors included the high quality of the students, the excellent library facilities and physical plant the school offers, and the opportunity to develop a course that he really wanted to teach—Business Planning. "This is a course that has been taught in a number of schools. The idea is to combine three or four subject areas that affect the solution of any given business problem and try to deal with the problem as a whole, considering the law in all these areas. Tax law, corporate law, securities regulations, and even problems of legal ethics might be involved. During the entire course of the seminar I expect to handle about three big problems. Giving each this much exposure will allow us to explore them intensively."

Siegel wants the training that comes out of his seminar to be of value to students in business and non-business situations. "I'd like students to realize that you don't put labels on problems. I want to encourage openness of mind. I'm actually looking beyond the course to a kind of societal planning. Although some say this is not the role of the lawyer, I believe it is, while the



Stanley Siegel

social scientists are learning and recording their observations, it is the lawyers whose training must be designed to effectuate goals. Teachers here must impart more than technical proficiency, because our students will be future leaders at both the state and national levels."

Siegel had nurtured the idea of teaching for some time and made his decision to come here only after exhaustive study of other law schools. He characterizes the school as one ready to move in new directions because it has the competence to go ahead in such unique areas of the law as the application of automation to the solution of legal problems of information retrieval and research.

For three years subsequent to his *magna cum laude* graduation from Harvard Law in 1963, the Pentagon had Siegel in the Office of the General Counsel of the Secretary of the Air Force. He worked primarily in the area of government contracts and was a member of the Armed Services Procurement Regulation Committee, which had responsibility for preparing and revising three massive volumes of Defense Department-wide contract regulations. Siegel was also involved in negotiating several international research and development agreements, and he prepared Air Force testimony for Congressional committees.

While at Harvard, Siegel was on the *Law Review* editorial board for two years.

As an undergraduate at New York University, Siegel earned his B.S. *summa cum laude*, in 1960, from the

School of Commerce. This background led him to take the Maryland CPA examination in 1965 and score highest in the state. The performance earned him the Elijah Watts Sells award, which is presented to those achieving the top ten grades in the country on the uniform national exam.

Siegel is married and has no children. He is a member of the New York and District of Columbia Bars and also a member of the Association of the Bar of the City of New York.

Father Bayne Expounds Unique Corporate Theories

Teaching corporations this spring is the Rev. David C. Bayne, S.J., on leave from the St. Louis University School of Law. In addition to the two sections of corporations, he is conducting a seminar on "Conscience, Obligation, and the Law."

Contrary to what one might believe, Father Bayne features a very down-to-earth approach to corporations law. Frequently augmenting casebook study with discussions of corporate news items extracted from various business publications, Fr. Bayne has not only made the latest corporate developments a topic for dinner table conversation, but has also promoted the formation of two de facto investment corporations, one for each section.

In class he employs a rapid-fire form of the Socratic method which insures that nearly every student will be called on at each class session. "My role as a teacher is to elicit the greatest effort possible on the part of the students," Fr. Bayne says. "All of my teaching techniques are designed to that end."

Fr. Bayne himself has been a student for a large part of his life. He received his A.B. from the University of Detroit in 1939, and, after two years of law school at Detroit, decided to enter the Jesuit Order. While completing his Jesuit training, he earned a master of arts degree from Loyola of Chicago in 1946, an LL.B. and an LL.M. from Georgetown University in 1947 and 1948, and a J.S.D. in 1949 from Yale University. After six years as dean of the University of Detroit Law School, Fr. Bayne moved on to St. Louis. In 1960, as a member of the

Institute of Social Order, the national Jesuit social science center, he wrote his book *Conscience, Obligation, and the Law*, which is the basis for his seminar. Three years later he joined the law faculty at St. Louis University.

A member of the Michigan, Missouri, and District of Columbia Bar Associations, Fr. Bayne has combined the priesthood with the study of corporations law. "I always had a great deal of respect for the Jesuits and knew that I would someday want to enter the Order." Once a member of the Order, the decision to continue his study of law followed naturally for Fr. Bayne.

"Ignatius Loyola, who founded the Order in the 1500's, conceived it to be the elite guard of the Church. His idea was to get together a small group of educated, intelligent people who could spring into action in the areas posing the greatest threats to morals and societal well-being," Fr. Bayne explained.

