

# Law Quadrangle Notes

The University of Michigan Law School

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**Characters on Cover Translate:** "Through the use of force one causes men's mouths to submit; through reasoning one causes their minds to submit."

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**Photo Credits:** Joan Fahlgren, 1, 4 (Palmer), 5, 22; Bob Kalmbach, U-M Information Services, 3, 4 (Nordby); U.S. Department of Health, Education and Welfare, 6.

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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 Hellman, University of Michigan Publications Office; **Graphic Designer:** Jennifer Magyar, University of Michigan Publications Office; **Law Student Writer and Photographer:** Joan Fahlgren; **Produced by:** University of Michigan Printing Services.

# u·m notes

## Terrance Sandalow Is New Law Dean

Terrance Sandalow, U-M law professor since 1966 and a specialist in constitutional law, the federal judiciary, and urban government, becomes the new U-M law dean on July 1.

The appointment makes Sandalow the 12th dean in the Law School's 118-year history (there were also two acting deans over this period). He succeeds Theodore J. St. Antoine, the law dean for the past seven years, who had requested to return to the faculty to resume teaching and research.

The nomination of Sandalow, approved by U-M Regents, resulted from the work of a Law School search committee chaired by Prof. Francis Allen. The appointment is for a five-year period.

Sandalow said: "The challenge in the years immediately ahead will be to maintain the Law School's tradition of excellence while responding to the ever-increasing demands placed upon the school and the legal system.

"Law schools are increasingly called upon to train students in skills, such as negotiation and counseling, that lawyers have customarily acquired only after entering the profession. At the same time, faculties have become aware of the legal system's need to take account of the learning of other disciplines if the law is to play the part that our society seems to demand of it. How best to respond to these challenges, while continuing to provide law students with the traditional fundamentals of a legal education, represents a formidable intellectual challenge."

Among other recent activities, Sandalow was a member of a special committee of the Association of American Law Schools (AALS) dealing with minority admissions questions. In this capacity, he co-authored the AALS' brief filed in the U.S. Supreme Court's pending "Bakke" case dealing with preferential minority admissions at selective professional schools.



Dean Theodore J. St. Antoine (left) and the Law School's dean-designate, Terrance Sandalow.

In the brief, the AALS strongly upheld the practice of using special criteria for minority admissions at law schools, where minority students have been underrepresented for many years.

A 1954 graduate of the University of Chicago, Sandalow received the Juris Doctor degree from that school in 1957. He taught at the University of Minnesota, 1961-66, before joining the Michigan law faculty.

Previously he served as law clerk to Judge Sterry R. Waterman of the U.S. Court of Appeals for the Second Circuit in New York, and as clerk to Justice Potter Stewart of the U.S. Supreme Court. He also spent two years with a Chicago law firm.

Sandalow is co-author of the book "Government in Urban Areas" (1970) and has written law review and other professional articles dealing with such subjects as municipal power, reform of state and local government, racial preferences in higher education, and the judicial protection of minorities.

Among other activities, Sandalow served as counsel to the Alaska State

Legislature regarding a court case which helped redefine the powers of the governor and the legislature. He has served as a consultant to New Detroit, Inc., the National Association and Regional Councils, and other metropolitan planning groups, and was chairman of a committee which investigated student disturbances at Eastern Michigan University during 1970-71, in the wake of the Kent State incident and the U.S. bombing of Cambodia.

Sandalow has been a member of the Committee on Academic Freedom of the American Association of University Professors, and was a fellow of the Center for Advanced Study in the Behavioral Sciences in Palo Alto, Calif.

Sandalow and his wife Ina, a teacher at Scarlett Intermediate School in Ann Arbor, have three children.

Sandalow's nomination to the deanship followed the recommendation of a Dean Search Committee including six U-M law professors and two law students.

## International Yearbook Started At Law School

The University of Michigan Law School will launch a new publication, the *Michigan Yearbook of International Legal Studies*, containing articles by lawyers, scholars and students in the field of international and comparative law.

Approved by a Law School faculty committee, the journal will be published once a year beginning around March, 1979.

It will have a senior editorial board of six or more Law School upperclassmen who, along with other student staff members, will be appointed by the Law School's faculty committee. The appointments will be made on the basis of scholastic achievement and writing skills.

The Michigan Yearbook joins two other widely respected student-edited law journals at the Law School—the *Michigan Law Review*, published since 1902, and the *Journal of Law Reform*, which was established in 1968.

U-M law Prof. John H. Jackson, a member of the faculty committee supervising the *Michigan Yearbook*, notes that the first issue will follow a Law School conference, sponsored by the student International Law Society, dealing with legal measures to curb foreign "dumping" of products in the U.S. at illegally low prices. The conference is being planned for November, 1978.

"The conference speakers would probably provide a number of papers which would become articles in the symposium volume," notes Jackson.

