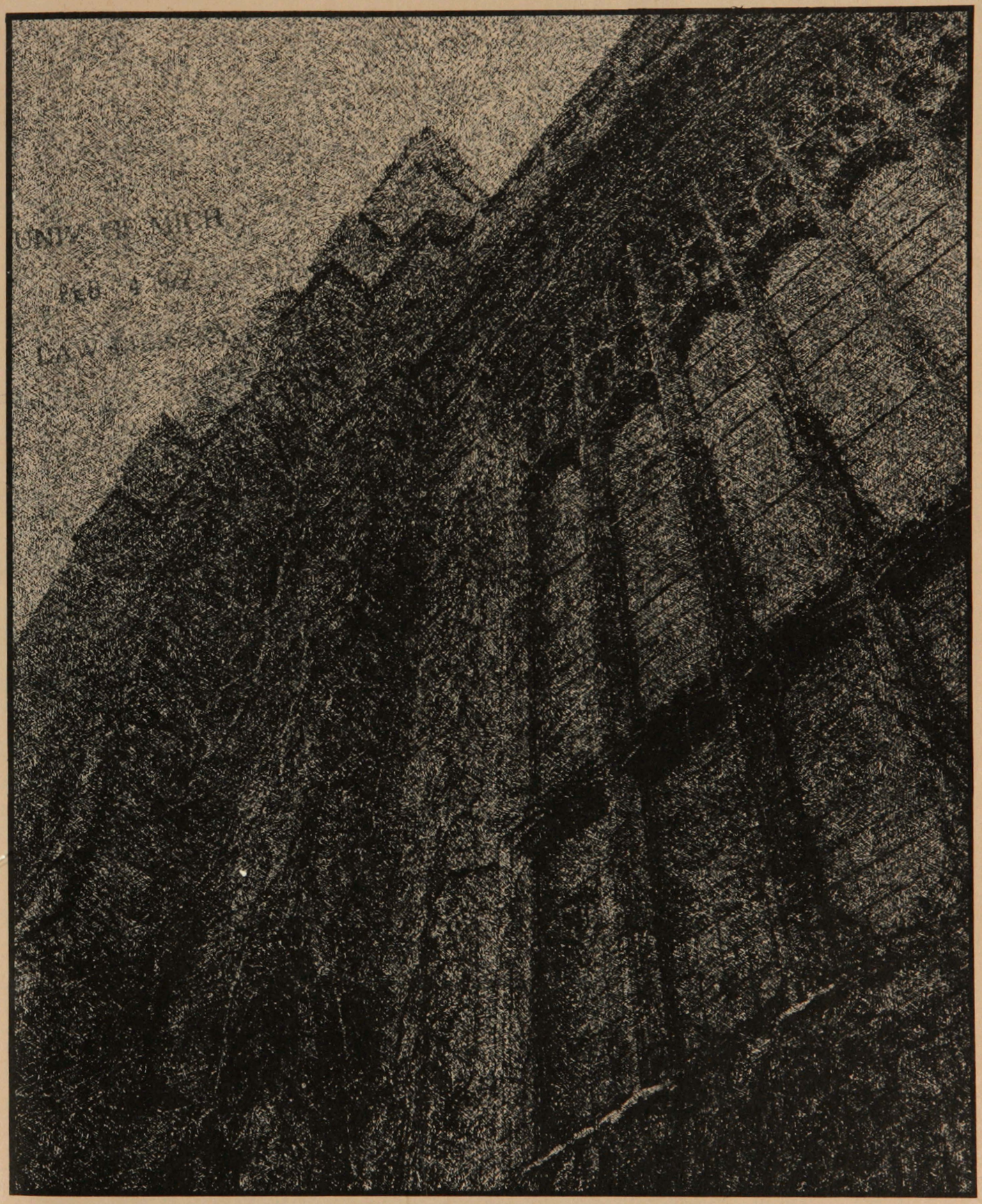
# Law Quadrangle Notes





The University of Michigan Law School Volume 16, Number 1, FALL 1971

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## U-M Law Grads Score Well in Job Placement

Despite a gloomy national employment picture, 70 per cent of the University of Michigan's 1971 Law School graduates had been placed in jobs upon graduation last spring. Another 6 per cent were listed as being committed to graduate study, fellowships or legal work in the military.

Out of 343 graduates for the 1970-71 academic year, 260 (or 76 per cent) by May 31 were listed as having "definite plans" for the future, according to Miss Ann Ransford, the Law School's placement director.

Each year, the Law School compiles its official placement statistics at the end of May, after the majority of the class has graduated.

As of Oct. 1, 1971, Miss Ransford said the placement total had reached nearly 80 per cent. The figures are expected to increase further as graduates continue to receive placement assistance throughout the year.

The 1971 totals are "surprisingly high" in light of the depressed job market for recent law graduates, Miss Ransford says. In fact, the 1971 figures are higher than those of the past several years.

In 1970, only 71 per cent of the graduate class were listed as having "definite plans;" in 1969 the figure was 72 per cent; and in 1968 the total was 73 per cent.

The placement director attributes the relatively high 1971 totals to the fact that Michigan is a "major law school" and that "students worked harder trying to obtain jobs" because of gloomy predictions.

She also notes that in previous years many Law School graduates were subject to the draft and did not actively seek employment. By contrast, with the dropping of graduate student deferments, most students now attending the Law School are either veterans or are exempt from the draft through the lottery system or for physical or other reasons.

Following are May placement figures for the 1971 class (which includes students graduating in December, 1970, and May and August, 1971):

144 were placed in private law firms
29 received government legal positions
10 were placed with companies
4 received jobs in banks
2 were employed by accounting firms
32 received judicial clerkships
4 received fellowships, including two foreign fellowships and two domestic internships
5 will pursue graduate law studies
2 will teach law
8 received positions with legal aid clinics
4 obtained public defender positions
10 are committed to entering the Judge Advocate General Corps, where they will perform legal work with the military
3 have received public interest law jobs
3 have joined VISTA, the domestic Peace Corps

Placement figures show the 1971 law graduates obtained jobs in a total of 29 states and the District of Columbia. This represents the widest geographic distribution of U-M law graduates in five years, the placement director says. Eighty-four of the graduates will take jobs in Michigan.

Also significant, according to Miss Ransford, is the fact that only 43 per cent of the 1971 graduates chose to accept jobs in their hometowns or home states, while the figure has been as high as 46 per cent in 1969, 65 per cent in 1968, and 81 per cent in 1967.

The low 1971 figure is surprising, she observed, because in times of sluggish employment students often try to take advantage of personal contacts and family associations in their home states.

Two law graduates set a precedent this year by deciding to set up their own law offices rather than joining established firms. One of the new firms will be in Ann Arbor and the other in Traverse City, Mich.

## Professor William J. Pierce Named Associate Law Dean

Formulating plans for a new library at The University of Michigan Law School has high priority for Associate Dean William J. Pierce.

Appointed to the post in May, Pierce is charged with responsibility for various non-academic matters, including over-all operations of the Law School and the annual budget preparation.

Pierce succeeds Joseph R. Julin, who left the Law School in January to become dean of the University of Florida College of Law.

A member of the Law faculty since 1951, Pierce received both his BA and Juris Doctor degrees from the University.

He described a new law library as one of the school's major needs because of pressing space limitations on the present facility. Pierce says plans for the new building would take into consideration student needs for an expanded reading room and individual study areas, as well as easier access to library stacks.

In addition, he says he has his eye on a law school auditorium with audio-visual capabilities and a seating capacity of 500. The Law School lacks such a facility at present.

Commenting on Pierce's appointment, Law Dean Theodore J. St. Antoine said: "I have never known a more efficient administrator than Bill Pierce. While most persons are weighing the pro's and con's of 10 different courses of action, Bill has made a decision and gone on to the next problem.

"He realizes that in a world where time is vital, a good solution today is usually better than an ideal solution two weeks hence. Nothing could have lifted my spirits more on entering the deanship than the assurance that the Law School would continue to benefit from Bill's unique practical savy and administrative magic."

Pierce continues as director of the Law School's Legislative Research Center, where much of his work

focused on social legislation and included such topics as water pollution, family law, metropolitan problems, commitment of the criminal mentally ill, and consumer protection.

He is former president and currently executive director of the National Conference of Commissioners on Uniform State Laws.

## U-M Students Win Law Office Competition

Two University of Michigan Law School seniors were declared winners of a national Mock Law Office competition which tested their ability to negotiate with clients and lawyers in a series of hypothetical "law office" cases.

Winners were Miss Dawn Phillips of Grand Haven, Mich., and David Harwood of Cincinnati, Ohio. They received a cash award of $150 apiece and a trophy which they presented to the Law School.

The competition, sponsored by the Emil Brown Fund, a legal foundation in Los Angeles, included teams from 12 law schools from around the country.

Hypothetical cases negotiated by the U-M team included one in which a client wished to use computer software as collateral for a bank loan. The student lawyers were required to deal with both the client and a lawyer representing the bank.

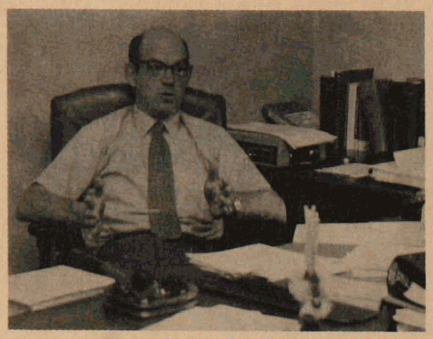
In another case, the U-M students served as house counsel for a corporation and were confronted with a corporate representative who requested advice on personal matters.

The competition, Miss Phillips notes, was basically a test of the students' ability to relate to clients and lawyers and to maintain a sense of legal ethics in their law office dealings.

Harwood and Miss Phillips were chosen to represent the Law School by U-M Prof. James J. White, a specialist in commercial transactions. This year, however, the School plans to conduct a local competition to select the student representatives.

## U-M Professor Returns From Federal Stint

Fresh from a two year tour in Washington as one of the "lawyers for the White House," Prof. Thomas E. Kauper has returned to teaching



assignments in property and antitrust at the University of Michigan Law School.

Kauper was on leave from the U-M until late this summer while serving as Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel (OLC).

In the hierarchy of departmental acronyms, the OLC is hardly as well known as HEW (Department of Health, Education and Welfare) or as curious as NOAH (National Oceanic and Atmospheric Administration). But despite its unpretentious label, the office plays a key role within the Justice Department.

One of its most important functions is fulfilling the Attorney General's statutory duties of rendering legal opinions to the President and his executive agencies. Working in this capacity, OLC attorneys have been described as the Justice Department's "house counsels."

Among recent projects, the attorneys drafted opinions on executive privilege and presidential appointment power. Often they are called on to consult with administrative agencies on statutory provisions and current points of law. Kauper recalls that much of his own work was conducted under the constant pressure of time.

His two years in Washington were spent as deputy to Assistant Attorney General William H. Rehnquist and as acting head in Rehnquist's absence. The office maintained a staff of 18 full-time lawyers.

In addition, Kauper chaired the office's important study committee on the Freedom of Information Act.

The U-M professor returned to Ann Arbor in August. In addition to his teaching duties, he is currently serving as Executive Director of the National Institute for Consumer Justice, a nonprofit organization funded by the U.S. Office of Economic Opportunity for the study of methods to resolve consumer disputes. Kauper is a 1960 graduate of the U-M Law School.

## U-M Law Grads Receive Foreign Study Grants

Despite a drop in foreign fellowship funds available to universities, seven University of Michigan law graduates have received fellowship grants to study abroad in 1971-72 and several others received extensions on earlier grants.

The 1971-72 awards reflect the declining variety and size of grants available to graduate students for continued research beyond their studies at the Law School. Maxwell Fellowships for African Studies have been terminated by Syracuse University and the number and size of Fulbright scholarships have been reduced recently. Financial support from the Michigan-Ford Foundation to law graduates seeking foreign fellowships is also being phased out.

The Law School is continuing its search among alumni and other sources for funds to supplement existing outside foreign study grants.

Michigan Law graduates still receive a high proportion of the most outstanding fellowship offers. During the last 10 years, graduates have won awards totaling more than $240,000 from sources scattered around the globe. The projects of this year's recipients indicate the scope of the grants.

Garrett B. Johnson of Akron, Ohio, received the Junior Volkswagen Fellowship for study at the University of Freiburg, Germany. Johnson, who will study pre-trial detention and criminal procedure abroad, was the only U.S. recipient of the distinguished award this year.

Stephen M. Goldman of Denver, Colo., accepted a Michigan-Ford partial fellowship to Brasenose College, Oxford University, England, for a two-year program of study in legal and political philosophy. Goldman, who was also a national semi-finalist in the prestigious Rhodes competition, studied international law at the Hague Academy last summer on a scholarship.

Gregory A. Lunt of California will begin studies in Switzerland on a Geneva Fellowship from the Institute of Higher International Studies, supplemented by Ford Foundation funds. Lunt will continue comparative studies in conflicts of law and multinational corporations.

Roger Wotila, a December law graduate from Pontiac, Mich., accepted a faculty-level grant for research and

teaching at the University de Los Andes in Bogota, Colombia. Wotila is being sponsored by the Social Science Research Council, the Ford Foundation, and the American Council of Learned Societies. Wotila had been active in legal aid work with the Spanish-speaking farm workers in Benton Harbor, Mich., and had specialized in migrant workers' housing problems.

