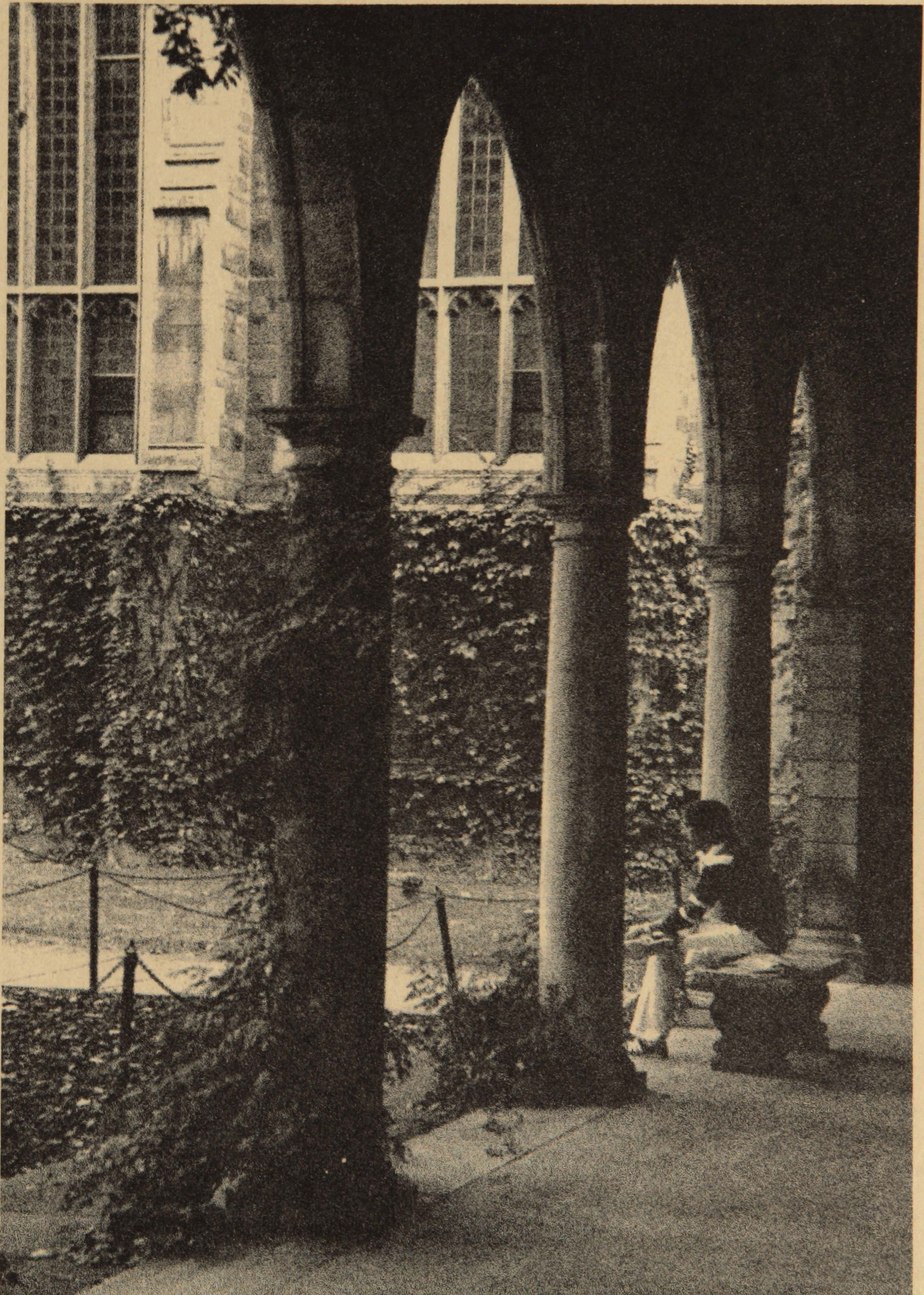


Law Quadrangle Notes

The University of Michigan Law School

Volume 21, Number 1 Fall 1976



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Publications Chairman: Professor Yale Kamisar, University of Michigan Law School; **Managing Editor:** Harley Schwadron, University of Michigan Information Services; **Editor:** Carol S. Hellman, University of Michigan Publications Office; **Graphic Designer:** Mary Kay Krell, University of Michigan Publications Office; **Student Contributors:** Mark Mestel, Bruce Johnson; **Produced:** University of Michigan Printing Services.

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u·m notes

Antitrust Chief Kauper Returns To Law School

As U.S. antitrust chief in Washington, Thomas E. Kauper sat behind a huge antique desk which he says was the "prized possession" of the Antitrust Division.

In the 1960's—or at least so the story goes—when Robert Kennedy, then the U.S. attorney general, spotted that desk in the Antitrust Division, he quickly had it transferred for his own use in the attorney general's suite. After Kennedy's departure, the desk was returned to the Antitrust Division where it has remained ever since.

Kauper, now back at the University of Michigan Law School, has left the old desk behind along with other mementos of his four years as antitrust chief. He served in the post longer than anyone else in recent history, with the exception of Thurman Arnold, who served slightly longer in the early 1940's.

Although his service in Washington came during a time of hectic transition between the Nixon and Ford administrations, Kauper became known for his steady professionalism in enforcing the nation's antitrust laws. During the past two years especially, his division was known for its vigorous campaign against price-fixing, leading to many cases and indictments.

Kauper was granted leave from the Law School when he accepted the antitrust post in 1972. He returned to the U-M in the fall, taking up his old teaching specialty—antitrust law.

Although Kauper admits to attractions of Washington life, he says he is happy to be back in Ann Arbor where the pace is more "relaxed" and the responsibilities less grave.

The pressures in Washington were considerable, Kauper said in a recent interview here. "On Friday afternoon you might find that certain companies were going to merge on Monday, and you'd have to decide whether you're going to block it. Then you're told that one of the companies is going to go bankrupt if they cannot go ahead with the merger.

"This sort of pressure gets to you after a while. I think anyone would tire of it," said the 40-year-old professor.

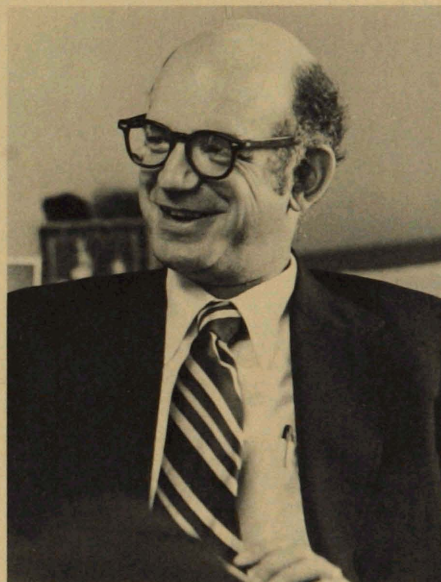
Although there were reports that Kauper had decided to step down from the antitrust post because of dis-

putes with the Ford administration, Kauper firmly denies this.

"As far as I know, anyone who reported this had not talked to me directly," said Kauper. "It simply was not true.

"Of course, anyone in that kind of job (antitrust chief) knows there will be disagreements," Kauper added. "But unless it's on an extraordinary moral principle, you can't just pick up your marbles and go home."

The reported disagreements between Kauper and the Ford administration were said to focus on the proposed Antitrust Improvements Act, described as one of the most significant antitrust measures since early statutes forming the foundation of U.S. antitrust regulation.



Thomas E. Kauper

Among other provisions, the new proposal—now passed by the Congress and signed by the President—allows state attorneys general to bring "parens patriae" suits (similar to "class action" complaints) on behalf of consumers who are victims of business conspiracies to set prices. Another major section of the legislation gives the Justice Department significantly greater power to compel production of documents and testimony in antitrust cases.

Kauper, who strongly backed most of the bill, notes that although Ford had "voiced considerable concern over the 'parens patriae' part of the bill," the President was presumably comfortable with the section expanding investigative powers of the Justice Department.

There are several other important legislative measures which were enacted during Kauper's tenure as antitrust chief.

One of Kauper's major accomplishments was gaining enactment of a bill

converting price-fixing from a misdemeanor to a felony. Under the measure, price-fixers now face the possibility of a three-year prison sentence and up to \$1 million in corporate fines, compared to the previous one-year sentence (usually suspended) and \$50,000 fines.

Kauper also helped in gaining repeal of federal legislation that had enabled states to enforce "fair trade" laws. These laws prohibited retailers from selling many products at prices below those set by manufacturers.

Kauper says he is pleased with the "aggressive" role the Antitrust Division has played in the price-fixing area.

"We made a judgment that we wanted a campaign made against price-fixing," Kauper recalls. "And I think we have been relatively successful, in the sense that many cases were brought and a number of people indicted.

"I don't have the precise figures, but I believe we indicted as many people in three years as in the previous 10 or 15 or 20 put together. Although I try not to use such labels, I suppose one could view our activities as being 'aggressive.'

Despite the increased price-fixing penalties, Kauper is not altogether optimistic about future enforcement in this area. Ultimately, he says, the question of whether price-fixers are given substantial jail sentences can only be resolved in the courts.

"It is extremely difficult to get anyone—the business community or the public—to believe that price fixing is a major offense," says Kauper.

"And if we perceive the judiciary continuing to refuse to impose jail sentences at all—or imposing 30 day sentences suspended, or something of that sort—then it seems to me that the business community will rightfully draw the conclusions that the penalties, at least in terms of jail sentences, are a very minor matter."

The Antitrust Division under Kauper, while cracking down on price-fixing, was less active in the merger area.

"In the merger area I think I could have been viewed as a bit more moderate than Richard McLaren, my predecessor, because I didn't really share all his views on conglomerate mergers. But other than that, there was no substantial difference," says Kauper.

"It is true we didn't file many merger cases, but that was largely a function of the fact that the economy wasn't doing well, and there simply weren't many mergers going on."