In general, says Jackson, "it is planned by the students that each issue of the new publication will include three to eight articles from established scholars, lawyers or government officials, plus a number of student contributions including comments or case notes, appendices, and bibliographies.

"The basic idea is to produce a volume of high quality that will be useful to scholars, government officials and practitioners. The students have decided that a first issue should be devoted to anti-dumping law and should be ready for press toward the middle of the next academic year."

Regarding anti-dumping, Jackson notes: "This subject is extraordinarily timely right now, in the light of U.S. developments on anti-dumping law, particularly with reference to the steel industry. In addition, the European Common Market has become active in using anti-dumping measures, so the issue takes on a renewed international importance."

Jackson notes that the new U-M law publication was initially proposed by students with a special interest in international law.

Other members of the faculty supervisory committee include Profs. Alfred F. Conard, Eric Stein, Gerald M. Rosberg and Emeritus Prof. William W. Bishop.

Among other functions, the faculty committee "will make the final selection of all personnel on the senior editorial board and of all staff members on the basis of their overall academic record, demonstrated writing skills and past writing experience," notes a Law School memorandum.

"For the first several issues, every piece to be published will be read and reviewed by at least one faculty member, and that faculty member in consultation with the faculty committee will have the right to veto the inclusion of any piece in the publication, on grounds of inadequate quality."

## Professorship Named For Paul Kauper

The Law School has established a new endowed professorship, named for the late U-M law Prof. Paul G. Kauper.

U-M law Dean Theodore J. St. Antoine noted that the professorship, to be filled at a later date, will be funded from annual earnings of the privately supported Paul G. Kauper Memorial Fund. Appointments will be made by the Regents on the recommendation of the dean of the Law School.

In addition to the professorship, the dean said the fund would also support student fellowships or scholarships, supplies, publication costs for scholarly materials, employment of research assistants, and other scholarly activities at the Law School.

One of the nation's leading constitutional scholars, Prof. Kauper died in 1974 after serving on the Michigan law faculty for 38 years.

Many of his writings dealt with such questions as the state and the individual conscience, order and liberty, relations of the three branches of government, and human rights in the international community.

Among Kauper's books were "Cases and Materials on Constitutional Law," "Frontiers of Constitutional Liberty," "Civil Liberties and the Constitution" and "Religion and the Constitution." Holder of the distinguished Henry Butzel Professorship at the Law School, Kauper in 1971 was named the U-M's Henry Russel Lecturer—the highest honor the University can bestow on a senior faculty member.

His son, Thomas E. Kauper, is currently on the U-M law faculty, teaching antitrust and property law. From 1972 to 1976 the younger Kauper served as Assistant U.S. Attorney General in charge of the Antitrust Division.

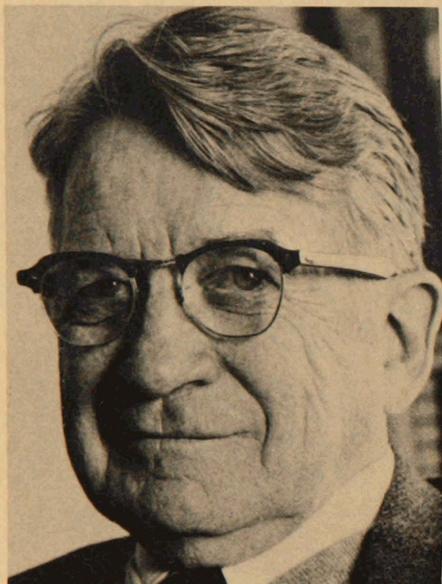
The boom of a construction crane frames the Law Library as it drives a steel piling into the ground along Tappan Street. Groundbreaking for the Law School's \$9-million, 77,500-square-foot underground library addition took place in late January.

Ken Beaudry, manager of construction engineering at U-M, notes that the 50-foot steel pilings along Tappan and Monroe will provide support for the street areas during and after excavation. Reinforced concrete pilings will be installed for support along the existing Law Library. The library addition, extending three levels below grade, is expected to be completed by 1980. The new building is being financed by funds raised in the Law School's capital campaign.



## George Palmer Retires After 46 Years At U-M

Prof. George E. Palmer retired from the U-M Law School faculty at the end of the winter, 1978, semester. He has been teaching at U-M since 1946 mainly in the areas of trusts and estates, and restitution.



George Palmer

Prof. Palmer says he is looking forward to having freedom to choose how to spend his time, but he is not ready to give up teaching entirely. He will teach at University of California's Hastings Law School during the 1979 winter term but has no firm plans beyond that.

Following graduation from U-M Law School in 1932, Palmer entered private practice in Indianapolis. In 1939 he entered Columbia Law School where he earned a Master of Laws degree. He worked as attorney, then associate general counsel, for the Office of Price Administration in Washington, D.C., from 1942 through 1945. He was then with the Department of Justice briefly before joining the U-M faculty.

