Law Quadrangle Notes

FALL 1970
VOLUME 15 NO.1

University of Michigan Official Publication

CONTENTS law quad notes

Publications Chairman: Professor Yale Kamisar, The University of Michigan Law School; *Managing Editor:* Wono Lee, The University of Michigan Information Services; *Contributors:* William A. Irwin; Michael Gross. Edited and designed in the University Publications Office.

On the cover: taken from a photograph of one of the many stone figures tucked away in the Michigan Law Quadrangle. Photo by U-M Photo Services.

Vol. 72, No. 20 *September 4, 1970*

Entered as second-class matter at the Post Office at Ann Arbor, Michigan. Issued semiweekly July and August and triweekly September through June by The University of Michigan. Office of Publication, Ann Arbor, Michigan 48104.

Dean Allen's Statement To Law School Alumni

Editor's Note: The following statement was issued by Dean Francis A. Allen concerning his decision to relinquish his administrative duties.

"When I accepted the deanship of this School in late December 1965, I stipulated that whatever the form of the appointment, I should feel free to reconsider my continuation in the position after five years of service,and that a comparable privilege should be recognized in the institution. Last month I informed my faculty colleagues of my desire to be relieved of my obligations as dean not later than June 30, 1971. It seems appropriate that I also inform the Committee of Visitors of this decision and to state the reasons that underlie it.

"Let me first make clear that my decision is not based on dissatisfaction with this great Law School or of the University of which it is a part. Insofar as one can be confident about any aspect of the future in these troubled times, I am confident about the Michigan Law School and its potential for even more distinguished service in the future than in the past. I have received splendid support from the alumni, faculty, and University administration, and my leaving contains no element of frustration or pique associated with any of these groups.

"My judgment is based on entirely different grounds. I have long felt that in most instances extended terms of service by educational administrators are a mistake. I personally believe that such appointments should be on a term basis, renewable if the administrator and the institution concur that the term should be extended, but freely terminable if either believes it best to do so. Nothing that has happened in the last five years has altered that conclusion. On the contrary, the rate of change, the physical and emotional demands of administrative obligations, seem to me to make the case all the more persuasive today. Among other important benefits is, I believe, that capable persons may be induced to serve on a term basis who would resist or decline in the absence of some such understanding.

"Another factor is my own growing sense of obsolescence. I believe that, if freed from administrative obligations, I am still capable of making constructive contributions to the problems of public disorder and of the administration of juvenile justice, which are areas of vital importance these days and which are, after all, those of my primary competence. I

am also eager to speak out in an individual capacity on certain problems of universities, which can hardly be done as I prefer to do it while I am the administrative head of the Law School.

"None of the considerations is really determinative, however. I have come to the conclusion that there are problems of health and well-being in my family that I can no longer ignore. In my judgment, continuing in this position beyond the time indicated presents risks I do not feel justified any longer in taking.

"A number of people have inquired about our plans for the future. Obviously, no one can completely order the future in this or in any other respect. We do hope to be away from Ann Arbor for the following the official termination of my duties. June and I have not even begun to think seriously about how that year should be spent. Thereafter, we hope and expect to return to Ann Arbor where I would resume teaching and writing as a faculty member.

"I should not close without saying two things I strongly feel. No greater professional honor has or will come my way than serving as dean of the University of Michigan Law School. Second, I greatly appreciate the warmth, support, and kindness that the alumni have lavished on Mrs. Allen and me since we made our decision to come to Ann Arbor. We shall always remember these innumerable kindnesses with pleasure and appreciation."

Prof. Carl S. Hawkins will serve as chairman of a faculty-student committee charged with responsibility for proposing a list of candidates from which University President Robben W. Fleming will recommend a replacement for Dean Francis A. Allen.

The committee appointed by President Fleming consists of Hawkins and Profs. Olin L. Browder, Jerold H. Israel, John W. Reed, Donald H. Regan, and G. Joseph Vining. The student members are David E. LeFevre and Wayne A. McCoy.

The President has asked the committee to work with Vice President for Academic Affairs Allan F. Smith, himself a former dean of the Law School, in specifying what qualities and experience the new dean should have and what long-range problems the Law School faces against which the qualifications and interests of prospective candidates can be judged.

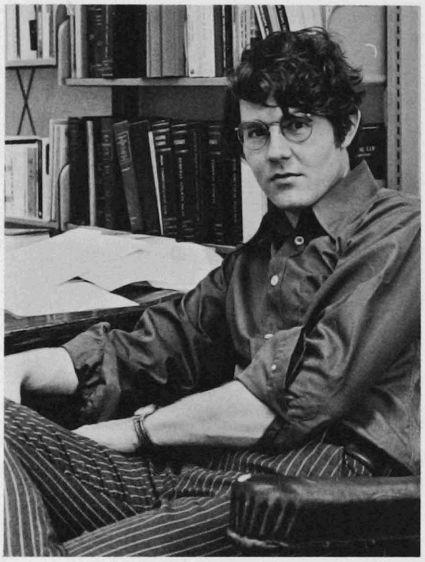
Hawkins said that the committee will undoubtedly ask for recommendations and advice widely—from the faculty of this and other law schools, from alumni, and from students. The Committee of Visitors will be consulted for its ideas this fall.

The committee hopes to give a report to the President so that he can propose a candidate for the Regents' consideration well before the end of the academic year.

Four New Professors Join Law School Faculty

Associate Professor Vincent Blasi joins the faculty after serving on the University of Texas law faculty for two years. Blasi was a visiting professor at the Stanford Law School the past academic year and had been a visiting professor here the summer of 1969. He graduated in 1967 from the University of Chicago Law School, where he was a law review editor and member of Order of the Coif.

At Michigan, Blasi will concentrate on courses in constitutional law. His special interest is freedom of expression and association—as evidenced by his 93-page article, "Prior Restraints on Demonstrations," which appeared in the August 1970 issue of the *Michigan Law Review*.



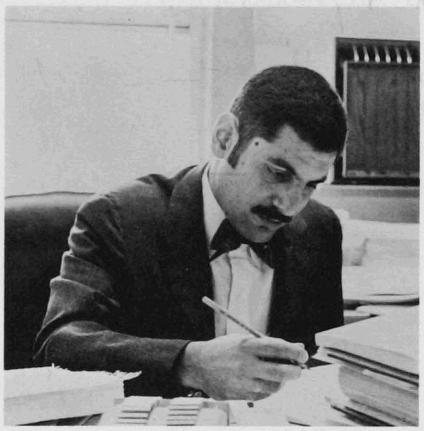
Vincent Blasi

Blasi has received a Field Foundation grant to examine the legal rights of journalists faced with government orders to disclose their informational sources. The project will explore the history, legal theories, proposed legislation, and litigation procedures concerning the issue of the "newsman's privilege" and develop materials helpful to lawyers litigating these problems.

Prof. Anthony Amsterdam at the Stanford Law School and Elie Abel, Dean of the Columbia University Graduate School of Journalism, are cooperating in the project. Columbia professor W. Phillips Davison will conduct a quantitative analysis of the effect absence of a newsman's privilege might have on newsgathering ability.

Associate Professor Robert Burt used to jokingly refer to himself as a walking contradiction of the separation of powers doctrine. Before entering teaching (he served two years on the University of Chicago law faculty before moving to Michigan this fall), Burt clerked for Chief Judge David Bazelon of the U.S. Court of Appeals for the District of Columbia Circuit, served in the executive office which represented the United States in the Kennedy Round trade negotiations, and was legislative assistant to Senator Joseph Tydings of Maryland.

As Assistant General Counsel in the Office of the President's Special Representative for Trade Negotiations, Burt worked at "cajoling and coercing the multitude of federal agencies and generally striving toward a policy which we thought would be best overall. The beauty of that position from my perspective was the view it afforded of the functioning of the executive branch—the continual clash of agencies."



Robert Burt

As Senator Tydings' legislative assistant, Burt's major projects were the Omnibus Crime Control Act of 1968 and the 1968 Civil Rights Act. He did the primary staff work for Tydings' partially successful effort to delete sections of Title II of the Crime Control Act. which purported to overrule the *Miranda* case, limit the availability of habeas corpus in state criminal convictions, and deprive federal courts of jurisdiction to review state court criminal prosecutions admitting confessions or lineup identifications into evidence. This rich practical background served him well when he authored a thoughtful and provocative article, "Miranda and Title II: A Morganatic Marriage," published in last year's *Supreme Court Review*.

Burt plans to apply his experience and interest in the institutional structure of the federal government in his

constitutional law course and his seminar on the Congress. He also will teach a course in family law. "This reflects another interest, in legal regulation of social behavior. The family law area is paradigmatic of what happens when the law attempts to control personal social behavior."

Burt received his LL.B. in 1964 from Yale, where he was a *Law Journal* note and comment editor. Prior to law school he received a degree in jurisprudence at Oxford after two years as a Fulbright scholar.

Harry T. Edwards joined the Law School faculty this fall as associate professor after five years of private prac-

Harry T. Edwards

tice with Seyfarth, Shaw, Fairweather, and Geraldson in Chicago. He received a J.D. with distinction in 1965 from the University, where he was a law review editor and a member of Order of the Coif.

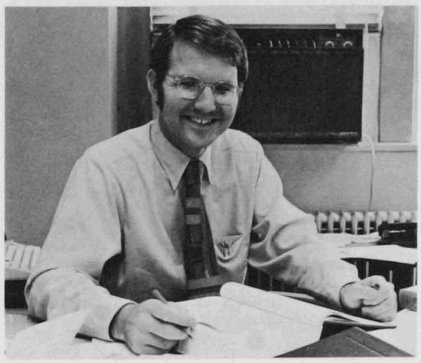
As a private practitioner, when not representing management interests in labor board proceedings or contract negotiations, Edwards engaged actively in *pro bono* legal work. He was a director of the Illinois division of the American Civil Liberties Union and worked with other legal aid agencies. He also helped the Highland Park (Illinois) Fair Housing Commission draft one of the first fair housing ordinances in Illinois.

Edwards says extensive involvement in legal aid activities did not interfere with his effectiveness as a corporation advocate: "I attempted in representing management to help them to see the wisdom of some of the things I was working for on the outside—for instance, fair employment practices."

He added, however, that "once we made a determination that a case was meritorious, I always pursued it as any other attorney might—as an advocate."

Edwards will teach courses in labor law collective bargaining and a seminar in negotiation. He also has a contract with West Publishing Company to write a text on labor law, a project he hopes to begin this fall and complete within two years.

James Martin joined the law faculty this fall as assistant professor after serving one year as law clerk to Judge



James Martin

Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit.

Martin received his J.D. in 1969 from The University of Michigan, where he was executive editor of the *Michigan Law Review* and a member of Order of the Coif. Prior to law school he was awarded a Woodrow Wilson fellowship and earned a masters degree in mathematics from the University.

While a second-year law student, Martin co-authored (with Prof. Paul Carrington) the lead article in the December, 1967 issue of the *Michigan Law Review:* "Substantive Interests and the Jurisdiction of State Courts." He also served as a student research assistant to Dean Francis Allen.

As an undergraduate at the University of Illinois, Martin was a member of Phi Beta Kappa and a Rhodes Scholarship semifinalist.

Battles, Kuklin Appointed Law School Administrators

Two new faces—an assistant dean and an assistant to the dean—have appeared in the administrative offices since spring to fill the voids left by the resignation of Roy Proffitt and the passing of Ken Yourd.

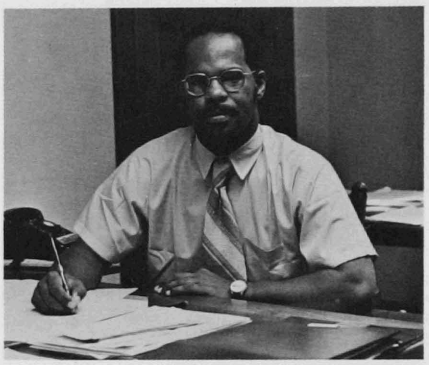
The new staff members are: Bailey H. Kuklin. assistant dean, and Ronald M. Battles, assistant to the dean.

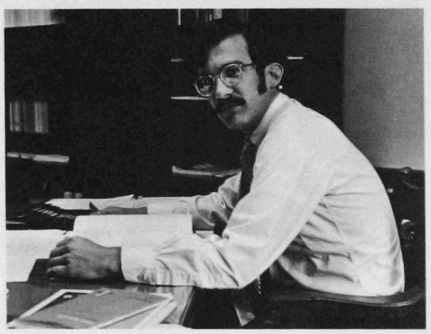
Kuklin (pronounced Cook′ lin), a 1966 graduate of the Law School, will work into the various administrative duties which kept adding on to Proffitt's responsibilities as assistant and associate dean.

Kuklin's initial tasks after arriving this past July were to learn the rudiments of scheduling classes and classrooms and exams and to register the more than 1,000 students for the fall term. These jobs involve a lot of sign making and counseling, he observed. After the beginning of the term press Kuklin looks forward to getting together with the rest of the administrative officers to evaluate the established division of labors. He also hopes to participate in plans to initiate a clinical legal education program at Michigan.

Kuklin was engaged in group practice as a Reginald Heber Smith Fellow for the Legal Aid Society of Westchester County, New York. Before that, he was a Peace Corps Volunteer in Nepal from 1967–69.

After receiving his J.D. in 1966 from the Law School, where he was assistant editor of the law review, he taught a legal writing course at the Stanford University Law School for a year. Kuklin is a member of the California and New York bars.





Battles (top) and Kuklin

"I hope to carry on in Dean Proffitt's flexible and understanding tradition," Kuklin commented.

Ronald M. Battles came to be assistant to the dean in charge of the financial aids office in March of this year. He holds an M.B.A. degree from the U-M School of Business Administration.

Almost immediately after receiving his B.A. in business administration from Penn State in 1965, he was commissioned as an officer in the Quartermaster Corps. In April 1966, he was transferred to Vung Tau, South Vietnam. about 60 miles southeast of Saigon.

Not long after returning home to Erie, Pennsylvania, he decided to use the money he'd saved to go back to school. He specialized in finance dur-

ing Michigan's two year M.B.A. curriculum, then accepted an offer to participate in General Electric's marketing management training program.

Since joining the U-M Law School, he has conducted a thorough review of the aid program. He examined many thousands of applications for aid in order to determine a reasonable budget for a law student which would both be flexible and recognize differences in individual needs.

