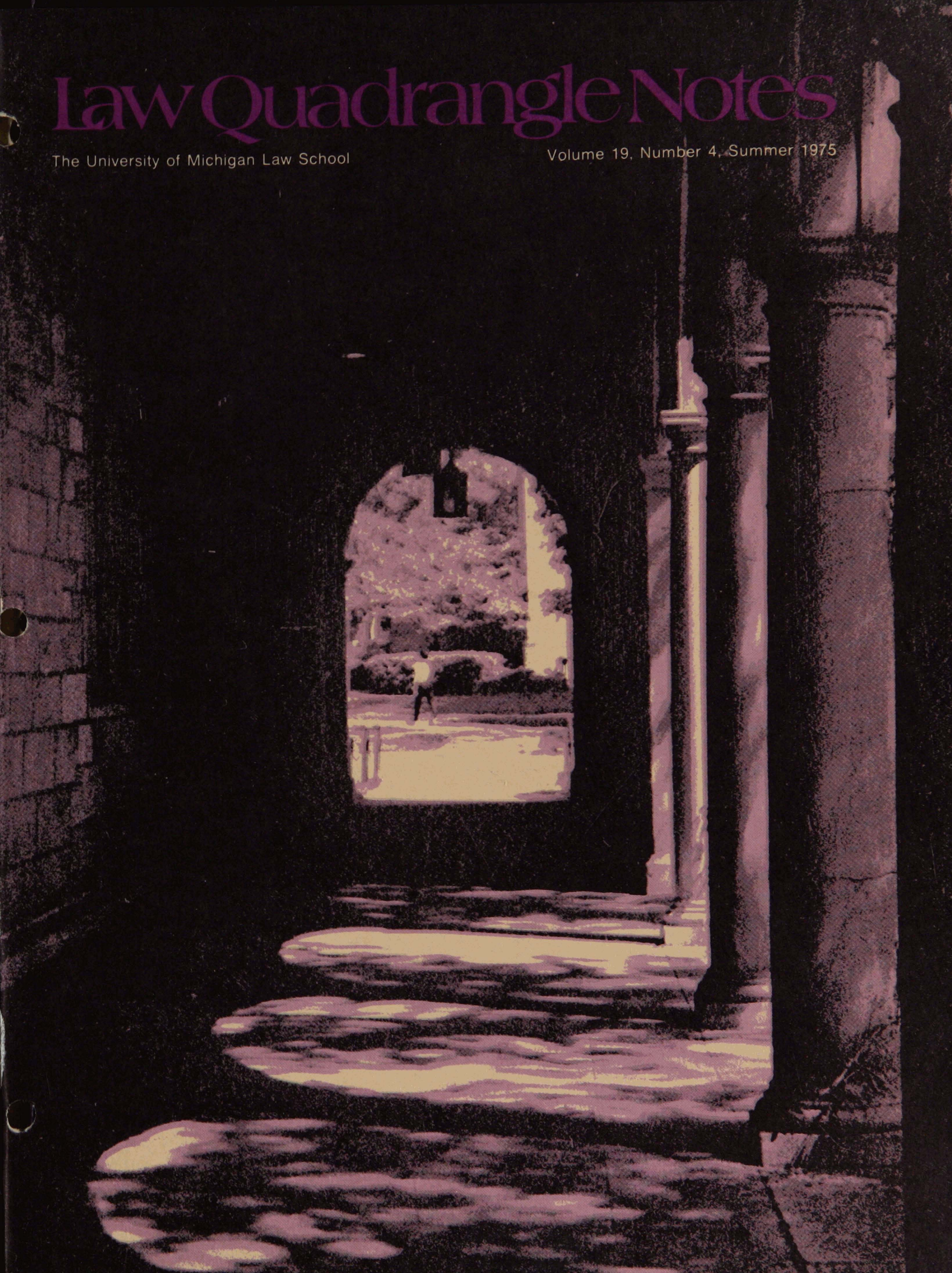
Law Quadrangle Notes

The University of Michigan Law School

Volume 19, Number 4, Summer 1975



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Job Openings Drop For New Lawyers

Recent University of Michigan law graduates, experiencing a slight decline in job placements, are among law students across the country feeling the pinch of the depressed job market.

Employment figures for newly graduated U-M law students are down about five per cent from previous levels, according to the Law School placement office.

As of early June, the office reported that 70 per cent of the graduating class listed "definite plans" for the future—meaning plans for employment, military service, or further graduate study. At this time last year, the figure was 75 per cent; in 1973 it was 72 per cent; and the year before, 75 per cent.

EDITOR'S NOTE: **U-M law alumni can help recent graduates and students of the Law School find jobs by completing the enclosed "mailer" in this issue of** *Law Quadrangle Notes*, **on which they can note any job availabilities at their law firms. Alumni can also indicate on the form whether they wish to serve as "contact person" in their geographic area, advising students interested in practicing there about the job market in general, quality of living, and other practical concerns.**

"U-M Law School has not done too badly, considering the depressed job market and the increased number of law graduates nationally looking for jobs," says Nancy Krieger, the Law School's director of job placement. "Still, our figures have declined from past levels."

She believes that "generally, national law schools such as Michigan have come close to previous placement levels, while some other schools have seen their job placement figures decline more sharply."

Surprisingly, Ms. Krieger notes a substantial increase this year in the number of job interviewers coming to U-M School, the number of interviews scheduled and the number of firms contacting the Law School by mail about job vacancies.

During the fall and winter terms there were some 436 interviewers who saw a total of 8,668 students at the Law School, according to Ms. Krieger. Last year there were 419 interviewers and 6,806 interviews conducted.

"Many students were alarmed by rumors of a depressed job market this year and scheduled an unusually large number of interviews," Ms. Krieger explains. "Potential employers were very cooperative about conducting so many on-campus interviews. Many students sought interviews with as many as 25 firms, while in the past 10 or 15 would have been the usual amount."

The placement director also reports that the number of law firms contacting the Law School by mail about job openings jumped from 633 last year to 788 this year.

Among other job-related statistics, Ms. Krieger reports that, although many U-M law students sought jobs in Michigan, fewer were hired than last year, while Detroit-area firms came close to previous hiring levels.

This year 36 students received jobs at Detroit law firms, compared to 41 last year. A total of 78 students received jobs with Michigan firms this year, compared to 95 last year, according to the placement office.

All told, out of 253 graduates reporting "definite plans" for the future, 160 will work for private law firms; 20 accepted federal, state, or local judicial clerkships; 17 will take jobs with business firms; 17 have taken jobs with federal or state government; 7 will work in legal services for the poor; 4 will enter teaching careers; and 1 will pursue further graduate study, according to the placement office.

Ms. Krieger's report also shows the most popular geographic locations of the graduates; 78 of them will work in Michigan; 27 in Washington, D.C.; 22 in New York City; 18 in Ohio; 14 in Chicago; 14 in California; 7 in Pennsylvania; and the remainder scattered throughout most other states.

Steven Pepe to Head Clinical Law Program

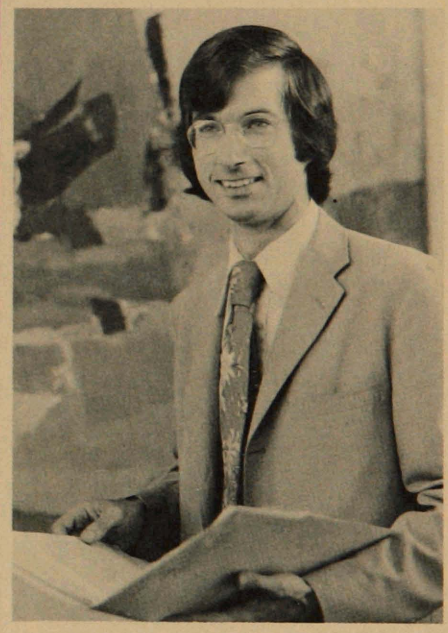
Steven D. Pepe formally joins the U-M law faculty this summer as an associate professor, with over-all administrative responsibility for the School's clinical law program.

The program, one of the Law School's most popular offerings, allows second- and third-year students to earn course credit by handling a variety of civil and criminal legal aid cases under faculty supervision. Students confer directly with clients and represent their cases in court. Also part of the program are seminars focusing on development of practical skills and analysis of psychological and ethical problems encountered by the students in their day-to-day work.

During the fall or winter term and during the summer, Pepe will direct the clinical program, supervise case handling, and teach the seminar. In the remaining term, he will teach subjects at the Law School that relate closely to clinical practice, such as welfare law and evidence. Other faculty members will take turns heading the clinic during the terms Pepe spend in the classroom.

Pepe has been co-director of the clinic along with Edward B. Goldman since January 1974, but as adjunct assistant professors, they did not teach courses in the standard curriculum. Goldman is to enter private practice this summer.

Pepe emphasizes that the clinic serves as a "social community service." "Our first concern is the quality of legal services our clients are receiving," he points out. The amount of time that students spend on cases and the close supervision they receive serve as safeguards in this respect, he says. "Individual attention and added effort," says Pepe, "make up for the lack of experience in legal representation."



Steven D. Pepe

Student participants are given a chance to develop practical skills by interviewing clients, preparing for trial, and appearing in court. Michigan court rules allow second- and third-year law students to try cases if they are supervised by an experienced attorney.

A special perspective on lawyer-client relationships is offered when students and clients allow their interviews to be videotaped. Individuals later view and analyze the tapes, with a psychiatrist participating in the discussion. Certain tapes demonstrating common professional problems are presented to the seminar.

Besides offering practical experience, the clinical law program increases students' exposure to problems of poverty, race, and status, and improves their understanding of the "institutional and interpersonal dynamics of the legal system," according to Pepe.

He feels that a term at the clinic can make the students' academic work more meaningful and can help them in choosing courses and careers.