"Law students should appreciate that corporation law is right at the heart of the well-being of the nation. My main purpose is to try to bring the corporate system the teachings of my scholastic background in moral theology and philosophy and to do my best to make the corporation the best possible form," he continued.

As a consequence, Fr. Bayne has been working on a philosophy of corporate control. "I feel that the area of corporate control will be the most important aspect of corporate law by the end of the next twenty years," he said.

Briefly, Fr. Bayne feels that the "controleur," the person holding the

controlling block of stock in the corporation, should be held to the standard of a strict trustee in his dealings with corporate property. So far Fr. Bayne has published six articles, all of which will become part of a book he hopes to write in the next few years.

But Fr. Bayne has not confined his attention to corporate control. He has other theories which he unhesitatingly presents to the class. "If the class does not agree with them, they are not obliged to adopt them," Fr. Bayne remarked. "At least these theories give them a point from which they can begin their analysis."

Kimball's "Historical Introduction to the Legal System" Published by West

Prof. Spencer L. Kimball of the Law School has recently completed a revision of his casebook entitled *Historical Introduction to the Legal System*. The new volume has been published by the West Publishing Company's American Casebook Series.

The book, which is presently being used by freshman law students at Michigan and other institutions, has been revised with the aim of meeting the needs which have arisen in conjunction with past experiences with its use. During the year and a half before the recent publication, Prof. Kimball spent considerable time writing new materials, re-arranging old materials based on suggestions received from other professors, and researching new sources. As a result, he estimates that changes affecting about 20 or 25 per cent of the original 1961 version, which was published by the Overbeck Publishing Company, are found in the new re-organized work.

The principle behind the present historical introductory course, which is taught by Prof. Kimball and others, grew out of deliberations on the Law School curriculum made by a faculty standing committee during the late 1950's. At the time, it was decided that a historical introductory course should replace the then-current freshman course which merely included miscellaneous yet important, information left out of other areas of the curricu-

lum. It was hoped, in addition, that the new introductory course would tie these various subjects together.

According to Prof. Kimball, who at the time was one of the strongest advocates of this faculty decision, "It was felt that an understanding of the history of the law is an obligation of the literary lawyer; in others words, he must be more than just a competent technician. Furthermore, we felt that a major law school should provide such a background in order to expose the student both to the history of the law and the time dimension in which the law developed."

With these goals in mind, Prof. Kimball took the initiative to prepare the material which became the basis of the new course. In its present form, the work is not like the ordinary casebook; instead of placing the emphasis on cases, Prof. Kimball has used historical excerpts which he feels help make the book read "more like a college than a law school text."

Shortly after the initiation of the historical introductory course at Michigan, several other schools decided to do much the same thing. For example, Prof. Kimball notes that at Harvard, Professors Dawson and Howe followed Michigan's lead, and that at the University of Pennsylvania, Prof. Honnald prepared materials to be read by students between the first and second years. All these professors worked individually and independently of each other.

In other schools at the present time similar experiments are also taking place. As a result, says Prof. Kimball, the materials used at various law schools have not only come to influence each other, but have also helped to benefit all such programs.

Consolidation a Hallmark of New Property Book

"When in our time the hard necessity for curricular compression followed on the heels of curricular expansion and proliferation, it was perhaps inevitable that the law of property, more vast in its dimensions than any other field, was a prime object of pruning and consolidation." So begins the



Fr. David C. Bayne, S.J.

preface to the nation's newest property casebook, *Basic Property Law* (West Publishing Co.), the combined effort of three members of the Law School faculty—Professors Olin L. Browder Jr., Roger A. Cunningham, and Joseph R. Julin.

“Pruning and consolidation” are indeed hallmarks of the new casebook,” the authors state. “Imagine a property book without that first case on wild animals or finders and company.” At the same time, however, the book strives to present the material in a manner which will somehow “impart a sense of the extent to which the institution of property reflects an organic unity or at least an identifiable pattern or structure.” The progression of the student from one area of property law to the next ought to suggest a certain logical and consistent pattern in order that the student can more easily appreciate the functional element of any body of law—the degree to which the law evolves to meet the needs of the community as they develop, while at the same time serving the equally compelling need to remain reliable and predictable.