Warren S. Grimes, a 1968 graduate, received an extension from the Volkswagen Foundation for study at the Max Planck Institute for Patent Law at the University of Munich in the area of international business problems. Thomas Nicolai, a 1970 graduate, received a similar extension for his studies in Germany.

Henry Bourgignon, a 1969 graduate, accepted a summer fellowship from the American Philosophical Society to continue his book on the early U.S. Supreme Court and the British Prize Courts.

Four other recent Law School graduates accepted grants for study at the Hague Academy of International Law this past summer. They are Susan Abrams of Kenya, Enrique Gavira of Colombia, Heribert Koeck of Austria and Fred Mayerson from the United States.

The Law School plays a major role in making these opportunities available to students. Mrs. Mary Broadley Gomes counsels students about possibilities and application procedures as part of her duties assisting Prof. William W. Bishop with the International Legal Studies program.

## Knauss To Become Vanderbilt Law Dean

Robert L. Knauss, the University of Michigan's vice-president for student services and a professor at the Law School, has announced he will leave the University early next year to assume the deanship of Vanderbilt University Law School.

A member of the U-M law faculty since 1960, Knauss was named University vice-president last year and was responsible for a vast reorganization of the Office of Student Services.

At the Law School he specialized in business associations, investment securities and regulation of securities and security markets. A 1952 graduate of Harvard University, he received his J.D. degree from the U-M in 1957.

Prior to joining the U-M faculty, Knauss had practiced law in San Francisco. He is a member of the American Bar Association's Section of Corporation, Banking, and Business Law as well as numerous other professional organizations.

## Students Gain Experience In Criminal Law

Thirty University of Michigan Law School juniors and seniors are finding one of the new clinical education programs this fall is not easy as they examine trial briefs and court documents.

The experimental class, Criminal Appellate Practice, is designed to give students first-hand experience in preparing briefs for use in criminal case appeals, according to course instructor Dan Seikaly.

Students meet once a week for class and then they are on their own.

"They're learning by doing what any good criminal lawyer with an appellate practice would do himself," Seikaly says. "They study the transcripts, spot the issues, interview clients in Jackson State Prison, and write their own briefs for the appeal."

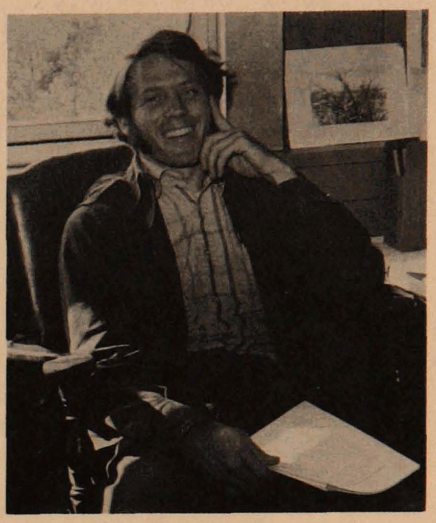
Some of the students may even have the chance to present oral arguments before trial courts under attorneys' supervision if cases are returned for reconsideration.

In addition, the class seems to counter the criticism that legal education is too bogged down in traditional hypothetical cases, Seikaly says.

The course, financed through a combination of Law School and federal funds, is closely connected with a new state public defender's office for criminal cases on appeal.

Seikaly, who was the first attorney hired by the new state office, is a graduate of Wayne State University Law School.

## U-M Law Student Works For Environmental Reform



University of Michigan Law School senior Roger Conner takes his special interest in environmental problems seriously.

So seriously in fact that he is combining his legal studies with a master's degree program in the U-M School of Natural Resources and a stint as a commissioner on the Michigan Air Pollution Control Agency.

A graduate of Oberlin College, Conner discovered his legal interest in ecology during a freshman property class. He recalls being dissatisfied with the limited treatment of pollution problems and later accepted a professor's invitation to look up the law and attempt to improve the problem's treatment for course presentation the following year.

His appointment by Gov. William Milliken as one of seven officials serving on the state air pollution control board came on the heels of last year's series of environmental teach-ins around the state in which he was involved.

Conner, who has served on the policy-making commission for 13 months, describes his experience in twin terms—"educational" and "frustrating." He is one of only two commissioners appointed at large from the state and is not expected to represent either broad industrial interests or local government concerns. He is also the only commissioner with any legal training.

"I hope that's to my advantage," he says. "Some experience with the law should enable me to persuade the commission to take a tougher stand on pollution issues and show fellow commissioners how it can be done. It's a

young agency—it was formed in 1965—and what happens now should have a real impact on its future development."

Conner pursues his interdisciplinary study on a fellowship from the New York Institute for Environmental Quality. His Natural Resources studies will add a full year to his education.

But he is convinced it is worthwhile.

"By themselves, with their own kind of training, lawyers can't really understand the environmental problem. Attorneys are generalists who facilitate problem solving, but that's not enough. My studies in the School of Natural Resources should help me see environmental problems more fully," he says.

After graduation Conner feels he will be able to continue his active interest in the law and environment as either a specialist in private practice or a government attorney.

He is the author of an article on the state constitutional problems of delegation of power, which appeared in a recent issue of the Law School's *Journal of Law Reform.*

He is a member of the Environmental Law Society, a U-M student law group which is working for the passage of more legislation to protect the environment.

## Francis A. Allen Receives Guggenheim Fellowship

Francis A. Allen, formerly dean of the University of Michigan Law School, has received a one year fellowship from the John S. Guggenheim Memorial Foundation for the preparation of a series of lectures on the concept of political crime.

Allen will deliver the lectures during the 1972-73 academic year at Harvard University, where he has been named to the prestigious Oliver Wendell Holmes Lectureship.

Allen relinquished the Law School deanship June 30. His successor is U-M Law Prof. Theodore St. Antoine.

The former dean is retaining his Ann Arbor residence and an office at the Law School during 1971-72. In the following year he says he will teach at the U-M Law School.

## Dean St. Antoine Named "Outstanding Educator"

Theodore J. St. Antoine, dean of the University of Michigan Law School, was one of five U-M faculty members chosen as Outstanding Educators of America for 1971.

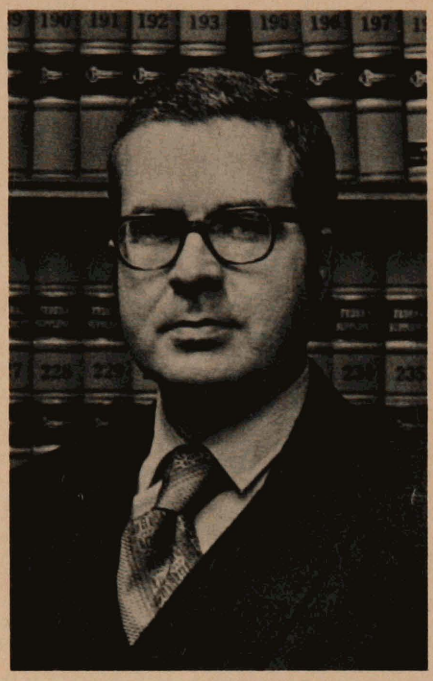
The annual award honors distinguished educators on the basis of their classroom talents, contributions to research, administrative abilities, civic service, and professional recognition.

St. Antoine, an authority on labor law, become dean of the Law School on July 1 after serving on the U-M faculty since 1965.

Other U-M faculty chosen for the award were Gordon J. Van Wylen, dean of the College of Engineering; Hansford W. Farris, associate dean of the College of Engineering; Joseph E. Rowe, chairman of the department of electrical engineering; and William Kerr, chairman of the department of nuclear engineering and director of the Phoenix Project.

The educators will be featured in a national awards volume entitled "Outstanding Educators of America."

## Professor Miller Receives NSF Study Grant



Prof. Arthur R. Miller of the University of Michigan Law School is undertaking a two-year study of the relationship between computer information technology and current legal standards of privacy and confidentiality.

The study, begun during the summer, is supported by a $160,000 grant from the National Science Foundation.

Miller, a leading authority on computers and the law and author of the recent book, The *Assault on Privacy,* says the major objective of his investigation is to provide background for a comprehensive re-appraisal of laws relating to personal privacy and automated data processing.

It is also possible, he points out, that the study will lay the groundwork for the drafting of new legal codes that would offset the threat to personal privacy posed by modern information technology.

"The changing patterns of data collection, handling and dissemination," the U-M law professor explains, "pose a significant challenge to legal doctrine and the underlying social policy it purports to reflect. In this context, a fundamental revision of existing legal principles and philosophy may be necessary."

Miller's investigation will be divided into two phases. Initially, it will explore judicial precedents and current

statutes to determine "how the existing legal structure bears on electronic data processing."

In the second phase, Miller will suggest guidelines on such matters as: rights and obligations of information gatherers and data subjects; legitimate sources of information and the areas that may properly be inquired into; new standards to appraise the accuracy of personal data; safeguards to maximize record confidentiality and minimize improper intrusion; standards of care to be honored by personnel engaged in data gathering, and the sanctions to be imposed for failure of responsibility; and the data subject's right to have access to files relating to him, and the procedures to be followed in correcting or deleting recorded information.

## Christensen Named Law Dean At Cleveland State University

Craig W. Christensen, a 32-year-old associate professor of law, has left The University of Michigan to become dean of the Cleveland-Marshall College of Law at Cleveland State University in Ohio.

Christensen assumed the new post in September after spending a year at the U-M and three years as director of Northwestern University's Institute for Education in Law and Poverty.

In addition to his duties at the U-M Law School, Christensen was a member of the staff of the University Attorney's Office here.

A graduate of Brigham Young University, he received his Juris Doctor degree, magna cum laude, from Northwestern's School of Law. His career included an executive post with the Chicago and North Western Railway Co. and service with the National Advisory Committee of the U.S. Office of Economic Opportunity Legal Services Program.

## Professor Stein to Advise On U.S.–European Relations

University of Michigan Law Prof. Eric Stein has been named to the U.S. Advisory Council on European Affairs, a newly-formed group of specialists who will advise the government on U.S. relations with Europe.

Stein, a specialist in international and comparative law who has written extensively on European economic and legal problems, joins 26 other Council members who will help the administration better define national interests and objectives in Europe.

Formation of the Council was announced by the U.S. State Department.

A member of the U-M faculty since 1956, Stein received law degrees from Charles University Law School in Prague, Czechoslovakia, and from the U-M.

Previously he has held positions with the State Department and the United Nations General Assembly. His recent publications include *Harmonization of European Company Laws,* which examines legal reforms of Common Market countries.

## Miss Deanell Reece, Alumna, Chosen as White House Fellow

Miss Deanell Reece, a 1971 University of Michigan Law School graduate from Scandia, Kan., has been selected to serve in Washington, D.C., as a White House Fellow.

Miss Reece was one of 16 fellowship winners, representing a broad range of fields, including law, business, journalism, and the military, who were chosen from some 15,000 applicants.

In Washington, Miss Reece will serve for one year as an aide to cabinet-level officials and will confer regularly with congressmen and executive officers, including the President. The fellowship program, now in its eighth year, is designed to give men and women between the ages of 23 and 35 broad exposure to the workings of the federal government and a chance to participate directly in national affairs.

Serving on the President's Commission on White House Fellows, the group which selected the fellowship winners, was Prof. Richard E. Balzhiser, chairman of the U-M department of chemical engineering.

Director of the Washington program is David C. Miller, a 1967 graduate of the U-M Law School.

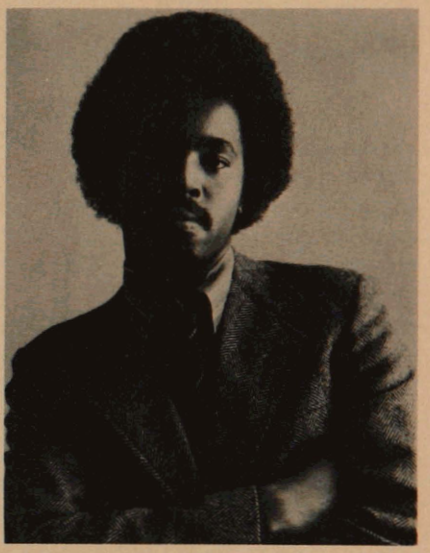
## Two Law Grads Do Legal Aid Research

Two 1971 graduates of the University of Michigan Law School have accepted one-year community lawyer fellowships from the Reginald-Heber-Smith Fund, a program co-sponsored by the Law School for the past five years.

Mrs. Elaine C. Palo of Summerville, N.J., and Charles E. Rutledge of Detroit were recepients of the awards which were granted by Howard University and funded by the U.S. Office of Economic Opportunity.

Rutledge and Mrs. Palo will work with local legal aid offices around the country in an effort to expand research on community legal problems. They are among 343 law students chosen for the program this year.

## Robert T. Pickett Heads Black Student Law Group



Robert T. Pickett, a third-year law student at The University of Michigan is serving as chairman of the National Black American Law Students Association.

He was elected to the post at the association's national convention in Washington, D.C. Pickett will serve a one-year term.

The association, now three years old, includes some 90 per cent of the blacks enrolled at the nation's law schools.

Before entering the U-M, Pickett received his B.A. degree from Kent State University in Ohio, where he was president of the student senate government association and vice president of the student body in 1968.

