Law Quadrangle Notes

The University of Michigan Law School

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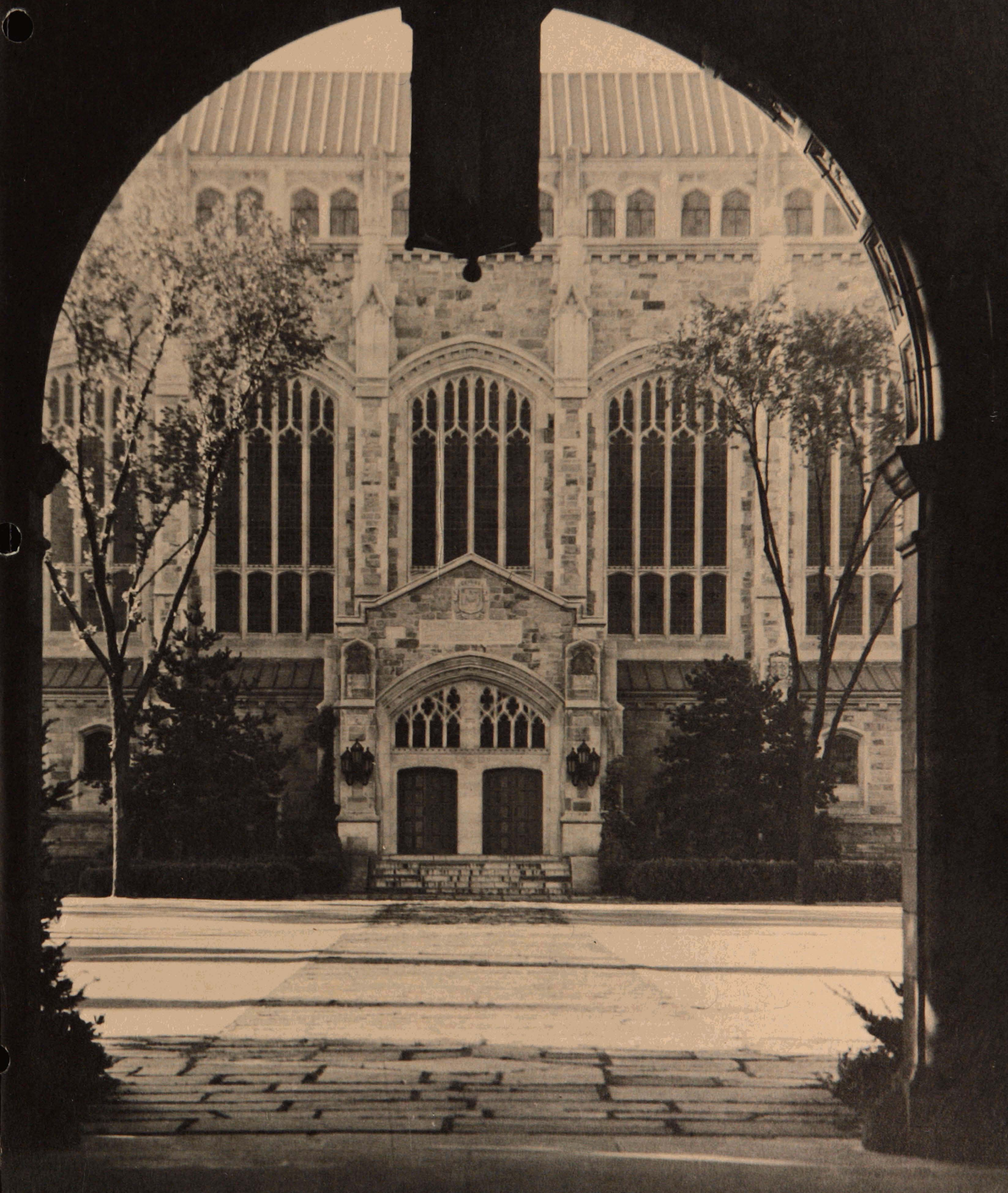

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Quality of Law Applicants Continues To Rise

The number of applicants for admission to the University of Michigan Law School has exceeded the 4,000 mark for the third straight year, and student academic qualifications based on test scores and college grades are higher than ever.

The number of women applicants is also on the rise, accounting for nearly 18 per cent of the total number of applicants in 1973, according to a report by Jane Waterson, the Law School's assistant dean and admissions officer.

Miss Waterson says the school received 4,496 first-year applications in 1973, which represents a slight decline from the 1972 figure of 4,915, the highest in the school's history. Figures for previous years show 4,786 first-year applicants in 1971, 3,740 in 1970, and 2,810 in 1969.

"Although the number of applications appears to be leveling off after last year's record total, the general quality of the applicants has gone up," says Miss Waterson, who notes that this also appears to be the trend at other law schools.

Her report reveals a median undergraduate grade point average of 3.57 (out of a possible 4.00) for the current first-year class, and a median score of 690 (out of a possible 800) on the Law School Admissions Test (LSAT).

Both these figures are higher than in previous years. For the 1972 first-year class the median undergraduate grade point average was 3.46 while the figure was 3.37 in 1971 and in 1970. The median LSAT score was 682 last year, 659 in 1971, and 648 in 1970.

Miss Waterson's report shows that 807 women applied for admission in 1973 out of a total of 4,496 first-year applicants. A current first-year enrollment of 374 includes 83 women, while 58 women enrolled in 1972.

Miss Waterson notes that the Law School now seeks an entering class of 360 to 370 students. First-year enrollment figures were higher in previous years, she says, because of the school's over-enrollment in anticipation of high draft calls.

Here are some other statistics in the report:

About 58 per cent of the current first-year student body are Michigan residents, compared to 51 per cent last year and 55 per cent in 1971. The remainder of current first-year students come from 33 states and the District of Columbia, with the highest out-of-state representation from Ohio, Illinois, Pennsylvania, and New York.

The current first-year class has 35 minority students, including blacks and Spanish surname students. About 16 per cent of the first-year class are listed as having some graduate school experience before entering law school, including 40 students with master's degrees and two with doctorates. A total of 146 first-year students, according to Miss Waterson, "have been out of undergraduate school for at least one year doing something other than graduate work."

Allan F. Smith

Allan Smith, Former Dean, Returns To Law Teaching

Allan F. Smith, who served as University of Michigan law dean from 1960-65 and as the U-M's vice-president for academic affairs since 1965, will step down from the vice-presidency at the end of the current school year to resume teaching at the Law School.

Dr. Smith, 62, said: "I have spent 14 years at administrative effort in the Law School and in the central administration, and I want to go back to teaching, which I like, and to my profession. I think I can be of greater use to the Law School if I move now rather than later."

Smith's request to be relieved of administrative duties was approved by the University Regents in October. University by-laws require executive officers and deans to retire from administrative posts at age 65, but they may return to professorial duties.

U-M President Robben W. Fleming commented: "Allan Smith is a superb vice-president for academic affairs. He has contributed immeasurably to the quality of this University, and it is hard to imagine anyone else in his position. Nevertheless, his desire for a less arduous assignment is understandable, and we bow to his wishes out of deep respect for his long and distinguished service."

A U-M faculty member since 1947, Dr. Smith was appointed to his present position to succeed Roger W. Heyns, who moved to the University of California as chancellor of the Berkeley campus. Heyns now is president of the American Council on Education in Washington.

Smith, who is widely known as a scholar, administrator, and author and who has gained a reputation as a superior classroom teacher, reflected: "It has been fun to watch a very great university in all of its operations. I am continuously struck by the strength of our deans and other academic unit heads. They and the faculty have given this University its international distinction."

Smith was born Dec. 19, 1911, in Belgrade, Neb., and was graduated from Nebraska State Teachers College, now Kearney State College, in 1933. He received a bachelor of laws degree from the University of Nebraska in 1940. He also has two degrees from the U-M—a Master of Laws in 1941 and a Doctor of Juridical Science in 1950. The University of New Brunswick awarded him an honorary Doctor of Civil Law degree in 1968.

He came to Michigan in the summer of 1946 as a lecturer in law and research associate in the Law School. After a year at Stanford, he was appointed assistant professor of law at Michigan in 1947, and was promoted to associate professor in 1950 and full professor in 1953.

He was director of legal research and chairman of the graduate committee of the Law School from 1954 until his appointment as dean in 1960. He also has served as chairman of the Senate Advisory Committee on University Affairs, the highest elective faculty post on the campus.

As vice-president, Smith has been active in numerous institutional and academic groups. He is presently U-M representative to the Committee on Interinstitutional Cooperation, head of the MERIT Computer Network board, the academic representative in the National Association of State Universities and Land Grant Colleges. He also served with the special commission of the National Science Foundation whose report was instrumental

in developing the Research Applied to National Needs (RANN) program.

Dr. Smith is a member of the American Bar Association, the Michigan State Bar Association, Phi Delta Phi (honorary member), and the American Judicature Society. He has served on various committees of the state bar, was chairman of its real property section, and for a time was on the governing board.

His publications include a volume on *Personal Life Insurance Trusts* and co-editorship of one of the most widely used casebooks on property. In 1956 he collaborated with Prof. Lewis M. Simes in a comprehensive revision of *The Law of Future Interests.*

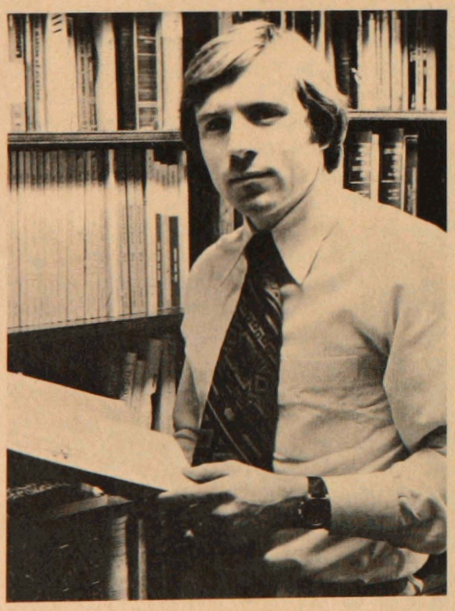
He is married to the former Alene Mullikin of Munden, Kan. They have two children, Stephanie (Mrs. John Niederhuber) in Ann Arbor, and Gregory, an attorney in San Francisco.

Three New Profs Join Law Faculty

Broadcasting regulation, environmental law, and the "compulsory process" clause under the Sixth Amendment are among the research interests of three new faculty members at the U-M Law School: Lee C. Bollinger, Jr., Philip Soper, and Peter K. Westen.

Bollinger is concerned with the rights of the electronic media. This summer he plans to examine that field and aspects of consumer law.

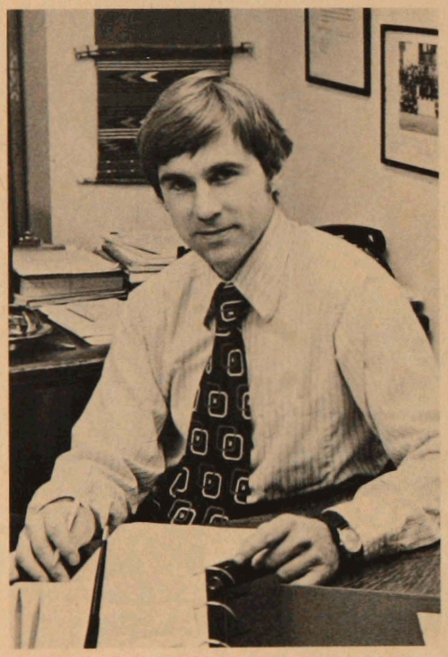
Bollinger graduated from the University of Oregon in 1968 and from Columbia Law School in 1971. He worked as a law clerk for Judge Wilfred Feinberg of the Court of Appeals for the Second Circuit, and for Chief Justice Warren Burger of the U. S. Supreme Court. He has taught contracts and commercial transactions classes since joining the U-M faculty in the fall.



Lee C. Bollinger, Jr.

Prof. Soper, who specializes in environmental law, comes to the U-M from the Council on Environmental Quality in Washington, D. C., where he was a member of the general counsel's staff from 1971-73. In this capacity he handled legal and procedural issues concerning the National Environmental Policy Act of 1969.

After receiving his bachelor's and master's degrees from Washington University (St. Louis) in 1964 and 1965, Soper graduated from Harvard Law School in 1969. He served as a law clerk to Justice Byron R. White on the U. S. Supreme Court, and then completed his doctoral dissertation work at Oxford in 1970-71. He received his Ph.D. in philosophy from Washington University in 1972.

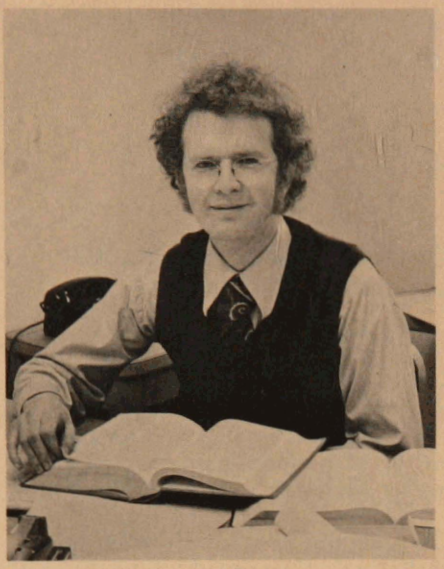


Philip Soper

Soper teaches classes in contracts and an environmental law course at the U-M. Currently, he is writing a book for both attorneys and laymen on the constitutional framework of environmental law cases.

The third new faculty member, Prof. Westen, teaches classes in civil procedure and criminal procedure. He graduated from Harvard College in 1964 and studied history at the University of Vienna for a year before returning to study law in the U. S. He received his law degree from the University of California at Berkeley in 1968.