The casebook is divided into three parts. Part 1 presents a survey of the basic *structure* of the law of private property. The foundation is the doctrine and law of estates, upon which every other part of the law of property either builds or is in some degree related. The authors, however, entitle Part 1 “The Nature and Division of Ownership;” it is in the use of the term “ownership” that the organic structure both in the law of property and the casebook first begins to be evident, for the law of estates they feel is but a part of that pattern of separable interests and inseparable incidents which for want of a better term may be subsumed under the head “ownership.” Hence, the term includes not only the way in which ownership is divided in the law of estates, but also the way in which it may be burdened by easements and real covenants or equitable servitudes. The term “ownership” also includes the definition of the physical extent of ownership in the law relating to the division of land by horizontal planes above and below the surface, and the limitations upon land use inherent in the adjustment

of the conflicting rights of neighboring land owners.

Logically and organically, then, the law of estates comes first. To anyone who has wrestled with the seemingly endless complexities associated with transferring property “to A and his heirs,” the thought of being immersed in such heady stuff at the outset of one’s legal education ought to be cause for concern. But the textual treatment the casebook utilizes almost exclusively to present the subject is

“. . . balance . . . must be struck between private property rights on the one hand and public rights on the other . . .”

“about as well tackled at one time as another,” and may in fact be only slightly more difficult than an early confrontation with the procedural details of appellate cases. The elimination of virtually all cases from the presentation of estates and future interests represents an enormous saving of time, and to that extent amounts to the requisite pruning.

The remaining chapters in Part 1 complete the presentation of the various aspects of ownership, each chapter fulfilling its part in the organic presentation of property law. Bailment, for example, follows the chapter on landlord and tenant—a juxtaposition that interestingly contrasts the ideas of possession and ownership. As the authors point out, in landlord and tenant, ownership is technically divided, while in bailment ownership is not thought of in such terms. Yet each deals with the consequences of the rightful possession by one of a thing otherwise belonging to another.

Part I also presents relatively recent cases wherever possible without sacrificing the illumination cast by some of the older opinions. In the landlord and tenant section, for example, of the 30 cases used, 20 have been decided since 1953, 13 since 1961.

Part 2 of the book deals with the transfer of ownership, an aspect without which the nature of ownership cannot be fully conceived. All methods of transferring ownership are covered,

from adverse possession through gifts of personal property to commercial land sales. A considerable portion of Part 2 is devoted to the conveyancing of land, including treatment of recording, priorities, and land title assurance.

It is in Part 3 that *Basic Property Law* assumes striking uniqueness, for this part, comprising nearly one-quarter of the casebook, deals with the public control of land use. In such an extensive treatment, the casebook goes further than most other such books. But, say the authors, “problems of land use control have recently assumed an urgency of compelling proportions. A property practitioner, even a neophyte, is as likely to face one of these problems as any other. The currency of these matters is likely to quicken student interest and attention. The fluid and amorphous nature of this rapidly developing field calls for efforts to provide at an early stage some form and order for student thought on these matters.”

The casebook thus affords the student the opportunity to emerge from his first year course with a sense of property law as a good deal more than merely a vast miscellany of remotely related areas and present day applications of feudalistic concepts which by force of precedent survived the environment that gave them birth. Old ideas survive, if at all, largely because they serve modern day needs, and this is the lesson the casebook attempts to drive home.

One further point needs mention regarding the casebook’s organic approach to the institution of property. The authors have sought throughout to illustrate what Professor Browder has termed the “property equation.” The study of the institution of property necessarily deals with the balance which must be struck between private property rights on the one hand and public rights on the other. Indeed, the law of property in a sense represents a compromise between these two basic and often competing interests. The thesis announced in the introductory chapter that there are not and never have been any “absolute” rights of private property, if not fully evidenced in the continual reinterpretation of the patterns of property law, must

come home with some force as one follows the application of a modern zoning law. This is the obvious illustration of the extent to which private rights must yield to the public interest; but the obvious perhaps facilitates an understanding of the forces that were at work in the judicial softening of a harsh lease provision through "construction" or "interpretation."

One area of property law has suffered under the hand of necessity—the law of personal property. Only bailments, gifts, and fixtures remain.

The preparation of the casebook originally began in the late 1950's. Allan F. Smith, former dean of the Law School and now Vice-President of Academic Affairs of The University of Michigan, and one of the auth-

ors of the now dated Aigler, Smith, and Tefft three-volume property casebook, was one of the moving spirits behind the enterprise, although at the end his other duties compelled him to terminate all participation in the project.

Although the book was not published until late June it has already been adopted by a dozen law schools.

