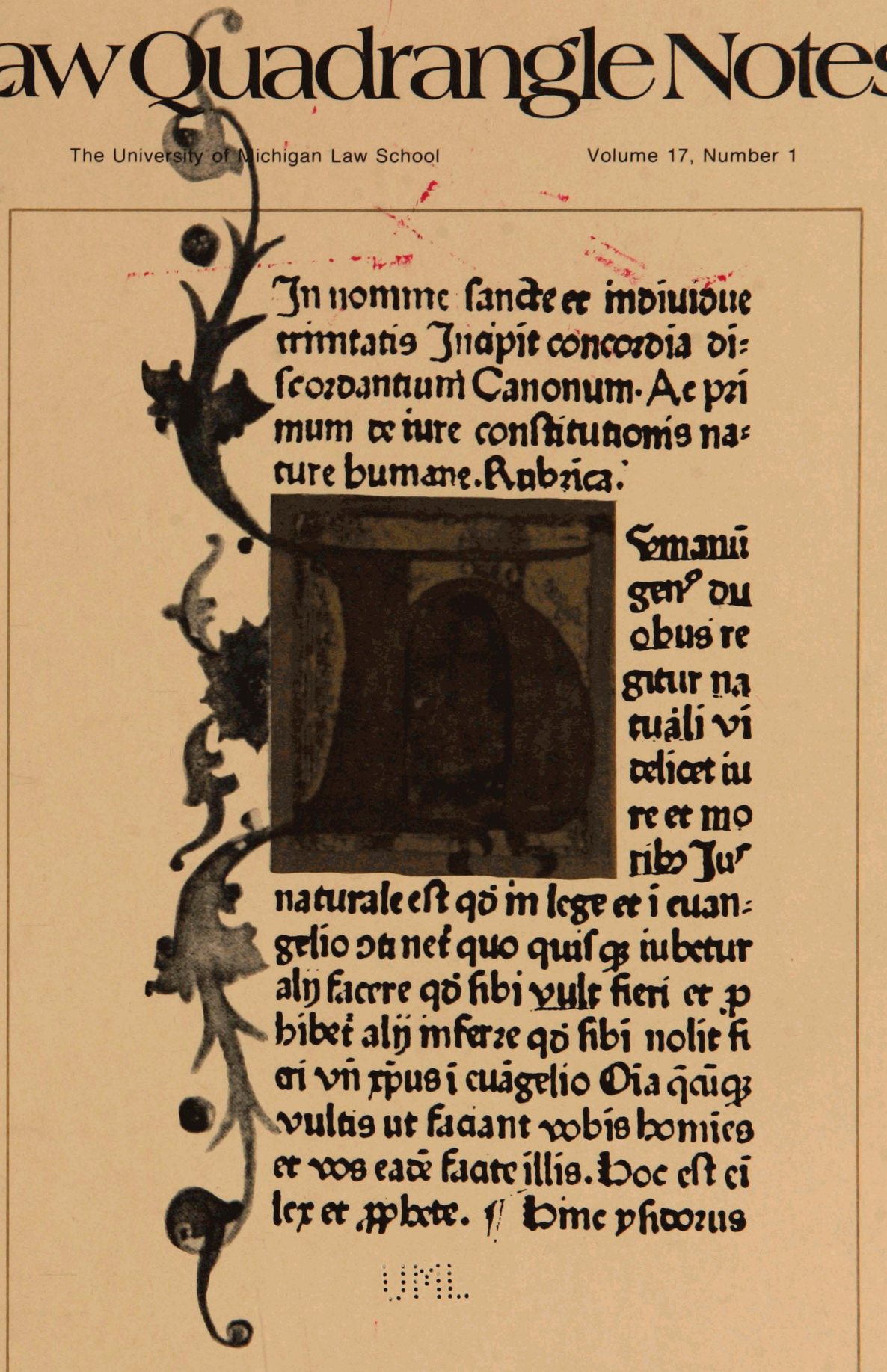
Law Quadrangle Notes

The University of Michigan Law School Volume 17, Number 1



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Cover: This issue of the *Notes* contains two stories about a book—a rather valuable book which now rests in the Michigan Law Library. A copyrighted piece by Prof. Donahue deals with its contents and another story by G. Kenneth Boyce speaks about the book itself. The book is handsome, with several illuminated letters—and the cover is our attempt to illustrate just one of them.

Photo credits: Larry Lau—1 (Stason), 2, 3 (Wellman), 4, 7, 14; Andy Marks—18; Doug Hesseltine—19; Culver Pictures—15; U-M Informations Services—1 (Kauper, Cramton), 3 (McAllister), 5, 9.

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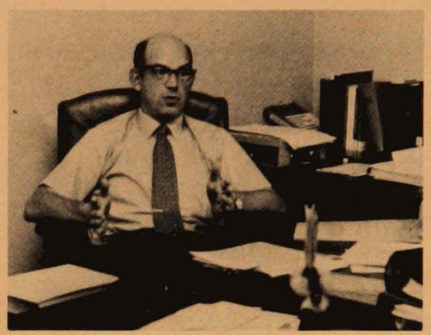
Law Professors Get Federal Positions

Three University of Michigan law professors have been appointed to legal posts in the Nixon Administration.

Prof. Thomas E. Kauper is serving as assistant attorney general in charge of the Justice Department's antitrust division, while Prof. Roger C. Cramton will have completed six months as assistant attorney general in charge of the Office of Legal Counsel.



Thomas E. Kauper

The newest appointee is Prof. John H. Jackson, who was selected as general counsel to the Office of the Special Representative for Trade Negotiations, a post that will figure

Roger C. Cramton

heavily in 1973 trade discussions involving the U.S., the European Common Market, and other countries.

Kauper, a specialist in antitrust and property law and a member of the faculty since 1964, was appointed to the Justice Department post last spring. As antitrust chief, he is responsible for government action on mergers and other business activities. Formerly he served as deputy assistant attorney general in the Office of Legal Counsel under William H. Rehnquist, now a U.S. Supreme Court Justice.

After U-M Law School graduation in 1960, he served as law clerk for Supreme Court Justice Potter Stewart and spent two years with the firm of Sidley & Austin in Chicago.

Prof. Cramton, a member of the faculty since 1961 and an expert in administrative law, began as head of the Justice Department's Office of Legal Counsel in July. His duties included rendering legal opinions to the President on constitutional issues relating to Presidential powers and powers of the executive branch of government.

Prior to the appointment, he served as chairman of the Administrative Conference of the United States, a permanent, independent federal agency concerned with the fairness and effec-

John H. Jackson

tiveness of the government's procedures in dealing with private citizens.

Cramton is a 1950 graduate of Harvard College and received his law degree from the University of Chicago in 1955. He was assistant dean of the University of Chicago Law School before joining the U-M faculty.

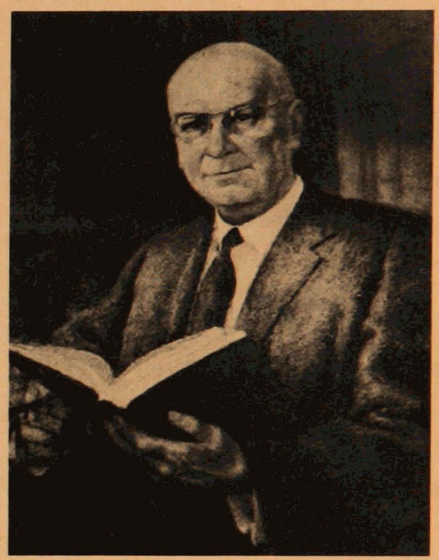
Appointed general counsel to the Office of the Special Representative for Trade Negotiations in December, Prof. Jackson will provide legal counsel on many aspects of U.S. foreign trade policy. In addition, he will assist in gaining congressional support for revised U.S. trade legislation.

A member of the faculty since 1966, Prof. Jackson is a leading authority on the General Agreement on Tariffs and Trade (GATT), the principal international contract controlling trade among non-Communist countries.

Jackson graduated from Princeton University and received his law degree from the U-M in 1959. Prior to joining the U-M faculty, he taught law at the University of California, Berkeley, from 1961-64.

E. Blythe Stason Dies at Age Eighty

E. Blythe Stason, dean emeritus of the University of Michigan Law School and a pioneer in atomic energy law and other areas of administrative law, died in Ann Arbor on April 10 after a brief illness. He was 80.



E. Blythe Stason
(from Law School Painting)

An engineer turned lawyer, Stason first taught electrical engineering at the U-M while completing his legal studies here. He assumed the Law School deanship in 1939 and remained in that post until 1960.

Dean Stason was known as one of the founders of administrative law as a separate branch of legal inquiry, and made many contributions to atomic energy law.

His 1500-page volume, "Atoms and The Law," co-authored with Profs. William J. Pierce and Samuel Estep of the Law School, was one of the first extensive legal studies to deal with such topics as civil liability for radiation damage, state regulation of atomic energy, and administrative practices of the Atomic Energy Commission.

He also helped draft the "Uniform Anatomical Gift Act," which set forth uniform national standards for donating human organs for transplant purposes.

Following his retirement from the deanship, he served as administrator of the American Bar Foundation in Chicago and then taught law for several years at Vanderbilt University. In 1970 he returned to the U-M to pursue scholarly activities at the Law School. That summer he received an honorary Doctor of Laws degree from the University.

Before his death he was in the process of completing a history of the Enrico Fermi nuclear power plant, near Monroe, Mich., and was writing a survey of his years at the Law School.

"E. Blythe Stason was one of the great pivotal figures in legal education at Michigan," said U-M Law Dean Theodore J. St. Antoine. "During his years as dean, the student body increased from 600 to about 900, and the full-time professorial staff nearly doubled from 18 to 33. The Law School was transformed from one dedicated almost exclusively to the teaching of traditional common law courses to one in which much emphasis was placed upon new statutory and administrative law subjects, and in which original research and public service became major responsibilities of faculty members.

"Dean Stason led the way in these developments, becoming himself one of the pioneers and nationally recognized authorities in the emerging field of administrative law. An engineer as well as a lawyer, he was always in the vanguard of those working on the joint problems of law and science.

"As teacher, scholar, administrator, and sympathetic friend, he made a unique contribution to the Law School, the University community, and the nation which will serve as a worthy and enduring memorial."

Dean Stason was the author of books on municipal corporations and administrative tribunals, and was a frequent contributor to professional journals. Under appointment by the Regents, he participated in the revision of Bylaws of the U-M Regents.

He was frequently called upon by state officials to draft important legislation. Among his noteworthy projects were the drafting of legislation for a state atomic energy agency and a review of the administrative structure of tax collection in Michigan.

Born in 1891 in Sioux City, Iowa, Dean Stason received his B.A. degree from the University of Wisconsin in 1913, and in 1916 graduated from the Massachusetts Institute of Technology with a degree in electrical engineering. He received his law degree from the U-M in 1922.

After practicing law for two years in Sioux City, he became a professor of law at the U-M in 1924, and served as provost of the University from 1938-44, concurrent with part of his term as dean of the Law School.

Dean Stason was a member of numerous legal and legislative organizations, including the National Conference of Commissioners on Uniform State Laws, the Attorney General's Committee on Administrative Procedure, and the Michigan Governor's Committee on Constitutional Revision.

He is survived by his widow, Adeline Boaz Stason; two sons, E. Blythe Stason, Jr., of New York City and William B. Stason of Lincoln, Mass.; a sister, Miss Margaret Stason of Pasadena, Calif.; and two grandchildren. A memorial service was held April 12 at the First Presbyterian Church in Ann Arbor, and memorial contributions have been received by the U-M Law School Fund.

Law Faculty Adopts Memorial Resolution

Following are excerpts from a memorial resolution adopted by the U-M law faculty following the death of Dean Emeritus E. Blythe Stason:

To the dean's position Stason brought extraordinary skill and solid judgement in handling of administrative matters. His work evidences the happy union of scientific and legal training. This, coupled with a native skill and an extraordinary endowment of physical energy, enabled him to be immensely productive during the time he served as dean. The Law School was the central object of his attention and he gave it thought, care, and devotion far beyond the line of duty. . . .

The quality and enduring effects of his years as dean of the Law School were well stated by Prof. Russell A. Smith in the appreciative article he wrote at the time of Dean Stason's retirement:

"Without question, his has been the greatest contribution and influence in the 100 year history of the Law School. Under his leadership the Law School has reached a position of real distinction along the law schools of the country."

. . . Characteristic of his concern with the frontiers of the law, Dean Stason in the post-war years devoted a major share of his own research interests to the new problems growing out of atomic energy development. The fusion of scientific and legal skills and training gave him a preeminent position in pin-pointing and analyzing the distinctively new legal questions arising from the peace-time use of atomic energy. . . .