Undoubtedly, the major antitrust case filed during Kauper's tenure was the one charging American Telephone

& Telegraph with monopolizing telecommunications equipment. The four-year-old suit, which some consider to be the largest antitrust action in the nation's history, was argued about a year ago but a decision is still pending.

Kauper's division was less successful in two major civil suits against the nation's two largest tire manufacturers, the Goodyear Tire & Rubber Co. and the Firestone Tire and Rubber Co. After substantial time and money had been spent in the action, Kauper was forced to make the difficult decision to drop the case because the division simply could not substantiate its early charges.

"It became quite clear as we struggled with this that the only conclusion we could come to, based on what we knew at that point compared to what we had put together when we had first filed, was that we just didn't have a case," Kauper recalled.

"The choice really came down to whether we could decide to keep the cases going and let the judge make the decision to throw it out, or try to negotiate a rather cosmetic decree that wouldn't have done much of anything, or dismiss the cases entirely.

"But a cosmetic decree usually does more harm than good; and if we went

to trial it would have cost an enormous amount of money."

Kauper notes that seeking a resolution to the review of the Firestone and Goodyear cases was a major reason he chose to remain in the antitrust post for four rather than three years. "I just didn't think it was appropriate to leave that decision to someone else," said the professor.

"Looking from hindsight," Kauper adds, "I may have stayed in Washington a year too long. But despite all this business about policy disagreements with the President, one reason I stayed was that I was very much in agreement with what he was trying to do."

In particular, Kauper says he was eager to follow through on certain White House-backed proposals, such as bills dealing with "deregulation" of the airline industry which has been exempted from antitrust laws by virtue of government regulation.

At U-M Law School, Kauper says he will probably teach "a lot less theoretical course," but one based more on the realities of the antitrust field.—H.L.S.

Prof. Alan N. Polasky Is Dead At Age 52

Alan N. Polasky, University of Michigan law professor since 1957 and a specialist in evidence, estate planning, and taxation, died on July 22 at the age of 52.

Prof. Polasky died of a heart attack while returning to Ann Arbor from Washington, D.C. Cremation has taken place, and memorial contributions were made to the St. Joseph's Mercy Hospital Building Fund in Ann Arbor.

U-M law Dean Theodore J. St. Antoine issued the following statement shortly after Prof. Polasky's death:

"Alan Polasky had the imagination, quickness of mind, and zest for combat to have been one of the legendary trial lawyers of our time. That he decided instead to devote his extraordinary talents to the teaching of law has put a whole generation of Michigan students immeasurably in his debt.

"Alan was a dynamic, stimulating classroom performer, with a sense of the dramatic that a veteran actor would envy. Some students were frustrated by his refusal to make the law simple and easy. Alan would laugh and respond that anything easy could be learned from books, and wasn't worth his attention.

"Few law teachers could match Alan in versatility. He was a nationally recognized authority in such diverse fields as evidence, taxation, and estate planning. He taught and

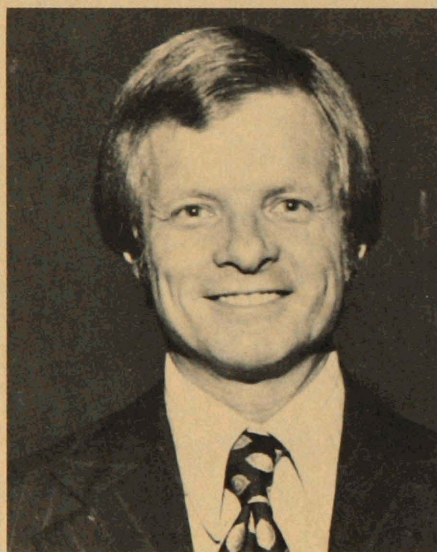
alumni notes



Cecil F. Poole

Two U-M law alumni were recently sworn in as U.S. district judges in separate parts of the country. **Cecil F. Poole**, who graduated from the Law School in 1938, is the new judge of the U.S. District Court for the Northern District of California (San Francisco), while **Ralph B. Guy, Jr.**, a 1953 U-M law graduate, is judge for the U.S. District Court for the Eastern District of Michigan (Detroit). Both previously had served as U.S. attorneys in their respective districts.

Judge Poole, after receiving his A.B. and law degree from Michigan, went on to receive an LL.M. from Harvard University in 1939. He served as assistant district attorney for the city and county of San Francisco from 1949-58 and was legal counsel to California Gov. Edmund G. (Pat) Brown from 1959-61. He became U.S. attorney for the Northern District of California in



Ralph B. Guy, Jr.

1961, remaining in that post until 1970. Judge Poole was a law professor at University of California at Berkeley, and has been affiliated with the law firm of Jacobs, Sills & Coblenz in San Francisco.

Judge Guy, before attending Law School, received his undergraduate degree from the U-M in 1951. He has been U.S. attorney for the Eastern District of Michigan for the past six years. He joined the U.S. attorney's office in 1969 as chief assistant and was appointed U.S. attorney the following year. Previously he served in the Dearborn city law department from 1955-69, holding the position of corporation counsel most of those years. Judge Guy was chairman of the U.S. Attorney General's Advisory Committee in 1975. He was honored as an "Outstanding Young Man of the Year" in 1964 by the national Jaycees.



Alan N. Polasky

wrote extensively in these areas, and was constantly called upon by federal, state, and local governments to serve as a consultant. His popularity on the lecture circuit owed almost as much to his irrepressible sense of humor as to his sound scholarship and savvy, practical advice.

"Alan's life was all too short, but it was full of overflowing with solid accomplishments, high spirits, and warm friendships from coast to coast."

Prof. Polasky was author of a widely used text book for lawyers, "Basic Estate Planning," published in 1974 by the Institute of Continuing Legal Education (ICLE) in Ann Arbor.

He was also co-author of a 1975 ICLE publication on "Evidence in Michigan Courts" and has written many articles in the fields of taxation, evidence, and estate planning.

He had been involved in efforts to revise the federal appellate court system and served as a consultant on multi-state tax laws. He had also served as reporter for proposals sponsored by the National Conference of Commissioners on Uniform State Laws dealing with uniform disposition of community property rights on death.

Born Aug. 23, 1923, in New York City, Polasky graduated from the University of Iowa in 1947 and received a law degree from the same institution in 1951.

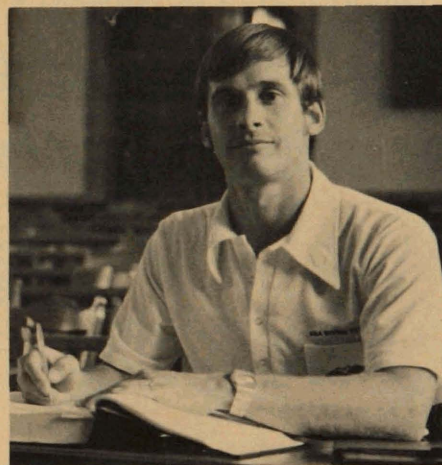
Before joining the U-M faculty, he practiced public accounting, served with a Chicago law firm and taught business law at Northwestern University.

Among other activities, Polasky served as chairman of the American Bar Association's Section on Real Property, Probate and Trust Law from 1967-68, and was a consultant to the American Law Institute's Federal Estate and Gift Tax Project from 1962-68.

He was a member of the Michigan Society of Certified Public Accountants, the American Accounting Association, American Bar Association, American Institute of Certified Public Accountants, the American Law Institute and American Judicature Society, among other groups.

Active in University and civic affairs, he served on the U-M's Committee on the Economic State of the Faculty and was a member of the board of trustees of the First Unitarian Church of Ann Arbor.

Prof. Polasky's survivors include his widow, Mary; two daughters, Janet, a student at Stanford University, and Catherine, who lives in Minneapolis; and a son, Alan Stephen, a student at Williams College.



Phil Boggs

Olympic Diving Champion Is First-Year Law Student

While many law students have used their legal education as a springboard to fame and success, there is one member of this year's freshman class who achieved genuine stardom before even setting foot inside the Law School.

He is world champion diver Phil Boggs, 1976 Olympic gold medalist and captain of the United States diving team at the Montreal games.

The 26-year-old former Air Force captain has added the weekly regimen of torts, contracts, criminal law and property to his daily workout at the University's Matt Mann Pool.

"I'll probably continue to dive, because I love it," Boggs said in an interview. "I won't continue to compete unless I know I can do well, and that depends on whether I'll have enough time to go to school and train."

A native of Akron, Ohio, Boggs earned his undergraduate degree in mathematics at Florida State University in Tallahassee, where he also won the NCAA championship in his

specialty, the three-meter springboard.

After that, he spent four-and-a-half years on the staff of the United States Air Force Academy near Colorado Springs, Colo., as a computer specialist, instructor, and educational researcher. During the same period, Boggs built an impressive reputation in international competition, winning meets in the Soviet Union, Canada, Mexico, Colombia, Sweden, Finland, Czechoslovakia, Yugoslavia, the Canary Islands and Monaco, and capturing the world championships in 1973 and 1975 (the only two times there has been an officially sanctioned world diving competition).

"The Air Force was great. It supported my diving and encouraged it, and in addition to providing me with a job, it afforded me the opportunity to continue training at a fantastic facility at the academy," Boggs said.

Not the least among the factors that attracted Boggs to Ann Arbor for his legal education was the fact that U-M diving coach Dick Kimball has been his personal mentor for the past four summers. Kimball also helped ready Boggs for this year's Olympics and coached him to victory in Montreal.

Since starting classes this fall, the compact athlete (5-feet-5, 131 pounds) has found time to give a few diving exhibitions with his coach, including one relatively disastrous Labor Day outing at a Detroit country club. Boggs struck his face on a surface of the pool bottom that slanted sharply upward from the diving basin, breaking a front tooth and suffering some abrasions.

"I donated some blood into a towel for a few minutes before we could finish the show," Boggs recalled. Dentists in the audience inspected his tooth, and the dental damage was eventually repaired.