Palmer's publications include case-books on trusts and successions, and restitution. His treatise on restitution will be published this spring.

## Correction

A list of U-M law graduates who received judicial clerkships, appearing in the fall 1977 issue of *Law Quadrangle Notes*, failed to mention the name of Linda M. Ojala, class of 1976, who is serving as law clerk for Justice Charles L. Levin of the Michigan Supreme Court.

## Virginia Nordby Gets Anthony Award

University of Michigan Law School lecturer Virginia B. Nordby, who also serves as policy coordinator in the U-M Office of the Vice President for Academic Affairs, has been named recipient of the 1978 Susan B. Anthony



Virginia Nordby

Award at the Law School.

The award, named for the 19th century pioneer in the women's suffrage movement, honors contributions furthering the status of women at the Law School. Now in its fourth year, the award is given by the U-M Women Law Students Association.

Nordby, who teaches a "women and the law" course at the Law School, is author of Michigan's 1975 Criminal Sexual Conduct Act (rape law), which was designed to reduce the trauma of rape victims in dealing with the legal system.

Along with researchers at the U-M's Institute for Social Research, Nordby is currently engaged in a study to determine the effectiveness of the Michigan law reform effort in reducing the incidence of rape and in facilitating legal action. The study is funded by the National Rape Center of the National Institutes of Mental Health.

Nordby recently served as one of three U-M representatives in dealings with the Chicago office of the U.S. Department of Health, Education and Welfare, regarding the U-M's compliance with federal affirmative action guidelines.

## Law School Receives Benedum Grant

The University of Michigan Law School has received a \$500,000 grant from the Claude Worthington Benedum Foundation of Pittsburgh, Pa., for the construction of the new law library addition.

The Benedum Foundation was established in 1944 by Michael L. Benedum and his wife Sarah. Benedum was an independent oil and gas producer known as "the world's greatest wildcatter" for his oil and gas explorations throughout the United States and Central and South America.

The foundation was established as a memorial to the Benedums' son, Claude Worthington Benedum, who died in the U.S. armed forces during World War I.

In a letter to the Law School announcing the grant, Paul R. Jenkins, executive vice president of the Benedum Foundation, said:

"Because of its special concerns and the limitations of its resources, the Benedum Foundation generally restricts its grants program to the Tri-State Area of Pittsburgh. However, from time to time we have reached out to participate in major developmental efforts of certain of those educational and other institutions, like The University of Michigan Law School, whose impact is national and even international in scope.

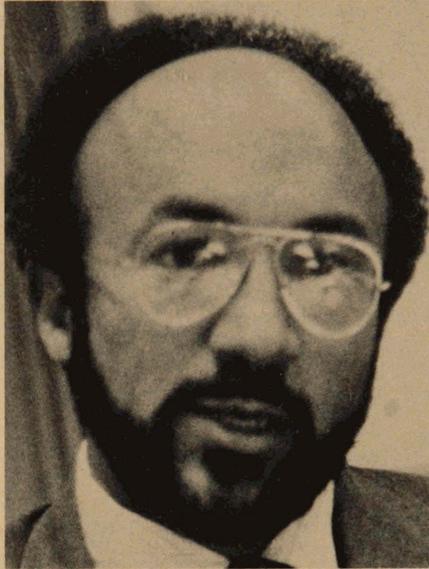
"The subject grant ranks as one of the largest this Foundation has committed in its history to such a purpose," continued the letter. "It was authorized with a full appreciation of the fact that the Benedum Foundation is thereby joining in a remarkable tradition of excellence in legal education and research. The continued strength of our society is dependent upon the kind of scholarship, breadth and sophistication in the law which only Michigan and a few others are capable of producing."

Michigan law Dean Theodore J. St. Antoine said the Benedum grant, contributed as part of the Law School's capital campaign, "came at a critical time, when we were preparing to break ground for the new building. The grant moves us significantly forward in reaching our campaign goal of \$10 million and will help us complete our new building."

## Harry Edwards Named To Publishing Board

U-M law Prof. Harry T. Edwards has been named to the editorial and advisory board of the West Publishing Company's law school department.

The board now includes the following law professors: Jesse H.



Harry Edwards

Choper, University of California (Berkeley); David P. Currie, University of Chicago; Edwards and Yale Kamisar of the U-M; Ruth Bader Ginsburg and Michael I. Sovern of Columbia; Robert Keeton and Arthur R. Miller of Harvard; Wayne LaFave, Illinois; Richard Maxwell, U.C.L.A.; and Charles Alan Wright, Texas.

U-M law professors are also advising other law book publishers. Prof. Alfred F. Conard is chairman of the advisory committee of Bobbs-Merrill's contemporary legal education series. Prof. Francis Allen has long been a member of the editorial advisory board of Little, Brown & Co.'s law book division.