A great vision of the law and its institutions as both a creative and stabilizing social force, a sense of personal dedication to the task of making the law an effective instrument for advancing the common good, a creative mind which yielded imaginative and constructive solutions to emerging problems, and an amazing capacity for marshalling his time and energy in support of large and challenging tasks contributed to make Dean Stason's career an extraordinarily rich and fruitful one. The Law School, the University, the local community, the state, the nation, and the international community have been the beneficiaries of his services as educator, administrator, scholar, public servant, and statesman of the law. . . .

"Law Quadrangle Notes" Receives ACPRA Award

Law Quadrangle Notes has received an award from the American College Public Relations Association (ACPRA) in recognition of the magazine's outstanding design and content.

Quad Notes was one of several magazines chosen for the award out of hundreds of entries. The entries were college and university magazines with external and alumni readership.

The awards were presented at the annual ACPRA convention in Minneapolis, where winning entries were put on display.

Jane Waterson Named Admissions Officer

Jane Waterson

Jane Waterson, a 1972 University of Michigan law graduate, has been named assistant dean and admissions officer at the U-M Law School. She is the first woman in the history of the school to hold such a post.

Dean Theodore J. St. Antoine said, "Miss Waterson combines in a unique way the qualities of good judg-

ment, poise, maturity, and a genuine desire to open the Law School to a variety of groups, including women.

"At a time when women are increasingly attracted to the law as a career, it will be reassuring for them to know that a woman will be in the admissions officer's post."

Although a recent graduate, Miss Waterson has had much practical experience, Dean St. Antoine noted. While a law student, she served on the staff of the Center for Law and Social Policy in Washington, D.C., where she worked on a wide range of clinical cases.

A native of Dowagiac, Mich., Miss Waterson majored in English as an undergraduate at the U-M and was a member of Phi Beta Kappa.

As the Law School's assistant dean, she will be in charge of student recruitment and admissions, financial aids for first year students, and relations with undergraduate institutions. She will also attempt to improve the Law School's methods of student selection.

Miss Waterson succeeds Matthew P. McCauley who stepped down from the post in the spring to enter law practice with an Ann Arbor firm.

Federal Judge Gets Diploma—At Last!

After a distinguished career as lawyer and jurist, a 76-year-old federal judge has finally been awarded a law degree from The University of Michigan, where he received his legal training more than 50 years ago.

Thomas F. McAllister completed his studies at the U-M Law School in 1921 but a technicality concerning residency requirements prevented him from receiving his diploma.

Now a senior circuit judge for the U.S. Court of Appeals (Sixth Circuit) in Grand Rapids, Judge McAllister was listed as a degree recipient in the U-M Law School's Senior Day ceremonies last May.

"The new degree brings back fond memories of the days I studied at the Law School," Judge McAllister said in an interview. "I'm delighted to finally be listed as a degree holder from the Class of 1921, in one of the finest centers for legal education in America."

The fact that Judge McAllister had not been awarded a diploma first came to the attention of U-M officials in 1940. The judge was promptly awarded an honorary bachelor of laws degree that year.

"I didn't pay much attention to the matter at the time," the Grand Rapids judge recalled, "but this year I decided that an honorary degree wasn't sufficient, because it didn't signify that I had completed the necessary course requirements at the Law School."

Acting on a unanimous recommendation of the U-M law faculty, the University Regents agreed to grant Judge McAllister a regular law degree, as of the Class of 1921. The U-M officials also agreed to wave the customary diploma fee of $25.

Judge McAllister (right) and Dean St. Antoine

Dean St. Antoine noted that "at a time when many students are questioning the worth of a higher education, Judge McAllister's request for a law degree serves as a striking example of the value a distinguished lawyer places on the formal recognition of his academic accomplishments."

Judge McAllister interrupted his undergraduate education at the U-M to volunteer for the French Foreign Legion during World War I, but later returned to the U-M to receive his B.A. degree and to enter the Law School in 1919.

He completed his legal education in two years, but a requirement stating that a law student must spend three years at the Law School prevented him from receiving a diploma.

At that time, however, a law diploma was not a prerequisite for taking the state bar exam. Judge McAllister passed the exam in 1921 and went to work for his father's law firm in Grand Rapids.

His career later included eight years as a Michigan Supreme Court justice and service with the U.S. Department of Justice and other legal agencies.

Prof. Wellman Continues Probate Reform Effort

Richard V. Wellman

Just how many states will enact legislation streamlining their probate systems depends largely on the willingness of lawyers, probate judges, and other interest groups to overcome inertia and dispense with a system that has become grossly outmoded.

This is the view of U-M law Prof. Richard V. Wellman, chief draftsman of the Uniform Probate Code (UPC) designed to overcome the costly and time-consuming legal requirements for the passage of property from a deceased person to his heirs.

The product of years of research and legal drafting, the code in 1969 received endorsement from the American Bar Association and the National Conference of Commissioners on Uniform State Laws.

But since then, only two states—Idaho and Alaska—have passed legislation modelled after the code. Wellman notes, however, that more than a half-dozen states—including Michigan, Arizona, Washington, Hawaii, Colorado, New Jersey, and Pennsylvania—have either introduced similar bills in their legislatures or shown "favorable signs of interest."

Wellman predicts there will be a "significant number of enactments" in the next few years. But, he says "it will probably be five to seven years before we can guage the full significance of the code in terms of nationwide legislative reform."

In order to quicken the pace of change, the U-M law professor is currently serving on a national group, known as the Joint Editorial Board for the UPC, which is attempting to promote and explain the code.

Basically, the code represents an attempt to take the settlement of estates out of the hands of the courts, except in cases where creditors or heirs claim they are not receiving their fair share of an inheritance.

Thus, in most instances, the

proposed new system would relieve heirs of small estates of the legal and administrative costs of protracted probate proceedings.

Among the main features of the Code:

—Estates would be settled by an administrator, usually an heir or widow, who would obtain authority from a probate clerk.

—Revised rules of "intestacy," which identify heirs when there is no will, would be sufficient to make wills unnecessary for most persons of modest means and average family circumstances.

—The proposed rules eliminate the necessity of intervention by a probate or other judge, unless a creditor or heir challenges the settlement.

—The code does away with such traditional and cumbersome practices as the posting of bond (to insure fidelity of an administrator), the appraisal of an estate by court-appointed officials and the mandatory filing of inventories. It also minimizes requirements for published probate notices.

—The code reforms laws relating to guardianship and powers of attorney in ways that would relieve elderly persons of fears about the management of their money and property in the event of incompetency.

—The proposed reforms offer the promise of uniformity of estate laws so that persons owning property in several states, or moving from one state to another, will face less complex estate planning problems.

Wellman notes that major concepts of the code have been approved by bar association committees, and that many probate judges have participated in research and drafting of the proposed reforms.

But he also acknowledges that the code has, in many states, received stiff opposition from various groups which have benefited from the traditional system—most notably, the probate judges, probate staff, appraisers, bondsmen, and representatives of legal advertising publications.

Wellman also notes difficulties in getting lawyers interested in the code. "Many lawyers," he says, "won't read or react to it until they have to. In the meantime, they usually do not like what they don't know or understand."

Another reason for the sluggish response, according to the professor, is that enactment of the code would have some effect on the make-up of a state's judicial system.

Wellman observes, for example, that the reforms would decrease the need for high-salaried probate judges to supervise routine estate settlements. But this does not mean the probate judges could not be put to good use. "In Michigan and other states, a whole cadre of judges could become available for general judicial duty, particularly in the overworked circuit courts," Wellman says.

Wellman suggests that consumer groups and law professors could be influential in pressing for the code's acceptance.

"In the final analysis," he says, "the prospects for early enactment of the code may turn on the degree to which interested consumer groups, particularly those representing elderly persons, bring pressure on state legislators for probate reform."

And, he adds, "if enough law teachers start working with the code in their classes, in 10 years or so, most lawyers will no longer recoil at the words 'Uniform Probate Code.'"

John A. Mason Holds Financial Aids Post

John A. Mason

About half the students at The University of Michigan Law School receive some form of financial assistance, and it's up to John A. Mason to help them find it.

Mason assumed the post of assistant to the dean and financial aids officer at the Law School last spring, after serving for nearly two years as a counselor in the U-M Office of Financial Aids. He succeeds Ronald M. Battles, who is now a senior administrative associate with the U-M Opportunity Program for disadvantaged students.

Mason is responsible for helping Law School upperclassmen obtain loans and scholarships from various Law School funds and from sources outside the School. He also works closely with Admissions Officer Jane Waterson in coordinating financial aids for incoming freshmen.

Mason notes that some 490 students received financial assistance from Law School funds in 1972, and that an additional 179 received aid from outside sources.

A major problem encountered by needy students, according to Mason, is "learning how to establish a realistic budget and making sure they won't be overburdened with loans upon graduation."

Mason is no newcomer to the education field. He taught for five years in elementary and secondary schools in Illinois and Kentucky, and is presently working on a graduate degree in higher education at the U-M.

A native of Lexington, Ky., he is a graduate of Kentucky State College and did graduate work at the University of Kentucky.

Nancy Krieger Named Placement Director

Nancy Krieger

Nancy Krieger is the new placement director at the University of Michigan Law School.

A native of Ann Arbor, Mrs. Krieger received a BA degree in communications from Michigan State University and has worked for the past three years as a coordinator in the U-M Office of Career Planning and Placement.

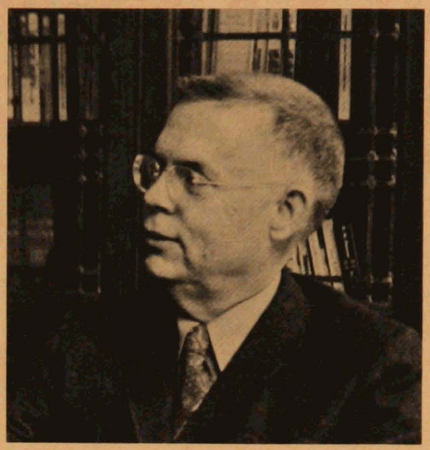
She succeeds Ann Ransford, who resigned from the Law School post this summer after six years of service.

Allen Named to School's Sunderland Professorship

University of Michigan law Prof. Francis A. Allen, formerly U-M law dean, has been named to the Edson R. Sunderland Professorship at the Law School.

Allen succeeds Russell A. Smith, who held the professorship from 1968 until his retirement from the Law School in June. Prof. Allen will hold the distinguished post for a five-year term.

The professorship was established in 1968 with a gift from Thomas Sunderland, the son of the late Prof. Sunderland who served on the U-M law faculty from 1901-44.



Francis A. Allen

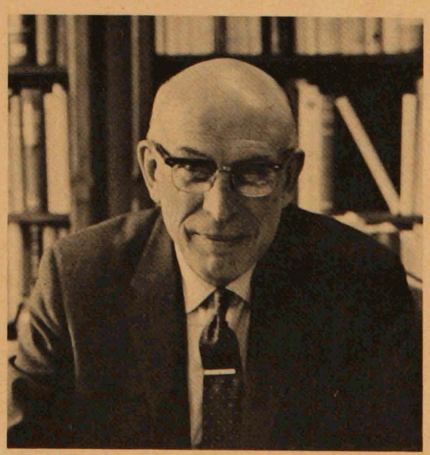
In nominating Prof. Allen to the post, U-M law Dean Theodore J. St. Antoine said:

"Prof. Allen is one of the leading figures in American legal education, especially noted for his work in the field of criminal law.... He has become known as one of those rare combinations of profound scholar and sparkling classroom teacher."

Prof. Allen was dean of the U-M Law School from 1966-71. Formerly he was a member of the law faculties of Northwestern University, Harvard University, and the University of Chicago.

He has contributed numerous articles on criminal justice and constitutional law to legal and social work journals, and has written and edited two books of legal analysis.

Paul Kauper Reappointed To Butzel Professorship



Paul G. Kauper

Paul G. Kauper, an authority on constitutional law and a member of the University of Michigan faculty since 1936, has been reappointed Henry M. Butzel Professor of Law.

Prof. Kauper has held the Butzel Professorship since 1965. The distinguished post is named for an 1892 U-M law graduate, and the annual stipend it carries is derived from income of the endowment Butzel willed to the University.

In recommending the appointment to the U-M Board of Regents, U-M law Dean Theodore J. St. Antoine noted that Prof. Kauper is one of the Law School's most distinguished scholars and teachers.

The recipient of many other awards, Prof. Kauper in 1970 was named Henry Russel Lecturer, which is the highest honor the U-M can bestow on a senior faculty member. In 1959 he received the Distinguished Faculty Achievement Award for his "brilliance in scholarship, mastery of the art of teaching and generosity in public service."

U-M Publishing Units Receive ABA Awards

Two University of Michigan publishing units have received awards from the American Bar Association (ABA) for outstanding contributions "to public understanding of the American system of law and justice."

The U-M Press received an ABA Gavel Award for its book, *The Assault on Privacy: Computers, Data Banks and Dossiers*. The book, written by law Prof. Arthur R. Miller, formerly of the U-M and now with Harvard University, examines the impact of computer information technology on personal privacy and other constitutional freedoms.