Asked whether he hopes to combine his athletic interest with his legal career, Boggs said, "Possibly. I would not be adverse to getting involved in athletes' contract negotiations and professional sports problems, but I can't say definitely at this point what my plans will be."

Despite his experience in performing well under pressure, Boggs is not totally immune to the common worries of first-year students. ("What are law school exams really like?" he asked the upperclassman who was interviewing him.)

But he said he hopes to keep up his schedule of regular diving sessions. "I find I'm much more alert for studying after I get away from the books and down to the pool for a time," he said.

"I'll always maintain a contact with the sport, because the sport's been great to me," Boggs added.

—Bruce Johnson

Eklund, Cohen Named Assistant Law Deans

Two new assistant deans, Susan M. Eklund and Donald S. Cohen, have been appointed at U-M Law School.

Eklund will be in charge of student affairs at the Law School, while Cohen will head the legal writing and advocacy program.

Law Dean Theodore J. St. Antoine noted that a large part of Eklund's activities will "consist of student coun-



Susan M. Eklund



Donald S. Cohen

seling and advising, covering a wide range of student problems. In addition to student counseling, Ms. Eklund will handle registration and class scheduling, and will serve in effect as secretary of the faculty."

Eklund received a B.A. degree with distinction from the U-M in 1970 and graduated from the U-M Law School in 1973. From 1973-75 she served as a staff attorney in a legal services program on an Indian reservation at Chinle, Ariz. She returned to Ann Arbor in 1975 to become associated with the Research Group, Inc., a firm which provides research services to the legal profession.

Cohen, the other appointee, "will be responsible for directing the senior judges of our moot court case clubs in the handling of the required first-year legal writing and advocacy program," according to Dean St. Antoine.

A 1967 graduate of Washington University of St. Louis, Cohen received a law degree from Northwestern University School of Law in 1970. For the following two years he was an attorney with the firm of Jenner and Block in Chicago. During 1970-74 he was also vice-president of Camp Horseshoe, Inc., in Wisconsin.

Since 1975 Cohen has been assistant dean and assistant professor of law at the University of Tennessee College of Law. He authored an article, "False Imprisonment," to be published in the Tennessee Law Review.

Eklund succeeds Rhonda K. Rivera, who has taken a law teaching post at Ohio State University, and Cohen succeeds Charles W. Borgsdorf who has joined an Ann Arbor law firm.

"West's State Digests" Needed By Law Library

The U-M Law Library has announced that it needs several sets of *West's State Digests* in order to "assure the most complete possible coverage of U.S. case law for research purposes."

"We would greatly appreciate donations from any alumni who find themselves no longer in need of their *West* digests," according to Peter C. Schanck, chief reference librarian.

Schanck says the library needs sets for the following states: Connecticut, Florida, Georgia, Louisiana, Maine, Minnesota, Mississippi, Nebraska, New Hampshire, North Carolina, North Dakota-South Dakota (combined in one), Rhode Island, South Carolina, Vermont, and Wisconsin.

Donated sets or inquiries should be directed to: Prof. Beverley J. Pooley, University of Michigan Law Library, 363 Legal Research Building, Ann Arbor, Mich. 48109.

Profs. Gray, Smith Report On China Visit

How can a country of 800 million people get along without lawyers?

By Western standards, this seems hard to imagine. But for the past 20 years, since the Cultural Revolution, the Peoples' Republic of China has abandoned its former Soviet-style legal system and adopted a less formal "Confucian" mode of conflict resolution.

Today there are few lawyers being trained at mainland Chinese universities. Responsibility for conflict settlement rests largely with a cadre of formal "mediators" rather than with "judges" in the formal Western sense.

This description of the present Chinese legal climate is offered by University of Michigan law Prof. Whitmore Gray, who was one of a group of 25 from the U-M spending close to three weeks in China last school year. Another U-M law professor making the trip was Allan F. Smith. All members of the group, which included four University regents, traveled at personal expense.

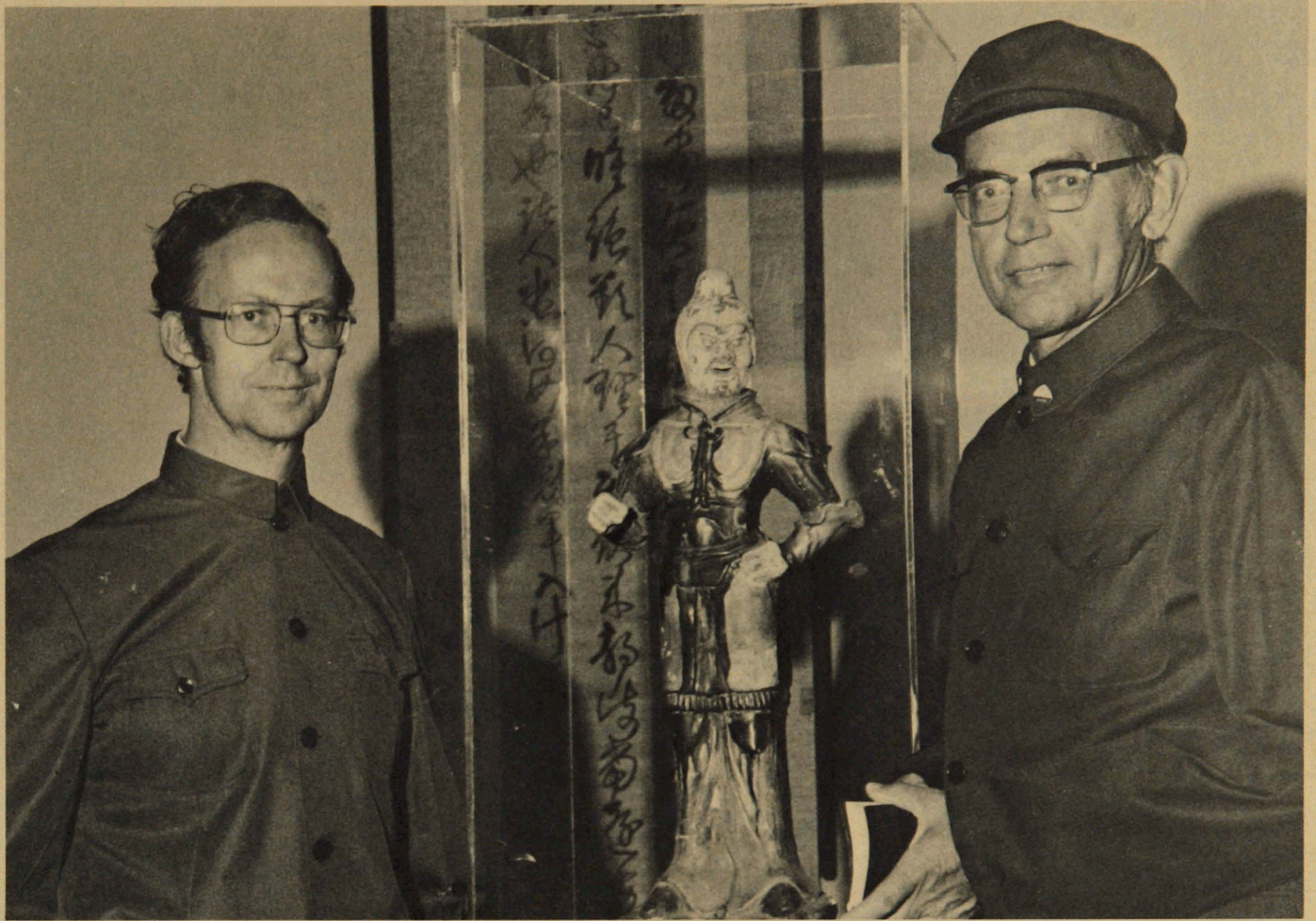
Discussing higher education in China during a recent talk in Ann Arbor, Prof. Smith said China has very few institutions Westerners would regard as universities, but many specialized training centers. Some of these, he said, perform on-the-job training within factories.

"There is an absolute dereliction of scholarship for scholarship's sake within China," said Prof. Smith, former U-M vice president for academic affairs. Institutions known as "May 7 schools" exist, he noted, as places to assign "unregenerate scholars" to perform forced labor.

Prof. Gray, a specialist in European, Soviet, and Asian law, noted that Westerners' knowledge of the present Chinese legal system is based on only "fragmentary" information. On his own trip to China, for example, the Americans were permitted only limited opportunities to observe day-to-day lives of the people, according to Gray.

"China does maintain a formal system of courts," said the professor, "but our impression is that this formal system is used very little. Instead, judges are sent to local collective farms to investigate complaints. If there is a problem of anti-social conduct, for example, the judge would customarily investigate the causes and present the case to the masses at the collective farm, asking them what should be done."

This informal system is in keeping with the traditional Chinese pattern of "mediation and conciliation," par-



Who are these men in the garb of Chinese officials? Despite their convincing disguises, they're not Chinese officials at all, but U-M law Profs. **Whitmore Gray** (left)

and **Allan F. Smith**. The two were among a group from the University visiting the Peoples' Republic of China last school term. The jackets and cap were among

their mementos of the trip. Smith and Gray pose in front of an appropriate Chinese display at the U-M Museum of Art.

ticularly with regard to domestic and civil problems, according to Gray.

"Crime is one of the most difficult areas to assess in China," said Gray. "We did not see evidences of crime on our trip, but we were insulated from day-to-day events. We were told there were problems of minor theft, along with some major crimes. During our visit we did see locks on bicycles and on lockers in schools.

"I have the impression major crimes are taken care of with great dispatch," Gray continued. "We were told that in one major crime not long ago involving the wife of a French diplomat in China who was raped, a suspect was executed soon after the crime."

At the same time, the Chinese also appear oriented toward "rehabilitation and re-education" of social deviants, according to Gray. "This, too, follows Chinese tradition. Exemplary behavior is encouraged through the use of positive norms and positive models," says the professor.

