Law Quadrangle Notes

The University of Michigan Law School

Volume 17, Number 3, Spring 1973

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The Cover: Tucked away in the corners of the masonary of the Law Quadrangle are bits of art many miss. It is left to the reader to determine the intent of the various facial expressions one finds on the faces of these "small ones."

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Van Buskirk, Hainline Win Moot Court Competition

University of Michigan law students Ronald Van Buskirk of Santa Fe, N.M., and Forrest Hainline of Detroit were declared winners of the 1973 Henry M. Campbell Moot Court Competition at the school.

They argued a hypothetical court case March 6 before a distinguished bench that included Judges Cornelia Kennedy and Talbot Smith of the U.S. District Court for Eastern Michigan (Detroit) and Judge John R. Brown of the U.S. Court of Appeals, Fifth Circuit (Houston, Tex.).

Also serving as judges were Dean Theodore J. St. Antoine and Prof. Vincent Blasi of the U-M Law School.

Judges in the 1973 Campbell Moot Court Competition at the Law School were (seated from left): Judges Talbott Smith and Cornelia Kennedy of the U.S. District Court for Eastern Michigan (Detroit), Dean Theodore J. St. Antoine and Prof. Vincent Blasi of the Law School, and Judge John R. Brown of the U.S. Court of Appeals, Fifth Circuit (Houston, Texas). Student finalists (from left) were: Alan Miller, James Maiwurm, Ronald Van Buskirk, and Forrest Hainline.

U.S. Supreme Court Justice William H. Rehnquist was scheduled to participate in the judging, but poor weather conditions prevented his arrival at Detroit Metropolitan Airport.

Runners-up in the moot court debate were students James Maiwurm of Shreve, Ohio, and Alan Miller of Birmingham, Mich.

The winners, announced at a banquet at the Michigan League, received cash awards of $200 each, donated by the Detroit law firm of Dickenson, Wright, McKean and Cudlip. The runners-up received $150 each. The names of all four finalists will be engraved on a plaque at the Law School.

The winning team represented state officials in a hypothetical case challenging the constitutionality of a state statute imposing limits on campaign spending by political candidates. The runners-up represented a candidate who claimed the state limits violated his constitutional rights.

All Law School freshmen are assigned to case clubs and engage in legal research, analysis, writing, and appellate argumentation. The top 32 are selected to compete in the Campbell Competition during their junior year. Following two elimination rounds, four finalists are selected to argue before a distinguished bench.

U-M Publication Explores Courthouses Of The Future

In the courtroom of the future, juries may retire to special viewing rooms where they can watch a videotaped trial on a TV screen.

Newsmen may sit in an enclosed press area, behind a one-way window, and phone in stories to their offices without disrupting the trial. In such circumstances, courtroom photography may even be allowed.

If a defendant becomes unruly, he may be removed to another room where he can view the trial on closed-circuit television and maintain contact with his attorney through a private telephone hookup.

These are among numerous possibilities discussed in *The American Courthouse: Planning and Design for the Judicial Process*, a 320-page volume examining the design of future American court facilities.

The book, which includes some 75 pages of photographs and architectural renderings of historical and contemporary courthouses, was just published by the Institute of Continuing Legal Education (ICLE) following a five-year study by faculty members of The University of Michigan Law School and the College of Architecture and Design. ICLE is a joint unit of the U-M and Wayne State University law schools and the state bar of Michigan.

The study, directed by A. Benjamin Handler, U-M professor of planning, was funded by the Ford Foundation and co-sponsored by the American Bar Association and the American Institute of Architects.

A major emphasis of the book is that the design of American court facilities will play an important role in "the realization of judicial objectives." It suggests, for example, that well-designed facilities should serve to enhance public confidence in the judicial system, provide for efficient court operations, and make legal services available to all segments of the population.

Among various design-related changes, the book predicts the widespread use of videotaping as part of the judicial process. Judge James L. McCrystal of Ohio, who presided over the first experimental pre-recorded trial, is quoted as saying:

"I foresee videotape trials in which we won't have those mammoth, paneled courtrooms, as we have now. We won't need them. We will need a courtroom to impanel a jury and give opening statements and closing statements, and then we will have jury viewing rooms.

"The jury can retire with the bailiff and look at the trial on television as long as they want and drink coffee and sit and be comfortable, and then we can have more jury rooms and fewer courtrooms. I think this will be the court design of the future."

Special viewing rooms for spectators and newsmen may also be available in the future, the book suggests:

"Neither spectators nor newsmen have to be physically present in the courtroom if there is a viewing area with one or more television monitors, permitting the observation of several trials or proceedings. Such facilities would allow use of a smaller courtroom and avoid disruption of the trial by partisan spectators."

In reference to the newsmen, the book adds, however:

"Because they fear it would set a precedent for excluding the press from the courtroom, most news reporters see little merit in seating the press in another room. . . However, there is some interest in an enclosed press area behind a one-way window which would permit the use of phones and possibly courtroom photography."

The book also raises some important questions about the future of courthouse design in light of such widely-publicized events as the "Chicago Seven" trial and the shootout at the Marin County (Calif.) Hall of Justice, where four men, including the judge, were killed.

In noting the importance of security measures to guard against such disturbances as the Marin County incident, the book adds, however, that "the development of adequate provisions does not mean that the court facility will or should look like a prison."

"Creation of an environment which offers both calm and dignity is an important objective," the book suggests. "Proper design of court facilities will contribute substantially to the relaxation of courtroom tensions and hostilities and, in doing so, will enhance security."

In reference to the "Chicago Seven" trial, the book discusses various ways to handle an unruly defendant. One alternative, according to the book, is to remove the defendant from the courtroom and allow him to view trial proceedings on closed-circuit television,

with private telephone communications between the defendant and his attorney.

Further information about *The American Courthouse* can be obtained from the Institute of Continuing Legal Education, 418 Hutchins Hall, Ann Arbor, Michigan 48104.

Roger Cramton Named Cornell Law Dean

Prof. Roger C. Cramton, who was recently on leave from the U-M Law School while serving with the U.S. Justice Department, has been named dean of the Cornell University Law School.

Roger C. Cramton

Cramton stepped down from his post as assistant U.S. attorney general in charge of the Office of Legal Counsel in late February. His appointment at Cornell becomes effective on July 1.

In the interim, he is serving as a consultant to the American Bar Foundation for a series of studies on legal education in the United States.

Cramton is the ninth U-M law professor to become a law dean in the past decade, giving the U-M the distinction of having more law faculty members go on to deanships than any other major law school in the country.

Others from the U-M who are currently serving as law deans include Robert L. Knauss of Vanderbilt University Law School, Joseph R. Julin of the University of Florida Law School, Roy L. Steinheimer of Washington and Lee University Law School, and Craig W. Christensen of the Cleveland-Marshall College of Law at Cleveland State University.

Also recruited from the U-M law faculty since 1963 were former Wayne State University law Dean Charles Joiner, now a federal judge; former University of Colorado law Dean John Reed, now back at the U-M; former University of Wisconsin law Dean Spencer Kimball, now executive director of the American Bar Foundation; and former Indiana University law Dean Burnett Harvey, now a professor at Duke University.

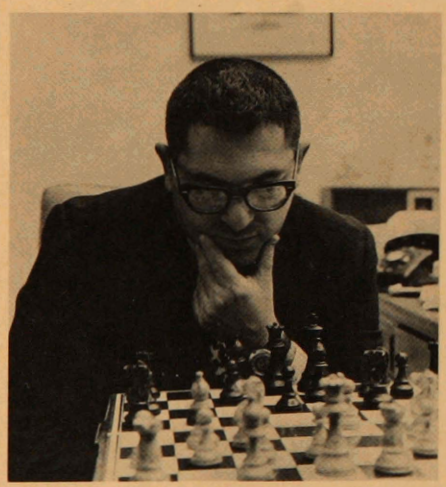
U-M law Dean Theodore J. St. Antoine called Cramton's decision "a loss to this law school but a very great gain for Cornell and for legal education in general."

Noting Cramton's reputation as an outstanding scholar in the fields of administrative law and industrial regulation, St. Antoine said, "I now look forward to Roger becoming a leading figure in the administrative side of legal education."

A member of the U-M law faculty since 1961, Cramton had also served as chairman of the Administrative Conference of the United States, a permanent, independent agency concerned with the fairness and effectiveness of the federal government's procedures in dealing with private citizens.

Before coming to the U-M he was assistant professor and assistant dean of the University of Chicago Law School. He is a 1950 graduate of Harvard College and received his law degree from the University of Chicago in 1955.

Prof. Kahn Finds Chess Match Taxing



Kahn studies the chess board. . .

Students at the Law School who explore the Internal Revenue Code under Prof. Douglas A. Kahn can expect to encounter hypothetical tax problems involving the prize winnings and expenses of a peripatetic amateur chess player.

Of course, the use of hypothetical questions is a long-standing law school teaching device. But Prof. Kahn's predilection for colorful chess players—rather than such typically nondescript characters as "A" and "B" or "XYZ, Inc."—lends a touch of humor and reality to the endeavor.

As it turns out, the affable professor is himself an avid student of chess and a formidable practitioner of the game. So formidable, in fact, that at the invitation of the Law School Chess Club, Kahn recently agreed to take on all comers in a simultaneous exhibition match.

"The Chess Club wanted to stage the match as a promotional device to generate interest in the game," Kahn recalled, "and I finally agreed to go along—but not without trepidation."

On the appointed Sunday, no fewer than 19 challengers appeared to do battle with the tax man. The ensuing match, in which the professor won nine games, lost eight, and drew two, took five and a half hours to complete and was anything but "relaxing" for the professor. Observers noted that

. . . and takes on challengers.

Kahn averaged less than 30 seconds per move in the course of the match.

"It was a physically demanding test," Kahn recalled. "There was no opportunity to relax between moves, and my stamina began to fall off toward the end." He also acknowledged that he was not particularly eager to duplicate the feat in the near future.

Introduced to the game at the age of eight, Kahn started playing "serious chess" during his freshman year in college. Through subsequent competition in "rated" tournaments Kahn amassed 1,990 points, leaving him just 10 points shy of achieving "Master" status—a coveted ranking in chess circles. In recent years, however, professional demands have forced him out of active competition.

Commenting on last summer's much-ballyhooed match in which Bobby Fischer stripped the world crown from Boris Spassky, Kahn observed that the spectacle gave chess a "shot in the arm" which should prove to be of lasting impact.

"Chess has traditionally been regarded with a great deal of anti-intellectual resistance," Kahn noted. "People were accustomed to regard-

ing it as much too 'fuddy-duddy,' but I think the match between Fischer and Spassky pointed out that chess is much more competitive than people used to think—and that the emotional strain in tournament play can be grinding."

Asked if he could discern any significant correlation between his vocation and his avocation, Prof. Kahn observed that chess, like tax law, has a particular appeal for persons who enjoy analytical thinking.

"I've also found that persons with training in mathematics or music tend to be better chess players," he said. "In fact, at the risk of being labeled a male chauvinist, I would have to say that the only people who don't make good chess players are women. Even at the level of world competition, there has been only one woman Grand Master in the history of the game."

With a diplomatic shrug and a smile, Kahn said he was unable to account for the male dominance of the game, but he did add, "If I had had more talent, I would have been a professional chess player instead of a law professor."

That he does possess some talent for the game is illustrated by what Prof. Kahn fondly recalls as his "greatest feat" in chess: "About nine years ago in a match in Washington, D.C., I played Bobby Fischer to a draw." But he added, "Of course, it was a simultaneous exhibition, and there were 69 other challengers."—*Paul Vielmetti*

Law School Fund Sets New Records

The returns are in for the U-M's twelfth annual Law School Fund drive (1972) and, once again under the leadership of National Chairman Thomas E. Sunderland of Phoenix, Ariz., new records have been set in both the amount of contributions, $416,022 (a 14½ per cent increase over the previous high, established a year earlier) and the number of gifts, 4,580. The 1972 giving campaign brought the grand total for the first 12 years of the Law School Fund to $2,576,615.

Four Women Among Law Review Editors

A woman law student has been named editor-in-chief of the *Michigan Law Review*, a student-edited legal publication of The University of Michigan Law School, and three other women have been selected as senior editors.

This is the highest number of female law students to serve on the 13-member senior editorial board in the 72-year history of the nationally respected legal periodical.

Christina B. Whitman was named editor-in-chief and the other editors were chosen in an election this spring by the *Law Review's* graduating editors.