During 1968-69, Westen worked as a law clerk for Justice William O. Douglas of the Supreme Court and later served as a legal adviser to the Ministry of Economic Development in Bogota, Colombia. For the past two years Westen practiced law in Washington, D. C., with the firm of Paul, Weiss, Rifkind, Wharton & Garrison, which specializes in federal civil and criminal litigation.



Peter K. Westen

Westen's article, "The Proposed National Court of Appeals: A Threat to the Supreme Court?" appeared last year in the *New York Review of Books.* He has also written on conflicts of law. Westen's current research involves study of the compulsory process clause under the Sixth Amendment.—*Marty Hair*

Appearance of Litigants Weighed in U-M Study

"Jurymen seldom convict a person they like, or acquit one they dislike."

This remark, made some 40 years ago by Clarence Darrow, the famous trial lawyer, may not be far from the truth, a University of Michigan study suggests.

Based on simulated automobile negligence trials, U-M researchers found that physical attractiveness of plaintiffs and defendants "appears to have a significant impact on juror decisions," including the amount of damage compensation awarded in such cases.

And these findings, the researchers conclude, "suggest that our complacent belief in the equity of the judicial process deserves some careful review."

The research was carried out by Richard A. Kulka, a doctoral candidate and assistant study director at the U-M's Institute for Social Research, and Joan B. Kessler, formerly a U-M student and now an assistant professor of communications arts at Loyola University of Chicago.

The study took place at the Law School, where a total of 91 undergraduate students acted as jurors in listening to a mock automobile negligence trial that had been recorded on audiotape. As they listened, photographs of a defendant and plaintiff appeared on a screen. For some of the jurors, photos of an attractive plaintiff and unattractive defendant were shown, while the process was reversed for other jurors. As a "control" condition, some jurors saw no photos during the simulated trial.

Among the findings:

—In cases where the plaintiff was "unattractive" (and the defendant "attractive"), only 17 per cent of the jurors issued a verdict favoring the plaintiff. By contrast, 49 per cent of the juror verdicts favored an "attractive" plaintiff, and 41 per cent of the "control" group favored the plaintiff whose photograph was not shown.

—The average damage award for an "attractive" plaintiff (who appeared with an "unattractive" defendant) was $10,000, while the figure was $5,600 for an "unattractive" plaintiff. When no photos were shown, the jurors awarded damage compensation averaging $8,600.

—Jurors were also asked to rate the defendant's negligence on a seven-point scale. When the defendant was "unattractive" (and the plaintiff "attractive"), the mean score for negligence was 4.36. By contrast, the mean score was 3.49 for an "attractive" defendant and 3.59 for the defendant whose photo was not shown.

Kulka and Mrs. Kessler stress that their findings are "tentative" in light of further experiments that are under way to determine juror response when plaintiff and defendant are equally attractive.

But they add, "The results obtained to date were interpreted as offering strong preliminary support for our main hypothesis. Physical attractiveness does appear to have a significant impact on juror decisions, even when use of audiotape permits the introduction of several additional cues (that could affect jury verdicts.)"

Austin Anderson Named New Director of ICLE

Austin G. Anderson, a Minnesota lawyer with extensive experience in continuing education for lawyers and other legal personnel, has been named director of the Institute of Continuing Legal Education (ICLE) here.

Established in 1960, ICLE is one of the nation's largest continuing legal education organizations, offering a variety of programs and publications for lawyers in Michigan and other states. The Institute is a joint unit of The University of Michigan and Wayne State University law schools and the state bar of Michigan.

Anderson's appointment took effect on Dec. 1. Previously he served in St. Paul, Minn., as director of the north-central region of the National Center for State Courts, a federally-sponsored agency designed to improve the administration of justice at the state level.

William J. Pierce, chairman of ICLE's executive committee and associate dean of the U-M Law School, noted that Anderson's background includes considerable experience in the training of para-legal personnel, such as registrars of probate, court administrators, law investigators, and legal secretaries.

Under Anderson's direction, Pierce said, the Institute "will undoubtedly expand its program to include para-legal training." Although para-legal

Austin G. Anderson

technicians have worked in law offices and courts for many years, Pierce noted, there have been few formalized programs to prepare them for their professions.

Calling Anderson "a man of experience and imagination," Pierce said the new director will be in the position of making a "unique contribution to the future of the Institute."

Anderson succeeds John W. Reed, who stepped down after five years as ICLE director to resume teaching at the Law School. Reed remains a member of ICLE's executive committee, which includes representatives of the U-M, Wayne State, and the state bar.

"Prof. Reed has done a tremendous job as director, and has helped make the Institute a first-class operation," Pierce said. "He has also contributed mightily to the Michigan bar and to lawyers throughout the nation."

A 1954 graduate of the University of Minnesota, Anderson received a law degree there in 1958 and then entered law practice in Marble, Minn. After serving as director of the Illinois Bar Association's Institute for Continuing Education, he returned to the University of Minnesota in 1964 as director of the Department of Continuing Legal Education. He also served concurrently as assistant dean and later associate dean of the University of Minnesota Law School.

In 1971 he became regional director of the National Center for State Courts, where his work focused on continuing education for judges and other court personnel in an effort to streamline operations of state courts.

Anderson has written extensively on continuing legal education and such other topics as law office administration and the training of legal assistants.

He has served as chairman of various bar association committees and currently chairs the American Bar Association's Special Committee on Legal Assistants. In addition to the ABA, Anderson is a member of the state bar of Minnesota and Illinois, the American Judicature Society, and the American Management Association. From 1968-70 he was president of the Association of Continuing Legal Education Administrators.

A Navy veteran, he is a member of the Sierra Club, Knights of Columbus, Lions Club, Veterans of Foreign Wars, and other groups. He and his wife, Catherine, have five children.

Brussels Exchange Program Now In Second Year

As the United States develops closer economic ties with European Common Market nations, the University of Michigan Law School is also expanding its involvement in European legal affairs.

Among the programs now under way is a student and faculty exchange between the U-M and the Free Universities of Brussels (Belgium). The exchange enables U-M scholars to monitor new legal developments in the Brussels-based Common Market Commission, while European scholars learn about the American legal system, according to U-M law Prof. Eric Stein, who initiated plans for the program last year.

Currently three 1973 U-M law graduates are participating in fellowship programs at the Flemish and French law faculties in Brussels, while two Belgian counterparts are doing graduate work at the U-M Law School. Fellowship grants are provided by the host institutions.

Participants from the U-M are Leo Phillips of Hillsdale, Mich.; Kenneth Berstein of East Meadow, N.Y.; and Richard N. Rowntree of Penfield, N.Y. Brussels graduates spending a year at the U-M are Jean Bellis and Jacques Rozenberg.

The first U-M faculty member to spend a full semester in Brussels under the exchange is Prof. Harry T. Edwards, a specialist in American labor law, who began teaching abroad in January. His counterpart from Brussels, Prof. Frans DePauw, formerly dean of the Flemish law faculty, taught at the U-M Law School last winter.

Prof. Stein also notes that, as a result of U-M involvement in the field of international law, a Brussels law firm has sought U-M students and graduates for overseas jobs. "This is the first time to my knowledge any European firm has come to interview prospective job candidates at an American law school," the professor says.

This spring two U-M law students will begin summer jobs at a Belgian firm. The students are Susan C. Ludlow of Flourtown, Pa., and John C. Reitz of Ann Arbor.

Both second-year law students have had extensive experience and travel in Europe. Ludlow holds graduate degrees from the Fletcher School of Law and Diplomacy and the Geneva Institute of International Studies, and she served as a consultant to the Organization for Economic Cooperation and Development in Paris. Reitz was previously a recipient of a Fulbright-Hays Scholarship to study German literature at the University of Munich.

Another U-M law student, Russel E. Burford, Jr., of Omaha, Neb., will begin a full-time job at a Brussels law firm next fall, specializing in legal problems of East-West trade.

Burford has also had considerable experience abroad, including studies in the Soviet Union. From 1970-71 he was a Ford Foundation Fellow at Leningrad State University, and his work at the U-M Law School has focused on Eastern European legal matters.

Another aspect of the U-M program in international law is study at the master's degree level for foreign law students. Prof. Stein notes that many of these graduates are placed in U.S. law firms for a year of "practical experience" and then return to practice law in their native countries, where they are a valuable "contact source" for the American firms.

Other U-M law graduates, according to Stein, specialize in international law with American firms here and abroad and with U.S. government agencies.

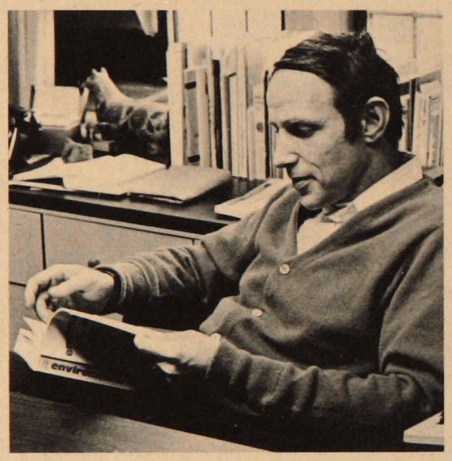
Many Cases Being Filed Under Environmental Law

Michigan's Environmental Protection Act (EPA), which in 1970 became the first state law to give citizens the undisputed right to bring polluters to court, is now being used widely by Michigan citizen groups and public agencies, and the law is gaining in stature among lawyers and judges.

So concludes U-M law Prof. Joseph L. Sax, the author of the legislation, in a survey covering cases over the past three years.

Sax says that during this period, some 74 cases have been brought to court under the EPA on a wide range of environmental issues, including legal suits initiated by the state attorney general's office, the Michigan Department of Natural Resources, and other public agencies.

This wide use of the EPA, says Sax, indicates that the law is far from being



Joseph L. Sax

"written off in the minds of judges, legislators, and concerned citizens as a mere aberration of the legislature that ought to be permitted to fade away as rapidly as possible."

Sax's study of EPA cases, covering a period from Oct. 1, 1970, to Oct. 1, 1973, is scheduled for publication in the *Ecology Law Quarterly* of the University of California (Berkeley) Law School. The study is coauthored by Joseph F. DiMento, a U-M law student who also holds a doctoral degree in urban and regional planning.

Most indicative of the act's potential, according to the study, are recent initiatives by the state attorney general's office to use the EPA in supplementing administrative regulations.

In one case, Sax notes, the attorney general brought suit against the National Gypsum Co., claiming that although a company plant in Alpena, Mich., was not violating regulations of the Michigan Air Pollution Control Commission, the plant was "still polluting the air around it."

Specifically, the company had been given six years to bring its plant into compliance with emission rules of the Air Pollution Control Commission, although no significant controls were established for the interim period.

The case was concluded in September 1973 when the attorney general and the company entered into a consent judgment which set forth a speedier compliance schedule, including the requirement that particulate emissions be reduced by one-half by the end of 1975. This judgment, which superseded the previous compliance schedule, received unanimous approval by the Air Pollution Control Commission.

Sax stresses the importance of the case as an example of how the EPA can be used as "a complement to the administrative process." And such achievements, he adds, could point the way "toward more ambitious use of the legal process in environmental controls."

Another achievement under the EPA, according to the professor, has been its contribution to the "education of judges, lawyers, public agencies, and citizens" in a time of serious threats to the environment.

"A good many Michigan lawyers have begun to develop valuable expertise in environmental cases or awareness of environmental problems," Sax notes.

And based on a survey of attorneys representing both plaintiffs and defendants in EPA cases, the U-M study shows that a large majority of lawyers view the judiciary as being capable of dealing with "the environmental, scientific, and technical" issues involved in such cases.

Despite these accomplishments, Sax acknowledges that environmental progress under the new law has not been dramatic, and that no "big-time test litigation" has resulted from citizen or agency suits.

Basically, says Sax, "we got what we bargained for in drafting a grass roots law. The great bulk of the cases have involved quite localized problems— a road widening, vacation home subdivisions, county land drainage, or a particular polluting factory—and they have been litigated in modest fashion.

"Most trials have taken only three or four days and have involved only local expert witnesses. We have not had an importation of either famous lawyers or glittering scientific superstars with which one adorns the 'big' case.

"Indeed, with a few rather tentative exceptions, EPA has not been used in a major assault on the biggest actors in the state—the auto industry,

agriculture, the electric generating utilities, or even the rapidly developing oil and gas or mining operations."

Sax also observes that the EPA has received "relatively little in the way of legal interpretation during the first three years," although the Michigan Supreme Court has recently indicated it will undertake interpretation of the EPA for the first time in a case challenging a proposed drain project in Mason County.

In general, Sax concludes, a number of important legal questions—including the constitutionality of the EPA under state law, and the applicability of the act in eminent domain cases and in suits focusing on aesthetic considerations—remain "without authoritative interpretation."

Here are some of the other findings in Sax and DiMento's study:

—Of the seven states with have enacted similar environmental protection legislation, only Michigan has had more than a dozen cases. All told, some 74 cases have been initiated in Michigan on subjects ranging from pesticide use and Indian fishing rights to an omnibus case designed to control pollution at the Ford Motor Co. The act has been utilized steadily over the past three years at a rate of about two cases per month, with suits being filed in 26 of Michigan's 83 counties.

—Surprisingly, established environmental groups "with more than local concerns" have not made frequent use of the EPA. The most common plaintiffs have been local and ad hoc groups.

—Forty-seven cases have been completed, including 26 cases which were resolved in favor of the plaintiff and 16 in favor of the defendants. The duration of the proceedings have ranged from one to 34 months, with the average length being seven months.

—The survey of attorneys shows that a plaintiff should anticipate expenses averaging $10,000 if the case goes to trial and $2,000 if the case is settled without a trial.