Research News, a monthly publication of the U-M Office of Research Administration, received an ABA Certificate of Merit for an article by Mrs. Jeanne W. Halpern entitled "How Does the Law Change?" Mrs. Halpern's article, focusing on the U-M Law School, discusses the role of legal research in public affairs.

A total of 15 ABA Gavel Awards and 29 Certificates of Merit were awarded to the nation's information and entertainment media, including newspapers, television and radio stations, motion picture studios, and book publishers. The winners were selected from 149 entries. The awards were presented at the ABA's 95th annual meeting Aug. 16 in San Francisco.

U-M Places Second In Law Office Competition

Students from the University of Michigan Law School placed second out of 24 teams competing in a national Mock Law Office Competition, which tested students' ability to conduct legal transactions in a law office setting.

California Western University won the final round of the competition, which was held in the spring at the University of Southern California. Other schools competing in the finals, in addition to the U-M, were the universities of Oregon, North Carolina and Houston, and Washington University.

Representing the U-M were Robert Nash of Kalamazoo, Mich., and David Miller of Ann Arbor. The pair negotiated cases involving the death of a shareholder in a small corporation.

U-M law Prof. James J. White, faculty adviser to the Michigan team for the past two years, notes that the competition is designed to stimulate student thinking and learning about law office skills.

Sponsor of the annual event is the Emil Brown Fund, a legal foundation in Los Angeles.

St. Antoine, Reed Urge Postgraduate Law Training

Two members of the University of Michigan law faculty have urged the state bar association to consider a program of formalized postgraduate education which would allow lawyers to become recognized specialists in certain legal fields.

Theodore J. St. Antoine, dean of the U-M Law School, and U-M law Prof. John W. Reed, director of the Institute of Continuing Legal Education (ICLE), made this recommendation at a recent Law School alumni breakfast in Detroit, held in conjunction with the annual meeting of the State Bar of Michigan.

Dean St. Antoine stressed that one goal of postgraduate legal education is to produce "obsolescence-proof lawyers" who are able to adapt to changes in the field.

But presently, he said, many lawyers oppose no-fault insurance legislation, probate reform, and other proposed legal changes because they fear their areas of expertise will become outdated.

The U-M law dean also noted that in a time of increasing complexity in the legal field, specialization in such areas as tax, probate, and labor law has already become common among

lawyers. But a system has not yet been established, said Dean St. Antoine, which sets forth specific qualifications for these specialists.

Dean St. Antoine said one way for the state bar to "come to grips with the problem" is through a formalized licensing procedure, under which lawyers specializing in certain areas would be required to take postgraduate courses.

The dean added that continuing education would also be valuable for "generalists," who often find it beneficial to learn of changes in various aspects of the law.

Prof. Reed said that if law specialties are recognized by the bar, continuing education organizations such as ICLE would be the likely vehicle to provide the necessary postgraduate training.

A joint unit of the state bar and the U-M and Wayne State University law schools, ICLE currently offers courses for lawyers in Michigan and other states on a voluntary basis.

Prof. Reed suggested that legal specialties could be recognized through a formalized licensing system or through certificates which would be presented to lawyers finishing postgraduate courses.

He noted that a pilot program of this type is now being established in California, but was vetoed by the Michigan bar association. The American Bar Association has yet to support the program nationally, Reed said.

Five Law Students Receive Fellowships

Five University of Michigan law graduates will continue their legal training here and abroad this year with fellowship aid from the federal government and foreign sponsors.

Carolyn Hansen, a 1972 graduate, will study the European Common Market for one year with the Free University of Brussels in Belgium. She is the recipient of an exchange fellowship sponsored by the U-M and the University of Brussels. Miss Hansen served as president of the student International Law Society while a law student.

Robert Kass, a 1972 graduate, has received a travel grant in the Fulbright competition to supplement a fellowship from the University of Geneva in Switzerland. He will study the legal problems of international arms control and disarmament. At the U-M, Kass served as liaison with the student division of the American Bar Association's Section of International and Comparative Law.

Stephen Hart, a 1971 graduate, will study and work as a research assistant for one year at the Max Planck Institute for Foreign and International Patent, Copyright, and Competition Laws at Munich, Germany. His study abroad will be sponsored by the West German government.

Two U-M law graduates have received one-year community law fellowships from the Reginald-Heber-Smith Fund, a program sponsored by the U.S. Office of Economic Opportunity.

Glenetta Miller will work in a legal aid clinic in Little Rock, Ark., to expand research on community legal problems. At the Law School, Miss Miller had been active in the Black Law Students' Alliance and the Legal Aid Society.

David Michaels has been assigned to a legal aid office in Chattanooga, Tenn. A former VISTA volunteer, Michaels was an intern last summer with the Law Student Civil Rights Research Council.

33 Graduates Accept Judicial Clerkships

Clerkships to state and federal courts have been accepted by 33 University of Michigan law graduates from the class of 1972.

Seven of the graduates have secured clerkships with judges sitting in federal circuit courts. Eleven will clerk for other federal judges, and 15 will clerk for state court judges.

The graduates, and the judges they will serve under, are as follows:

William J. Abraham, Jr.
Clerk for The Honorable Edward A. Tamm
United States Circuit Court—
Washington, D.C. Circuit

David N. Adair, Jr.
Clerk to The Honorable John Oliver
United States District Court—
Western District
Kansas City, Missouri

John P. Apol
Clerk for The Honorable Charles Joiner
United States District Court—
Eastern District
Detroit, Michigan

Edward J. Cox, Jr.
Clerk for The Honorable Robert M. Duncan
Military Court of Appeals
Washington, D.C.

Edward D. Eliasberg, Jr.
Clerk for The Honorable Philip Pratt
United States District Court—
Eastern District of Michigan
Detroit, Michigan

David M. FitzGerald
Clerk for The Honorable Charles Levin
Michigan Court of Appeals
Detroit, Michigan

Michael I. Garcia
Clerk for The Honorable Frank James
Court of Appeals—Division I
State of Washington
Seattle, Washington

James H. Geary
Clerk for The Honorable W. Wallace Kent
United State Court of Appeals—
Sixth Circuit
Kalamazoo, Michigan

William D. Grand
Clerk for The Honorable Nelson K. Mintz
Superior Court—Appellate Division
Newark, New Jersey

Jeffrey J. Greenbaum
Clerk for The Honorable Frederick B. Lacey
United States District Court
Newark, New Jersey

Charles A. Hillestad
Clerk for The Honorable Paul Hodges
Colorado Supreme Court
Denver, Colorado

Henry L. Jones, Jr.
Clerk for The Honorable Thomas Eisele
United States District Court
Little Rock, Arkansas

Creighton F. Klute
Clerk for The Honorable Cornelia G. Kennedy
United States District Court—
Eastern District
Detroit, Michigan

Kenneth A. Kraus
Clerk for The Honorable Robert B. Krupansky
United States District Court—
Northern District
Cleveland, Ohio

Nielsen V. Lewis
Clerk for The Honorable Ward J. Herbert
Superior Court of New Jersey—
Chancery Division
Newark, New Jersey

Patrick B. McCauley
Clerk for The Honorable G. Mennen Williams
Michigan Supreme Court
Lansing, Michigan

Michael McQuigan
Clerk for The Honorable T. G. Kavanaugh
Michigan Supreme Court
Detroit, Michigan

Philip F. Mattia
Clerk for The Honorable James R. Guiliano
Superior Court—Essex County
Newark, New Jersey

James M. Moore
Clerk for The Honorable John Feikens
United States District Court—
Eastern District
Detroit, Michigan

Iraline Peniston
Clerk for The Honorable Eugene Hamilton
Superior Court—
Washington, D.C.

Terrence G. Perris
Clerk for The Honorable J. Edward Lumbard
United States Court of Appeals—
Second Circuit
New York, New York

John B. Pinney
Clerk for The Honorable Philip Pratt
United States District Court—
Eastern District
Detroit, Michigan

James M. Ridella
Clerk for The Honorable Timothy C. Quinn
Michigan Court of Appeals
Lansing, Michigan

John E. Rosczyk
Clerk for The Honorable Marvin J. Salmon
Thirtieth Judicial Circuit
Lansing, Michigan

John G. Salmon
Clerk for The Honorable Robert B. Lee
Supreme Court of Colorado
Denver, Colorado

Frank M. Schuck III
Clerk for The Honorable T. John Lesinski
Michigan Court of Appeals
Detroit, Michigan

Harvey J. Shulman
Clerk for The Honorable Frank M. Coffin
United States Court of Appeals—
First Circuit
Portland, Maine

Peter Thompson
Clerk for The Honorable Miles W. Lord
United States District Court
Minneapolis, Minnesota

Winship A. Todd, Jr.
Clerk for The Honorable W. Wallace Kent
United States Court of Appeals—
Sixth Circuit
Kalamazoo, Michigan

Bruce Vinokour
Clerk for The Minnesota Supreme Court
St. Paul, Minnesota

Richard L. Virtue
Clerk for The Honorable Donnan Stephenson
Supreme Court of New Mexico
Santa Fe, New Mexico

Joseph Zengerle
Clerk for The Honorable Carl McGowan
United States Court of Appeals—
Washington, D.C. Circuit

Vernon I. Zvoleff
Clerk for The Honorable Noel Fox
United States District Court—
Western District
Grand Rapids, Michigan

Recent Law School Events

Daniel J. Boorstin

Noted historian Daniel J. Boorstin, director of the National Museum of History and Technology of the Smithsonian Institution, delivered a five-part William W. Cook lecture series at The University of Michigan last spring, under the sponsorship of the Law School. In his lectures, on the general theme "Frontiers of Ignorance," Boorstin observed, among other things, that American scientific enterprise has become increasingly "popularized" and "result-oriented," and thus has lost much of the autonomy of pure scientific inquiry. Boorstin also suggested that the "bigness" of many of our scientific efforts—such as the American space program and the creation of supersonic transports and the atom bomb—has left the ordinary citizen with little control over the direction of events.

Letters

To the Editor:

In the last *Law Quad* article I wrote before resigning as assistant dean to enter private law practice, I put out a call for amusing anecdotes. Judge Robert S. Gilbert of Saginaw, Michigan, rose to the occasion and passed along the following tale:

"Prof. Durfee taught a course called 'Equity' to freshmen law students when I was in school. The professor was an unusual man to say the least. He was in his last year of active teaching when this story was going around the law school. It is reputed to be true.

"The professor had some likes and dislikes, and one of his strongest dislikes was discussing bluebooks and grades with his students.

"A student from Detroit drove to Ann Arbor after having received his Equity grade. He went to Professor Durfee's office in Hutchins Hall, and the professor came to the door. 'Professor Durfee, I have come to discuss my bluebook with you.' said the student. The professor's reply was 'I am sorry young man but Professor Durfee is in California,' and with that the office door was closed. The student was stunned and headed back for Detroit.

"He was however, a determined young man, and he decided that he could not let the matter rest. The next day he drove back to Ann Arbor, knocked again on the professor's door, and again said, 'I have come to discuss my bluebook with you professor.' The reply was, 'I told you yesterday that Professor Durfee is in California.' The student expected this and said, 'That is why I have come all the way out here to California to see you.'

"Professor Durfee stroked his whiskers, looked perplexed, and replied, 'This is really too bad—I would certainly like to discuss your bluebook with you after such a long trip, but the fact is that it is impossible to do this; for you see, I left your bluebook back in my office in Ann Arbor.' "

I have heard minor variations on this story, but feel that Judge Gilbert's version should be accepted as official because it is so well told and because he had the pizazz to send it in. Surely this is not the only funny thing to have happened in the Law School's hundred plus years, however. Keep those anecdotes coming.

Matthew P. McCauley
Ann Arbor

* * * * *

To the Editor:

This letter is to bring to your attention an omission on page 2 of the *Law Quadrangle Notes*, Volume 16, No. 2, Winter, 1972, wherein you omit the State of Alaska from the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit.

Having enjoyed the Law Quadrangle Notes since graduation in 1962, I believe you would want to be informed of errors.

Victor D. Carlson
Judge, Superior Court
State of Alaska
First Judicial District
Juneau

SOME THOUGHTS ON MICHIGAN'S COPY OF THE ARGENTORATENE GRATIAN

by
Professor Charles Donahue, Jr.

The five hundredth birthday of anything calls for a celebration. Certainly the five hundredth anniversary of a book as extraordinary as the Michigan Law Library's copy of the Argentoratene edition (so called from the Latin name of the city of Strassbourg where the book was printed) of Gratian's *Decretum* calls for some sort of memorial. Kenneth Boyce's piece, which follows this one, tells something about the book itself, where it came from and how it got to Michigan. This piece deals with its contents.

In the Middle Ages the canon law was more than a series of rules about the internal governance of the Church. In England, for example, the canon law courts had jurisdiction over marriage, wills, libel and slander, many minor criminal offenses (much of what later came to be "morals" offenses), church property (largely), the crimes of clerics (basically anyone who was literate), and, in some areas, contract matters as well. This extensive jurisdiction was administered through a system of local and diocesan courts from which appeals could be taken to the two archbishops at York and Canterbury and, ultimately, to the Pope in Rome.