Pepe has a background in community legal service work. Under a Reginald Heber Smith Fellowship, he worked as staff attorney for the Neighborhood Legal Services Program in Washington, D.C. He was later a clinical teaching fellow at Harvard Law School, teaching seminars and supervising students in the handling of cases connected with legal aid agencies.

Pepe's work has focused on problems of low-income housing. He did research in that field at the London School of Economics and Political science.

Pepe attended the University of Notre Dame as an undergraduate. He was an assistant editor of the *Michigan Law Review* at U-M Law School, graduating in 1968. He then clerked for one year for Judge Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit.

Prof. William Bishop Plans for Retirement

U-M Law Prof. William W. Bishop, Jr., is due for retirement furlough prior to his formal retirement in 1976, but he will still be spending much of his time in the classroom.

"He's doing it out of the sheer love of teaching," says Law Dean Theodore J. St. Antoine of Bishop's decision to take on a full class load for fall 1975.

Bishop has taught international law courses at the Law School since 1948. In 1966, he was named Edwin DeWitt Dickenson University Professor of International Law.

He came to the Law School from the U.S. Department of State after brief periods teaching law at the University of Pennsylvania and Columbia University.

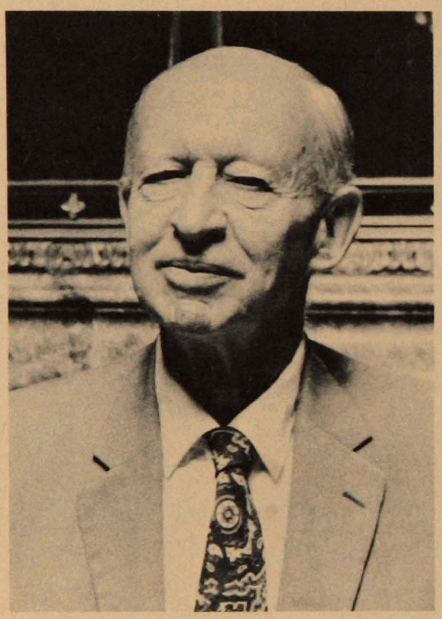
Bishop studied political science as an undergraduate at U-M and pursued legal studies at Harvard, Michigan, and Columbia.

As an assistant legal adviser at the State Department, he formulated the "continental shelf doctrine" proclaimed by President Truman in 1945. The doctrine asserted U.S. jurisdiction over its continental coastal areas.

The concept gained wide acceptance. Today, the extent of jurisdiction over the continental shelf is a central issue at the ongoing international Conference on the Law of the Sea.

One major shift in recent years in the field of international law, according to Prof. Bishop, has been the increasing power of third-world countries, many of which question legal concepts that evolved without their past participation. Nonetheless, "the newer countries are coming to see the advantage in trying to have relationships governed by law," according to the U-M professor.

In this respect, the United Nations has been useful as a center for negotiations and a forum for ideas, says Bishop. "It has been a source of low-profile accomplishments," he notes. "But it's an institution we'd have a great deal of difficulty doing without."



William W. Bishop, Jr.

The lawyer's role emerges most clearly in the process of reaching international agreements, Bishop says. In regard to problems like the global food crisis, "lawyers aren't going to be the ones to come up with innovative solutions, not in their capacities as lawyers. The lawyer's function is that of getting a general agreement or consensus on paper in a legally acceptable way," according to the professor.

Bishop has spent most of his professional life preparing law students for careers in international law. His *International Law: Cases and Materials*, now in its third edition, is the leading casebook in the field. In addition to his teaching responsibilities, he has been a member of the board of editors of the *American Journal of International Law* since 1947 and served as editor-in-chief during 1953-55 and 1962-1970. He is also honorary vice-president of the American Society of International Law.

Commenting on Prof. Bishop's retirement, Dean St. Antoine noted:

"In a period when many scholars are accused of pursuing their research interests at the expense of their students, Bill is a reassuring example that both can be served, and served magnificently. Generations of Michigan students have become intellectually attracted to international law through their contact with Bill Bishop the teacher, and they have become morally committed to careers in the field through their contact with Bill Bishop the man."

Winners Announced In Campbell Debate

Winners in the 51st annual Henry M. Campbell moot court competition at the University of Michigan Law School were announced by U.S. Supreme Court Justice Byron R. White, who served as one of the judges in the hypothetical court debate.

The winners were students William Black and Marilyn Huff, both of Dearborn, Ronald Henry of Southgate, and Warren Harrison of North Woodmere, N.Y. Black and Ms. Huff argued before the bench, while the other two students prepared legal briefs for the case.

Runners-up in the competition were James Davis of Arlington, Va., and Mark Luscombe of Clinton, Ill.

The winners were announced by Justice White at a banquet following the competition in early spring. Also serving as judges in the mock debate were Judge J. Skelly Wright of the U.S. Court of Appeals, Washington, D.C. Circuit; Justice Mary S. Coleman of the Michigan Supreme Court; and Dean Theodore J. St. Antoine and Prof. Peter K. Westen of the U-M Law School.

The winning team represented the State of Michigan in a fictional case in

Judges in the Campbell moot court competition at U-M Law School were (seated from left): Dean Theodore J. St. Antoine, Judge J. Skelly Wright, Justice Byron R. White, Justice Mary S. Coleman, and Prof. Peter Westen. The student finalists (standing, from left) were: Marilyn Huff, William Black, Warren Harrison, Ronald Henry, Mark Luscombe, and James Davis.

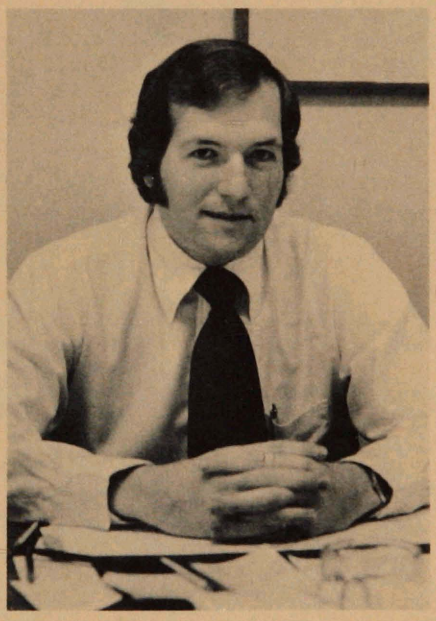
which a white prisoner claims he was denied his constitutional rights because he was tried by a predominantly black jury in Detroit rather than in his home town of Dearborn, where the jury would have been white.

Both winners and runners-up in the competition received cash prizes donated by the Detroit law firm of Dickinson, Wright, McKean and Cudlip. Names of the finalists are engraved on a plaque at the Law School.

The competition is the culmination of the U-M Law School's program in legal writing and advocacy, in which students gain practice in writing legal briefs and presenting arguments in a court setting. The program is headed by Assistant Dean Charles Borgsdorf.

Roger Martindale Is Admissions Officer

Roger T. Martindale, a 1972 U-M law graduate, is the new assistant dean and admissions officer at the Law School.



Roger T. Martindale

Martindale "has a serious interest in educational administration and should bring good judgment and a broad perspective to this sensitive post," said Dean St. Antoine in commenting on the appointment.

Martindale's duties will include selection of incoming classes of law students, with guidance from the faculty; evaluation of admissions practices; maintaining contacts with colleges in Michigan and throughout the country; and preparation of admissions literature and other related tasks.

He received a B.A. degree, *magna cum laude*, from Brigham Young University in 1969 before attending U-M Law School. As a lawyer he has been associated with the firm of Jennings, Strouss & Salmon in Phoenix, Arizona.

Martindale succeeds Jane Waterson Griswold, who had been admissions officer since June 1972. She is now engaged in private law practice in Cleveland.

New Sexual Conduct Law Outlined by Virginia Nordby

The victim of rape is often the victim of the legal system as well, the author of Michigan's new rape law said at a national women's conference at Stanford, Calif., recently.

Virginia B. Nordby, a faculty member of the U-M Law School, said Michigan's new Criminal Sexual Conduct Act represents an attempt to "treat victims of rape more like victims of other crimes."

The new law, passed by the Michigan legislature last August, took effect April 1. Nordby said the new law should serve as a model for similar legislation in other states.

The U-M law instructor was speaking at the sixth national conference on "Women and the Law" at Stanford University. The conference, focusing on women-related legal issues, was attended by women lawyers, law students, and legal educators from around the country.

Nordby said that, among other provisions, the new Michigan law:

—Sets penalties based on the "degree" of sexual assault or injury to the victim.

—No longer requires that the victim prove "non-consent" to having sexual intercourse.

—No longer includes information on the victim's prior sexual activities with other persons as admissible evidence.

—No longer provides that the victim must resist, where such resistance would be futile or dangerous.

In the past, said the Michigan lawyer, "the need to prove 'non-consent' justified and necessitated excruciating examination of the victim's private life." And, said Nordby, "if the victim failed to meet the law's requirements for resistance, outcry, and prompt report, she was made to feel that she was guilty."

If the rape victim "had been a voluntary companion of the accused, she was treated as 'fair game,' " Nordby continued. "If the victim has had an active sexual life with a third person, she was viewed as a prostitute and at least assumed to have 'enjoyed it.' If the victim was seductively dressed, hitchhiking, or had had a drink, she was assumed to have 'asked for it.' "

Nordby insisted that legal statutes are largely responsible for the low conviction rates of rapists and the reluctance of women to report instances of rape.

Virginia B. Nordby

"An analysis of 1970 FBI data revealed that a person accused of rape—and the complaint found valid—had seven chances out of eight of walking away without any conviction for anything," said Nordby.

"Forcible rape has a lower conviction rate than any other crime," she said, and, according to FBI estimates, only one in 10 rapes are even reported.

Here are some of the specific provisions of the new Michigan law, as compared to the old law, according to Nordby:

—Four degrees of sexual assault are now defined, depending on such factors as presence of a deadly weapon, serious injury to victim, and whether there was sexual penetration as opposed to sexual contact. (The previous law defines rape as a single offense requiring sexual penetration.)