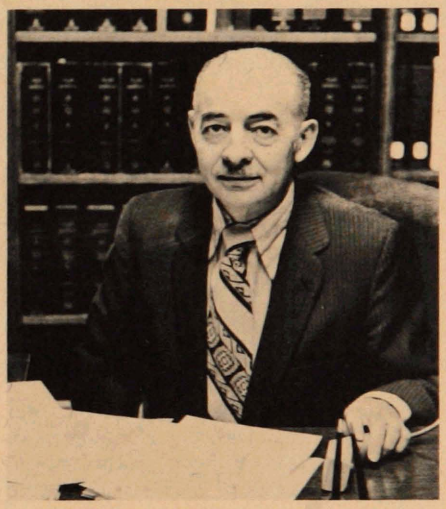
—The most common type of case under the EPA has involved land development controversies, which have often been settled in an atmosphere of compromise with the judge as mediator. Sax notes that most of these cases have not resulted in "all or nothing confrontations between unyielding adversaries," as some critics had feared.

Prof. Kennedy Leads Bankruptcy Law Reform

It will be another two or three years before Frank R. Kennedy, a University of Michigan law professor, sees the culmination of efforts to reform one of the most complex of legal fields—federal bankruptcy law.

His involvement in the far-reaching reform effort began in 1960 when he became chief draftsman of new legal rules of procedure for bankruptcies. The new rules were finally implemented by the courts on Oct. 1 of this year, but Kennedy views the changes as minor in contrast to the comprehensive reforms proposed in legislation now being considered by Congress.

Kennedy has returned to the Law School after spending two years in Washington, D.C., as executive director of the Commission on Bankruptcy Laws, which drafted the proposed National Bankruptcy Act of 1973. Introduced in Congress in the fall, the proposed legislation will be the subject of hearings throughout the coming



Frank R. Kennedy

year. And once the bill is enacted, Kennedy predicts an 18-month transition period before the reforms can actually be put into effect.

The U-M professor acknowledges that many provisions of the 600-page proposal will be viewed as "controversial," and he anticipates opposition by the consumer credit industry, bankruptcy court personnel, and other groups directly affected by the reforms. "Undoubtedly, the bill will be subject to some changes by Congress," says Kennedy. "But I'm hopeful that most of the substantive legal measures will be enacted as proposed."

Major features of the bill call for a separation of the present bankruptcy court system into administrative and judicial units; measures making it easier for bankrupt individuals to pay off their debts over a period of time; and new procedures streamlining business bankruptcies and reorganizations.

In outlining the proposed changes in bankruptcy court structure, Kennedy suggests that the current system, which places heavy administrative burdens on the courts, leads to "a drain and a bad use of judicial manpower."

In addition, he sees an "incompatibility" in the role of judges who both decide disputes and appoint and supervise trustees representing the litigants. In appointing a trustee, a judge "becomes identified with the party whom the trustee represents," says Kennedy, "and this could be seen as an infringement on the judge's impartiality in the case."

To separate these administrative and judicial functions, the Commission recommended establishment of a U.S. Bankruptcy Administration as a part of the executive branch of the federal government, and the creation of "separate independent bankruptcy courts" whose judges would be free from administrative duties "and elevated in stature so as to command the respect of the litigants."

Under the proposal, the Bankruptcy Administration, operating through local and regional offices, would handle over 90 per cent of the administrative work now done by the bankruptcy judges across the nation to perhaps one-third of the present number."

Among other structural changes, the Commission recommended that bankruptcy judges be appointed for 15-year terms instead of the present six, and that the courts be further insulated from possible partisanship by having funds drawn from general public revenues rather than collected fees. Kennedy notes that this measure would also provide a greater source of funds for the bankruptcy courts. Under present circumstances, he says, the bankruptcy courts are "theoretically self-supporting" but their costs exceed collected revenues.

Many of the changes proposed by the Commission deal with personal bankruptcies, which have become the most common type of case heard by bankruptcy courts—possibly as a side effect of the recent explosion in consumer credit. Presently consumer bankruptcies overshadow business bankruptcies by a nine to one margin.

A major problem in this area, according to Kennedy, has been the relative unattractiveness of "wage-earner plans," which allow bankrupt individuals to pay off their debts over a period of years rather than opting for "straight" bankruptcies, where they would be discharged from their debts upon surrendering their property.

And many individuals who do choose such payment plans, Kennedy notes, agree to pay their debts in full (called "extension" plans) and then

wind up defaulting on their payments.

"An extension, which calls for 100 per cent payment, frequently imposes hardship on the debtor and his family," the U-M professor explains, "and the mortality of extension plans is high."

To offset this, the Commission recommended that individuals be fully informed of various options by a counselor employed by the Bankruptcy Administration. Among these options is a "composition," under which a bankrupt can pay only a portion of his debts over a period of time. And to make such an option more attractive, the Commission recommended eliminating the present requirement prohibiting an individual from seeking further relief from his debts under the Bankruptcy Act for a six-year period after he opts for a "composition."

Here are some other consumer-related provisions in the proposed legislation, according to Kennedy:

—Creditors' consents would no longer be required for either a "composition" or "extension" plan (although creditors could challenge a plan in court as not being in their best interests). Also under the proposed legislation, if a debtor enters an "extension" plan, where he agrees to pay in full, attorneys' and trustees' fees would be borne by his creditors.

—A bankruptcy discharge would have the effect of extinguishing a debt forever, thereby prohibiting creditors from obtaining "reaffirmations" of debts from bankrupts whose debts have already been declared legally uncollectable. In addition, creditors would no longer be able to use the charge of "false financial statement" to block the discharge of a debt.

—There would be a standardization of exemptions, which are now controlled by state law and vary widely around the country. ("Exemptions" are property that the debtor is allowed to keep after being declared bankrupt.) Among the standardized exemptions, a debtor would be able to claim a homestead of up to $5,000 in value; $1,000 in household furnishings and other personal property; $500 in cash; and life insurance with a cash surrender value of up to $1,500.

Although one general aim of the proposed legislation is to liberalize consumer bankruptcy, there are some areas of tightening, according to Kennedy. Under the proposed reforms, for example, the following debts could no longer be discharged to bankruptcy: debts incurred without intent to pay, involving credit purchases made within 90 days prior to bankruptcy; and educational debts made during the first five years after the first installment becomes due.

In the area of business bankruptcies, here are some of the proposed changes under the legislation:

—Procedures would be simplified to speed court action in cases involving involuntary bankruptcy petition could be filed by one creditor having a claim of $2,500 "if he can allege and prove simply that the debtor is unable to pay his debts or has failed to pay his current liabilities."

By contrast, under current law, three creditors are usually required for an involuntary petition, and Kennedy maintains that, as a result of the legal delay, "assets are dissipated and the debtor becomes hopelessly insolvent before administration is commenced."

—To protect the debtor against ill-founded petitions in involuntary bankruptcy cases, the court would hold a preliminary hearing to determine what action is in the best interests of the debtor and the creditors. If the court proceeds with the case, there would be no jury trial on any issue presented by the petition (under current law a jury trial is provided on demand of the debtor).

—Business "reorganizations" (as opposed to "straight" bankruptcies, which often lead to liquidation) would be covered under Chapter VII of the proposed law, consolidating Chapters X, XI, and XII of the old law which have overlapped in practice. Chapter VII would provide a fexible mechanism for small or large businesses to work out a variety of reorganization plans.

—While the Securities and Exchange Commission (SEC) now investigates and participates in certain business reorganization cases, the new law would greatly restrict the role of the SEC in the bankruptcy field. Instead, the agency's functions in this area would be performed by the new U.S. Bankruptcy Administration. The federal government would also be affected by proposed changes in the priority of payment of claims, whereby the government would have the same status as any other creditor for non-tax claims and for tax claims accrued more than one year (rather than three years) prior to the bankruptcy.

International Law Group Grows in Popularity

An increasing number of U-M law students are devoting their spare time to the International Law Society, one of the most popular student organizations at the Law School.

The society has more than 80 members and an impressive schedule of activities, including a series of lectures by distinguished visitors on current international law topics.

Last fall's presentations included a lecture on U.S.-Soviet relations by Gyorgy Arbatov, a foreign policy adviser from the Soviet Union; a speech on multinational corporations in Europe by Albert Coppé, a former vice-president of the European Economic Community's governing commission; and a discussion of nuclear law and the environment by Bernard G. Bechhoefer, a Washington, D.C., attorney and former State Department counsel.

Speakers this year will include J.J. Beuve-Mery, senior legal adviser to the European Common Market Commission, and Emilio Cardenas, an attorney and law professor from Buenos Aires, Argentina.

A further attraction for society members is participation in the Philip C. Jessup Moot Court Competition in International Law. The competition involves preparation of briefs on international legal questions and presentation of oral arguments at the regional and national levels.

Over the years, U-M teams have consistently been among the top contenders in the competition. Last year the U-M team won "best brief" honors at the regional level and Priscilla Gray of U-M Law School was named "top oralist" at the national competition in Washington, D.C.

The 1973 competition, sponsored by the American Society of International Law, drew contestants from 20 American and 16 foreign law schools. In this year's competition a hypothetical case will deal with national legislation to license mining of ocean minerals.

Among other activities, the society has organized foreign language luncheon tables at the Lawyers Club dining room and sponsored social gatherings for the 40 foreign students currently attending the U-M Law School.

Robert Wessely, president of the student group, notes that the society also provides job assistance to students in the "selective" field of international law. Each year, for example, the society hosts State Department officials and representatives of major law firms who visit the Law School to discuss student career placement.

U-M law faculty members who have been active in society activities include Profs. Eric Stein, William W. Bishop, John H. Jackson, and Whitmore Gray.

Correction

Segments of the article on experimental neurosurgery in the fall, 1973, *Law Quadrangle Notes* were printed out of sequence.

The article, entitled "At the Present Time Experimental Neurosurgery Cannot be Performed on Involuntarily Confined Mental Patients," appeared on pages 9-15 of *Quad Notes*. It should have read as follows:

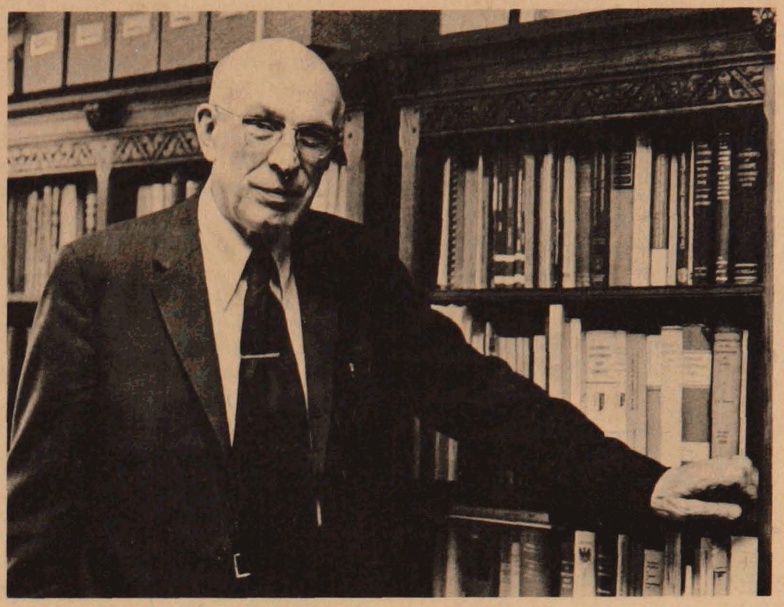
On the bottom right-hand side of page 9, the paragraph ending with the words "any such authority to compel experimental neurosurgery" should have been followed by the text on page 11 beginning with the words "As a matter of state law. . ."

On the top left-hand side of page 12, the sentence beginning "Mr. Justice Brennan amplified this reasoing in his concurring opinion" should be followed by the text on pages 9 and 10 begining with the quotation "At bottom, then, the Cruel and Unusual Punishments Clause. . ."

We regret the error and hope this correction will be of help to readers who wish to refer to the article.

THE HIGHER LAW AND THE RIGHTS OF MAN IN A REVOLUTIONARY SOCIETY

Paul G. Kauper



Paul G. Kauper

This article is extracted from a lecture by Professor Kauper in the Old North Church, Boston, Mass., November 7, 1973. Professor Kauper was one of a group of distinguished lecturers assembled by the American Enterprise Institute to discuss the nature and the future of the American Revolution. Each lecture in this series was video-taped for future presentation in conjunction with the nation's bicentennial celebration in 1976. Kauper's lecture was also part of a program marking the 200th anniversary of the Boston Tea Party and the 250th anniversary of the founding of the Old North Church, from whose steeple shone the lantern which sent Paul Revere off on his famous midnight ride.

The American Revolution was both radical and conservative. It asserted the right of people to revolt against established authority. It declared that government derives its authority from popular consent. The central document of the Revolution asserted an idea, poignant with radical overtones, that all men are created equal.

But the Revolution had its conservative overtones. It found its intellectual justification in ideas and principles with long established historical foundations. It had its roots both in English legal and political institutions and in a body of theological, moral, and philosophic thought which had universal dimensions. Old and essentially conservative ideas and traditions were harnessed to the cause of revolution. In turn they laid the foundation for a new constitutionalism which has survived because of its capacity for change and yet in the process remains loyal to the ancient truths which have given rootage and continuity to the system.

It was no accident that lawyers and law-trained leaders played prominent roles in the revolutionary struggle and in the subsequent transformation from a confederation into a federal Union. Constitutional thinking was a pivotal element of the intellectual structure which undergirded the Revolution. Central to this constitutional thinking was the concept of the "higher law," to which ultimate recourse could be made in judging the validity of ordinary enactments. Two principal components merged in American colonial thinking to shape this concept. One was the idea of natural law and its corollary notion of natural rights. The other was the tradition of the English common law as embodying a system of justice founded on right and reason. Natural law and natural right, on the one hand, and the view of the common law as basic and fundamental law, on the other, were twin notions that fitted together naturally to produce the notion of the "higher law" which emerged as a powerful force not only in supporting the claim of the colonists but in laying the foundation of the American constitutional system.