The U-M professor says the scarcity of lawyers in China may eventually

have important consequences, particularly in the international legal field where China must relate on an equal footing with Western lawyers and businessmen.

"At the present time China's Council for the Promotion of International Trade, which is responsible for its international legal dealings, has a legal staff which includes Chinese lawyers trained abroad, including those trained in the United States.

"The Chinese say they are now in a transitional period. During the Cultural Revolution, the universities, including the law schools, were closed. The faculty of the University of Peking—which was China's leading law school—were sent to May 7 schools for 'thought reform.'

"The universities have now reopened," notes Gray, "but there is still much uncertainty about the role of law schools in a country that is training only a few legal administrators, but no lawyers for actual law practice."

With assistance from its foreign-trained lawyers, China is now capable

of acting in a "predictable manner" in the international law field, according to Gray. "Since the Chinese enter into thousands of contracts every year with foreign buyers and sellers, they have their share of disputes. In these cases they follow the accepted pattern of settling out of court whenever possible or expressing their willingness to enter into international legal arbitration as any other country.

"In the future," said the professor, "they will continue to rely on lawyers trained before the Cultural Revolution or those trained at foreign law schools for their dealings in international law."

Prof. Gray said it is quite possible that some Chinese lawyers will receive training at the U-M. In fact, one Michigan law alumnus, James L. Elsmann of Birmingham, Mich., recently established a scholarship fund designed to bring students from the Peoples' Republic of China to study at U-M.

More Job Recruiters To Visit Law School

The Law School is off to one of its best starts this year in regard to job placements for graduates, reports placement director Nancy Krieger.

At the beginning of the current school term, some 455 recruiters from law firms had set dates to interview prospective job candidates at Law School throughout the year.

"As the year progresses, this number will probably increase significantly," said Ms. Krieger. "There's no telling how high it could go."

In the fall of last year, the initial number of recruiters totalled about 380. By the end of the year 453 had visited the Law School.

Is the level of recruitment here indicative of a generally brighter employment picture for law graduates?

Ms. Krieger said 1976 U-M law graduates did "quite well" in their job placements, with some 75 per cent listing definite job plans at the time of their graduation last spring. This compares favorably with the figure of 72 per cent the previous year.

Although U-M law graduates appear to be doing well in job placements, Ms. Krieger says this situation is not generally true for all law schools.

Hutchins Classrooms Are 70 "Footcandles" Brighter

They're throwing new light on several old subjects at U-M Law School this year—literally.

The lighting in six Hutchins Hall classrooms has been remodeled in the first such project since the building was opened. James Gribble, assistant to the dean for business and finance, said the staff is "very pleased" with the result.

The old incandescent fixtures in rooms 118, 138, 250 and 120, which produced a gloomy average of five or six footcandles of light on the student desks, have been replaced with attractive fluorescent panels. The gold-tinted light from the four-foot-long tubes now casts an average of 75 footcandles, according to Gribble.

Alterations to existing fixtures in rooms 132 and 150 have also significantly brightened the reading surfaces there.

The key to the new installation is a recently designed parabolic louvre which reflects and directs the light in a more efficient way, Gribble said. A special consultant hired by the Law School proposed use of the innovation after studying the special lighting needs in Hutchins Hall.

Funds for the \$50,000 project were allocated several years ago by the cen-

tral administration of the University, but work was delayed until a design could be found that would preserve the architectural integrity of classrooms, Gribble said.

He said the Law School hopes to expand the new lighting to other classrooms as funds become available.

—Bruce Johnson

Stein Co-Authors Book On European Community Law

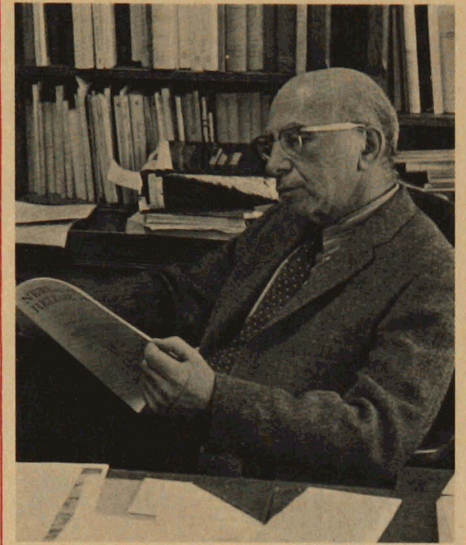
What if each state in the United States had a different language and widely varying legal practices and business laws?

The result would be roughly equivalent to the situation faced by the nine European Common Market nations as they now attempt to harmonize business laws and practices and ease age-old restrictions on trade.

This presents a difficult challenge to the Western Europeans. Equally challenging is the task of American law students, legal scholars and corporation counsel who attempt to gain a comprehensive understanding of the European Economic Community (Common Market).

Legal developments in the fast-changing field are chronicled in a new book, "European Community Law and Institutions in Perspective," co-authored by Profs. Eric Stein of the University of Michigan, Peter Hay of the University of Illinois, and Michel Waelbroeck of the University of Brussels, Belgium. The book was released by the Bobbs-Merrill Co.

Stein, U-M professor of international law and organization, notes

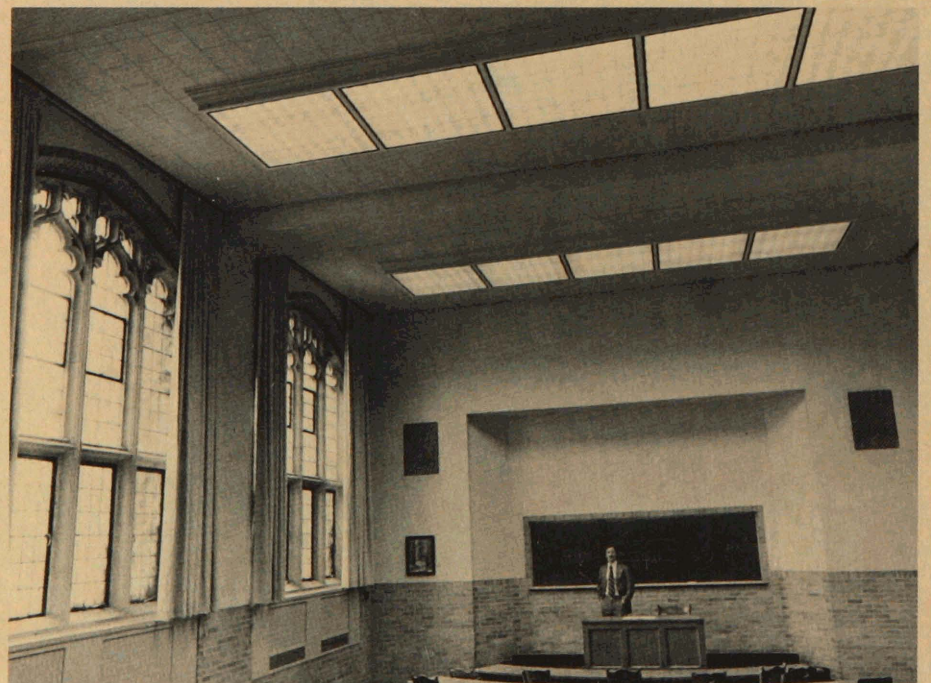


Eric Stein

that despite the book's emphasis on the Common Market, the American legal system is not ignored.

In fact, the book includes many references to American legal documents, institutions, and case law. The reason, Stein notes, is that "although the United States represents a single market in international trade, there are still many similarities between problems faced by the EEC and those of the U.S."

Stein notes, for example, that the U.S. has set many world precedents in anti-trust law. And the commerce clause of the U.S. Constitution has as its goal the free trade of goods without unreasonable restraint—the same goal sought by the Common Market nations.



Room 138, Hutchins Hall, one of the rooms in the Law School where new lighting fixtures were installed.

Jacques H. J. Bourgeois, who last spring was a visiting scholar to U-M Law School from University of Brussels and the College of Europe in Belgium, said the book will be useful in English-language law programs abroad, as well as international legal studies programs at American universities.

"I was struck by the many references to English language materials on Common Market law, many of which I was not aware of before," said Bourgeois. "I was also impressed by the parallels and comparisons relating to certain aspects of Common Market law with their corresponding American legal institutions and case law."

Prof. Bourgeois, who holds a graduate degree from U-M Law School, is a member of the legal staff of the Common Market Commission. Several of his colleagues on the commission also received graduate training at U-M. While a visiting professor at U-M, Bourgeois joined Prof. Stein in teaching a U-M law course on the European Community and offered a seminar in the international trade field.

The new publication by Profs. Stein, Hay and Waelbroeck is a successor to their earlier work, "Law and Institutions in the Atlantic Area," published in 1967.

The current book "is for all practical purposes a new work since only a small fraction of the material has been carried over from the earlier text," according to the authors.

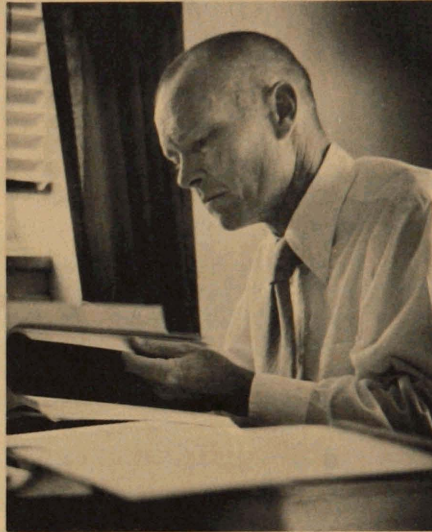
They say the new publication is intended to serve as a teaching and research tool, as well as a general treatise on the European Economic Community.

"The events of the 1970's," the authors note, "have added new incentives to focus more sharply on the European Community. In the first place, with the accession of the United Kingdom along with Denmark and Ireland, the Community became unquestionably the dominant institution in Western Europe. . . . Again, as economic problems have moved to the forefront in the relationship between the United States and Western Europe, it has been the Community that has increasingly spoken and acted on behalf of the nine (member nations)."