Proffitt Resigns Deanship, Will Remain at Law School

Roy F. Proffitt resigned as associate dean at the end of June after 14 years as an administrator at the Law School. He received his J.D. from Michigan in 1948 and was appointed the School's first assistant dean in 1956.

He noted in asking to be relieved of his duties as associate dean that the responsibilities of the office had increased so much in both number and complexity that he no longer had time to prepare and teach a course and had little opportunity for his own research and writing or keeping in touch with the Bar.

Proffitt will continue to handle several major administrative jobs. He will serve as director of alumni relations for the Law School, which includes direction of the Law School Fund activities in Ann Arbor. He will also be associate director of the Institute of Continuing Legal Education. In addition, he hopes to "read a few law books so that I can re-tool and get back on the teaching rostrum to some extent."

Observed Dean Allen: "For a decade and one-half, Roy Proffitt has made invaluable contributions to the Law School as a teacher and assistant dean, and more recently as associate dean. His contributions as a counselor and friend of law students have been especially notable. Thousands of Michigan graduates recall with appreciation his sound advice and assistance. Many of these are aware that their own careers were made possible by the sympathetic help he provided in moments of crisis. Few men have a larger 'family' and a more admiring one than Roy Proffitt. We know Roy as an effective, dedicated, and compassionate man. I am happy that the School can look forward to his presence and services for many years to come."

As the School's first assistant dean, Proffitt undertook to centralize functions previously performed by the secretary of the Law School and several faculty committees. Growth and change characterized most of the matters with which he and his office were concerned.

The student body grew from 879 in 1956 to more than 1,100 in some recent years. The faculty grew from 31 to 56 members; course offerings increased 25 per cent and the number of actual classes increased 38 per cent between 1956 and 1970. Handwork in the administrative offices has not vanished, but much of the process of classification and most of the student records are now handled on data processing equipment.

During the 10 years that Dean Proffitt was responsible for awarding and disbursing scholarships, moral obligation grants, and loans to the students from Law School accounts, the volume of work in that "department" of his office increased from 254 students receiving a total of approximately $118,000 in 1956–57 to 422 students receiving aid totaling $410,933 in 1965–66.

In 1964 Dean Proffitt assumed general direction of the Law School Fund activities in Ann Arbor. During that year there were 2,913 gifts and contributions totaled approximately $145,000. The number of gifts in 1969 reached 4,302 and total contributions reached $283,683.29.

Among his many committee assignments, Proffitt has served for 14 years on the Law School's Administrative Committee, chaired, in 1965, the President's (Hatcher) Commission on Off-Campus Housing, and served in 1967 on another Presidential Commission to study and report on the Student's Role in Decision Making in the University. In 1964 he was a member of Governor Romney's Special Commission on Traffic Safety, and since 1965 has served as secretary of the Special Committee of the Michigan Bar to Revise the Michigan Criminal Code.

Professor Leidy Dies; Founded Placement Service

Prof. Emeritus Paul A. Leidy died July 20 in Ann Arbor. He was 81.

Dean Francis Allen said: "Few teachers in the Law School have enjoyed the esteem, love and affection that was given to Professor Leidy.

"He was an accomplished and popular teacher and as secretary of the Law School he was deeply involved in the problems of the students. As a result of starting and nurturing the School's placement service, he corresponded with law firms and other employers, as well as students and former students throughout the country."

Leidy attended The University of Michigan, where he received his bachelor's degree in 1909, his master's degree in 1911, and his Juris Doctor degree in 1924.

He joined the law school faculty as professor and school secretary in 1926. In 1946 he took on additional duties as law school placement director. He retired in 1952.

Prof. Donahue Pioneers Selective Service Litigation

Until two years ago, pre-induction civil litigation challenging actions of the Selective Service System was virtually unknown. Between the end of World War II and 1968 there were perhaps a dozen reported cases of this kind. The traditional methods of raising questions about Selective Service actions were by way of defense to a criminal prosecution after refusing induction into military service or in a habeas corpus petition filed after accepting induction. But since the Supreme Court's 1968 decision in *Oestereich v. Selective Service Board*, which gave limited sanction to pre-induction suits, the number of such cases has burgeoned. Well over 50 pre-induction cases were reported last year.

Prof. Charles Donahue, Jr., has been deeply involved in this significant new area of the law. He has litigated two important pre-induction cases and, in the May 1970 issue of the *U.C.L.A.*

Law Review, authored what the *Review,* in its introduction, aptly described as an "exhaustive and profound analysis" of the difficulties of pre-induction Selective Service litigation: "The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues." Perhaps more importantly, Donahue has used his work in the field as the vehicle for an informal effort in clinical legal education.

Donahue first became involved in pre-induction Selective Service litigation after learning that several Michigan law students had been denied the statutorily mandated I-S deferments under a regulation purporting to preclude such deferments for those holding only a graduate II-S student deferment since 1967. The I-S deferments would have allowed the students to complete their academic year's work before being inducted into the Army. In *Ellis v. Hershey* Donahue successfully argued in the U.S. District Court for the Eastern District of Michigan that the regulation was in conflict with the Selective Service Act which excludes from I-S deferment only those holding *undergraduate* II-S deferments since 1967.

Subsequently, in *Gregory v. Tarr,* Donahue challenged a similar regulation which was read by the Selective Service to bar the regulatorily mandated fatherhood III-A deferment to those holding only graduate II-S deferments since 1967. The Eastern District of Michigan agreed with Donahue's position, holding in the alternative 1) that the regulation had been erroneously interpreted by the Selective Service System, or 2) that the regulation, if correctly interpreted, was founded on a mistake of law, or 3) that if correctly interpreted and not founded on a mistake of law, the regulation was invalid as unreasonable and contrary to the Act. *Gregory* is now on appeal to the Sixth Circuit, which will hear Donahue's argument in the case some time this fall.

Both *Ellis* and *Gregory* were brought as class actions. To date the two cases are the only reported successful class actions in the Selective Service area.

In *Ellis* the plaintiffs, all law students, were deeply involved in assisting Donahue in researching and preparing materials for the case. Although none of the plaintiffs in *Gregory* were law students, Donahue involved several law students in work on the suit. This approach, Donahue reports, proved to be an excellent device for introducing the students to the intricacies of litigation in the federal courts. Besides involving complex and novel questions concerning the substance of Selective Service law and the availability of pre-induction civil judicial review, both cases presented an array of difficult procedural questions. These questions ranged from problems of pleading and joinder under Rule 23 to the largely unexplored complexities of the Mandamus and Venue Act.

Donahue's article on pre-induction review grew out of his experiences with the *Ellis* and *Gregory* cases. The present confusion in the law governing pre-induction review, the article suggested, stems from the Supreme Court's attempts to avoid the constitutional issues posed by Congress' effort in the 1967 Selective Service Act to narrowly limit the availability of judicial review. As a solution to problems of pre-induction review, as well as a method of avoiding future constitutional conflict over such review, the article suggests creation of a Selective Service Court patterned after the World War II Emergency Price Court.

Students involved in research on the *Ellis* case were Larry D. Owen, '70, Jack C. Radcliffe, Jr., '70, Stephen C. Ellis '70. William G. Wolfram '70, John W. Steckling '70. and Timothy M. Sisson. Working on the Gregory case were John D. Trezise and Owen. Trezise also served as research assistant for preparation of the U.C.L.A. article.

Ellis and *Gregory* were litigated in association with James Lafferty and Marc Stickgold, both partners in a Detroit firm which has handled a number of draft cases.

Judicial Clerkships Taken By Twenty New Graduates

This year, 20 members of the class of '70 will be serving as law clerks to federal and state court judges. Seven will work for the Michigan Court of Appeals; six for justices of the supreme courts of Arizona, Hawaii, Illinois, Minnesota (2), and North Dakota; four for U.S. District Courts in California, the District of Columbia, and Michigan (2); and three for the U.S. Court of Appeals for the second, sixth, and ninth circuits. (Two Michigan men will be serving as clerks to Justices of the U.S. Supreme Court, but both are members of the class of '69.)

The graduates and the judges for whom they are clerking are listed below:

Gary N. Ackerman—The Hon. A. Andrew Hauk, U.S. District Court, Central District, Los Angeles, California

Darryl J. Anderson—The Hon. Wade H. McCree, Jr., U.S. Court of Appeals, Sixth Circuit, Detroit, Michigan

James N. Barnes—The Hon. John H. Pratt, U.S. District Court, Washington, D.C.

James A. Bieke—The Hon. J. Edward Lumbard, Chief Judge, U.S. Court of Appeals, Second Circuit, New York, New York

Gordon B. Conn, Jr.—The Hon. Oscar Knutson, Chief Justice, Minnesota Supreme Court, St. Paul, Minnesota

Charles Cope—Michigan Court of Appeals, Pre-hearing Division, Detroit, Michigan

Alan M. Goda—The Hon. Masaji Marumoto, Supreme Court of Hawaii, Honolulu, Hawaii

Walter K. Hamilton—Michigan Court of Appeals, Pre-hearing Division, Detroit, Michigan

Robert L. Hencken—The Hon. W. Wallace Kent, Chief Judge, U.S. District Court, Western District of Michigan, Grand Rapids, Michigan

Brian J. Kott—Michigan Court of Appeals, Pre-hearing Division, Lansing, Michigan

David B. Lewis—The Hon. Theodore Levin, United States District Court, Eastern District of Michigan, Detroit, Michigan

David M. Lick—The Hon. Timothy C. Quinn, Michigan Court of Appeals, Lansing, Michigan

R. Stan Mortenson—The Hon. Stanley N. Barnes, United States Court of Appeals, Ninth Circuit, Los Angeles, California

John L. Sobieski—The Hon. Walter Schaefer, Supreme Court of Illinois, Chicago, Illinois

Charles H. Tobias—Michigan Court of Appeals, Pre-hearing Division, Detroit, Michigan

Donald P. Ubell—Michigan Court of Appeals, Pre-hearing Division, Lansing, Michigan

Robert O. Wefald—Clerk for the North Dakota Supreme Court, Bismarck, North Dakota

Michael F. Williams—Minnesota Supreme Court, St. Paul, Minnesota

William G. Wolfram—The Hon. T. John Lesinski, Michigan Court of Appeals, Detroit, Michigan

Mary M. Zeluff—The Hon. Lorna E. Lockwood, Chief Justice, Arizona Supreme Court, Phoenix, Arizona

Social Problems Draw Grads, Placement Director Says

Environmental law and criminal law are growing interests among graduating law students, according to Placement Office Supervisor Ann Ransford. These interests are part of an increasing concern with social problems which she has observed in talking with students over the past couple of years.

"But I think Ralph Nader is exaggerating somewhat in his recent article in the *New Republic* (which was reprinted in the June *Case And Comment)* when he implies that graduates no longer want to go to Wall Street due to a lack of *pro bono* efforts on the part of those firms. This may be true in part, but I think it also reflects an increasing intolerance of commuting, pollution, and other urban problems in the large industrial cities across the country," Miss Ransford says.

"The Placement Office receives about a thousand notices a year. These represent at least 2,000 individual openings. The demand is very great for young attorneys and the supply has not increased proportionately. Thus, the students can play their options to the fullest degree, and an increasing number are indicating a preference for places such as Seattle, Portland, Denver, and Phoenix. I can only speculate, but I think that regardless of how many public service projects the big city firms undertake they are still going to have increasing difficulty recruiting young attorneys. Higher salaries aren't the answer, since most students know that the difference mostly goes for higher living costs."

Nevertheless, starting salaries averaged significantly higher across the board for Michigan graduates. Law firms offered from $8,400 to $16,000 this year, with an average of $13,017. Last year's average was $12,143; in 1966 it was $7,696. Banks, corporations, and CPA firms offered an average of $13,937 this year, up from $12,146 last year. Federal judicial clerks received salaries averaging $11,200—$2,300 more than last year—while state judicial clerks received $11,008 on the average, compared to $9,223 last year. All those who accepted federal government positions received a GS-11 level salary of $11,233.

Only about one quarter of the December 1969, May and August 1970 graduates are liable to be drafted, compared to the 65 per cent who were subject to call last year. But the draft made itself felt in another way: this year's class numbers only 234, compared to the usual average of 350.

Still, the Placement Office arranged more interviews than ever before—5,108—over 1,800 more than the previous year. A large part of the difference was due to increased use of the Office's facilities by second year students. Seventy-five per cent of the employers interested in third year students also wanted to talk to second year students about summer clerkship positions. Of the 116 students in this year's class who held such clerkships, 35 are returning to their summer employers on a permanent basis.

Last year almost 1,000 employers either wrote or came to the Placement Office about job opportunities. Some have indicated that although they will come again this year, they may have fewer jobs to offer due to the slowdown in the economy.

Of the 170 seniors reporting definite plans as of the end of May, 107 found legal positions as a direct result of the Placement Office's activities. Twenty more could have found their jobs via the Office, but did not, while faculty referrals and foreign fellowship counseling accounted for another 21 positions. Twenty-seven students used their own initiative to find positions, and four associated with their father's firm.

The breakdown of the plans of these 170 students indicates not quite half chose to practice with law firms:

Law Firms		81
Government		21
Federal	12	
State	9	
Corporate		10
Legal	8	
Non-legal	2	
Banks		2
Insurance		1
CPA Firms		3
Judicial Clerkships		20
Federal	7	
State	13	
Fellowships		11
Foreign	9	
Domestic	2	
Graduate Study		1
Law	0	
Other	1	
Teaching		7
Law	5	
Other	2	
Political Campaigns		2
Military JAG		9
Legal Aid		2
Peace Corps		0
VISTA		0
Total		170

Thirty-eight of the 170 reporting definite plans returned to their home area, another 30 to their home state. Less those with military commitments or foreign fellowships, 145 students located in 24 states and the District of Columbia, as follows:

Alaska		1
Arizona		4
California		10
Connecticut		3
District of Columbia		14
Florida		1
Georgia		1
Hawaii		2
Illinois		5
Indiana		3
Louisiana		1
Maryland		1
Michigan		56
Detroit	30	
Lansing	9	
Ann Arbor	7	
Minnesota		4
Missouri		4
New Jersey		1
New York		12
North Dakota		1
Ohio		9
Oklahoma		1
Oregon		2
Pennsylvania		4
Rhode Island		1
Washington		4
Wisconsin		3

Robert Knauss Appointed University Vice-President

Robert L. Knauss, Professor of Law at The University of Michigan, has been appointed Vice President for Student Services at the U-M.