Cunningham is Consultant In Research Study of Roadside Enhancement

Professor Roger A. Cunningham of the Law School faculty is presently engaged in research as legal consultant

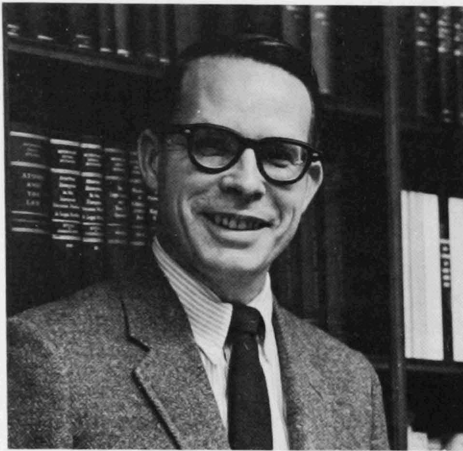
on a study of the "Valuation and Legal Implications of Scenic, Conservation and Roadside Easements." Professor Cunningham is responsible for the "legal implications" research, while Donald T. Sutte, Jr., of Hinsdale, Illinois, is responsible for the "valuation implications" research. The study is sponsored by the state highway departments of the United States as part of the National Co-operative Highway Research Program, under the general supervision of the Highway Research Board of the National Research Council—National Academy of Science.

The study on which Professor Cunningham is now engaged is an indirect outgrowth of the enactment by Congress of the Highway Beautification Act of 1965 (79 Stat. 1028).



The four students competing in the final round of the annual Henry C. Campbell Moot Court Competition on March 8 were, from left: Robert P. Hurlbert, Edmund Carney, Stephen C. Wood, and Carl von Ende. The court which declared von Ende and Wood the winners included,

from left: Dean Francis A. Allen, Judge Wade H. McCree, Jr., of the 6th U.S. Circuit Court of Appeals, U.S. Supreme Court Justice Tom C. Clark, Commissioner Philip Elman of the Federal Trade Commission, and Thomas E. Kauper, Assistant Professor in the Law School.



Roger A. Cunningham

The prospect of obtaining substantial amounts of federal funds for "enhancement of scenic beauty adjacent to such highways," without the need to supply matching funds, has stimulated a great deal of interest in state highway departments with respect to acquisition of "scenic enhancement" interests. The current study is an outgrowth of that interest.

Professor Cunningham views the scope of his study as broad enough to cover not only "scenic easements, conservation easements and roadside easements" like those already acquired by public agencies in a few states, but also to cover all other "less-than-fee" interests in land which may be acquired by public agencies in order to enhance the scenic beauty of highways.

The first phase of Professor Cunningham's study, now nearing completion, has been concerned with the assembly of all available information as to past experience in the use of scenic, conservation, and roadside easements, or similar less-than-fee interests in programs of scenic enhancement and conservation. This part of the study includes, but is not limited to, the assembly of information as to the experience of Wisconsin, California, New York, and the U.S. Bureau of Public Roads with such interests. One product of this phase of the study will be an annotated bibliography of the relevant literature and an annotated list of relevant state constitutional provisions, statutes, administrative regulations, and judicial decisions.

The second phase of Professor Cunningham's study, which in part overlaps the first phase chronologically, is an analysis of the data obtained in the first phase of the study.

The third phase of Professor Cunningham's study, which also overlaps the first and second phases chronologically, deals with basic legal problems likely to arise in some (or many) states if and when the states decide to get into the scenic enhancement business on a large scale.

The final phase of the study will consist of the preparation of new constitutional provisions (for use where needed) to authorize the use of public funds (and, in some cases, highway trust funds) for less-than-fee acquisition for scenic purposes; new constitutional provisions (for use where needed) to authorize the use of eminent domain in property acquisition for the purpose of scenic enhancement; new statutory provisions specifically authorizing the acquisition of less-than-fee interests for scenic purposes, and authorizing both the expenditure of public funds and the use of eminent domain in connection with such acquisition; and model forms of instruments to be used in a program of less-than-fee acquisition for scenic purposes.

The study of legal problems involved in the acquisition of less-than-fee interests for scenic enhancement of our highways, along with the companion study of valuation problems, is expected to be completed by October 31, 1967.

Pierce A Leader of National Conference on Uniform State Laws

Widely lauded for its Uniform Commercial Code, the National Conference of Commissioners on Uniform State Laws continues its quest of a more effectively integrated federal system, in part under the leadership of University of Michigan Law School professor William J. Pierce.