The authors continue: "The reader may wonder why we included so much material on American law—statutes, cases, and text. Our objective in this respect has been not only to study the instrumentalities in American law for participation in, or cooperation with, the new institutions (such as the Trade Act of 1974), and the differences and similarities in the

solution of similar problems on both sides of the Atlantic. In addition, we have sought to identify American interests, private and governmental, in the working of the new institutions and in achieving mutually acceptable solutions.

"The American experience—its achievements as well as its failures—in building a federal-type legal framework for a single market of continental proportions is obviously relevant to the European effort. . . ."



James J. White

Prof. James J. White Heads Advisory Commission

Prof. James J. White of U-M Law School has been named to head the state's Advisory Commission on the Regulation of Financial Institutions.

Chosen by Gov. William Milliken this summer, commission members have been asked to make final recommendation by early 1977 on policy changes affecting Michigan's financial institutions.

Milliken has asked for "recommendations consistent with the objectives of protecting the consumer, insuring capital availability for economic development, and regulating fairly and equitably the financial institutions of the state of Michigan."

The governor said the commission will review the structure and competition of the state's financial services industry and study alternative methods for adjusting interest rate ceilings.

He said it will also examine laws granting regulatory powers to the state commissioner of financial institutions.

A member of the U-M law faculty for the past 12 years, White is the author of several books on commercial transactions and a new textbook on banking law.

Other members of the advisory commission include leaders in finance, business, and government from throughout the state.

Prof. White was also one of nine recent appointees to the state's Legal Services Corporation Advisory Council, which will advise on state procedures for providing legal assistance in civil matters for persons financially unable to afford private counsel.

Appointment of the council members was also made by Gov. Milliken.

Prof. Joseph Sax Receives AMC Conservation Award

Prof. Joseph L. Sax of the University of Michigan Law School has been named to receive an American Motors Conservation Award for 1976.

The award, given this year to a total of 22 men and women from across the country, has been "presented annually since 1954 to professional and non-professional conservationists for dedicated efforts in the field of renewable natural resources," according to an announcement from American Motors Corp. (AMC).

Prof. Sax, who is author of Michigan's 1970 Environmental Protection Act giving citizens the right to bring polluters to court, was selected in the "professional" category of the awards competition. The awards were also given to "non-professionals" and to national and local groups for outstanding achievements in conservation.

Individual and group awards include bronze sculptured medallions and honorariums of \$500. Announcement of the winners was made by AMC Chairman Roy D. Chapin, Jr.



Joseph L. Sax

The AMC announcement said Sax "is widely recognized as one of the nation's most aggressive and thoughtful leaders in the field of environmental law.

"Authorship of the landmark legislation is but one example of the outstanding contributions Sax has made over many years to the study and protection of the environment. His law students have always been taught the importance of proper management of natural resources and the role they should play in their private lives and within the legal profession in furthering the cause of conservation," said the announcement.

Prof. Robert A. Burt Joins Yale Faculty

Robert A. Burt, U-M law professor and also professor of law in psychiatry, has joined the faculty of Yale University.

Burt is a 1964 graduate of Yale Law School. At U-M his research and teaching focused on such areas as genetics and the law, family law and medical law.

Along with Prof. Francis A. Allen of the Law School, Burt in 1973 represented a state mental patient in a well-known Detroit court case in which a three-judge panel ruled that experimental brain surgery could not be performed on any person involuntarily detained in state mental institutions, even if consent were given to the experiment.

Burt graduated from Princeton University in 1960 and received a master's degree from Oxford two years later. After graduation from Yale Law School he was law clerk to Chief Judge David L. Bazelon of the U.S. Court of Appeals in Washington, D.C.

He later served as assistant general counsel in the office of the U.S. Representative for Trade Negotiations and as a legislative assistant to U.S. Sen. Joseph D. Tydings.

Before joining the U-M law faculty Burt was an associate professor at the University of Chicago from 1968-70.

Among other affiliations, he is a fellow of the Institute for Social Ethics and the Life Sciences and a member of the National Academy of Science Committee on Inborn Errors of Metabolism. He was co-reporter for the American Bar Association's Project on Standards for Juvenile Justice in the area of child abuse and neglect.

Twenty 1976 Graduates Receive Judicial Clerkships

Twenty 1976 graduates of U-M Law School have begun appointments as judicial clerks, including 11 who have been assigned to federal courts.

In addition, two members of the class are clerking for the United States Supreme Court (reported in the previous issue of *Law Quadrangle Notes*.)

The following is a listing of clerks for the federal and state courts:

Ellen Borgersen, for Hon. Frank Coffin, U.S. Court of Appeals for the First Circuit, Portland, Maine.

Albert Calille, for Hon. Ralph Guy, U.S. District Court, Eastern District of Michigan, Detroit, Michigan.

Charlotte Crane, for Hon. Wade McCree, U.S. Court of Appeals for the Sixth Circuit, Detroit, Michigan.

Chris Dunfield, for Berrien County Circuit Court, St. Joseph, Michigan.

Barbara Harris, for Hon. Charles Weltner, Fulton County Courthouse, Atlanta, Georgia.

Joyce Hensley, for the Michigan Court of Appeals, Lansing, Michigan.

Lawrence Joseph, for Hon. G. Mennen Williams, Michigan Supreme Court, Detroit, Michigan.

Barry Kaplan, for Hon. Charles Joiner, U.S. District Court, Eastern District of Michigan, Detroit, Michigan.

Barry Landau, for Hon. Talbot Smith, U.S. District Court, Eastern District of Michigan, Ann Arbor, Michigan.

Donald Lewis, for Hon. Marion K. Finkelhor, Court of Common Pleas, Pittsburgh, Pennsylvania.

A. Russell Localio, for the Michigan Court of Appeals, Lansing, Michigan.

Andrew Marks, for Hon. Charles Richey, U.S. District Court, Washington, D.C.

Thomas Sarb, for Hon. Noel P. Fox, U.S. District Court, Western District of Michigan, Grand Rapids, Michigan.

Larry Saylor, for Hon. George E. MacKinnon, U.S. Court of Appeals for the D.C. Circuit, Washington, D.C.

Steve Schon, for Hon. J. Edward Lumbard, U.S. Court of Appeals for the Second Circuit, Bridgeport, Connecticut.

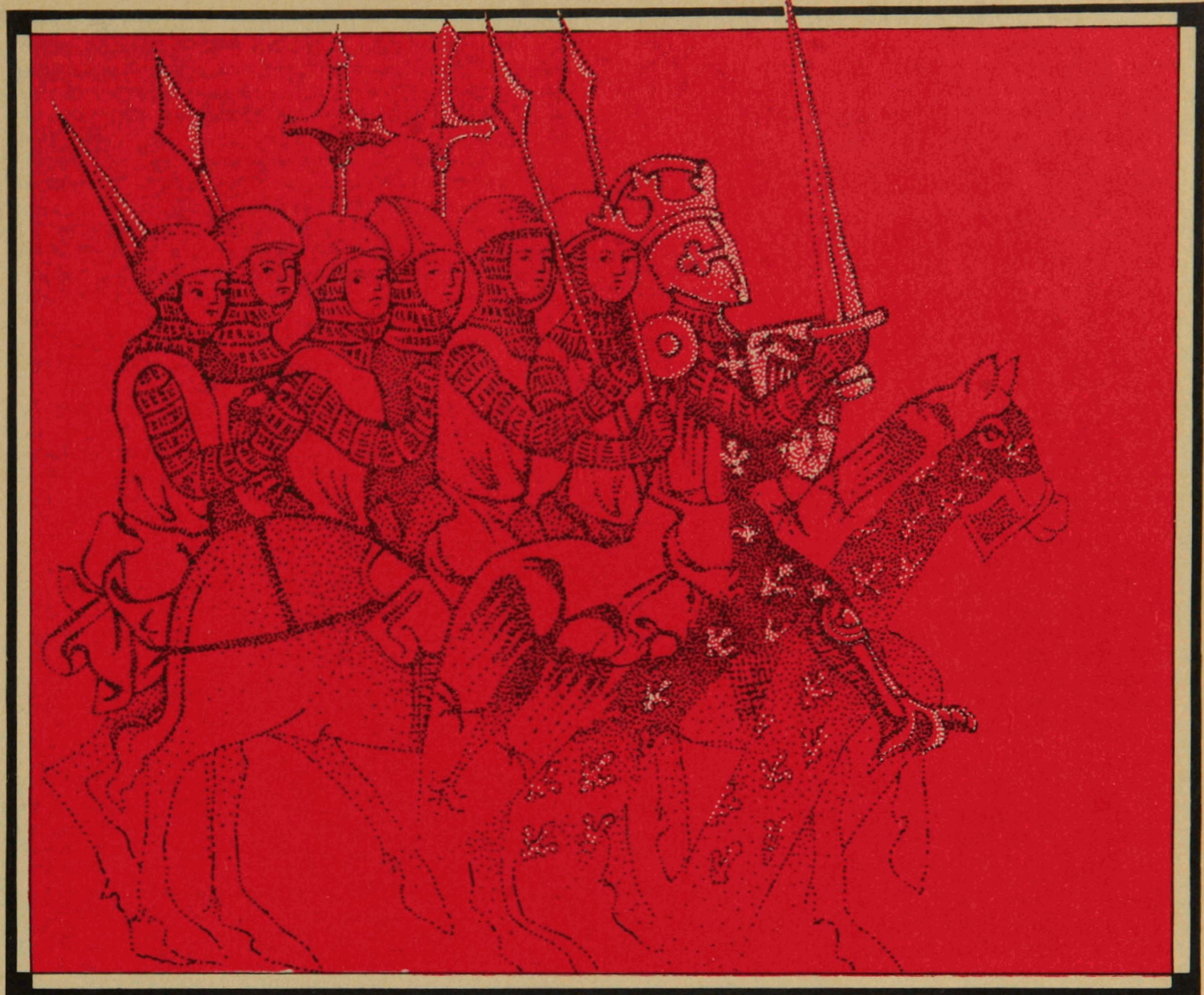
Steven Silverman, for the Michigan Court of Appeals, Detroit, Michigan.