Christina B. Whitman

Mrs. Whitman, whose husband Jay is a 1971 U-M law graduate, is the second woman in history to serve as the publication's editor-in-chief. The first was Sally Katzen, who held the post from 1966-67.

Mrs. Whitman suggests that more women in top editorial positions on the *Law Review* "seemed inevitable, in light of the increasing number of women enrolled at the U-M Law School."

According to recent enrollment figures, women law students now comprise nearly 13 per cent of the Law School's total student body. In the fall of 1973, there were 149 women enrolled out of 1,166 students.

Law Prof. Stanley Siegel, chairman of the publication's faculty advisory board, notes that Mrs. Whitman has compiled an outstanding academic record at Law School and made many contributions to the *Law Review* as an associate editor during the past year.

Each year the top 10 per cent of the Law School's first-year class are selected to serve as *Law Review* associate editors for the following academic year. A select number of associate editors are then elected to the senior editorial board and are responsible for the production of eight editions of the *Law Review* during their final year at Law School.

The following students have been elected to the senior editorial board:

Editor-in-Chief: Christina B. Whitman, Rockford, Ill.

Managing editor: Brian B. O'Neill, South Range, Mich.

Article and book review editors: Jeffrey D. Komarow, Ypsilanti, Mich.; and Elinor P. Schroeder, Fort Myers Beach, Fla.

Administrative editors: William J. Davey, Marshall, Mich.; Frank J. Greco, Royal Oak, Mich.; and Craig A. Wolson, Toledo, Ohio.

Note and comment editors: Sara Sun Beale, Toledo; Ronald A. Kladder, Plymouth, Mich.; Daniel E. Reidy, Chicago, Ill.; Richard P. Saslow, River Vale, N.J.; Gail F. Schulz, Ann Arbor; and Dana L. Trier, Princeton, N.J.

Some "Ungraded" Courses Available To Law Students

Effective with the start of the 1973 winter term, second- and third-year U-M law students may now elect to take a limited number of courses on an "ungraded" basis. The change in academic regulations occurs as a result of an amendment approved by the faculty in December, 1972.

Under the new system, any elective course or seminar may be taken on an ungraded basis at the option of the individual student. The option is not unlimited, however, since certain restrictions have been imposed.

One such limitation provides that no more than two courses or seminars may be taken on an ungraded basis in the term immediately preceding the student's graduation. In addition, the regulations limit to 15 the number of credit hours taken under the ungraded option which may be offered to satisfy the requirements for the J.D. degree. Currently, those requirements call for the satisfactory completion of 82 credit hours for those enrolled in the normal three-year course.

Although the ungraded course option is popularly referred to as "pass-fail," that description may not be entirely accurate, since a student exercising the option must achieve the equivalent of the letter grade "C" in order to receive the final grade of "P" for the course. Thus a performance equivalent to the letter grade "D" will be deemed unsatisfactory and a "P" credit will be withheld.

The adoption of the ungraded course option represents the latest chapter in an ongoing debate among faculty and students on grading reforms. A sampling of student sentiment conducted last year by a Law School Committee on Academic Standards and Incentives revealed a wide range of views on the subject.

The questionnaire set forth six alternative grading systems and sought to measure the degree of support and opposition accorded each model, both on an individual and comparative basis. The alternatives ranged from a mandatory pass-fail system

for all students to the retention of the current system. The results indicated that the current system drew the least amount of support and the strongest opposition among the six models presented.

Acknowledging the wide divergence of views elicited by its survey, the Committee in its report noted, "It is highly probable that no grading system will ever gain the approval of the entire student body, and not unlikely that whatever system is in effect will ultimately fail to attract the approval of a majority. However, the level of dissatisfaction with the present system which is revealed by the survey, and the absence of significant support for it, suggest a real and important conflict between the premises on which it is based and the mores of the contemporary student body."

According to Prof. Luke K. Cooperrider, chairman of the Committee, the amendment ultimately adopted represents a compromise between the Committee's recommendation and the counterproposals urged by other faculty members with differing views.—*Paul Vielmetti*

Prof. Siegel Answers Postal Service Critics

Reorganization of the U.S. Postal Service in 1971 as a quasi-independent public corporation did not cure postal ills overnight, but it provided a better alternative than Congressional supervision of the nation's mail service.

So says University of Michigan law Prof. Stanley Siegel, who maintains that before 1971, when it was under Congressional control, the U.S. Post Office had become a "political dumping ground" and "one of the most inefficient operations in the history of government."

Siegel, one of the principal draftsmen of legislation reorganizing the Post Office, was responding to critics who claim that slow service and high rates demand that the Postal Service be re-established as an executive department under supervision of Congress.

Siegel said that, under Congressional control, the Post Office had "a long history of deficit-ridden operations, slow performance, and ineffective productivity." But, he said, it is unrealistic to expect the reorganization to reverse this decline immediately.

Commenting on past government supervision of the Post Office, Siegel charged that, among other shortcomings, Congress "failed to supply sufficient funds to modernize postal facilities" and was responsible "for setting postal rates at the point where deficits were necessary."

He also noted that "Congress insisted on political appointments of the top 30,000 or so postal employes." As a result, said Siegel, "Congress made the Post Office the political dumping ground of the federal government."

By contrast, Siegel said management-level postal employes are now chosen on the basis of "business skills" rather than for "political patronage purposes."

He also noted that the new Postal Service has succeeded in raising a significant amount of money by itself and now has some $700 million worth of capital improvements under commitment.

Stanley Siegel

"This is at least two or three times the amount of capital improvements that was under commitment prior to the establishment of the new corporate structure," Siegel said.

Saying that efforts are being made to improve mail service, Siegel added that recent rate increases—and increases predicted for the future—are needed to compensate for salary increases for postal employes. He said that wages for postal workers had been extremely low in the past and that "rates for services of every kind have increased drastically in recent years."

The U-M professor noted that some of the sharpest criticism of the Postal Service has come from newspapers and magazines, which are affected by increases in second class postage.

But Siegel said "it is within the statutory mandate of the Postal Service legislation" for Congress to subsidize publications with second class postal permits without impairing the autonomy of the Postal Service.

La Raza Is Active At Law School

Minority group representation at the Law School has been on the upswing in recent years, and that trend is reflected in the growth of La Raza, an organization of law students from Spanish-speaking backgrounds.

Founded in 1971 by Fernando Gomez, who at the time was the only Spanish-speaking student at the Law School, the organization now has 12 members. According to Felipe Ponce, the group's newly elected president, La Raza—which means "the race"—is a closely-knit organization and virtually every Spanish-speaking law student is a member.

Ponce, a second-year student from East Chicago, Ind., lists two major objectives which the group has sought to further.

First, the organization has promoted various activities aimed at creating an awareness among members of the Law School community that blacks are not the only minority group facing problems. At the same time, Ponce is quick to point out that blacks and Spanish-speaking groups face similar problems and work to achieve similar objectives.

Ponce noted a spirit of cooperation between members of the Black Law Student Alliance (BLSA) and La Raza, particularly during the latter organization's first two years of operation. "In the past," he noted, "members of La Raza also belonged to the BLSA and participated in their tutorial program, since we had not yet established a similar program of our own."

To further the goal of increasing community awareness of the special problems facing Spanish-speaking minorities, La Raza has presented films and sponsored lectures concerning the plight of migrant farm workers. Their most recent efforts have been directed toward generating support for various boycotts aimed at strengthening the bargaining position of the United Farm Workers Union. In connection with that effort, the group sponsored a lecture appearance by Dolores Huerta, vice president of the UFW.

The organization's second major objective is to generate interest in the Law School and the legal profession among Spanish-speaking college students. With the support and cooperation of the dean's office and the admissions office, La Raza has thus far completed two major recruiting trips to the Southwest.

In addition, La Raza is planning to conduct an undergraduate law conference at the Law School in the fall. The group hopes to attract representatives from Spanish-speaking groups at all state university campuses, and to encourage interested undergraduates to seek admission to the Law School upon completion of their undergraduate studies.

In addition to Ponce, other officers elected to serve during the 1973-74 year include: Luis Guzman, of San Antonio, Tex., vice president; Jose Berlanga, of Corpus Christi, Tex.,

secretary; and Chuck Jimenez, of Los Angeles, Calif., treasurer. All are first-year students.—*Paul Vielmetti*

Law Professors Debate Press Subpoena Issue

A University of Michigan law professor maintains that increasing government demands for confidential information from journalists mark an erosion of government respect for freedom of the press.

This view, held by Prof. Vincent Blasi, is in sharp contrast to the position of another U-M legal scholar, Roger Cramton, who insists that the government has always recognized "the special place occupied by the press" under the Constitution.

Blasi and Cramton expressed their views in articles carried by *Newsday*, a Long Island, N.Y., newspaper, and in recent testimony before Congressional committees studying the rights of newsmen subpoenaed by government agencies.

Vincent Blasi

Cramton, who was on leave from the U-M Law School while serving as an assistant attorney general in the U.S. Justice Department, maintains that any law giving newsmen absolute immunity from forced testimony would be "unnecessary at this time."

He insists that the Justice Department has followed a policy of issuing subpoenas to newsmen only when such a measure was considered "essential to a criminal or civil investigation."

But Prof. Blasi suggests that a major problem with press subpoenas is that they are issued in "unnecessary circumstances," when the reporter has no important information to contribute. This was one of the conclusions Blasi reached after surveying more than 1,000 newsmen in a 1970 study undertaken at the request of the Reporters' Committee for Freedom of the Press.

And now, Blasi says, government pressure on newsmen is even greater, following last year's Supreme Court decision requiring newsmen to testify before a grand jury if subpoenaed.

The U-M professor, who favors partial immunity for reporters called before government tribunals, says the most alarming thing about the 5-4 Supreme Court decision is the attitude of the five justices who supported the majority opinion.

That opinion, Blasi writes in the *Newsday* article, reveals "serious misgivings about the journalism profession . . . and quite a limited conception of an independent press in our system of government."

Blasi feels that this attitude is likely to affect other free press issues in the future. "What, for example, will happen," he writes, "when newsmen claim the right to interview prisoners, civil servants, armed service personnel, or other important news sources who are subject to government control?

"What will happen when reporters for unpopular news organizations seek press passes to seek access to particular scenes of crime, riots, or disasters?"

Specifically, Blasi favors a national shield law giving newsmen absolute immunity in grand jury investigations and qualified immunity in civil and criminal cases. He also favors a requirement that a prosecutor or defendant must file an affidavit and petition before a newsman is ordered to testify.

Once Congress goes on record as supporting the idea that subpoenas are to be issued only in unusual circumstances, says Blasi, the frequency of subpoenas is likely to be reduced and the pressure on reporters would be eased.

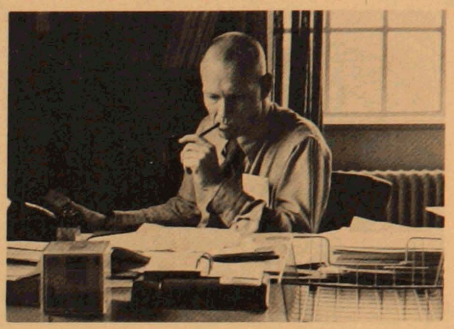
Cramton, on the other hand, says "the Department of Justice does not oppose in principle the creation of a qualified (newsman's) privilege," but he adds that "the successful experience under the attorney general's guidelines for subpoenas to the news media demonstrates that legislation is unnecessary."

"The information gathered by the media may occasionally be vital in establishing the guilt or innocence of a person suspected of a serious crime," Cramton writes in *Newsday*.

"Usually the press and the government are able to reach an ad hoc solution in balancing the competing interests involved that is reasonably satisfactory to both. Only in the unusual, but often controversial, case where the matter cannot be resolved informally has it been necessary to resort to compulsory process."

Prof. White Co-Authors Book On Commercial Code

Lawyers who have been searching for priceless analogies and comments which make the study of the Uniform Commercial Code as witty as it is technical can stop looking.



James White

Law Profs. James White of The University of Michigan and Robert Summers of Cornell University have found them for you.

Their new book, *The Uniform Commercial Code*, features an in-depth, insightful discussion and interpretative analysis of the Uniform Commercial Code, but it also contains such gems as, "Unfortunately the foregoing section is in one respect like the amphibious tank that was originally designed to fight in the swamps but was ultimately sent to fight in the desert."

This book is designed for two audiences—law students and practitioners. White and Summers believe that to a certain extent, those audiences have different needs.