He succeeds Barbara W. Newell, who has been Acting Vice President for Student Affairs since 1968.

In announcing Knauss' appointment, President Robben W. Fleming said: "I am delighted that Robert Knauss will be the new Vice President for Student Services. He has had a long involvement with students through service on faculty committees, and is intimately acquainted with the problems which arise in the present

context. His standing with the students has been demonstrated by Student Government Council's endorsement of him, and his stature with the faculty is reflected in his current Chairmanship of the Senate Advisory Committee on University Affairs (SACUA). The appointment has the full support and endorsement of the Regents."

Foreign Fellowships Given Seventeen Students, Grads

Seventeen Michigan Law School graduates and students received fellowship grants this year to study abroad in 1970–71. Four of these were Fulbright fellowships in a year when only 300 were offered across the nation. Several of the other grants were the only ones of their kind awarded to U.S. law graduates.

The Law School has played a dual role in making available these opportunities. Mrs. Mary Broadley Gomes counsels students about possibilities and procedures as part of her duties assisting Prof. William W. Bishop with the International Legal Studies program. Financial support has been provided through a grant from the Ford Foundation.

However, the Ford Foundation, like many other funding groups, is shifting its priorities. Ford funds for international legal studies at Michigan are being phased out. For the past decade these funds have financed about half the fellowships received by Michigan Law School graduates for research in international or comparative law abroad.

During the same period graduates have won awards totaling about $200,000 from other sources. Besides the Fulbright program, these grants have come from such groups as the Belgian-American Education Foundation and Volkswagen.

The projects of this year's recipients indicate the scope of studies undertaken with the support of grants from Michigan and other sources.

Warren S. Grimes, J.D. 1968, received the only Junior Volkswagen fellowship in comparative legal studies this year to work at the Max Planck Institute for Patent Law at the University of Munich in the area of international business problems. Grimes spent last year at the Max Planck Institute in Heidelberg on a German government (DAAD) fellowship working on some aspects of consumer protection.

Robert Hollweg, J.D. 1966, is completing his doctorate in law at the Max Planck Institute in Heidelberg in the field of constitutional law under a German government (DAAD) fellowship.

William A. Irwin, J.D. 1970, received a grant from the Law School, with the support of the Council on Law-Related Studies in Cambridge, Mass., to study the legal and administrative aspects of the regional water management cooperatives in the Ruhr district of Western Germany. He will work principally at the Institute for the Law of Water Management at the University of Bonn and hopes to determine how the German system of effluent charges to finance water management and waste cleaning expenses might best be adapted to U.S. institutions and pollution control programs. Mr. Irwin earlier spent two years living in Germany, and he served with the Peace Corps teaching and working on a newspaper in Kabula, Afghanistan. During Law School he did extensive research on the Michigan Air Pollution Control Commission.

John R. Laughlin, J.D. 1970, received a Fulbright fellowship to undertake a comparative study of government regulation of the Belgian and French securities markets. He also received one of four CRB (Commission for Relief in Belgium) fellowships offered annually to U.S. graduate students by the Belgian-American Education Foundation.

George P. MacDonald, J.D. 1970, received one of only 11 Fulbright fellowships to study in England in 1970–71. He will undertake a formal degree program in African studies and international relations at the University of London's School of Oriental and African Studies.

Thomas R. Nicolai, J.D. 1970, received a special fellowship to work at the Patent Law Institute in Munich, West Germany. He will spend half his time working on a comparative study of European and German patent conventions and the other half helping prepare the English edition of the Institute's journal. Mr. Nicolai studied and taught in Bonn in 1965–66 on a national collegiate scholarship.

William C. Oltman, J.D. 1969, has received a temporary Junior Lectureship to teach at the law school of Queen's University, Wellington, New Zealand, while doing legal research there. His travel is being supported by a grant from the Law School's Ford funds. Oltman has spent the past year teaching at Indiana University Law School, Indianapolis.

Steven D. Pepe, J.D. 1968, was granted a Michigan–Ford fellowship to do special research in the fields of urban planning and land use control, with emphasis on housing for the poor in England, where much of the pioneer work has been done. Mr. Pepe was clerk to Judge Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit in 1968–69, and last year was a Reginald Heber Smith community fellow in Washington's Neighborhood Legal Services Program.

James M. Roosevelt, J.D. 1970, received the University of Erlangen (West Germany) exchange fellowship to undertake a comparative study of contract remedies. A member of the law review staff, Mr. Roosevelt also worked with Prof. Whitmore Gray on a new translation of the German Civil Code.

Robert J. Sammis, J.D. 1970, received a Fulbright fellowship to study the Colombian system of legal education and compare it with the U.S. system. He will work at the University of Los Andes in Bogota, where he is expected to join in teaching a seminar.

George J. Siedel, J.D. 1970, received a Michigan-Ford travel fellowship to enable him to undertake a formal graduate program in criminal law and criminology at Cambridge University (Trinity Hall) in England.

Lyle B. Stewart, J.D. 1970, received a Michigan–Ford grant to work in the field of company law at the Department of Law in the University of Bombay, India. He hopes in particular to examine the operations of the Company Law Administrative Board in order to gain insights into the use of company law and the corporate form as a tool for encouraging economic development. He also hopes to investigate the implementation of the recently enacted anti-trust statute and its role in the control of Indian corporations. Mr. Stewart spent two years as a Peace Corps Volunteer in the state of Mysore, India, doing community development work, prior to coming to the Law School.

John C. Unkovic, J.D. 1970, received a Fulbright fellowship to undertake a study of the interaction between the common law and the tribal laws of Australian and New Guinea peoples and to compare that interaction with that of the American Indians in the U.S. He will work first at the University of Melbourne, then go to the University of Papua and New Guinea. Unkovic taught American history at Eastern Michigan University while at the Law School. He holds a diploma in economics from Oxford University, England.

Ronald L. Walter, J.D. 1969, received a Michigan–Ford travel grant to augment his assistantship at the University of Goettingen, West Germany, where he has been working in the area of the taxation of foreign cor-

porations and the German-American Tax Treaty. Walter also assisted Prof. Grossfeld in preparing the International Encyclopedia of Comparative Law.

Robert C. Wells, J.D. 1969, received a grant from Michigan–Ford funds to enable him to complete his study of the reform of the land tax law in Costa Rica. He has been working on this project with the Agency for International Development on a Fulbright fellowship.

This past summer Steve Goldman, who will graduate next year, received a fellowship from the Hague Academy of International Law to attend their summer course. William Mansfield, a graduate student from New Zealand (from whose Ministry of Foreign Affairs he is on leave) also received such a fellowship. Two other students, Greg Lunt and Sandra Steele, also attended the sessions.

Prof. Sax Writes Book About Environmental Law

Prof. Joseph L. Sax has returned from a year's leave of absence during which he wrote about the role of the courts in resolving disputes in environmental matters. The product is, in the introductory words of Senator George McGovern, a "remarkable book:" *Defending The Environment—A Strategy For Citizen Action,* to be published in December by Alfred A. Knopf, Inc.

The book is for "people" as well as for lawyers. Using several case studies —notably the disputes over the Alaska pipelines, the Hudson River Expressway, the Colorado wilderness, and the Hunting Creek "fiasco"—Sax convincingly demonstrates how the government of the people can be distorted so that it no longer works for the people. As he puts it, it is a book "about the game of government, and how it is played to the detriment of the ordinary citizen."

"Ultimately the question we must ask ourselves," Sax concludes, "is whether we are prepared to leave the public interest to hired hands." The "hired hands" are the bueaucrats in administrative agencies who purport to make decisions on what is best for the majority but who in fact, as Sax elaborately documents, often are moved by political pressures or are simply limited by the "insider perspective."

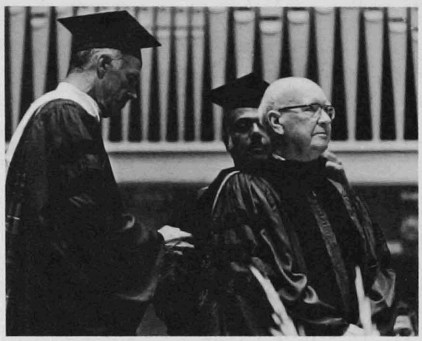
One remedy, Sax suggests, is to shift some of the power of decision making from "those who know best" in the administrative and executive agencies to the courts. This will allow ordinary citizens to raise environmental concerns in a forum where they can get a decision (not just a press release) and have some assurance it is based on facts rather than politics—or bureaucratic fears of ever offending anyone.

Much of Sax's book is taken up with careful answers to both the legitimate and the specious questions raised about referring cases designed to protect the environment to the courts. Why not simply have more "independent" task forces or councils? Why not simply allow more citizen input in the planning and hearing stages? Why must we have more distasteful and polarizing litigation? Sax's conclusions about the effective role the courts can play are based on an exhaustive exploration of several cases where a sensible solution was achieved.

Courts are not a panacea, Sax stresses. The campaign for environmental quality will continue to be waged in state houses, in Congress, in the media—even in administrative processes. "While the theme of this book has been a plea for greater judicial intervention," he writes, "it should be eminently clear that the goal is to create *additional* leverage for the citizen—to add to, rather than diminish, the opportunities for redress. Our goal, ultimately, is to improve and provoke the democratic process, not to constrain it. Courts are made quite powerful enough if they are enabled to build a common law for the environment, remand to the legislatures, and declare moratoria."

The "remand" and the moratorium are the devices Sax believes the courts asked to decide environmental cases have used most successfully in democratizing the democratic process. By sending a case back for further administrative consideration, or granting a temporary injunction, a court can provide a critical period for open discussion and weighing of alternatives—and for a decision made in public rather than in the recesses of bureaucracy.

Sax will have an opportunity to see his ideas tested soon. A bill he drafted to provide for increased citizen standing in environmental disputes and for the ability of the courts to begin to formulate a common law of the environment passed the Michigan legislature last June. H.B. 3055, now Public Act No. 127 of 1970, has returned some power to the people, as Sax advocates. Time will show what they do with it.

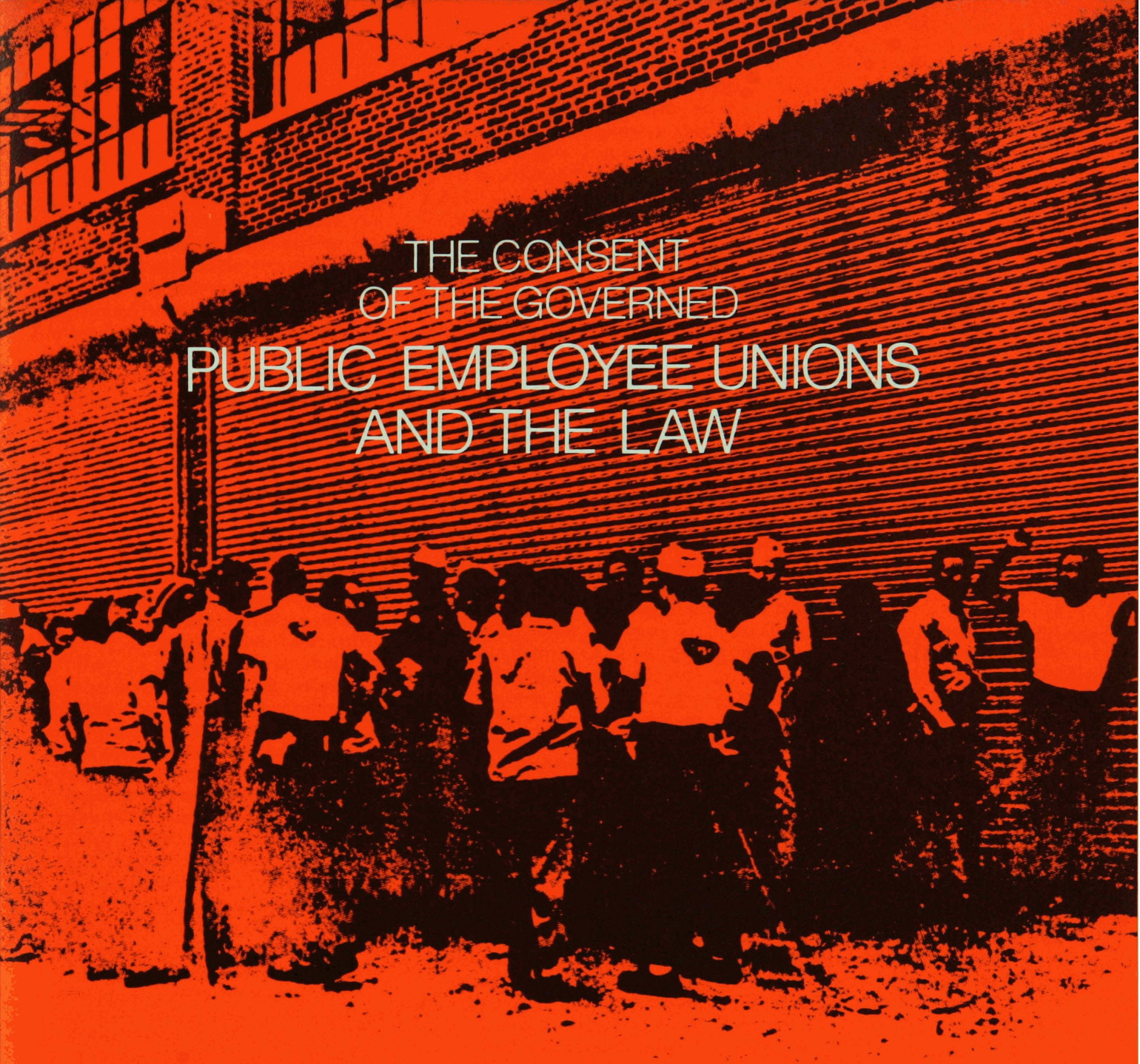


Dean Emeritus E. Blythe Stason (right) was awarded an honorary Doctor of Laws degree at the University's summer commencement. Following is the text of the citation:

"Edwin Blythe Stason, Juris Doctor in the Class of 1922; former Professor of Law and Dean of the Law School; more recently, Administrator of the American Bar Foundation and Professor of Law at Vanderbilt University.

"As a scholar in pioneer fields of administrative law, local government law, atomic energy law, and the legal issues of current medical science, Dean Stason has established his versatile technical skill and his instinct for that truth which, as it is written, shall make us free. He enhanced the precision and authority of the laws of Michigan through his offices for the State Bar and his expert counsel to successive governors and legislatures. In the nation, he has contributed to just and orderly federal administrative procedures, to the apt regulation of atomic power, and to uniformity among state laws. Finally, through international conferences which he organized as Managing Director of the Fund for Peaceful Atomic Development and as Administrator of the American Bar Foundation, he has served the cause of peace and justice within the total world community.