Equally significant was the definite coupling of natural law with the idea of natural rights. The view that man is a creature of God, reflects the divine wisdom, enjoys the liberty to pursue his natural faculties, and may assert a freedom against the arbitrary exercise of authority was a natural corollary of a transcendent law of reason which emphasized truth and morality. These rights were not created by law but were recognized and sanctioned by it; they were antecedent to positive law, and the law's function was to preserve and protect them.

The conception of natural rights was a basic ingredient in the thinking of the colonists. Speaking for the Supreme Court in 1963, Mr. Justice Clark said: "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." The writings and speeches of the Fathers abounded in the idea that men enjoyed basic freedoms which were the gift of God and were therefore immutable and inalienable. Indeed, it is fair to say that for the fathers it was the conception of natural rights, rather than rights

developed at the common law, which furnished the dominant philosophy undergirding the revolutionary movement. King and Parliament had violated these rights and therefore the colonists were morally justified in asserting their independence.

These ideas found their classical expression at Jefferson's hands in the great language of the Declaration of Independence:

> "When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. . ."

The document thus speaks of "the law of nature and of nature's God," says that "all men are created equal" and are endowed by their Creator with "inalienable rights." Jefferson's preference for the term "the law of nature and of nature's God," rather than natural law is a characteristic expression of the deistic thinking. Nevertheless it is significant that he invokes an ultimate divine source of the moral law and of natural rights. The appeal then is to the divine law which governs men and their institutions and which is the source of the equality of men and of rights which belong to them as creatures of God. This was the foundation for the reasoned discourse which followed on the grievances of the colonists and of their right to declare their independence of English rule. Resting its case on natural law and natural rights the Declaration remains an abiding affirmation of the higher law to which men and their governments are subject.

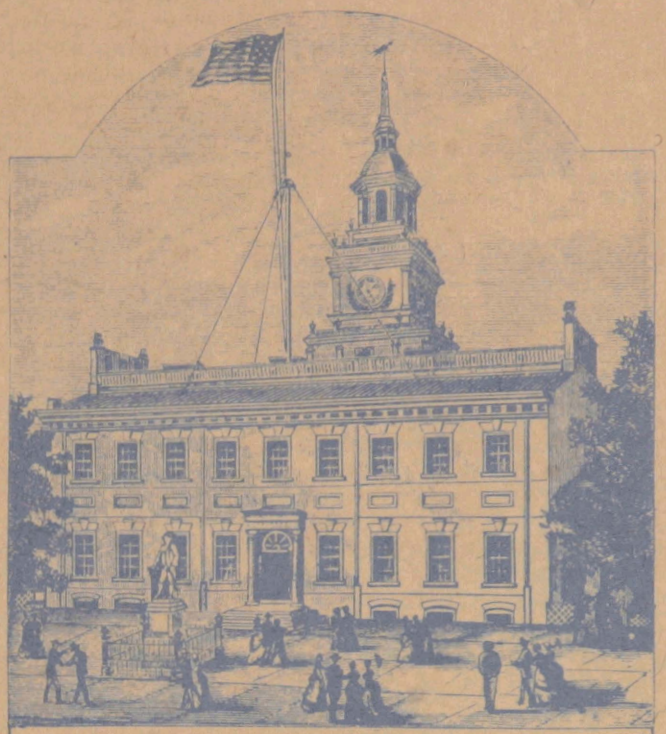
A further line of natural law thinking which entered into the main stream of American constitutionalism was found in the theological and political contributions which stemmed from the Protestant Reformation and found their most effective expression in the Puritans and Presbyterians. The concept of the two kingdoms, both under God, the necessity for law as a restraint on evil and on the abuse of power, the concept of civic righteousness, the happy combination of individualism and social conscience, the emphasis on the charter as basic law, the notion of limited power, and the commitment to democracy and majority rule helped shape not only the concept but also the substance of the higher law, provided justification for revolt against established authority, and furnished an important strand of thought for the fabric of American constitutionalism.

The contribution of the common law tradition to the higher law concept was equally impressive. The intellectual leaders of the colonies well understood the rights of Englishmen as they had been hammered out on the anvil of experience. Lawyers had been nurtured in Blackstone. They were well versed in John Locke whose treatise on government with its emphasis on the basic right to life, liberty, and property as limitations on the power of government exercised a strong influence in supporting the natural rights theory. James Otis in denouncing the infamous writs of assistance demonstrated his intimacy with the English precedents which supported the freedom from unreasonable search and seizure. More important, however, than the specific contents of the common law and the rights that grew within its protection was the process and authority it claimed. A system hammered out on the anvil of pragmatic experience, embodying the rule of reason, relying on precedent for its development and fortified by the occasional documents, beginning with Magna Carta, which resulted from constitutional crises and documented the rights of Englishmen, it acquired at the hand of lawyers and judges a concreteness and toughness which inspired respect, commanded authority, and gave direction to English constitutional development. Most important, in elevating the role of reason and emphasizing the central role of the judges it became a symbol of a fundamental law which achieved justice, articulated and protected the rights of Englishmen, and served as a limitation against abuse of power. For Englishmen it epitomized the rule of law. Rulers were subject to it. Bracton had said that the king was subject to the law and to God. Lord Coke, the preeminent prophet of the common law who had led the fight against the Crown, who went back to Magna Carta for his inspiration, who was a champion of English right, found common right and reason "to be the genius of English law and liberties." Indeed, Lord Coke declared that even a law of Parliament contrary to reason was void. Thus the common law became identified with a higher law, and a powerful tool was forged for asserting the supremacy of the law and the role of the judges in interpreting and applying this basic law. The great documents produced in time of crisis added strength to the common law tradition. Out of Magna Carta wrested by the barons from King John emerged the idea that men could not be deprived of their life, liberty, or property except in accordance with the law of the land, an idea which later found expression in the notion of due process of law—an enduring English contribution to constitutional thinking. The great Declaration of Rights affirmed the basic rights of Englishmen. Thus the written document, asserting fundamental law and right, a document to which men could appeal in later generations, a symbol and a beacon, assumed its place in the higher law tradition. Following in this great tradition the colonists also penned a written document whereby they gave both a public proclamation of their rights and a reasoned statement in support of the decision to assert their right to self-government.

The ready acceptance of natural law and natural rights thinking, coupled with a reverence for the common law, as itself embodying the law of reason and stating accepted norms of justice, and the veneration accorded historic documents declaratory of right combined powerfully to establish the "higher law" thinking which permeated the Revolution and laid the foundation for a remarkable constitutional development. Indeed, American constitutional history, the crises it has endured, and the development which has ensued can be viewed as an explication of the higher law. It has given rise to hopes, expectations, and claims that have produced their own revolutions.

The constitutions adopted by the individual states. . .contained so-called "declarations of right." The use of the word "declarations" warrants emphasis. The constitutions did not create these rights; rather the constitutions simply declared those rights which were derived from what was stated in the Declaration of Independence to be the self-evident truth that all men are endowed by their Creator with certain inalienable rights including the right to life, liberty, and the pursuit of happiness.

We need not rehearse all of the historical factors leading to the failure [of the federal Constitution to include a declaration of rights] except to mention that those who played a leading role in the drafting felt it unnecessary to include a bill of rights since they did not find it conceivable that the scope of the federal powers would permit an intrusion into the rights reserved to the people or to the states. This, however, did not go unchallenged and to meet this opposition the first ten articles of amendment, commonly known as the Bill of Rights, were adopted shortly after the Constitution itself went into effect. Specific rights are guaranteed in the



The concepts that the Constitution was the higher law of the land and that it is the judiciary's function to give this fundamental law its authoritative interpretation "are the pivotal and the distinctive aspects of American constitutional development and may well be characterized as America's unique contribution to constitutional thinking."

first eight amendments. The great freedoms are there—beginning with the indispensable freedom of religion, speech, press, assembly, and petition for the redress of grievances. But significantly the Ninth Amendment declared that the enumeration of the foregoing privileges and rights shall not be construed to deny or disparage others retained by the people. Here was a clear expression that the rights set forth in the Bill of Rights were not created but were simply declaratory of those that had been reserved by the people and that still others might later be claimed. The Ninth Amendment implicitly embodies the natural rights philosophy.

The stage was then set for the great American experiment in government pursuant to a written charter. Two great principles emerged and they received their classic exposition at the hands of John Marshall in his famous opinion in *Marbury v. Madison*. The Constitution was the fundamental or the higher law of the land, and it is distinctively the function of the judiciary to give this basic law its authoritative interpretation. These twin concepts of paramount law and of the judicial function in interpreting this law are the pivotal and distinctive aspects of American constitutional development and may well be characterized as America's unique contribution to constitutional thinking. The relationship of these basic principles to the theory of natural law and natural right is readily apparent. Once the people have reduced their thinking on the fundamental structure of government and their reserved rights into a written document, notions of natural law and natural rights tend to merge into this document which becomes the symbol, indeed, of the higher law of the land. The veneration popularly accorded the Constitution amply demonstrates the tendency in the popular mind to see in it an embodiment of presuppositions founded in the natural law. This higher law acquires concreteness through a process whereby an independent judicial tribunal interprets this law in a final and authoritative way so that natural law and natural rights are happily absorbed into positive law through the process of empiric adjudication. For some the Constitution thereby acquires even a divine sanction.

Care must be taken, however, in identifying the Constitution with a transcendent natural law and the Bill of Rights with natural rights. Basic principles expressed in a constitution can be identified with a body of universal and enduring ideas reflecting reasoned conclusions respecting human nature, the function of government, and the institutions designed to canalize and limit power. But particular institutional arrangements worked out at the Philadelphia convention, marking a response to immediate historical experience and in a number of instances representing a compromise of opposing ideas, should not be viewed as ultimate and permanent expressions of these principles. Indeed, the framers, while hoping to establish a system of government intended to meet the vicissitude of time and experience and to endure for generations to come, to use John Marshall's language, recognized that specific institutional arrangements may be transient and no longer responsive to new conditions when they provided a mechanism for amendment of the Constitution.

An even more important consideration, however, is that natural law, however conceived and whatever its authority, must necessarily remain outside the Constitution and not be confused with it. Ultimate values in national life, goals to be achieved, principles relevant to new movements in national life, conceptions of freedom, right, justice, and morality have their inception in theological, philosophical, moral, and social thinking which transcends the Constitution. A constitution may suffer a serious flaw and its validity be judged by recourse to a higher law. The same is true of any attempt to identify constitutionally guaranteed rights with natural rights. The Declaration of Independence spoke in general terms of the right to life, liberty, and the pur-

suit of happiness. According to Locke, the generalized expression was right to life, liberty, and property. A constitutional scholar has observed that the natural rights on which there was the largest measure of agreement among the Viriginians were: (1) freedom of conscience, (2) freedom of communication, (3) the right to be free from arbitrary laws, (4) the rights of assembly and petition, (5) the property right, (6) and the right of self-government. To these must be added equality in the enjoyment of right. These were rights inherent in the conception of man as a moral and rational creature entitled to the full enjoyment of his faculties. Not all of these were expressly captured in the specifics of the Bill of Rights. On the other hand, some rights receiving positive recognition which reflected English history and practice, such as the right to trial by jury, can hardly be called natural rights. Jefferson referred to these as ancillary rights which helped to fence in the natural rights.

That there was still a natural law and conception of right outside the Constitution was made manifest in the great struggle over the slavery issue. Jefferson had boldly declared in the Declaration of Independence that all men are created equal, that this was a self-evident truth and was associated with those inalienable rights with which all men are endowed. It had become painfully evident that this grand assertion of the Declaration could not be reconciled with an institution whereby one race held another in subjection and submitted it to all the degradation of forced labor. The slavery issue emerged as the nation's great moral issue as reflected in the sharp and bitter sectional struggles on the question of whether the institution of slavery should be extended to new territories and by the insistent demands of the abolitionists that all slavery be abolished. The latter could well point to the Declaration of Independence as stating a self-evident natural right on the part of all men to be free and to be given equal treatment. The Constitution itself had made a nodding concession to the slavery problem in permitting the termination of the slave trade after 1808 and in fixing the formula for apportioning seats in Congress, but it also imposed a duty to return run-away slaves to owners. Moreover, the Supreme Court in the celebrated Dred Scott decision went so far as to say that the slave-owner had a constitutionally protected property interest in his slaves, and that for the law to deprive him of that interest when he took a slave into free territory was itself a deprivation of property without due process of law. No further comment is needed upon a decision which expanded upon a right of property at the expense of human freedom and the basic notion of equality, except to note that it went in the face of a growing moral revulsion against slavery. A judicial decision which rested on considerations incompatible with basic moral concepts could not in the end command respect. Abraham Lincoln said that the Dred Scott decision was morally wrong and that it should be changed. William Seward in his sharp criticism of the Court declared that there is a higher law than the Constitution. Even constitutions are to be tested and judged by natural law.

The slavery issue was incapable of solution by either judicial or political means and in the end required four years of bloody conflict for its resolution.

Out of the Civil War came a radically revised constitutional order and an extraordinary expansion of rights accorded federal protection. The Thirteenth, Fourteenth, and Fifteenth Amendments were designed historically to give constitutional status and protection to the former black slaves and rested on a concept of human equality which the Declaration had declared to be a natural right. Viewed from the perspective of general constitutional theory, the function of the federal government in the protection of rights and the continued vitality of natural right thinking, the Fourteenth Amendment had the widest and most pervasive significance.

"In the hand of the judiciary [the Fourteenth Amendment] became a tool for implementing the grand assertion of the Declaration of Independence . . ."