## Recent Law School Events

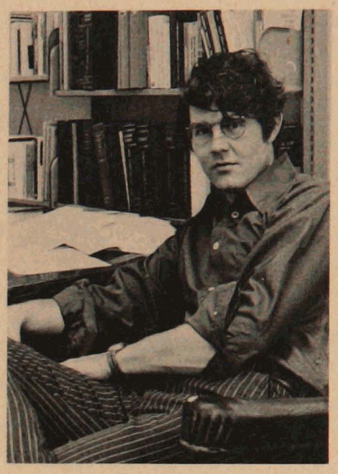
Louis L. Jaffe, this year's Thomas M. Cooley lecturer at the U-M Law School, devoted his lecture series to an examination of the American broadcast industry. Speaking at the U-M

Sept. 7-9 and 16-17, the Harvard University administrative law specialist warned that increased competition brought about by cable television and other broadcasting alternatives might lead to a glutted market, severely fractionated audiences, and a lack of revenue to support high quality programs. Above, Jaffee converses with students in a Law School office during his stay in Ann Arbor.

Three U-M law professors were among participants in a recent seminar at the Law School examining international trade and monetary implications of President Nixon's new economic policy. From left are Law Prof. Alfred F. Conard, U-M economist Robert Stern, Law Prof. Eric Stein, and Law Prof. John H. Jackson. The seminar was sponsored by the student International Law Society.

Some 250 professors, administrators, and legal counsels from 100 colleges and universities in 28 states gathered at the U-M in September to discuss the prospects for faculty collective bargaining. The conference was sponsored by the Institute for Continuing Legal Education (ICLE), a joint unit of the U-M and Wayne State University law schools and the State Bar of Michigan. At the podium, above, is John W. Reed, ICLE director and a law professor at the U-M. Others, from left, are U-M Law Prof. Russell A. Smith; Prof. Terrence M. Tice of the U-M School of Education; Prof. Charles M. Rehmus, co-director of the U-M Institute of Labor and Industrial Relations; and Mrs. Belle Zeller, a political science professor at City University of New York. Several speakers observed that unionization of faculty members at more state colleges and universities seems inevitable if state legislatures continue to enact laws protecting the right of public employes to form into collective bargaining units. But just how much faculty members stand to gain at the bargaining table remains questionable, conference participants were told.

# SOME OBSERVATIONS ON THE PRESS SUBPOENA CONTROVERSY



By Professor Vince Blasi

If journalists, why not social workers? Guidance counselors? Psychiatrists? Bankers? Sociologists? Ombudsmen? Parents? Close friends?

This is a question frequently asked those who contend that journalists should not have to reveal to courts and investigative bodies information received in confidence from news sources. The principle is well established in the common law that fact-finding tribunals are generally entitled to "everyman's evidence" no matter what adverse consequences may ensue to the unwilling witness's

BASED ON A STUDY BY PROFESSOR BLASI, DIRECTOR OF THE FIELD FOUNDATION RESEARCH PROJECT ON PRESS SUBPOENAS.

personal or economic relationships. There are, however, some much-criticized exceptions to this general principle of disclosure. Lawyers and spouses have common-law privileges against compulsory disclosure. Statues in two-thirds of the states give doctors and priests a similar immunity from subpoenas. In some circumstances, police officers cannot be compelled to reveal the identity of their informers. Military and diplomatic "secrets of state" are privileged. There is a trend toward a statutory privilege for psychoanalysts.

Newsmen have maintained for years that they, too, are in need of a privilege against subpoenas. This Term the U.S. Supreme Court will hear three cases in which journalists claim that at least a partial immunity against subpoenas is implicit in the free-press clause of the First Amendment.

Is a privilege for newsmen really important? Has news coverage been adversely effected to any significant degree since the dramatic increase in the volume of subpoenas approximately two years ago? Seeking answers to these and related questions, I have personally interviewed about 50 editors and reporters across the country. Also, with the assistance of Professor Richard Baker of the Columbia Journalism School, I have surveyed a cross-section of about 1,000 working journalists. Here are some of the findings.

Most of the newsmen I interviewed believe that the profession relies way too much on "off-the-record" information and "not-for-attribution" quotes. They offer several reasons for the judgment that the reliance on confidential information is, in many ways, a bad journalistic habit. For one thing, reporters can get caught up in a gossip syndrome whereby they become more concerned with getting the inside story for themselves than with getting as much of the story as possible across to the reader. Many editors and reporters feel that reporters could get a great deal more information on-the-record if they were tougher with sources and less concerned about really being on the inside. Also, regular confidential sources can co-opt a reporter, particularly when the reporter's career is inter-related with the source's career. The danger of co-optation is probably greatest in reporting on politicians, but it is not unknown in covering radicals and minority groups. Another danger with confidential sources is that they tend to lie more readily when the discussion is off-the-record and their deceit will not be exposed in print to those who know better.

On the other hand, relationships of trust and familiarity with sources can be important to reporters in assessing and filtering the information that comes to their attention. Also, in many reporting contexts, it is important to get sources out of the interview room and into an atmosphere in which they will relax, speak expansively, and permit their daily routine to be observed. Rather than any sensitive information he may get, it is this need for the reporter to associate freely and to draw his own conclusions that makes quality reporting frequently dependent on relationships of confidence with sources. And "confidence" in this regard usually means an unspoken sense of trust that the reporter will understand the information he is getting and will know what to use, not any explicit agreement as to what is on and off the record. There are, of course, instances in which important stories are acquired from sources who demand elaborate assurances that their anonymity will be protected—interviews with fugitives and exposes of government corruption often fall into this category. By and large, however, the informal "confidential" relationship is the more common and the more important.

Sources "dry up" for a number of reasons. The most common is the source's disillusionment with the way the reporter is writing his stories. For many news sources, particularly dissident groups and individuals, it is important for the reporter to convince them that he is "on their side." "Objectivity" is considered to be an impossible concept—a manifestation merely of liberal self-deception. The prevalent attitude, and this is by no means limited to radicals and minority groups, is summed up in the slogan, "If you're not for me, you are against me."

This sensitivity on the part of sources can have some interesting effects on the competition for stories. Reporters for the newsweeklies sometimes are able to placate angry sources by placing all the blame on the writers and editors in New York. Earl Caldwell of the ***New York Times*** says that in covering the Black Panthers in the Bay Area he has an easier time of it than do reporters with the San Francisco Chronicle because the Panthers don't regularly read the ***Times;*** Jack Nelson of the ***Los Angeles Times*** once appeared at an S.D.S. convention with a scrapbook of his sympathetic stories on radical groups and found this to be a remarkably effective device for acquiring sources.

This pressure to write favorably about regular sources is consciously resisted by most reporters. Few admit to ever tempering stories or omitting even marginal information that might greatly annoy a source. Many newsmen, on the other hand, concede that they sympathize with their sources. In my interviewing I encountered a common self-description: "I don't pretend to be neutral, only fair." Editors are very worried about the tendency of young reporters in particular to identify too closely with their sources. At the same time, however, these editors affirm that in terms of its determination and ability to "really get to the bottom of things," the newest generation of journalists is unsurpassed.

There appears to be one other common phenomenon in source relationships. Threats to cut the reporter off are made much more frequently than they are carried out. Particularly for those local and national media that are important to the source's endeavors, disenchantment with the reporter has a way of subsiding after a short period of time. Some reporters attribute this high source return rate to something more than the need for publicity. They say that most sources will quietly acknowledge the "inherent fairness" of a critical story, even while they go through the motions of ranting and raving. If the reporter is cut off, it is usually only temporary.

The subpoena controversy must be viewed against this background. Reporters are worried about being subpoenaed not because they are privy to highly sensitive information that would send their sources to jail—newsmen virtually never have such information. Their concern, rather, is that any cooperation on the part of reporters with the government's investigative and prosecutorial efforts is likely to cause deep resentment among sources. For a reporter who covers radicals or "the uncommitted" or the black community, an appearance before any government tribunal,

even if the appearance is involuntary in response to a subpoena, may well type-cast him in the minds of already-suspicious (and perhaps paranoid) sources as "one of them."

For subpoenas requested by the government, seldom will reporters possess information that is not either a matter of public record or else already in the hands of the government from alternative non-press sources. There have been some interviews "from the underground," but these are almost always arranged with such elaborate precautions that the reporter learns nothing that would assist the manhunt. When a middle-level bureaucrat blows the whistle on government corruption, the reporter who breaks the story will seldom hold back vital information from his readers. . . .

More often than not, reporters are subpoenaed as witnesses not because they have information that is otherwise unattainable but because they are unusually articulate on the stand, or because it would cost the government some expense and effort to gather the available information on its own, or because the government does not want to blow the cover on its paid informers or eavesdropping methods—or, some reporters feel, because the government wants to discredit them with their sources in order to reduce the news coverage given those who "say only what's wrong with America."

Proponents of a privilege for newsmen contend that these rather marginal and dubious increments to the fact-finding process cannot begin to justify the disruption that subpoenas cause to the equally important process of news-gathering. The argument takes on an added dimension when it is noted that reporters will often go to jail rather than make their modest contributions to the factfinding efforts of government tribunals. In our questionnaire survey, we asked the respondents, "Generally speaking, would you be willing to go to jail in order to protect important source relationships which you believed ought to be privileged but which were not under the existing law if you were advised by your lawyer that the sentence would probably be 30 days but might be as much as 6 months?" Over seventy per cent of those who answered the question said that they would accept a contempt citation in the circumstances. If press subpoenas will produce more martyrs than evidence, what is the point?

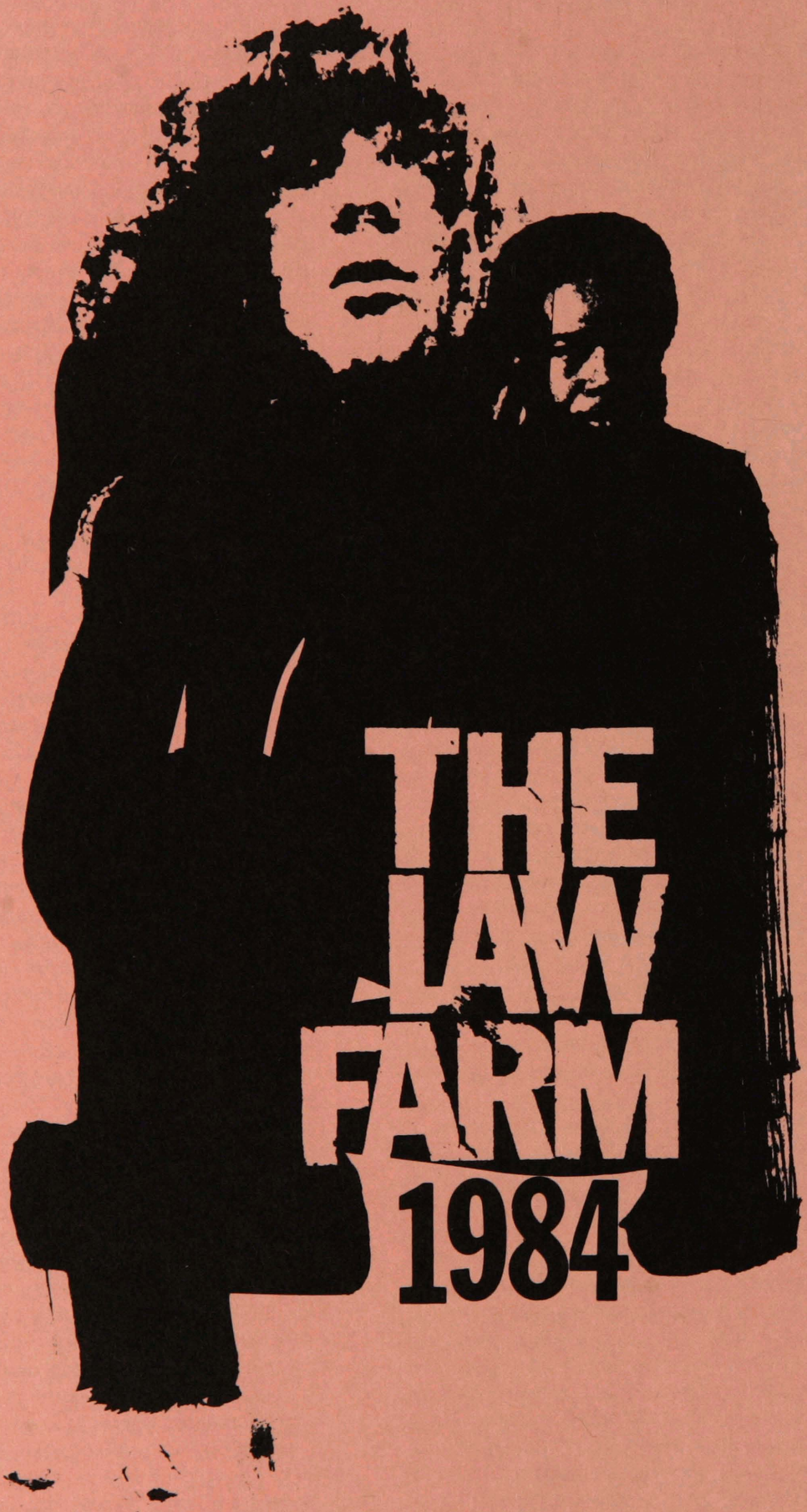
The point, say opponents of a newsman's privilege, is one of legitimacy. Even if reporters seldom possess fresh information, some of the other reasons for subpoenaing the press are perfectly defensible. In this era of overburdened law enforcement resources and fiscal stringency, why shouldn't reporters and all other citizens be utilized whenever possible to save the police time and money? Many of the reporters who now view the subpoena issue as a matter of principle used to cooperate eagerly with prosecutorial efforts. Newsmen frequently volunteered information, for example, while covering the civil rights movement in the South and after breaking investigative exposes. Police reporters traditionally have shared their information with law enforcement authorities while engaging in a friendly rivalry with them to see who could solve the crime first. Why the change of attitude now?