"The University of Michigan, viewing with gratification and pride the continued distinction of this elder statesman, extends to Dean Emeritus Stason the singularly fitting degree Doctor of Laws."



THE CONSENT OF THE GOVERNED
PUBLIC EMPLOYEE UNIONS AND THE LAW

Delivered before the Second Annual Collective Bargaining Forum in New York City, May 1970, by Professor Theodore J. St. Antoine

Introduction

The major development in labor relations legislation during the past decade was the veritable eruption across the country of state statutes providing for the unionization of public employees. Wisconsin led the way in 1959 by imposing the duty to bargain on municipal employers. Ten years later, by my count, 22 states had passed laws authorizing some form of collective bargaining for either state or local employees, or both. An additional 10 or so states have prescribed bargaining procedures for certain specified categories of employees, such as firemen, policemen, teachers, or public transit workers. All told, over two and a half million state and

"Law can serve at best as a levee to channel great social movements, not as a dam to halt the tide."

local public service employees, better than a fourth of the total, are now organized.

. . . I shall deal briefly with three important problems of public employee bargaining—the subject matter of negotiations, the use of the strike weapon, and the possible role of compulsory arbitration. But first I should like to try to set these topics in a somewhat broader perspective. Some 15 years ago I heard the philosopher Hannah Arendt declare that the concept of authority had ceased to exist in Western Civilization. At the time I couldn't really understand, let alone accept, what she had said. Now I think I understand. All the traditional lawgivers of our society—governments, churches, parents, and even, I must sadly acknowledge, University professors—have been sharply challenged and, in part at least, discredited. From now on, it seems to me, the legal regulation of large masses of persons cannot be based upon the divine right of the lawmaker. Either it will have to be based upon raw power, exercised in a way which I feel would be incompatible with life in the good society, or else it will have to be based upon the consent of the governed.

Let me be more concrete. In a period which has witnessed a nationwide flood of illegal strikes by those most docile of public servants—school teachers and postal clerks—I think we delude ourselves if we believe that traditional legislative prohibitions, backed up by court injunctions, fines, and jailings, can control the conduct of massive groups of persons who are convinced of the justice of their grievances, who have lost faith in the usual procedures for redress, and who are ashamed to go outside the law (for example, through resort to forbidden work stoppages) in order to achieve their objectives. Law itself, of course, is one of the principal influences shaping a man's or a group's perception of legitimate or appropriate behavior. My point is that law is only one of those influences, and that law loses much of its effectiveness as a regulator insofar as it loses touch with the thinking of the persons regulated. Put baldly, law loses much of its effectiveness insofar as the persons regulated conclude that they have more to gain by flouting the law than by obeying it. Society's aim, therefore, should be to ensure that a citizen's stake in having the law maintained is always greater than his interest in having it subverted.

Now, I realize that these comments may not sit well with many of you who suspect where I am headed once I take up our particular topic for today. Indeed, I am not sure that all the implications of my comments sit well with me. In any event, it seems wiser to start with a candid view of an unsatisfactory reality than with a beguiling vision of a world that no longer is. And as I see it, law can serve at best as a levee to channel great social movements, not as a dam to halt the tide. . . .

Subject Matter of Bargaining

A typical state statute will require, or at least permit, public agencies to negotiate with the majority representatives of their employees concerning "terms and conditions of employment." Similar language of course is found in federal and state legislation regulating private bargaining, where it has generally been interpreted to include such standard items of negotiation as wages, hours, vacations, welfare and pension benefits, and grievance procedures. Public employees tend to seek the same things as their private sector counterparts. So far, however, there has been relatively little litigation over the scope of the mandatory (or permissive) subjects of bargaining in public employment.

What litigation has occurred has seemed to focus on two issues—union security and the arbitration of unresolved grievances. This is so even though these matters are explicitly dealt with in about half the statutes containing a comprehensive regulation of public bargaining. Although court decisions are in conflict, the current trend appears to be toward upholding bargaining on both these topics, in the absence of statutory prohibitions. Michigan and New Hampshire courts, for example, have sustained the agency shop; another half dozen states have expressly authorized the checkoff through legislation. An earlier judicial aversion to grievance arbitration, grounded on the notion that it represented an unconstitutional delegation of governmental power, has now pretty much disappeared.

At least two large differences exist between the scope of bargaining in public and in private employment. First, state statutes or civil service regulations often spell out for the public servant many aspects of the employment relationship customarily left to negotiation in the private sector. Statutory mandates will ordinarily override any contrary bargaining settlements. But it is always possible a court may find a collective agreement has "supplemented" a piece of legislation—as agency shop provisions have been deemed supplemental of teacher tenure laws. The effect of conflicting civil service regulations is even less clear. A contract provision negotiated pursuant to a statutory duty to bargain, for instance, has been held to prevail over the job classification powers of a *local* commission. I assume the result would be different if the commission

involved were a state body acting within its proper constitutional or statutory jurisdiction. There is a considerable area for potential conflict here, which prudent legislators and prudent negotiators will have to take into account. The future emphasis should be on resolving employment questions by bargaining, not by legislative or administrative fiat.

Public bargaining also differs significantly from private bargaining because of the disproportionately large number of professionals and semiprofessionals in public employment. Such persons consider it entirely natural that they should have a role in formulating policy on levels that, in traditional industrial relations philosophy, would probably be reserved for management. Thus, school teachers are intensely concerned about class size, choice of texts, student evaluation, and faculty qualifications. Some of these items—class size, for example—could fairly be related to working conditions. But I am persuaded the teacher's interest cuts much deeper. It is like the doctor's or the lawyer's zeal for maintaining the standards of his calling; it reflects a regard for product output as distinguished from work input. Another element in the teacher's thinking is not so altruistic. Tightening the requirements for a teaching post will not only improve the quality of education; it will also reduce the number of competitors for jobs. (Obviously, this dual motivation for a concern about standards is a familiar phenomenon in other professions and crafts.) At any rate, the range of the teacher's bargaining interests is understandable, and it is paralleled among other groups of public employees aspiring to professional or semiprofessional status.

My hope is that bargaining law in the public sector will profit from the experience in the private sector. Sophisticated negotiators on both the union and the management sides have told me they are convinced effective bargaining would be advanced if all distinctions between mandatory and nonmandatory subjects were dropped, and if either party could insist on bringing to the table any proposal that was not unlawful. The willingness of union or employer to devote time and effort to negotiating about a particular matter should be sufficient warrant of its relevance. Some employers may be appalled at this seeming disregard of managerial prerogatives. My own hunch is that any knowledgeable union can easily hang bargaining up, ostensibly on a mandatory topic, if it feels strongly enough about something that is technically nonmandatory. It would seem far more sensible to place all the cards out in the open, and to let negotiations proceed on the matter that is really at issue. Neither union nor employer would have to agree to any given proposal, but at least there could be a full exploration of the various alternatives.

Since the dichotomy between bargainable and nonbargainable subjects has become well-established, most existing legislation could probably not be interpreted as abolishing the distinction. For the time being, the most feasible compromise may be a relaxed reading of the current statutes so as to allow negotiators a wide latitude in introducing topics for bargaining. I take it I need not labor the connection between this suggestion and my underlying thesis that in today's world, viable law draws its main strength from the consent of the governed.

Public Employee Strikes

With one exception, every state that has addressed itself to the question, either through statute or common law, has forbidden public employees to strike. The one exception—perhaps surprisingly, perhaps not—is the ruggedly individualistic old State of Vermont. There, municipal employees may not strike only where it would endanger the health, safety, or welfare of the public.

In recent years there have been extensive studies of whether public employees should have the right to strike. Beginning with the report of New York's Taylor Committee four years ago, and continuing through the report of a Twentieth Century Fund Task Force last month, the verdict almost invariably has been that the strike ban should be retained. Various reasons have been given for this conclusion. Some seem to me plainly specious, such as the argument that one cannot strike against a "sovereign." This overlooks the fact that the age of feudal kings is over, that in today's democratic society the people are sovereign, and that the people through their chosen representatives can authorize strikes if they wish. Other arguments against strikes by public workers deserve much closer attention.

It is often contended that public employee strikes cannot be countenanced because they would deprive the whole community of essential services. Certainly, a community can hardly do without police and firefighting services, and most persons would agree that policemen and firemen cannot be permitted to strike. But apart from a few such extreme instances, strikes by public employees may have no greater effect on the community than strikes in private employment. A strike in a basic industry, like steel or autos, for example, has a substantial nationwide impact. Can anyone honest-

"Professionals and semiprofessionals in public employment . . . consider it . . . natural . . . to have a role in formulating policy on levels that . . . traditionally . . . would . . . be reserved for management."

"Strikes by public employees may have no greater effect on the community than strikes in private employment."

ly say that it's worse to have Johnny miss a few days of school? And a work stoppage in a local transit system or electric utility is going to have the same economic consequences, regardless of whether the enterprise is publicly or privately owned. Whatever else may be said about strikes in these circumstances, there seems little sense in outlawing those which happen to involve "public" employees.

Perhaps the most plausible objection to strikes in the public sector is that they would constitute an inappropriate intrusion of economic force into what is essentially the political process of budget allocation and tax levying. This, as I understand it, is the basic position of the Taylor Committee. The strike in private bargaining is said to be necessary to provide employees with economic power equivalent to their employer's. At the same time, the pressures of the market place are felt to impose constraints on the terms of the ultimate settlement negotiated by private parties. In contrast, it is argued, neither the state nor any other interested group of citizens can bring to bear an economic weapon akin to the strike, and the very nature of the services supplied by government makes the constraints of the market place inoperable. It follows, therefore, that permitting public employees to strike would give them a wholly undue advantage in bargaining.

I have two responses to this line of reasoning. First, I think it vastly oversimplifies the power relationships between public employer and employee. Balancing "economic" and "political" power is surely not like putting two clearly marked, unequally weighted bags of sand on opposing scales. The labor economists long ago made me skeptical about the capacity of unions to effect massive economic changes in the private sector, regardless of what might be our armchair expectations. I see no basis for greater confidence in our ability to predict how a complex mix of "economic" and "political" forces would interact in the public sector, until we have much more empirical data than are now available. The evidence on hand to date, indeed, tends to allay any fear that public employee strikes would dangerously alter the balance of bargaining power. In virtually every province of Canada, for example, municipal employees in nonessential classifications have been covered since the mid-1960's by general labor legislation, which includes the right to strike. In Ontario, municipal employees have operated under a Wagner-style statute for a quarter century, without even a strike prohibition for "essential" workers. And, at last reports, Toronto was alive and well.

My second comment is highly pragmatic. Growing militancy among public employees is simply a fact of life. Over the past decade, work stoppages by various classes of civil servants increased some 20 times in number and magnitude. My guess is that whatever the law may say, whatever official committees may say, public employees who feel sufficiently aggrieved over their wages or working conditions are going to strike. The law should face up to that reality. It is folly, in my opinion, to outlay absolutely a form of conduct that is sure to be engaged in, under certain conditions, by respectable persons in the thousands.

A more realistic approach would be to adopt flexible procedures for handling most public employee work stoppages. A blanket prohibition on strikes by policemen and firemen should probably be retained. Beyond that, I would forbid only work stoppages that have judicially been determined to endanger vital public interests. Needless to say, that will require the courts to draw some nice lines on occasion. But line-drawing is the business of courts, and I cannot understand why there has been so much fuss about the administrative difficulty of distinguishing between essential and nonessential services. Even in the case of forbidden strikes, I would keep the sanctions within credible bounds. Experience indicates that Draconian penalties—automatic discharges, jailings, loss of representational rights, a fixed scale of heavy fines—are self-defeating. Their very severity makes them politically unfeasible. Fines graduated according to the gravity of the offense, and the denial of checkoff rights, are examples of more effective sanctions.

Tailoring injunctions and sanctions to particular strike situations may have another advantage. While workers are frequently prepared to disregard broadly phrased legislative proscriptions of work stoppages, they seem much readier to comply with specific court orders issued after notice and hearing. Such, at any rate, is the lesson suggested by the operation of Taft-Hartley's mandatory injunction and national emergency provisions. Perhaps the hearing itself assures the union and its members that the unique aspects of their individual case are being duly heeded, and that they are not confronting a blind and inflexible law.

Compulsory Arbitration

Policemen and firemen, it is generally conceded, cannot be allowed to strike. The consensus on this point has led to proposals for special procedures to resolve impasses in collective bargaining with these groups. Four states—Rhode Island, Wyo-

ming, Pennsylvania, and Michigan—have now enacted statutes covering either police or firefighters or both, which provide for the compulsory arbitration of the terms of new contracts when negotiations break down.

Predictably, these statutes have been attacked as unconstitutional delegations of legislative power. So far, however, the legislation has been sustained by the highest courts of Rhode Island, Wyoming, and Pennsylvania, and I doubt that Michigan will prove the holdout.

The more serious question is the practical impact of compulsory arbitration on collective bargaining. As yet I do not think we have enough evidence to judge, although Chairman Robert Howlett of Michigan's Employment Relations Commission feels compulsory arbitration's cousin, fact-finding, has had some "enervating effect" on bargaining. There has been a tendency, he says, for both union and employer negotiators to "save one for the fact-finder."

Chauvinism compels me to mention that the first arbitration award under Michigan's new law was released last week by a panel chaired by Professor Russell Smith of my law school. Observers had previously voiced concern that it would probably be much harder for the impartial chairman to secure a majority vote of a tripartite panel in the case of a complicated new-contract arbitration than in the case of a simple grievance arbitration. At least on this first outing, Chairman Smith confounded the pessimists by coming up with a 71-page decision that commanded the unanimous assent of union and employer panelists. Possibly we have here something like the famous bumblebee, which goes right on flying despite the experts who say it can't.