Jeffrey Smith, for Hon. Lawrence Lindemer, Michigan Supreme Court, Lansing, Michigan.

William Waldo, for Hon. Ellsworth A. Van Grasfeiland, U.S. Court of Appeals for the Second Circuit, Rochester, New York.

Mark White, for Hon. John Feikens, U.S. District Court, Eastern District of Michigan, Detroit, Michigan.

Thomas Zarembo, for Hon. Michael Cavanagh, Michigan Court of Appeals, Lansing, Michigan.



on winning and losing

by Francis A. Allen
Professor, University of Michigan Law School

[Prof. Allen presented this address at the Law School's Honors Convocation last spring.]

Preoccupation with winning has always been an American propensity, and never more so than today. Yet there is surely no group in our society that needs more to devote serious thought to the nature of winning and losing than lawyers. Winning and losing are inherent in the adversarial system that we as lawyers cultivate. To be sure, skilled practitioners negotiating long-term relations among parties may deliberately avoid exacting the total victory that their power might make possible, in the interest of establishing more stable and enduring associations. There are, nevertheless, many situations in which one lawyer must win and another lose. Sound ideas about winning and losing, therefore, are essential to the lawyer's happiness and peace of mind, his effectiveness and his integrity.

Today sound ideas about winning and losing are not in oversupply. Some observers have suggested that the true prophet of the modern American philosophy of success was the late Vince Lombardi. "Winning," he said, "is not everything. It is the only thing." And again: "To win you've got to hate." One might be disposed to dismiss such statements as excrescences on the wonderful world of professional athletics were it not for the fact that these or similar dicta have obviously provided the bases for much that has recently occurred in our public life.

Two words, "Watergate" and "Lockheed," are sufficient to make the point. Why this modern obsession with winning? Perhaps winning becomes increasingly important as our confidence declines in the inevitability of victory in our international relations and in conten-

ding with our internal problems. Perhaps our addiction to spectator sports reflects a yearning to escape the complexities of a world in which it is often no longer clear of what winning consists. It is comforting to be absorbed in activities in which the winner can be identified simply by consulting numbers on a scoreboard.

A Lesson from History

Fortunately, sources of wisdom about winning and losing are not confined to Lombardian aphorisms. One unlikely source of wisdom is far removed from us in time and spirit. It is (of all things) the heroic medieval chronicle, *The Song of Roland*. Many of us encountered versions of this story in our fifth grade readers, and have thought little of it since. Roland, the ideal knight, and his staunch companion Oliver are assigned to the rear guard of Charlemagne's army as it moves across the Pyrenees from Spain to France. Roland and his companions are suddenly assaulted by overwhelming numbers of their Saracen enemies. The Franks fight bravely, and when reduced to a handful of survivors, Roland blows a mighty blast on his ivory horn, his oliphant, to summon aid from Charlemagne. Thirty leagues away Charlemagne hears the call, responds with all possible speed, but arrives too late. All the Franks have perished. Roland lies dead under a tree—facing Spain and the enemy.

It is a good story, even in the pale versions made available to grammar school students. Some years ago I came across a modern translation of the poem and was captivated by it. Appended to the poem was a short essay by G. K. Chesterton. At the Battle of Hastings, Chesterton relates, a minstrel marched in front of the Norman army, throwing his sword in the air and singing—*The Song of Roland*. There is a mystery here. As stated by Chesterton, the "bard in front of their battle line was shouting the glorification of failure. . . . [T]he court poet of William the Conqueror was celebrating Roland the conquered."

Can this mystery be penetrated? To do so one must certainly know more about the poem than is revealed in its bowdlerized versions. The poem at one moment is extraordinary in its sophistication and insights, and at the next in its credulity and crudity. The chronicler fully understood the entertainment value of extreme violence. Blood runs deep in these lines.

A much repeated figure is that in which the Christian knight strikes the infidel a blow of such tremendous force that the sword splits the adversary's body from helmet to crotch, cuts through the saddle on which the Saracen was riding and proceeds to sever the horse in twain. Interspersed in such excesses, however, are perceptions of character of great subtlety. Roland, one discovers, is not without blemish. To be sure, he is a mighty warrior, and his loyalty to the emperor and to the Christian cause is beyond all doubt. But he is prideful and impetuous; his judgment is erratic. When Roland and his companions discover that they are beset by forces of overwhelming superiority, Oliver urges Roland to sound the oliphant to summon aid from Charlemagne. Roland refuses and says:

A fool I should be found
In France the Douce would Perish my renown.

Later, when the cause becomes hopeless, Roland suddenly decides to sound the horn. Oliver indignantly protests. You refused to summon aid when it might have assisted us, he says in effect; now that our cause is lost, to blow the horn would be a craven act. And he adds:

Vassalage [i.e., chivalry] comes by sense, and not folly;
Prudence more is worth than stupidity.

The dispute is mediated by one of the last survivors, a warrior archbishop, who recommends that Roland sound the horn. It will do us no good, he says, but it will bring Charlemagne back to wreak vengeance on those who kill us. And Roland blows his shattering blast on the oliphant.

The chronicler makes no effort to adjudicate the controversy between Roland and Oliver. He states the case and leaves the judgment to his auditors.

What are we to make of this? How are we to resolve Chesterton's paradox? Why was the army of William the Conqueror led to battle with a song of failure? In thinking about these matters from time to time over the years, I have come slowly to doubt Chesterton's premise. I have come to doubt, in other words, that *The Song of Roland* is a song of defeat and failure. The poem is surely ambiguous at this critical point, but certain conclusions can be drawn. If Roland failed it is not because he died and his companions were slaughtered. Nor is it because the battle was lost. The poem is saying, I think, that death and frustration of one's immediate purposes may be consistent with victory. If Roland failed, it is because in some measure his conduct fell short of the requirements of his code and his ethic. That code required courage, loyalty and fortitude; but as Oliver remarked, it also demanded sense and not folly. But the poem, considered as a whole, is a story of men who lived and died by their code. I believe, therefore, that it was intended as a song of victory.

The Pyrrhic Victory

There is a point here that is as important as it is simple: winning and losing must be carefully defined. *The Song of Roland* asserts that there can be no victory without fidelity to one's code of right and wrong. What is perhaps more striking, there can be no failure when that fidelity has been maintained.

A young person involved in the events of his age must first honor his conception of decency and propriety, must resist the pressures and temptations to depart from it. Such a person has not failed, however frequently his goals of achievement are denied, especially if infidelity is resisted with grace and serenity. I do not believe that the poem would have us despise the lesser victories. It is a good thing to win prizes, lawsuits, and elections. It is splendid to gain economic rewards and public recognition. But to make these things the test of winning is the fatal error. The person who is denied prizes and awards but who maintains the ethical ideal has triumphed because his life constitutes a vindication and validation of the ideal. These are hard teachings, but they constitute the essence of moral realism. Surely the history of the post-war world warns that we reject these teachings only at peril to our own lives and that of our society.

In recent years laws students have often castigated their society because, they say, it will make them do things they believe to be wrong. There are no doubt good grounds to protest many of our social practices, but this is not one of them. The pressures and temptations are great, and the obstacles to the ethical life confronted by lawyers are especially formidable. But in what age and in what culture have men and women participating actively in the life of their times been spared pressures and seductions? Why are we peculiarly entitled to a regime of morals made easy? One willing to attribute moral lapse to forces impinging upon his life from the outside compounds his infidelity with a forfeiture of human dignity.

The Song of Roland contains other insights on the subject of winning, perhaps more subtle than those already considered. Charlemagne hastens to Roncesvalles and

finds that he has arrived too late. He promptly takes effective and ruthless measures to avenge himself on the infidel hosts. He returns to France and, in the concluding lines of the poem, retires to his bedchamber. Charlemagne is an old man. He is exhausted in body and spirit. He has concluded a long and grueling campaign in Spain. His arms have prevailed, but the victory is ambiguous. His much-loved nephew, Roland, is dead. Roland had borne much of the military burden of the empire. The flower of Frankish chivalry has been exterminated in the Pyrenees mountain passes. The king has been required to deal with treason in his own ranks, and he has executed the traitor and those who conspired with and supported him.

Charlemagne lies down to sleep seeking refreshment and renewal, but his dreams are interrupted by a visita-

These also are hard facts, so hard, indeed, that millions of persons all over the world have shrunk from a clear-eyed recognition of them. These persons have ingested the narcotic of political fanaticism that makes possible the belief that their cause is infallibly virtuous and must inevitably succeed. Perhaps these persons are correct in believing that only in such self-stultification and self-deception can modern men and women gain purpose and morale sufficient to direct the forces of the modern world. If they are correct, however, we must abandon our dreams of a humane society, one in which both mind and feeling are free. The critical question is whether men and women, undeceived about the perils and ambiguities of all human action, can summon the morale and effort necessary to contend effectively with those who have rid themselves of all doubts.

"The person who is denied prizes and awards but who maintains the ethical ideal has triumphed because his life constitutes a vindication and validation of the ideal."



Francis A. Allen

"It is a good thing to win prizes, lawsuits, and elections. It is splendid to gain economic rewards and public recognition. But to make these things the test of winning is the fatal error."

tion from the angel Gabriel. "Summon the hosts, Charles, of thine empire," he is directed. The pagans, it seems, are besieging a Christian city in the land of Bire, and Charlemagne is placed under divine mandate to lift the siege. The poem then comes to what may be the most stunning conclusion in all of literature. The last two lines are:

"God! said the King: "My life is hard indeed!"
Tears filled his eyes, he tore his snowy beard.