Moreover, these opponents assert, there is little evidence that the over-all quality of reporting has been much affected by the subpoena threat. Our survey asked, "In the last 18 months, has your coverage of any story been adversely affected by the possibility that you might be subpoenaed?" Of those who answered the question, only about 8 per cent said "yes," another twelve per cent said "I'm not sure." Many of the reporters I interviewed stated that, in retrospect, their fears about sources drying up were unjustified. Some movement sources have become less accessible, it is true, but this is probably more attributable to a general disillusionment with the establishment press than to any specific fear of subpoenas. John Kifner, who specializes in radical coverage for the ***New York Times,*** says that the subpoena controversy has even cemented some relationships with sources, placing the press unmistakably on "their side." Earl Caldwell also reports that his resistance to the government's subpoenas has made the Panthers more willing to trust him, although they are now reluctant to let him tape record interviews. A meaningful legal privilege against subpoenas would enable a few reporters to get some significant stories that are now unavailable—interviews with fugitives are mentioned most frequently—but on the whole it cannot be said that the increased subpoena threat in the last two years has significantly hampered American journalism in any quantitative sense.

But again, one must return to the basic question of legitimacy. If the Supreme Court were to reject the newsman's bid for a privilege, the legitimacy calculus would be radically altered. The Attorney General's guidelines, which have had a surprisingly salutary effect, might be withdrawn. Local prosecutors, defense lawyers, and civil litigants would probably be less reluctant to subpoena the press if the prospect of protracted litigation over the constitutional issue were removed. Editorial writers could no longer rely on the First Amendment to rally public opinion behind their embattled brethren in the newsroom. Journalists accepting contempt citations might find judges who are freed from legitimacy doubts more willing to impose stiff sentences. In such a climate, every reporter whom I queried on this point believes, many source relationships would become more structured, more self-conscious, more riddled with suspicion, and less conducive to quality reporting.

In this regard, newsmen have everything to lose and very little to gain from the pending Supreme Court cases. Should the justices establish a qualified privilege (given the Court's present make-up, an absolute privilege is not a realistic possibility,) they would only ratify the existing equilibrium. Should they, on the other hand, give their imprimatur to the practice of subpoenaing the press, they would unleash furies that are currently under control. It is because of this precarious state of government-press relations that a privilege for newsmen cannot be equated with a privilege for social workers or guidance counselors. The press subpoena issue has evolved into a highly visable symbolic confrontation which threatens to alter the balance of forces that now keeps the subpoena power in check.

In some respects, the situation is analogous to the controversy over the Pentagon Papers, which many newsmen consider a Pyrrhic victory. As Jim Hoge, editor of the ***Chicago Sun-Times,*** puts it: "The First Amendment is never expanded by litigation."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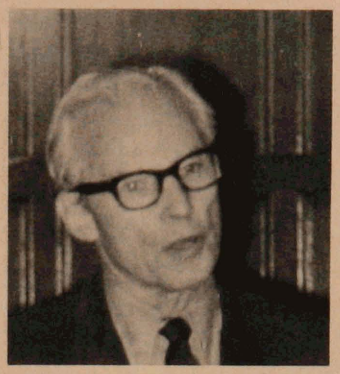


# EXTRACTS FROM AN ADDRESS DELIVERED TO THE SOUTHEASTERN CONFERENCE OF LAW SCHOOLS AT CHARLOTTESVILLE, VIRGINIA, AUGUST 23, 1971, BY PROFESSOR CONARD, PRESIDENT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS

By Prof. Alfred F. Conard

To address this Southeastern Conference of Law Schools in Charlottesville imposes a responsibility which is unique in my experience. Hovering over this campus is the spirit of the fathers of the Declaration of Independence and the Constitution of the United States. . . .

We have been engaged today in the consideration of the provocative models of a two-year curriculum, and a clinical third year. We have probably fallen into the old rut of asking ourselves whether we would rather have had these alternatives last year than the program which we actually conducted. This is the usual retrospective response to reform proposals. But if we were to take a leaf from the lives of Jefferson and Madison, we would probably have approached the problem from quite a different viewpoint. We would ask what kind of a law school we would like to have 50 or 100 years from now, and then inquire what kind of structures would move us in this direction.

This approach would be a dizzying one for almost any lawyer, conditioned as we are to studying the wisdom of the past, and to assessing the civil, criminal, and familiar penalties to be visited in retribution for sins committed and proved. A social scientist of my acquaintance finds a significance in the fact that most science periodicals are designated "journals," which means something pertaining to the day, while law periodicals are usually called "reviews," which means looking back. We have a professional bias somewhat like that of a tail gunner who fainted when he went up to the cockpit and saw the world rushing toward him at 600 miles an hour.

Unaccustomed as I am to looking in a forward direction, I will forego any efforts to contemplate the year 2071, but will try merely to image what the law school of 1984 may look like, if we are able to see it at all through the accumulated smog. I am not going to talk about the curriculum, but offer some suggestions for your consideration about who will populate the law farm 13 years hence.

The first change which I ask you to contemplate with me is one that I view with unalloyed satisfaction. We will have a great many more women among us. Even if they are bra-less and uncombed, they cannot fail to improve the scene and the scent provided by the present cohorts of males.

But that is not the reason why we shall have them. We shall have them, first, because they want to be lawyers, and they come with intellectual credentials in no way inferior to their male counterparts'. We will have them, second, because we are going to need to employ all the available intelligence in America to solve the problems which are before us. We may have more than enough lawyers, but we will never have more than enough of the best brains.

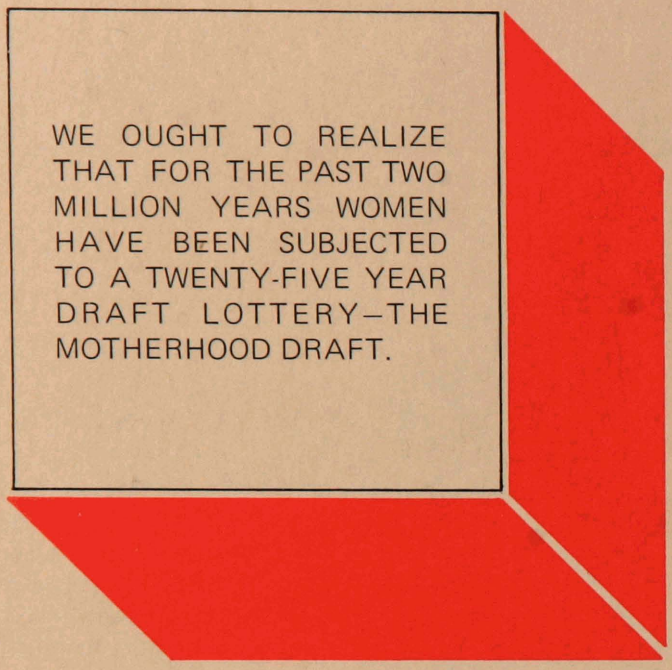
Underlying both of these factors—the desire of women to perform legal services, and the demand for legal services performed by women—lies a revolutionary change in the lives of women—the repeal of the women's draft. We have all seen the destructive effects of the men's draft—which hung over their heads like the sword of Damocles for eight years, sapping their attention and determination. Two years of certain service would have been much better than eight years of uncertainty. We ought to realize that for the past two million years women have been subjected to a 25-year draft lottery—the motherhood draft. If they did not choose to be nuns—in or out of habit—they had very little control over the duration and frequency of their years of motherhood.

This aspect of women's lives has changed dramatically. They can and they do plan the timing and the frequency of their motherhood interruptions. This facility coincides with a new popular ethic of population growth. A woman can now bear her quota of two children with no greater interruption of her professional career than a man's military service.

Please don't quote me for the proposition that there is no longer any difference between men and women. Women will continue to assume and bear a larger share than their husbands of the responsibility for children and the home. Many of them—thank God—will choose homemaking as their full-time profession. What I am asking you to contemplate is the changing attitude of women toward the professions, and the radical change in the incidence of motherhood which gives this change a firm factual foundation.

As a result of woman's emancipation, we are going to have more women play more important roles in the public and commercial life of our country and of the world. There will be an Indira Gandhi and a Golda Meir in the western world as well as in Asia, and the law school admissions officers who have not yet sensed the trend of our times will be soon hurrying to catch up.

An interesting philosophy about who should be admitted to an elite university was offered to me some years ago by the distinguished British professor, Charles John Hamson. I had asked him whether Cambridge still admits nobility of modest intellectual achievements, along with the bright young men to whom they award scholarships. Professor Hamson gave me the most honest answer I have ever heard about a university's admissions policy. He said, speaking of earlier days:




"The vocation of Cambridge was to educate the future leaders of Great Britain. We admitted some who would be leaders because they were very rich, some who would be leaders because they were very noble, and some who would be leaders because they were very bright. Tutors are much more timid today: they seek to shelter behind the supposedly objective and largely irrelevant examination-score. For my part I reporbate their timidity."

Believing that an increasing proportion of the leaders of America will be women, I also believe that law schools which intend to educate future leaders will not only admit but will actively recruit prospective leaders of the female sex.

The task of increasing our feminine recruits will not be a particularly arduous one, but it will involve some changes in our ways of behavior. It is not enough to say that we will admit women along with men when their grades are equal. We must also give at least equal consideration in scholarship and fellowship aid to women who need it. When we are awarding points for evidence of leadership, we must find some way of equalizing the allowance which we give to athletes and student politicians who have achieved a prominence which is not equally available to women.

In this connection, we may profitably contemplate a change which I have learned about by studying the book-racks in airport newsstands. In place of the passive role in sex which earlier generations considered optimal, women are now being coached to play a seducer's role. This may also have its counterpart in recruiting. In the past, recruiters have thought they did well enough if they were passively receptive to women applicants. I think they will soon become as eager to induce bright young women as bright young men to enter their law schools and to become lawyers.

Welcoming women into the law schools is only the beginning. We will also have to help them find important career opportunities. Fortunately, many law schools have already launched upon the task of disciplining the law firms to give equal opportunity to women. But are we exercising similar discipline upon ourselves? There is a conspicuous under-representation of women on United States law faculties, and we are going to be under increasing pressure to correct it.

I learned this the hard way when testifying on the Higher Education Amendments bill before the House Subcommittee on Education. I dutifully read the script that our proficient Executive Director prepares each year for his tenderfoot president. It told about the expansion of law schools, and the rapidly rising enrollment of racial and ethnic minorities, and of the female majority. Chairman Edith Green interrupted me to ask, "What kind of record is there in terms of women on law faculties?" Unfortunately, I could not furnish her with any reassuring statistics, although I could tell her about the equal opportunity amendment to our articles of association adopted at the last annual meeting. She made it clear that when we show up next year, we had better have some hard evidence of female representation.

In hiring women on law faculties, as in every other area where a traditional under-representation has prevailed, we are faced with the problems of breaking a circle. The bright young women who came to law school in the past were quickly discouraged by the male dominance from believing that they could stand in the foremost rank. Even if they succeeded on the academic scene, they found that judicial clerkships were much less available to them. They were rarely hired by first-rate law firms, and when hired were seldom sent to court to try cases. Consequently, it is easy for us to say that we cannot find young women with the same qualifications of experience as young men, and thus continue the denial of equal opportunity.

This excuse will no longer satisfy anyone. We need affirmative action which makes some allowance for the past denials of an equal chance. The only question is how much affirmative action we need. How much is not enough, and how much is too much?

Certainly we should not go so far as to award teaching positions to women who will be poor teachers. This is unlikely to be a severe problem. In view of the high intellectual achievements of women, and their restricted opportunities in other areas, we are likely to find plenty of available talent, so long as we make due allowance for women's more limited access to distinguished practical experience. So long as women are a smaller proportion of law faculties than of the legal profession, we should suspect ourselves of not having gone far enough. Luckily, no one is demanding that since women form 51 per cent of the population, they must form 51 per cent of law students and faculty.

If you have found any sense in these remarks on the recruiting of women, maybe you will be willing to consider along similar lines the recruitment of blacks. Some of the reasons for recruiting blacks are similar to those for recruiting women. Wherever there is talent, we owe it the chance to develop, and we owe ourselves the chance to benefit from it. Furthermore, blacks are going to occupy an increasing number of positions of power in America be-

cause their voting power and buying power is far greater than their present representation, and they are going to use their power to get representation. Therefore our question is primarily whether we want the blacks who achieve power to have benefited from the offerings of educational institutions, or to achieve power without this benefit—and with a smouldering resentment because they were denied it.

In some other respects, blacks in professional schools raise very different questions from women. If women have a cultural deficit, it is a very slight one, developing only in the professional school and in the first years of practice, when they first find the prime opportunities less accessible to them.