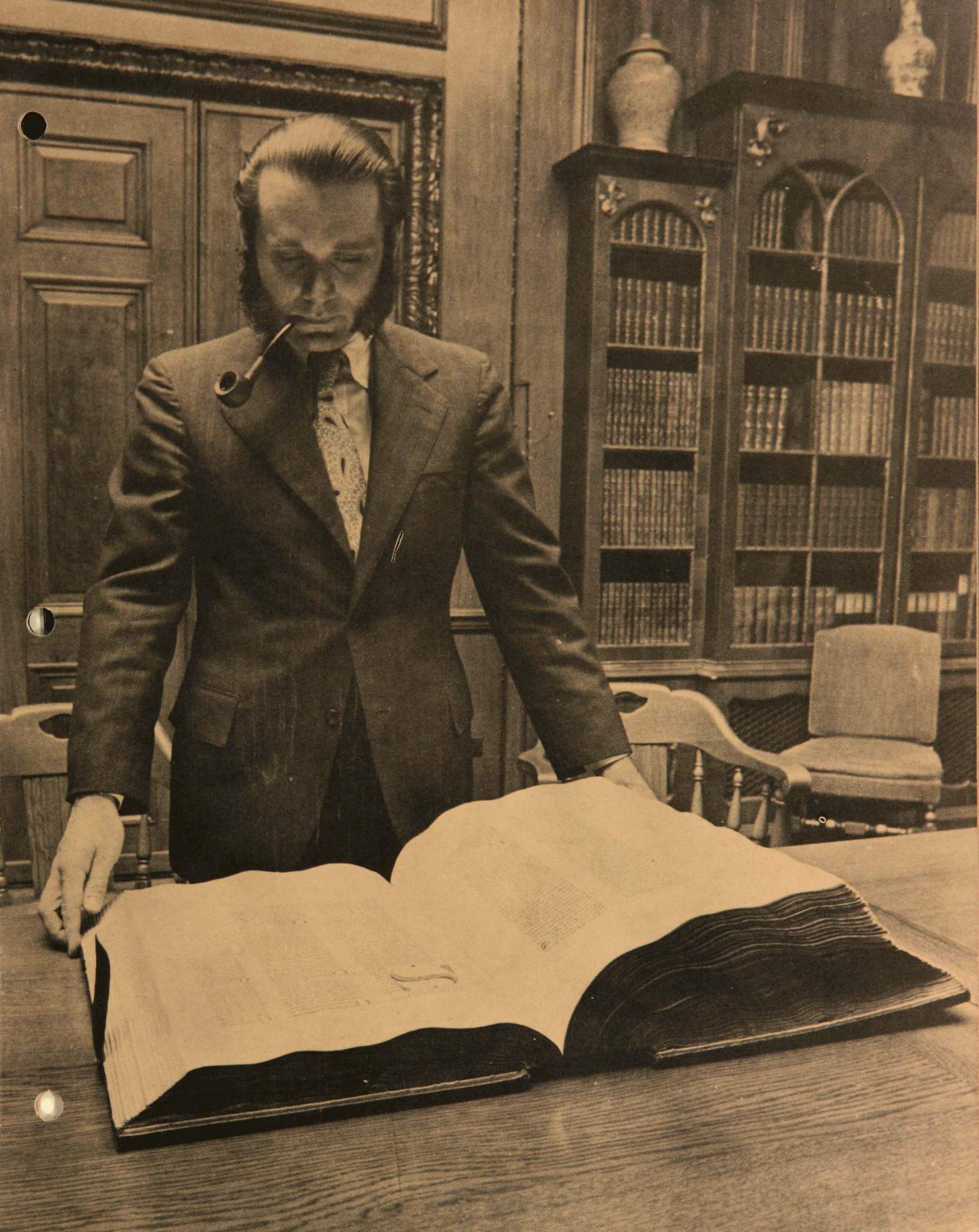
To get a full picture of the workings of law in medieval society, it is plain that we cannot ignore the canon law. The canon law is interesting as well because of its early use of the basic techniques of legal reasoning, techniques which we still employ today. Further, the canon law of the Middle Ages provides an excellent paradigm for comparative study. It is sufficiently different from our own law to give us distance, and yet it is clearly within the Western legal tradition, so that there are no insuperable barriers of access to it.

Most of the law which the canon courts were applying in the Middle Ages may be found in the *Corpus Juris Canonici*, a massive work of which Gratian's *Decretum* constitutes the first and largest part. The *Corpus* is available in a two-volume nineteenth century edition by Aemilius Friedberg. Friedberg's edition, however, does not contain the glosses (of which more later). For a glossed edition of the *Corpus* one must have reference to an early printed edition like the Argentoratene *Decretum*. Thus, in addition to providing one with a sense of union with the past, the Michigan *Decretum* also has material in it which cannot be found in modern printed editions.

But just what is Gratian's *Decretum* and what is in it? There are annoying gaps in our knowledge about the *Decretum* (as there are about many medieval works). Even its title is unsure, some manuscripts calling it the *Decretum*, others the *Concordance of Discordant Canons*, a title which aptly describes the nature and methodology of the work.

We know practically nothing about the life of Gratian, the author of the *Decretum*. His birth date is unknown. He became a Camaldolese monk (a variety of Benedictine) of the monastery of Saints Nabor and Felix in Bologna. He taught law at the monastery, and it is generally thought that he finished writing his *Decretum* around the year 1140. He probably died before 1159, the year in which his pupil, Rolando Bandinelli, became Pope Alexander III. That Gratian became bishop of Chiusi after he wrote the *Decretum* is probably legendary. That he was the half-brother of Peter Lombard and Petrus Comestor is certainly legendary, although this latter legend does indicate the significance of these three figures in twelfth century intellectual history—Gratian for law, Lombard for theology, and Comestor for ecclesiastical history.

Gratian's connection with Bologna is also significant, for it was in Bologna, approximately two generations before Gratian's time, that the *Codex Florentinus*, a manuscript of the *Digest* of Justinian's *Corpus Juris Civilis* had been discovered. (The Michigan Law Library has a handsome photographic copy of the *Codex Florentinus*.) The *Digest* is a huge collection of excerpts of the writings of the Roman jurists, principally from the se-



cond and third centuries A.D. Its rediscovery in the eleventh century after it had been virtually lost to the Western world for some four hundred years produced an extraordinary revival of legal studies at Bologna.

The Romanists of Bologna analyzed the Roman texts by the use of glosses. Because of the lack of books medieval teachers read aloud the text of the work about which they were lecturing to their students. They then commented to the students on the text. As this commentary became solidified, the teachers wrote it down in the margin of the text. These marginalia were called "glosses." Other teachers read these glosses and added glosses of their own, until many folios of medieval manuscripts contained more marginal commentary than text.

The content of the glosses varies widely. Some contain simple cross-references to other passages on the same issue. Many, however, are more complex, seeking to define the underlying rationale of the text, to distinguish it from other inconsistent texts, or to elaborate on the rule of the text in the light of specific factual circumstances. By such devices the academic Roman law developed until the raw mass of texts in the *Digest* had been sufficiently rationalized that the book could be employed in the decisions of actual litigated cases or in the resolution of specific governmental problems.

Canon law study lagged behind the study of Roman law, at least in part because there was no definitive text of canon law like the *Digest*. The texts of canon law were scattered in the legislation of the councils of the Church, the decretal (opinion) letters of the popes, and the writings of the fathers and the theologians of the Church from almost the time of Christ into the eleventh century. Collections existed, perhaps the most famous being those of Burchard of Worms (c. 1010) and Ivo of Chatres (c. 1095), but little effort had been made to rationalize the texts, to reconcile their inconsistencies, and to elucidate their underlying rationale.

Gratian's *Decretum*, then, served two functions. It gathered together in one place a comprehensive collection of canon law texts arranged by subject matter in the manner of the *Digest*, and it provided a commentary in the manner of the glossators of Roman law which sought to distinguish and reconcile the texts, and elucidate the basic principles at stake in those texts. Gratian's method was to collect a group of canons on a topic, indicating by rubrics at the beginning what he thought the principle of each canon was. Each text or group of texts he followed with material of his own—the so-called *dicta Gratiani*, the sayings of Gratian. It is in these *dicta* that Gratian's chief contribution is to be found, for it is in these *dicta* that we generally find Gratian's reconciliation of inconsistent canons and his version of the underlying principles.

The following material from Case 27 of the *Decretum* (translated by the author) illustrates well Gratian's method. It is taken from the second and longest book of the *Decretum* which is organized around thirty-six hypothetical cases. Gratian sorts these cases into issues posed in question form which he then seeks to answer with his authorities and *dicta*.

Case 27

A certain man who has taken the vow of chastity espouses a wife; she, renouncing the previous match, goes to another and marries him; he seeks after her to whom he was previously espoused.

1. The first question is whether there can be marriage between those who have taken a vow of chastity?

2. Second, is it permitted for one who is espoused to leave the one to whom he is espoused and marry another?

[The consideration of the first question is omitted.]

. . . The second question follows in which we seek to discover whether a woman espoused to one man can renounce the previous match and transfer her vows to another. First, we shall see whether they are married, second whether they can depart from each other. That they are married is easily shown by the definition of marriage and by the authority of many writers. Matrimony or nuptials is the matrimonial joining of man and woman maintaining indivisible intimacy. Moreover, there was a marriage between this couple which required indivisible intimacy, for there was between them consent which is the efficient cause of matrimony. According to Isadore of Seville [d. c. 636], "consent makes matrimony."

[Canon 1 is omitted.]

Canon 2. *Pope Nicholas* [I (d. 867)]*in canon 3 of the Bulgarian Council:* Consent alone conforming to law among the parties suffices when the question is whether parties are married. If that alone is lacking, anything else, even if accompanied by intercourse, is frustrated.

* * * * * * *

Gratian: They are also proved by authority to be married. For Ambrose [d. 397] says in his book on virgins:

Canon 5: When the marriage begins, the name marriage is taken. The deflowering of virginity does not make a marriage, but the conjugal pact. Therefore, there is marriage when a virgin is joined to a man, not when she is known by the man.

* * * * * *

. . . Gratian: By all these authorities these people [i.e., the ones in the hypothetical case] are shown to be married, but Augustine [d. 430] testifies to the contrary saying:

Canon 16: There is no doubt that a woman who has not had intercourse is not a married woman.

[The succeeding canons deal with the question of married parties taking up the religious life. While the canons are by no means consistent, Gratian resolves the differences in the following dictum:]

Gratian: Since it does married parties no good to offer continence to God without each other's consent, and since, (although a husband does not have power over his body but his wife has it) nonetheless, espoused women may choose the monastic life and espoused men may with benefit take up the better life without seeking the consent of their espoused, it is apparent that there is no marriage between espoused parties.

[There follows material concerning impotence, also not completely consistent, which Gratian resolves thusly:]

Gratian: See, the impossibility of intercourse, if it arises after intercourse has occurred between the parties, does not dissolve the marriage, but if it arises before intercourse has occurred, then the woman is free to marry another. Whence it is apparent that the parties were not married otherwise they would not be permitted to part from each other except on account of fornication, and if they parted, they would be obliged to remain unmarried or to reconcile themselves with each other.

* * * * * *

Canon 34: *From the Council of Toledo* [c. 790]: It was decreed by the council that if a man took another's espoused by force, he should be punished with public penance and should remain without hope of marriage. If the woman did not consent to the same crime, she should not be denied the privilege of marrying another. But if after these things had happened the guilty parties had presumed to marry each other, both should be anathematized.

. . . Gratian: It appears therefore, that she [the woman in the hypothetical case] is not a married woman, since the privilege of marrying another is not denied to her who is espoused to a living man. How, therefore, according to Ambrose and the other fathers, are those espoused [*sponsae*] called married [*conjuges*] when by all these arguments they have just been shown not to be married? But it ought to be known that marriage is begun by espousal but is perfected by intercourse. For this reason there is marriage between those espoused, but it is marriage initiate

[*conjugium initiatum*]; between those who have had intercourse there is valid marriage perfected [*conjugium ratum*]. When Ambrose says:

Canon 35: When marriage is begun, the name of marriage is taken, not when the woman is carnally known by the man.

Gratian: See, in espousal marriage is initiated not perfected.

* * * * * *

Canon 45: *Gregory* [d. 604] *in his homily on the Gospel "when it was late on that day:"* Thus He permitted the disciple to remain in doubt, just as before His birth He wished Mary to have an espoused who nonetheless did not attain his nuptials. For it came about that the doubting apostle became a living witness of the true resurrection just as the man who was espoused of His mother became a guardian of her inviolate virginity.