## James Martin Favors U.S. Science Court

In considering political matters relating to scientific issues, Sen. Edmund Muskie of Maine is said to have yearned for a "one-armed scientist" who would not follow each assertion with the statement, "on the other hand. . . ."

That is precisely the function that a U.S. "science court" could perform, providing factual, scientific information as a basis for policy considerations made by other units of government.

So notes U-M law Prof. James A. Martin in an article analyzing various proposals for the creation of such a science court.

In a society where science and technology are playing an increasingly dominant role, Prof. Martin lists several reasons for the creation of a science court:

—The need for accurate information to serve as a basis for deciding important policy questions. For example: "Will freon damage the upper atmosphere and thereby increase the incidence of skin cancer, or will it lower the oxygen level of the atmosphere?" Or "is saccharin a dangerous food additive?"

—The court would tend to reduce the power exercised by scientists, limiting their contributions to scientific facts, as distinct from social views and policy recommendations. Too often, says Martin, "the social views of scientists—the soundness of which may not be particularly related to their scientific learning—are imposed under the guise of scientific expertise."

—To eliminate the opportunity for policymakers to hide policy decisions behind scientific conclusions. "For example," notes Martin, "whatever might be the merits of continuing the present penalties for the use of marijuana, legislators ought not be able to justify their position on this issue by pointing to the now-discredited notion that marijuana is physically addictive."

—To identify false claims, especially when they arise in the course of public debate.

"The freon case," says Martin, "is a good example of the kind of issue science court proponents would like to see submitted to the court because, almost immediately after the initial suggestion of harm to the atmosphere from freon, industry representatives came forward with claims that the danger was not nearly so great as suggested."

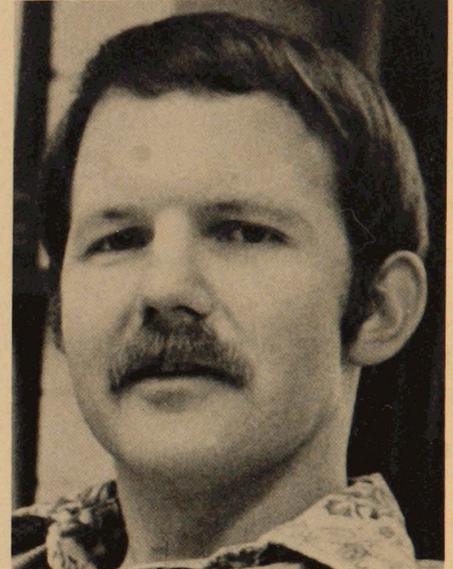
"The freon controversy also serves to illustrate the difficult problems that often confront policymakers who must determine both scientific facts and public policy," notes Martin.

"If the worst fears of the original researchers are realized, there could be thousands of extra cases of skin cancer per year, and the oxygen level of the atmosphere could drop. Juxtaposed against these highly speculative dangers . . . are the loss of a useful product (aerosol spray cans), harm to an industry, and the loss of many jobs that it provides."

Martin notes that opposition to the idea of a science court has generally

focused on the claims that "the attempt to isolate scientific issues from political issues will prove impossible" and that, "by making pronouncements on controversial scientific matters, the science court would stifle further consideration, debate and research on the matter."

Various proposals for a science court are now being studied by a task force of the Presidential Advisory



James Martin

Group on Anticipated Advances in Science and Technology.

In one popular model, suggested by Dr. Arthur Kantrowitz of Avco Everett Research Laboratory of Everett, Mass., the science court would consist of both advocates and judges, who would issue rulings only on scientific aspects of public policy questions presented to it, carefully avoiding "political and moral issues," notes Martin.

"The advocates should be drawn from among scientists working in the field in which the controversy arises. Science court judges, on the other hand, should be people who 'understand the rules of scientific evidence, have no intellectual or other commitments regarding matters before them, and possess the mature judgment needed to weigh the evidence presented.'" notes Martin.

"Judges in the Kantrowitz model would be chosen from a panel by the advocates for each side, with a 'right to challenge judges for evidence of prejudice.'"

Another important aspect of the court would be that its findings would be published, subject to national security restrictions, says Martin.

Another suggested model for the court, according to Martin, would pit the adversaries against each other before Congressional committees and in

televised debates. "Members of Congress and television viewers could then make up their own minds as to the scientific and policy questions at hand."

Martin continues: "The common thread among the many models suggested . . . is a mechanism whereby the factual, scientific components of important public questions can be separated from policy considerations and evaluated by judges who are both scientifically competent and neutral."

By contrast, current methods of evaluating scientific data for public policy decisions are much more limited in scope, notes Martin.

One method, for example, is the use of expert witnesses by Congressional committees and subcommittees, and in judicial trials. Another method is the use of advisory panels composed of both scientists and laymen, notes Martin.