—Sentences range from two years to life, depending on the degree of sexual assault. (Previously an offender could be sentenced for life or any term of years.)

—Non-consent of the victim need not be proved by the prosecution, although consent may be raised as an affirmative defense in certain situations. (Under the old law, the woman is required to prove non-consent.)

—The threat of force, such as the threat of kidnapping, may be sufficient to prove sexual assault. The victim need not resist where such resistance would be futile or dangerous. (The old law stipulates that the rape be accomplished by force and the victim resist to the utmost.)

—Evidence of the victim's sexual activities with persons other than the accused is not admissible in almost all circumstances. (Under the old law such evidence is admissible at the discretion of the trial court.)

Survey of Arbitrators Completed by Prof. Edwards

A University of Michigan law professor says a survey he conducted shows that many labor arbitrators may not be qualified to handle legal issues in employment discrimination cases.

Prof. Harry T. Edwards notes that the most convenient way for employees to pursue charges of employment discrimination is through grievance and arbitration procedures—not through legal action in the courts.

But in a survey of all U.S. members of the National Academy of Arbitrators, completed in April 1975, Prof. Edwards found, among other things, that "only about 72 per cent of the respondents indicated that they felt professionally competent to decide legal issues in cases involving claims of employment discrimination."

The U-M law authority announced his findings in a recent address before the National Academy of Arbitrators meeting in Dorado, Puerto Rico. Based on the findings, Edwards concluded that in deciding employment discrimination cases, courts should not accord "great weight" to previous arbitration opinions.

Edwards argued that "the nature of the arbitration process often will not allow for full and adequate consideration" of an employe's rights under Title VII of the 1964 Civil Rights Act. The survey also showed that many arbitrators themselves say "they have no business interpreting or applying a public statute in a contract grievance dispute," the professor said.

Edwards said his survey revealed that many arbitrators who did consider themselves competent in dealing with legal issues of discrimination did not keep abreast of relevant judicial and legal developments.

"Most of the respondents (83 per cent) who indicated that they had never read a judicial opinion involving a claim of employment discrimination also indicated that they did not regularly read advance sheets to keep abreast of current developments under Title VII. Yet 50 per cent of this group of respondents nevertheless answered that they felt professionally competent to decide 'legal' issues in cases involving claims of race, sex, national origin, or religious discrimination," according to Edwards.

Edwards also cited the inability of this group of respondents to define certain legal terms mentioned in his questionnaire.

The professor concluded: "There is no reason to believe that the arbitration selection processes, as they presently exist, are designed to screen out unqualified persons in cases involving claims of employment discrimination."

The survey was sent to all 409 current U.S. members of the National Academy of Arbitrators, of whom 200 (or 49 per cent) responded.

Edwards noted that in a 1974 case (*Alexander v. Gardner-Denver Co.*), the U.S. Supreme Court did not prohibit arbitrators from hearing employment discrimination cases. But the court did make it clear, he said, that employes who enter into arbitration do not forego the right to court action under Title VII of the Civil Rights Act.

Harry T. Edwards

Edwards warned that "the courts should be very wary about reading *Alexander* too expansively" and thus standing in the way of "full and complete judicial resolution of employment discrimination claims."

In the survey, said Edwards, "many of the responding arbitrators suggested that the quality of evidence given in employment discrimination cases heard in arbitration was deficient . . . This fact alone would surely suggest that the courts ought to be very careful before they begin to accord great weight to arbitration opinions involving claims of employment discrimination."

New Legal Service Offered For Women

A student group called "Feminist Legal Services" has been established at the University of Michigan Law School to provide legal counseling and do research on women-related legal problems.

The group—which includes about 15 women law students and one male member—is under the direction of two practicing attorneys, Rhonda R. Rivera and Margaret Leary. Rivera is the Law School's assistant dean for student affairs and Leary is assistant director of the U-M Law Library.

Since November, cases handled by the group have dealt mostly with problems of divorce, credit, sex discrimination, and legal name changes, according to Rivera. The service is free of charge for women who cannot afford legal counsel on their own.

Rivera says members of the Feminist Legal Services have also done research in connection with marriage and divorce laws in Michigan, the state's new Criminal Sexual Conduct Act (rape law) which took effect April 1, and a number of other areas.

Rivera recently attended a national women's legal conference at Stanford University where she gave a talk outlining operations of the U-M Feminist Legal Services. Judging from the interest of law professors and students from other universities, Rivera says the U-M organization may be one of the first of its kind at the nation's law schools.

Feminist Legal Services "gives women law students excellent experience for general law practice or work with a feminist law firm," says Rivera.

The women's legal program in some ways parallels operations of the U-M's clinical law program, where law students provide legal aid to the poor. In fact, some cases handled by the feminist group are referrals from the clinical law program. Unlike the latter program, students in the Feminist Legal Services gain no academic credit for their work, according to Rivera.

"Some of our clients seek help not knowing if they really have a legal problem," says Rivera. "In some cases we make referrals to area social service agencies."

Rivera and the student lawyers emphasize counseling as an important part of the activities of the Feminist Legal Services.

"In our society women are supposed to be the empathic and compassionate ones," Rivera notes. "Women do have these skills—this is also true for many men—and this is a positive attribute for lawyers."

Elaine Milliken, student coordinator of the Feminist Legal Services and one of the student founders, also underscores the organization's sensitivity to "people-type problems."

"So often the human problem is larger than the legal problem," she

says, noting that many clients may simply need a "sympathetic ear," backed by professional expertise.

But Milliken also cites many obstacles facing women lawyers, even in dealing with female clients. "Other women may not see women attorneys as competent," she says. "The traditional role model for a lawyer is a man."

Milliken says she hopes this stereotype begins to change as more women enter the legal field. At U-M Law School, for example, female enrollment has increased substantially over the past several years, and women now account for close to 20 per cent of the student body.

24 Law Graduates Receive Clerkships

Judicial clerkships have been received by 24 U-M law graduates this spring. Twenty of the graduates will serve as clerks in federal courts, three in state courts, and one for a county court.

Here are the names of the graduates and the judges under whom they will serve:

Robert Bernstein
The Honorable Richard P. Matsch
United States District Court
Denver, Colorado

Susan Bloch
The Honorable Spottswood Robinson III
United States Court of Appeals
District of Columbia Circuit
Washington, D.C.

Teresa D'Arms
The Honorable Phillip Forman
United States Court of Appeals
Third Circuit
Trenton, New Jersey

Daniel Ducore
United States Court of Claims
Washington, D.C.

Eric Eisen
The Honorable Jay Rabinowitz
Supreme Court of Alaska
Fairbanks, Alaska

Barbara Etkind
The Honorable George Clifton Edwards
United States Court of Appeals
Sixth Circuit
Cincinnati, Ohio

Clayton Gillette
The Honorable J. Edward Lumbard
United States Court of Appeals
Second Circuit
New York, New York

Robert Haviland
The Honorable Cornelia Kennedy
United States District Court
Eastern District of Michigan
Detroit, Michigan

John Holdenried
The Honorable Warren Urbom
United States District Court
Lincoln, Nebraska

Michael Kopinski
The Honorable Wendell A. Miles
United States District Court
Western District of Michigan
Grand Rapids, Michigan

Ronald Longhofer
The Honorable John Feikens
United States District Court
Eastern District of Michigan
Detroit, Michigan

Stephen McKown
Forty-eighth Circuit Court
Allegan, Michigan

Jeffrey Liss
The Honorable Charles Richey
United States District Court
Washington, D.C.

alumni notes

Samuel Krugliak has been elected chairman of the U-M Law School Fund National Committee. He will serve for a two-year term through 1976, directing the Law School's nationwide fund-raising efforts. Krugliak is a partner in the firm of Krugliak, Wilkins, Griffiths and Dougherty of Canton, Ohio, and has been active in affairs of the Law School Fund for many years. He was vice-chairman of the fund during 1973-74, special gifts chairman in 1971-72, and has represented his class on the fund since 1962. Among other posts, Krugliak was a member of the Law School Committee of Visitors from 1966-70 and served on the board of directors of the U-M Alumni Association from 1971-74. He was graduated from the U-M in 1938 and received his law degree here in 1941. As national committee chairman, Krugliak succeeds Malcolm L. Denise of Grosse Pointe, Mich., who served for a two-year term through 1974.

Samuel Krugliak

University of Michigan Regent **Lawrence B. Lindemer,** an alumnus of the Law School, has been appointed to the Michigan Supreme Court by Gov. William G. Milliken. The appointment fills a vacancy created by the recent death of Justice Thomas M. Kavanagh. Lindemer, who received an A.B. degree from the U-M in 1943 and a law degree from Michigan in 1948, was first appointed to the U-M Board of Regents in 1968 by Gov. George Romney. He was again appointed a regent in 1969 by Gov. Milliken and then elected to the same post in 1972. A partner in the firm of Foster, Campbell, Lindemer and McGurrin of Lansing, Lindemer was active in the state Republican party for many years. Before becoming a U-M regent, he was a member of the state House of Representatives and served as state GOP chairman for five years.