Gratian: From all these things it appears that those espoused are called married by a hope of future things not by the fact of present things. How, therefore, can they be called married from the time of the first oath of espousal, if that joining which they assert at the espousal may be denied? But, from the first oath of espousal, it may be called marriage, not because there is a marriage in the espousal, but because of the faith which they owe another because of the espousal that they afterwards will become married. In the same way sins are said to be forgiven by faith not because they are forgiven by faith before baptism but because faith is the cause by which we are cleansed from our sins in baptism. For this reason John Chrysostom [d. 407] says "Intercourse does not make matrimony, but will." and Ambrose says "Not the deflowering of virginity but the conjugal pact makes matrimony." This is to be understood as: intercourse without the will to contract matrimony and the deflowering of virginity without conjugal pact does not make matrimony, but the will to contract matrimony and the conjugal pact make it so that a woman in the deflowering of her virginity or in intercourse is said to be married to a man or to celebrate the nuptials. Thus, Pope Siricius [d. 399] calls the departing of espoused persons a marriage separation. But such parting is not a violation of a present marriage but a future one, one hoped for because of espousal. Thus, even the devil was said to have fallen from beatitude not that the beatitude which he then had but that beatitude for which he was made. Thus also, a man who by the merit of his life and his learning is elected as a priest or bishop, if in the meantime he should deserve to be deprived of his election, is said to lose the priestly or episcopal oil, not that which he has received, but that which he was elected to have. Therefore, by this authority, an espousal cannot be called a marriage.

[Having decided that espousals are not marriages, Gratian finally comes to the question of whether an espoused can renounce her espoused and marry another. Clearly he can find no authority for the proposition other than what he has already brought to bear. He does, however, distinguish a number of canons. The first two canons deal with the problem of the espoused who simply goes off and has intercourse with another. These compel the return of the espoused to her original espoused.]

Gratian: But it is one thing to renounce a previous marriage contract and marry another; it is quite another thing to engage in illicit debauchery.

[Gratian still isn't over the hurdle. He has to deal with a canon of Pope Siricius which forbade espoused parties from going to another marriage.]

Gratian: But by this authority Siricius prohibits a woman from going to second vows who has been led to her espoused's house and with her espoused has been veiled and blessed. The divorce of such partners violated the blessing which the priest has placed on those about to be married. And therefore the marriage we are talking about in the instant case is not forbidden by this authority.

The solution which Gratian arrived at in the foregoing passage was not to last. His own pupil, Alexander III, abandoned the distinction between *conjugium initiatum* and *conjugium ratum* as the means of reconciling the authorities and of determining when a marriage is formed and substituted in its stead a distinction between present and future consent, the former making a valid and normally indissoluble marriage, the latter merely a contract to marry which could be called off if the other party gave cause. Later still, the Council of Trent (1563) required as a condition of validity that the present consent be exchanged in the presence of a priest after the promulgation of banns.

Gratian's contribution remained significant, however. He was the first one to assemble the multifarious authorities on espousals and to recognize their inconsistency. He realized too that what lay at the heart of these authorities was the question of consent, and he developed a means for resolving the authorities which took into account the diverse contexts in which they arose: the question of entering the religious life, the theological discussion of the marriage of the Virgin, the problem of impotency, and finally the simple question of one espoused who wishes to marry someone else.

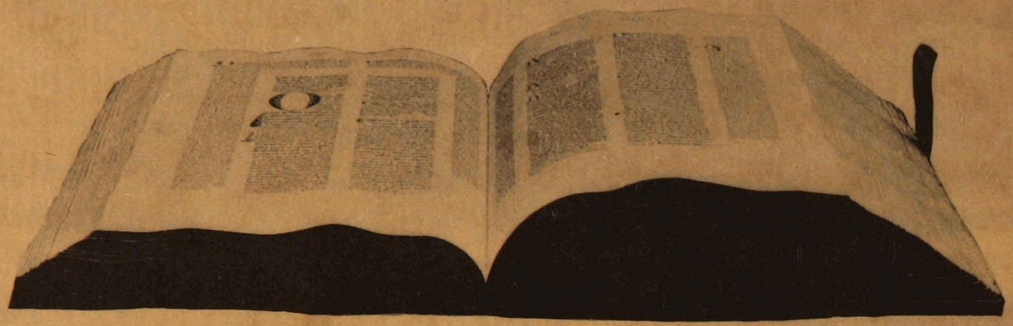
Gratian's mammoth work needed digestion, clarification, and refinement. The School at Bologna had written glosses on the text of the *Digest*; it was only natural that glosses should be written on the *Decretum* both at Bologna and elsewhere. Johannes Teutonicus (John the German) probably in the second decade of the thirteenth century wrote a gloss on the *Decretum* that was so comprehensive and authoritative that it became known as the *glossa ordinaria*, the ordinary gloss. This gloss is included in the Michigan Argentoratene edition of Gratian.

Canon law in the Middle Ages was not, however, confined to the academies. Medieval bishops and popes were called upon to decide cases and the opinions, particularly of the latter, were collected in much the same way as we today collect and publish the opinions of judges. The most famous collection of decretal letters, as these opinions were called, was promulgated by Pope Gregory IX in 1234. It contained excerpts, rather than the full text of the letters, arranged according to subject matter by the scholar Raymond of Penifort. By and large only opinions after Gratian's time were included, and the size and scope of the work gives a good idea of how enormously productive of decretal letters the papal chancery was during the 100 year period between Gratian and Gregory.

After the publication of the *Decretals of Gregory IX*, a new edition of the *Decretum* and its *glossa ordinaria* was obviously needed, since much in the *Decretum* has been changed, if subtly, by this vast outpouring of papal opinion-writing. The new edition was undertaken by Bartholomaeus Brixiensis (Bartholomew of Brescia) who added his own glosses, usually signed "Bart. Brix.," to those of Johannes Teutonicus. Bartholomaeus' glosses are also included in the Argentoratene edition of Gratian.

Thus, the Michigan Argentoratene *Decretum* contains a significant portion of the achievement of what is known as the classical period of canon law. In the later Middle Ages the popes continued to write decretals and the academics continued to write commentary, although this commentary, as time went on, tended to be in treatise rather than gloss form. I think it is fair to say, however, that the later Middle Ages never equalled in sheer intellectual achievement the work of the period from Gratian to Gregory IX. It is not until the Council of Trent in the mid-sixteenth century that major developments were again forthcoming, but by this time the canon law of Rome had ceased to be the law of all Christians, though it remained of vital importance to Roman Catholics.

A CLOSE LOOK AT A "CRADLE BOOK"



by
G. Kenneth Boyce,
former Chief Catalogue Librarian
University of Michigan Law Library

Gratian's *Decretum* had been a standard work for nearly three centuries before the invention of printing, and hundreds of copies had been laboriously made in manuscript to serve the needs of lawyers, scholars, and all who were concerned with canon law. Because of its popularity, the *Decretum* was among the first books issued by Europe's earliest printing presses. It was printed for the first time in the city of Strassburg by Heinrich Eggestein in 1471. That edition must have sold well, for Eggestein issued the same text again the following year. The University of Michigan Law Library copy is of this second printing, dated 1472.

This date, it should be observed, is less than twenty years after the publication of the first book printed in Europe, the "Gutenberg" bible. Our Gratian is therefore a true representative of the "incunabula," those productions of the infancy of printing, between the years c. 1455 and 1500, which are appropriately called "cradle books."

Both Eggestein editions of Gratian are very rare books. Five copies of the 1471 editio princeps are recorded as being now in North America (the State of Michigan can boast possession of one of these copies also, at the Detroit Institute of Arts), only four of the 1472 edition. Of the latter, in addition to the Michigan Law Library copy, there is one each at the Library of Congress, The Pierpont Morgan Library in New York City, and McGill University in Montreal. Thirty-eight other copies are recorded as being in libraries in Europe.

Though so few copies of the two Strassburg editions of Gratian are known today, it does not follow that all editions which were printed during the incunabula period are similarly rare. Since the *Decretum* was popular with readers and book purchasers of the fifteenth century, publishers kept reissuing it, with the result that within thirty years after Eggestein printed his text in 1471 and 1472, no fewer than forty-six other editions appeared.

To modern eyes accustomed to books of a more manageable size, the 1472 Gratian seems a ponderous tome, which indeed it is. A large folio measuring nearly 19 inches in height, it is made up of 459 leaves of paper printed on both sides. Much of the weight and bulk of the volume is due to the heavy handmade, all-rag paper which Eggestein used. Though cumbersome, that paper is very durable and remains today in almost as good condition as when it was made 500 years ago. The binding is original, apparently placed on the volume shortly after the date of printing (but more of the binding later).

A notable feature of the 1472 Gratian is the lack of a title page—a feature that was common to practically all books of so early a date, for the title page was not used (with rare exceptions) until later. The information which we are accustomed to find today on a title page appeared in a paragraph which the printer added at the end of the text, known as the "colophon." The colophon on the final leaf of the 1472 Gratian runs (transcription is literal, except that the abbreviations have been expanded; capitalization is modernized):

> Presens Gratiani Decretum unacum apparatu Domini Johannis Theuthonici atque additionibus Bartholomaei Brixiensis in suis distinctionibus causis et consecrationibus bene visum et correctum, artificiosa adinventione imprimendi absque ulla calami exaratione sic effigiatum et ad laudem Omnipotentis Dei est consumatum per venerabilem virum Heinricum Eggesteyn Artium Liberalium Magistrum civem inclite civitatis Argentinae anno Domini MCCCClxxii.

This may be freely rendered:

> The present *Decretum* of Gratian, with the commentary of Johann the German [Semeca] and additions of Bartholomew of Brescia, well revised and corrected in [its several sections], has been produced by the ingenious invention of printing without a single stroke of the pen and brought to completion to the praise of Almighty God by the worthy man Heinrich Eggestein, Master of Liberal Arts, citizen of the renowned city of Strassburg in the year of Our Lord 1472.

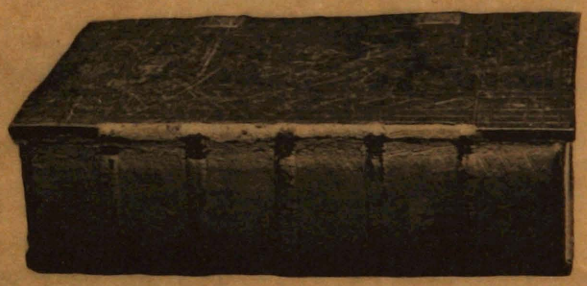
It is interesting to note that although Eggestein had already printed four or five texts before the Gratian, he was still so close to the beginnings of printing that he had not ceased to marvel at the new-found ability to reproduce an entire book "without a single stroke of the pen" thanks to the "ingenious invention of printing."

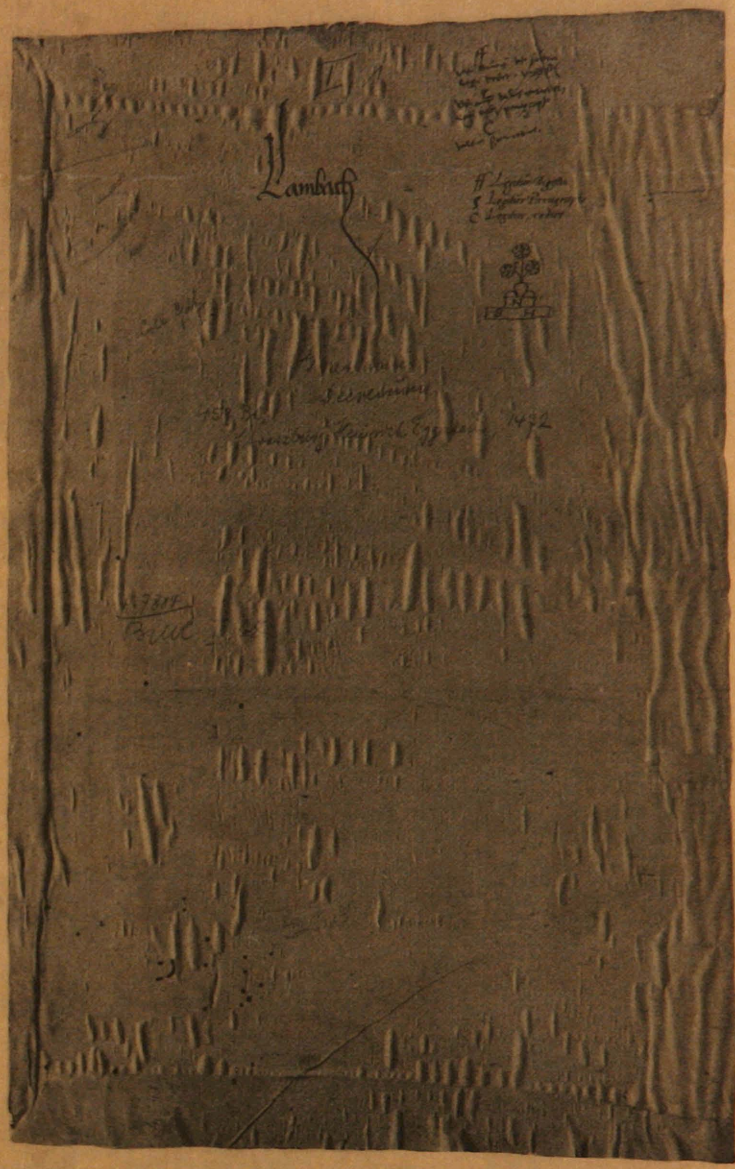
The Michigan copy still has the original binding which was apparently placed on it sometime in the latter part of the fifteenth century. Such a Heavy volume required a stout binding which this certainly is: dark brown leather drawn over heavy wooden boards and fitted with two stiff thongs with brass clasps to keep the volume closed. The surface of the leather is decorated on both covers and on the spine with a simple design stamped in blind, composed of panels formed by multiple fillets and filled in with individual stamps many times repeated, an ivy-like leaf and a rosette being the commonest of the stamps used. The craftsmanship of the binding is good, that of the ornamentation is second-rate.