But a common weakness of these methods, according to the U-M professor is the lack of cross-examination of the expert witnesses. And a weakness of the advisory panel concept, says Martin, is that, because such a panel is not elected or appointed to make policy but rather serves as an arm of a policy-making unit, its rulings would carry less weight than that of a panel assembled to determine objective scientific fact.

## Alumnae Conference Slated For October

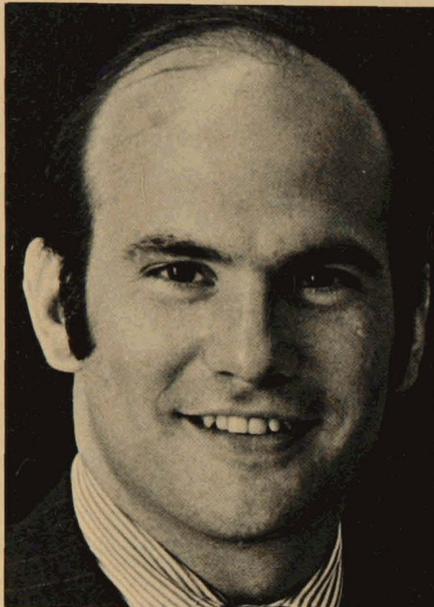
The U-M Women Law Students Association (WLSA) has scheduled an Alumnae Conference Oct. 20-22 at the Law School.

The conference is an attempt to "encourage female alums to return to Ann Arbor, to meet with current women law students, and to explore relevant legal topics in a series of panel discussions," notes Beverly Bartow of WLSA.

Although the full schedule of events has not been finalized at this time, Bartow notes that the conference will include an evening cocktail party Oct. 20; panel discussions Oct. 21 on such subjects as minority women in the law and coordinating a law career with family responsibilities; an evening banquet Oct. 21 featuring former U.S. Congresswoman and U-M law alumna Martha Griffiths as speaker; and an informal brunch Oct. 22.

Alumnae interested in participating in any of the panel discussions should contact WLSA, 306 Lawyers Club, 551 South State Street, Ann Arbor, Mich. 48109.

# alumni notes



**Christopher B. Cohen**, a member of the Law School class of 1967, was recently sworn in as principal regional official for the Chicago office of the U.S. Department of Health, Education and Welfare (HEW). Since 1971 Cohen has served as alderman in the 46th ward of northside Chicago, where he was involved in work with a variety of ethnic groups and in a number of socially oriented programs, including removal and rehabilitation of abandoned, burned-out buildings. He has been a member of the Chicago law firm of Schwartzberg, Barnett and Cohen. Among other positions, he served as deputy Cook County Liquor Control Commissioner and hearing officer; law clerk and staff attorney for the Legal Aid Bureau of the United Charities of Chicago; intern with the Civil Rights Division of the U.S. Department of Justice; and staff assistant to U.S. Senators Abraham Ribicoff (D-Conn.) and Robert Kerr (D-Okla.). Cohen, 35, received his undergraduate degree from the U-M in 1964. This is not the first association of the Cohen family with HEW. Chris's father, Dean Wilbur Cohen of the U-M School of Education, headed HEW in 1968.

# BUSINESS CORPORATIONS IN AMERICAN SOCIETY

by Alfred F. Conard

Henry M. Butzel Professor  
The University of Michigan

[Delivered at the Second Regional Symposium on Structure and Governance of Corporations, sponsored by The American Law Institute—American Bar Association Committee on Continuing Professional Education, Sea Island, Georgia, December 1, 1977.]

## The Societal Takeover

If Ben Franklin and Tom Jefferson could be with us today, I don't think they would be astounded by the executive jet that flew us here from Atlanta. I expect that Jefferson would pull a couple of sketches out of his saddlebag to show that he was thinking of a lighter-than-air machine to move tobacco from Charlottesville to Newport News. Ben would say it was in the back of his mind when he flew his kite. But I think they would be really amazed to discover how the life of America—its means of eating, clothing and sheltering itself, its workways and work places, its culture and ideals—has come to be centered around the institution of the business corporation.

The business corporation was a phenomenon seldom encountered by the founding fathers, probably seen about as often as elephants and giraffes. Williston counted seven in existence before the U.S. constitution. He certainly overlooked some, but incorporation was so rare in governmental activities of the time that it was not even mentioned in the U.S. constitution. The 18th century books on "corporations" dealt primarily with municipal and ecclesiastical corporations, not business corporations. A strict constructionist might argue from this that the power to regulate in corporations was reserved to the states, but a more plausible inference is that it was conceived of as one of the tools—like licensing, or prohibiting—by which powers such as the interstate commerce power and the currency power should be exercised.