Lawrence B. Lindemer

D. John McKay
The Honorable Noel P. Fox
United States District Court
Western District of Michigan
Grand Rapids, Michigan

Lawrence Moloney
The Honorable G. Mennen Williams
Michigan Supreme Court
Lansing and Detroit, Michigan

Michael Murray
The Honorable Timothy C. Quinn
Michigan Court of Appeals
Lansing, Michigan

David Neuman
The Honorable Robert DeMascio
United States District Court
Eastern District of Michigan
Detroit, Michigan

Dale Oesterle
The Honorable Robert Merhige
United States District Court
Eastern District of Virginia
Richmond, Virginia

Mark Pomerantz
The Honorable Edward Weinfeld
United States District Court
Southern District of New York
New York, New York

Mark Rowley
The Honorable Albert Engel
United States Court of Appeals
Sixth Circuit
Grand Rapids, Michigan

Michael Runyan
The Honorable Talbot Smith
United States District Court
Eastern District of Michigan
Ann Arbor, Michigan

Adrian Steel, Jr.
The Honorable William H. Webster
United States Court of Appeals
Eighth Circuit
St. Louis, Missouri

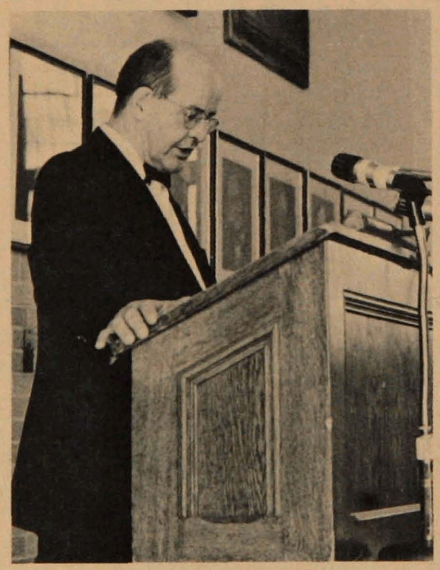
John Stevens
The Honorable Philip Pratt
United States District Court
Eastern District of Michigan
Ann Arbor, Michigan

Douglas Tisdale
The Honorable Alfred A. Arraj
United States District Court
Denver, Colorado

Recent Events

Michigan Gov. William G. Milliken had two reasons to attend "Senior Day" ceremonies of U-M Law School: he was to be the keynote speaker for the occasion, and his daughter **Elaine** was one of the 300 graduating law students. Also attending the spring ceremonies were Mrs. Milliken and their son, William, Jr. In his address, the Michigan governor called for political candor and old fashioned "citizen involvement" to help the country overcome the current wave of post-Watergate and post-Vietnam "cynicism." He also said: "The resiliency of this country and its inhabitants, our ability to cope with diversity—this capacity is perhaps our greatest national resource."

Dr. Robert S. Morison, a physician by training who now holds a distinguished professorship of science and society at Cornell University, was the first non-lawyer to deliver the Thomas M. Cooley Lectures at the U-M Law School. In his lecture series, the Cornell professor said scientific advances may lead to new ethical values and greater individual freedoms regarding life-death issues, such as abortion and suicide. In the medical field, he said, "I hope we can maintain and foster this atmosphere of encouragement for individual decisions." Dr. Morison also challenged traditional and "legal" notions of life and death, saying: "Life and death are not to be regarded as simple alternative states. Both actually proceed hand in hand, though at somewhat different rates. From their beginning in the fertilized egg, the processes of life wax and become ever more complex and interesting while the processes of death proceed inconspicuously, slowly reducing the elasticity of connective tissue, depositing plaques in the blood vessels, and gradually eliminating brain cells. Sooner or later the processes of death become more obvious and the pleasures, creativities, and interactions of life become less conspicuous until ultimately there is nothing left of the living being."



Some Observations on Promoting and Accommodating the Interests of the Public, the Bar, and the Law Schools

By now most Americans, and not least the lawyers, would probably like to forget all about Watergate. But its reverberations pervaded the Law School during the past year, and I think a few further observations are in order. This seems especially appropriate because a growing number of signs indicate that the ultimate meaning of this painful episode may be quite different from the initial perceptions. An affair that many persons thought demean-

ing to the whole legal profession could yet prove, in retrospect, the fitting climax to two decades in which the law and lawyers occupied stage center on the American domestic scene. From the school desegregation cases in 1954, through the resignation of a president some 20 years later, the legal system was called upon to meet a staggering array of societal needs: civil rights, reapportionment, peaceful protest, public order, personal privacy, equality for women, a healthy environment, and finally, and most fundamentally, the preservation of constitutional government itself. That a few holders of law degrees were implicated in the sorry events that led to this last and severest test of our legal institutions would seem of little moment when set against the system's effectual, if perhaps not totally triumphant, response.

Watergate and its aftermath nonetheless sounded at least two significant warnings for the legal profession and the law schools. The country's long preoccupation with the unfolding scandal of break-in and cover-up served to divert attention from several fast-developing, world-wide problems that were even graver and more basic: the energy crisis, the food crisis, the population crisis, and, as a function of those three, the economic crisis. Most of the great public issues with which the law has dealt since 1954 have been, at bottom, ethical issues. Lawyers, rightly or wrongly, feel at ease with such questions. But lawyers can claim no special competence when it comes to marshalling scarce natural resources or fine-tuning the economy. While lawyers will undoubtedly be involved in putting together government and business programs for treating these new problems, they will often have to yield primacy of place to the nuclear engineer, the agronomist, the economist, and the international banker. More than ever before, it becomes incumbent upon legal education to equip its graduates to work effectively with experts in a variety of disciplines. At the same time, the law schools must realistically anticipate getting a somewhat smaller share of exceptional intellectual talent in the years ahead, as more of the ablest young people are drawn off to master the arts of human survival.

A second cautionary message goes to the moral obligations of our profession. Elsewhere I have contended that it would be simplistic to think that the burglaries, perjuries, and other misdeeds of the Watergate law graduates could have been averted by required courses in legal ethics. On a deeper level, however, the bar and legal educators are culpable. We have not addressed ourselves sufficiently to some of the principal responsibilities of the profession. Specifically, we have concentrated too much on the negative injunctions against solicitation of clients, conflicts of interest, and other crass misconduct. We have paid too little heed to the positive role of the lawyer in our society, and to the noble mandate of ensuring adequate legal representation for every citizen. Both altruistic professionalism and legitimate self-interest call for a closer look at these latter failings.

The legal services shortage and the lawyer surplus. At the present time, approximately 70 per cent of the population is not receiving needed legal services. The richest 10 per cent can afford lawyers. The poorest 20 per cent is at least partially served by legal aid societies, public defenders' offices, and so forth. This leaves some 140 million Americans of "moderate means" (defined in 1970 as those with incomes between $4,000 and $15,000) who are often unable to pay standard attorneys' fees and thus may have to go without necessary legal advice.

Ironically, this deficiency in the delivery of legal services exists side by side with a growing surplus of lawyers. Following the spectacular upsurge of interest in legal studies during the last half dozen years, the law schools of the nation have been graduating between 30,000 and 35,000 young lawyers annually—about 10 per cent of the total practicing bar. If this pace continues, the number of lawyers in the country could be doubled in less than fifteen years. Yet the American Bar Association reports that there are only 16,500 openings each year for employment in a legal capacity. Half the annual crop of law graduates must seek jobs elsewhere.

The paradox of deprivation amidst plenty can be explained in several ways. The middle class has perhaps failed to recognize its own need for legal counsel in purchasing a house, registering a consumer complaint, or seeking relief from a recalcitrant bureaucracy, or at least it has not thought legal assistance in such situations worth the cost. Until lately, neither the organized bar nor the legal scholars have focused on the problem of the fair distribution of legal services among all elements of the population. Probably most important, however, have been the strictures of the canons of ethics and other bar association rules against advertising, competitive fee policies, and group prepaid legal services plans.

These restrictive canons are a sensitive issue. For many lawyers, they undoubtedly represent a sincere effort to maintain the dignity and independence of the profession, and to prevent the fomenting of litigation or the indulging of temptations to sharp commercial practices. In a simpler age, the canons may well have served such purposes. But in today's anonymous urban society, there is increasing evidence they tend to erect artificial barriers between lawyers and potential clients. If the bar itself does not respond to these changed circumstances, it runs the risk of losing the initiative to other public instrumentalities in channeling important new developments in the format of legal representation. The Supreme Court, for example, has struck down as unconstitutional a number of limitations on the use of counsel employed by civil rights groups and labor organizations to handle litigation on behalf of their members. The Justice Department has charged that minimum fee schedules are violative of the antitrust laws. And in the Pension Reform Act of 1974, Congress overrode all state bar rules forbidding lawyers to participate in so-called "closed panel" group legal services programs, insofar as they are established through collective bargaining between unions and employers.

Fortunately, there are indications of a much greater receptivity these days on the part of the organized bar toward fresh approaches in the delivery of legal services. The leadership of the American Bar Association has favored liberalizing the canons of ethics to accommodate a wider range of group plans, the most promising device yet proposed for bringing legal representation to the mass of the people. Many local bars have eliminated mandatory minima for fees. The expanding movement for specialization has been accompanied by a growing willingness to let lawyers classify themselves by area of expertise, thus enabling the uninitiated public to make a more intelligent choice of attorney.

The time is ripe for the practicing bar and the law schools to cooperate in promoting what seems a happy confluence of their own and the public's best interests. The bar does not wish to be overwhelmed by a flood of new lawyers far exceeding the absorbent capacities of the current market. The law schools do not wish to see their graduates going unemployed. Presumably, all wish the public to have adequate legal representation available at a reasonable cost. The challenge is to devise new structures for bringing together the many would-be lawyers without clients and the many would-be clients without lawyers, and to shape those structures in keeping with the spirit of the profession's finest traditions, if not the letter of its antique laws. I could easily imagine a highly rewarding law school seminar built around this theme. Further along, I could also imagine law students testing out proposed solutions through appropriate clinical projects. At any rate, I am satisfied it is in some such fashion, rather than in lecturing students on the evils

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by Dean Theodore J. St. Antoine
Based on the Dean's Report to the President of the University for the 1973-74 academic year

of criminal behavior, that legal education will respond most profitably to the lessons of Watergate.