There are now no flyleaves to protect the first and last printed pages from the covers. It is probable that there were originally flyleaves but they have been removed in modern times. Discarded sheets of vellum or paper containing print or manuscript were commonly utilized for this purpose in early bindings and, though they were considered waste paper when the binding was made, they frequently have a special value today as specimens of early printing or for the texts which are preserved on them. Such flyleaves have frequently been removed by the booksellers through whose hands the early volumes have passed.

The white lining papers on the inside of both covers are certainly original. That on the reverse of the front cover bears a mark of previous ownership of the volume, the name "Lambach" written in ink in tall Gothic letters, probably contemporary with the binding itself. Beside it, in quite a different hand and ink, are jottings explanatory of the symbols commonly used in the text of the *Decretum*, and below is a rough drawing of three flowers arising from a base of two steps on which appear the letters: N S H. The significance of the drawing has not been determined. The only other markings are recent notations in pencil, in a German hand, recording bibliographical references of interest to booksellers.

The name "Lambach" tells us that the volume once formed part of the library of the Benedictine abbey of





that name in Upper Austria, on whose shelves it apparently rested from the fifteenth to the present century. Lambach Abbey, founded in the eleventh century, exerted considerable cultural influence in medieval times. It was the home of a notable school of manuscript illumination and its library, already rich in manuscripts, rapidly added fine specimens of printed books from the fifteenth century onwards. For a considerable period the abbey also operated its own printing press.

Lambach was fortunate in escaping the secularization which ended the cultural as well as the religious functions of most of the monasteries of central Europe. The abbey has survived and is active today, but as an institution, still under the supervision of the Benedictine Order, charged with furthering Austrian education. The library thrives and its present book collection is reported as about 50,000 volumes, of which 159 are incunabula, 873 manuscripts. These figures reflect the change in emphasis from historical and ecclesiastical scholarship to more utilitarian subjects. For, early in the present century, Lambach library was said to possess, among its 35,-000 volumes, 340 incunabula and 7,000 manuscripts, and the incunabula were prized as a particularly rich collection. But financial distress forced the abbey to sell many of its treasures in the period following World War I with the result that about half its incunabula and by far the greatest portion of its manuscripts were dispersed. Lambach's loss has meant a gain for many other libraries of the world, offering them the opportunity of acquiring for themselves rarities which had enriched the Austrian abbey for centuries. One of those rarities is the Michigan Law Library's 1472 Gratian. The Library acquired the volume in 1953 from the New York bookseller, Israel Perlstein, who reports that he had it from an unspecified book dealer in Prague. Of its journey from Lambach to Prague we know nothing. We do know that at least one other such volume has found its way from the shelves at Lambach to the United States, for Harvard Law Library possesses the Lambach copy of a later incunable edition of Gratian's *Decretum*, that printed at Basel in 1482.

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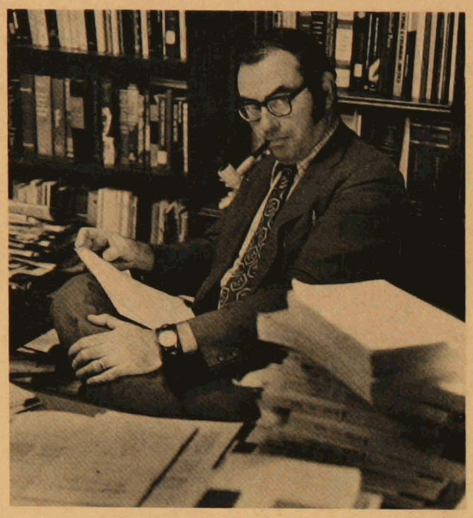
THE DEATH PENALTY CASES

by Professor Yale Kamisar



[Shortly after the "death penalty" cases were decided, the editors of *Newsday* asked Professor Kamisar to comment on the decision and to give some notion of how it had been received by constitutional and criminal law experts generally. Condensed versions of the following article appeared in *Newsday* on July 21, 1972 and in the *Los Angeles Times* on July 30.]

Fifty years ago Clarence Darrow, probably the greatest criminal defense lawyer in American history and a leading opponent of capital punishment, observed:

> The question of capital punishment has been the subject of endless discussion and will probably never be settled so long as men believe in punishment. Some states have abolished and then reinstated it; some have enjoyed capital punishment for long periods of time and finally prohibited the use of it. The reasons why it cannot be settled are plain. There is first of all no agreement as to the objects of punishment. Next there is no way to determine the results of punishment. If the object is assumed, it is a matter of conjecture as to what will be most likely to bring the result. If it could be shown that any form of punishment would bring the immediate result, it would be impossible to show its indirect result although indirect results are as certain as direct ones. Even if all of this could be clearly proven, the world would be no nearer the solution. Questions of this sort, or perhaps of any sort, are not settled by reason; they are settled by prejudices and sentiments or by emotion. When they are settled they do not stay settled, for the emotions change as new stimuli are applied to the machine.

At the time Darrow made these observations—a few years after the first World War—four abolitionist states had just reinstituted capital punishment and the abolition movement had lost its momentum in other states. But the movement did achieve one lasting success—the almost complete elimination of *mandatory* capital punishments. The result of this humanitarian effort, however, was to make the imposition of the death penalty exceedingly rare, haphazard and capricious—and lead to the Supreme Court's June, 1972 decision in *Furman v. Georgia* where the five holdovers from the Warren Court (Brennan, Douglas, Marshall, Stewart, and White) ruled, over the bitter dissents of the four Nixon appointees (Burger, Blackman, Powell, and Rehnquist) that the current discretionary, random, arbitrary administration of the death penalty constitutes "cruel and unusual" punishment in violation of the Eighth and Fourteenth Amendments.

At the time he made it, Darrow's prediction that the question of capital punishment "will probably never be settled" appeared well-founded. That it would someday be settled by the Supreme Court of the United States seemed inconceivable. The high Court had already sanctioned death by shooting and by electrocution. Indeed, 25 years later, in the infamous *Resweber* case, where Louisiana had botched its first attempt to execute petitioner, it allowed the state to strap the man in the electric chair a second time and throw the switch again, thus sustaining what the dissenting Justices called the horror of "death by installments." And in the 1950's it twice legitimated the execution of men whose sanity was in doubt, leaving the question of sanity to the private judgment of a governor and a warden. Thus, even the Justices who voted to strike down the death penalty in June, 1972, conceded, as they had to, that the Court had long assumed that death was a constitutionally permissible punishment.

How, then, explain the June decision? Although each member of the majority wrote a separate opinion, the salient and pervasive factor was the sharp decline in the infliction of capital punishment. The decline began in the 1940's, but accelerated dramatically in the 1960's (several years *before* the appellate court policy of issuing stays in death cases began). Executions had averaged 128 per year in the 1940's and 72 per year in the following decade, but dropped to 21 in 1963, 15 in 1964, a mere 7 in 1965, and just one in 1966. Since 1965 there have been only 10 executions—a figure smaller than the *monthly* average during the 1930-50 period—and in the last five years there have been no executions at all.

The reduction of the infliction of the death penalty to a trickle of cases aggravated and made more visible the arbitrariness of the process. Justice Brennan compared it to "a lottery system"; Justice Stewart to "being struck by lightning." And the Justice whose vote to strike down the death penalty last month most surprised Court watchers, Justice White, could perceive "no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not."

As Professor Michael Meltsner of the Columbia Law School pointed out, Justice White, generally regarded as the most conservative Warren Court holdover, indicated that he had been "radicalized" by his reading of the records and general closeness to the problem. For, in a rare "personal touch," he based his conclusion that capital punishment has been arbitrarily inflicted "on 10

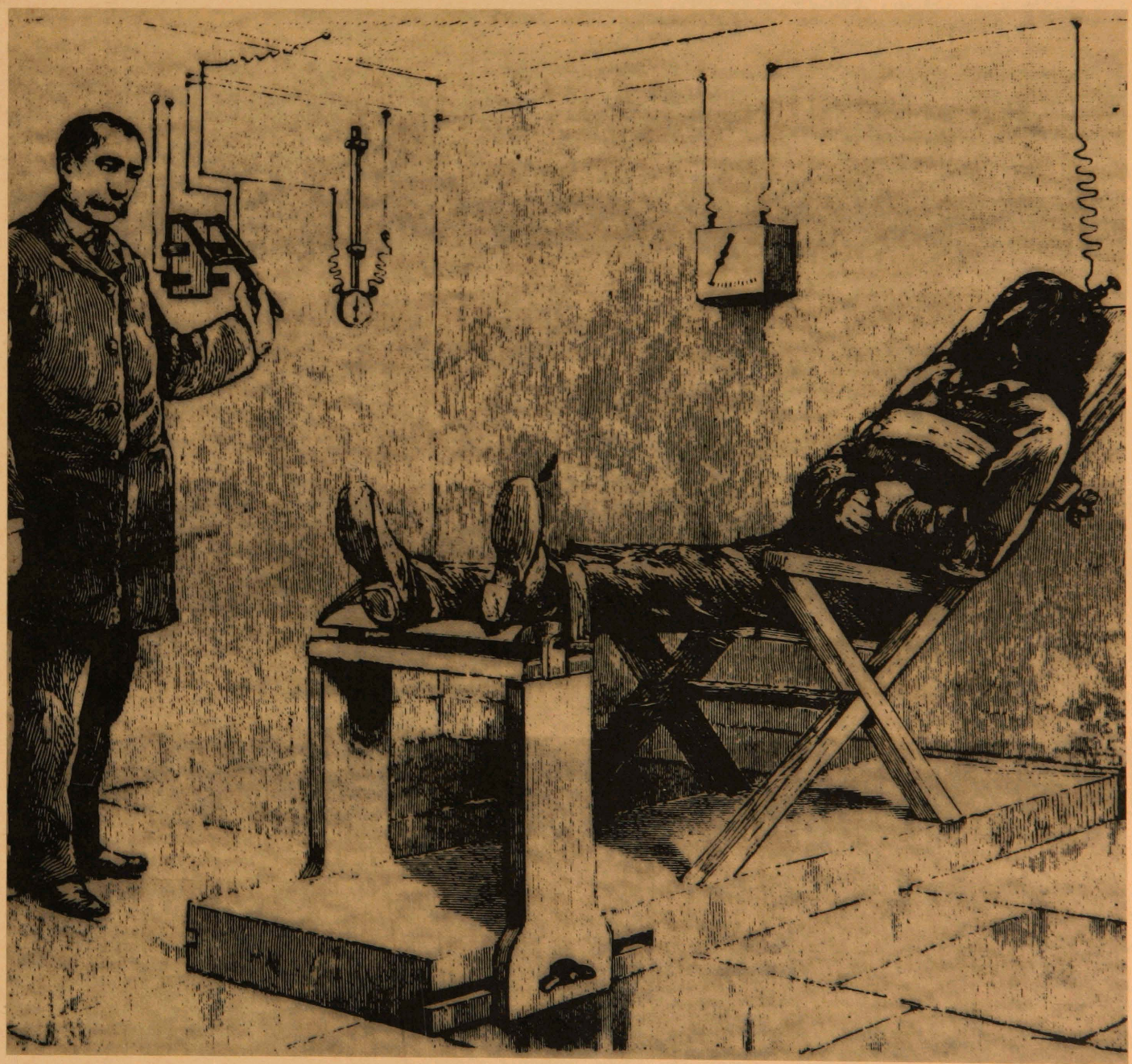
years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases in which death is the authorized penalty."

The sharp decline in and the present virtual nonexistence of the infliction of capital punishment also enabled the majority to make short shrift of the contention that death is a necessary punishment because it deters the commission of certain crimes more effectively than could any term of imprisonment. There was no need to appraise this argument in the abstract because, as Justice Brennan noted, "proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed," but under our current system "the risk of death is remote and improbable." Similarly, Justice White observed that deterrence is not served "where the death penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others."