The provision that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person the equal protection of the laws stated conceptions of right which were capable of broad interpretations readily identifiable with natural rights. In the end the Fourteenth Amendment marked a revolution in the protection of rights and led to what we may call the nationalization of right. In the hands of the judiciary it became a tool for implementing the grand assertion of the Declaration of Independence that all men were to enjoy equal opportunities to enjoy life, liberty, and the pursuit of happiness.

A great controversy within the Court has turned on the question whether the due process clause should be interpreted to incorporate within its protection, as a limitation on the states, the specific guarantees of the first eight amendments and originally designated as restrictions only on the federal government. For our purpose it is sufficient to note that for some members of the Court fundamental rights were not necessarily those identified in the Bill of Rights but only those of a very basic character, more akin to natural rights, whereas other justices felt that the ultimate wisdom in the declaration of rights had been stated in the Bill of Rights and that any recognition of fundamental rights must proceed at least with the first eight amendments as the starting point or even be limited to them.

The struggle within the Supreme Court produced an expression of ideas and choice of values which deserve further consideration. Shortly after he ascended to the bench Mr. Justice Black in a notable dissenting opinion attacked the fundamental rights interpretation of the due process clause, as it had evolved historically in the Court's decisions. He attacked it on two grounds. He said historically it was intended through the Fourteenth Amendment to make the Bill of Rights apply to the states. Secondly, the Court's use of the fundamental rights theory was in his view premised upon an application of the natural law concept which he characterized as "an incongruous excrescence on our Constitution." The latter observation by Mr. Justice Black is worth particular attention. It is evident that Mr. Justice Black in his general jurisprudential thinking was a positivist and that his remark reflected the general decline of natural law and natural rights thinking in American legal thinking. This decline can be traced to the latter part of the last century when with the rise of the new science and a secular humanism, the idea of a transcendent natural or moral law fell into disrepute. It began the era of positivism in American jurisprudence well epitomized in the writing and opinions of Mr. Justice Holmes. In the eyes of the positivist law is viewed in historical and humanistic terms. Translated into constitutional terms rights are significant only as they find concrete expression in the historic document. There are no rights outside the Constitution resting upon notions of natural right, and the business of the law is simply to develop concrete solutions to concrete problems based on the application of text as informed by history and reason.

Justice Black's picture of natural law in his famous dissent in the *Adamson* case was particularly unfortunate since it disregarded the honored place that natural law thinking had in the early days of the Republic and which it had long enjoyed in the American legal tradition. To label it an excrescence on our Constitution was to be particularly insensitive and blind to a significant part of American constitutional development.

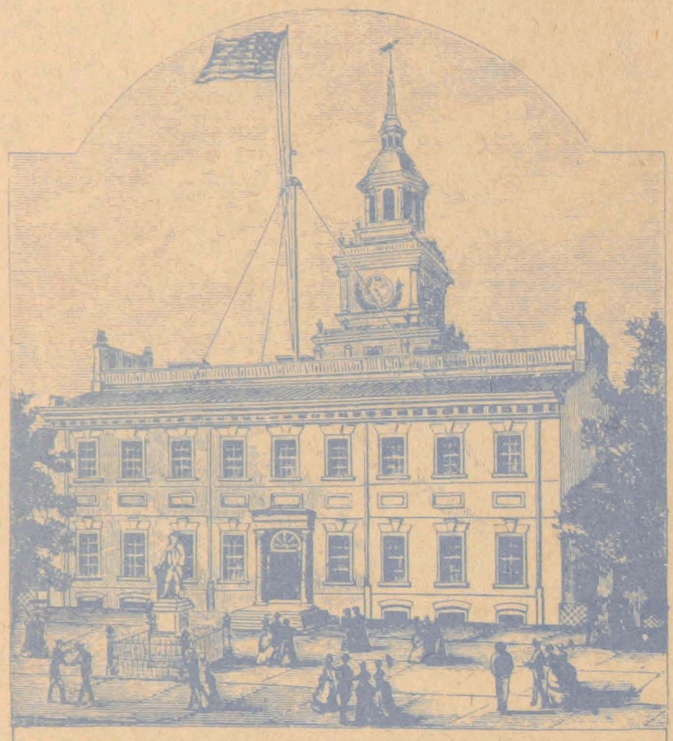
Justice Black led a movement within the Court whereby he attempted to divorce the Court's interpretation of due process from a conception of fundamental rights which were not identified with the Bill of Rights. For the most part he was successful—at least in his insistence that the express guarantees of the first eight amendments should be recognized as fundamental rights. But it is illusory to suppose that even in this process the Court has abandoned natural rights thinking. An examination of the Court's opinion demonstrates that rarely is the result dictated by the explicit language of the text. Rather it is the result of a reasoned interpretation illuminated but not controlled by history and inspired by an understanding of ultimate values which are not explicit and at most implicit in the constitutional order.

Examination of the decisions in recent years, with an eye to policy predilections and value orientation, makes clear that the values of a democratic society have emerged as uppermost—religious liberty and freedom of conscience, the basic freedoms of expression, the rights attached to self-government and the citizen's participation in it, the protection of the individual against arbitrary restraint, his freedom to pursue his own way and cultivate his faculties, and the protection of minorities against invidious discrimination. These are readily equated with natural right categories. The emphasis on these aspects of liberty represents a choice of values by the Supreme Court—values which turn on the worth and dignity of the person on the one hand and the institutions and procedures that are unique to a democratic society. We come back then to what perhaps is the most fundamental aspect of natural right thinking and that is that man as a creature of God is entitled to be treated with dignity and respect, and he has inalienable rights, and that government is instituted to serve his welfare.

Today we are in the midst of a great social revolution with many facets. Old ideas, conventions, institutions, and restraints are challenged. A fierce new individualism with large claim to personal liberty is being asserted. The old morality has been discredited, and a new permissiveness is dominant. A parallel and related development is a new egalitarianism, manifesting itself in the movement to remove all discrimination based on race, color, religion, national ancestry, sex, age, and economic status.

We are so close to these movements that we are likely to be blinded to their revolutionary and even radical character, for it is essentially a silent revolution coursing its way within established channels. A striking aspect is the legitimizing of these movements by constitutional interpretation. Constitutional thinking has been accommodated to the great movements of our day and in turn has contributed to them.

Despite the efforts of some justices to discredit the natural rights doctrine, it has recently reasserted itself in an interesting and dramatic way. In its significant decision in *Griswold v. Connecticut* the Supreme Court reaffirmed a fundamental rights interpretation of due process of law by finding implicit in the concept of liberty a notion of personal privacy which includes the freedom of marriage and of the family relationship. Here the Court held invalid a Connecticut statute which forbade the use of contraceptives by married couples. The case presented some illuminating insights into the thinking of the justices. Mr. Justice Douglas, who shares with Mr. Justice Black an abhorrence of natural rights thinking because he associates it with the laissez-faire philosophy of earlier years, tried valiantly but not very persuasively to link the right of privacy nowhere mentioned expressly in the Constitution with the rights expressly mentioned in the Bill of Rights and included within their periphery. Mr. Justice Goldberg dealt with the matter in a more forthright way. He recognized the rights pertaining to the marital estate, to home, and to family as fundamental in character and said that the Ninth Amendment to the Constitution was a recognition that Courts could recognize and protect other rights besides those mentioned in the Bill of Rights, a proposition which of course has support in the long history of the fundamental rights interpretation of the Constitution with its strong natural right overtones. Justices Harlan and White similarly rested their case on application of



"Having grown accustomed to the constitutional protection of natural rights and having become self-indulgent in their enjoyment, we easily forget that belief in natural rights helped spark the revolutionary movement."

the idea that the privacy of married life was a fundamental right which cannot be flagrantly invaded as was done in their view by the Connecticut statute without serving any substantial public interest. Clearly a majority of the Court was reaching out for a conception of right outside the Constitution.

Notwithstanding the dissent and Justice Douglas' protestations, *Griswold* marked a significant revival of natural rights thinking, whatever the formal argument employed by the majority. *Griswold* was followed in the recent cases where the Court found that the liberty secured by the Fourteenth Amendment protected the right of a female to abort a foetus within the first six months of pregnancy. Our interest in the case at point centers on the theory the Court used in striking down a state legislative enactment by reference to a conception of right not explicit or even implicit in the Constitution. Building on the right of privacy developed in *Griswold*, the Court said that it was immaterial whether this was derived from the fundamental rights interpretation of the due process clause or from the Ninth Amendment or from some peripheral aspect of a Bill of Rights guarantee. Even more strikingly than *Griswold* is this decision's affirmation of the classic notion that the liberty secured under the due process clause protects the so-called fundamental rights which the Court articulates by a natural rights process type of reasoning. These decisions have gone far to provide constitutional legitimacy for the current claims that a person has a constitutional freedom to the pursuit of happiness subject only to restrictions designed to protect compelling public interests. This is the Declaration of Independence all over again.

The vitality and persistence of fundamental rights thinking in the interpretation of the higher law is strikingly demonstrated also in the interpretation of the equal protection clause. Despite early intimations that only the newly emancipated black would come within the protection of this clause, its use to protect the black was virtually forgotten after the decision in the *Plessy* case upholding the separate but equal theory. Then came the great revitalization of the equal protection concept when the Court in 1954 in its famous *Brown* decision held that compulsory racial segregation in public schools resulted in unlawful discrimination against black children. Chief Justice Warren's opinion on the effect of segregation upon the life of the black child makes clear that legally imposed segregation could not be reconciled with the moral imperative underlying the equal protection idea. The Court was giving constitutional flesh and blood to the promise held out in the Declaration of Independence and giving expression to an idea of human dignity and fulfillment which has its roots in the Judaeo-Christian tradition. But *Brown* was only the beginning of a new chapter on the meaning of equality. Commencing with the one-man one-vote decision which stressed equality in enjoyment of the right to vote, the Court branched out in all directions in revitalizing the equal protection guarantee and in doing so has employed a new method of analysis. Classification must be subject to careful scrutiny by the Court if it rests on so-called suspect criteria or if the effect is to impair the enjoyment of a fundamental personal right. Discrimination falling into either of these two categories can be tolerated only if required by some compelling public interest. Thus discrimination based not only on race, color, and religion, but on national ancestry, alien status, economic status, illegitimacy of birth, have come under judicial condemnation. Even now the Supreme Court is engaged in the process of accommodating the equal protection idea to the movement currently in full tide for liberation of the female sex from discrimination long sanctioned in law and in practice.

The movement in favor of equality is instructive for two reasons. In the first place it gives constitutional

legitimacy to that democratization of American life so well portrayed by Boorstin in his recent volume. It reflects also an increasing awareness of the ethnic, racial, and religious diversity of America's pluralistic society. The new insistence on equality which lays open to inquiry distinctions long tolerated in the law and the new liberty with its assertion of personal identity and freedom of expression are a response to deep and strong social currents of our day. Secondly, the revival in judicial opinions of the fundamental right concept both in the interpretation of due process and of the equal protection clause is a tribute to the persistence and vitality of natural rights thinking.

A misconception of natural right thinking which renders it suspect is the supposition that it is identified with a fixed body of dogma which has irrevocably defined these rights so that they do not admit of progressive application. This, of course, is not the case. Natural right thinking is dynamic thinking, it is creative, adapts itself to new situations. As the late Father Murray pointed out, the old ideas of religious liberty limited to tolerance had their source in a different day and the new idea of religious liberty, for instance, is a response to the new individual and social consciousness of our day, and one should add, a response to the pluralistic character of our society.

The argument is made, as Justice Black has made it, that unless the Court limits itself to the text of the Constitution it is lost in subjective speculation and that the sky alone is the limit. This, too, is a misconception. Natural right is not what any justice happens at the time to believe ought to be the right of the person. At least according to the historic process it is the result of rational discourse and dialogue based on the experience of the race and on fundamental philosophic and moral considerations respecting the nature of the man and his relation to society. It finds expression in many writers and indeed there is a contemporary ring to it. One need only to look at the Declaration of Human Rights adopted by the United Nations or to the preface to the European Convention on Human Rights and Fundamental Freedoms to see that the appeal to rights that inhere in the dignity of the person and to the freedoms which are essential to a democratic society is still very much the mode and gives a particular sanction to these rights. Moreover, the body of rights they declare reflect a universal consensus which gives an objective validity and refutes the notion that natural right thinking by judges is subjective and egocentric.

We have a strong constitutional system. It has survived crises and vicissitudes of history, has adapted itself to the extraordinary transformations in American political, economic, and social life, has both inspired and weathered silent and peaceable revolutions, and has created the condition of a free, open, and pluralistic society. The Fathers built even better than they knew. Asserting the right of revolution, they laid the foundation for a society which provides peaceable means for growth and change. Freedom of religion, of speech, press, and assembly, the safeguards afforded the accused, freedom from arbitrary administrative action, the personal liberty of the individual and equality before the law stand at a high level of protection. We have a system of judicial review which operates to protect the integrity of the constitutional system and to protect basic rights against abuse and against the tyranny of the majority. Probably in no other democratic country are the freedoms for which the colonists were willing to sacrifice and die more fully protected. Having grown accustomed to the constitutional protection of natural rights and having become self-indulgent in their enjoyment, we easily forget that belief in natural rights helped spark the revolutionary movement. It is indeed good that we use the Bicentennial to refreshen our appreciation of our freedoms and to capture again the excitement, daring,

"[T]he classic conception of natural right as restraint on government . . . is no longer adequate to the needs of a society where substantial pockets of poverty, hunger, disadvantage and want persist."

and devotion of the patriots who challenged authority when they threw the tea bags into Boston Harbor, who responded to Paul Revere's midnight ride with the resulting confrontations at Lexington and Concord.