Law school autonomy and bar admission requirements. In the two exciting decades that saw the law rechart the course of our society, dramatic changes also took place in legal education. As set forth in prior reports, these included the expansion of the curriculum, both through the addition of novel subject matter in a relatively conventional format, and through the introduction of wholly new interdisciplinary offerings and clinical programs. Recently, a revolution of a different sort occurred when the doors of the law schools swung open to welcome such previously underrepresented groups as women and minorities. It may be symptomatic of the rather less glamorous role I foresee for lawyers in the post-Watergate world that two of my major concerns of the past year were throwbacks to the more mundane (albeit critical) problems of an earlier day—preserving the autonomy of the Law School, and securing adequate funding for its programs.

> Ironically, [the deficiency in the delivery of legal services to Americans of "moderate means"] exists side by side with a growing surplus of lawyers.

Several American jurisdictions have either adopted or proposed rules making it a prerequisite for admission to the bar, or for admission to practice in the trial courts, that applicants complete a prescribed list of courses, sometimes with a specified number of credit hours for each course. No one can quarrel with efforts to improve the quality of the practicing bar. Serious questions must be raised, however, about this particular method of achieving that objective.

Law schools, especially the best law schools, are unusual amalgams of training institutions and research centers. Law teachers have a vital role to play as constructive critics of the legal system, in addition to being instructors in law for their students. The students in turn should not only be learning the skills of their craft as future client counselors, but should also be preparing themselves as future lawyer-citizens, with special obligations to society at large. In fulfilling this broader social and professional mission, especially, the law schools must be accorded the same freedom of inquiry that characterizes any other reputable academic institution.

The attempted encroachment on the traditional prerogatives of law schools to determine their own curricula may stem in part from hostility toward the attention being paid in legal education today to less conventional subject matter, including the use of other disciplines to re-examine basic legal postulates. Should this be true, it constitutes a dangerous threat to the wide-open debate that seems to me essential if the law schools are to come to grips effectively with the pressing legal and social issues of the day. Moreover, I see no signs that the widening of law school horizons in the last few years has impaired the professional quality of the product. The same spirit of inquiry that has led legal educators to look beyond traditional legal materials toward other disciplines has also led them to look beyond appellate case analysis toward such eminently utilitarian endeavors as courses in business and estate planning, seminars in negotiating techniques, and a variety of clinical offerings in trial and appellate practice. Today's graduates, I am convinced, are better prepared in all respects to start practicing than my contemporaries and I were when we emerged from law school some 20 years ago.

Highly practical considerations also militate against outsiders' intrusions, either direct or indirect, in determining law school curricula. So far, there has been no uniformity among the proposed lists of mandatory courses. If this pattern continues, the result could be a crazy-quilt of varying prescriptions. Students uncertain about where they were going to practice (probably the norm in a national law school like Michigan) would wish to retain their options by taking all the courses required by every jurisdiction in which they might be interested. The major portion of their schedules could be filled with prescribed courses, leaving little room for individual selection and the enriching experience of exploring unmapped terrain. Even if there were more uniformity in the stated requirements, it would be like chasing quicksilver to try to pin down and label the variegated curricula of the country's many law schools in terms of a standardized formula. Courses similar in name differ in content; courses similar in content differ in name; and courses similar in both name and content differ in length and hourly credit. Should all these definitional hurdles be cleared, there would still remain a weighty substantive objection. Inevitably, a strait-jacket would be imposed on the healthy experimentation that now goes on constantly in law school, as courses appear, expand, contract, merge, divide, and evaporate, in blithe disregard of the catalogue listings, all in the hope of a more effective and congenial treatment of the subject at hand.

Prescribed curricula could have disastrous cost implications. One recent major proposal called for a clinical course in trial advocacy as a condition for admission to practice in the trial courts. Now, clinical instruction is an unusually expensive form of legal education. As I calculate it, the costs are three or four times as great as the average for all other forms of instruction, including both lecture courses and seminars. At Michigan the bill for our principal clinical program amounts to over $100,000 annually. Only a quarter of our students can take this course. A fourfold expansion to accommodate the entire student body would probably up the total cost to between $400,000 and $500,000 a year. This would constitute almost 25 per cent of our current instructional budget of around $2 million (not counting the library). I see no available source for new money of this magnitude. Any effort to re-allocate existing funds to finance such an expanded clinical program would, needless to say, be simply devastating for elements of our present curriculum that have long been deemed fundamental to a sound legal education.

Finally, in my view, a significant matter of principle is at stake here. Of course the bar is entitled to insist upon the highest standards for admission, and I would have no objection to the most rigorous testing of candidates on all appropriate subject matter. But legal educators, too, have their special province, and, as someone who has not yet spent as much time in teaching as in active practice, I have no hesitancy in asserting that they are in the best position to decide on the most desirable components of preparatory training for the practice of law. I share their skepticism that any particular constellation of law school courses is uniquely successful in fashioning capable practitioners. Although I would not suggest for a moment that it is unimportant what substantive material we cover, I firmly believe that the primary function of law school is not to inform but to acculturate, not to convey a set body of knowledge but to develop a certain way of looking at legal problems.

Adventuresome course offerings are often a mark of the better law schools, and adventuresome course selection is often a mark of the better students. If bar examiners or particular courts are dubious about the qualifications of the products of more innovative programs, they have every right to demand a suitable demonstration of the candidates' capabilities. What should be maintained is the salutary distinction between the bar's responsibility for the evaluating of applicants for admission, and the law schools' responsibility for the educating of students. . . .

The New "WOMEN & THE LAW" Course at Michigan

Last year Michigan joined a growing number of law schools across the country offering a new course on "Women and the Law." Student demands for "Women and the Law" courses and the interest of male, as well as female, students in the subject seem to reflect an increased awareness that the law itself has been the principal vehicle for the historical subjugation of women. The recent women's movement, to an unprecedented extent, has relied almost exclusively on legal attacks for the achievement of its goals. Other great social movements of recent decades have relied on marches, sit-ins, and boycotts, but the women's movement has used test cases, legislative reform, and constitutional amendment. As women's efforts in self-education and consciousness-raising bring them to new awareness of their rights, the amount of litigation will continue to increase, and lawyers of both sexes will be called upon to articulate the issues, know the statutory law in detail, and understand the potential constitutional challenges.

by Virginia B. Nordby*
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*EDITOR'S NOTE: This text was prepared in February 1975, and does not cover subsequent developments.

The three-unit "Women and the Law" course at Michigan surveys the law's special treatment of women in a number of fields. It explores the historical basis of this treatment in early common law, the various modifications and justifying rationale developed in the American systems, and constitutional theories used first to support and now to attack sex-based differentials in the law. There is considerable focus on current proposals for law reform, with on-going evaluation of the probable effects of the Equal Rights Amendment. Students wishing to pursue one particular topic in greater depth are encouraged to register for an additional unit of independent research. Each term about a third of the class has pursued this option and written papers on topics as wide-ranging as eugenic sterilization, pension and retirement benefits, and legislative history of the Michigan Constitution's attempt to abolish the disabilities of coverture.

Early Common Law

The legal status of women in America owes its historical origins and philosophical thrust almost entirely to the common law of England. This is so despite the fact that thousands of women immigrated to America from civil law countries. There is evidence that early Anglo-Saxon women

enjoyed extensive legal freedoms. The Supreme Court of New Jersey recently noted: "It has taken 1,500 years for married women to regain the rights they held under Anglo-Saxon law in the latter part of the fifth century." *(Sillery v. Fagan and Fagan.)* However, the demands of feudal society and a land-based economy ultimately produced near-total legal disability for women, especially for married women (and, except for nuns and whores, most women were married). In his *Commentaries*, Blackstone summarized their position:

> By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; . . . Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. . . . For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be to covenant with himself. . . . If the wife be injured in her person or property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own; neither can she be sued without making the husband a defendant. . . .
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> But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her during her coverture, are void. . . . And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her. . . .
>
> The husband also, by the old law, might give his wife moderate correction.

As recently as 1966 the Supreme Court allowed a married woman a defense, based on the Texas law of coverture, against efforts of the Small Business Administration to collect a disaster loan it had awarded to her flooded business enterprise. Dissenting, Justice Black observed: "The Texas law of 'coverture' . . . rests on the old common law fiction that the husband and wife are one. This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband." He characterized the rule as an "archaic remnant of a primitive caste system."

The law of coverture placed married women in a legal position akin to slavery. Indeed, when the importation of black slaves into the American colonial south necessitated laws defining their status and protecting them from excessive cruelty, it was the law of coverture which was deliberately chosen as the model for the slave codes. After the American Revolution, the law of coverture became part of the received common law and remained unchanged, except for equitable mitigation in some cases, until the states began passing Married Women Property Acts in 1839. Those Acts, however, did not abolish the entire law of coverture but sought only to modify those aspects of it which interfered with land conveyancing and a woman's right to her own separate property and, later, separate earnings. Many aspects of the old law remain today, in surprising variety, in every state.

The opposite side of the coin, and a necessary corrollary to the extensive disabilities placed upon women by the law, has always been the notion that the law appropriately must concern itself with the special protection of women. Traditionally, women, children, and idiots were thought to require special protection because of their natural and legal disabilities. Thus, husbands were required to support their wives and children—hardly unfair, since husbands had been given all their wive's property and earnings and the right to their services in the home without pay. Other legal devices used to protect women from the disabilities placed upon them were enforceable antenuptial contracts, dower, equitable trusts, a wife's equity to a settlement, separation from bed and board, and later statutory forced shares and Married Women Property Acts. It always was thought appropriate for the law to extend these special protections to women. Indeed, any survey of the historical treatment of women by the law necessarily deals with the myriad and complex interactions of these twin motifs of repression and protection. In different periods of time, under changing economic and governmental conditions, the type of repression and the focus of the protection have shifted, but always they have been operative to deny the possibility of complete equality and to force upon women a separate legal personality. Some have regarded this special treatment as advantageous. Blackstone was convinced "that even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England." But in 1971, surveying laws which disable women from full participation in the political, business, and economic arenas and noting that they are often characterized as protective and beneficial, Justice Peters of the California Supreme Court observed: "Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."