The almost complete discontinuance of capital punishment in the past decade was also considered strong evidence that the punishment has been largely rejected by contemporary society. True, conceded Justice Brennan, many legislatures (some 40) authorize the death penalty and opinion polls and referendum votes indicate that substantial segments of the public continue to support it, at least in the abstract, but "the objective indicator of society's view of an unusually severe punishment is what society does with it" and society's rejection of the punishment "could hardly be more complete without becoming absolute."

But the almost complete disuse of capital punishment probably influenced the Court to a much greater degree than is apparent even from reading the opinions. Members of the Court have repeatedly pointed out that a law may be ineffective, unenforceable, unwise, or even downright silly but still not in violation of the U.S. Constitution. The average man, however, rarely draws such distinctions. Because a decision "legitimating"

The First Electric Chair — Culver Pictures



capital punishment would be interpreted by many as "approving" it, the result would undoubtedly have been a stifling of the current movement for reform in non-judicial forums and the lending of the Court's prestige to those forces favoring the continuation of the death penalty. In short, as former Justice Arthur Goldberg and Professor Alan Dershowitz of Harvard maintained in an influential article published on the eve of the capital punishment case, to give the imprimatur of legitimacy to the now broadly challenged death penalty "would defeat the very reason behind judicial restraint—encouragement of decision by the other branches of government."

Moreover, more was at stake than the fate of the three petitioners directly involved in the cases. Hanging in the balance were the lives of almost 600 condemned men and women who had been piling up in "death row" for years and years. I strongly share the view of Harvard criminologist Lloyd Ohlin that "the people administering the death penalty desperately wanted the Court to get them 'off the hook' and were transmitting clear signals to this effect"; a "legitimation" of the punishment after a slowdown and then "moratorium" on its use "might produce a 'bloodbath' of horrible proportions and brutalizing effect."

How, in the face of a massive bloodletting, could four members of the Court vote to uphold the death penalty? Recalling his days as a law clerk to Chief Justice Earl Warren in the late 1950's and the care and intensity with which he and his fellow clerks studied the "death cases"—the files "marked with a big pink sticker"—Professor Jesse Choper of the University of California (Berkeley) commented: "It is much easier to talk about 'judicial self-restraint' and 'deferrence to the legislative judgment,' as did the dissenters last month, when you *know* you *don't* have the votes to send 500 or 600 people to death."

Although all the constitutional and criminal law experts interviewed personally rejoiced at the Court's result, they gave it a mixed reception as a matter of constitutional pronouncement. Professor Christopher Stone of the University of Southern California Law Center noted that the decision would be perceived by the public not as a "legal" but a "moral judgment," one which citizens and legislators feel well qualified to make for themselves; and that unlike legislative malapportionment, for example, "there was no built-in lock against the public working out this problem for itself." But Professor Meltsner, one of the lawyers for petitioners in the death cases, maintained that you "cannot expect political resistance to an evil which is not presented to the public as something which really occurs"; "the Justices were much closer to the problem than the average citizen and they were well aware that in reality there were no alternatives to judicial action. The Court, at least a majority, fully understood that it was literally 'a court of last resort.' "

Imprisonment, pointed out Professor Sanford Kadish of the University of California (Berkeley), "although obviously less awesome than the punishment of death, is nevertheless a devastating experience. Yet the decision who escapes with a fine or suspended sentence or probation or who goes to prison (and for how long) is probably made as 'wantonly' and as 'freakishly' [using Justice Stewart's words] as the imposition of the death penalty. Should we, therefore, move in the direction of mandatory prison terms?"

Professor Kadish also found it "ironic," if not "bizarre," that if the death penalty could still be constitutionally administered at all, it would have to be done "without the individualized discrimination which one would have thought to be the requirement of a sensitive, civilized society." Both Kadish and Columbia Law School's Richard Uviller thought it somewhat "grotesque" that if a *much higher percentage* of "eligible" criminals had been executed the death penalty might have withstood constitutional challenge.

All of the professors interviewed (as did even the dissenters in the death case) agreed with the general propositions advanced by the majority that the "cruel and unusual" punishment clause could not be confined to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment, that the clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" and may acquire new meaning "as public opinion becomes enlightened by a humane justice." But a number of the experts were troubled, as were the dissenters, by the suddenness of the majority's perception of great changes in public attitudes and standards of decency since decisions of only a few years ago; since for example, 1958, when Chief Justice Warren, speaking for four members of the Court, observed by way of dictum: "The death penalty has been employed throughout our history, and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Most legislatures still authorize death as the punishment for certain crimes and new federal death penalty legislation dealing with assassination and aircraft piracy has been overwhelmingly adopted. Juries and judges continue to impose the death penalty and according to polls and referenda, large segments of the public continue to support it. How, in the face of all this, could members of the majority conclude that "this punishment has been almost totally rejected by contemporary society" (Justice Brennan), that "it is morally unacceptable" to the American people "at this time in their history" (Justice Marshall)?

In this regard, one section of Justice Marshall's opinion caught heavy fire. He reasoned that if the average American *knew more about* capital punishment (for example that it is no more effective a deterrent than life imprisonment, that it is imposed discriminatorily against certain identifiable classes of people, that it may actually stimulate criminal activity, that it wreaks havoc with our entire criminal justice system) *then* that American would find it "shocking to his conscience and sense of justice."

Kadish's response was typical of the reaction of several professors: "This is the classic ploy of any philosopher-king; we know what's best for you; if you knew what we know you would agree with us. Justice Marshall's approach represents a kind of elitism in moral judgment not easily reconcilable with the egalitarian tendencies manifested in other decisions of the Court." But Kadish's colleague, Jesse Choper, disagreed: "The Justices have always been accused of being philosopher-kings, but that's what judicial appraisals of constitutionality are all about." He thought Justice Marshall had made a "valiant effort" to deal with the extraordinarily difficult question of public opinion—and, "what's more, I think he's right. Just imagine the widespread revulsion if the public had to witness executions!"

Stanford Law School's Herbert Packer sides with Choper: "The Supreme Court *is* an elitist institution. I hope it always will be." But I think there is much force in the retort of U.C.L.A. Law School's Gary Schwartz: "The Court is entitled to disregard public opinion when it interprets certain counter-majoritarian provisions of the Constitution such as the command of the First Amendment that 'Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech,' but public standards of decency and morality are inherent in the 'cruel and unusual' punishment clause. The Court, therefore, cannot disregard public

opinion in this instance—or 'reconstruct' it in the speculative fashion Justice Marshall did."

Despite the foregoing, the decision in the death penalty cases, frankly, came as quite a surprise to me and, so far as I can tell, to most students of the Court. A main reason was that only a year earlier, in *McGautha v. California*, the late Justice Harlan—speaking for a majority which *included* Justices Stewart and White—had emphatically rejected the contention that permitting a jury to impose or withhold the death penalty as it sees fit without any guidelines or standards violates due process. "In light of history, experience, and the present limitations of human knowledge," declared the *McGautha* Court, "we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The states are entitled to assume that [even without any governing standards] jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision. . . ."

If, as seems to be the case, the justices, especially Justices Stewart and White, were reluctant to enter into the long-standing and hotly contested capital punishment debate, yet equally hesitant to "legitimate" the punishment, the preferable way to proceed would seem to have been to continue to chip away at the procedural administration of the death penalty, that is to say, to have required in *McGautha* that the states develop and articulate criteria under which convicted capital felons should be chosen to live and die—not to launch a more frontal assault, as the Court did this June. A holding, last year in *McGautha*, that capital case juries must be instructed as to when the death penalty should be imposed would have spared the hundreds awaiting execution, yet afforded the state legislatures much greater leeway to rethink capital punishment than they were given by the June 1972, decision.

Moreover, if, after requiring that legislatures articulate standards for application of the death penalty, it had turned out that the arbitrary and haphazard, if not discriminatory, imposition of capital punishment still continued—as it probably would have—*then* the Court would have been in a better position to do what it did this June.

Why didn't Justices Stewart and White take the route offered by *McGautha* rather than the broader avenue presented in the more recent case? Perhaps because in June they were free of a powerful force which had operated on them the previous year—the restraining influence of that great "judge's judge"—Harlan. Perhaps because Justices Stewart and White did not themselves know until the "moment of decision" last June that they *would* vote to strike down the death penalty. They knew that *McGautha* was not the "last act," that a decision to affirm the convictions in that case would not "pull the switch"—the "cruel and unusual" punishment issue was waiting in the wings. But the curtain was about to fall. And perhaps, after struggling for years to avoid meeting the issue head-on, when they finally had to do so Justices Stewart and White simply could not bring themselves to uphold the punishment—even if they had to go off on grounds which seem quite inconsistent with their previous position in *McGautha*. As Professor Choper said of the Stewart-White switch, "this is a study for psychiatrists as well as for lawyers."

How much leeway do the legislatures now have? What, if anything, is left of the death penalty?

The pivotal opinions of Stewart and White plainly leave open the question whether any system of capital punishment, as opposed to the currently arbitrarily, capriciously administered one, may be reconciled with the Constitution. A third member of the majority, Justice Douglas, also explicitly leaves for another day the question whether a mandatory death penalty would survive challenge. And, despite reports to the contrary by the mass media and assertions to the contrary by dissenting members of the Court, I do not read the opinions of even the remaining two justices, Brennan and Marshall, as concluding that the Constitution bars capital punishment for all crimes and under all circumstances.

Justice Brennan does have some very unkind things to say about the death penalty (calling it, for example, "a denial of the executed person's humanity" and "uniquely degrading to human dignity"), but in light of the fact that it is "a punishment of longstanding usage and acceptance in this country" he "hesitates" to strike it down on that ground alone, but instead enters into a long discussion of its "arbitrary" infliction. True, Brennan is unimpressed *as a general matter* with the argument that death is a more effective deterrent than life imprisonment, in large part because a person contemplating a murder or rape is confronted with but "the slightest possibility that he will be executed in the distant future." But what would he say, for example, about a narrow statutory provision like Rhode Island's, which makes murder by a life term prisoner punishable by a mandatory death sentence?

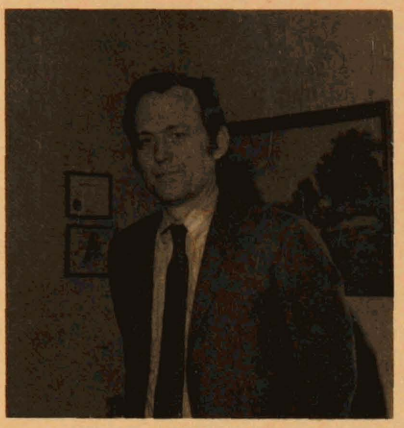
Finally, among the factors Justice Marshall considers "critical to an informed judgment on the morality of the death penalty" are "that convicted murderers are rarely executed"; "that no attempt is made in the sentencing process to ferret out likely recidivists for execution"; and that the punishment "is imposed discriminatorily against certain identifiable classes of people."

In short, there is ample room in the opinions for sustaining narrowly defined crimes, carrying mandatory death penalties, certainly the slaying of a prison guard by a lifer, perhaps even the murder of a police officer, generally; or presidential assassination or air piracy. But the Court did not have to come to grips with mandatory death sentences. If and when it has to face up to that question, can it bring itself to "legitimate" a law which mandates the punishment of death without regard for possible mitigating circumstances or anything in the offender's background? After all, the world wide movement against capital punishment is much more pronounced against mandatory death penalties than discretionary ones and, as the Court has pointed out on occasions, as far back as the 18th century there was legislative "rebellion against the common law rule imposing a mandatory death sentence on all convicted murderers." Moreover, the constitutionality of mandatory death sentences may not reach the high Court for another four or five years and by that time there will not have been a single execution for a full decade—"an incredibly powerful force," points out Professor Meltsner, "operating on any Justice who is conscientious and uncertain."

On the other hand not only is there room within the four corners of the majority opinions for mandatory death sentences, perhaps even discretionary ones for special fact situations, but the four newest members of the Court dissented with such intensity that one cannot overlook the possibility that the case itself may be overruled in the near future. After all, why should the dissenters honor a shaky, cloudy, and bitterly protested new precedent when, as they are deeply convinced, the majority itself overruled or disregarded precedent to arrive at the result it desired?

In short the death penalty is badly battered, and almost dead—but not so dead that the next Nixon appointee cannot breathe some life back into it.

SOME BRICKBATS FOR THE PROPOSED EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1972



by Professor Paul D. Carrington

[On March 20, 1972, President Nixon proposed two pieces of legislation, one a moratorium on court-ordered busing of elementary and secondary students, and the other entitled the Equal Educational Opportunities Act.

Preliminarily, the bill would have Congress find that dual school systems are unconstitutional, that dual school systems have been virtually abolished, that extensive transportation of students has been ordered, and that such transportation is expensive and harmful.

Title I of the bill would direct the "concentration of resources for compensatory education." It would not provide new federal money for compensatory education, but would redirect the use of money presently earmarked for compensatory education under the Elementary and Secondary Education Act of 1965, and for the costs of desegregation under the Emergency School Aid Act.