Adam Smith, who declared the principles of economic freedom in the same year in which the Continental Congress proclaimed political freedom, had no more conception of the future role of business corporations than did the colonial bumpkins. His principal discussion of business corporations—which he called "joint stock companies"—is found in his book *The Revenue of Sovereign*, under the heading, "Of Public Works and Institutions which are necessary for facilitating particular Branches of Commerce." He is emphatic about the inferiority of corporations to individual proprietorships. "Negligence and profusion" he says, "... must always prevail in the management of the affairs of such a company."

In contrast to their insignificance in the world of the founding fathers, business corporations are the biggest institutions in American life today. Their



revenues—roughly equivalent to the money they handle—amounted in 1970, to about \$1.7 trillion, out of total business income of about \$2 trillion. This was about eight times the federal government revenue of about \$200 billion, and about five times the total federal, state and local government revenues of about \$350 billion. Total educational expenditures in 1970 amounted to about \$70 billion, or four percent of corporate revenues, and total church expenditures to a piddling \$3.5 billion, or two tenths of a percent of business corporation budgets.

But the real significance of corporations does not lie in the fact that they take in more money than governments, universities or churches. They provide the scale of promotion by which most Americans judge themselves to be successes or failures. Corporate leaders have founded the great foundations and are among the major benefactors of universities, churches and political parties, to which they bring the values that they have learned on the corporate racecourse.

It is no exaggeration to say that business corporations have taken over the positions of societal dominance occupied at other times by the nobility, the priesthood, the country squires and the generals. These are reasons enough for this gathering of juristic leaders to give to the structure and governance of business corporations some small fraction of the attention that we lavish on the structure and operation of political government.

### The Dimensions of Corporations

If we are going to talk about the structure and governance of corporations, it is essential before we start that we have a notion not only of the dimensions of corporations in the aggregate, but of the extreme variations in the dimensions of corporations in particular.

If the assets and revenues of all corporations were divided evenly among them, they would have assets and revenues on the order of one million dollars apiece. This would imply a division of wealth and power not too different from what Thomas Jefferson contemplated, except that factories would be substituted for plantations, and employees for slaves. But the facts are quite different. There are about two million business corporations in the United States, and they differ among themselves as widely as fleas differ from elephants. Some have assets and revenues in the tens of billions, while the great majority are found under a million.

Because of this diversity, many of the statements that are perfectly valid with regard to corporations like American Telephone and General Motors are implausible when applied to the 99.99 percent of corporations with assets and revenues of less than a billion dollars, and complete nonsense when applied to the 90 percent of corporations with assets and revenues of under one million. Although the variety of dimensions is almost infinite, we can get a helpful grasp of the subject by thinking of business corporations as distributed among four types.

At the top of the heap stands a class of corporations which Phillip Blumberg has appropriately called the "megacorporations." Their distinctive characteristic is that they are too big for anyone to take over by a tender offer, and their shareholders are too numerous to permit a revolution by proxy fight. The well-known paradigms of this class are American Telephone and General Motors.

Melvin Eisenberg has emphasized the limited number in this class by referring to the "AT&T myth." But it is not a myth that AT&T and GM are immune to takeovers and proxy fights. And it is not a myth that there are scores of other corporations which are equally immune. I would guess the number at around 200, which is about one one-hundredth of one percent of all U.S. corporations.

These are the great corporations that have inspired most of the contemporary comment about corporations, not only the critical comments of A. A. Berle, A. J. Livingston, Chris Stone and Ralph Nader, but also the sympathetic analyses of John Calhoun Baker and Peter Drucker. Their writings are misleading insofar as they treat these megacorporations—as "the corporation," or "the modern corporation." But they are quite right in suggesting that these colossi set the style for the other 1.6 million corporations and that each of them can by its own actions exert a palpable influence on the national economy, and many of them on the nation's foreign relations.

A second segment of the corporate population might be called the "available" corporations. They are available in two senses. Their shares are offered for sale on the public financial markets, and the entire company is small enough so that it is susceptible to being gobbled up by a larger company and vulnerable to revolution through a proxy fight. In terms of size, most of the companies in this group will have revenues of more than a million (without which they would not be publicly traded) and less than a billion (which would make them into megacorporations).

What distinguishes these companies from the megacorporations is that they are not immune to proxy fights and takeovers, and are not, therefore, a part of the AT&T syndrome. It does not follow, however, that shareholder democracy is running riot in their ranks. Most of the time their managements rule unchallenged and escape the harassment which consumerists, environmentalists and integrationists lavish on the managers of more visible targets such as General Motors and Exxon.

There are a number of widely prevailing misconceptions about this class of corporations, which are often wrapped up in the loose classification of "publicly held corporations." One is the assumption that they are co-extensive with the companies that are subject to the reporting, proxy, takeover and short-swing trading rules of the Securities Exchange Act of 1934; they are not, because there are between 15 and 20 thousand companies publicly quoted in the pink sheets, and only about eight thousand filing annual reports under the Exchange Act. All together, publicly quoted companies comprise about one percent of the active business corporations in the United States. We still have about 99 percent of U.S. corporations to account for.