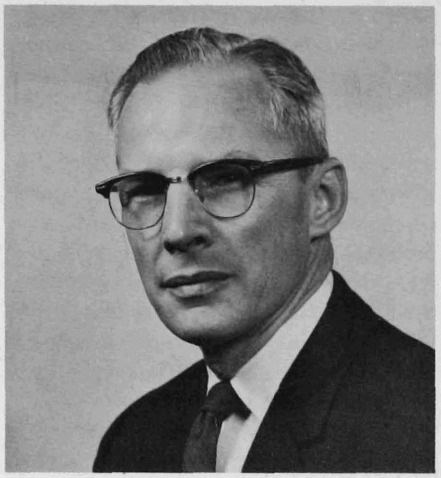
Conclusion

Bills recently introduced in Congress would establish federal standards for collective bargaining by state and local employees throughout the nation. I think such federal legislation would be premature at best. The proposals overlook the significant value of experimentation by many states and cities with a variety of bargaining models. We have a good deal to learn yet about public unionism, and I feel it is too soon to freeze ourselves into a single pattern. Moreover, it is a mistake to assume that federal labor law will always be "better" labor law. States like Wisconsin, New York, and Michigan are usually more progressive. There is also a tendency toward the "least common denominator" approach in federal thinking, as is attested by the retrogressive recommendation of the Intergovernmental Relations Advisory Commission that public employee unions be granted only "meet and confer" rights and not genuine collective bargaining rights. At some point, naturally, opinion may crystallize on the optimum form of public unionism, and then the question of federal controls, at least for the laggard states, could be revisited.

It may be that collective bargaining in the public service should be left permanently to local regulation. One of the principal merits of uniform federal law in the private sector is the curbing of regional prejudices that could Balkanize the nation's economy by giving either unions or employers undue advantages in different areas. Many if not most state and municipal activities are necessarily localized, however, and therefore may harbor less potential for interfering with the free flow of commerce. This is a problem I haven't thought through. But in keeping with the underlying theme of my talk, I suppose I could suggest that the consent of the governed is probably most meaningful when both the governed and the governor are close to home. . . .

"It is folly . . .to outlaw absolutely a form of conduct that is sure to be engaged in . . . by respectable persons . . ."

Testimony of Professor Alfred F. Conard before the New York Joint Legislative Committee on Insurance Rates and Regulations



Almost twenty-five years ago I was engaged in a conversation with Judge Vanderbilt, the Dean and rebuilder of the New York University Law School, and I asked him why anyone should put up with the indignity of living in New York or fighting the commuter's battle in and out of it each work-day. He said, "It simply depends upon whether or not you want to operate in the intellectual capital of the world." Although I am reluctant to concede you this distinction, the report on automobile insurance submitted to Governor Rockefeller by Superintendent Richard E. Stewart reaffirms the leadership of New York in public policy formulation.

The adoption of this proposal would be a great forward step for the State of New York with regard to the welfare of its citizens, the speed and quality of its justice, and the convenience of its automobilists.

One of the ways in which the Stewart plan is most obviously right is in restoring a degree of fairness in the distribution of compensation for personal injuries. If there is one thing which the surveys have shown conclusively, it is that the tort system overpays the small claimants who need it least, and underpays the large claimants who need it most. This was shown in the Columbia study in 1932, in the Philadelphia study in 1961, in the Michigan study in 1964, and again in the Department of Transportation study in 1970. The Stewart proposal will put a stop to this. By eliminating damages for pain and suffering, it will cut out the principal reason for overpayment of the small claims. By eliminating the need to prove negligence, and the ceiling on policy limits, it will eliminate the underpayment of the large claims. It will cut out a lot of waste and it will cut out a lot of tragedy.

Another giant step which the Stewart plan would take is to cut out the outrageous duplication of payments which currently takes place. Under the tort law rules a man can collect sick-leave pay for a week during which he was disabled by an accident, and then collect from the automobilist's liability insurer the same pay over again. This is not only a waste of money, it is a racket which can only destroy faith in the integrity of the whole negligence system. This double payment happens in lots of ways—by duplication of health insurance and all sorts of other programs. It is a more acute problem in New York than in most other states precisely because New York legislation has been more progressive with regard to temporary disability insurance, and because New York employers and employees have been more progressive in providing for sick-leave pay, health insurance, and other benefits. The Stewart plan will eliminate most of this double payment by providing that when a loss has been made up, it will not be compensated over again in the automobile injury system.

A third gain of the Stewart plan is to excise a couple of vermiform appendices from the automobile insurance system. These vestigial remnants are the negligence question, and damages for pain and suffering. The negligence question got into the picture when injury suits were claims made by an injured man against the personal assets of a wring-doer. This made sense. But today when insurance is compulsory, injury claims are not really made against wrong-doers; they are made against insurance funds to which all automobilists contribute. There is no sense at all in insuring against negligent injuries, but not against others. Can you imagine someone insuring his house against fire if caused by negligence, but not against fire if caused by an unexplained accident?. It is preposterous, but no more preposterous than what is going on in automobile injury cases today. Similar observations apply to pain and suffering. If a man has wronged another, it is not unreasonable to make him pay for the pain as well as the loss. But when all the automobilists are required by compulsory liability insurance to pay their money into a common fund, it is silly to take money out of this fund for pain and suffering. Did you ever hear of anyone voluntarily buying insurance against pain and suffering? Everybody I know would rather keep his premium money and bear his suffering without balm. If no one in his right mind would voluntarily buy insurance against pain and suffering, it is silly to require everyone to buy it compulsorily.

There is an extremely important by-product of the elimination of these negligence and pain and suffer-

Conard's writings on the subject

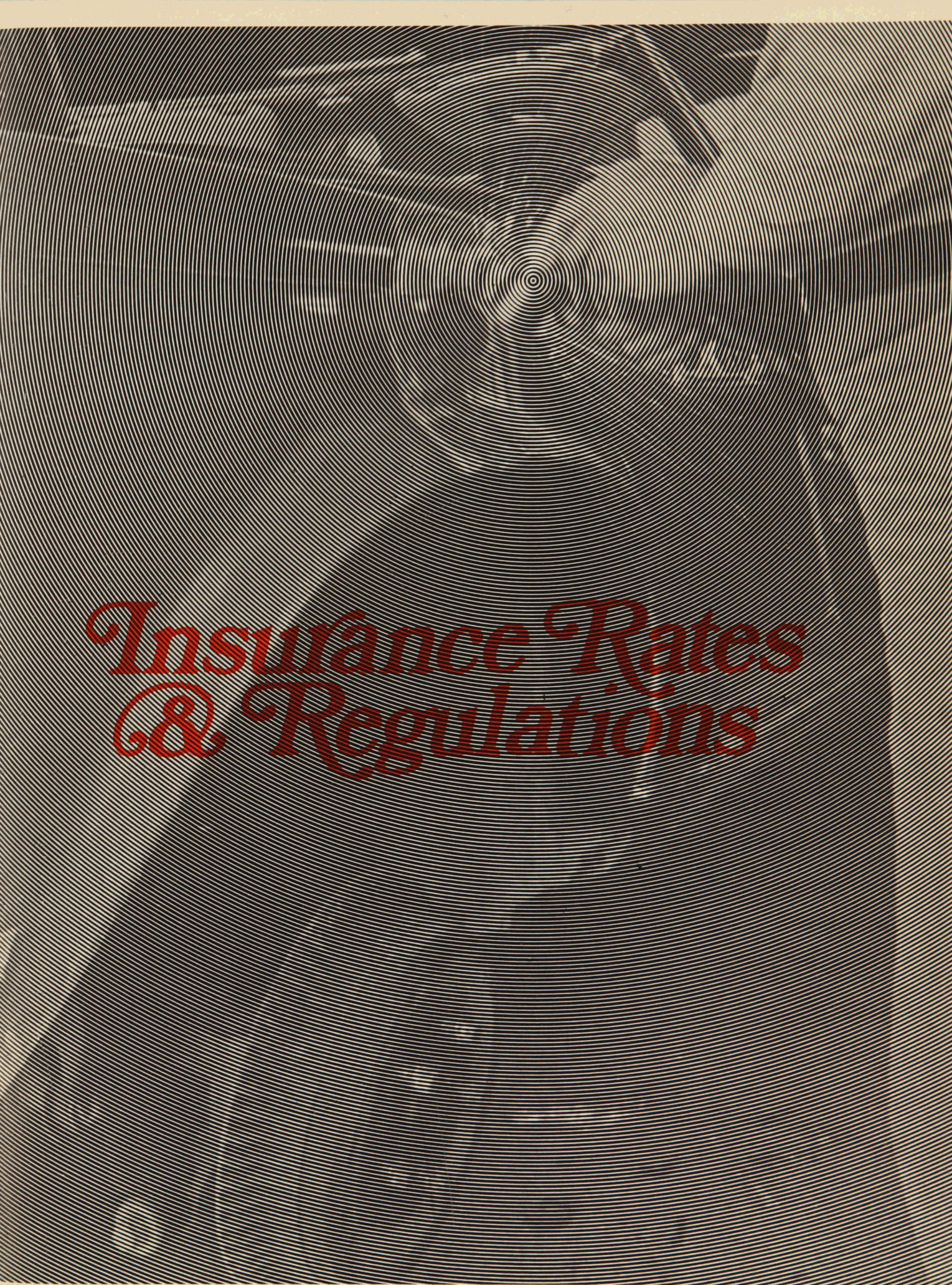
Conard, Morgan, Pratt, Voltz & Bombaugh, **Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation** (University of Michigan Press, 1964).

His views on solutions of the compensation problem have been published in:

"The Economic Treatment of Automobile Injuries," 63 Mich.L.Rev. 279 (1964)

"New Hope for Consensus in the Automobile Injury Impasse," (w.J. Ethan Jacobs) 52 Am.B.J. 533 (1966)

"Live and Let Live: Justice in Injury Reparation," 52 Judicature 105 (1968)


Insurance Rates
& Regulations

"The average citizen will be very slow to give up the illusion that somebody else pays for his automobile damage. . ."

ing questions. It will take a tremendous amount of work out of the crowded New York courts. I say this is a by-product, because I for myself would not change the law in order to lighten the courtroom load. If the law is right, we should provide enough judges to administer it. But the law in these particular matters is utterly out of date, and the overcrowding of court dockets is only one of the cancerous excrescences of the archaic legal rules.

Aside from these rather specific and visible changes which the Stewart plan will bring about, it will open the way to exciting potential improvements in the industry of automobile insurance. One of these improvements will be a diminution in the shameless efforts of claimants to claim too much and of insurers to pay too little in accident settlements. This kind of conduct has always been much more flagrant in liability insurance than in first-party insurance because the claimant and the insurance company in liability insurance are strangers to each other, who hope never to meet again. In first-party insurance, they are doing business together, and both have good reasons to conduct themselves honestly and fairly.

There is another aspect in which automobile insurance practice may be greatly improved under the Stewart plan. That is in the rating of risks. This is a terribly complicated subject, but I think it is a matter of common knowledge that in first-party insurance—like fire insurance and life insurance—it is immensely easier to rate the various risks fairly and satisfactorily than in third-party insurance. Consequently the Stewart plan shift from third-party to first-party insurance will open the way to alleviating some of the presently acute rating problems.

Why should I come here all the way from Michigan to tell you that the Stewart plan is sound when you have plenty of New York witnesses to tell you the same thing? My endorsement of the Stewart plan will probably surprise a number of my friends. I have been very critical of most of the previous nonfault proposals, and have said so publicly.

The Stewart plan is not only a good one; it is a much better one than any of its predecessors. It is the first one which I can wholeheartedly support.

The Stewart plan has two main advantages over the Keeton-O'Connell plan. One of these advantages is that it eliminates the claim for damages for pain and suffering in excess of $5,000. This was an utterly unworkable limit, since nobody knows how much pain and suffering is worth $5,000. By eliminating all recovery for pain and suffering caused by negligence, the Stewart plan has arrived at a better solution.

Another advantage of the Stewart plan is that it frees medical and rehabilitation benefits from the ceiling of policy limits. Under the Keeton-O'Connell plan—as under current insurance practices—all benefits were subject to a $10,000 limit. Thus when an injury victim accepted medical and rehabilitation benefits, he cut himself off from a corresponding amount of income replacement. This was an obsolete arrangement which had been abandoned decades before in workmen's compensation. Since the Stewart plan has no ceilings, it automatically liberates medical treatment and rehabilitation from the confining effect of policy limits.

Although the Stewart plan will benefit the people of New York in many ways, we may be sure it will be widely opposed. Indeed, its complete adoption would be a minor miracle. Non-fault automobile injury plans have been adopted during the twentieth century in Saskatchewan, Ontario, Germany, Norway, and Finland, but not one of these plans completely abolished the tort cause of action, as proposed by Stewart.

For these reasons and others, I think it is worthwhile to consider what should be done if the entire Stewart plan cannot be sold as a package. In that event, the possibility would arise of adopting other reforms, which might be fragments of the Stewart plan. If a number of these fragments were put into effect, and proved successful, we could move with greater confidence to accept the rest of the package. In the course of this gradual approach, we would probably learn a good deal that we don't know now about the dynamics of first-party accident insurance. We would greatly diminish the financial risks of switching a multi-billion dollar insurance industry to an untested basis of loss payments.

If we decide on reform by stages, the first step should be compulsory medical payments insurance for each automobilist. It could and should be done immediately.

First-party medical payments insurance is already in widespread use; insurance companies will have no trouble in rating it. The logic of compulsory first-party medical insurance is unanswerable. Injured people ought to be treated and healed, regardless of how the accident happened. Doctors and hospitals ought to get paid, regardless of how the injury happened. All we need to do is to take the medical payment coverage which most sensible people carry voluntarily, broaden it a little bit, and make all automobilists carry it. This would put about three-eighths of the Stewart plan into effect in a manner which is hardly even debatable.

The second stage in reform would deal with automobile damage. Everyone who has studied automobile accident settlements at all knows that property damage settlements are a national disgrace. Chiselling and

"Automobile negligence damage suits are a national disgrace . . . because the negligence suit has been turned into a compensation system."

racketeering are rampant. However, a cure is at hand, and the Stewart plan discloses what it is. The main idea is simply to make each private automobilist responsible for his own car damage, instead of for the other fellow's. This is a trade-off. Each private automobilist is relieved of liability for the damage he does to other cars in exchange for giving up claims against other private automobilists. There are lots of advantages to this. People who will exaggerate a claim against somebody else's insurance will be a lot more careful against their own, knowing that their losses simply escalate their own insurance premiums (instead of somebody else's premiums). Furthermore, if each man's loss is his own we can safely let him decide freely whether he wants to insure or not. We can do away with the compulsion to insure. This in itself is a great gain in freedom. A lot of shady adjustment practices will automatically drop out of the picture when this sort of a change is made.