"We include footnotes plump with citations for the practitioner, and for student and practitioner alike we offer our best effort at exposition of the law," the authors say.

"Doubtless the experienced practitioner and the advanced student will find some of our exposition too elemental, and the beginning student will surely find some of it too complex."

It may be true that law students tend to merely skim through legal texts such as this, but even the most "non-studious" student will stop to re-read such passages as the one on page 25: "We number these cases with some fear for we realize that those who can analyze do, and that those who cannot, number."

The book is organized in the same fashion as the Code and proceeds through the articles from first to last. It also deals with laws which may be relevant to the Uniform Commercial Code (mainly the Bankruptcy Act and the Federal Bills of Lading Act).

"We believe we have concentrated our efforts in ways that reflect not only the student's but also the lawyer's needs," White and Summers say.

The book is published by West Publishing Co. of St. Paul. Minn.—*Lee Hampton*

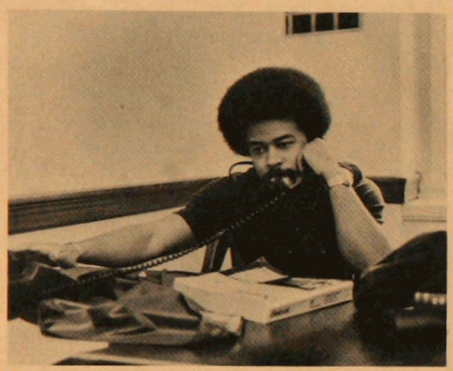
Student Program Assists Michigan Prison Inmates

A lot of prisoners are facing a very serious problem. They can't get free legal assistance.

That is, those who don't know about the University of Michigan Law School's Michigan Inmates Assistance Program.

Several years ago, under the supervision of two Detroit attorneys, U-M law students initiated an ambitious project to provide free legal assistance to Michigan inmates. And they've met with quite a bit of success.

"We keep getting more and more clients," says John Thompson, third-year law student and co-director of the program. "The people that we help just keep telling other inmates about us . . . the word just travels through the grapevine."



John Thompson

The Michigan Inmates Assistance Program (MIAP) serves inmates at the Detroit House of Correction, including both the men's and women's divisions, and the Federal Correctional Institution at Milan.

Law students who have completed 28 hours of course work are authorized to appear in state courts, sign papers, and act as attorneys (except in federal court) under the supervision of a member of the bar.

Freshman students, while they may not perform any of these official acts, may take on as much research and supportive work in cooperation with upperclassmen as they feel they can handle.

Students get no pay or academic credit for working with the inmates but offer their services on a voluntary basis.

Whenever necessary, students talk with supervising attorneys Martin Weisman and Bettye Elkins (both of the Detroit firm Dykema, Gossett, Spencer, Goodnow, and Trigg), who sign all papers which the students have filed with the court, advise them on strategy, and supervise their courtroom work.

DeHoCo inmates desiring assistance contact MIAP by sending in request forms, while initial contact with Milan clients usually comes via a sign-up sheet at the institution.

Along with Thompson, two other law students, Suzanne Bickford and Jim Kenney, serve as directors of the program. Prof. David Chambers is faculty adviser for the group.

Thompson said he was skeptical at first about the outcome of the program.

"For a while I didn't think the program was going to be successful because the students only seemed interested in corporate law and business, but with this year's freshman class things began to pick up. They seem to really be interested in MIAP and in helping disadvantaged people."—*Lee Hampton.*

Prof. Jackson Offers New Contracts Casebook

Prof. John H. Jackson has an uncanny sense of timing. Two days before the U-M law professor was appointed general counsel to the Office of the Special Representative for Trade Negotiations, he sent the manuscript for his new contracts casebook to West Publishing Company.

The principal goals of Prof. Jackson's book are the following:

—A sound examination of the usual core of the contract law subject, with emphasis on the law's development or change (rather than on "what the rules are").

—A complete coverage of the essential components of sales law as represented in Articles 1 and 2 of the Uniform Commercial Code, such that a further course in sales is unnecessary for students who have gone through all of these materials.

—Explicit attention to a group of legal methodology notions or jurisprudence type questions, which can be efficiently introduced in connection with the contract-sales materials of this book.

—A general introduction to other important commercial law concepts and transactions so as to prepare students for advanced law courses in the usual law curriculum.

—Integrating material that helps the student understand the interrelations between contract-sales and other major fields, such as torts, property, and civil procedure.

These are ambitious goals, but in a first-year course that comprises six semester hours (90 hours of classroom time), Prof. Jackson feels that these goals can be achieved.

Perhaps the most significant departure from existing contracts casebooks is Professor Jackson's effort to incorporate a study of sales law of the U.C.C. into the study of contract law. His reasons for this are two-fold. First, he feels that it is misleading to teach contract law without extensive reference to the U.C.C., which, by analogy or otherwise, is becoming a major source of general law in contract cases, rivaling the restatement in this regard. Since so much of Articles 1 and 2 must be considered in a contract course, it seems unnecessarily repetitious for a student to cover much of the same material in a later course in sales. By adding a few topics to the contracts course, Jackson believes, major economies can be obtained in the law school curriculum. Secondly, and probably more importantly, by systematically considering the Code along with common law principles of contract, some extraordinary opportunities arise to study the relationship of statutory materials to common law court opinions as sources of law.

Prof. Jackson has described the pedagogical assumptions which underlie his book as follows: First, the book is devoted to being the best teaching tool which it was possible to fashion. That is, whenever pretensions of scholarship or theory (and he notes that the reader will detect some in this book) conflicted with the goal of providing a tool for the student's efficient learning, the latter goal tended to prevail. In this connection, "feedback" was important and the use of three tentative editions of these materials to teach complete contracts courses provided important information on which to base pedagogical judgments. Secondly, the book is premised on the view that a law course should not "hide-the-ball" or "play games" with students. The materials should assist the student in his learning and not unnecessarily add to the time it takes him to understand the materials. Thus to a modest extent, the book departs from the case method. When text or explanatory materials seem to be a more efficient way for a student to learn, there is no hesitation in using them. Many queries, problems, or questions are included to stimulate thought, but where cases or treatise opinions exist which bear on the problems, this is indicated.

Thirdly, Jackson's materials assume that students can learn a great deal by themselves, especially if furnished appropriate materials. Complementing this assumption is the author's experience that classroom time, even in a six semester-hour course, is very crowded for achieving the purposes which a first-year course in contracts might ideally have. Consequently, one of the objectives of his case book is to furnish the student a significant

amount of reading to be done outside of the classroom, much never to be the subject of formal classroom discussion. These readings are designed to give the student the necessary background to enhance his study of the materials which will be discussed in class, and thus to enhance that classroom discussion.

In evaluating the over-all approach to first-year contracts manifested by this book, Prof. Jackson views the course less as a "course in contract law" than as one of a half-dozen important first-year foundation blocks for the rest of a law student's legal education.—*Yale Kamisar*

Recent Law School Events

Boris I. Bittker

Delivering the 1973 Thomas M. Cooley Lectures at the U-M Law School was Prof. Boris I. Bittker of Yale University, a leading authority on technical and ethical aspects of federal taxation. Bittker delivered a three-part lecture series on "Income Taxation and Political Rhetoric" April 4-6. The Cooley Lectures were established by the U-M law faculty and are supported by the William W. Cook Endowment for Legal Research. They are named for a former dean of the U-M Law School who served as one of the three faculty members when the School was founded in 1859.

Letters

To the Editor:

I read with interest Matthew P. McCauley's letter in a recent *Law Quad Notes* issue relative to Professor Durfee, who had a tremendous talent of humorously making a very serious point to his students. I was in his Equity I class in 1950, the year before he retired.

There are two incidents which I personally witnessed in his class which illustrate his talent for making a point through his not so subtle humor.

On one occasion, Professor Durfee called upon a student to state a case. . . . The student proceeded to read from a very lengthy "canned" brief. After several minutes of reading, and when the student was approximately halfway through the brief, Professor Durfee reached into his pocket, pulled out a white handkerchief, ducked behind his desk and proceeded to wave the handkerchief in the air.

I presume it is still traditional to have the annual law school dance, referred to as the "Crease Ball," and that for that auspicious occasion, the *Raw Review* is still published. . . . The particular *Raw Review* which I recall commented upon the fact that it was very difficult to take notes in Professor Durfee's class. As a matter of fact, this was very true. I still have in my possession notes from all my law school classes which are very voluminous, but the notes from Professor Durfee's class consist of primarily four pages of doodles, the product of my note-taking for the entire semester. The day after the "Crease Ball," Professor Durfee, who apparently had read the *Raw Review*, announced that he understood that it was difficult to take notes from "Old Durf." He was therefore going to make an outline. He walked up to the blackboard, placed upon it with his chalk a Roman numeral I which took up the entire length and breadth of the blackboard, and then proceeded to lecture for one hour without any further references or additions to his "outline."

There is one other story which I heard about him while I was a law student, but which I did not witness personally. On one occasion, while grading final exam papers, he read a certain student's answer to the first question, proclaimed it "the best damned answer I ever saw," and proceeded to inscribe upon the final exam a large A+, without bothering to read any of the answers to the rest of the questions.

I hope that these anecdotes will contribute something to the collection about Professor Durfee.

John J. Namenye
Judge of Probate
Muskegon, Michigan

SOME COMMENTS ON SEVERAL DISTINCT BUT INTERRELATED SOURCES OF TENSION WITHIN THE LAW SCHOOL, AND BETWEEN THE LAW SCHOOL AND THE WIDER COMMUNITY

The following observations are based on Dean St. Antoine's Report to the President of the University for the Year 1971-72.

The role of the law teacher. A perceptive colleague, who holds a joint appointment in the Law School but is not himself a lawyer, once gave a tongue-in-cheek but nonetheless apt description of the peculiar pedagogical problem of law teachers as contrasted with teachers in most other graduate disciplines. Said he: "We graduate school people know what we are doing, in a way you law school people do not. We are out to reproduce ourselves—to make our students as much like ourselves as possible, because they too are going to be teachers and researchers. But your students, by and large, are not going to teach law; they are going to practice it. So you must prepare them to be something different from what you are, and that is far more difficult."

This mildly whimsical analysis masks several large questions about the nature of legal education and the role of the law teacher. Are the skills required for law practice essentially different from those required for legal scholarship? What kind of person should the law schools enlist to train tomorrow's practitioners, and how should the teacher's time be divided among classroom and library and legislative committee room? Should all schools follow the same pattern, or should some gear themselves (or portions of their curriculum) to the needs of specialized clienteles, such as would-be government policy-makers, or corporate counsel, or small-town and neighborhood lawyers?

If I were left to think such questions through by myself (but deans, no doubt fortunately, never are), I suppose I would conclude that they suggest false dichotomies, and that the most theoretical training is also the most practical; the finest scholar is also the finest teacher; and the law school best equipped to turn out jurisprudes is also best equipped to turn out general practitioners. In a sense, that is indeed what I believe. But enough dissents have been registered by students, alumni, and faculty members to convince me that, if my position is not simply wrong, at least it may require some qualification.

Student complaints that teachers become overly absorbed in their own intellectual pursuits are age-old; I imagine that Plato and his schoolmates thought their famous (and unpublished) mentor spent too much time in solitary walks instead of in discourses with them. Our law students are part of that tradition. And sometimes, surely, their complaints are justified. But a major legal thinker is not only a teacher for the students in his classroom; through his writings and speeches, he is also a teacher for the whole profession, and occasionally for the whole society. I am confident that it is often more profitable for students as good as ours to look over the shoulder of a first-rate legal craftsman at work than to have the undivided attention of an ordinary artisan.

Students prize teaching marked by clarity and organization and a dash of showmanship, and they grieve that they do not always find it. Who can blame them? Yet I suspect that too much clarity and structure could easily serve as a deceptive tranquilizer against the painful ambiguities and disorderliness of the law. Slavishness to a lesson plan might inhibit some of the most original minds on a faculty, who tend to think out loud in the classroom in a way that is at first disconcerting but may ultimately be the most rewarding. The views of alumni may be helpful here. The teachers they most revere, at least by hindsight, are frequently the abstruse theoreticians, who concern themselves more with the underlying principles, with the legal process as a whole, rather than with the exhaustive exposition of technical doctrine.