Title II would define as unlawful the denial by a state of equal educational opportunity. It would also provide that the failure to attain racial balance is not unlawful, while Section 203 would provide:

"Subject to the other provisions of this title, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity unless such assignment is for the purpose of segregating students on the basis of race, color, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis."

Title III would provide for federal jurisdiction in suits brought to enforce the statutory right.

Title IV would enumerate the appropriate remedies for a denial of the statutory right to equal educational opportunity. The crucial section is 403. Section 403(a) would provide that no court may order an increase in the average daily distance traveled by elementary school children, nor in the average daily number of such students transported. Section 403(b) would extend the same prohibition on transportation of students in the seventh grade or above "unless it is demonstrated by clear and convincing evidence" that no other remedy would adequately protect the right to equal educational opportunity.

The following comments are based on Professor Carrington's testimony of April 12, 1972 before the House Committee on Education and Labor. In recent years Professor Carrington has become increasingly interested in the subject of education law. He is also a member of the Ann Arbor Board of Education.]

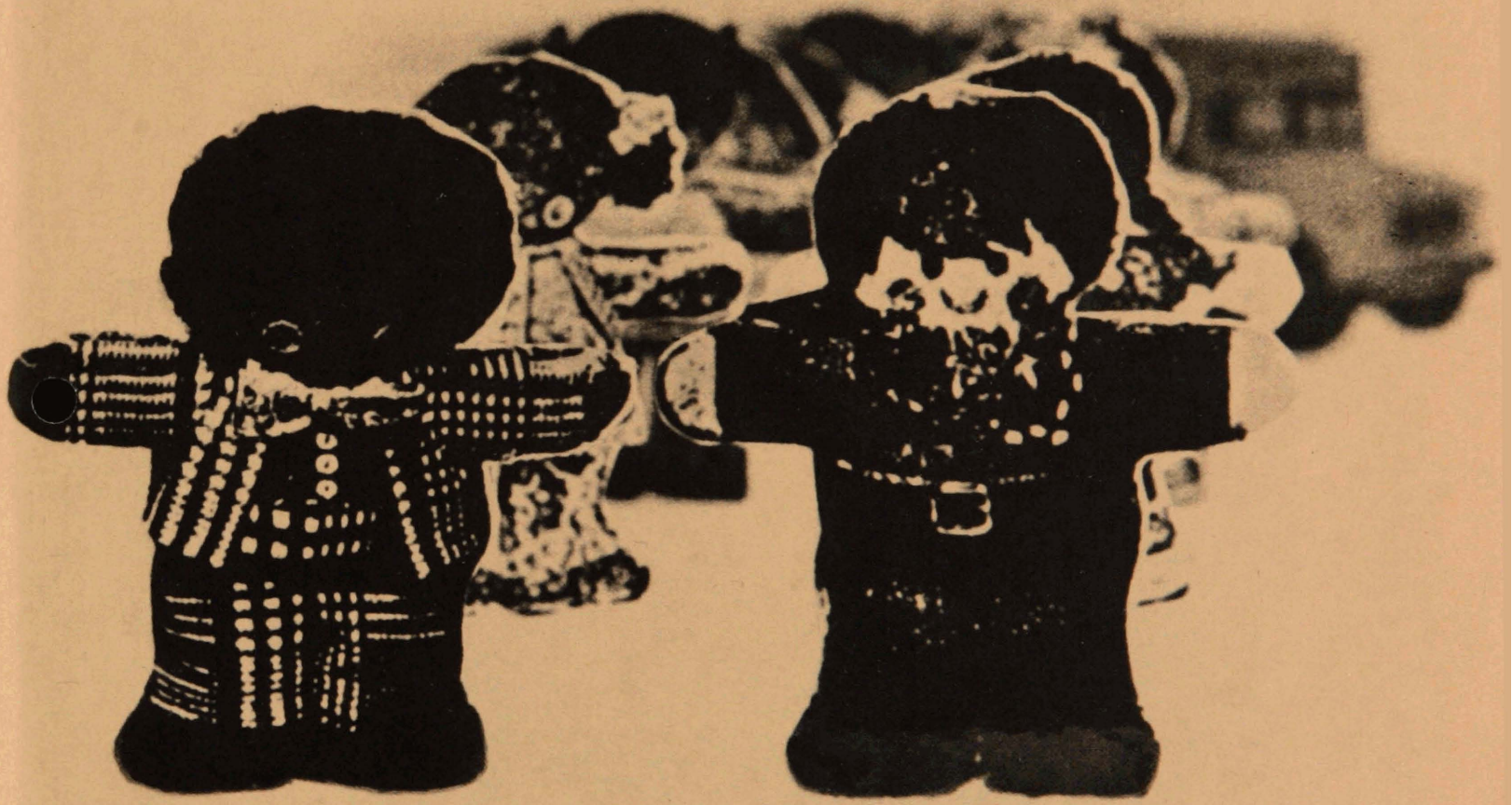
I will not conceal my disdain for this legislation. I am opposed to it (1) because it rests upon false legislative findings, (2) because it purports to express a financial commitment when in fact it provides no new resources, (3) because most of its handsome rhetoric is superfluous, (4) because most of that substantive rhetoric would be undermined by the enforcement provisions, (5) because it would place the Congress and the executive officers of the United States in opposition to the constitutional rights which they are sworn to uphold, and (6) because it would elevate some of our least noble instincts to the level of national policy while invoking the name of one of our highest ideals. In short, I find this to be a cynical bill.

In being more specific about these proposed legislative findings, I would challenge findings (4), (5), (6), and (7) as stated in proposed Section 3(a). With respect to (4), which finds that some schools are being bankrupted by transportation costs, I would challenge the proponents of the bill to identify even one case in which an increase in transportation costs resulting from a judicial decree has been so great in relation to the budget affected that it could reasonably be inferred that educational quality was perceptibly affected. With regard to proposed finding (5), which states that busing is risky to health and safety, it is self-evident that no supporting data could possibly be supplied. Clearly, a bus is the safest and most comfortable way to get to school, and long rides are taken by many of the students who are receiving the best educations. Nor is finding (6), which asserts that the risks are greater for younger children, valid. It expresses special concern for young children, but it is the young children who are most exposed to the risks of the road if they are not publicly transported, and, it would also seem that they are more likely to have an agreeable adventure than their more contentious adolescent siblings. There is no experience to suggest that they are harmed by riding. Finally, finding (7) proclaims the confusing inadequacy of judicial standards, whereas those standards are more clear, more rational, and more uniform than are those proposed in the body of the bill itself.

Secondly, I observed that Title I of the proposed bill expresses a bogus commitment of funds. One may welcome the concentration of funds available for compensatory education, but this legislation is not needed to accomplish that result. There is no other suggested advantage in transferring funds from other federal programs, which are presently underfunded, to the program which is described in Title I of this bill. The only apparent result of this portion of the bill would be to pretend that the Congress is doing something to serve the cause of equal educational opportunity when in fact it is not.

Thirdly, I observed an apparent conflict between the substantive and remedial segments of the bill. While most of the language of Title II is unexceptionable, it is largely declaratory of existing law clearly stated by the Supreme Court. Only Sections 201(f) which proscribes failure to take appropriate action to overcome language barriers, and 203, which favors the assignment of students to schools nearest their residences, seem to be at all novel, and both are probably illusory.

Fourth, but most important, some of the important provisions cannot be effectively enforced within the ambit of the constraints on remedies which are rather crudely established in Title IV. Especially troublesome in this respect is the inflexible provision of Section 403(a) bearing on transportation of children in the first six grades. Also worthy of note, it seems to me, is the curious feature of the bill which would encourage the use of federal jurisdiction as a means of limiting the enforcement of federal constitutional rights. This feature is the result of the operation of the jurisdictional provisions of Title III as they relate to the restrictions on remedies contained in Title IV. Theoretically, it would be possible



under this bill for a state court to continue to enforce the duty to desegregate described in Section 201(b) effectively, without regard for the inhibition on remedies prescribed in Title IV. But in fact this is but another illusion because, of course, any local school board threatened by effective enforcement in state courts could remove its case to the federal court under Section 1441 of the Judicial Code, and thus force the disadvantaged children to litigate in the disabled federal forum. This can only be regarded as a bizarre distortion of the historic role of federal courts.

Fifth, I protested that the bill would align the Congress and executive officers of the United States against the enforcement of the Constitution which they are sworn to enforce. I question whether the provisions of the Fourteenth Amendment authorizing legislation can be fairly read to authorize Congress to intervene for the purpose of restricting the rights conferred by the Amendment. I contend that the power of Congress over the jurisdiction of the federal courts can be exercised only in a manner which consists with constitutional rights. I do not believe that Congress is empowered to abort the Fourteenth Amendment by prohibiting its effective enforcement. And there can be no question that the bill would partially overrule the recent and unanimous decision of the Supreme Court in the *Swann* case. Section 403(a) seems to be in clear conflict; Section 404, which proclaims a qualified inviolability of school district boundaries, seems to be arguably so. The apparent result of these provisions would be to put some courts in the position of having to declare a statutory and constitutional right of young plaintiffs while at the same time having to declare their own impotence to correct the abuse.

My sixth protest concerned the elevation of an unworthy instinct to the level of national policy. My reference here is to the sometimes beloved, but unfounded, concept of the neighborhood school. It has become commonplace to say that buses don't teach kids. Neither do neighborhoods. Excellent, elite education has never been localized in neighborhoods, in this country or elsewhere. Those who care the most about schools have generally wanted their kids to get out of their neighborhoods. A passionate commitment to the neighborhood school does not usually reflect affirmative aspirations but negative fears about alien influences and behavior. In other words, the neighborhood school idea is not very neighborly. Our national goal has been, as it ought to be, to confront and overcome that kind of fear and distrust. To express that sentiment in the laws of the United States can only confirm and dignify it.

I am, of course, quite aware that this bill is a response to a political thunderstorm. Perhaps there is a time for hortatory legislation, which might help to provide an opportunity for cooling the public temper. This bill could be amended to make it a reasonably benign gesture. In that spirit, I would suggest several revisions. First, I would delete proposed findings (5) and (6) from Section 3, these being the most patently false. Secondly, I would delete Section 403(a) and eliminate the reference in Section 403(b) to "the seventh grade or above." Thirdly, I would amend Section 404 to add qualifying language similar to that contained in lines 20 and following of Section 403(b). Finally, I would propose inclusion of an amendment to Section 1445 of Title 28, being the provision of the Judicial Code bearing on non-removable actions. School desegregation cases should be non-removable. If the state courts are more willing to enforce the Constitution than the Congress is, they should not be prevented from doing so.

Before concluding, I would like also to suggest consideration of a quite different approach to the problem of disarming the irrational fears of some of our fellow citizens. True to the tradition of public education, the desegregation movement has tended toward the monolithic and authoritarian. Perhaps there should be some method of responding to the few individuals who are most passionately unwilling to bear the burdens involved in enforcing our constitution. Even the selective service legislation makes some such accommodations for dissenters.

Congress could authorize federal courts to make such accommodations as a part of some desegregation decrees. This might take the form of a modest and small-scale tuition voucher plan. The voucher could not be so large as to attract parents and students otherwise willing to abide by the desegregation decree, but it could be large enough to permit the most antagonistic to opt for low-cost private education, in their own neighborhoods if that is their desire. The cost of such vouchers could be borne out of the public school budget because of the saving that would accrue from reducing the number of students served. This plan would, I hasten to point out, raise a constitutional problem of its own. Can public money be diverted in any amount to the support of racially unbalanced private schools? If the racial imbalance is not the result of operative policy, and the funds are distributed under the supervision of a federal court, for the purpose of facilitating effective and peaceful desegregation, perhaps the expenditure would not be unlawful.

A variation on the tuition voucher scheme would be an authorization for the federal courts to include as a feature of desegregation decrees an option for individuals to pay a substantial fee for the privilege of opting out of the desegregation plan. Funds thus obtained might be used to provide additional educational services which would give affirmative incentives to those willing to cooperate fully in the enforcement of the constitution. This plan would encounter legal difficulty similar to that identified in connection with the tuition voucher scheme.

A third variation on the theme would be to provide real incentives for cooperation on a broader scale. This could be done, for example, through the Internal Revenue Code by making the size or availability of tax exemptions for children conditional on the degree of segregation practiced by the school they attend. While this may seem to be a radical proposal, indeed, it is at least possible that it could prove to be quite effective as an instrument for reducing the friction generated by the enforcement of the Constitution.

These three suggestions are not offered as perfected solutions to the political problem that besets us. They are offered for the limited purpose of trying to stimulate the Congress to consider the possibility of a more constructive role than that which is contemplated by the bill now before you.

In conclusion, this bill is a bad bill, and a destructive one. Its enactment would be a shame. But its consideration does afford the Congress an opportunity to define an important and useful role in dealing with the most crucial problem which our country faces.

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