The poet here is seeking to comprehend the idea of winning in ways that are peculiarly cogent to modern men and women. This comprehension is based, first, on the realization that victories are not inevitable, that effort and rectitude may not be enough, that there is no certainty that the forces of light will prevail over the forces of darkness.

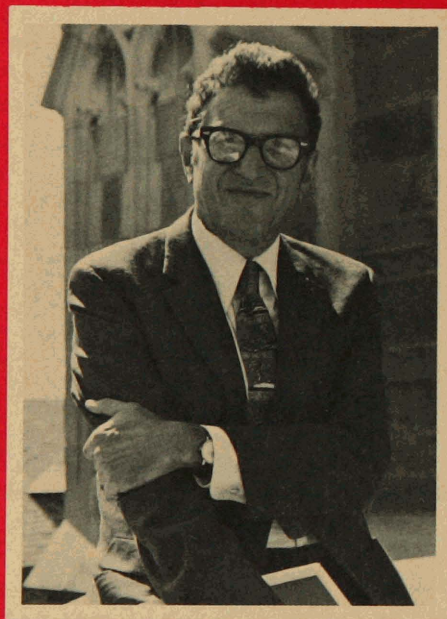
In short, one may devote a lifetime to a purpose or a cause, make sacrifices of health and pleasure and still be denied the satisfaction of seeing one's goals achieved. But there is perhaps an even more insidious realization. One may pay dearly to achieve one's purpose and succeed, only to discover that one's small triumph is too insignificant to matter much or, even worse, to conclude that one was mistaken in the choice of goals; that one's achievement has done harm rather than good.

An Impossible Dream

Charlemagne's anguish adds one final ingredient to our understanding of the nature of winning. He faces in sudden awareness the agonizing fact that there is no final victory. However great the triumph, it is ephemeral. Without further struggle it withers and dies. As long as one is truly alive and functioning, the battle goes forward. One may be able at times to choose his battleground, but he may not escape the battle. It is not difficult to feel Charlemagne's anguish in comprehending this reality. But we are entitled to believe, I think, that in the morning when he awakened, Charlemagne obeyed the mandate imposed upon him, summoned his troops and made his way to the land of Bire.

You are to be congratulated for the victories we are celebrating today. They are small victories, but not unimportant ones. Their chief importance lies in the promise they give of future struggles and future achievements. If one day you find yourself beset by evil forces in your own private Roncesvalles, do not hesitate to sound your horn and summon aid. I believe that you will be surprised by the outpouring of support from like-minded men and women. If timely aid arrives and you survive, reflect on what you have gained. Your gain, as Charlemagne perceived, will be the opportunity to fight again another day on other fields.

שאלות ועד על המדיניות האנטי-טרייסט החדשה בארצות הברית



by
Peter O. Steiner
Professor of Economics and Law
University of Michigan

[Based on a speech delivered in New York City on March 4, 1976, at a Conference on "Antitrust Issues in Today's Economy."]

I resist the temptation to review the history of the monopoly problem and restraints of trade from the days of Adam Smith to those of John Paul Stevens. I wish instead to ask whether, as some clearly believe, we need major new antitrust legislation. This in turn involves three questions: (1) Should the goals of antitrust policy be expanded? My answer is no. (2) Are there significant deficiencies in our present policies? My answer is yes. (3) Is new legislation the way to remedy such deficiencies as may exist? My answer is no.

I do not mean to suggest that significant changes in policy may not be warranted. I mean instead to suggest

that the evolution that is occurring, albeit slowly, is more promising than the proposals for legislative surgery. (Of course, like each of you I have my own agenda of ideal legislation that I would be glad to see enacted if only Congress could be trusted to do it my way and if the Courts would understand how it was to be interpreted.)

Traditional Goal of Antitrust Policy

I take the traditional goal of antitrust policy to be the preservation (some would say restoration) of a competitive private enterprise system. This involves explicit policy because the economists' first insight ("Markets

work!") is tempered by their other insight ("Markets fail!"), and one form of market failure is the monopoly problem. There is, and was from the start a competing concern (Bork calls it a deviant theme) that would interpret antitrust as against bigness rather than in favor of competition. This populist view lives a cyclical life of its own, with its most recent upsurge during the merger wave of the late 1960's. With the collapse of that phenomenon it has receded some, but the legislative proposals it spawned are still around. From this vantage point, as distinct from 1968, there seems no new, clear, or present danger of the creation of an industrial oligarchy, and I would judge the trend (in defining goals for antitrust) is back toward competition. The repeal of the Miller-Tydings and McGuire Acts is a straw in this wind. While I do not think that the tradition of Brandeis, Black, Douglas, and Patman will ever wholly disappear, it seems in a no-growth phase at the moment.

The traditional goal of preserving competition is, in my view, not only still appropriate for antitrust, but quite sufficient. There are many other real problems of our society that demand attention. Some would have us use the antitrust laws to meet them. There are, for example, the many recent examples of corporate, union, and governmental abuse of power. But to turn antitrust enforcement to those abuses would not only divert scarce resources but would decrease the ability to maintain competition by warping the view of what activities merit close surveillance. I remember still the well-intentioned suggestion made in 1968 by the Mitchell-Kleindiest-McClaren team to use the antitrust laws as a major weapon in their planned war against organized crime. Fortunately they were dissuaded. Another suggestion, which should be resisted as well, is to conceive of antitrust as a major weapon against inflation. While some current antitrust activities, such as attacks on entry restriction in the regulated industries, may have a once and for all effect on the *level* of prices in some areas, they have virtually no bearing on the root causes of the *rate of increase of prices* that is inflation. The current inflation is occurring in all sectors of the economy, independent of the vigor of competition. If this seems a straw man, observe how quickly most discussions of the "industrial reorganization" proposals get entwined with the current inflation. If oligopoly power indeed deserves attention, it does so on its merits, not because of the failures (and there are many) of our macroeconomic policies. (I am, incidentally, astonished to read that repeal of the Fair Trade Laws—amply justified on other grounds—occurred because of the expected effect on inflation. Although it is nice to be right for the wrong reason once in a while, it is not reassuring.)

Proposed Legislation

Proposed legislation is a response to perceived inadequacies in the existing policy arsenal. Let me comment briefly on five areas of alleged deficiency: (1) oligopoly, (2) mergers, (3) pockets of exempt behavior, (4) execrable unilateral conduct, and (5) treble damages and other penalties.

Oligopoly

The courts have stubbornly resisted repeated urging to extend to oligopoly—"shared monopoly power"—the strict standard of monopolization under Section 2. Those who saw the *Aluminum*, *Tobacco*, and *Triangle Conduit* decisions as presaging a "New Sherman Act" before which oligopoly would fall, were to be disappointed. This disappointment has led to repeated proposals for new legislation creating a rebuttable presumption for deconcentration of highly concentrated industry struc-

tures. Oligopolistic industries exhibit, par excellence, the competing tensions between the economies of scale in production and distribution that make large enterprises efficient and the centers of private power that make them capable of abusing the social good. But these tensions have existed from the start and are precisely the ones that make antitrust policy both difficult and important.

There is no credible evidence to suggest that the oligopoly problem has recently become more acute. Nor has the structuralist view that high concentration leads with decisively high probability to adverse performance won new logical or empirical support. James Rahl, in 1962, concluded that "there is no consensus of scientific, scholarly, legislative, executive, or judicial opinion in this country as to the wisdom of doing anything very basic about" the oligopoly problem, and nothing since 1962 would lead me to modify his conclusion. Indeed, the current revival of the debate is in response to a challenge from the other side; Professor Brozen's attack on the validity of the association, as a long-run phenomenon, between high concentration ratios and persistent high profits. One does not need to take sides in that debate to read in it a warning against restructuring legislation in this area. We should legislate from knowledge not from frustration with our ignorance. It may well be that we shall one day know enough to justify an Hart-like industrial reorganization bill or a vertical dismemberment of the oil industry, but I do not believe that that day has come.

Mergers

In the years since 1950, when mergers came under effective antitrust control, the courts have adopted very different standards of the quantum of market power that is required to trigger a structural antitrust violation. It is most severe on mergers, next most on market occupancy by a single firm, and least on shared power. Few would quarrel with that ordering. The current support for a merger notification bill may reflect a desire for an even more restrictive policy toward mergers. It may instead reflect fear that a more centrist Supreme Court will sharply retreat from the positions of the Warren Court. At the very least it suggests a recognition (and a regret) that the Merger Guidelines, which promised to become merger policy with a Supreme Court before which "the government always won," are on their way to the status of historical curiosities.

How should one evaluate the proposal? Since the large merger, like the large corporation, is not unambiguously undesirable, a policy proposal that adds to the inhibitions ought to bear the burden of showing that the mergers it will stop ought to be stopped. Giving the Justice Department the power automatically to enjoin preliminarily (and thus frequently to block permanently) large mergers, supposes a clear need either to move the judicially determined line or to trust the economic judgments of the Department of Justice more than those of the Courts. The second seems doubtful on its merits, and doubly so because of the mixing of prosecutorial and judicial functions. As to whether we are now too permissive, I am aware of no evidence that suggests a more restrictive policy is required, or that absolute size (not market share) is the relevant measure. The conglomerate problem, which might have occasioned such legislative concerns in 1968, no longer does both because of the decline of the phenomenon and (more basically) because the Courts have found a way to embrace the problem using potential competition as a sound but flexible standard for integrating conglomerate diversification into the main corpus of antitrust: the effect on competition.

Exemptions

Once we get beyond the exemption of labor unions (and some would challenge even that), virtually every area of actual or de facto exempt behavior has been subject to debate and proposed legislative challenge. Far the most important exempt areas are the regulated industries. The presumption underlying Section 11 of the Clayton Act was that competitive concerns with respect to the industries they regulate should be delegated to the ICC, the FCC, the CAB, and the FRB. The implicit faith was that regulators, as they acquired knowledge of their industries problems, would not lose the resolve to achieve the benefits of competition. This faith has been known to be misdirected for at least a generation. Here, quite in contrast to the oligopoly and merger areas, there is today a "scientific and scholarly consensus" that increased reliance on competition in regulated industries is in order.