The large proportion of blacks—in contrast—have a cultural deficit dating almost from their birth. Many of them have had a deficient exposure to books, to pictures, to lectures, to drama, to commerce, to banking, to government—to all the institutions of an advanced society. Lacking these exposures, they often lack even the words with which they could describe or discuss them. Naturally, they make poor scores on aptitude tests. Consequently, as competition for law school places sharpened through the 1960's, many schools found that their representation of blacks was going down, even though the black percentage of college graduates was rising.

Because of these factors, we are faced with an extremely painful dilemma. If we admit and subsidize students purely in relation to their test scores, we will make no progress at all in the introduction of blacks into the legal profession. In all probability, we will even diminish the black fraction.

It would be equally disastrous to establish a fixed percentage of blacks who must be certified as lawyers without regard to their abilities. It would be a fraud upon the clients who relied on our certification of competence. But not for long. They would find out soon enough that we were certifying blacks who did not meet the standards of whites. They would then be suspicious of all black lawyers. The ultimate fraud would be on the blacks themselves, whom we would have led to believe in the existence of opportunity which would vanish like a mirage when they tried to clutch it. Blacks have no enemies more dangerous than those professed friends who insist that the proportion of blacks admitted to practice must match the proportion of whites, regardless of individual merits.

What we have to find is some middle ground between admission on scores and admission on quotas. I do not have any formula, but I would like to offer some hypotheses for your consideration. First, we must disabuse ourselves of the supposition that students who are admitted with lower aptitude scores always finish with uniformly lower grades. This is not true of any group, black or white. If we study the performance of our lowest decile of admittees, we regularly find that a significant proportion graduate in the upper half, and an occasional one makes honors. At the same time, some of those whom we have admitted in the top tenth sink to the bottom, or even fail. Consequently, when we admit low-scoring blacks, we are not admitting people of whom none can be successful lawyers. Rather, we are admitting persons of whom a lower percentage will succeed. At some point, that probability falls so low that it is a fraud on society and on the admittees themselves to invite this investment in education. That point may well be reached before any fixed quota is reached. There are some symptoms that we can usefully watch out for. When we find ourselves removing requirements of difficult but basic courses in response to complaints of our special admittees; when we find special admittees systematically avoiding courses like taxation, which is important in every level of practice; when we find ourselves giving take-home exams which permit anyone with a modicum of assistance to write a passable paper—we should suspect ourselves of going too far.

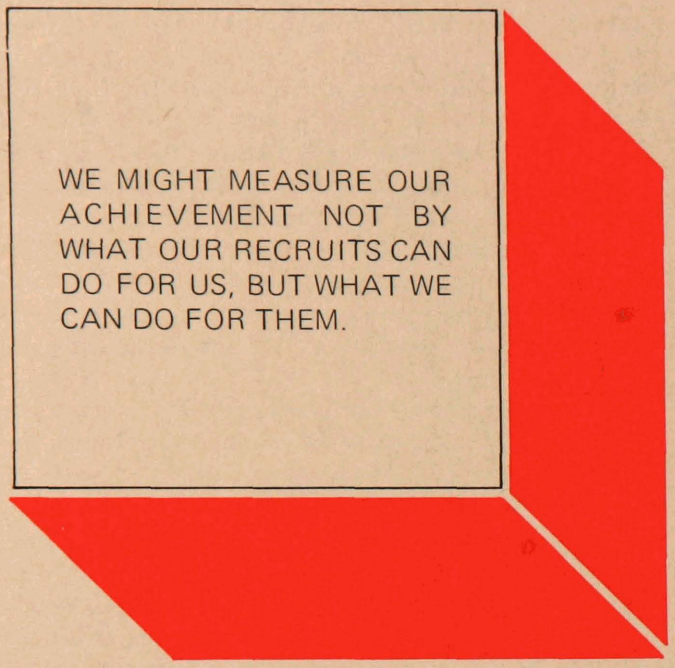
On the other hand, when we find that our black law school fraction is less than half the fraction of black law college graduates in the area which we normally serve, we should be very suspicious that we are not doing enough.

Wherever we find the middle ground between too much and not enough, it will be about as comfortable as the demilitarized zone in Korea or Vietnam. Every twitch of a muscle will draw fire. Under these circumstances, we will be tempted to twitch our muscles as inconspicously as possible, as many administrators have tried to do. They have tried to tell their alumni that admission standards have in no way fallen, while reassuring militant blacks and whites that the school is launched on a program of proportionate representation. Naturally, neither faction believed them. You can probably fill out the story with verifimilitudinous detail applicable to your local situation.

There seems to me to be only one path through this no-man's land. It is to announce publicly that we are admitting blacks whose prospects of success are lower than those of whites whom we exclude, because we will and we must have increased numbers of blacks in positions of authority. No doubt such candor will shorten some decanal careers; but ex-deans make wonderful professors.

After we have solved the problem of black admissions, our troubles will have barely begun, because we already hear the demands for Caribbean-American admissions. Shall

OUR QUESTION IS PRIMARILY WHETHER WE WANT THE BLACKS WHO ACHIEVE POWER TO HAVE BENEFITED FROM THE OFFERINGS OF EDUCATIONAL INSTITUTIONS, OR TO ACHIEVE POWER WITHOUT THIS BENEFIT—AND WITH A SMOULDERING RESENTMENT BECAUSE THEY WERE DENIED IT.




we establish quotas for every nationality, color, accent, or sex? We may find there are more of each than we ever suspected.

We will probably go some distance down that road; I don't know just how far. Eventually, we will certainly pull off and study the map, and ask ourselves where we want to be in 1984. I have many friends who believe that after a short detour with the blacks and possibly the chicanos we can get back on the high road of admissions by LSAT scores. Personally, I suspect that that was a bad road from the beginning. The recent book by Jencks and Riesman entitled ***The Academic Revolution*** gives some idea of what was wrong with it. Most universities were established to raise the level of the people around them—Indians in New Hampshire, sons of farmers throughout the middle and far west, hyphenated Americans in the great cities. As quickly as they could, these universities turned to a competition for the candidates least in need of educational opportunity, and most likely to grace the university by financial or intellectual success. This is the high road which had led us to our admitted errors in excluding blacks and chicanos, and to our yet unadmitted errors of cutting out the sons of the poor in favor of the sons of the middle class. The LSAT score is not only the password of admission, but is competitively displayed to attract an ever more elite group of high-point winners.

I wonder if we might not learn from this experience to employ a new conception of excellence—a conception which embraces not only the most excellent ivy leaguers, but also the most excellent blacks, the most excellent Indians, and the most excellent sons of sharecroppers and fur trappers. We might measure our achievement not by what our recruits can do for us, but what we can do for them.

I would like to pass now from the kinds of people who will be in the law schools, to the number who will be there. In the past, most of us have set a limit to our enrollment which was fixed at the number whom we felt we could most comfortably educate with our existing facilities and faculty.

This cut-off point is coming under heavy fire. As nearly everyone knows, approximately 104,000 aspirants took the law school aptitude test for 1971, and there are only thirty-odd thousand places in the law schools for them. This in itself would create extreme pressure. But when we are admitting low-scoring blacks while excluding medium-scoring whites, and if in the future we go still further to admit low-scoring sons of white laborers while excluding higher-scoring sons of white professionals, we are going to be under even greater pressure.

Some will doubtless advocate open admissions—the famous French system which permitted registering 1,000 freshmen for a class in which only 200 seats were available. The revolutionary experiences of the French universities have persuaded most observers that this is not a solution. At the same time, I do not think we can smugly explain that the number we are admitting is the maximum because it is the number we can most conveniently teach.

At the hearings on the Higher Education Act Amendments before the Senate Subcommittee on Education, we had an enlightening exposure to congressional thought on this subject. Ed Kuhn—the former president of the American Bar Association, and chairman-elect of the Section on Legal Education—had just testified, "We have only so many seats in the law schools, and the students just have to have a seat." Senator Pell, the committee chairman observed puckishly, "The seat is filled for 8 hours a day. How about the other 16 hours?"

Senator Javits volunteered that he had attended a 4-to-8 o'clock curriculum, and felt that his education was reasonably adequate. Senator Pell remarked that the Committee Counsel (Stephen J. Wexler) was also a 4-to-8 alumnus. Senator Mondale quipped, "I guess I'm the only one who went to a respectable law school," bringing down the house.

In this area, too, we will have to search for a middle way between untenable extremes. Against the quality of education of those whom we admit—and the convenience of our teaching schedule—we must weigh the needs of a tremendous wave of young men and women who are searching for their area of service in a more and more congested world. In the student wave folowing World War II, faculties found it possible to educate far larger numbers than they had thought possible.

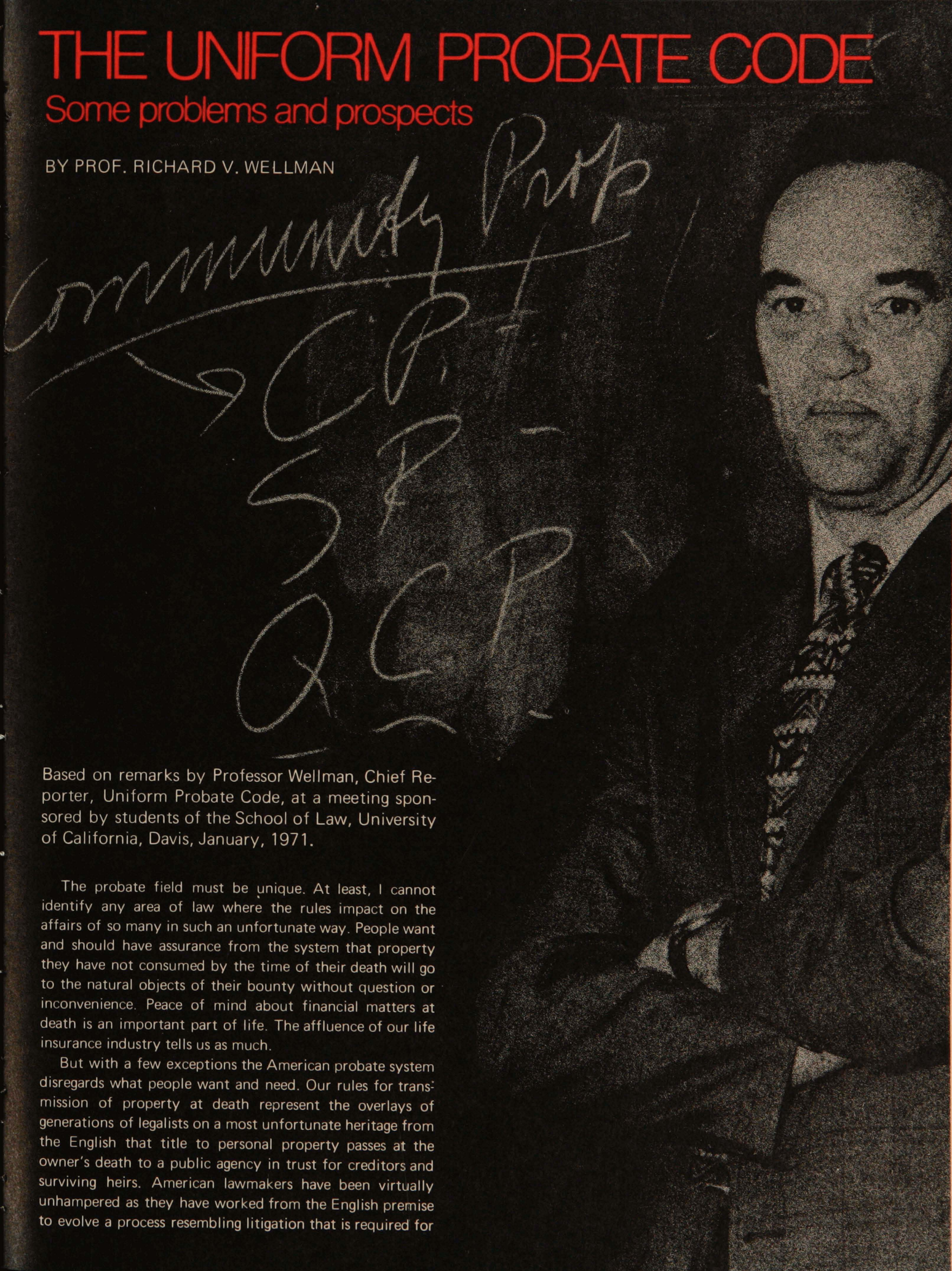
We have no equal sense of gratitude to the applicants of today, most of whom are veterans of battles of a quite different order. But it seems very likely to me that we will not be able to resist the pressure for additional legal education and that we will in fact be expanding our enrollments very substantially beyond what we told Millard Ruud—in his questionnaire of 1970—was our maximum.

I think I had better look no further at the future. After a short glance, I feel like the Punxatawney groundhog, who, after a glimpse of his shadow, crawls back into his hole for another six weeks. If I can crawl back into mine for another six years, I will be ready for retirement, and perhaps I need never face the realities which I now envision. But I know of no hole in which to crawl. And so I invite you to join me in contemplating this huge bulking shadow which we cast upon the ground ahead of us.

# THE UNIFORM PROBATE CODE

## Some problems and prospects

BY PROF. RICHARD V. WELLMAN



Based on remarks by Professor Wellman, Chief Reporter, Uniform Probate Code, at a meeting sponsored by students of the School of Law, University of California, Davis, January, 1971.