From most of the current literature of corporations, you might assume that the corporations that are not publicly quoted are closely held. This would be untrue, if we give any meaningful significance to "closely held." I assume that "closely held" means held by shareholders who are not more numerous than the thirty which has been adopted as a limit by the more generous of close corporation statutes. If that is true, there is a big gap between the companies that are widely enough held to be publicly quoted and those which have 30 or less holders. This gap is occupied by a third class of corporations in which might be called the awkward stage—too small or uninteresting to be noted and quoted by dealers, and too large to enjoy the advantages of close corporations. But they are too numerous to be ignored in any serious conversation about reforming corporation law. I think there may be as many as a hundred thousand of them.

Having disposed of the megacorporations, the "available" corporations, and the "awkward stage" corporations, we are ready to talk about the closely held corporations, with thirty or less shareholders. This is where 90 to 95 percent of all corporations are found. They include the one-man companies, the family companies, most of the subsidiary companies and the joint venture companies. Most of them are definitely in the small business category, with revenues and assets of under a

million dollars. In fact, the median American corporation has assets and revenues in the area of one hundred thousand dollars, and about three shareholders.

Most of the things said by economists and sociologists about corporations have nothing to do with this set. Their decisions do not set national levels of employment or investment. The securities laws touch them hardly at all, and they frequently ignore the norms of the corporation codes. This is somewhat ironical, because these are probably the only kinds of corporations in which it would be possible to hold a meaningful shareholders' meeting attended by a significant fraction of the shareholders, with a chance to influence one another's minds. But instead of using this opportunity, closely held corporations commonly ignore the form of shareholders' and directors' meetings; sometimes they systematically exclude the ceremonies of corporate democracy by contracting among themselves on offices, salaries and perquisites.

### The Involution of Corporate Control

A second aspect of modern corporations which would profoundly shock Jefferson and Franklin, and which shocks a number of contemporary observers, is the peculiar distribution of power. Since corporations dispose of greater resources than governments, the question of who controls them can hardly be less important to the general welfare than the question of who controls the governments of cities, states, and even the federal government.

The legislative plan, with its superficial resemblance to political democracy, is well known. The investors of equity capital control the corporation through the election of directors who in turn appoint and remove the executive officers. In exercising their power, the equity investors are presumed to act to maximize their common interests as investors—primarily to make profits, but subject to the same constraints of humanity and ethics which they exercise in their personal affairs. How frequently this system operates in practice, no one seems to know. I am prepared to assume that it prevails in the great majority of business corporations. But we know there are some very important deviations from it, which we must bear in mind if we are to make a valid evaluation of corporate structure and governance.

The most notorious deviation is the one that occurs in the companies whose ownership is so large in total value and so dispersed in numbers that the investors do not even try to control the management. This is the phenomenon described by Adolph Berle, whose exposé probably inspired section 14 of the Securities Exchange Act of 1934. The irony is that forty-three years later, management control appears to be more widespread than it was in 1934. The proxy rules may have contributed in a minor way to the proxy fights of the 1950's in smaller companies but have had little if any visible effect on the 200 largest corporations which were the focus of the study of Berle and Means.

A second deviation from the legislative norm consists in the possession of the largest blocks of shares in the largest companies by institutional investors. These institutions have all the legal incidents of title, but they have no convictions about what business the company ought to be in, or how it ought to treat its employees and consumers. Their job is just to make a good investment record. Ralph Nader has suggested that the institutional investors should solicit and carry out the instructions of their constituents. This suggestion seems to ignore the fact that investors who have delegated all their investment discretion to institutions will have even less idea about how their companies should be run than about which companies their money should be invested in.

A third deviation consists in the ownership of controlling blocks of shares by other companies, whose interest in the dividends to be derived from the shares may

be a good deal less than their interest in other advantages which can be gained from the affiliation. The most spectacular examples of this phenomenon have occurred, or have been alleged to occur, in the relation of an international oil company to its producing subsidiary in some foreign country—Venezuela for example. The parent company may have considerably more to gain from buying the subsidiary's oil at a cheap price than from collecting whatever profits would emanate from the subsidiary after splitting them with minority shareholders and with the tax collectors of the host country.

The directors of the subsidiary are presented with a sharp conflict between their duties to the subsidiary corporation and their loyalty to the controlling corporation which gave them their jobs and may be their principal paymaster.

These three deviations are particularly characteristic of large corporations, but there is a fourth which is recurrently met in small corporations. The company tells its shareholders nothing about its business and keeps such poor records that an inspection of them, aside from its antagonistic aspects, would not reveal very much to an outsider and may not give a very good picture even to the insiders. It is run pretty much as a proprietorship, which treats the outside shareholders as poor relations.