At the same time, the alumni side with the students on another important point. The courses they value the most, and would most like to see expanded, are the most practical, the most distinctly professional, such as procedure and evidence, business and commercial law, trusts and estates, legal writing, and so on. This anomaly may be more apparent than real. Indeed, it may epitomize the unique status of the law as an academic discipline. The subject matter is the stuff of everyday living; yet only an intelligence of a high order can meet the challenge of treating it adequately. And perhaps nowhere else in the University must the speculative intellect operate so cramped by facts, so hedged by power, so vulnerable to a multitude of conflicting human values. The legal scholar's flights of imagination can never stray far from solid earth. That is the law's limitation, but also its strength and pride.

Toward the end of my first year as dean, a substantial portion of the faculty went off to a lakeside retreat for two days of informal conversations about the Law School. While we had a fairly wide-ranging agenda, we never managed to get much beyond the first item, which dealt with "the teaching function" and "the appropriate content of a contemporary legal education." In virtually around-the-clock sessions (that were rarely afflicted with the solemn air of the usual faculty meeting), we reproduced in microcosm the debates over methodology that have swirled through American legal education for almost 200 years, with the palm going, at various times, to the "academic model" characteristic of William and Mary and of Virginia in post-Revolutionary days, where the study of law was coordinated with the study of the liberal arts in the rest of the University; the "professional model," installed at Harvard by Justice Story in 1829 to meet the competition of the proprietary law schools that had built their success on appeals to the specifically vocational interests of their students; and the "integrative model," pioneered by Columbia with mixed results 50 years ago, which attempted to fuse the study of law and the social sciences.

One plausible suggestion emerging from our discussions was that perhaps no single law school can be equally effective in turning out practitioners, policy-makers, and scholars, and that therefore different schools should concentrate on different objectives. I am satisfied, however, that a law school of the size, quality, and public status of Michigan cannot afford such a choice. We owe a duty to the great mass of our students and to the people of the state to adhere to our primary mission of training the future members of the practicing bar. Yet I am also convinced that to produce the most effective active practitioners, it is essential for a law school to have the capacity to produce creative legal scholars.

A fully formed lawyer will know some things that almost any law school can teach, some things that no law school can teach, and some things that ordinarily only a great law school can teach. Practical judgment, personal rapport, and communicative power may be refined in law school, but legal education can hardly bear the major responsibility for inculcating these qualities; they are the deposit of a whole lifetime. Two other, more peculiarly professional attributes—a lawyer's analytical skill and his basic store of legal information—can, fortunately, be acquired in any reputable law school, although the depth and richness of the learning experience will naturally vary from place to place. Much as students may worry about understanding "the law" and knowing how "to think like a lawyer," the standard legal education (supplemented by the first year or so of practice) is largely successful here. Young practicing attorneys are generally not deficient in either the analytic techniques or the doctrinal knowledge that we could reasonably ask the law schools to impart.

What lawyers of any age are most likely to lack is something I would call "legal self-consciousness." By that I mean an awareness of the law-client-lawyer relationship, not as a fixed construct, defined by a relatively static set of rules, but as an organic entity, constantly evolving in response to assorted political, social, and economic stimuli. To me, an attorney who negotiates the merger of two once-mighty but now-struggling railroads, or who revises the estate plan of an elderly tycoon, knowing all the applicable provisions of the corporation code, the probate code, the Internal Revenue Code, and the securities regulations, is still an incomplete lawyer unless he adds to his technical expertise a sure grasp of the myriad extralegal forces that may vitally affect both the practical consequences of the merger or estate plan and the legal principles governing it. To give students a sense of this critical extra dimension of law practice requires, in my judgment, the same kind of broad-gauged education that is needed to fashion imaginative legal scholars. Thus, while I have no right to speak for all my colleagues, I should like to think that most of us came away from our marathon sessions beside the lake last spring with a deeper realization that a law school's dedication to original scholarship is not only compatible with the training of the most proficient active practitioners; it is indispensable.

I IMAGINE THAT PLATO AND HIS SCHOOLMATES THOUGHT THEIR FAMOUS (AND UNPUBLISHED) MENTOR SPENT TOO MUCH TIME IN SOLITARY WALKS INSTEAD OF IN DISCOURSES WITH THEM.

The national law school in the state university. Michigan occupies a unique place among the state law schools of the nation. At its opening in 1859, the Law School appealed widely for students by publishing newspaper advertisements in the major cities across the country. Over the years nonresidents have generally outnumbered residents in the School, and about two-thirds of our 10,000 living alumni are outside the state. Even now, only a slight majority of incoming first-year students are Michigan residents.

During the past few years, as pressures for admission to law school have sharply increased, Michigan's large out-of-state enrollment has come under heavy attack from many quarters within the state. It is felt to be unfair for a state law school to turn away qualified residents while accepting nonresidents, and it is felt to be especially unfair for the citizens of Michigan to have to subsidize the legal educations of students from other states. In my view, these grievances are based on serious misconceptions.

Quite apart from the historical tradition, and the concomitant obligation that may impose on us toward our nonresident alumni, Michigan's funding in itself is enough to demonstrate that the School is a state institution only in a somewhat attenuated sense. More properly, it might be called half-public and half-private. In round figures, as I look at them, it takes four million dollars a year to maintain the Law School. That includes not only our internal operating budget but also our share of the University's administrative and maintenance expenses, and depreciation on our splendid buildings (the gift, of course, of New York lawyer William W. Cook). Of that four million dollar total, about half is derived from student fees, and another quarter from private or non-Michigan sources. Only one-quarter comes from the public revenues of the state. Although even our higher nonresident tuition does not fully cover the cost of a legal education at Michigan, the difference is more than offset by gifts from out-of-state donors, primarily nonresident alumni. In short, it is entirely correct to say that the education of nonresident students at the Law School does not cost the Michigan taxpayer one cent.

Michigan is large as law schools go. Indeed, it is fairly close to twice the size of the principal state law schools in neighboring Ohio, Indiana, Illinois, Wisconsin, and Minnesota. Despite its substantial nonresident enrollment, therefore, Michigan in a normal year will train as many residents of this state as our sister law schools will train residents of each of their home states. Put another way, it is much as if we had *two* law schools in Ann Arbor—one of standard size for residents, publicly financed, and the other of comparable size for nonresidents, wholly financed from private sources.

We do not, of course, have two separate institutions here; we have a single major national law school. And I am satisfied that the presence of a cosmopolitan, highly qualified student body, and of a cosmopolitan, highly qualified faculty, is of inestimable value both to our resident students and to the people of Michigan. When the state turns to writing a new Constitution, or when the legislature turns to writing a new corporation code or criminal code or probate code or environmental protection law or no-fault accident liability law or public employee relations law, it knows that it can find on the Law School faculty one of the nation's foremost authorities in each of those fields. When a student walks into a Michigan classroom, he or she knows that the instructor will be the kind of person the federal government is pleased to call upon to redraft the bankruptcy laws, or to advise on international trade or disarmament, or to consult on tax policy, or to serve as an assistant attorney general. And the student knows, too, that in

exchanges with schoolmates, he or she will be stimulated and enlightened by some of the liveliest young minds that can be assembled from all over the United States.

The Law School owes much to the State of Michigan. The state owes it to us, and to itself, not to forget just what it means to have a great national law center in Ann Arbor.

Elitism and Egalitarianism. Almost 5,000 students applied for admission to the first-year class of 360 that entered Michigan in the fall of 1971. That was about double the number of applicants of a couple of years before. This extraordinary surge of interest in law study undoubtedly had multiple causes. Three that I can identify are a nationwide shortage of lawyers, which helped boost the annual income of the typical American attorney from $5,000 in 1950 to $25,000 in 1970; a new idealistic attraction to the law as the cutting edge of such social movements of the '60s as civil rights, the war on poverty, and the defense of the environment; and the drop in the Ph.D. market that occurred toward the end of the decade. This confluence of circumstances, we can be sure, will not continue unabated indefinitely.

In the meantime, the law schools are faced with the happy (or unhappy) task of picking and choosing among the most outstanding group of applicants in history. At Michigan, the median undergraduate average of first-year students is now around a "B+," and the median score on the Law School Admission Test is in approximately the upper three per cent. Without being too cruelly precise about it, we can say that something like the lower half of the entering class of less than a decade ago would not be admitted today.

This embarrassment of riches calls for some hard thinking about what we are doing in legal education today. We all know that our so-called "predictors" are somewhat deficient even in forecasting academic performance; they are still less reliable in predicting success in practice. They tell us little or nothing about such critical factors as energy, drive, conscientiousness, business sense, client relations, and the like. Even if we were better at gauging potential for "success" (however defined), there is left the question of our obligation to respond to perceived societal needs for more lawyers who are blacks, women, natives of the Upper Peninsula, and so on.

I confess to genuine bafflement in sifting through the competing claims of elitism and egalitarianism in legal education. As I have indicated earlier, I am convinced that the practice of law at the highest levels demands an intellectuality of the highest order. But a rugged breed of self-taught lawyer flourished in this country for a century after President Jackson's populist heyday, until the American Bar Association and the legal educators combined, with the usual mixed motives of professionalism and economic self-interest, to make the formal three-year law school program the well-nigh universal pathway to the bar. If a certain kind of client could be reasonably well served in a certain kind of practice by an attorney who never went to law school at all, have we become self-deluded mandarins in thinking that legal education must now be reserved for the best of the best?

While recognizing the temptation of professional chauvinism, I believe on balance that a law school like ours should strive, with certain qualifications to be mentioned shortly, to put together as intellectually able a group of students as we can. I have faith that brains make a difference in solving legal problems (like other problems), and even among our current vintage crop of students, marked gradations in ability exist. Although I concede there may not be a direct correlation between brainpower and the other, more subjective qualities needed for success in practice, I find no inverse correlation, either. Law may not remain forever the magnet it now is for so many of our brightest young people, and I think we ought to seize the present opportunity to get the finest among them to help us reshape and advance our profession and our society.

WITHOUT BEING TOO CRUELLY PRECISE ABOUT IT, WE CAN SAY THAT SOMETHING LIKE THE LOWER HALF OF AN ENTERING CLASS OF LESS THAN A DECADE AGO WOULD NOT BE ADMITTED TODAY.

For me, two practical conclusions follow from all this. First, we should not readily give up the struggle to sort out the very best from the next best in the admissions process, and simply resort to random selections from a pool of "qualified" applicants. At the same time, I am sufficiently skeptical of the validity of the evaluative formulas we now employ that I think we might seriously consider reserving, at least experimentally, a certain number of places in each beginning class for selection on a random or other nonquantitative basis. Second, I do not feel this is the time for American law schools to embrace the bold and imaginative recommendation of my colleague Paul Carrington that we move from a three-year to a two-year standard curriculum. The proposal is sure to face intense opposition from the bar associations, anyway, anxious as they are about the unprecedented flood of young lawyers now moving into practice. But entirely prescinding from that, I think that if there was ever a chance to perfect our capacity to use the third year of law school profitably, by broadening the horizons of our fledgling lawyers, by deepening the sense of "legal self-consciousness" of which I spoke before, it is with the extraordinarily talented group of students we have to work with today.

This quest for excellence, in the sense of an almost ruthlessly objective pursuit, admits of at least one further, glowing qualification. We can now pronounce our six-year-old special program for minority group students a resounding success. Students who came to us with grave educational handicaps performed effectively in this highly competitive environment, and then embarked on promising careers in active practice. Their example compels one to ask whether there may be other neglected groups in our society that should receive special consideration in the law school admissions process—whose impact in law practice would similarly be all out of proportion to their numbers: whether we should, for example, deliberately seek a geographical as well as a racial mix among our student body, so that the outlying rural areas of the state, and not just the metropolitan centers, are broadly represented. I do not think this is a betrayal of the elitist principles I espoused earlier. Egalitarianism, too, has worthy claims, and the goal here, as elsewhere, is not the triumph of an absolute, but the proper accommodation of competing values.

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The Proposed National Court of Appeals:

A Threat to the Supreme Court

by Peter Westen

The recent proposal for a National Court of Appeals shows that the Supreme Court is again under attack and that this time even more is at stake than decisions over who will sit on the Court. Unlike the fights over President Roosevelt's court-packing plan and over Fortas, Haynsworth, and Carswell, which were waged by opponents of the Court who thought they could change it by picking new players, the present attack comes from men who profess to support the Court, yet who are striking at its very rules and authority.