The probate field must be unique. At least, I cannot identify any area of law where the rules impact on the affairs of so many in such an unfortunate way. People want and should have assurance from the system that property they have not consumed by the time of their death will go to the natural objects of their bounty without question or inconvenience. Peace of mind about financial matters at death is an important part of life. The affluence of our life insurance industry tells us as much.

But with a few exceptions the American probate system disregards what people want and need. Our rules for transmission of property at death represent the overlays of generations of legalists on a most unfortunate heritage from the English that title to personal property passes at the owner's death to a public agency in trust for creditors and surviving heirs. American lawmakers have been virtually unhampered as they have worked from the English premise to evolve a process resembling litigation that is required for

every estate. Consequently helpless family survivors must wait while notices, hearings, orders, and the passage of time settle hypothetical questions that no one has raised and which purify inheritances that survivors would much prefer to take sooner and as is. In many states, the situation is made much worse by specialized courts that handle probate business. In these states, particularly, the result is an insensitive, autocratic bureaurocracy that controls the process of probate legislation to the point that even practicing lawyers can do little but live with it. For survivors, the worst state systems delay delivery of inherited assets for six or more months and shrink about 10 per cent from all that passes through for fees and expenses.

But, there are many ways of avoiding probate, so why worry? Probate avoidance has been a pastime for cagey Americans for generations. It is my guess that it has become the rule, rather than the exception. I suspect that probate avoidance helps explain figures from Cleveland where a recent, careful survey indicates that more than one half of all estates in probate gross less than $16,000. But, probate avoidance is a game for persons who think about money matters; also, it must be played with know-how. Hence, it's

WIDE CONSENSUS AMONG LEADING PEOPLE IS MORE IMPORTANT THAN BRIGHT IDEAS OR CRISP PROSE WHEN YOU'RE TRYING TO ALTER THE DIRECTION OF SOMETHING AS MASSIVE AS OUR PROBATE INSTITUTION.

not an acceptable substitute for benevolent law that would support, rather than harass, its subjects. Probate avoidance tends to take many well-informed persons out of the circle of people who might be interested in probate law reform. Thus, it adds to the difficulty of finding political muscle to match that of the probate bureaucracy that figures its power in numbers, of estates, each with attendant requirements of bond, legal advertising, appraisers, and work schedules for court personnel, as much as in volume of dollars flowing through. Probate avoidance has alarmed some lawyers, because it means that their stock in trade, the will, loses as joint tenancies and deposit trusts provided by stock brokers, bankers, and realtors become more popular. The attitudes of these lawyers undoubtedly contributed to the climate that made it possible to produce the Uniform Probate Code.

I should not leave you with the impression, however, that most lawyers are eager for probate law reform. Too many of the most powerful represent clients who do not mind paying big probate fees that are borne in important part by government in the form of tax deductions. Too many others are in the high production specialty of modern estate planning keyed to the revocable trust. Taxes and probate worries drive moneyed people into the arms of planners and planners are not quite ready to buy the argument that tax pressures alone would sustain their present volume of business.

The Uniform Probate Code is sponsored by the American Bar Association and the National Conference of Commissioners on Uniform State Laws. From what I've said, you might doubt that a product of these organizations of lawyers would offer much as a vehicle for significant reform. I suspect that many who have heard of the Code have tossed it off as public relations gimmick to fool people about what lawyers really want and to divert energy from better corrective approaches. And if it is a vehicle for reform as it is represented to be, you will ask, "How come?"

My short answers to these questions are (1) the Code offers exciting prospects for truly significant reform of the probate institution; and (2) in spite of the fact that it took a series of minor miracles to see it through the long process of preparation and approval, the Code has arrived. The organized bar cannot ignore or deny it. There's a struggle ahead in regard to its enactment, but the Code looks like the best means of getting at and eliminating the sad heritage of 200 years of the wrong kind of probate law making.

First, let me give you a brief peek at the more promising features of the Code. (1) The Code should relieve persons without tax or family problems of any pressure to make a will or use probate-dodging alternatives. If a spouse survives, $15,000 can be zipped through an executor or administrator to her in as little time as a week after death. The tools operative here are exemptions that put so much over to the spouse ahead of creditors or the terms of any will, and an affidavit procedure that will permit a fiduciary, with full power to create saleable titles to inherited assets, to get letters of authority from a probate clerk as soon as five days from death have passed.

(2) If there's no will, the Code gives the next $50,000 to the spouse, and divides the excess between spouse and children where there are no children by a prior marriage. This substantive plan will align with what all the signs tell us most married persons want. It dovetails with a new look in probate procedure that will permit the fiduciary to collect, pay debts, and make final distribution of estates with no more contact with public office than the affidavit proceeding by which he obtains his letters. The adjudicative processes of the court will be entirely passive, ready to be activated to solve any question that may arise, or to protect fiduciaries from the dangers of hindsight review of their business for the estate, but limited to dealing with matters that petitions present. The fiduciary is not an officer of the court, and statutory requirements relating to bonds, appraisers, and court accountings go out with the abandoned concept.

(3) Statutes of limitation that run 3 years after death will permit survivors who claim in intestacy to avoid all contact with any public office. Hence, for heirs who are content to wait three years, the system says "sit tight and everything will be OK."

(4) Most guardianships and conservatorships can be

avoided under the Code. If property protection for a living but disabled person becomes necessary, the Code abandons the idea of supervision by a court in favor of the statutory trustee.

(5) The code contains a provision that should carry deeds, notes, mortgages, and all forms of contracts containing provisions shifting benefits at death past the peril of being classed as testamentary. In a sense, this section is intended to keep the probate process honest by approving a broad range of probate alternatives that can be used if bureaucrats refuse to permit the Code's administrative features to work as intended.

When other details are examined, it will be seen that the Code changes the answers to questions about the trustworthiness of people, the need for protection of creditors of decedents, and the necessity for exact correctness in transmissions at death that over many generations have been resolved against survivors and in favor of the legal system. Over-all, it represents a determined effort to move probate matters away from bureaucrats and back to people and their counselors who are anxious to give sensitive and needed service in regard to family financial matters.

## THE DIRTY WORDS "COMMUNITY PROPERTY" KEPT FILTERING INTO OUR DISCUSSIONS AND THREATENED TO TEAR US APART.

However, to the same degree that the Code has promise, it is frightening to those whose ways it would change. How did it come about? . . .

The code project started in the ABA's Real Property, Probate, and Trust Law Section. . . . It happened that in 1961-62, the Section chairman and the officers below him in the move-up scheme were more interested in probate law than in title insurance, trust administration, tax planning, and other topics that commonly occupy the attention of the membership.

Once persons from different parts of the country start talking probate, the topic of reform is very likely to get top attention. Probate means red tape everywhere and men who make their livings hacking at red tape frequently are as anxious as any to get rid of it. Twenty or so years earlier, the Section had sponsored preparation of the Model Probate Code—a project for which Prof. Lewis Simes was principally responsible. In 1961, the idea approved for a long range, new section project was to modernize the 20-year-old Model Code, and to seek its wider acceptance as a means of cutting down on probate red tape.

The 1961 project would have gone nowhere but for the fact that the ABA sponsors managed to talk the National Conference of Commissioners on Uniform State Laws into taking primary responsibility for the job. NCCUSL is an old organization (80 plus years now) made up entirely of uncompensated lawyers who are appointed by the governors or legislatures of their states to consider proposals for uniform state legislation. Through most of its history, the pattern of the Conference had been to avoid big, controversial projects. It had declined to get into probate in the early 1940s when the Model Code was being started. But, by 1962, it was feeling its oats. The Uniform Commercial Code was a success; in another year, the Conference was to employ Allison Dunham of Chicago Law School as its first Executive Director. Its high officers included a remarkable colleague of mine from Ann Arbor, one Bill Pierce, whose philosophy about the National Conference was that it should be deeply involved in the process of law reform, and that big projects were sometimes easier to handle than small ones. Prof. Pierce was also very much concerned about the probate mess—he had been the first chairman of Michigan Bar Association's Probate Law Section, and had written about the stagnation and corruption that characterized the probate bureaurocracy in the large cities of the east and midwest.

But even with its new energy, the National Conference would not have undertaken a probate code project without the recommendation and promise of continuing support of the ABA group. Even reformers like to work where they are most likely to succeed. Thus, the clubby atmosphere of the governing council of the Property Section provided the vital spark that could come from no other quarter. Certainly, no probate code revision project that might be launched in any particular state could possibly become sufficiently detached from local politics to come at the problems with the needed new look.

Framing a charter for a useful project and getting useful work started are different matters. Prof. Dunham labored to find some gift money to finance the project—there was almost none to be had. It was 1963 before the project invited seven interested professors to Chicago to form the reporters group. The word there was that there was no money; that it would be very difficult to get a probate code through the National Conference where long-standing rules required three line by line readings of proposals before the Committee of the Whole before there could be a vote of acceptance. The predictions were that every commissioner of the 150 or so who attend the once-a-year, week-long meetings at which the Conference conducts its business, would know enough about probate to question every word of any Code. We left that first meeting with very general assignments to put our thoughts on paper. In return, we were promised a return trip to exciting Chicago in another six months or so for more talk. When the second meeting rolled around, very little had been done. The little energy there was was spent in trying to identify goals; it all seemed very non-productive. 1965 was helped some by a February meeting in New Orleans and a summer meeting in Hollywood, Florida. Still, the gloom of continuing reports of no money and the indecisiveness of volunteers who were unwilling to stick their necks out against the risk that they

would be tabbed for even more unpaid and possibly pointless work, dominated these meetings. At each get-together, the leaders from the ABA Property Section would appear to see what was going on and to make statements. We argued—interminably it seemed to me—about who got title to real estate on death. We wallowed around with assumptions about the court that was to handle probate jurisdiction. Each person knew his own court system well and could think of no other. Proposals for allowing any court of probate to settle problems of title to land inevitably ground down to a series of speeches about Missouri, Tennessee, New Jersey, or Wisconsin probate officials and constitutions, and how no end of good talk could change things.

Then Mr. Dacey wrote his best seller, ***How To Avoid Probate,*** and the fat was in the fire. The National Conference reviewed its tight budget and found enough to hire two of us for the summer of 1966; object, get a code on paper. Suddenly, three years of seemingly pointless discussion paid off. Our meetings had at least stayed close to business and the two reporters had some idea of what might work. We managed to produce a draft of about 200 pages which we hauled to the annual meeting at Montreal. That

ONCE THE LABEL "MODEL" IS ATTACHED, EVERYONE RELAXES AND CONFERENCE SUPPORT MONEY DISAPPEARS. . .WE KNEW THE CODE WOULD BE "MODEL" RATHER THAN UNIFORM IN IMPACT, BUT WE COULD NOT GIVE UP THE LABEL "UNIFORM."

first draft would have been a disaster under normal circumstances, but it served its major purpose of being at the right place, at the right time, with lots of paper. It demonstrated to the powers in the Property Section and the National Conference that the joint project was underway and could produce something. It assured us that no other national lawyers' group would try to respond to the Dacey furor. From then on, our project gave the American Bar Association an answer to press and public queries about Dacey, lawyers, and probate: e.g., "We are working on it." Happily, some real problems with the first draft got lost in the shuffle. One was the result of a notion of mine that statutes would be more comprehensible if written in a narrative form. My original portion on probate procedure was like nothing any lawyer had ever seen before in a statute. Fortunately, few outside the inner circle ever read it. . . .

The period from August 1966 to August 1969 was an exceedingly full one for me and others who worked closely with the Code. I became Chief Reporter in early 1967. From that point until copy for the approved draft was finally cleaned up and packed off to the printer, life was full of meetings, lonely evenings of trying to sort out jumbled notes, letter writing, speech writing, and draft after draft of parts and all of the emerging job. There was lots of travel. With draftsmen and committee members from east and west coasts, and from north and south, it didn't make much difference in terms of cost where we met. Including annual meetings, we saw Houston, Boulder, Honolulu, New Orleans, Phoenix, Philadelphia, Seattle, and Dallas, as well as far too much of Chicago.

There were three major drafting spurts after the first draft in 1966. The most important occurred during the summer of 1967 when all eight reporters and a couple of professor observers spent five weeks in a drafting seminar at Boulder, Colorado. With our families housed in nearby student dormitories, we worked daily from 8:00 to 4:00 for five solid weeks. In the mornings, persons worked alone or with one or two others as drafting sub-committees. At 1:00 p.m. every afternoon, the whole group would listen and argue as drafting sub-committees followed a cruel time-table in bringing their problems and drafts before the entire group. With three secretaries and plenty of duplicating facilities, the paper and arguments flew. At 4:00 o'clock every afternoon, we'd retreat back to a dormitory lounge that had been assigned to us, often to continue the battles for the benefit of long suffering wives. Somehow, it all worked out. When the end of the fifth week arrived, we had Articles I, II, III, IV, V, and VI with Comments on paper. Moreover, only the guardianship article, Art. V, had not been fully read, discussed, and approved by all eight whose names went on the package. Another miracle was that we became and remain fast friends. It was quite an experience.