Presently serving as President of the Conference, Pierce has been a Commissioner since 1953.

The Conference was organized in 1892 to promote uniformity by voluntary action of each state government, and has since drafted more than 200 uniform laws on numerous subjects and in various fields of law. In recent years the value of uniformity among the states has increased greatly.

"With the development of rapid transportation and communication, the states have become increasingly interdependent socially and economically so that a single transaction may cross many state lines and involve citizens in many states," explained Pierce recently.

The Conference consists of Commissioners from each state appointed by its governor, and from the District of Columbia and Puerto Rico. It meets formally for only a one-week period each year, but the loyalty and diligence of the commissioners has resulted in a long list of broadly accepted uniform laws.

"The one area in which we have had problems in gaining widespread favor of our proposals has been the property field," Pierce noted. "This is understandable, I suppose, owing to the great lack of uniformity of property itself, and to the very well-entrenched rules in the area."

But in most other areas the success of the Conference's proposals has been widespread, especially in the commercial area, culminating in the Uniform Commercial Code, now accepted by 47 states, the District of Columbia, and the Virgin Islands.

Current work of the Conference centers around the formulation of a



William J. Pierce

Uniform Consumer Credit Code, a Uniform Probate Code, and a Uniform Family Law Code.

Work on the former two is fairly well along at this point, the Uniform Probate Code work being directed by another Michigan Law professor, Richard V. Wellman. The family law study has only recently been begun under the auspices of a \$60,000 Ford Foundation grant.

"The work of bringing about a substantial degree of unification of state law in our federal system by voluntary state action is an undramatic but highly significant contribution to the goal of making our federal system work," said Professor Pierce.

"Elimination of differences among the legal systems of the states on the subject of family law has effects far beyond assisting the individuals involved," he continued. "The Conference hopes that this new effort in the field of marriage and divorce will herald a new era of state co-operation in unifying the law in the United States."

The work of the commissioners does not end, however, with the drafting of the specific acts.

"Each commissioner returns to his home state and obtains help in an endeavor to secure the enactment by ordinary legislative procedures of identical acts in each state so that

uniformity can be achieved," Pierce added.

"We are pleased that the contributions of the Conference have assisted in attaining greater uniformity among our state laws, and we envision many more successes in the future," Pierce concluded.

WATCHERS, from page 9

individuals and private agencies taking the law into their own hands, and the relationship of public law enforcement agencies to society were very interesting to the viewers," he stated.

Each having had previous experience in television work, both Julin and Israel found the work in producing the series rewarding insofar as the purposes they hoped it would serve.

"They are definitely a valuable medium, and I think they could be used with success in many areas and at many levels. I'd especially like to try something along this line at the undergraduate level in an attempt to interest college students in the legal profession," Israel concluded.



BANKRUPTCY STUDY, from page 8

cases, extraterritorial service of process beyond that now authorized, fairly liberal provision for transfer not only of cases but of summary proceedings before the referee within cases, and stringent controls of solicitation and voting of proxies. . . .

The size of the rules project is formidable. The Bankruptcy Act has several hundred sections, and some sec-

tions, *e.g.*, section 77, run for many pages. A broad view of the Committee's responsibility might lead to the drafting of rules which would leave only a skeleton of the present Act in force. In particular the provisions of the reorganization and rehabilitation sections are largely procedural in nature rather than substantive and might conceivably be superseded for the most part by rules. . . .

I.L.S. CONFERENCE, from page 2
for a significant expansion of world trade through tariff reduction.

Professor John Letiche of the Economics Department of the University of California (Berkeley) warned that the success of regional trade blocks, such as the Common Market, would prevent the expansion of world trade by raising discriminatory barriers between these blocks.

Professor John H. Jackson of the Michigan Law School ended this stimulating discussion of present trade developments by criticising the existence of too many legal loopholes in trade agreements, particularly GATT, which offset and outweighed any benefit received by the reduction of tariffs.

"The United States failed to free trade from national and international restrictions after World War II when it had a dominant leadership position in world commerce," he explained. "It may not be able to do so now since the changing environment in the Atlantic Area has equalized its economic power."

Some 127 people registered at the Conference, including members of the International Law Society, other law students and students from other university disciplines, businessmen engaged in international commerce, and practicing lawyers with clients in the international field.

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