From a technical point of view, this change could be made immediately, just like the switch in medical payments insurance. However, it will take a little longer in public education. The average citizen will be very slow to give up the illusion that he is getting somebody else to pay for his automobile damage when he makes a negligence claim. But it *is* an illusion, because the claims enter the premiums which everybody has to pay.

Automobile damage is about one-seventh of all automobile losses; when this stage is added to the first, we will have the Stewart plan about 50 per cent effective.

The third stage should be an attack on the duplication of payments —the absurd system by which people sue for losses which have already been made up. The present system is so illogical that if the public can ever be made to understand it, the public will certainly vote to change it. Unfortunately, it will not be easy to make them understand it, and a considerable program of education will be required.

These three elements are relatively clear. They are just a matter of getting the public to understand what is going on, and how they can change it.

The remaining steps are going to be harder. One of the most urgent and logical of these is to raise automobile accident policy limits. At the present ceiling of $10,000, we guarantee that every serious injury victim will be pitifully undercompensated.

It would be simple enough to raise the policy limits if that did not compel us to raise the already unbearably high premium levels. When we get rid of payment duplication, we may get a little relief from premium levels, but the real solution is the much tougher one of eliminating damages for pain and suffering. This is essential to any real reform. Although I personally do not think that money can reduce pain, probes of public opinion have shown clearly that people are attached to this linkage.

The pain and suffering question is so emotionally charged that it would be a great mistake to tie it as an anchor to other important parts of the Stewart plan. The public will have to face it simply as a money issue, coupled with an increase in policy limits. The public should be presented simply with the question as to whether they are willing to give up pain and suffering damages in exchange for tripling the amount available for lost wages.

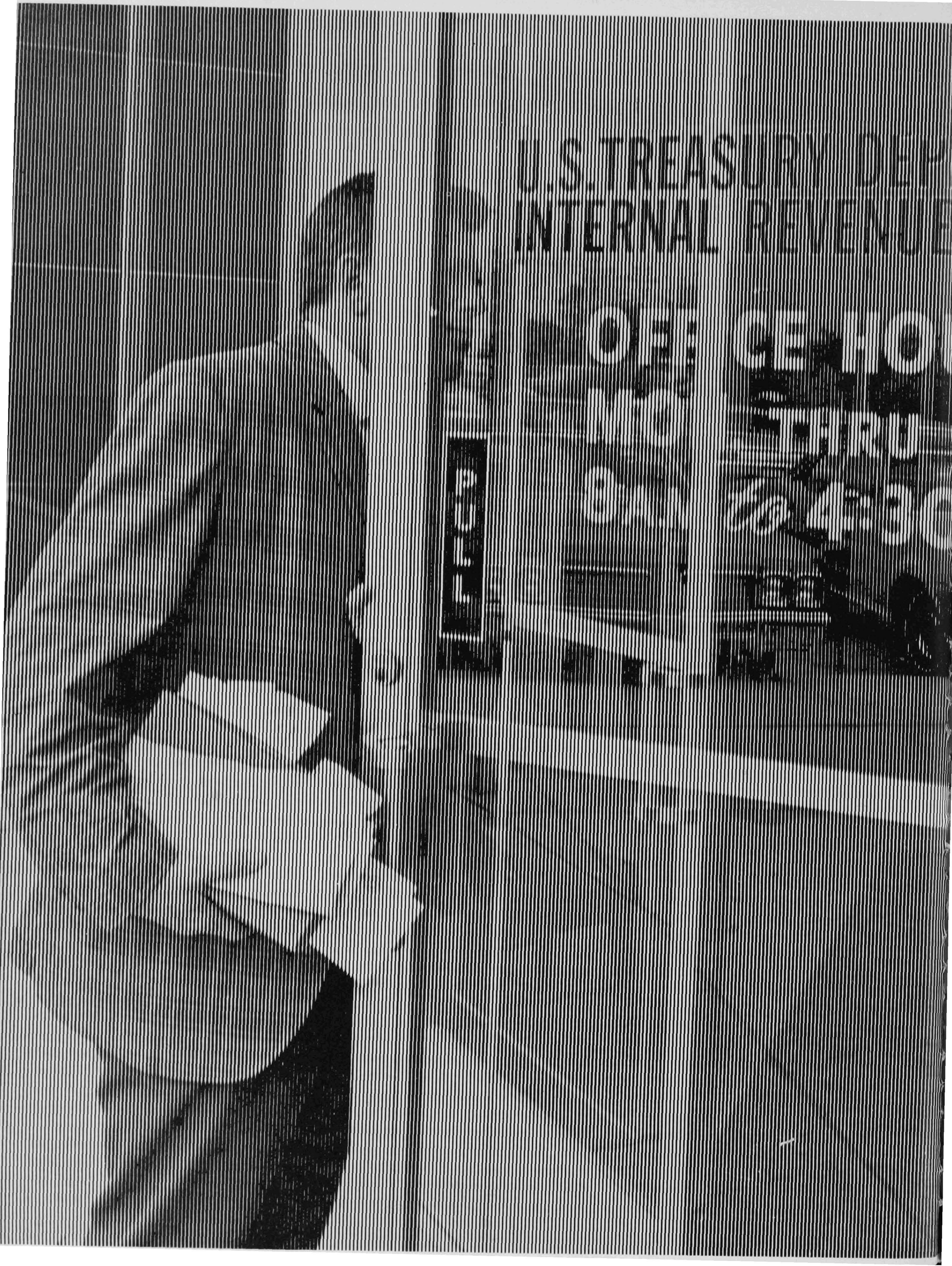
The next stage is to switch compensation of wage losses from a third-party negligence system to a first-party no-fault system. This switch will involve some rather hazardous actuarial calculations. But if we have first eliminated pain and suffering claims against insurance funds, the loss calculation will have been greatly cleaned up, so that we can estimate much better what the costs will be.

Finally we get to the problem of abolishing the negligence action for damages not otherwise compensated. This will be the battle of the ages, and we can be certain that every palladium of liberty from Magna Carta to the *Miranda* case will be wheeled into the field of battle. The bench and bar will choose up sides and call each other betrayers.

As a matter of political tactics, I would fight this battle the last of all, and maybe not fight it at all. Other countries have pretty well solved the automobile injury problem without abolishing the tort action. Besides, I do not think that the principle of negligence is a bad principle. I do think that automobile negligence damage suits are a national disgrace. The reason is not because the principle is wrong, but, as the Stewart report shows, because the negligence suit has been turned into a compensation system.

If we take care of the compensation angles through first-party insurance plans, and if we eliminate duplicatory damages in negligence actions, there will not be many negligence actions left, they will not cost very much money, and they will not burden the courts.

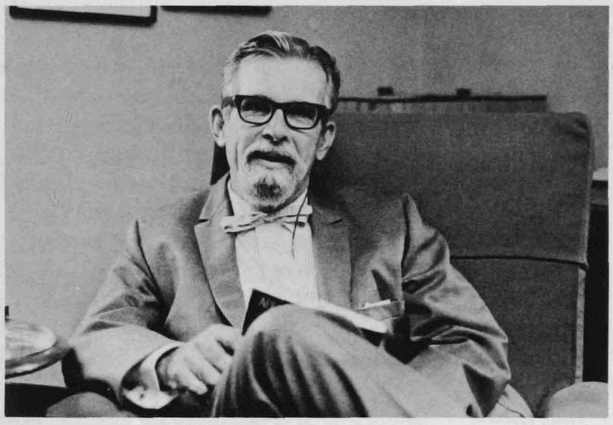
In conclusion, let me say again that the Stewart proposal is absolutely sound, and ought to be made an objective not only in New York, but also nationally. I doubt that it is politically possible to make all of its revolutionary reforms at one-fell swoop. Rather, I think it ought to be presented as a ten-year program to be adopted in easy stages. One way or another, I urge you to adopt it.



U.S. TREASURY DEP
INTERNAL REVENUE

Internal Revenue Service Conflict Resolution Procedures

Based on the introduction to Professor Wright's new work: Needed Changes in Internal Revenue Service Conflict Resolution Procedures, published by the American Bar Foundation, which provided funds to assist the study.



by Professor L. Hart Wright

Within the Internal Revenue Service, disputable income tax questions may be resolved at any one of several administrative levels. Each such tier differs from the others in terms of authority. In aggregate, however, they are expected to resolve issues efficiently, conveniently to both government and taxpayers, with justice in each case, uniformity among cases, and with a minimal burden being imposed on the judiciary.

That these goals cannot be achieved in any absolute sense is not due to the human factor alone. Equally disabling are their inherent conflicts. Undue emphasis on one goal necessarily is at the expense of another. Thus, at best the Service can hope only to achieve a proper balance. Even this, however, is not adequately accomplished by existing procedures. Their shortcomings and the remedies are the concern of my study.

Proposed changes will not affect those giant strides heretofore made toward one goal. Today, viewed relatively or comparatively, few disputes suffer the added burden of litigation. In context, this achievement is almost miraculous, for the Service, in administering our tax law, faces two formidable obstacles not encountered in like measure by any comparable tax system.

One obstacle is the unmatched complexity of the law the Internal Revenue Service administers. When applied to the countless and varied transactions which make up our sophisticated economy, a vast number of interpretative problems emerge. Thus, to confine litigation within reasonable limits, the Service must achieve bilateral agreements in an enormous absolute number of cases. This is not easy. The law's basic principles have spawned, in the interest of tax equity or nontax societal needs, a host of significant statutory deviations and subdeviations. The substantial nature of the consequent tax differentials necessarily intensifies interpretative pressure at all the joints and makes each such agreement that much more difficult to achieve.

The pattern of court organization also complicates the administrative conflict resolution process. In contrast to many other highly developed countries, the judicial pyramid which presides over U.S. tax affairs lacks an effective apex. Because of their nationwide jurisdiction, two of the three trial forums disclaim allegiance to any particular intermediate court of appeals. The intermediate courts, in turn, view one another with respect but no more. If

"One need . . . is to enlarge the government's outright concession practice in relatively small cases . . ."

only one appellate court has spoken on an issue, uncertainty continues because a second appellate court later might not agree; typically, until then the Supreme Court will not assume jurisdiction. Contributing to uncertainty in the interim is the real prospect—proven by our experience—that, when and if the Supreme Court will not assume jurisdiction, it may disagree with the appellate court that first addressed itself to the issue.

Given the untold number of varied transactions hidden behind subtotals reflected in the 75,000,000 final income tax returns filed in fiscal 1967, and the consequent uncertainties generated by the formidable obstacles just recited, it should not surprise us to find that district audit personnel felt called upon to assert 2,059,000 deficiencies. Nor is it surprising that, in 76,000 of these cases, taxpayers entered an administrative appeal upon failing to resolve their differences with the appropriate tax examiner. Attesting, however, to the Service's relative success in ultimately securing agreements is the fact that, in that same year, the judiciary—far from being inundated—had to resolve on the merits only 1,340 income, estate, and gift tax cases. This represented less than two per cent of the cases administratively appealed and only an infinitesimal fraction of total deficiencies asserted. Comparatively speaking, the number of trial determinations was little more than the number in Belgium or the Netherlands and was far less than the number in Britain, France, or Germany.

These statistics, though reassuring in the relative infrequency with which asserted deficiences are litigated, leave open whether the administrative procedures, in resolving the host of other issues, were reasonably calculated to achieve in proper balance the other four goals—efficiency, convenience, justice, and uniformity. My study demonstrates that before such disputable issues actually will have a reasonable chance to be disposed of in accord with a properly balanced version of those aims, procedures at each administrative level must be modified in some respect. A brief resumé of the most important of the necessary changes follows.

The first suggested modifications relate to the highest field level—the region. Ordinarily that level should seek, as it now does, to "settle"—on the basis of mutual concessions responsive to the competing strengths and weaknesses of the two sides—even those marginal or arguable issues which, if litigated, a court, to conform to the statute, would have to decide *entirely* for one side or the other ("all-yes-or-all-no" issues). Also equally valid, generally speaking, is the longstanding requirement of the settlement process: neither side shall be expected to concede outright any issue unless its contention possesses, solely by reference to the litigation hazards, only nuisance value. But in one respect this standard must be changed.

The need, in the interest of justice, is to enlarge the *government's* outright concession practice in relatively *small* cases, to include arguable all-yes-or-all-no issues where the taxpayer is acknowledged, on the basis of anticipated litigation hazards, to have at least a slight edge which, economically speaking, he can ill afford to demonstrate by actual litigation.

Another change in regional practices is required to improve the timeliness, orderliness, and efficiency with which settlements are reached in cases even now ultimately settled. Present arrangements actually contribute not only to substantial delay in reaching agreements but also to an unnecessary and expensive drain on the Service's most talented field personnel. The preferred remedy for both the delay and waste is to consolidate the appellate division and the regional counsel's office, though certain preliminary steps regarding personnel practices must be initiated well in advance.

A second set of proposed changes relate to the quite different conflict resolution role performed by personnel in the more densely populated and widely scattered district audit divisions.

That the latter do, by agreement with taxpayers, resolve most issues involving potential deficiencies obviously contributes to both efficiency and convenience. But this achievement itself emphasizes the importance (in the interest of justice and uniformity) of the need to redefine the conflict resolution role of the two echelons within these divisions (agents and conferees) and to do so with greater precision than currently exists.

Redefinition is required primarily because there is a frequently recurring inherent conflict between (i) the responsibility imposed on tax examiners to try to persuade taxpayers to agree to an asserted deficiency and (ii) the Service's own ultimate notion of "administrative" justice as reflected in the settlement practices of the yet higher regional offices. The conflict is most dramatically revealed in cases which include at least one truly marginal or arguable all-yes-or-all-no issue.

Lacking true settlement authority, audit division examiners are expected both to set up a deficiency for the entire amount at issue and attempt to secure the taxpayer's agreement to it. This attempt may conflict with the Service's own ultimate standard of administrative justice. The regional level to which this ulti-

mate standard is entrusted, on considering an appeal of such truly arguable issues, ordinarily is expected to seek an appropriate "settlement," not the outright concession sought by the audit division's examiner.

Because small cases of this type often involve unsophisticated and unrepresented taxpayers, justice will not be attained unless the examiner's role as an advocate is revised in a manner that tends to assure that these particular cases will reach officials empowered with the type of full settlement authority now reserved to the regional level. For a variety of reasons, that authority generally cannot be extended to examiners themselves. Nevertheless, in small cases, taxpayer convenience does affect the prospect of according to these cases the Service's ultimate notion of administrative justice. To this end, full settlement authority should be extended to the districts' own conveniently located circuit-riding conferees.