. . . The next major drafting input occurred the following summer when three of us met for four weeks in Berkeley to hammer out Article VII on trust procedures. There's no question but that three can think and write together more effectively than eight. Partly because of this, and partly because the time for committee criticism and re-writing was more limited, I believe that Article VII represents the best work in the Code. I do not mean to say that the group who worked directly on the earlier portions of the Code should have been smaller. It was very important to get as many people as possible in as participants in the drafts to dealing with the mess in decedents' estate. Wide consensus among leading people is more important than bright ideas or crisp prose when you're trying to alter the direction of something as massive as our probate institution.

The final major drafting input occurred in the last six months before the 1969 summer meeting in Dallas. . . . A small group, including the project chairman, two high conference officers, and I, met for four days to iron out kinks and resolve dilemmas that had developed. In the process, we practically re-wrote the guardianship article which had haunted us from 1966.

Little and big battles sparked the Code's development. In the beginning, we had time to argue interminably over some very silly points as illustrated by the squabble I alluded to earlier over whether title to real estate should be deemed to pass to a personal representative. Yes—shouted

those who wanted to strengthen the trust concept. No—responded the traditionalists who feared that title might somehow float into never-never land if given to a personal representative who forgot to close the estate. Finally, the happy compromise emerged. Title descends to heirs or devisees, but the personal representative has the power over title of an owner! Marvelous!

We battled over the names to be given to a guardian of the estate of an incompetent. The original draft of this Article used a civil law term "curetel." The reviewing lawyers were shocked. But the draftsman resisted use of "conservator." To him, this brought memories of hated representatives of the federal reserve who stole banks from their stockholders and officers in the Great Depression. Two hours of expensive O'Hare Inn meeting time involving about 25 people finally produced "curetelic-trustee" as a compromise. Later, and without any very clear authority, I substituted the word conservator in a manuscript then being prepared and that was the end of it.

Our biggest struggles were with independent as opposed to supervised administration for executors and administrators, and with the question of whether general notice to all interested persons must precede probate and appointment. The independent administration hurdle was finally jumped by agreement that the Code should offer options that would allow lawyers everywhere to say that the way they were accustomed to handle estates was still OK. The battle over notice was much tougher. I was convinced that a statutory requirement of general notice to all interested persons would wreck the idea that non-court procedures were being approved. We resolved the issue in 1966, only to re-debate it again in 1967 and 1968. Again, a form of compromise won the day. No prior notice is required, but after appointment, a personal representative has a fiduciary obligation to inform heirs and devisees that he's in office.

ULTIMATELY. . . RESPONSIBILITY FOR THE CODE WILL REMAIN WHERE IT SHOULD BE—SQUARELY WITH THE LEGAL PROFESSION WHICH STANDS TO GAIN IN PUBLIC ESTIMATE AND TO LOSE NOTHING EXCEPT THE CURSE OF RED TAPE THAT SHROUDS ITS EFFORTS. . . .

The dirty words "community property" kept filtering into our discussions and threatened to tear us apart. The Commissioner co-chairman in 1968-1969 were from Washington and Texas. Also, one reporter was from California. Invariably, when community property was mentioned, we'd get three speeches about how common law lawyers didn't understand community, and how it was different in each community state. Just as invariably, the commissioners from several of the common law states would go to sleep.

Our struggles with community property related to discussion of what to do about dower, spouse's elective share, and related ideas. This is the toughest part of the entire Code. In Michigan where I served as draftsman for a state bar association probate code drafting committee, progress came to a dead stop when it reached this subject. After half a winter of fruitless bi-weekly meetings I decided to push for elimination of all statutory protection against disinheritance of a spouse. I argued that no scheme that would get by a table full of lawyers had been suggested, that the power of a spouse to get a will contest to a jury was a sufficient deterrant, and that we were wasting our time. To my surprise, the committee agreed and the Michigan Bar's probate code drafting project lurched forward.

The national committee's debate over this lasted through the entire period of preparation. Argument raged over how to relate any meaningful check on a spouse's gift-making propensities to all kinds of non-probate transfers that can serve as will substitutes. Various ideas for distinguishing deserving from undeserving spouses were tried and rejected. Many proposed that judges should have wide discretion in dealing with claims by disinherited spouses; more resisted this approach. I made a serious effort to get the group to adopt the Michigan position. It didn't work. Finally, the necessity to do something forced us to agree on provisions we knew would be ineffective against any determined spouse-hating planner who could hire a sharp-eyed lawyer. The conviction born in compromise was that political facts of life required inclusion of some provision; that we had to meet the obvious problems with existing legislation; but that the wealthy, malevolent planner should not be the object of a statutory net. The law review critics are already hard at work on these sections.

The attacks from outside were somewhat more exciting. It was at Philadelphia in 1968 that the Commissioners had their first eyeball to eyeball confrontation with opposition. A delegation from the National Newspaper Association appeared to present their arguments in favor of many statutory requirements for published probate notices. They wanted four ads per estate, each with three insertions. We provided for one and permitted it to be finessed. Their slightly veiled threat of determined resistance at all political levels in all state legislatures if we did not accede to their extravagant demands helped the cause of getting the Code through the National Conference. The participating commissioners had a high sense of public purpose by this time, and the raw threat of retaliation only strengthened their determination to shape a code dictated by the merits rather than by special interests.

The opposition at Dallas the following year was much more worrisome. First, a trade association known as the American Insurance Association upset with Code proposals to eliminate statutory requirements for fidelity bonds for administrators, sent a hard hitting, memorandum in support of their position to every commissioner prior to the meeting. This was followed up at Dallas by a delegation of effective salesmen who talked of the claims their companies had paid. The bondmen had a powerful complaint. It was that the Code's proposal that interstate administrators be bonded only when a family member or a creditor demanded, was without known parallel in the statutes of the

United States, England, and Canada. We had two sources for a counter argument. First, to keep a big sub-committee of the ABA's Property Section occupied the previous year, we had circulated an elaborate questionnaire among lawyers from all parts of the country that included some pretty pointed questions about the cost and utility of probate bonds. The responses were not surprising, but extremely useful. I remember particularly the response from one Chicagoan who, in answering a question about his experience with recoveries on probate bonds, said that in all of his years of practice, he had seen no claim made on a bond, let alone a recovery. He added that he had questioned all of the lawyers in his rather large firm, and none had ever been involved in a claim on a bond. Indeed, the respondent said that he could find only one lawyer of many he had talked to who had even heard of a probate loss that produced a bond claim. This questionnaire also told us that the cost for the same bond in the 50 states ranged from a low of $10.00 to over $100.00, and that probate bond rates had been stable since 1929. We did not succeed in efforts to get the bonding companies to reveal their loss experience. Also, we used the figures from Cleveland to show how interstate estates were usually very small, and how lawyers across the country were unanimous in excusing bond in wills they prepared for affluent clients. The commissioners turned down the AIA appeal.

The officers of the National Conference who planned the Code's progress through the ordeal of line-by-line readings before the Conference worked with skill and intimate knowledge of their group. The principal tactic was repetition. The Uniform Probate Code became an annual agenda item as soon as the Conference approved the project. Before the reporters had their first meeting, small drafts of sections dealing with execution of wills and simultaneous death had been inserted into the summer programs for a few minutes of argument. When a complete draft of a full code was first placed on the Commissioner's desks in Honolulu in 1967, it was the fifth consecutive year in which the Conference had assigned formal time to probate. The process developed familiarity, acceptance, and momentum. The group was fully prepared to take the time necessary at Dallas in 1969 to finish the job.

The Code was approved by a 44 to 4 vote of the states after the commissioners spent three days and one evening in the tedious business of line-by-line reading of the last draft. At every break, the committee huddled to re-write provisions that had been torn up by debate on the floor, and to plan for the next go-round. Before the final vote of approval, a last minute motion to change the label of the code from uniform to model was soundly defeated. We had fought off this move for all of the years of Conference consideration of the Code—principally because in the Conference, the label "model" means that the commissioners are not duty-bound to work for adoption in their states. Worse, once the label "model" is attached, everyone relaxes, and Conference support money disappears. It has come to be an euphemism for ash can. We knew the Code would be "model" rather than uniform in impact, but we could not give up the label "uniform."

. . . Now the struggle for adoptions is under way. The Code's proponents are staying with it via a 10-man editorial committee charged with answering questions and criticisms, furnishing speakers and technical assistance to committees and legislatures in states which become interested. The first battle in each state is to get as broad a group as possible to make the first report. This isn't easy. In West Virginia, the legislative counsel bounced the ball to the state bar which in turn asked its standing probate and trust law committee to look at the Code and report back. The results were predictable and negative. Local committees of existing probate experts, usually older than the average age of all lawyers, are not likely to agree that they must change their ways to the extent called for by the Code. Of course, this isn't the way their report reads. Constitutional doubts, concern over the need for change of long-held principles for determining heirs, and a suggestion that a set of limited amendments that were being proposed to the existing West Virginia Code would do as well, frame the negative report.

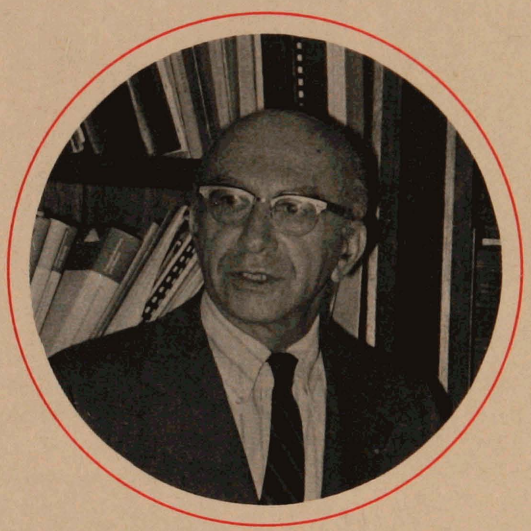
In other states, the Code appears to be faring better. It was introduced in the Idaho legislature recently after a broadly representative committee of the state spent the better part of 1970 looking it over. The signs from Hawaii, Arizona, Alabama, and many other states are quite favorable. Still, it will be years before we'll know its ultimate fate. Some states, like Montana and New Jersey, will go at it piece-meal. This year, Montana legislators will be asked to enact the Code's guardianship article. In New Jersey, a few sections dealing with execution of wills will be pushed forward. In other states, notably New York, Wisconsin, Maryland, and Oregon, recently approved new probate codes mean that local interest in the subject is exhausted, so that nothing more will happen for a long time.

In the meantime, the ABA and the Commissioners will try to stir up interest. A six-article newspaper series about the Code is being released to national newspapers. We are trying to interest labor unions, credit unions, old folks' organizations, and anyone else who will listen, in passing the good word. There's a chance of rousing these non-professional segments of the public, but I doubt that any of them can be counted upon for more than rather bland endorsements. Ultimately, therefore, responsibility for the Code will remain where it should be—squarely with the legal profession which stands to gain in public estimate and to lose nothing except the curse of red tape that shrouds its efforts to provide useful family financial counselors, if it can be nudged forward in support.

The Code sponsors will continue the effort to try to get lawyers to understand that the Code is designed to help the profession, rather than to do it in. But, many lawyers won't read or react until they have to. In the meantime, they usually do not like what they don't know or understand. Progress will be slow, at best.

In the final analysis, the prospects of the Code may turn on the degree to which law teachers decide to use it to teach Wills and probate procedure. Like the old federal rules of civil procedure, the Code offers teachers everywhere a common alternative to the typical local maze of probate statutes and rules. If enough teachers start working with the Code, in 10 or so years, most lawyers will no longer recoil at the words Uniform Probate Code. It took 10 years for UCC to get around—probate will take longer, but old optimists never say die.

# ARMS CONTROL AND INTERNATIONAL LAW



PROF. ERIC STEIN

*(The substantially expanded and documented text of Stein's lectures will be published by the Hague Academy.)*

*BACKGROUND* Professor Eric Stein was appointed Carnegie Endowment lecturer at the 1971 Summer Session of the Hague Academy of International Law. The Academy, located at The Hague, Netherlands, has been the center of instruction in international law for almost half a century. Prof. Stein gave lectures and seminars in the cycle on "Disarmament." Two hundred seventy lawyers from 61 countries were enrolled in the course, including five Michigan Law School students or alumni. Other lecturers in the cycle included Prof. O. V. Bogdanov of Moscow; Mrs. A. Myrdal, the Swedish Minister for Disarmament; A. García Robles, Under-Secretary of State for Foreign Relations, Mexico; and Dean A. S. Fisher of the Georgetown University Law Center, former Director of the United States Arms Control and Disarmament Agency.

In his lectures, Stein provided the first systematic comparative survey of a series of treaties that have resulted from the post-World War II negotiations in the arms control field. These include the Antarctic Treaty of 1959; the partial test ban treaty of 1963; the treaty on outer space, including the moon and other celestial bodies of 1967; the treaty for the prohibition of nuclear weapons in Latin America of 1967; the treaty on the non-proliferation of nuclear weapons of 1968; the treaty prohibiting emplacement of weapons of mass destruction on deep sea-bed of 1971; and the convention prohibiting the production of biological weapons which is about to be completed in Geneva. The current strategic arms limitation talks (SALT) held alternatively in Vienna and Helsinki were also considered. The treaties mentioned above are generally referred to as "partial" or "collateral" measures, as distinguished from the ambitious plans for "general and complete disarmement" which have proved abortive.

Starting with an historical perspective, Stein examined the role of the international law factor and its correlation with modern weapons technology in the complex negotiations, viewed in the broad context of national policies and capabilities. He described the various negotiating forums including the private talks between the two superpowers where basic agreements are first reached, the Geneva Disarmament Committee of 24 members where joint drafts of the superpowers are revised to reflect broader interests, and finally the U.N. General Assembly where the texts are debated and recommended to governments for their approval.