Last December the Federal Judicial Center published the *Report on the Case Load of the Supreme Court*, confirming earlier rumors that that Chief Justice of the United States had appointed a study group to recommend ways to lighten the work of the Court. The seven-member group, whose chairman was Professor Paul A. Freund of Harvard, and which included Professor Alexander Bickel of Yale, former ABA President Bernard Segal, and Professor Charles Alan Wright of the Texas Law School, spent a year on the project. They interviewed Justices of the Court, talked with law clerks, compiled statistics, deliberated. The result is the kind of technical document that the government regularly produces and then buries in the Library of Congress. Yet this report has already been criticized by Justice William O. Douglas, Justice Potter Stewart, former Justice Arthur J. Goldberg, and even former Chief Justice Earl Warren, who has otherwise diligently avoided controversy since his retirement.

The Freund committee believes that the Court has so much work that it can scarcely function at all. "We are concerned," it writes,

> that the Court is now at the saturation point, if not actually overwhelmed. If trends continue, as there is every reason to believe they will, and if no relief is provided, the function of the Court must necessarily change. In one way or another, placing ever more reliance on an augmented staff, the Court could perhaps manage to administer its docket. But it will be unable adequately to meet its essential responsibilities.

The report concludes that the Court cannot continue to complete its "essential" business unless some of its present authority is transferred by Congress to other courts.

The Court has both original jurisdiction to preside over trials and appellate jurisdiction to review cases already decided by lower courts. Original jurisdiction extends to controversies so rare that the Freund committee virtually ignores them. Most of the Court's business derives instead from its appellate jurisdiction to review all cases from lower federal courts and any case from a high state court that involves rights under federal law. Last year 4,371 appellate cases were taken to the Court and put on its docket, two-thirds from lower federal courts and one-third from state courts.

But the statistics tell only part of the story. At one time, the Court was required to decide all appellate cases, however clear-cut or insignificant they might have been. In 1925, Congress passed a Judiciary Act in response to the Court's growing docket and to pressure from the overworked Justices. The act allows the Court to screen the appellate cases for the few it wishes to decide and to deny the remainder without decision, in effect letting the decision of the lower court stand. Accordingly, the Court now regulates its case load by taking only a limited number of cases for full argument and decision each year. During the 1970-1971 term, for example, the Court heard argument in 151 cases of a total docket of 4,192. In fact, while the docket increases with each term, the Court hears argument in approximately the same number of cases each year. Between 1940 and 1970, while the docket grew from 1,109 to 4,192 cases, the Court regularly selected only about 140 cases for full argument.

The Court cuts down its work even further by consolidating for joint decision cases that raise similar issues. As a result, the Court hands down about 120 official opinions a year, which the nine Justices divide among themselves. Thus, although Justices may write additional concurring or dissenting opinions of their own, each has official responsibility for only about a dozen Court opinions each term.

The Freund committee recognizes that the Court has succeeded in regulating the number of cases it decides by full opinion, but it is dismayed by the Court's raw docket, which has grown fourfold over the last 30 years. The Court now reviews about 70 new cases a week, from which it selects two or three for full review. The committee assumes from these statistics that the Supreme Court has lost control over its docket, and concludes that the Court needs help in winnowing the "chaff" (as the committee calls it) from the few cases worthy of review.

The principal and most controversial recommendation by the committee is that Congress transfer some of the

present authority of the Supreme Court to a new National Court of Appeals. This "National Court" would consist of seven judges, drawn by rotation from existing federal courts of appeals, who would serve for staggered three-year terms, with no more than one judge from any one of the eleven circuits. The National Court would, first, screen all appellate cases that now go to the Supreme Court and transmit some of them to the Supreme Court, denying the remainder. The Freund committee estimates that the National Court would transmit around 400 cases a year, from which the Supreme Court would select one third for full decision. While the Supreme Court itself could still select cases that had not yet been screened by the National Court, it would nevertheless lose forever the power to review cases once the National Court had denied them.

Second, the National Court would have the power to act as the highest federal court in the land by considering certain federal (although not state) cases on its docket and deciding them itself. The Supreme Court now resolves the differences that arise among the eleven federal circuits concerning interpretation of the U.S. Constitution and other federal laws. It does this when it reviews a federal case to which differing circuit court precedents apparently apply. Under the Freund proposal, however, the Nation Court would have the authority to resolve some of th nflicts among the circuit courts by making final int tations of law which the Supreme Court could not review.

The proposal of a National Court is troubling. It rests on an assumption about the case load of the Supreme Court that has nothing to do with the way the Court really works. The Court, as we shall see, is not in fact overworked. Even if it were, the proposal addresses the least burdensome part of the Court's responsibility. Instead of making appellate justice more efficient, the proposed changes would serve to isolate the Court and promote conflicting sources of authority by interposing still another court between the Supreme Court and the courts below. More important, under the guise of simplifying the Court's work, the proposal would undermine the authority of the Court to determine which cases it will decide.

It should be noted that Chief Justice Burger, as chairman of the Federal Judicial Center, picked the members of the Freund committee himself. The Chief Justice has made no secret of his own views about the case load of the Court. In his most recent message on the "State of the Judiciary," he said:

> In my remarks to you in New York last year, I said that something must be done to arrest the constant increase in docketed cases in the Supreme Court or the quality of the Supreme Court's work would become impaired and the Court would be unable to perform its historic role in the American system of government. Now, after three years on the Court, that conviction becomes more firm.

It is also no secret that the Chief Justice placed on the committee three prestigious academics who variously believe that the Court should either decide fewer cases or decide its cases very differently. Professor Freund warned as long ago as 1961 that the "mounting docket of cases looms as a serious barrier to the true purposes of the Supreme Court," and recommended a policy of "granting fewer petitions for review." As he put it:

> [Reasoned adjudication] is too precious to be at the hazard of internal pressures from the Court's work load that interfere with the essential processes of reflection, consultation, collective criticism, and careful exposition.

Professor Bickel is an outspoken critic of the Warren Court who complains that the Supreme Court already decides too many cases on their merits. Professor Wright, who disagrees with many of the Court's important decisions in criminal cases, argued a few years ago that even the lower federal courts were overworked. Of course these and the other committee members are honorable men who undertook, in their own words, "to study the case load of the Supreme Court and to make such recommendations as [their] findings warranted." Yet, considering their views and the views of the Chief Justice who appointed them, one suspects that they came not to praise the Supreme Court, but to bury it.

More important, the committee consists of men who know the Court only from the outside, as law professors, practicing lawyers, and court administrators. But it includes no one who knows the Court from the inside, and who can determine whether the Court is indeed overworked. One notes the absence of Justice Stanley Reed, Justice Tom Clark, Charles Whittaker, Arthur Goldberg, and Abe Fortas—activists and conservatives who were appointed by five different Presidents and who served over a period of three decades.

The only active Justice who has made an independent study of the case load of the Court rejects the Freund committee premise. Justice William O. Douglas believes that the Court, if anything, is underworked. As he wrote in the *Cornell Law Review* some years ago,

> The upshot of these statistics is that we have fewer oral arguments than we once had, fewer opinions to write, and shorter weeks to work. I do not recall any time in my twenty years or more of service on the Court when we had more time for research, deliberation, debate, and meditation.

Two months ago, in an opinion that preceded the Freund report, Douglas reaffirmed the same view. He referred to the "vast leisure time we presently have," and repeated that "the case for our 'overwork' is a myth." Last term Douglas wrote twice as many opinions as any other member of the Court (many of them dissents), and three times as many as some of his brethren.

How does one explain the differences between the position of Justice Douglas and that of the Freund committee? Both start with the same statistics and have access to the same information. The explanation, according to Professor Freund, is that Justice Douglas

The proposal of a National Court ... rests on an assumption about the case load of the Supreme Court that has nothing to do with the way the Court really works.

possesses exceptional abilities that distinguish him from others on the Court. A better reason is that while the Freund committee largely based its view on statistics, Justice Douglas based his on the art of judging itself.

To begin with, as Justice John Harlan told a group at the Chicago Law School in 1963, ". . . over-all statistics alone are not very revealing of recent trends in the volume of the Court's work." Statistics do not account for the fact that the Court approaches its cases in different ways. The Court first determines whether it should take a case, which is very different from, and less exacting than, deciding one. The Justices do not have to hear oral argument or write opinions explaining their decision to accept or refuse a case. Even more important, they do not have to make a final judgment concerning the law in the case. They must only decide whether the case is sufficiently important or interesting or troubling to be fully argued.

The Court dismisses more than 90 per cent of its cases without deciding them. Normally, the Justices receive the papers in a case two weeks before passing on it. The petitions are frequently only a few pages long and some Justices prefer to read each petition themselves. Others ask their law clerks to summarize the arguments and make a recommendation. The Justices then meet in secret session. Unless at least one Justice wishes to talk about a case, the Court automatically denies it without discussion. The Court accepts cases for argument only if four Justices vote to do so. During the week ending December 11, 1972, the Court considered 82 cases from which it selected only five for full argument. Among the cases denied, the Justices probably did not discuss more than six among themselves.

The burden of the work falls, instead, on the 150 to 170 cases the Court selects each year for full argument. There is no putting them off for later decision. Each Justice must study the next round of papers, listen to lawyers for each side, confer with his brethren, review his own prior positions, and eventually decide the case for himself. Then, if he has responsibility for an official opinion of the Court or wishes to write a separate opinion, he must try to explain his decision in a way that persuades his brethren and the half-million lawyers in the country. Justice Louis D. Brandeis was known to prepare as many as sixty drafts of a single opinion. In the death penalty cases last June, each of the nine Justices wrote a separate opinion in what amounted to a book of over 230 pages. It can be harrowing work, but it is this work that is at the heart of the Court's function and no one, including the Freund committee, wants to alter it in any way.

In its fascination with statistics, the Freund committee has overlooked a more useful measure of the Court's work: the Court is "current" with its docket. Before the Judiciary Act of 1925, the Court frequently fell years behind in deciding cases that had been argued. But after the act gave the Court the right to select the cases it wanted to decide, the Court has been up to date. It screens cases as soon as the papers are filed, hears oral argument as soon as the lawyers are ready, and decides all argued cases by the end of the term. The Court is able to administer its docket and still take a three-month summer vacation and a one-month recess every year.

Whatever time elapses between filing and deciding a case is largely for the benefit of the litigants. After a case is filed, the opposing party has a month in which to respond. If the Court then selects the case for full argument, the first party has 45 days and the opposing party another 30 days thereafter in which to file further briefs. Because of such intervals, the Court regularly carries over cases from one term to another. But they hardly represent a "backlog," as the report pretends. Most lawyers wish they had even more time in which to prepare. After the papers are all in, the Court hears an hour of oral argument for each of the cases and then invariably decides them by the end of the term. Last March and April, for example, the Court heard two important cases involving the rights of U.S. senators and decided both in June with opinions exceeding 120 pages in length.

While the Freund committee largely based its view on statistics, Justice Douglas based his on the art of judging itself.

Some Justices have complained about their work. Justice Whittaker, for example, evidently worked so hard that he prematurely left the Court "physically exhausted" (as Chief Justice Warren later described him). On the other hand, from what his colleagues later wrote about him, one can conclude that Justice Whittaker was never happy on the Court. Although he had done excellent work as a lower court judge, he was tormented by his responsibility as a Supreme Court Justice. He agonized over every decision he was called upon to make, and one suspects that no amount of judicial reform would have eased his burdens.

More recently, Justice Lewis F. Powell, Jr., reported to a conference of judges that he found his work "overwhelming in terms of its demands on my time, my mental and my emotional resources." But it should be noted that Justice Powell came to the Court in the middle of an important term only to find that the Court had been holding its most controversial cases for his arrival, and that he frequently held the deciding vote. Furthermore, history shows that Justices who feel overwhelmed by their work at first later came to feel differently. Justice Harlan, who complained to the New York City Bar Association in 1958 that the Court was overworked, told a Chicago group in 1963 that the Court could successfully manage its business by regulating the number of cases it agrees to decide. Similarly, while Justice Stewart told the American Bar Association in 1959 that the Court's case load was "demonstrably a heavy one," he told reporters at Harvard recently that the case load is "neither intolerable nor impossible to handle" and suggested that reformers table their proposals for another 10 years.

Indeed, since the Freund committee interviewed only the nine Justices now on the Court, it probably received a misleading impression. The Chief Justice had been on the Court only a year when he appointed the committee.

The Freund proposal seems intended to isolate the Supreme Court from the 4,000 messages a year that arrive from courts throughout the country.