Execrable Unilateral Conduct

Unilateral predatory conduct by one lacking the market power to be charged under Section 2, and lacking the multiparty conduct to fall within Section 1 is (arguably) a lacuna in present antitrust coverage. It is not clear to me that there are major adverse competitive consequences in such conduct, but it creates a legal unease and has invited legislative proposals to close the gap that may have economic consequences. Of course, there is always FTC 5, but that is small comfort to the private victim who seeks either injunctive relief or damages.

Penalties

My interest in the size and nature of penalties is their effect on motivation. It is often argued that the fines assessable in criminal cases are still ludicrously small when assessed against large corporations. If such fines were the only penalties, they would indeed be a primary deficiency of our present laws. But to discuss intelligently the disincentive effects of an antitrust prosecution, it is necessary to treat the whole penalty package as one: the criminal penalties to individuals, the fines, the staggering costs of litigation, and the damages (single or treble) in civil suits.

I sense a rising unease about the perverse incentive effects of mandatory treble damages, particularly when piggybacked on class action suits. Treble damages were initially intended to provide a finder's fee to injured plaintiffs and thus to motivate the rooting out of violations that might otherwise escape the eye or budget of the public prosecutor. Even when that economically sound objective was not served because private suits increasingly came in the train of public suits, treble damages could be argued to add desirably to the penalties for violation, and thus both to compensate for generally inadequate deterrents in public suit penalties and to create a largely laudable incentive for consent decrees or nolo pleas in the kind of close cases that it is desirable to have settled quickly.

Does a different motivation—closer to extortion—without economic or moral justification now come into play? After issuance of a complaint in a governmental suit, a flood of class action treble damage suits is all but automatic, and these can be initiated at relatively little cost. These cases in turn are likely to be collected in a single court for trial, thus all but assuring they will all be decided the same way. A defendant determined to fight the public case on its merits may expose himself to enormous risk if he should lose. Suppose, to see the issue clearly, a seller of a commodity with unit value of \$100 sold one million units per year over 10 years. If a jury ultimately (albeit wrongly) finds damages of \$10 per unit over the entire period, he faces a \$300 million penalty

(plus attorneys fees). For a company with sales of \$100 million per year this is surely an awesome prospect. Suppose his activities were in fact legal, and he does not wish to accept a consent decree. Surely there is still one chance in 100 that he will lose both public and private suits. (Is there ever less chance than that?) The "expected value" of his loss is over \$3 million but the loss, if it occurs, will be ruinous. Is the seller not safer to settle the private suits before they really begin, for say \$2 million (or even \$4 million)? It is a risk-prone lawyer who advises his client otherwise. Yet such thinking invites suits whose only purpose is such a settlement. Defendants collectively should fight such suits, but acting independently they should not. You know better than I if this is a real or fancied problem in both "large" and "small" suits.

If, as I believe, remedies and penalties are a problem area, it is because the "package" has developed without plan and without comprehensive review as such factors as inflation, tax rates, tax rulings, ease of getting standing for private suits, ease of maintaining class actions, have changed. Moreover, what is illegal keeps changing in unforeseen ways. It would be remarkable if the present penalty package was optimal, and there are many reasons to suppose it is not. If it is to be corrected, however, it will benefit from looking at as a whole rather than piecemeal.

"In my view we have a vital and evolving national antitrust policy . . . The more striking current proposals for legislative reform seem to me dictated by ideology rather than by evidence of malfunction, and by broader concerns about the nature of our society than can sensibly be implemented through an antitrust policy."

Deficiencies in Current Policies

Even in my relatively sanguine review, there are visible deficiencies in three areas: unwise exemptions, unilateral predatory conduct, and damages and penalties considered broadly. Are these prime candidates for legislative reform? I think not.

The whole history of antitrust in this country gives pause against heavy reliance on the statutory remedy. As a statutory field, antitrust invites statutory reform. But the basic statute was constitution-like in its language and provided the invitation, if not the necessity, to the judiciary to develop a common law of antitrust. Such judicial interpretation has frequently led to dissatisfaction and to subsequent legislative reform. But the corrective legislation seldom promptly accomplished what it intended and it often invited adaptive responses that were adverse. Both the FTC Act and the Clayton Act were legislative responses to the first two decades of the Sherman Act—each was intended to correct deficiencies that by 1914 bothered the populists and/or the business community. Hardly any feature of either act worked as intended. Neither the creation of the FTC as a specialized agency which, with professional expertise, was expected to fashion a sensible law of restraints of trade nor the incredibly detailed language of Clayton Sections 2 or 3 succeeded in taking discretion from the federal courts

or created the certainty that business wanted. Neither Act resolved the latent conflict between preservation of competition and protection of small competitors. The original Section 7, attempting to meet a demonstrated failure to cope with the merger problem, probably did more damage than good, by inducing asset acquisitions. It was to be 36 years before a sound antimerger statute was enacted. This Cellar-Kefauver Act—surely the triumph in the post Sherman Act legislative history—succeeded because it was legislation based upon knowledge, not on ignorance, on recognized deficiencies, not vague unease. There ought to be a lesson in that. As to the other major legislative attempts: Webb-Pomerene, Miller-Tydings, McGuire, and Robinson-Patman, the less said the better. They surely do not make legislation (other than repeal) seem promising.

If detailed legislative reform has been one of the unhappy experiences in antitrust, judicial abdication has been the other. Both in the early twenties when the spirit was "anything goes," and in the mid 60's when everything went, delegation of the defense of competition either to private conscience, or to the Justice Department's prosecutorial discretion seems to me to have been unsatisfactory.

Notwithstanding everyone's ability to conjure up a collection of horrors in Supreme Court decision making,

"Since the large merger, like the large corporation, is not unambiguously undesirable, a policy proposal that adds to the inhibitions ought to bear the burden of showing that the mergers it will stop ought to be stopped."

it has been judicial construction and evolution that (with Sherman 1 and 2 and the revised Clayton Section 7) has developed and continues to develop a national antitrust policy. In broad outline it is both effective and sensible and has shown a remarkable ability to evolve and to adapt to changes in both social mood and whatever scientific and scholarly consensus exists.

We forget, I think, that antitrust is younger than its years. In terms of a period of sustained interest and attention it really dates only from the end of World War II. Before that we had no sustained period with both executive willingness to push it, and judicial willingness to explore the outer boundaries; since then there have been no periods of hiatus. In virtually every area except simple price fixing, antitrust has come a long way, since 1945. (Indeed in some areas it has, in my view, come too far, but there I have little doubt, a more nearly balanced court can find its way back.)

While all of this leads me to a presumption against a legislative reform if a judicial response is possible, the presumption is of course rebuttable. Legislation has worked well where there is a well-defined need, where there is a consensus as to what and how to proceed, and where the possibilities of unsatisfactory side effects seem small. Thus, the Cellar-Kefauver Act seemed a happier response to the merger problem than a

stretching of Section 1. With respect to the principal present deficiency areas I am not presently persuaded.

1. The erosion of areas of de facto exempt behavior is progressing constructively without new legislation. *Goldfarb* has opened the possibility of bringing professional services generally into a single antitrust policy; the doubtful special treatment of professional sports seems unlikely to long survive; most important, the fringes of regulation are being opened up to doses of entry and competition, and a more massive rethinking of regulatory policy is underway. While that rethinking may in due course entail new legislation, at the moment conventional avenues of reform seem to be effective. Indeed, the Justice Department's AT&T suit seems at least as much an attack on past regulatory decisions as on any of Ma Bell's activities.

2. While a new statute could deal with unilateral predatory conduct by defining unfair competition as a crime open to private plaintiffs, I doubt if it could be limited to socially undesirable practices. My fear is that such a statute would, like Robinson-Patman, tend to shield competitors at the expense of competition more often than it would be pro-competitive. The stubborn vitality of the Robinson-Patman Act despite the all but unanimous view of disinterested observers that it is an anticompetitive statute, is not reassuring. The small businessman, the harassed distributor, and the generally unaggressive competitor are too numerous to make the legislative arena a prominent source of reform. I think the dangers of bad legislation are sufficiently large here, that it is, if necessary, preferable to live with the problem. Of course, the unilateral execrable conduct lacuna (if it is that) may be reached without new legislation, though at the expense of keeping the Section 2 "Attempts" standard fuzzy. Such behavior could be embraced by the courts' further eroding of the quantum of power that constitutes monopoly (thus bringing ever closer the thing of which there is a dangerous probability) or by following Professor Turner's suggestion of accepting a trade-off between power and conduct such that in the face of foul conduct without redeeming value, one forgets to look further for power. While there is much to be said against a fuzzy standard, such as now governs Section 2 attempts cases, there is something to be said for it if the alternative is bad enough.

3. Finally we come to penalties. My problem here is that I have no sense that a coherent consensus of what to do exists, and that is a dangerous posture from which to draft legislation. The need for a coordinated view of both private and public penalties seems crucial, yet difficult to manage, and none of the current legislative proposals attempts one. To neglect such coordination is to neglect the evident fact that the private suit and the public one go hand in glove and that the private penalties provide the major deterrents. Is the new schedule of penalties provided by the Tunney bill sensible? Surely it depends on how the courts expand or contract the private suit. Here again evolution seems to be at work. If *Bigelow* opened up the private suit at the beginning of the modern era, *Eisen* may have started to limit its potential for becoming the tail that wags the dog.

Let me come, at last, to the title question. In my view we have a vital and evolving national antitrust policy. It seems certain, no matter which party controls the government, that we will continue to have an Antitrust Division that enforces this policy and attempts to change its limits, and a judiciary that shapes it to the world it sees. The more striking current proposals for legislative reform seem to me dictated by ideology rather than by evidence of malfunction, and by broader concerns about the nature of our society than can sensibly be implemented through an antitrust policy.