Certain other compelling practical considerations, and a need to conform national office instructions to existing practice in the interest of integrity, require a yet different arrangement to accommodate the host of small, arguable all-yes-or-all-no issues which emerge in the audit of corporate giants. As to these issues, full settlement authority should be extended officially to the highly experienced agents who conduct such audits, the settlements being subject only to their group supervisor's approval.

Changes also are required at the national office level in the procedures pertaining to both the *letter* and *published* rulings programs. In contrast to most other highly developed countries, the national office, in the interest of taxpayer certainty, undertakes on an enormous scale the difficult burden of responding in advance to requests for rulings on *prospective* transactions. Most of the 13,774 substantive letter rulings issued in fiscal 1967 were of this type. These private letter rulings, together with 3,118 answers to requests from field offices for substantive technical advice, also furnished the subject matters for 392 substantive published rulings.

While certain shortcomings in each program tend to be inherent, these difficulties have been accentuated by the nature of the relationship which exists between the two programs. Because of this relationship, either private rulings are too long delayed or, in the published version, the Service suffers substantial risk of inaccuracy or of violating a publication commitment made to Congress.

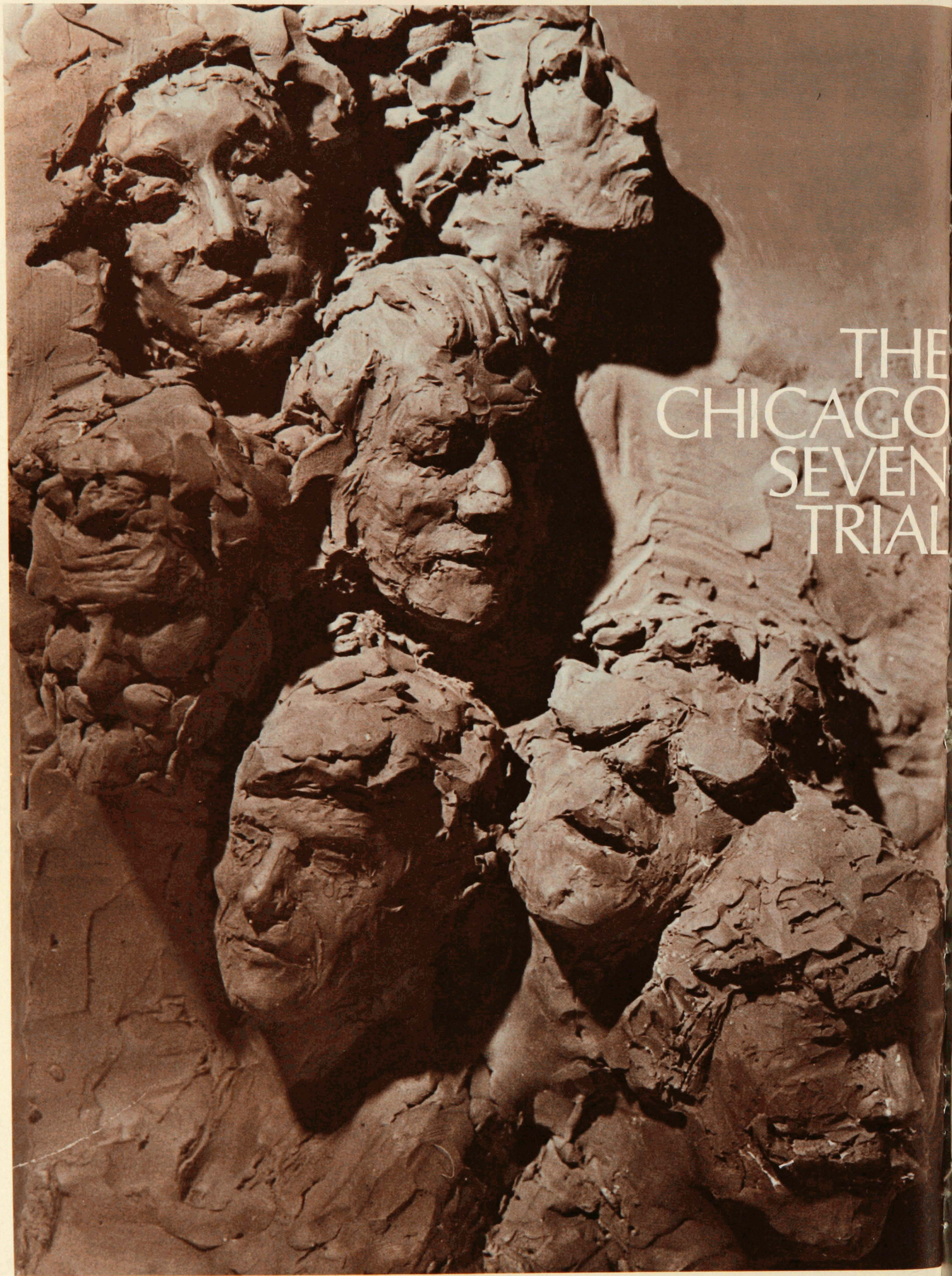
Another problem has emerged because the Commissioner ordinarily refuses to rule on certain prospective transactions which either are associated with the so-called avoidance area or raise issues deemed primarily factual in nature. Usually, practical considerations appear to be legitimate deterrents to any asserted claim for rulings in these areas. However, a competing societal value, of great significance to our *entire legal order,* and thus transcending in importance the administrative tidiness of our tax system standing alone, should lead the Commissioner to rule on certain avoidance-type questions. This change should be complemented by yet another which would cushion the drastic effect of the only two alternative answers (favorable or unfavorable) should he rule on such questions. What is needed is an escape valve which provides greater flexibility, enabling the Commissioner to take more adequate account of real differences in the degree of taint and doubt he may associate with prospective transactions. Specifically he should be able to rule adversely and simultaneously provide both the taxpayer and himself with the opportunity to secure confirmation or rejection of that view by an independent tribunal (the tax court) before the taxpayer is forced to abandon the affected prospective transaction.

Three other proposed changes relate solely to published rulings. If the Service's past behavior is indicative, this program will not be sustained as well as it should be. Given the outside pressure which focuses almost exclusively on timely production of letter rulings, a mechanism is needed to assure adequate personnel for both rulings programs and that the attention of personnel will be spread more evenly between the two.

There also is a serious discrepancy between the two rulings programs in the procedural safeguards accorded taxpayers. In the case of private letter rulings, the Service has gone about as far as it can in according a hearing to the affected taxpayer. But no such safeguard is provided the nameless host of other taxpayers who may be affected substantially by a published ruling. The unfairness of this should be, and easily can be, corrected without harming the program itself.

A final set of proposed changes relate to an administrative function carried out by a congressional committee—the Joint Committee on Internal Revenue Taxation. Practical considerations having nothing to do with the constitutionally oriented separation-of-powers doctrine warrant repeal of a statutory provision from which has grown this committee's case-by-case review of large refunds. The repeal should be accompanied, however, by a broadening of the scope of this committee's activities in relation to general review of the Service's entire range of administrative procedures.

"... audit division examiners are expected both to set up a deficiency for the entire amount at issue and attempt to secure the taxpayer's agreement to it."


THE
CHICAGO
SEVEN
TRIAL

Extracts from a speech given before "The Economic Club of Southwestern Michigan," April 22, 1970

by Professor Jerold H. Israel

There are only a handful of cases each year that manage to capture the attention of the national press for a short while. There are even fewer cases that manage to keep that attention for weeks on end. The Chicago 7 conspiracy trial was such a case. It is quite understandable therefore that we have sought to draw some general lessons from that trial. Our generalizations are overextended, however, if they fail to take into account the special nature of the Chicago prosecution, and our historic experience with cases of that type. Consider, for example, the disruptive conduct of the defendants in the Chicago case. Several commentators have suggested that such conduct evidences a serious crisis that may (or does) extend throughout the judicial system, applying to cases of all types. We may indeed be facing such a crisis, but we must not forget those special factors, inherent in the Chicago prosecution, that separate the problem of dealing with disruptive conduct in that case from dealing with disruptive conduct in the run-of-the-mill criminal case—the robbery, narcotics, or burglary case.

Chicago 7 was, at least in part, a seditious speech case—a prosecution based upon public speech, at least partially political in content, that was allegedly designed to produce illicit activity. The history of seditious speech prosecutions in this country shows that they have traditionally been marred by altercations between the court and the defendants, frequently involving disruptive conduct. It also shows, however, that these prosecutions have aroused considerable public sympathy for the defendants' plight, despite their disruptive conduct. Admittedly, the nature and extent of the disruptive conduct and public sympathy in the Chicago case differs in certain respects from past seditious speech prosecutions, but the pattern is largely the same.

During the World War I Espionage Act trials, there was less formal disruption, but altercations were not infrequent. In the *Abrams* case, involving the prosecution of five Russian aliens for urging a general work stoppage to defeat the war effort, the defendants and the court crossed swords time after time as the judge charged the defendants with seeking to convert the trial into a platform for anarchist propaganda. During the state criminal syndicalism trials of the 1920's and early '30's, involving prosecution of members of various left-wing groups, the altercations continued and often went beyond argument. In 1944, the prosecution of 30 Nazi party leaders, for an alleged conspiracy to encourage insubordination in the military, easily rivaled Chicago in terms of the number of altercations and actual disruptions. That trial was marked by constant disputes between defense counsel and judge, with several defense counsel being held in contempt. Delaying tactics of all sorts were attempted, including a motion to delay the trial so that depositions could be taken of Hitler, Roosevelt, and others. One counsel was finally dismissed from the case after, inter alia, he petitioned the House of Representatives to impeach the judge. The defendants also got into the act. The prosecutor's opening statement was consistently interrupted by the defendants' shouts—shouts such as "this is Moscow," "that's a lie"—and the marshalls were frequently called into action to seat the defendants and restore order in the court room. One defendant was so obstreperous that his trial was finally severed from those of his co-defendants.

Many of the same problems arose again in the Communist Party trial—

the *Dennis* case—of the 1950's. There all six defense counsel were held in contempt. Indeed, they were cited for 39 instances of contempt, sentences ranging from 30 days to 6 months. These citations were based on various improprieties, including repeated refusals to terminate argument after the judge had made his rulings, and various direct allegations, made before the jury, that the judge was maliciously seeking to assist the prosecution and gain publicity for himself. Several defendants also interjected comments throughout the trial that attacked the integrity of the judge, and, when he sentenced one of these defendants to contempt, the remaining defendants all rose, and started to approach the bench with vigorous cries. They were finally seated with the assistance of the marshall.

From the accounts of several commentators, I gather that the defendants and counsel in Chicago persisted in activity quite similar to that encountered in both the 1944 Nazi trial and the 1950 Communist trial although such activity was undertaken, perhaps, with considerably more wit than that exhibited by the participants in the earlier cases.

No doubt these disruptions do present serious difficulties, and several new remedies aside from the traditional criminal contempt citation may be needed. We have already heard from the Supreme Court on the constitutionality of several techniques. Indeed, the court has held that a judge may be justified, under certain circumstances, in removing the defendant from the court and continuing the trial without him. The court issued this ruling, however, in the context of an armed robbery prosecution, and a totally effective remedy in such a case may be considerably less effective in a seditious speech trial. It must be remembered that a striking characteristic of past sedition prosecutions has been not only the defendant's disruptive behavior, but also the considerable popular opposition to these prosecutions, which has often been reflected as sympathy for the defendant's plight. In determining a proper approach for the trial of the seditious speech case, we must be concerned not only with preventing disruptions but also with that element of public reaction.

It should be emphasized that public support for defendants in sedition cases has not been limited to groups who share the defendants' basic philosophy. The World War I prosecutions were questioned by various pro-Wilson, pro-war commentators, who were nevertheless concerned about the misuse of the criminal process to deny civil liberties. The 1944 sedition trial was severely criticized by several newspapers, particularly the *Chicago Tribune,* claiming the prosecution was based in politics and violated civil liberties. The *Dennis* prosecution was attacked in various magazines by many respectable authorities, including several political leaders. Today we have various prominent individuals and newspapers expressing similar concern with respect to the Chicago trial.

"The history of seditious speech prosecutions in this country shows that they ... have aroused considerable public sympathy for the defendants' plight ..."

Of course, these critics do not necessarily justify the action taken by the defendants in the Chicago trial—nor does history show that the papers like the *Tribune* and others supported the disruptive tactics of the defendants in the earlier cases. Most of the critics have suggested, however, that the defendants are not entirely to blame. Here are people, they say, who may well have been prosecuted by the government largely because of their political position. Is it any wonder, they argue, that the defendants soon lost their faith in the system and resorted to disruptive conduct. At the minimum, they argue, both sides were at fault. Or as Tony Lukas of the *New York Times* recently argued, three sides are at fault—the defendants for the disruptive conduct, the judge for refusing to remain neutral, and the prosecution for bringing the case in the first instance. Of course, some critics have gone farther. They have suggested that the defendants had no realistic alternative. As they see it, the defendants were being politically persecuted, didn't stand a chance on technical legal grounds or otherwise, and their only alternative therefore was to fight back as best as they could—by attracting the attention of the press.

These views, particularly the former, have been so widely advanced by such diverse authorities that they obviously must have some plausible appeal. I think the question we have to ask ourselves—in drawing some lesson from Chicago—is why? What is it that permits the defendants in seditious speech cases to argue that they are the subject of political persecution, inevitably to be judged guilty with no defense available except to make a political, radical event out of the trial itself, and permits persons who normally have substantial faith in their government—particularly lawyers—to stop and wonder, to feel that maybe the defendants are "telling it like it is."

There are several factors that have gathered support for defense claims of this type. One has been the very amorphous nature of the charges brought against the defendants. The legal tradition of this country bases criminality upon action. This is not to say that all punishment is limited to activities which actually and directly cause harm. We also punish unsuccessful activities. Under the law of attempts, we may punish a person who seeks to, but does not accomplish harm—but even here the defendant must take steps beyond preparation, he must have engaged in a substantial act—an act that unequivocally indicates his desires to achieve an illegal and harmful result. Our courts have long held that speech can constitute such an act, although the difficulties involved in interpreting many public statements should make us somewhat hesitant in relying upon speech alone as the affirmative act that constitutes an attempt. When speech is treated as such an act, it should, at a minimum, clearly

indicate an illicit purpose. This means, in effect, that the speech should at least constitute a call for illegal action—a call which is likely to be acted upon by the audience within the reasonable future. A recent Supreme Court decision has adopted basically this standard as a constitutional limit on the punishment of allegedly seditious speech.