This is not to suggest that all is well with the system. I suggested earlier that the conception of right is not static and part of our current problem is to develop and implement conceptions of right addressed to current needs. In this day of highly refined technological development which has provided the means of sophisticated electronic surveillance and data storage and retrieval, the newly formulated right of privacy requires recognition and implementation. At a time of great urban concentration and the proliferation of regulation to deal with a constantly enlarged myriad of inter-relationships, the liberty of the individual to maintain some degree of identity and to pursue a path of self-respect requires us to be skeptical of a paternalism whereby Big Brother peeks over the shoulder to tell a citizen what is good for him. The unrestrained exploitation of our resources and the debasement of the environment require a recognition that citizens have a natural God-given right in their common resources and in the environment, a right far more compelling than the freedom once claimed in the name of laissez-faire thinking, to plunder resources, pollute the air, and impair the amenities of living. The rights of all citizens regardless of race or color to opportunity for equal achievement and enjoyment of the nation's goods free from the blight of discrimination are only imperfectly realized. Equally important is the realization that the classic conception of natural right as restraint on government, so well captured in our system, is no longer adequate to the needs of a society where substantial pockets of poverty, hunger, disadvantage, and want persist, notwithstanding the general state of affluence. Freedom from want, ignorance, poverty, hunger, inadequate housing surely must take their place in the panoply of natural rights. Indeed, for those trapped in the web of our system the responsibility of society to meet the basic economic and social needs is far more significant than the traditional restraints designed to protect liberty against the abuse of power.

Equally important in this day of heightened international concern, a day marked by the tide of rising expectations of the have-not peoples, is a recognition that their rights and freedoms are inextricably entwined with ours. We can no longer indulge in a parochial view of our rights and interests and thereby ignore the responsibility for sharing our resources with others and supporting their aspirations to the freedoms and satisfactions we claim for ourselves. The Declaration of Human Rights adopted by the United Nations, a Declaration to which we are a party, is a ringing affirmation of the great words that "all men are created equal and endowed by their creator with certain inalienable rights."

More troubling, however, are symptoms of a general malaise in American thought and life which creates an unease as we approach the Bicentennial and contemplate the nation's future. Pessimism and cynicism about American life are widespread. As so well demonstrated by the recent revelations, power has been shamefully exploited and abused and the governmental process corrupted by men who were concerned with power free from a sense of moral responsibility. Illegal and reprehensible tactics directed to the end of winning elections are an ugly thrust at the integrity of the political process. The trustworthiness and credibility of the people's elected agents have been deeply eroded with a resulting loss of faith in the people's servants and in the whole political process. Extravagant campaign expenditures, financed by large contributions from those who have special interests to protect, debase the free electoral process and undermine the freedom of the people's representatives to serve the public interests. Freedom of the press too often becomes an excuse for distortion and manipulation of news, invasion of privacy and intrusions into those judicial processes designed to maintain the conditions of a fair hearing for those charged with wrongdoing. Private groups are bastions of wealth and power which parallel the government in the authority they exercise. The new freedom characterized by sloughing off of old moral restraints finds expression in license and permissiveness. The new egalitarianism poses the risk of cheapening American life and culture and eroding the sense of excellence. The pursuit of materialistic gratifications in our affluent society, also claimed in the name of liberty, has dulled the conscience and impaired our vision of the enduring spiritual values that make a people great. And where there is no vision the people perish. And so it appears to many that the spark ignited by the Revolution, the elan, vitality, and lively expectations which guided the Fathers have been dimmed and corroded by selfishness, corruption, and aimlessness.

But we need not despair. Indeed, a healthful pessimism underlies constitutionalism, the concept of a government of limited powers and the rule of law—the recognition of the evil in man and the need of restraints to check the abuse of power. Power does corrupt. This in itself is a basic premise of natural law and one which underlies our system with its dispersion of authority between the federal government and the states, its separation of powers, and its system of checks and balances. These basic limitations on authority are even more essential to the maintenance of freedom than the rights formally declared in the Constitution. The very fact that flagrant abuse of power has been uncovered and that the legislative branch is now reasserting its authority as against extravagant assertions of executive authority is itself evidence of the strength and resiliency of our system.

We have the means of curbing large concentrations of power, whether in the public or private sectors, of reforming the electoral process, if only we have the understanding and determination to do so.

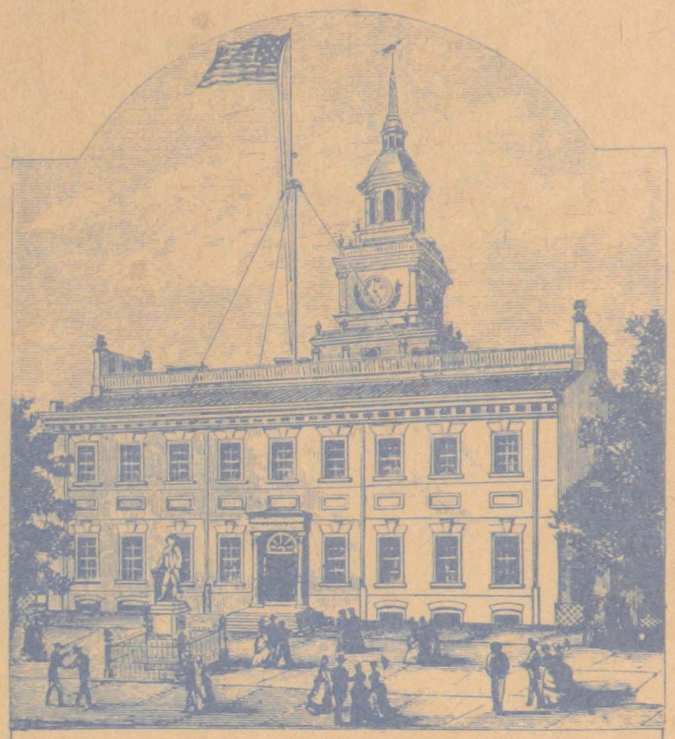
But even more important we have the resources of mind and spirit needed to cleanse our society of its grossness, its preoccupation with material ends, of recapturing the dedication and fire which inspired the Revolution and harnessing them to the revitalization of today's society.

Basically our problem is a moral problem—a problem addressed to the minds and hearts of the people. The pessimism which is an important ingredient of our constitutional thinking is balanced by an optimism—a faith that men can work together to achieve common goals in a society held together by a sense of civic righteousness. This is the faith we must again recapture and cultivate. But a later generation cannot continuously harvest the fruits from trees others have planted and cultivated. This means for our day a restoration of faith in the basic institutions that have served us so well and which constitute what Walter Lippman has called the public philosophy. It calls for continued vigilance in the nurture of ideas and institutions which are our higher law heritage—the notion of limited power, of representative government as the fundamental check on power, the right to vote, the freedoms of speech and press, the freedom of dissent, the protection of minorities, access to courts for the vindication of our liberties; for renewed appreciation of our heritage of rights and freedoms and renewed insistence on the premises underlying the conception of natural right. It calls for restoration of a moral sense of integrity in the affairs of government; for decency in public life and for civility and reasoned discourse in the great debate on issues of public concern. It calls for sensitivity, compassion, and generosity in response to human needs. It calls for self-restraint and responsibility in the claim to and in the exercise of freedom lest liberty degenerate into licentiousness and freedom into

anarchy. It calls also for an appreciation and affirmation of moral values which undergird the public order. It calls for assessment of our rights and liberties as more than negative restraints but as positive means for self-development and service to others. Freedom uncanalized by purpose, discipline, and regard for the common good is self-destroying.

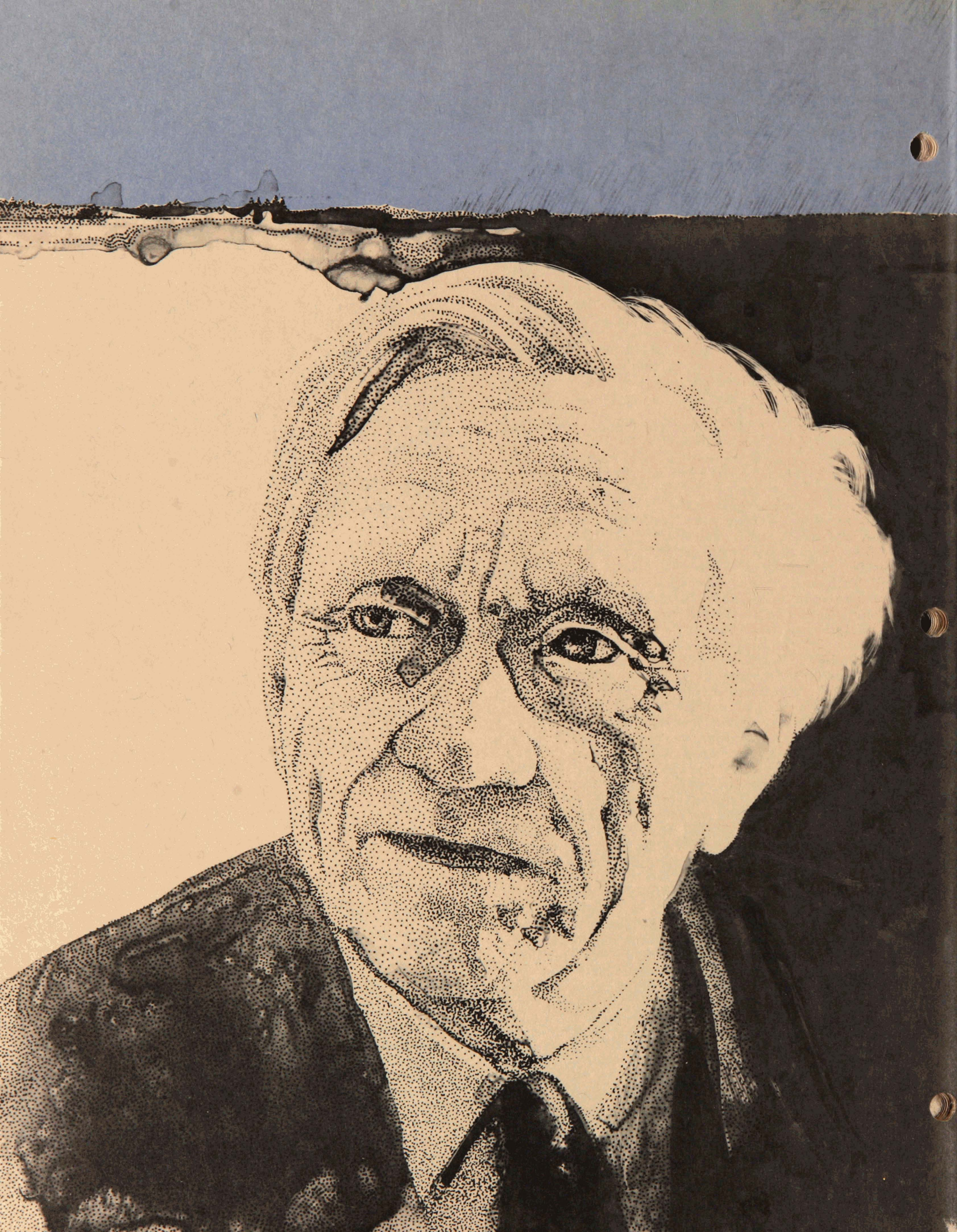
I have suggested that in the end the institutions we deem important and the significance of the rights we assert must rest upon some consensus in the public mind respecting the values we deem important—the content of the contemporary natural law. I have further suggested that this reduces itself to shared moral perceptions and understanding. This leaves the ultimate question of the basis for the moral consensus or public philosophy. Whether a nation can long survive without some substantial consensus as to overriding values is a question which invites serious discusssion. There was a time when it could be said that we were a Christian nation and that we were guided by the Christian ethic in regard to national values. That day is past. In our pluralistic society with its diverse religious elements no single religion can claim for itself a favored position in the law, and the law in turn may not reflect the views of a single religious community.

Where then, if at all, can a basis be found for the moral consensus which is the heart of natural law? The historical tradition is important and our roots are deep in that respect. The accepted views of nations are relevant. To others it may appear that the Constitution and the values it embodies constitute our moral consensus and that the Supreme Court serves the function of moulding and interpreting our higher law. But as I have stressed before, misconceptions and dangers lurk in the view that ultimate conceptions of wisdom, justice, and morality are embodied in a written legal instrument. The ultimates, identified with transcendent values, must in their very nature lie outside the Constitution, just as basic rights have their source outside the Constitution. It is a form of idol worship to see the Constitution as the expression of ultimate values in our nation's life. Moreover, it is dangerous to rely on an institution—more particularly a tribunal of nine men—for the ultimate exposition of our national values by according them a constitutional incarnation. It is sometimes said that the Supreme Court is the conscience of the nation. This, too, is specious. The Court cannot impose its own notion of conscience without correspondence to the accepted moral values of the community. It can lead but within limits. In the end its decision on ultimate values must be sustained by some higher law rooted in the common consciousness and understanding. Moreover, the legislative branch has a voice also in expressing the moral concern of the people, and its expression of that concern should not be lightly disregarded by the courts. The current revolution, centering on the new freedoms, accompanied by the extraordinary claims made in the name of personal liberty, raises questions on the limits of this liberty and the organ responsible for determining these limits. Natural rights have their limits, and the Supreme Court has said that fundamental rights are subject to restrictions designed to serve some compelling public interests. The abortion cases are particularly relevant here because they deal with moral values and with the basic question of choosing priorities among conflicting interests. Should a court override a legislative determination that the regard for life, implicit in the protection of the fetus, is a sufficiently important public policy consideration to warrant restrictions on a woman's freedom over her own body? The most important criticism of the abortion cases is the judicial intrusion into a matter reserved for legislative policy. They reflect the danger of having the Court assume a role as the nation's conscience at the expense of the legislative function in determining important questions of public policy.



"It is a form of idol worship to see the Constitution as the expression of ultimate values in our nation's life."