Industrial Revolution

With the coming of the industrial revolution, new variations in the repression-protection motifs developed. The largest movement of women from the home and farm into the paid labor force occurred around the turn of the twentieth century. During that decade a higher percentage of women moved into the employment arena than has ever done so since—including the years of the two world wars. Sweatshop working conditions, long hours and low pay were a way of life for male as well as female workers, but when laws limiting employers' powers of exploitation were ruled unconstitutional as to workers in general, but valid as to women workers, a plethora of state "protective" laws were passed for women workers only. Adopting the theory

that "half a loaf is better than none," labor leaders sought laws requiring seats and rest breaks and limiting weights to be lifted and setting maximum hours to be worked and minimum or overtime pay to be given to women. Even after the Supreme Court reversed its position and permitted such legislation for the protection of **all** workers, male as well as female, special rules for women only continued to be adopted and retained. Originally these laws undoubtedly benefitted the woman worker significantly, but as conditions changed and unions became stronger, the laws increasingly interferred with women's employment opportunities, making her a burden to employ and encouraging the employment of men when jobs were scarce. The pervasively demeaning effect of special "protective" rules for women was well noted by Judge Winter in the 1973 case of *Eslinger v. Thomas:*

> Adult females, or nearly adult females, are no longer chattels of their husbands or parents. If they are tendered and accept special protection or special courtesies, there is no violation of right; but unwelcome special protection, especially denial of employment opportunity, foisted upon them is counter to modern law and modern social thinking.

Frontier and Home

Not surprisingly, besides the industrial revolution, another significant extra-legal influence upon the present legal status of women in America was the presence of the frontier, the vast unsettled land where egalitarian standards of productivity and resourcefulness measured a person's worth and women were in such short supply that numerous exceptions to traditional roles and customs were tolerated. A man with a wife could homestead 640 acres; a man alone could have only 320. In drafting its first constitution the California legislature chose the civil law system of marital community property solely for the purpose of enticing women to the West. In 1869 the first woman in the world went to the polls and legally voted in a general election in South Pass City, Wyoming (now a ghost town). And Jeanette Rankin had served a term as Congresswoman from Montana before the passage of the Nineteenth Amendment guaranteed the right to vote to all American women.

On the frontier, a woman working on the homestead was economically productive, indeed she was essential to the success of the enterprise. Moreover, her ability to produce large families was necessary for the population of the vast land. Thus, the conviction gradually strengthened that "a woman's place is in the home." This idea was not a strong part of medieval English society, where women were guild members and pursued a variety of crafts. Nor was it a realistic view in the cities of the East where the industrial revolution was forcing women off the farms and into the mills. Ultimately, fundamentalist religious views and a Victorian attitude toward the sexes often referred to as "Comstockery" contributed to the further development of the "woman's place is in the home" theme into the additional conviction that "a woman not in the home is sinful." Thus it was thought inappropriate for women to travel alone, speak at public gatherings, acquire an education, engage in any business or profession except child care, attend a variety of public events, or be a customer in any establishment serving alcoholic beverages. A woman who did these things was regarded not merely as unconventional and untrue to her "fundamental nature" but as a sexually loose and immoral person. Since men were not deemed immoral for the same conduct, the so-called double standard of sexual morality flourished.

Tracing the ramifications of the double standard in various areas of the law reveals not only a different standard for men and women, but also a different standard for "good" and "bad" women. For example, the criminal laws of every state are replete with provisions reflecting the double standard; the "unwritten law" defense under which a husband may kill his wife's lover but a wife may not kill her husband's mistress; obscene language in the presence of women; enticing a minor female away from home; seducing a woman on promise to marry; transportation of a consenting adult female across state lines for immoral purposes; statutory rape laws which only protect a virgin of chaste character; previous sexual activity of a rape victim with someone else as a practical defense to forcible rape; prostitution laws which do not punish the customer. Women have traditionally been excluded by law from a variety of occupations because of the potential for sexual impropriety or the appearances of impropriety; bartending, wrestling, law clerking, and legislative paging are only a few which come to mind. Female juveniles are particularly oppressed by the double standard, usually coming within the criminal justice system for sexually delinquent behavior rather than for traditionally anti-social criminal behavior and often retained within the system longer than boys for "their own protection" and rehabilitation.

Thus, the law has either created or sanctioned intricate devices of repression and protection of women in response to historically changing socio-economic conditions. Often, particular individuals who were unduly repressed have benefitted least from the protective devices, and many women have found legislative protection to be more officiously burdensome than actually helpful. Moreover, many men have been seriously victimized by measures intended to protect women.

The law of coverture placed married women in a legal position akin to slavery. Indeed, when the importation of black slaves into the American colonial south necessitated laws defining their status and protecting them from excessive cruelty, it was the law of coverture which was deliberately chosen as the model for the slave codes.

Constitutional Interpretation

In spite of this extensive and pervasive differential treatment of women by the law, it was not until 1971 that the U.S. Supreme Court recognized the existence of a legitimate federal constitutional question. That year, in the landmark case of *Reed v. Reed*, the Court for the very first time struck down a state law patently and invidiously discriminating against women. Before *Reed* the Court had firmly held, in a variety of factual situations, that both repressive and protective special treatment of women were constitutional. The first case assigned for the "Women and the Law" course, *Bradwell v. Illinois* sets out the rationale to be used thereafter, in varying forms, in response to constitutional challenges. This was a case attacking the refusal of Illinois to allow women to practice law. Justice Bradley had dissented in the famous *Slaughter-House Cases*, handed down just before *Bradwell*, arguing that the newly enacted privileges and immunities clause ought to prohibit a state from denying to a large segment of the population the right to engage in an otherwise legal profession or occupation.

Viewing the issue of women lawyers as fatally different from male butchers in New Orleans, Justice Bradley concurred in *Bradwell* for the following reasons:

> . . . the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

A year after *Bradwell*, in an opinion strikingly parallel to the *Dred Scott* decision, the Court found that the constitution did not guarantee women the right to vote, thus stamping the seal of constitutional approval upon historical tradition and the old common law in the area of women's rights.

Even when the protection is not desired by many women and suspiciously hints of an impermissible legislative purpose, the Court has found it constitutional. Such has been the case in the past with state laws automatically exempting all women from the obligation of jury service. Not until January, 1975, did the Court hold such exemptions to be a violation of a criminal defendant's right to a jury composed of a "fair cross-section of the community" guaranteed by the Sixth and Fourteenth Amendments. Previously, in the 1961 case of *Hoyt v. Florida* the Court had upheld such exemptions against equal protection challenge, noting that:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.

The refusal of many judges to take seriously women's

Traditionally, women, children, and idiots were thought to require special protection because of their natural and legal disabilities.

Repression of women remained constitutional even after the new equal protection rubric came to the fore. In the 1948 case of *Goesaert v. Cleary* the Court announced that the State of Michigan could constitutionally deny to all women the opportunity to work as bartenders. Lower courts have upheld the complete exclusion of women from other occupations, using the *Bradwell-Goesaert* reasoning that a woman's place is in the home and women outside the home are sinful and must be controlled in the interests of public morality.

The Supreme Court of the United States has also consistently upheld special protective laws for women. In *Lochner v. New York* legislation attempting to set maximum hours of work was found to be an unconstitutional interference with freedom of contract and the right to work. Nonetheless, in 1908 in the landmark case of *Muller v. Oregon*, at the urging of Louis Brandeis and his famous "Brandeis Brief" (in fact written by Josephine Goldmark), the Court upheld maximum hours laws for women only. Noting that women's physical structure and the performance of the maternal function place women at a distinct disadvantage in the competition for survival, the Court found that special "protective" legislation would always be justified.

> Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man.

This decision was hailed at the time as a major achievement. Although nine years later the Court reversed *Lochner* and upheld maximum hours laws for men as well as women, and although the Fair Labor Standards Act now regulates hours and wages for both, the decision of *Muller* that differential protective treatment of women is constitutional has never been repudiated and was cited only last term in *Kahn v. Shevin* to justify a state property tax exemption for widows but not widowers. Noting that elderly widows forced suddenly into the job market are at a distinct disadvantage, Justice Douglas upheld the exemption as a state tax law "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."

claims for equality instead of "protection" is revealed in a New York case involving the automatic jury exemption issue:

> Plaintiff is in the wrong forum. Her lament should be addressed to the "Nineteenth Amendment State of Womanhood" which prefers cleaning and cooking, raising of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems with her landlord. *(De Kosenko v. Brandt).*

In light of this strong tradition of constitutional laissez-faire, it is not surprising that many advocates of women's rights concluded that only a constitutional amendment could break the vicious circle of repression-protection found in so many areas of the substantive law. Some legal scholars argued that existing constitutional principles were adequate to deal with invidious discrimination based on sex. But at the time the Equal Rights Amendment was adopted by Congress there seemed little likelihood of those principles being put to that use. Using the traditional equal protection analysis, courts have upheld differential treatment for women if the sex-based classification bore a rational relationship to any legitimate legislative purpose. The presumption had been in favor of constitutionality and the traditional stereotypes about women's role in society had been enough to support a finding of rationality.

With the landmark *Reed* case in 1971 and the key decision in *Frontiero v. Richardson* in 1973, a new direction in the Court's treatment of sex-based discrimination has at last been signaled. In *Reed* the Court struck down an Idaho law requiring preference for men over women in the issuing of letters of administration of decedent's estates. The brief opinion failed to indulge the usual presumption of constitutionality, but instead required that there be a "fair and substantial" relationship between the objects of the legislation and the classifications drawn. "The Equal Protection Clause . . . does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." The Court pointedly refused to rely on stereotypes about women's lack of experience in business affairs, which had been used by the lower court, and instead judicially noticed the fact that in this country a large proportion of estates are effectively administered by widows.