Justices Blackmun, Powell, and Rehnquist joined the Court even more recently. New Justices arrive to do work unlike anything they have known before. Justice Douglas has said that a new member needs 10 years to master himself and the job:

> There is a popular impression that there are criteria, based on experience, that qualify some to sit on the Court more than others. A man prominent in bar association activities or a judge of a state or federal court is often thought to have special qualifications to be a Justice of the Supreme Court. Actually no prior experience, however varied, supplies the elements. . . . No matter the prior experience of a Justice, it takes about a decade on the Court for one to feel at home in all fields of the law.

Even if the Court were overworked, which it is not, the proposed National Court is misconceived in several other important respects. It has very much the appearance of a committee compromise of several contradictory positions. Far from helping the Court, it would impede it from performing its constitutional mission.

First, the National Court would, if anything, compound the work of the Supreme Court. It leaves the Court both the hard work of deciding between 150 and 170 cases a year, and the task of winnowing them from an estimated larger group of 400 cases. Yet whatever difficulties the Supreme Court now has in screening its docket, it will have the same ones with the 400 cases the National Court would send it, for these of course would be the most difficult cases. Most of the remainder can be denied without appreciable effort. Chief Justice Charles Evans Hughes and Justice Harlan estimated that between 50 and 60 per cent of the cases submitted for review are so frivolous that they should never have been filed. In short, the National Court leaves the Supreme Court with the hard work and takes away what is very little work at all.

Moreover, the figure of 400 cases a year is only an estimate. The judges on the National Court, after all, come from the very federal courts whose decisions are being screened. They may agree with their own courts, which would leave the Supreme Court with nothing to review. On the other hand, since they do not have to decide those cases themselves and have no evident interest in limiting their number, they may transmit far more than 400. In that event, the Supreme Court would end up where the Freund committee found it.

Finally, because cases may still go to the Supreme Court before they are denied by the National Court, they can be expected to do so. Lawyers today do not by-pass courts of appeal by going directly to the Supreme Court because they know they can always go there later if necessary. But under the Freund proposal, cases will have no other chance to reach the Supreme Court if the National Court turns them away first. Consequently, diligent lawyers will find themselves filing two petitions for review simultaneously, one in each court. For the cost of Xeroxing, they can guarantee their clients a chance to be heard by the Supreme Court. If Congress establishes the National Court to take over the screening function, the Supreme Court would presumably defer to the new court and by-pass it only in exceptional circumstances. But even if the Supreme Court, before review by the National Court, selects only one per cent of the cases sent simultaneously to both courts, it still will have to review all of them.

Moreover, with respect to federal cases, the National Court would usurp the power of the Supreme Court to resolve "conflicts" among lower courts concerning the interpretation of federal law. This is a great power indeed. Most lawyers can discover cases in other circuits that conflict with the law in their own circuit. When they do so, they will, under Freund's proposal, take their case to the National Court. As a result, the National Court will be making law on the most important questions of our national life without the Supreme Court having anything to say about it. While the U.S. Constitution specifies that there be "one" Supreme Court, the National Court would become its rival with equal authority to shape federal law.

In "conflicts" about constitutional law, moreover, the National Court will ultimately clash with the Supreme Court. For the Supreme Court will still have to decide the same constitutional issues in state cases as the National Court confronts in federal cases. So long as the Supreme Court has the final word in constitutional matters, therefore, the National Court will be unable to resolve such conflicts with finality and, instead, will simply create more confusing law for the Supreme Court to reconcile.

More alarming still, the Supreme Court would lose forever the power to review cases that the National Court had screened and denied. Yet "the selection of cases," according to Justice Powell, "is as vital as the decisional process itself." Justice Brandeis was even more emphatic. "The most important thing we decide," he used to say, "is what not to decide."

Why is it so important that the Supreme Court screen its own cases? One reason is that the Supreme Court has its own sense of timing. Again, the death penalty cases are an example. For years the Court was asked to decide whether capital punishment violates the constitutional prohibition against cruel and unusual punishment. Throughout the Sixties, the Court screened and denied hundreds of cases making that argument. Last year the Court felt the time was right, selected a group of capital punishment cases, and decided the issue.

The Court was able to decide the death penalty cases when it did only because they were already on its docket. Who knows what would have happened had the Court waited a year, two years, or even 10 years for the National Court to transmit them, or for a lawyer to file petitions for simultaneous review. The ability of the Supreme Court to set its own pace should not depend on whether the National Court gives it a chance to do so. What is equally important, as Justice Harlan told the New York City bar, is that "the question whether a case is |worthy of review| is more a matter of 'feel' than of precisely ascertainable rules." Each Justice follows his own criteria. Justice Brandeis believed, according to Professor Freund, that the Supreme Court should concentrate on important cases and ignore "individual injustices." Oliver Wendell Holmes, on the other hand, wrote:

> My keenest interest is excited not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some inner theory, and therefore of some profound interstitial change in the very tissue of the law.

The Freund proposal seems intended to isolate the Supreme Court from the 4,000 messages a year that arrive from courts throughout the country. By screening those cases, however negligible they may seem, the Supreme Court now knows more about the nuances of legal change, and knows them sooner, than any other government body. Justice Douglas considers this indispensable:

> The review or sifting of these petitions is in many respects the most important and, I think, the most interesting of all our functions. Across the screen each term come the worries and concerns of the American people—high and low—presented in concrete, tangible form.

If a National Court is set up, the Supreme Court will eventually lose touch with this information and with the nation it serves. It will become a follower, not a leader of legal change, which may be what the Freund committee intended all along.

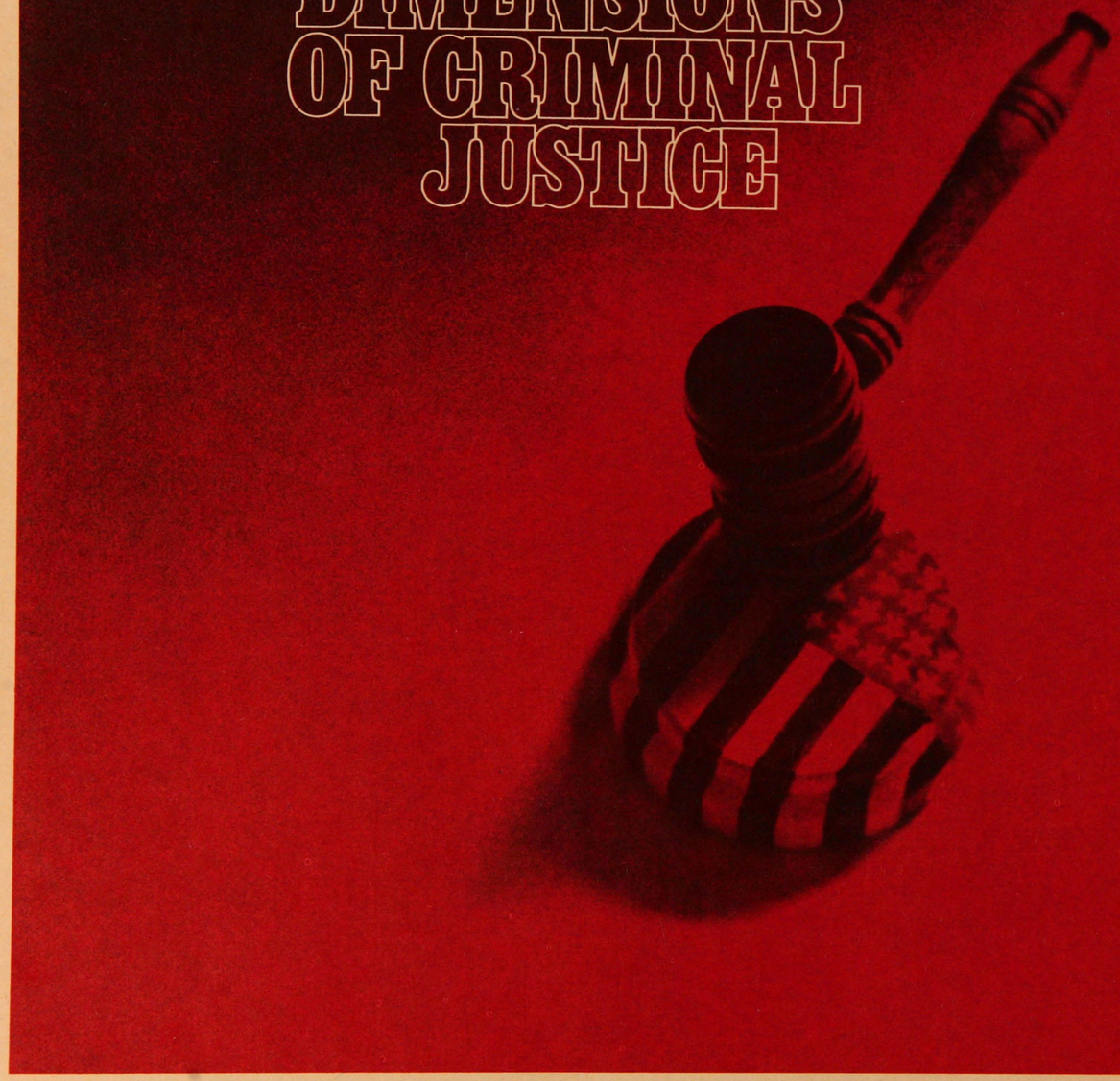
America listens to the Supreme Court now because it has the final word and because, as Justice Arthur Goldberg says, it stands open to everyone:

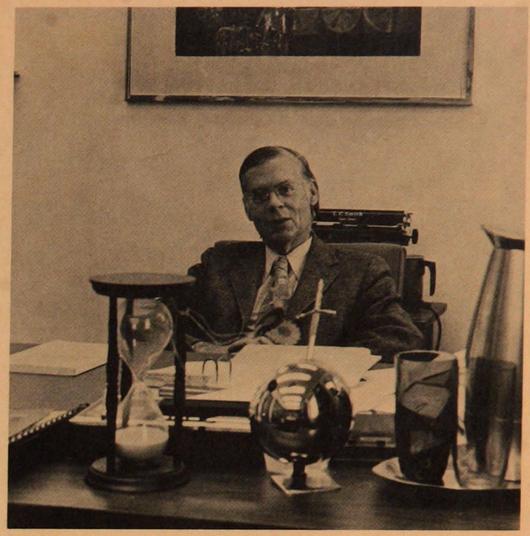
> It is perhaps the greatest virtue of the Supreme Court as it now functions that it serves as a guarantee to all citizens of whatever estate, race, or color, that our highest court is open for consideration of their claim that equal and relevant justice under the Constitution is being denied them.

Under the Freund proposal, those doors will close. Power will shift to the palace guard. Citizens will stop appealing to the Supreme Court, stop listening to it and believing in it, and eventually stop obeying it.

If a National Court is set up, the Supreme Court ... will become a follower, not a leader of legal changes, which may be what the Freund Committee intended all along.

THE CRIMES OF POLITICS: POLITICAL DIMENSIONS OF CRIMINAL JUSTICE





by Francis A. Allen
Edson R. Sunderland Professor of Law

Professor Allen delivered the 1973 Oliver Wendell Holmes lectures at Harvard Law School on March 13, 14, and 15. The following comments are based on extracts from Professor Allen's third lecture, "Reflections on the Trials of Our Time."

In the preface to his indispensable, if sometimes exasperating, volume on *Political Justice*, Professor Otto Kirchheimer canvassed the various contributions to the literature of his subject. "Finally," he wrote, "there are the legal theorists, whose intellectual efforts stand in inverse ratio to their influence on actual practice.

Professor Kirchheimer was surely correct in counseling a certain modesty when estimating the impact of academic criticism in the areas of public policy under consideration. No amount of analysis is likely to deter a government from taking protective measures when it feels that the security of the state is threatened. Mr. Justice Holmes once remarked that detached reflection cannot be demanded in the presence of an uplifted knife. What is true of individuals is, in this respect, also true of political societies. One difference, however, is that societies are perhaps more prone than individuals to apprehend threats when none exist. The life-cycle of legislation in this field tends to encourag practice." ng at those times when rationality and reflection are least likely to be in evidence. Typically, laws proscribing political behavior are enacted in periods of strong public feeling, sometimes bordering on hysteria. Typically, too, such periods, although recurrent, are short-lived. Nothing is so dead as yesterday's Red scare; but the veering of public attention away from the subject that had earlier produced hysteria weakens the impetus to repeal or modify the legislation passed in a state of public excitement. The result is to confer a kind of immortality on such laws, making some available for continued application by an unobserved bureaucracy, and maintaining all for use in the next recurring period of public agitation. When the next period arrives, not only are the old laws likely to be applied, but they may also stimulate new legislative adventures in repression and crime definition.