No, the conscience of the nation lies outside the Constitution and supports it. The conceptions rooted in common understanding are the stuff of a nation's aspiration and moral vision. It is in the shaping of a common ethic of the people which draws its inspiration from religious, moral, and philosophical sources, which is illuminated by history, fortified by the ringing affirmation of the great Declaration, and given concrete application through the reasoned discourse which is the hallmark of a great society that our hope lies of giving contemporary meaning to the higher law and the natural rights of man.



MR. JUSTICE DOUGLAS AND THE LONELINESS OF LONG DISTANCE JUDGING

by Professor Peter Westen

Prof. Westen, who joined the Michigan law faculty last fall, served as a law clerk to Justice Douglas in 1968-69. This article is reprinted with the permission of **Juris Doctor;** *© 1974 by MBA Communications, Inc.*

The Supreme Court had recessed last summer when a federal court in July declared the American war in Cambodia unconstitutional, raising the question whether the war should be permitted to continue in the meantime while the government appealed. The question went first to Justice Thurgood Marshall who refused to act alone, and then to Justice William O. Douglas who was found in hiking boots and jeans at his mountain retreat in Gooseprairie, Washington. Douglas heard argument on both sides and then ordered an immediate halt to the war. He said he was doing what any judge would do under the circumstances, because "we know that someone is about to die," either innocent "Cambodian peasants" or "the American navigator who drops a ton of bombs on a Cambodian village."

Douglas misjudged his fellow justices. They rallied by telephone from their scattered vacations and, for the second time in history, joined in superseding a summer recess decision. The war was permitted to continue. The next day, as dawn was breaking on the Mekong River, an American navigator made a mistake on a B52 mission over Cambodia and dropped more than 20 tons of bombs on the women and children of Neak Luong.

It was not the first time that Douglas had been rebuffed for an unpopular decision of life and death. Twenty years earlier, when young Bill Rehnquist was still a law clerk and before any of the present members of the Supreme Court had become federal judges, Douglas stayed the execution of Ethel and Julius Rosenberg.

The circumstances were similar. Three days before the scheduled execution, while the Court was in summer recess, the Rosenberg lawyers discovered a novel argument against the death penalty. They went to Justice Hugo Black whose secretary turned them away, and then to Douglas. After struggling with the case for two days and nights, Douglas granted the Rosenbergs an eleventh-hour reprieve to spare their lives until their case could be decided. Chief Justice Vinson was furious. The Court reconvened in emergency session and, for the first time in history, overturned a summer recess decision. The Rosenbergs were electrocuted by sundown.

The Cambodia and Rosenberg decisions are vintage Douglas, and illustrate why his admirers revere him and his critics fear him. The decisions also illustrate how long he has been on the job. To be exact, by October 29 of last year Douglas had served on the Supreme Court for 34 years and 196 days, which is one day longer than Justice Stephen Field (1863-97) and longer than any other justice since the founding of the Republic. When 40-year-old Douglas was appointed to the Court by President Franklin D. Roosevelt in 1939, he was the youngest justice in over a hundred years. Now at the age of 75, with a pace-maker to keep his heartbeat regular, Douglas seems as strong as ever. He just returned from the People's Republic of China which, after studying Chinese, he has been trying to visit for more than 20 years.

"Douglas has served with nearly one-third of all the justices in history, and written over 1,200 opinions across 100 volumes of the U.S. Reports."

It may be too soon to render a final verdict on Douglas. If he lives as long as Justice Oliver Wendell Holmes, Douglas may still be on the Court in the year 1991. Nonetheless, he has given the country the longest and fullest performance on record, which should be enough to judge him by. It is important to take measure of the man as a judge if for no other reason than to decide whether to seek more Court appointments like him in the future.

The trouble is that few people can agree about Douglas. The disagreement was confirmed in a 1972 survey of 65 professors who specialize in constitutional law and were asked to classify all justices in history from "great" to "failure." The results for Douglas were inconclusive, ranging from those who ranked him at the very top to those who faulted him for writing untidy opinions. As far as the public is concerned, it was not too long ago that Gerald Ford launched his campaign to remove Douglas from office for his outspoken views:

"Mr. Justice Douglas has been telling us something and this time he wanted to make it perfectly clear. His blunt message to the American people and their representatives in the Congress of the United States is that he does not give a tinker's damn what we think of him and his behavior on the bench. . . .I believe. . .he is unfit and should be removed. I would vote to impeach him right now." (Rep. Gerald Ford, speech, April 15, 1970).

Perhaps the best way to judge Douglas, therefore, is to compare him with both acknowledged extremes—with Felix Frankfurter (1939-62), whom the survey ranked an all-time "great," and with Charles E. Whittaker (1957-62), who was ranked at the very bottom of the list as a "failure."

They were all contemporaries. Frankfurter, who was a former law professor like Douglas and a great intellectual rival, enjoyed two months seniority over Douglas and, therefore, had a better office. When Frankfurter retired and Douglas moved into the better office, he even had the carpet changed so he could not be said to be walking in Frankfurter's footsteps. Whittaker, in turn, was sincerely respected by all his colleagues for his dedication and, according to Douglas, always put a "special effort into scrutinizing even the humblest petition." But he could not cope with the task he set himself and eventually had to retire because of physical exhaustion.

I

Whittaker and Douglas had a common beginning. They were both born into poor families in the farmland of the Midwest and soon emerged as prodigies at the top of their profession. Douglas was born in 1898 in Minnesota, the son of an itinerant "home missionary" for the Presbyterian Church. After moving west, Douglas earned his way through school working in creameries, junk yards, packing plants, and fruit orchards. He won a scholarship to Whitman College where he slept in a tent on a vacant lot for two years, eventually becoming student body president and Phi Beta Kappa. He worked his way across the country tending sheep and riding the rails until, with eight cents in his pocket, he reached the Columbia Law School where he later graduated at the top of his class. Fourteen years after graduation, he was on the Supreme Court, the youngest appointment since James Madison put 34-year-old Joseph Story on the Court in 1811.

Charles Whittaker had similar beginnings. He was born in 1901 on a farm near Troy, Kansas, where he attended school by riding twelve miles on horseback every day. He saved money for law school by trapping small animals, and by working as an office boy during the day while studying law at night. He was admitted to the bar a year before he graduated and soon became a senior partner in the same firm where he had worked as a messenger. By the time he was appointed to the federal bench in 1954, he was president of the Missouri Bar Association. It was a page out of Horatio Alger who was, in fact, one of Whittaker's favorite authors.

Whittaker and Douglas also shared an endless capacity for hard work. Whittaker worked himself literally to exhaustion, taking no time off either in the evenings or on weekends. Chief Justice Earl Warren later remarked that "Whittaker's entire preoccupation was with the law. He refused to leave time for any diversion."

Douglas has the same compulsion. According to Justice Hugo Black, who was also known for his industry, "Douglas is simply an unbelievably prodigious and constant worker." While teaching at Yale (1928-34), Douglas wrote several thick law books and a dozen articles. Since then, in addition to his official work he writes at least one book a year on everything from his travels in Outer Mongolia to the constitutional law of India. Last year he wrote twice as many opinions as any single justice.

In every other way, however, Douglas differs from Whittaker. To begin with, Whittaker could never rank with the all-time greats because he was not on the Court long enough. Justices achieve greatness by the way they decide cases. Since they get the chance to write only a few opinions each year, they need a number of years to show their skill. It is no accident, therefore, that most of the great justices in history served for more than 20 years and at least five, including John Marshall, Oliver Wendell Holmes, and Hugo Black, served for more than 30 years.

Furthermore, the longer a person sits on the Court, the greater his impact on the law. Douglas, for example, has served with nearly one-third of all the justices in history and written over 1,200 opinions across 100 volumes of the U.S. Reports. His seat on the Court has counted for three and four times as much as other appointments. Like Hugo Black before him, he has been able to bide his time on some issues and, having lost them for 10 or 20 years, finally write opinions after 30 years which elevate his earlier dissents into the law of the land.

"Lawyers (unlike professors) prefer Douglas' opinions because they are candid and because they give some general guidance as to how he would decide future cases."

Whittaker's personal agony, however, was not too little time on the Court, but too much time in a job he said made him "miserable." He suffered from the most fearful of judicial nightmares—indecision. Unlike Douglas, whom one of his colleagues called "the fastest worker I've ever seen" and who invariably completes his work before the others, Whittaker had nothing to show for his prodigious efforts. After painstaking study of the facts and search for precedents and after hearing from lawyers on both sides, he simply could not make up his mind.

Whittaker waivered back and forth, depending on who last had his ear. Some of his brethren, like Frankfurter, would wheddle and intimidate him to take their side, and would even supply him with ghost opinions to use as his own. Invariably, when it came down to a vote, he sided with the conservatives hoping to find comfort in the status quo.

One should try to understand Whittaker's failing, not to disparage him personally, but to appreciate the art of judging. Every judge suffers from some indecision from time to time. In the Rosenberg case, for example, where the Court had to decide whether to extend Douglas' stay or permit the Rosenbergs to be electrocuted, Frankfurter refused to vote one way or the other, saying he needed more time to study the matter. A few days later, after the Rosenbergs had died, Frankfurter concluded that Douglas had been right all along, and apologized for the "painful" and "pathetic" appearance of his late opinion.

In Whittaker's case, however, indecision was chronic because he lacked two essential qualities: he had no constitutional philosophy and no judicial conviction. His failing was not so apparent as a lower court judge where he had to apply existing Supreme Court precedents to particular cases. But when he came to the Supreme Court and was asked to create new precedents for others, he discovered that he had no guiding principles for deciding what the Constitution means. Thus, according to his biographer, "Whittaker could vote on both sides of what appear to be identical cases and never articulate any reason for his judicial stance."

Not Douglas. Unlike justices who decide each case on its individual facts, Douglas has formulated general principles from his study of history about the role of the courts and the meaning of the Bill of Rights. As a result, he derives individual decisions from general concepts which make his opinions consistent and predictable, regardless who the litigants happen to be.

To that extent his decisions may look like gut reactions, but as one of his colleagues says, "the difference with Douglas is that his gut is full of the law." Douglas said the same thing after a college address last year. He was asked why he was willing to stay and answer questions from the audience, where Justice William Rehnquist, who had spoken at the college a few days before, had refused to answer any questions off the cuff. The difference, he said, is that "my answers are not off the cuff. I have been thinking about them for 30 years."

Douglas described his approach to constitutional adjudication several years ago in an interview with Eric Severeid:

> "[The First Amendment says] 'Congress shall pass no law abridging freedom of speech or press.' And I take it to mean what it says. That's strict, strict construction. Other members of the Court over the years have said that when the Constitution says Congress shall make *no laws* abridging freedom of speech and press, it really means Congress may make *some laws* abridging freedom of speech and press. Now, if you go off on that tangent, then it takes you a long time to make your decision. You have to do an awful lot of research. You work 18 hours a day, and write 58-page opinions."

The statement is revealing for several reasons and represents something Whittaker could never have said of himself. To begin with, in deciding what the Constitution means, Douglas does not start with recent precedents or opinions by other judges. He starts with the text of the Constitution itself and tries to formulate for himself some general conclusions about what the framers intended. He believes that while the source-meaning of the Constitution never changes, each changing generation must discover and rediscover how the original meaning applies to its changed conditions. Accordingly, he considers the duty of every justice to return to the original text and decide what the 200-year-old words in the Constitution mean for America today, rather than accept what some predecessor believed they meant for other times. A good opinion is not one that finds its artful place in 200 years of prior gloss, but one that brings new life to the original text, which is why he says *"I'd rather create a precedent than find one."*

Furthermore, because he derives individual decisions from general principles, Douglas can openly reveal the broad values underlying his conclusions. Whittaker, who lacked a constitutional vision, fearfully tailored his opinions as closely as possible to the precedents and facts at hand and thereby deprived them of any general meaning. Lawyers (unlike professors) prefer Douglas's opinions because they are candid and because they give some general guidance as to how he would decide future cases. Justice Tom Clark, who is now retired and presides as a lower court judge, finds that "Douglas is a good man to work with. He uses few words, he doesn't beat around the bush." Clark Clifford says the same thing for the practicing bar. "His opinions are decisive and incisive. I think the bar generally likes his opinions. You know where he stands."

Finally, unlike Whittaker who lacked the personal conviction to oppose the government in controversial cases, Douglas traces his decisions back to first principles and has the resulting confidence to stand alone, if necessary, for what he understands to be the law. Courage is desirable everywhere in government, but on the Supreme Court it is essential. The founding fathers did

their best to make the Supreme Court a separate branch of government, independent of the Congress and the president, and coequal. In the end, however, its independence rides with the judicial courage of its members to say "no" to the world. If its members begin to agree with other branches of government out of cowardice, caution, or complaisance, the Court will have lost its way.

Douglas can be rationally persuaded to change his mind. On several controversial issues, including whether school children of the Jehovah's Witnesses faith could be expelled for refusing to swear allegiance to the flag and whether the government could evacuate Japanese-Americans from California during World War II, Douglas admits that his earlier views were wrong. But once he reaches a decision, he cannot be intimidated by a hostile public or an angry president.

The Rosenberg case is a good example. Douglas first tried to avoid the controversy by sending the Rosenbergs to Hugo Black, sensing that any justice who acted on their behalf would be putting his own career on the line. Nonetheless, when Black turned them away and it was up to him, Douglas had the courage to halt the execution so that their case could be decided by the full Court before they died. Even after the Court repudiated him 6-3, and the Congress threatened him with impeachment for granting the stay, he proclaimed "I know I am right on the law."

His best and perhaps unparalleled exhibition of raw judicial courage was the decision to stop the war in Cambodia. There was no real dispute in that case about the law. It is well accepted that when a party whose conduct has been declared illegal by a lower court wishes to continue his conduct pending appeal to a higher court, he must prove that he would suffer "irreparable injury" to stop in the meantime. Because the war in Cambodia had been declared illegal by a lower court, therefore, the government had a duty to prove that it would suffer "irreparable injury" if it stopped the bombing pending its appeal. It was not a legal question but a factual decision about the importance to America of the last 10 days of bombing.