When we look at past prosecutions for seditious speech, however, we find that frequently the initial charges failed to meet these standards. The Chicago prosecution, for example, was based in part upon the Anti-Riot Act of 1968. Under the sections of that Act, cited in the Chicago case, two steps are needed for violation. First, the actor must travel in interstate commerce, or use a facility of interstate commerce such as a telephone, with the intent to incite a riot; and second, during the course of such travel he must perform an overt act for that purpose. The statute clearly and carefully defines the concept of incitement and limits it to urging or instigating other persons to engage in acts of violence which cause a clear and present danger of damage to property or other persons. It specifically excludes from the incitement concept the expression of belief or the mere advocacy of ideas. However, the statute does not require that the actors actually engage in incitement. All that is necessary is that they travel in interstate commerce with the intent to engage in incitement and that they commit some overt act. Under the traditional law, that overt act may be no more than scheduling a meeting, renting a hotel room, or meeting with some other person. What this means is that the prosecution rests primarily upon proof of intent. And such proof may come from various sources other than the actual concrete actions of the defendants.

The broad nature of the statute makes any prosecution under it particularly susceptible to attack. Even where the particular prosecution is based on actual incitement, the defendant can point to a parade of horribles—of innocent activity that might fall within the statute. Thus, Lukas, in the *Times,* suggested the possible prosecution of a person who visited a friend in another state and subsequently participated in a demonstration that led to violence by others; and Jules Feiffer in a clever cartoon (although decidedly weak from the legal viewpoint) had one of his cartoon characters, a ballet dancer, arrested by a "cartoon of justice" because the ballerina in a prior cartoon (distributed, of course, in interstate commerce) had "encouraged through bodily movement and gesture demonstrations against the war," which had, in fact occurred.

It seems clear to me that Congress made a glaring error—possibly an error of constitutional dimensions—in drafting this statute so broadly. The prosecution in Chicago made an even more glaring error in relying on such a broad statute. The Chicago prosecution, as I understand it, was based in part on the position that the defendants had already engaged in incitement to riot in their speeches during the convention period. I suggest the government's position in the public eye would have been substantially improved if the prosecution would have been limited to charges of incitement and would have been based on a traditional incitement to riot statute such as the Illinois statute. It is true, however, that the Federal government had no such statute aside from the anti-riot act, and there were certain obvious advantages to federal rather than state (i.e. Daley) prosecution. But another federal statute was available that provided an even more satisfactory basis for prosecution (from the civil liberties viewpoint) than an incitement statute.

"It seems clear to me that Congress made a glaring error . . . in drafting the Anti-Riot Act of 1968 so broadly."

The government could have based its case strictly on the violation of the Civil Disorder Act of 1968. That act makes it a crime to teach or demonstrate to other persons the use of explosive or incendiary devices or techniques capable of causing injury or death to persons, intending that those techniques be used in the furtherance of the civil disorder which may obstruct interstate commerce. It also prohibits acts of obstruction or attempts to obstruct firemen or law enforcement officers lawfully engaged in the lawful performance of their official duties. Although it was rarely mentioned in the press, two of the defendants in the Chicago trial, Froines and Weiner (both of whom were acquitted), were charged specifically with violating that act in the demonstration of incendiary devices. Moreover, the rest of the defendants, except for Seale, were charged with having agreed to operate training sessions at which the march marshalls would be given instruction in "techniques of resisting and obstructing police action including karate, Japanese snake dancing, methods of freeing persons being arrested, and counter kicks to the knee and groin." Certainly, a charge based strictly on that type of allegation would have placed the prosecution in an entirely different light. Of course, whether it could have been proven or not may be another story. But I suggest that if the Federal government believed they could not have sustained such a case, then perhaps they never should have brought charges.

One reason the sedition cases in the past have not been based directly upon the alleged teaching of violence, or at least specific instances of incitement to illegal acts, has been the government's special affinity for the charge of conspiracy. I have previously noted that the criminal law generally requires some substantial substantive act for imposition of liability. The one exception to that requirement lies in the crime of conspiracy—which requires only an agreement among the parties. Because conspiracy reaches so far back into the preparatory stages for potential criminal action, it constitutes a potentially pernicious basis for prosecution. Nevertheless, it has

been accepted in American criminal law because of the special danger presented by organized group criminality. As a practical matter, however, conspiracy charges are rather rarely employed when defendants' illicit purpose has been manifested by no more than an agreement. In most conspiracy prosecutions, the conspiracy element is used as a measure of joining together several defendants who participated jointly in a substantive act. When we prosecute people for conspiracy to rob a bank, usually the bank has already been robbed or some of the participants at least have engaged in acts sufficient to constitute an attempt. Usually the same is true in seditious speech cases. In *Dennis,* for example, the defendants were not charged with having actually planned and taken actions toward the overthrow of the government, or with urging others to do so, but with conspiring to urge others to do so in the future. Yet the government's case was based in part on what it considered to be instances of actual advocacy.

In the Chicago case, the defendants were not charged with actually having engaged in the instruction of the march marshalls in illicit acts, but with having conspired to do so. Yet, the convention riots were clearly a thing of the past, and the marshall's training, if any, was a matter of record. Indeed, one of the overt acts alleged in support of the conspiracy was the attendance of six of the eight defendants at a "marshall training session" at Lincoln Park on August 24, 1968.

Since the government's proof in Chicago did relate to actual activities that had already taken place, I suggest that the prosecution could readily have been based on charges of actually participating in illicit instruction or urging others to do so rather than a conspiracy to engage in such instruction (not to mention the charge of conspiracy to travel in interstate commerce for the purpose of inciting). Admittedly some prosecution flexibility might have been lost, although one primary advantage of a conspiracy charge—a combined trial—could have been achieved by charging the defendants as aiders and abettors (accomplices). Offsetting any other procedural disadvantages would have been the withdrawal of one of defendants' major points in support of their claim of political persecution—the conspiracy charge. Elimination of the conspiracy charge would have served, along with prosecution based entirely on the civil disorder statute, to effectively undercut the defendants' claim that they were being prosecuted for some imagined agreement under the most amorphous of all crimes—prosecuted for associating with each other rather than doing anything.

Of course, one might ask, what if the government could not show any illicit training of the marshalls, what if there was only an agreement to engage in those activities but they were never successfully carried off. Again, I suggest, if that was the only case the government had, it should have foregone prosecution. Despite its validity in other types of prosecution, the conspiracy charge has too frequently been abused as applied to conspiracies to engage in seditious speech to be a proper prosecutorial tool today, except perhaps in the most compelling and clearcut case. Indeed, the government should have learned from experience in the 1944 prosecution where the A.C.L.U., acknowledging that the government theory of prosecution did not violate civil liberties, still protested the conspiracy charge, or the *Dennis* case, where much of the critical comment in legal journals centered on the nature of a charge of *conspiracy* to advocate overthrow sometime in the future.

"... the conspiracy charge has too frequently been abused as applied to conspiracies to engage in seditious speech ..."

Still another factor cited in support of defendant's claim of political prosecution – and probably even more crucial from defendants' point of view than the broad and amorphous nature of the charges—has been the limited scope of the defense that they can present. The defendants have argued that they are not only prosecuted for political speech, but that they are denied the opportunity to reply in kind. The rules of evidence, they argue, are not conductive to the full explanation of their position. This is a viewpoint that has been reflected not only by the defendants who have engaged in disruptive tactics, but also by those who quietly sat through seditious speech trials—such as the defendants in the *Spock* case.

Of course, the defendant in any case should have ample opportunity to show that he did not engage in the illicit activity charged by the prosecution. In seditious speech prosecutions, however, this may present certain problems. Most frequently, defendants in such cases argue that speeches which are viewed by the government as seeking to incite illegal violence were actually intended only to suggest the use of force as a matter of self defense. In order to establish the veracity of this claim, the defendants will want to establish that they indeed did have reasonable grounds to fear that the authorities would attack their supporters and self defense would therefore be necessary. This, in turn, may require a full-fledged examination of the nature of our society, the nature of the so-called establishment, and the nature of police efforts to protect it. Yet, the rules of evidence, as they have been applied in such cases, have not been conducive to providing such an explanation. In the Chicago trial, for example, the defendants were never able to properly present their arguments along these lines. When defense counsel called Mayor Daley to the stand, and asked for a right to cross examine him as a hostile witness, the court denied that right. The mayor was treated as a witness for the defense, and therefore the defense was largely stuck with his answers. Of course, defendants can, by taking the stand themselves, attempt to explain their position. But if their position is such that it necessarily involves

commentary on world events or on particular public officials, a court might readily respond that such testimony is "out of order"—noting that "the system is not on trial here but only the defendants." While this may be true, the fact of the matter is that the explanation of the defendant's position—particularly of their intent—may depend in part upon their view of the system. Indeed, the defendants' supporters argue, the courts usually recognize the relevance of such matter in treating the prosecution's case. Adverse remarks of the defendant relating to the government are frequently admitted on the prosecution's behalf as evidence of defendant's evil intent with respect to particular speech. The defendants on the other hand are restricted admitting what they view as the adverse remarks of government officials that show, they believe, that they could reasonably anticipate the need for action in self defense.

It should be emphasized that although what the defendants are trying to do in these cases is commonly disdained as "turning the trial into a political platform," their basic approach is quite similar to that employed in many run-of-the-mill criminal cases. In the typical homicide case, the position of the defense often is to shift the trial from the defendant to anyone else—usually the victim. The defense always wants the jury to know that defendant acted in honest belief of self defense (whether reasonable or not) or, if a case cannot be made to that effect, that the victim, in any event, really "had it coming to him." The doctrines which permit the defendant to do this—particularly the doctrine of self-defense—is commonly given considerable leeway by the trial judge in permitting introduction of various evidence concerning the victim and his relation to the defendant. We have refused, however, to fully apply the same doctrine or allow the same evidentiary leeway in the seditious speech prosecution for fear of converting the trial into a political platform. But the constitutional basis for prosecution of incitement to illegal activity may logically require that we permit exactly that.

A third factor that has contributed to public concern over seditious speech prosecutions has been the failure of trial judges to maintain a neutral position throughout the trial. It is claimed that the judges tend to consistently rule against the defendants, assert their authority before the jury in such a way as to indicate their low regard for the defendants, and make comments on the evidence indicating their preference for the government's position. Perhaps the most formidable aspects of this problem are inevitable. If defense counsel persist in their tendency to raise every technical detail (as they have in several seditious speech cases) the judge is going to rule against them rather frequently, and this will detract from judicial acceptance of their arguments even where they have a more substantial point.

Similarly, a certain degree of antagonism between the court and the defendant is almost inherent in the very framework of the sedition trial. Judges, as a general rule, are products of the establishment. Moreover, judges tend to be in a position where they get a great deal more respect than most other professionals and they tend to expect a good deal more respect. The defendants, on the other hand, often have little respect for the establishment or for the judge, whom they consider its agent. If the defendants are guilty they have indeed sought to undermine what they view as the establishment's goals through illegal activity. If they have not gone that far, they probably have at least attacked the establishment and often suggested that the establishment will initiate the use of force against them. Thus, even where no disruptive conduct is planned as a matter of strategy, the natural reactions of the bench and the defendants is likely to produce a tense situation. The situation often has become even more tense because of the defense counsel's behavior, but this too may be the product of circumstances. Defense counsel in this type of case is placed in an extremely difficult position, particularly if he does not fully share the defendant's viewpoint. Usually his clients are well educated, independent thinkers. Sometimes they would prefer to handle the case themselves. They start out with a viewpoint that the establishment is working against them and also with a certain suspicion of the defense counsel, for he, after all, is an officer of the court. As the movement booklet on the radical's defense notes, the lawyer is "part of the system." But defense counsel knows that he must gain the confidence of his clients. Probably the best way to gain their confidence is to lean over backwards to prove his independence, to be fiery and aggressive. The more counsel operates in this manner to seek the support of his clients, the more likely he is to antagonize the judge. Yet it is inevitable that he must take that risk, for his first objective, of course, must be to win his client's confidence.

"One cannot really be a martyr without help from the system."

Thus, we have a situation in which natural animosity between the judge, the defendants, and eventually defendant's counsel is highly likely. These tensions are not impossible to handle. The judge must reveal (hopefully) his stoic side. He must be willing to put up with a certain degree of arrogance, and suppress his own to some extent. The fact of the matter is, however, that this is easier said than done. Several papers, in commenting upon Judge Hoffman's conduct in Chicago, have cited Judge Medina's handling of the *Dennis* trial as an appropriate standard. Judge Medina, it is said, "kept his cool" and emerged a hero. We tend to forget that he was not a "hero" to some very respectable, very much accepted legal authorities at the time. Justice Frankfurter, for example, in reviewing the contempt sentences arising from *Dennis,* was as critical of Medina's conduct as he was of defense counsel—noting among other things numerous "episodes involving

the judge and defense counsel that are more suggestive of an undisciplined debating society than of the hush and solemnity of a court of justice."

I think we must realize that the complete exercise of proper restraint, particularly under the type of pressures exerted in Chicago, is an extremely difficult task. Certain standards can be suggested, however, that may assist the judge in exercising restraint. One such standard, suggested by Frankfurter's opinion, is the avoidance of witty responses to comments of counsel or defendants. Jokes from the bench, particularly those that poke fun at the defense counsel or defendants, may serve beneficially to relieve tension at trial, but they seem a good deal less defensible in cold print—and we find them scattered throughout the record in cases extending from Abrams through the Chicago prosecution.

What I have suggested in this short piece is that the prosecution's charge in these cases should be limited, that the defense should be given greater leeway in presenting that portion of their case attacking the establishment, and that the courts must make greater efforts to maintain a neutral position throughout the trial. I do not mean to suggest that these measures will necessarily prevent disruptive tactics. The defendants in many cases may find considerably less political value in an acquittal than in a conviction. Their own philosophy may require that they try to turn the trial into a radical event. The movement may require martydom. But one cannot really be a martyr without help from the system. The defendants can be disruptive but they will not gain support unless there is an air of rationality to their charges that they are victims of political persecution by the establishment. And this is what we must prevent. That having been done, I think we will find that the problem of applying appropriate remedies—such as contempt, or even exclusion from the court room—will prove manageable.