The role of academic criticism in areas like these will be peripheral at best. It may, nevertheless, have its importance. Detached reflection on our experience may diminish the ignorance that condemns societies to relive the past and may induce or hasten the sober second thought, even in periods of public excitement. In short, analysis and reflection will not insure a policy guided by wisdom, but they may make contributions to our sophistication. In this field sophistication may provide a stronger bulwark than wisdom; at least it may be easier to come by. . . .

Despite the powerful inducements to the uses of political prosecutions by governments, there may be powerful inhibitions, as well. The same ambiguities that confront efforts to identify the consequences of such a proceeding after it has been held will even more seriously afflict estimates of probable results before the proceeding is initiated. Even when the government is most concerned with immediate political gains and most unmindful of long-run consequences, the resort to a criminal prosecution involves significant risks. Such a case requires the government to relinquish control of a situation and to place it in the hands of judge and jury, who may be disposed to exercise their independence to the full. There is chanciness in the fact that the trial gives the accused a forum; and on more than one occasion the defense has demonstrated far greater skills in public communications than the government. Public reactions may be unexpected. It is often unclear whether the public will be attentive to the proceedings, or, should it become interested, whether its sympathies will lie with the hounds or with the fox. These are utilitarian considerations; but there are other more fundamental uncertainties. Unintended consequences inevitably accompany social action, but it may be doubted that any of the ordinary functions of government are afflicted by greater ambiguities and uncertainties than the prosecution of political offenders; and this is true whether one views these proceedings from the perspective of the government's interest or that of the larger society. Thus if, as I observed earlier, the problem of creating and administering a law of political crimes is a matter of more or less, of when and how, it is of particular importance to identify at least some of the factors that are productive of unintended consequences.

The consequences produced by prosecutions of political offenders are peculiarily dependent on the circumstances obtaining in society when the proceedings are held. Such circumstances, of course, alter over time; and hence one of the productive sources of unintended consequences is miscalculation about the degree of social change that has occurred and about its nature. In looking back on our earlier experiences one is struck by the extent to which the dangerous alien was conceived as the principal threat to our internal security. In very significant measure the frenetic resort to mass deportations, as well as to criminal sanctions, represented an expression of American nativism with its suspicions and fears of strangers who appeared to threaten an entire style of life that had come to be understood as distinctively American. Perhaps a remnant of these attitudes can be seen in the strongly held beliefs of some middle-western legislators in the 1960's that the student disorders on state university campuses were the product of admitting undesirables from the Eastern seaboard into the student bodies. These beliefs, not having been founded on fact, proved invulnerable to factual refutation. As in the case of aliens, the legislatures passed exclusion laws, laws which very substantially limited the number of out-of-state students who might be admitted to the state universities. Although this legislation was primarily motivated by financial stringencies, the political factor was not significant and sometimes was quite explicit.

There are significant differences in feel between the recent past and earlier periods of anxiety about radical activity in this century, and one of the factors most important in producing these differences is the circumstance that in the late 1960's those groups producing concern—college students, racial and ethnic activists—were made up overwhelmingly of native-born Americans. Although deportation has not lost all significance as an instrumentality to combat internal subversion, the conception of the dangerous alien played small part in the agitations of the last decade. This is a highly significant development, and its importance may not be fully appreciated, within or outside the government. Bumper stickers admonish us to love America or leave it; but those offering the warning have not suggested a means for compelling the latter alternative, unless prison or the concentration camp is seen to be the mode of exit.

An argument familiar to criminologists is that society "needs its criminals." The punishment of deviancy, it is suggested, represents a ritualistic reaffirmation of the community's values and strengthens the sense of personal worth of the non-criminal majority by identifying its members as parts of a group possessing distinctive convictions and aspirations. This view might be thought to apply with particular force to the prosecution of political crimes. Thus the punishment of the traitor both dramatizes the reality of the community and reinforces the sense of identity of its constituent members. One need not deny all validity to these perceptions to recognize that in a society in which consensus is suffering substantial erosion, the social effects of imposing punishment on political deviants may be quite different from that suggested by the theory. If the deviant is part of an infinitesimal minority, or a member of a large but powerless group, then, arguably, his symbolic sacrifice to the values of the dominant group may enhance the vigor and cohesion of the majority. But if the deviant groups are substantial in size, assertive in demands, and vigorous in defense of their values, if they are recruited in significant measure from persons born close to the centers of power as well as from the dispossed, attempts at criminal repression may produce a clamor that assaults the confidence of the majority group and which weakens rather than fortifies its sense of identity. To obtain the satisfying feeling of truth vindicated may then require a quantum of force not available to the majority, or, if available and employed, that threatens or destroys the libertarian assumptions of the society. In short, the problems of administering the law of political crimes in the late 1960's proved to be significantly different from those that were presented when the government pursued the specter of the dangerous alien; and one may suspect that the rather indifferent successes of recent political prosecutions reflect, in part, an incomplete awareness of these differences.

Not all the risks and social liabilities associated with the prosecution of political offenders, however, are to be explained by recent changes in the nature of political deviancy in the United States. On the contrary, the long history of such proceedings in various periods and cultures reveals a remarkable persistence of certain tendencies, many of which are often deleterious to general social interests and sometimes dangerous to the governments that frame and prosecute the criminal charges. Much of this history may be summarized in the proposition that the identification and punishment of political offenders tends strongly to excess. Excessive public reactions constitute one of its most significant forms. A repressive stance of the government may sometimes induce a popular supportive reaction exceeding anything the government contemplated or desires. This phenomenon was noted by the younger Pliny when, as a provincial Roman governor, he sought

advice from the Emperor Trajan on how to administer sanctions on those who professed Christianity. "Now as I have begun to deal with this problem, as so often happens," he wrote, "the charges are becoming more widespread and increasing in variety. An anonymous pamphlet has been circulated which contains the names of a number of accused persons." Trajan replied counseling moderation in the procedures to be employed, and to his enduring credit added: "But pamphlets circulated anonymously must play no part in any accusations. They create the worst sort of precedent and are quite out of keeping with the spirit of our age." Unfortunately, wisdom like Trajan's is rare in all societies.

The tendency to excess is seen also in judicial behavior. No such proposition should be advanced, of course, without giving full recognition to the numerous honorable exceptions. Nevertheless, it is remarkable how often in widely separated historical periods, overreaching and arbitrary behavior of judges appears to have been associated with the prosecution of political offenders. The judge "conducted the trial with malicious ferocity . . . [E]very ruling throughout the long trial on any contested point was in favor of the state and . . . page after page of the record contained insinuating remarks of the judge . . . with the evident intent of bringing the jury to his way of thinking." The words do not refer to a recent event but were spoken by Governor Peter Altgeld of Illinois in 1893 about the performance of the trial judge in the Haymarket case. Commenting on the political trials of the Roman Empire, Montesquieu observed that "Tiberius always found judges ready to condemn as many people as he could suspect." In late eighteenth-century England the series of prosecutions for criminal libel and sedition in which Thomas Erskine gained his reputation as a defender of liberty were characterized by judicial extravagance. "God help the people who have such judges," said Charles James Fox.

Judicial excess will often be reflected in the imposition of excessive sentences. It is here that governments often lose the verdict of history. Now long after the events, one may well doubt that the interests of the British people were well served by the imposition of the death penalty on Roger Casement, and wonder whether the United States was advantaged by the capital sentences in the Rosenberg case. Memories of such events have long lives, and are often carefully cultivated by the political minorities from which the convicted offenders arose; and after time has passed, the steady attrition of the minority often convinces the majority that a serious injustice has been done. More broadly, it can be said that policies of political repression, however enthusiastically supported when devised, tend in the long run to damage the reputation of governments and to fare poorly at the hands of history. Perhaps this is so because ordinarily those who make history do not write it. In any event, even the fearsome Wobbly, who invaded the dreams of our fathers and grandfathers, tends now to be recalled as a quaint and loveable folk hero who produced a book of first-rate songs.

These and other evidences of excess are symptomatic of the unique stresses that prosecutions of political crimes create in the institutions of justice. In very large measure these stresses arise from the basic fact upon which the political offense concept rests; namely, that persons who commit political crimes are ordinarily different in significant respects from other criminals. Studies of the attitudes and beliefs of common criminals reveal that such persons tend to accept the conventional values of the community, including those values that are embodied in the criminal law that they have been charged with violating. To be sure, offenders are adept at discovering reasons to excuse their own behavior or to "neutralize" the official values when applied to their own situations. It probably remains true, however, that most prisoners do not challenge the broad principles of the criminal law, nor do they reject the legitimacy of the governmental institutions that administer it, however quick they may be to charge mistaken or abusive uses of state power in their own cases. Moreover, to a remarkable degree the procedures of criminal justice depend upon and receive the cooperation of the accused and his counsel, even in cases in which conviction of the defendant is all but inevitable and the penalties to be imposed are serious. As the late Professor David M. Potter observed: "The unanimity with which in the past, accused persons accepted this system was so total that we were not even aware of the naked vulnerability of the courts until the Chicago Seven disclosed it to us."

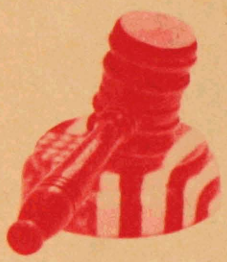
Bumper stickers admonish us to love America or leave it; but those offering the warning have not suggested a means for compelling the latter alternative. . .

The "political" defendant creates very different burdens and tensions for the institutions of justice. He will often seek to test the values and motives of the official agencies against his own and thereby subject justice to trial. His efforts in this connection may be carefully deliberated. "In court," writes Father Philip Berrigan, "one puts values against legality according to legal rules and with slight chance of legal success. One does not look for justice; one hopes for a forum from which to communicate ideals, convictions, and anguish." And again: "When it comes to defending political dissenters like ourselves, lawyers become accomplices in the game against us—if, that is, they play its rules." The defendant obtains sustenance for his resolve in the conviction that his own values and purposes have received a higher validation than can be conferred by the legal order, and in the belief that his efforts and sacrifices may advance the welfare and happiness of human beings. He may be sustained also by the fact that in some sense he is not alone.

Characteristically political crimes grow out of group activity, the size of the group and the effectiveness of its organization varying, of course, from case to case. Even when the defendant finds himself defeated in his efforts to express and advance his political values in the court-

room, his associates and supporters outside the courthouse will often subject the proceedings to a drumfire of criticism and protest. The prosecution of a political offender, therefore, may involve two trials: the one in which the accused must respond to the charges brought against him by the government, and the other in which the court and the agencies of government are subjected to a kind of prosecution in the community. One of the substantial risks for the government is that, although it may win in the courtroom, it may lose in the larger tribunal. . . .

We have left to police and prosecuting agencies, without the assistance even of meaningful, publicly stated standards of performance, the intricate task of adapting programs of law enforcement to the attainment of our larger political values. It is to condemn the community rather than these agencies to report that the latter have proved inadequate to the task. The problem is all the more acute, since some of these agencies have not only achieved remarkably untrammeled volition to determine what they will do, but also what and how much the public is entitled to learn about their activities. All of these various circumstances breed a kind of bureaucratic obtuseness that in times of stress can be dangerous, for it confuses public reactions and may deny support for the government in cases in which it is deserved. The task of frustrating e activities of political terrorists, for example, is surely legitimate function of



It is remarkable how often . . . overreaching and arbitrary behavior of judges appears to have been associated with the prosecution of political offenders.

government. This task does not include the harrassment of groups organized to advance political objectives through constitutionally protected means, however unpopular or even unwise these objectives may be. That our secret police, both state and federal, have stooped to such harrassment has often been alleged, and the evidence supporting these allegations has not always been convincingly refuted. Yet nothing is more calculated to breed and sustain political extremism than widely held and apparently supported beliefs that in the political arena our police are regularly, sometimes deliberately, flouting the principles on which our polity is based.

Confidence of the community is vital here. The task of identifying and controlling the political terrorist is one of extraordinary difficulty. The difficulty inheres in the fact that *political* crime is involved. It is not apparent that a police agency can proceed to identify persons who have engaged in acts of political violence, like last year's planting of time bombs in bank vaults, without placing under surveillance a great deal of non-criminal political activity and large numbers of persons who have not and never will descend to acts of violence and terror. Thus the police function in these cases is in constant danger of impinging on the basic political values of the community. It is an alarming circumstance that in large segments of our society, even legitimate and vitally necessary police activity is conceived as oppressive. This is true, in part, because the police have on occasion violated political values, have sometimes revealed insensitivity to or even ignorance of these values, and, accordingly, have made themselves and our political compact vulnerable to corrosive suspicion. The danger, however, is not only that the police may be denied support when deserved, but also that in other segments of the community the police may gain support when it is undeserved. Police practices that regularly disregard basic restraints may teach the community that security can be achieved in no other way. If believed, the lesson strips us of our capacity for indignation when political values are invaded by official authority. Without that capacity those values cannot survive.