Justices ordinarily scrutinize a claim of "irreparable injury" with care and skepticism, whether it comes from a governor or a sheriff or a local school board. But when the claim came from Secretary of State William P. Rogers himself, none of the justices was willing to challenge him. Except Douglas. He listened to the president's ministers with the same solicitude any losing party deserves, and when they were unable to convince him that the Republic would suffer "if one or a thousand more bombs do not drop" on Cambodia, he had the courage to act accordingly. History will tell us who was right.

II

Felix Frankfurter would probably resent being compared with Douglas, which makes the resentment mutual. During their 25 years on the Court together, Frankfurter and Douglas waged relentless war. Professor Fred Rodell of the Yale Law School and a good friend of Douglas describes the rivalry by anecdote:

> "It seems that a very large, very rich corporation had been held guilty of breaking the antitrust laws and had carried its case to the Supreme Court. The company's lawyers then had a brillant idea. Aware that the justices regularly whisper to each other on the bench during the course of argument, they smuggled two professional lip-readers into the Court to catch the drift of judicial comment. At the lunch recess, as soon as the justices trooped off, the lawyers leapt for the lip-readers—who looked woebegone. 'Sorry,' said one lip-reader, 'but all we got was when Justice Frankfurter kept asking that lawyer all those questions and Justice Douglas turned to Justice Reed and said, *'Why can't the little bastard keep his big mouth shut and let us get on with it?'* "

It is said, in turn, that Frankfurter refused to join opinions he otherwise agreed with simply because Douglas had written them.

The two men clashed partly because of the great differences between them. Frankfurter was a little man of vests and Phi Beta Kappa keys, with sparkling *pince-nez* astride a very big brain. He was an intellectual snob, in the best sense of the word, who left the immigrant Jewish community of his working parents on the Lower East Side to join an academic elite at Harvard and later a power elite in Washington where he shared brilliant conversation with a fellowship of superior minds. He nurtured a deep friendship with Franklin D. Roosevelt and others of birth and brains, and enjoyed the loyalty of young lads of promise throughout the country. He had particular affection for arcane words and for the English way of doing things.

Douglas came to Washington from the other direction, not from the literary salons of Boston, but from the wilderness of the Northwest where a man is admired for the length of his stride and the mountains he has climbed. Earl Warren has said of Douglas that "he is as much a Westerner in the old tradition as is to be found anywhere in public life today." He is a big, physical man in jeans and hiking boots who likes to work alone, to live outdoors, and share the rugged company of men of action. He is a man of few words, with no patience for pleasantry and little time for friends, which is just the way he wants it.

The basic reason the two men clashed, however, was because of their similarities. They each enjoyed an uncommon measure of the elements that make for greatness on the Supreme Court. They both possessed as much raw brain power and over-all learning as any men who have sat on the Court, and both served long enough to leave their mark. Frankfurter, who served for 23 years, came from Harvard Law School where he was a professor of government regulation and the federal courts. By the time he was appointed, he had advised presidents, drafted legislation, and written books on the

"It always comes as a surprise . . . that the cases that fascinate Douglas most are not the free speech cases . . . , but the complex rate-making cases and railroad reorganizations that leave everyone else bewildered."

range of legal issues that come before the Supreme Court.

Douglas had similar preparation. He made his reputation as a professor of government regulation at Yale, inspiring Robert Maynard Hutchins, then at Chicago, to call Douglas the most "outstanding law professor in the nation." From Yale he went to Washington where he advised President Roosevelt on a variety of matters, drafted legislation, and served as chairman of the S.E.C. By the time he was named to succeed Justice Brandeis, Douglas had acquired a mastery of corporate law and finance that will probably never be surpassed by another sitting justice. It always comes as a surprise to discover that the cases that fascinate Douglas most are not the free speech cases which he finds easy, but the complex rate-making cases and railroad reorganizations that leave everyone else bewildered.

It is no secret in Washington that Douglas is acknowledged to be intellectually the most capable member of the Court. When Justice Lewis F. Powell, Jr., joined the Court two years ago, one of his brethren took him aside and referring to Douglas, said how "great" it was "to have at least one genius on the Court." Earl Warren, who spoke in Douglas' honor last November, said the same thing:

"I have never sat with a man of his versatility, of his abilities in so many lines as Bill Douglas. And today when our friend and colleague, Abe Fortas, was making his opening statement, he referred to Bill Douglas as a 'legal genius.' I would like to write a concurring opinion to that act and say that while I agree with the opinion, I would say that Bill Douglas is a genius, period."

The nice thing about judges of comprehensive intellect is that they can do their own work. Most justices concentrate on their respective specialties—whether criminal law, or business regulation, or civil liberties—and delegate much of their other work to their colleagues and law clerks.

Frankfurter and Douglas, on the other hand, were fiercely interested in all the Court's business and considered it all within their range. As a result, it can be said that Douglas is the only living justice who writes his official opinions by himself. It means that every Douglas opinion is a genuine work, conceived in his mind, framed in his terms, and explained in his words.

Besides their brillance and learning, the justices possessed what Frankfurter called "something of the creative artist." Frankfurter, an apostle in judicial restraint, created whole doctrines to explain why the Supreme Court should refrain from deciding controversial cases, either because the parties lack "standing," or the dispute is not "ripe," or the issue is too "political," or the case can be decided by another court, or out of deference to "elected officials," or out of deference to the "states." It was an intellectual *tour de force* that has greatly influenced the federal courts and shows up in their refusual to stop the war in Cambodia and reluctance to order the president to produce the Watergate tapes. It also explains why Frankfurter is Richard Nixon's favorite justice.

Douglas has the same capacity for what he calls the "flash of creative genius," but uses it for precisely the opposite purpose. He believes that the Supreme Court should play an affirmative role in deciding disputes between individuals and the government, in umpiring the distribution of power among coordinate branches of government, and in having a final word on what the Constitution means. Thus, the Court tends to rely on Douglas to write its seminal opinions deriving new rights from unexplored areas of the law, such as the right of equal treatment for the poor, the right to travel, the right of privacy, the right to enforce collective bargaining agreements, the right to sue the government, and the right to protect the environment.

What ultimately separates Frankfurter and Douglas from lesser justices, however, is that *one can predict their decisions in advance.* It is sometimes assumed that great justices keep an open mind in every case and do not know themselves until the last moment how they will vote. Nothing is further from the truth. None of the great justices in history have been "swing" men capable of jumping in any direction in every case. They have been men like John Marshall with what Frankfurter called "a coherent judicial philosophy" which largely determined in advance what they would do in individual cases.

There is a good reason for that. Justices have a specialized task that distinguishes them from lower court judges. The trial judge who presides over a criminal case or an automobile case or a divorce has the job of determining the facts. He has to decide whether the accused really committed the murder, which driver was really speeding, and how much alimony the husband can really pay. Since every case is different, he can discover the facts only by hearing all the evidence before making up his mind.

The job of a Supreme Court Justice is different. By the time he gets the case, the facts are generally established and what remains is to resolve a pure question of law within the larger legal framework. When a justice is completely unpredictable on those recurring questions of law, it is a bad sign. Either he lacks conviction about the larger legal framework and decides each case on impulse—or his principles are so hidden or narrow that no one can tell what his written opinions mean in future cases. Or he has compromised his position so often in behind-the-scene efforts to rally a majority, that no one can tell from his written opinions what he really believes. It is no accident, therefore, that the great justices have all been more or less predictable, because it means that they were able to overcome impulse and render consistent decisions based on general principles that others could follow.

The case of the White House tapes is a good example. The Supreme Court may soon be asked to decide which

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branch of the government has final authority to decide claims of "executive privilege"—that is, claims by the president that he has a legal right to keep certain information secret. The question is "who decides?" Judge John J. Sirica and the court of appeals have said that the Constitution gives the courts the final power to decide what is legally protected. Nixon has said that the Constitution gives him alone the power to make that legal determination.

It is impossible to know in advance what the Supreme Court will do. Some justices, like Lewis Powell, have been judges for too short a time to permit prediction. Others, like Byron White, who have been there long enough have failed to formulate a philosophy of judgment that provides any guidance. One thing is sure, however, Felix Frankfurter probably would have voted for the president and William O. Douglas, like John Marshall, in all likelihood will vote for the federal courts.

Indeed, it is precisely because one can say that about Frankfurter and Douglas that they deserve such high marks. If Douglas, who voted against his friend Harry Truman for seizing the steel mills 20 years ago, were to vote otherwise on the White House tapes today, he would be abandoning what he has said the Constitution means. He would have to repudiate his prior decisions and decide the case on the basis of impulse or caution or fear. He has never done that before and is unlikely to begin now.

A decision on the White House Tapes will also help decide who is the better judge, Frankfurter or Douglas. Each has his friends and enemies. Some of Douglas' opponents, like Vice President Gerald Ford, dislike him for reasons apart from his ability as a judge—for what he does off the Court, for the books he writes, for his disreputable friends, for his many wives.

Others, including many law professors, dislike Douglas for his judicial style. They prefer Frankfurter, who wrote technical and learned opinions for an elite audience, and whose exhaustive monographs are handy teaching devices. The also consider Frankfurter a greater craftsman because he grounded his opinions in precedent.

It is no accident that Frankfurter paid homage to precedent. Frankfurter, by temperament, was a conservative justice who resisted judicial change of all kinds—even change in the name of the Constitution. Precedent is always most useful to those who resist change. Frankfurter found it convenient to stand on stare decisis, because he found himself committed to the status quo.

Douglas, on the other hand, like Oliver Wendell Holmes writes crisp, quotable opinions with few footnotes. He writes them for the purpose of explaining his decisions to lower judges and practicing lawyers, not to enlighten law professors. When he wants to write a scholarly article, which he can do perfectly well, he publishes it in a law review, not in the *U. S. Reports.*

If he takes less care with precedent it is because he pays more heed to the original words of the Constitution. Unlike Frankfurter, Douglas has no fear of judicial change. He respects precedent only insofar as it reflects the spirit of the Constitution as he understands it, and is perfectly willing to overrule 100-year-old cases if he finds them in error.

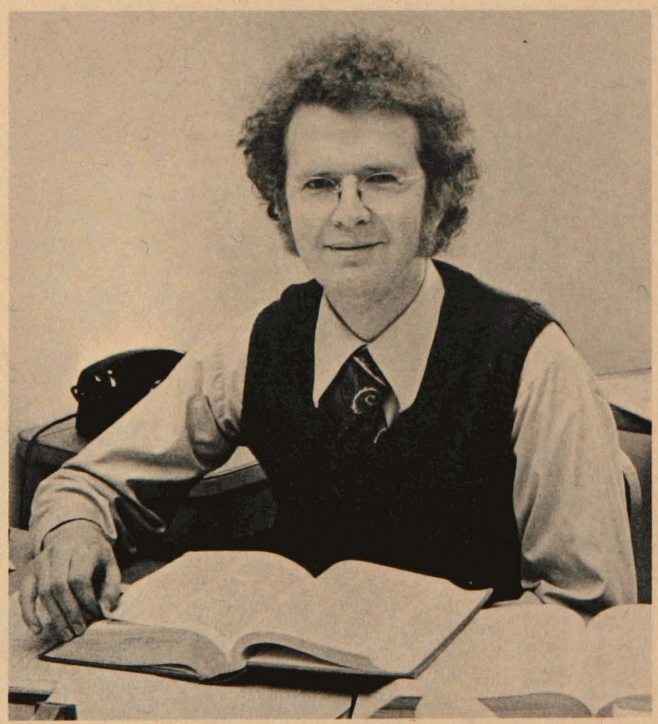
A decision on the White House tapes will tend to show who had a better sense of the times. Frankfurter and Douglas shared much in common but their visions of the Constitution remain irreconcilable; they should be judged accordingly. The greater justice will be the one with the better vision, the vision that history indicates. That explains why when Holmes came to praise the great John Marshall, the highest tribute he could render was to recognize that "time has been on Marshall's side."

It is fitting that history should measure justices, ultimately, in terms of their success. As long as they sit on the Court, they enjoy the special privilege of telling America what the Constitution means. They stand in the shoes of the founding fathers for the purpose of interpreting the continuing spirit of the Republic. When they are gone, however, the country reserves the right to render a judgment on their performance by the spirit it chooses to live by. "What has mattered in the end," as Anthony Lewis puts it, "is whether the judges read the country's spirit right."

Time, so far, seems to be on Douglas' side, partly because of his view of government. The basic difference between Frankfurter and Douglas is that while Frankfurter implicitly trusted the government to be good, Douglas always expects it to be evil. He has a paranoia of government, which is healthy in a judge and which derives not from personal experience, but from his view of the Constitution and the role of judges in policing it. The founding fathers themselves distrusted government and, therefore, arranged things so that men in power would be checked and balanced and prohibited from doing evil. As Douglas puts it, "the Constitution was designed to take government off the backs of people and make it difficult for government to do anything to the individual."

Time is also on Douglas' side as a matter of law. Unlike Frankfurter whose views have been largely repudiated by the Court, Douglas has seen his main principles accepted, including that the federal Bill of Rights be applied to the states, that questions of civil liberty be weighed in favor of the individual, that rich and poor be treated alike, and that the courts be willing to resolve disputes between the government and the people.

He is still fighting for some of those principles which explains why he still dissents more than any other member of the Court. He now stands alone, for example, in believing that the first amendment means what it says, which is to take the government out of the business of telling the American people and their children what they may read. He may not win that battle during his lifetime. But he maintains the purity of his position with the confidence that his vision will be vindicated by history or, as he puts it, "by that Higher Court which invariably sits in judgement on the decisions of this Court."



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