Lower courts have recognized that the "Reed test" requires a stricter standard in sex discrimination cases than

the usual "rational basis test." At the least, *Reed* removes the presumption of constitutionality and shifts the burden to the state to justify its discriminatory policy. Some courts have described the *Reed* test as one of "strict rationality" or "rational scrutiny" and are striking down sex-based classifications with increasing frequency. The Supreme Court itself, in subsequent cases, has referred to the *Reed* test as something distinctly different from the traditional rationality test.

In the *Reed* case, as well as in most of the cases raising constitutional challenges to sex-based classifications, the women's advocates urged the Court to declare all such classifications inherently suspect, requiring a compelling state interest to justify them. A number of lower courts have in fact declared sex-based classifications suspect, and in 1973 in the *Frontiero* case, four members of the Supreme Court agreed. Justice Brennan, joined by Justices Douglas, White, and Marshall, felt that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." Applying criteria developed in race and national origin cases, the plurality noted: 1) "our Nation has had a long and unfortunate history of sex discrimination" (citing *Bradwell v. Illinois*, among others); 2) sex, like race, is an immutable characteristic determined solely by accident of birth; 3) sex, like race, has high visibility; 4) sex, like race, frequently bears no relation to ability to perform or contribute to society and as "a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members"; 5) women, like blacks, are vastly underrepresented in the Nation's decisionmaking councils.

Justice Rehnquist was the sole dissenter. The remaining Justices felt the case could have been disposed of under the *Reed* test.

If sex were declared a suspect classification, it is unclear whether or not special protective laws which favor women over men would survive the strict scrutiny review which would be required. The Supreme Court declined to decide the issue as to race in the *DeFunis* case. Justice Douglas, who has previously voted to declare sex a suspect classification, nonetheless favored preferential tax exemptions for widows in the *Kahn* case. Women's rights advocates, who feel that repression and the stigma of inferiority inhere in special "protective" treatment for women, renewed their calls for passage of the Equal Rights Amendment after the decision in *Kahn*.

Since 34 of the required 38 states already have adopted the Equal Rights Amendment, and in light of heightened pressure to adopt the Amendment during the 1975 International Woman's Year, the "Women and the Law" course devotes considerable attention to its probable implications. Students enjoy an oral debate on the ERA, conducted as a mock legislative hearing to determine whether the State of Hutchins should ratify the Amendment. Students role-play as advocates for different groups arguing either PRO or CON. Generally represented are League of Women Voters, AFL-CIO, N.O.W., Senator Sam Ervin, Representative Martha Griffiths, Veterans of Foreign Wars, etc. One or two students always enjoy playing law professors!

Federal and State Legislation

Adoption of a new constitutional amendment, reinterpretation of the Fourteenth Amendment, and piecemeal law reform at the state and federal level, are all different ways of substituting equality for the present system of repression and protectionism. After examining the constitutional route in detail, the "Women and the Law" course next considers law reform proposals and recent legislation that seek to equalize the status of men and women before the law in the fields of labor law, family law, reproductive freedom, criminal law, and education.

The Equal Pay Act of 1963 probably has done more actually to help more women than any other single piece of legislation. Passed after extensive hearings had revealed the invidious effect on female wage earners and their families of the prevailing practice of deliberately and systematically paying women workers less than men, the Equal Pay Act has been hailed by Judge Abraham Freedman in *Shultz v. Wheaton Glass Co.* as "a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority. . . ." The provisions of the Act are straightforward: employers are required to provide equal pay to employees of opposite sexes who perform equal work. Equal work is defined as substantially similar skill, effort, and responsibility under similar working conditions. Defenses are allowed for bona fide seniority, merit or piecework factors, or any other factor other than sex. The latter exception is not allowed to swallow the Act, but is restricted to legitimate situations such as training programs, individualized "red circle" pay scales, or wage differentials based on economic benefit to the employer of an individual employee's performance. In the years since its passage the Equal Pay Act has forced wage equalization between men and women worth millions of dollars of back pay and has ended the pervasive practice of separately negotiated pay scales for men and women.

Although hailed as a major advance for women, the recent Roe *and* Doe *abortion cases quite pointedly did not hold that a woman has a right to decide what happens to her own body.*

Another equally broad charter for women workers was passed the following year: the Civil Rights Act of 1964, Title VII of which prohibits discrimination in employment on the basis of sex. Both Title VII and the Equal Pay Act mandate equality and specifically prohibit the so-called reverse discrimination against men which "protective" legislation had previously permitted. Thus, state protective laws for women are inoperative due to the Supremacy Clause. The "Women and the Law" class studies in detail problems which have arisen in litigation under Title VII, such as the parameters of the bona fide occupational qualification defense (bfoq), proof of discrimination against women in light of the neutral-rules doctrine of *Griggs v. Duke Power*, the issue of whether differential treatment based on sex-unique characteristics such as beards or pregnancy constitutes sex-discrimination under the Act, the impact of laws enacted under states' Twenty-first Amendment authority which regulate the employment opportunities of women in establishments dispensing alcoholic beverages, and the effect on Title VII issues of recent Supreme Court decisions under the Fourteenth Amendment.

The legislative mandate of total equality in the employment area has at long last abolished the traditional legal motifs of repression and protection in a major and important area of modern women's lives. Of course it may be a very long time before women achieve equality in actuality,

but the end of legally enforceable inequality has been an essential first step.

The "Women and the Law" course also examines family law issues involving the adult female family member. The remnants of the law of coverture and other legal disincentives toward marriage are discussed within the context of proposals for law reform. The traditional treatment of marriage as a legally defined status which legitimizes sexual relations and institutionalizes the care of the young is compared with proposals for individually determined, contractually defined partnerships. A major segment of time is devoted to the newly developing right of privacy and its impact on reproductive freedom. Although hailed as a major advance for women, the recent *Roe* and *Doe* abortion cases quite pointedly did *not* hold that a woman has a right to decide what happens to her own body. The state's interest in "protecting" her health may be asserted after the first trimester and the state's interest in the potential for life of the fetus would justify a complete prohibition of abortion after viability. However, several major questions are not yet clearly resolved: the rights of the father after the first trimester, the permissible scope of state regulation of clinics for first trimester abortions, the responsibilities of medical personnel if aborted fetuses survive, the validity of "conscience clauses" for public or private hospitals, and, very importantly, the validity of financial sanctions for making or not making the abortion choice.

Proposals for reform of the divorce law and rules relating to property distribution and support after divorce present significant public policy issues of great urgency. Whether or not the law could provide greater fairness to the parties, whether it should be reformed to abandon repressive common law disincentives to marriage, whether the legal definition of the institution of marriage should be modernized are questions with underlying religious, moral, and social connotations of great complexity. If the law moves in the direction of greater flexibility and self-determination for married couples, should it nonetheless try to "protect" the less dominant partner, and, if so, in what circumstances?

The focus on law reform carries over into the criminal law area as well. A small team of Michigan law students last year researched the rape laws, participated in evaluating proposals for change, prepared drafts of proposed revisions, and (out of personal interest but not for credit) helped in the public educational campaign and lobbying effort which resulted in Michigan's new Criminal Sexual Conduct Act. Current proposals relating to prostitution are also examined.

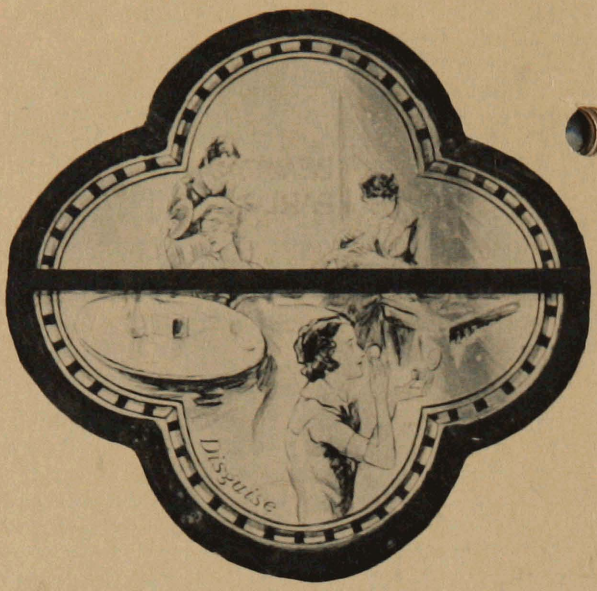
Other than prostitution, surprisingly little is known about the nature of women's crime. Not only do women account for only a small percentage of the total crime rate, but the type of crime they commit is significantly different from male crime. Yet very few studies have been made, very little data collected, to help us understand the forces which impel women toward criminality or the impact upon women criminals of our male-oriented system of criminal justice. It is now clear that a significant increase in crime by women is occurring. Some assert that this is the logical consequence of the so-called Women's Liberation Movement. Others say that it follows from the unequal and suppressive impact of poverty on women. Still others view it as the inevitable result of the drug problem among women. Many urge that the increase in women's crime should not be met with an increase in women's prison-building. But these arguments are based largely on what we know of the impact of prison on male criminals. On the other hand, many law enforcement officials still urge, and some courts still consider, the view that female offenders should be incarcerated *longer* than males committing the same crime. This, for the reason that it is women's nature to passively conform to societal norms (whereas it is man's nature to aggressively rebel), hence rebellious women are far more deviant than rebellious men and take longer to rehabilitate. On equal protection challenge courts have allowed states to attempt to prove these assumptions. Except in the area of prostitution, the effort thus far has not been successful and disparate sentencing and penalties have been held unconstitutional.

Conclusion

It is sad to realize how uninterested and unsympathetic the legal profession has been to the unique legal problems of women over the years. Except at the behest of a father or husband, women's rights were rarely vindicated in the courtroom, and only after years of determined effort by outcast feminists have legislative bodies offered token shreds of equality. Major injustices and inequities have gone unchallenged, indeed unnoticed, for centuries. Intense and resourceful study and research has been devoted to every area of the law, but rarely have the unique problems of women in those areas been considered. The "Women and the Law" course seeks first to uncover these inequities and examine the intricacies of their supporting rationale, and second to lay a foundation for research and reform through constitutional and legislative analysis.