The significance of the legal factor has varied, Stein pointed out, from one measure to another, ranging from a limited role in the Test Ban Treaty, to a crucial role in the treaties concerned with legal regimes for environments that had become only recently accessible by advancement in modern technology: the Antarctic, outer space, and deep sea-bed. Having analyzed the form and content of the agreements, Stein dealt with the many difficult problems of interpretation raised by the lack of definitions and ambiguous language reflecting laborious compromises. He considered on a comparative basis the procedures for verification of compliance, the dispute settlement and enforcement procedures, and finally the provisions concerning duration, modification, and termination.

*CONCLUDING OBSERVATIONS* The sum total of the legal restraints in treaties subsumed under the heading of 'collateral measures' may be summarized as follows:

(a) No essentially military activities shall take place on the Antarctic continent or on the moon and other celestial bodies. This means complete "non-militarization."

(b) No weapons of mass destruction, that is nuclear and chemical-biological weapons, shall be placed in orbit around the earth or otherwise deployed in outer space, or emplaced on the deep sea-bed; nor shall any facilities designed for nuclear weapons be placed on the deep sea-bed.

(c) All nuclear explosions are prohibited except that the present nuclear-weapon states may continue both peaceful explosions and weapons testing under ground, providing the resulting radioactive debris do not cross national frontiers.

(d) There shall be only five nuclear-weapon states (United States, U.S.S.R., United Kingdom, France, Chinese People's Republic). Other states (parties to the Non-Proliferation Treaty) renounce nuclear weapons and peaceful nuclear explosions programs; they will be assisted in the development of their peaceful uses programs by the nuclear-weapon states, and they will accept international safeguards, upon all these programs in order to ensure that no nuclear materials are diverted to weapons purposes. An international agency with powers of on-site inspection will


. . .THE USE OF NUCLEAR WEAPONS IS CONTRARY
TO THE INTERNATIONAL LAW OF WAR. . .

supervise compliance. A regional safeguards system will provide additional assurance that there shall be no nuclear weapons or explosions programs in the Latin American zone.

(e) The use of both chemical and biological methods of warfare is prohibited by international law, although there is disagreement as to whether the prohibition covers the use of "non-lethal" chemical irritants (tear gas), defoliants, and herbicides. Production for other than peaceful (prophylactic) purposes of biological agents, toxins, and related delivery means shall be prohibited and existing stockpiles destroyed within a fixed time period.

(f) All states shall pursue negotiations "in good faith" on further measures to end the arms race, including nuclear disarmement, and on a treaty for general and complete disarmement under strict and effective international control.

Only two of these legal restraints, those in the Test Ban Treaty and in the Biological Weapons Convention, compel states to terminate activities in which they have actually engaged, and only the latter would amount to actual "reduction" of armaments. The Test Ban Treaty became reality only after the superpowers had amassed extensive information for weapons development; the Biological Weapons Convention only after the United States had decided to discard biological weapons as militarily useless, under considerable pressure from domestic and international public opinion.

All the other restraints are in the nature of "preventive disarmament." This means that they are designed to prevent the extension of the arms race to environments and areas where it had never existed. Thus there were no vested military-bureaucratic-industrial interests in on-going activities or systems that had to be overcome. Timing was important since mass allocation of resources and new technology might have made the prohibited military uses in the new environments, particularly in outer space, both feasible and attractive. The restraints are incomplete since significant military uses of outer space and the deep sea-bed remain legitimate. But substantial expenditures were avoided because of the agreed restraints, although both superpowers continue to allocate large amounts to research on weapons systems for outer space and the sea.

Since the West refuses to accept any restraint which can not be monitored for compliance, and because the Soviet Union rejects "intrusive" verification, the range of the acceptable collateral measures is reduced.

The collateral measures do not provide for elimination of nuclear weapons. They do not require renunciation of wartime use of such weapons, or even a limitation of such use to retaliation against nuclear attack. Despite a certain level of consensus (manifested in the General Assembly Declaration of 1961), that the use of nuclear weapons is contrary to the international law of war it can not be said that a general rule outlawing any such use has become part of international law.

The sum total of the restraints accepted in the collateral measures represents a moderate reform of the international system rather than a structural or qualitative change. The international system continues to be based on nation-states most of which continue to rely for their security on national or allied military power. The collateral measures are limited supplements, not alternatives to the reliance on military power.

The superpowers still pursue the deterrence strategy and nuclear weapons remain the crucial component of their strategic deterrent forces. Although the collateral measures may have weakened the great military alliances politically, they have left undisturbed the existing arrangements for stationing nuclear weapons on allied territory. Moreover, the bipolar aspects of the international system have been increased and institutionalized, at least temporarily, for the benefit of the superpowers, in the face of a contrary trend toward polycentrism, that is, the emergence of new centers of political and economic, if not military, influence.

Because of their basically undiminished reliance on national military power, states have been hesitant to accept collateral measures containing significant restrictions on their military activities, particularly in absence of ironclad safeguards against evasion. In order to be able to recapture their freedom of action and get rid of the restrictions, they have insisted on clauses for withdrawal at short term notice and they have resisted compulsory third-party dispute settlement procedures. These features, and more importantly the refusal of China and of certain other "nuclear threshold" states to cooperate, have added to the instability of the measures.

On the other hand, the negotiations on the collateral measures have greatly increased the knowledge of arms control problem and the agreements reached in these negotiations have improved the climate in the international system, particularly between the superpowers. As the two superpowers approach parity in their nuclear deterrents, the perception of their common interest may be broadening. In the current phase, the negotiations have become focused on the really important issues of limitation on the number of nuclear defensive and offensive delivery systems. Moreover, the nature of the arms race has changed somewhat. In the past, decisions with respect to development of new weapons systems were made exclusively on the basis of technological potential and the assumed general intentions of the other side. Today, as the interactive character of the arms race increases, national decision-makers are compelled, in calculating the value of any new system, to take into account also the other side's probable counteraction and the expenditure of funds required for the development or deployment of such a system. Neither side, however, has as yet given these considerations the full weight they deserve. . . .

Arms control negotiations are a complex process which interacts with the bilateral and multilateral relationships among the nation-states generally. After more than a quarter-century of negotiations, it has become increasingly evident that real progress in arms limitations can not be achieved without reduction of tension and political settlements among the major powers and without substantial strengthening of international institutions for the maintenance of peace. In the short-run perspective, since states are not prepared to accept general and complete disarmament, partial collateral measures are likely to remain the standard instrumentalities for arms control consensus.

# LIGHT WORDS

## (AND A FEW SERIOUS ONES)

## ABOUT THE LAW AND THOSE WHO LIVE IT

BY PROFESSOR JOHN W. REED

EXTRACTS FROM A BANQUET SPEECH AT THE 32ND ANNUAL CONFERENCE, SIXTH JUDICIAL CIRCUIT OF THE UNITED STATES, MACKINAC ISLAND, MICH., JULY 2, 1971.

. . . This conference that brings together so many judges provides a great opportunity for us non-judges. We who are lawyers and teachers and lawyers' wives and judges' wives—we have a great time here, judge-watching. We learn much about how the system works, and why. I think, however, that our observations of judicial conduct off the bench should be considered privileged. You judges should not be taxed with our recollections of your days, and nights, at Grand Hotel.

Some of you have been judges for a long, long time, and we honor you for your distinguished careers. I can't help remembering, however, the judge who glared at the drunk before him and said: "You've been popping up before me in this court regularly for over twenty years." The drunk answered: "Can I help it if you don't get promoted?"

. . . I do wish that you judges would be kinder to each other. I think it was someplace in the Fifth Circuit a few years ago that a judge had an operation and his associate judges sent him a get well card—by a vote of five to four. . . .

Not long ago, W. H. Auden was asked for a definition of a minor poet. His answer: "If you take two poems by one man and read them and you can't tell which was written first—that is a minor poet."

What Auden said applies to judges, and to teachers and lawyers—indeed, to all professionals. We ought all to strive constantly to improve on what we have been and what we are. Perhaps you recall Mary's statement during "testimony time" during the midweek prayer meeting: "I ain't what I ought to be, and I ain't what I'm gonna be; but, thank the Lord, I ain't what I was." . . .

From our first day in law school we were brainwashed to believe that all the world's problems could be solved by the application of reason—by the use of rational processes. Logic was king. Like Sergeant Friday, who asked for "the facts, ma'am, just the facts," we thought that given enough information we could solve any problem.

Well, gentlemen—Your Honors—any wife here tonight can tell you it just isn't so. You may recall the complaint of the judge's wife who said, "When I ask my husband if he loves me, he thinks I want information."

Our wives, at least, know that reality goes beyond words. Some of you may remember Ring Lardner's wonderful story title: "Shut up, she explained!" . . .

When we lawyers and judges have gathered a lot of facts and have put them into words in some ostensibly rational order, we are likely to think we have the world by the tail. "Fact-gathering is a comforting occupation; it makes us feel scientific, and the more facts we gather, the more scientific we feel." Fortified by accumulated information, we develop strong views and people praise us for the courage of our convictions. Modesty goes out the window and vanity comes in. I know one judge who—well, I won't say he is egotistical, but he won't take a hot shower because it clouds the mirror!

Perhaps I should say, again with reference to the ladies, that our wives usually have a pretty accurate reading on these matters. A young judge rushed home and said to his wife, "Guess what: I've been named Man-of-the-Year." "Well," said she, "that just shows you what kind of a year it has been."

As I say, we develop strong views, based on facts and reason. People praise us for our wisdom and courage; and we begin to believe them. And there we are, well on the way to becoming stuffy.

Well, I have a confession to make to you. I don't like stuffy people. . . . I don't like people who carry their professional status or their official position like a marshal's baton at all times. I don't enjoy people who won't unbend. Indeed, I almost don't trust them.

As an aside, let me say that my biggest problem with today's college-age young people is not their unesthetic dress, their crude speech, or even their disdain for the conventions under which you and I are accustomed to live. It is the assurance with which they make moral judgments. From the disengaged skepticism of the 'fifties we have moved into a new dogmatism in the 'seventies, a kind of moral arrogance which is "blindness to one's blindness." The moral beliefs of the young are not the problem—most are laudable—but rather their implicit claims to moral authority for holding them. As Arthur Danto has said: "Knowledge is never a matter of merely being right. And the difficulty in taking the right road by accident is that without anything about oneself being different, one could just as easily have taken the wrong road."

The poet John Ciardi has suggested that we lay too much emphasis on conviction as an ultimate value. Show me a man who is not confused (said he) and I'll show you a man who has not been thinking. He will be a man who has not asked enough questions.

Too many of us think that the reason for asking questions is to answer them. May it not be the greater merit of questions that they lead not to answers but to new questions, and the new questions to others yet? A church group recently erected a roadside sign that proclaimed boldly: "Christ is the answer." Some wag then wrote on the sign: "What's the question?"

There will always be more questions than thoughtful men can answer, though the unreflective will always have their fast answers ready. But the larger confusion seems preferable to the smaller certainty. "Whoever is always right and always sure of himself . . . has been deserted by his angels." In Grant Gilmore's words, "Facts give us, not truth, but the illusion of truth and those who know they are right have always done a great deal of harm in the world and always will."

I am reminded of Hardy Dillard's report of a sign outside an English church: "Some churches are rigidly conservative, others rabidly liberal. Ours is the middle road: Open-minded certainty."

Most of us have been taught more convictions than we can live with unless we shut our minds. Someone needs to remind us that "the courage of one's convictions may in reality turn out to be the cowardice of one's mind, the retreat into easy and self-binding certainty." "Where mind is the measure, there must be the courage to face one's confusions whole."

Now, you may well ask: Where does one find the courage and honesty to face his confusions? . . . There is a delightful and familiar passage in the book of Ecclesiastes, in which the preacher says:

"To every thing there is a season, and a time to every purpose under heaven:

A time to be born, and a time to die;
A time to break down, and a time to build up;
A time to weep, and a time to laugh."

And ***there*** is the clue—a balance between seriousness and lightheartedness. Heaven knows there is enough to be serious about. Our young are disaffected. Our poor are in misery. Our cities are bankrupt. Our sense of national purpose has become darkly clouded. We are divided by age, race, religion, and station. It's a deadly dangerous time with perils known and unknown, from the smog over Los Angeles to the fog over Washington, from the UN buildings to remote clearings in Indochina and the deserts of the Near East. . . .

It is hard, I admit, to find a time to laugh. But find it we must, because it is the only path to sanity.

The man who takes himself seriously—in the sense that he is all convictions and no confusions—who is unbending and humorless, lives a caretaker's life. He merely takes care of the responsibilities placed on him, at best. He does not create. Not knowing what the real questions are, he produced answers that are irrelevant. In a sense he lives a half life. He finds time to mourn but not to dance. He finds a time to weep, but he does not find a time to laugh. Laughter opens pathways to the discovering spirit. Like love, it demands response. . . .

None of us can afford to forget that ours is an eternal search for a juster justice, a more lawful law. But while we search for God's own truth and while we seek a better life for all men, we cannot afford to forget that the good life must have balance; there must be a time to laugh as well as a time to weep. Only then will you and I have the courage to face our own confusions.