This survey of the consequences that result from administration of the law of political crimes rests on the assumption that this governmental function is often a necessary, and surely an inevitable, one. That the consequences are sometimes seriously deleterious to the society in which the function is performed and even to the government whose function it is does not invalidate the assumption about its necessity and inevitability. All experience with political prosecution supports the prediction that in the future, as in the past, such proceedings will sometimes be launched that are neither necessary nor wise. So long as governments can obtain immediate political gains from the trial of a political case, one may expect that, on occasion, decisions will be made to proceed with prosecutions injurious to the long-term interests of the community. This is true, not only because the prospects of immediate gain are often a more powerful determinant of behavior than are fears of a speculative future loss, but also because the undesirable consequences are often unexpected and unforeseen and, therefore, do not serve as effective deterents of unwise behavior.

Justification for a quiescent fatalism is surely not to be derived from these facts. We have acquired a much broader experience with these problems than was possessed by the American public in the days of the Great Red Scare at the end of the first world war or even in the era of Senator Joseph McCarthy in the 1950's. The unintended consequences of efforts to control politically motivated behavior need not prove so surprising and unpredictable in the future as in the past. Certain propositions about public policy in the area can now be stated with reasonable confidence. Surely the experience of the last generation offers little to recommend repetition of mass political trials of the sort represented by the Chicago Seven case or by the prosecution of our native fascists and proto-fascists in the early years of the second world war. Such proceedings have rarely contributed to our essential security, and they have often eroded support for the institutions of justice. A growing skepticism about the uses of the conspiracy device, especially in cases impinging on First Amendment rights, strongly counsels an in-

creased emphasis on the demonstrable overt act as a basis for criminal prosecutions in this area. Discretion will always play an essential role in the administration of criminal justice, including that relating to the law of political crimes. But we are under pressing necessity to insure a greater responsibility in the exercise of such discretion as is practiced by prosecutors and by police agencies performing surveillance functions. Explicit statements of policy outlining areas of jurisdiction, techniques to be employed, and procedures to be pursued are required; and machinery adequate to supervise decision making and to hold public officials accountable who abuse their authority should be devised. Realization of such measures, of course, will require intelligence and will. But this is true of any public effort to affect and strengthen policy.

However important the administration of political crimes law may be to individual and social interests, studies in this area have a wider significance and application. In particular, these inquiries may have significance for the criminal law generally. Law enforcement in the political crimes area is afflicted with the problems associated with administering any system of coercive sanctions, but it also encompasses the risks and social liabilities that are peculiar to itself. Many of the risks are associated with the fact that every political trial contains the potential of an assault on the legitimacy of the law and the institutions of justice by the accused and his organized supporters in the community. A strong constitutional regime will ordinarily survive these assaults, but no system of justice thrives when its basic authority is placed continually in question. The "political" ingredient in the political crimes concept is a volatile, not a stable, element; and given appropriate conditions, whole areas of the criminal law that formerly were conceived as involving common crimes against persons and property can quickly be transformed into areas of political crime. In situations of extreme political disruption the entire criminal justice function may be seen as political; and when this perception is formed, the vital contributions to public order that the criminal law is expected to provide may no longer be available.

The difficulties and disabilities associated with political crimes may be extended into the areas of ordinary criminal law enforcement by decisions to make certain kinds of behavior criminal or by the methods employed by police agencies and courts to enforce the law. One of the fundamental explanations of the attitudes that deprive the system of criminal justice of the support of increasingly large groups within our society is the very *breadth* of attempted criminal regulation. Many years ago the report of a Royal Commission made the point that the automobile had done much to deprive the police of the spontaneous support of the community. Because many traffic violations are criminal, and because most adults are drivers, a majority of adults for the first time became potential criminals. The interests of the population, therefore, and the consequent attitudes have become in some measure adverse to the system of law enforcement. These attitudes are strengthened by the fact that even innocent acts of the driver may be classified as criminal or quasi-criminal, and because of the often abrasive way in which traffic regulations are applied.

Much more serious, of course, are the factors that have encouraged the separation of young people from the institutions of adult society. Part of the conscious dynamics of the youth culture and probably even more of its unconscious motivations operate to create differences that distinguish it from adult society. These differences, including the use of marijuana, have involved inhabitants of that culture in hostile confrontations with the police and the apparatus of the criminal law. There has developed in some young people a flaming conviction that the system of criminal justice is inhumanely repressive and a threat to personal integrity and volition. These attitudes, gained in many cases from first-hand experience or observation, may take on significant political dimensions, for they create a numerous constituency responsive to political movements predicated on the assumption of the injustice and oppression of existing social institutions. Although one may reasonably conclude that the issue of whether persons should have access to drugs other than tobacco and alcohol is intrinsically not very interesting, it is likely that our penal policy is exacting costs in this area that we cannot prudently sustain.

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Prediction is hazardous, but some indications of the last decade suggest a future characterized by a greater degree of self-consciousness and assertiveness on the part of groups defined by age, ethnic background, religious commitment, and perhaps in other ways. It seems probable that if something like the free society is to be achieved in the years ahead, it will be the product of a broader tolerance of diversity in interpersonal relations, ethical imperatives, and private conduct. The notion of the melting pot is today antagonistic to political and personal freedom, for it could be achieved only through massive governmental coercion or a tide of repressive social conformity. These considerations are of the highest importance to the criminal law, for the tolerance upon which rest our hopes for the only species of liberal society likely to be available to us in the future must be reflected first and foremost in the criminal law and its administration. This is the true significance of the decriminalization movement in the area of sumptuary regulation. The continued effort to impose an official version of propriety in these areas will probably fail, and at great cost. But the costs of success are likely to be higher, for success can be achieved only through a kind of counter-revolutionary effort leading to a society as

repressive as the hyperboles of radical reform assert it already to be.

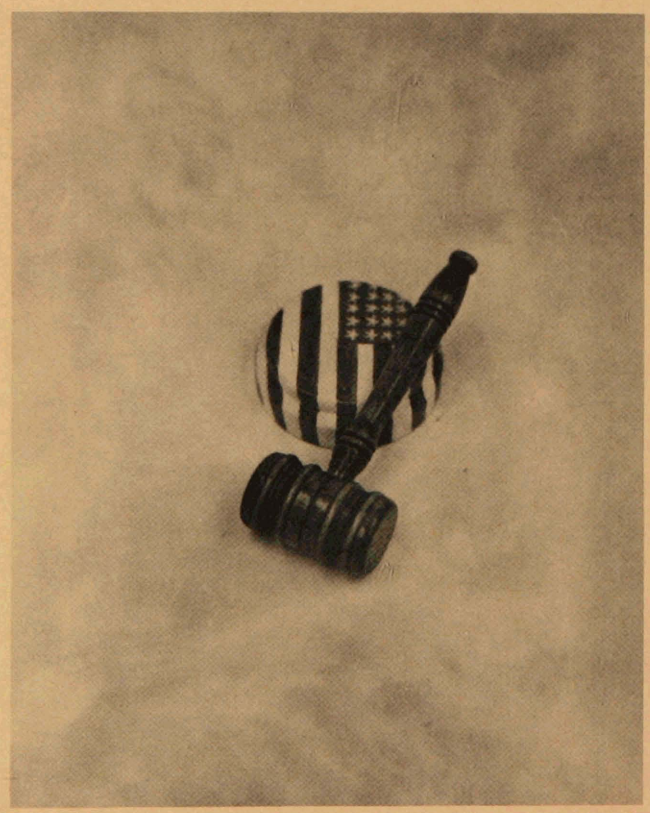
Ordinary crimes against persons and property—behavior which by any test falls within the proper concerns of the law—may, however, be converted into political crimes by the methods employed in law enforcement. For many years this society has experienced frustration because of its apparent inability to cope successfully with serious criminality. One of the consequences has been the rise of what might be called the "war theory" of law enforcement. As long ago as 1937, Max Radin observed:

> We are invited periodically, in the newspapers, from the pulpit, on the air, to engage in a war on crime. The military metaphor is so persistent and carried out in such detail, that we can scarcely help taking it for granted that somewhere before us, there is an intrenched and hostile force consisting of men we call criminals, whose purpose it is to attack Society, that is to say, us. The matter is presented as a simple enough affair, and it is assumed that if we fight valiantly, we shall win and conquer the enemy.
>
> And then? Unfortunately, we are not quite clear what is to happen then.

Wars are attended by certain inconveniences, and one of these is a war psychology which, with only slight encouragement from circumstances or special pleading, can be quickly converted into a war psychosis. A society in such a mental state is not likely to achieve an accurate grasp of reality, to establish sensible priorities, or to make correct calculations of social costs involved in policy alternatives. Evidences of these distorted perceptions abound in contemporary statements about law enforcement. Thus one frequently encounters the reflex of politicians and law enforcement spokesmen that attributes disturbing criminal occurrences to nation-wide conspiracies (usually of a radical cast) or to the efforts of "outside agitators." Few of these assertions are ever confirmed by competent evidence. The events surrounding the Attica affair provide striking and frightening illustrations of such misapprehensions of reality and their consequences. In a story dated September 14, 1971, and distributed widely through the national media, an assistant state correction commissioner was quoted as saying: "We have eye-witnesses who saw the hostages' throats cut—and we believe their reports." The autopsy evidence of the next day establishing that no throats were cut, and that the victims died of gunshot wounds inflicted by the assaulting forces is startling enough. What is most revealing and suggestive, however, are the reactions of incredulity in the face of the evidence displayed by many of those involved and in the public at large. Conceptions of who the "enemy" is and of his nature, when erroneous, can prepare the path to disaster.

The war theory of law enforcement has induced police departments in several urban communities to embark on programs of "aggressive patrol," which have led officers to enter high crime areas of central cities in disguise. These tactics have brought sharp and violent contacts with dangerous criminals. Some such persons are apprehended or killed. As the pattern unfolds, however, police officers are injured or die; and police forces in vindictive retaliation seek out the offenders, invade the privacy of persons in their homes, engage in unlawful detention of suspects, violate the rights and assault the dignity of those supposedly advantaged by such programs of law enforcement. The inhabitants of these neighborhoods, sorely oppressed as they are by private criminality, leave no doubt that at such times it is the activities of the police that are to be feared and resented. What is perhaps most ironic about these occurrences is that there is no convincing evidence that they contribute to the over-all effectiveness of law enforcement; and there is considerable reason to suspect that the contrary result is produced. Professor Albert Reiss has pointed out that by far the larger part of arrests, and hence of convictions, are initiated by citizen complaints to the police. It appears to follow that programs that alienate the citizenry from the police and which, among other things, inhibit citizen cooperation in law enforcement will, in the long run, reduce the effectiveness of the police function. Whether these and other results follow from policies of "aggressive patrol" is surely a researchable question. But the war theory of law enforcement by focusing on the elimination of criminals in particular cases rarely leads the police to pose such questions.

The issue, of course, goes beyond the matter of law enforcement efficiency. One who elects to launch a war on crime should be aware that he is electing to engage in civil war. The concept is one that a liberal society cannot afford to harbor. The security of life and possessions from criminal interference is part of the blessings of liberty and the domestic tranquility our constitutional arrangements are committed to advance. The criminal law has important contributions to make to the securing of these ends. But the devastating and stigmatic penalties of the criminal law are compatible with the spirit of a liberal society only when there is consensus about the necessity for penalizing the conduct defined as criminal and about the means employed in applying the law. Extension of the criminal law beyond these limits not only results in indifferent success in the areas to which the law is extended but may also threaten its effectiveness in its traditional applications. It is beyond these limitations that the area of political crimes is to be found. A first principle of statesmanship in the formulation of penal policy is, therefore, to confine the areas of political crime to their narrowest possible limits. So long as the political behavior of individuals and groups threatens the interests and values that the majority is entitled to defend, statutes defining political crimes will be drafted and political prosecutions initiated. But this is activity to be justified by the principle of strict necessity; and when the necessity is ended, the criminal law should then return to its routine but indispensable tasks.



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