The value and importance of this type of course in the law school curriculum recently was noted by Professor Harry H. Wellington on the occasion of his selection as dean of the Yale University Law School. "What we have to teach and work on as well [as legal ethics] is the concept of morality in the law itself. Our students tend to go on decades after getting their degrees, to making laws and judging laws, and so many legal decisions are moral decisions—look at abortion, capital punishment, equal rights." At Michigan, the "Women and the Law" course seeks to prepare students for legislating and judging by exposing the fictions and stereotypes of the past and by systematically articulating the goals and consequences of change.

Window Illustrations Brighten Hutchins Hall

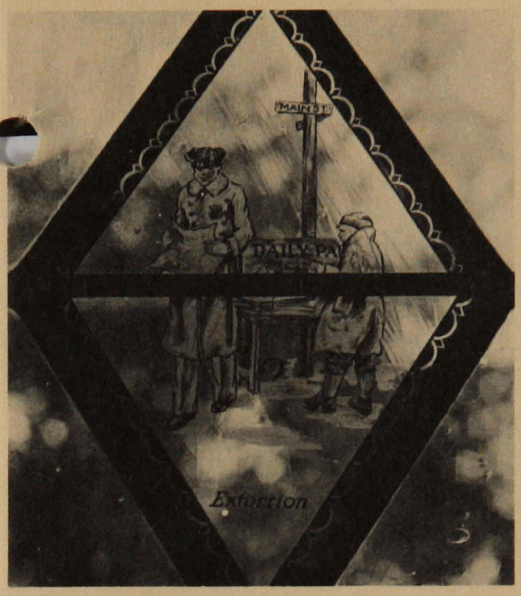


In a book about the Law Quadrangle published in 1934, it was said: "It is always possible to discover features about the place which have not been observed before, even by the residents."

Even today, the statement seems true. In Hutchins Hall, which was completed in 1933, one can make some of the more entertaining discoveries by looking out of the windows on the main floor. Here, cartoons in stained glass sections portray various legal problems that students discuss in the building's classrooms. The artist, though, had a sense of humor. How else could a child reaching for the cookie jar be said to illustrate "petty larceny"?

The original sketches for the windows are filed at the Bentley Historical Library on the U-M's North Campus. But one thing, apparently, is not on file—the name of the artist. The Law School's most avid history buffs do not know who to thank for these moments of relief in a building where thoughts are so often ponderous.

Conceived and Photographed
by Mark Mestel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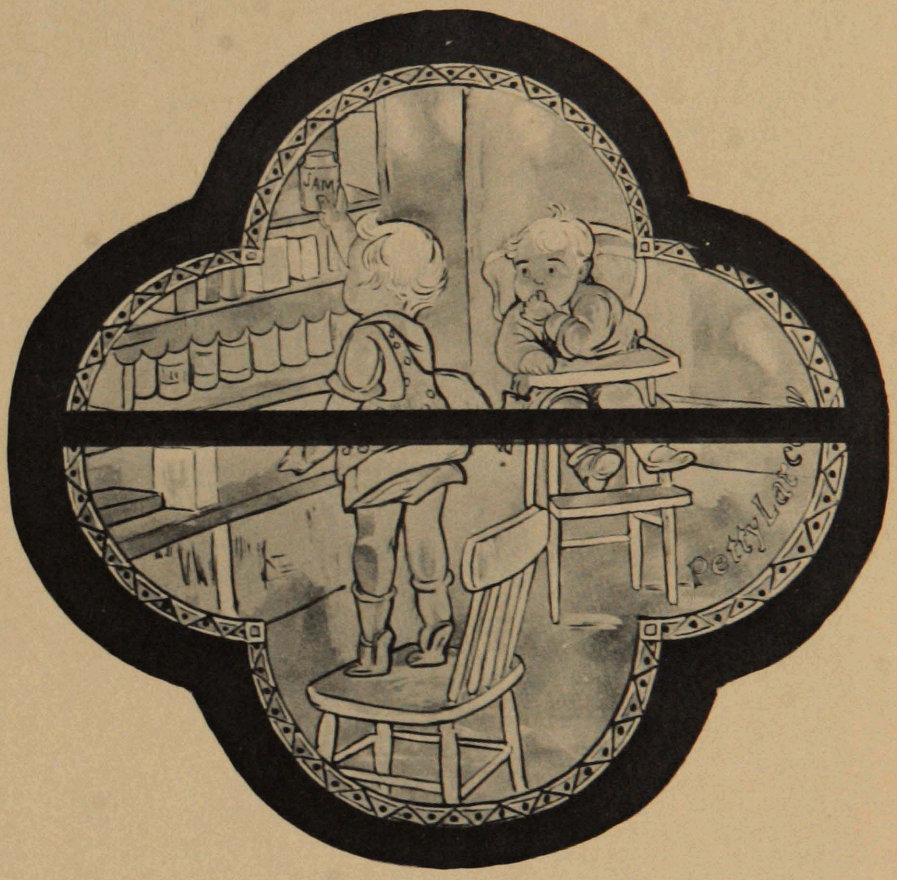
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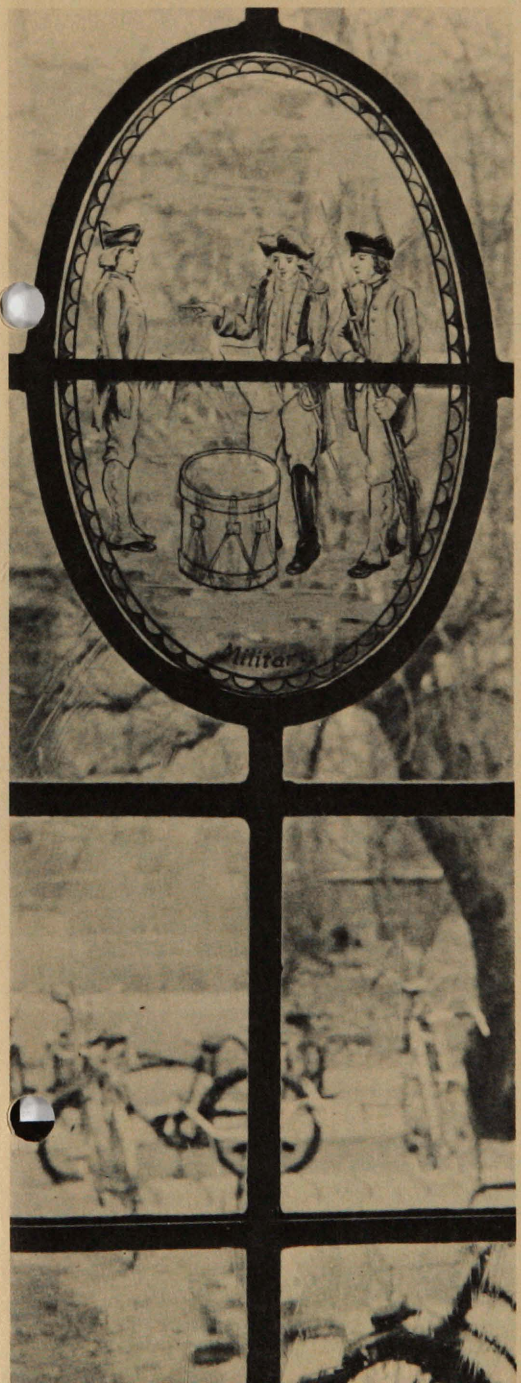
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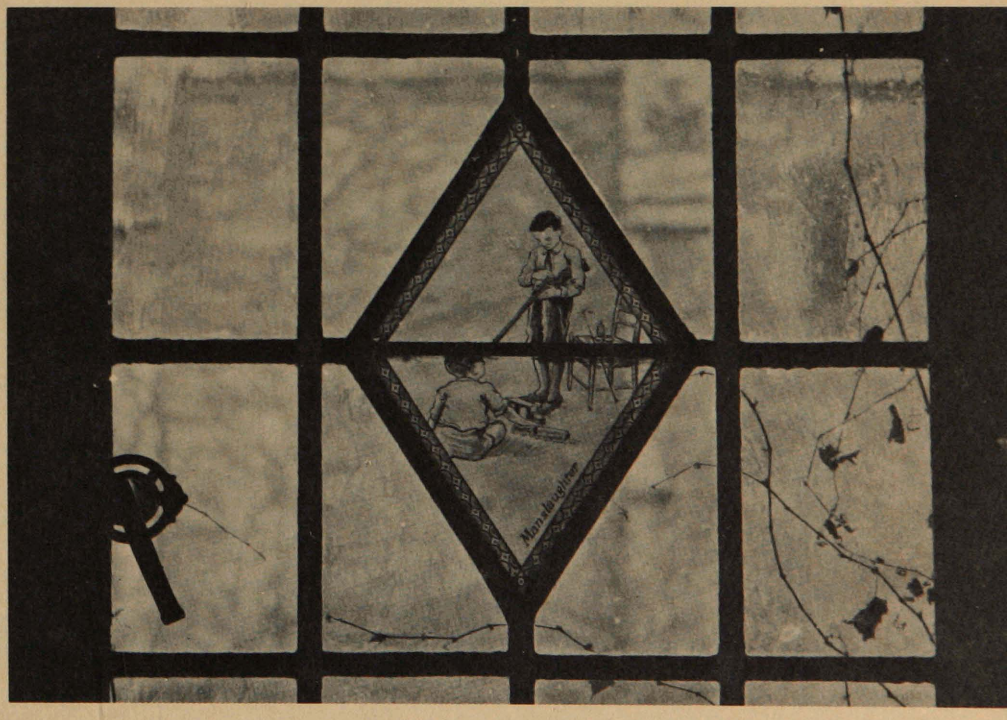
Manslaughter

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