### Conclusion

The responsibility for suggesting what changes, if any, are needed in the structure and governance of business corporations has been assigned to others. But I would like to offer a pair of observations of how the history and morphology of corporations should affect our approach to such changes.

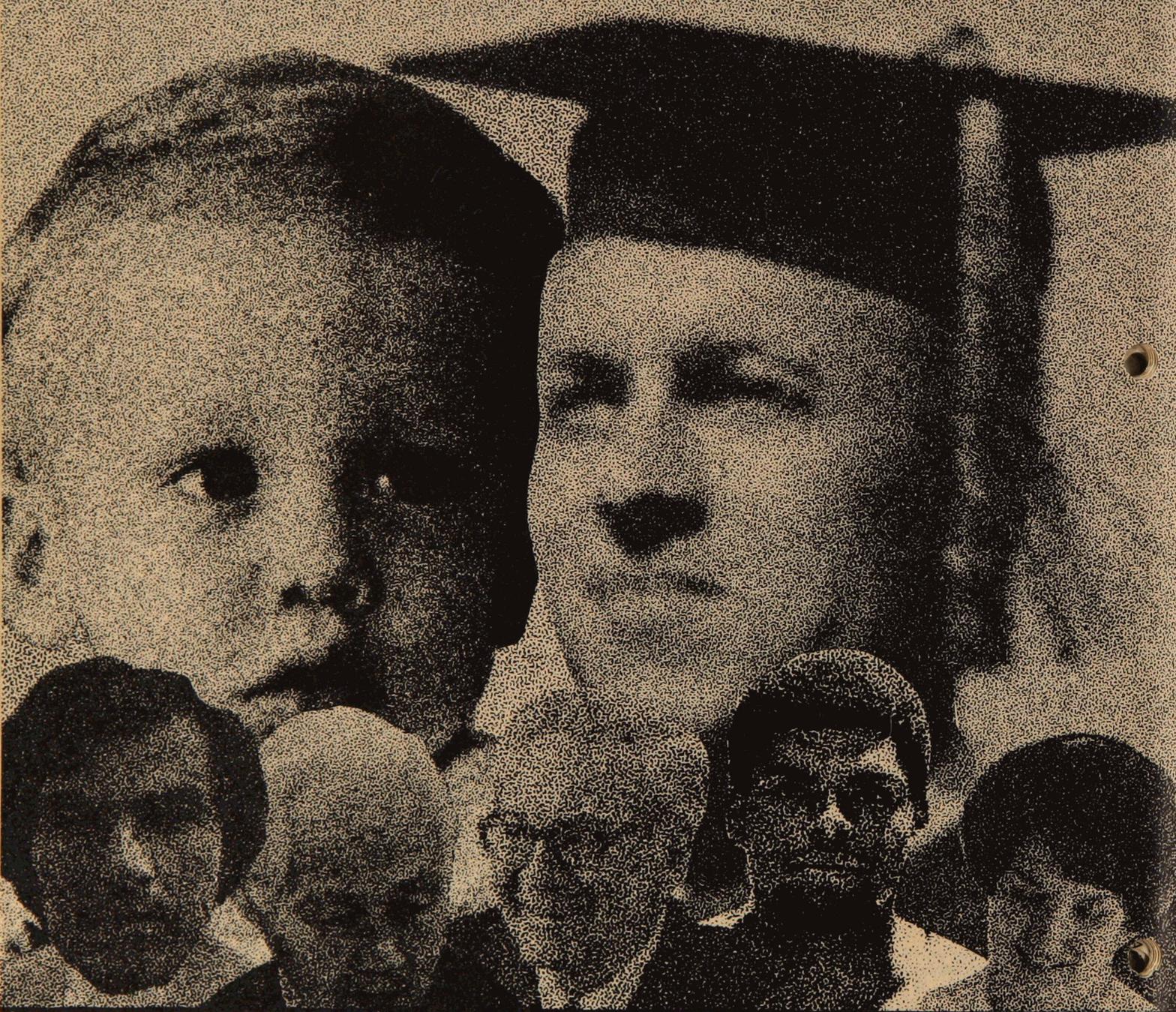
The first is that many of the proposals are made largely in contemplation of the megacorporations. This is most obviously true of the criticism of size. But if we look at the charges of domination of national governments, of lack of investor control, and of market dominance, we find they are based on assertions about the megacorporations. Although the proponents of reforms generally advocate their application to all "publicly held corporations," they have not laid a data base for that broad a coverage.

Furthermore, if reform proposals are to be extended to all publicly held corporations, some thought must be given to defining the group. The corporations which now report to the SEC are only about half of those which are quoted by brokers. If quotation by brokers is the criterion of regulation, can a corporation escape it by keeping itself out of the pink sheets?

On the other hand, there are a number of problems which are not at all related to public quotations and holdings. Ignorance of corporate affairs is certainly most acute not in the quoted companies, but in the unquoted ones. And the potential for abuse is greatest in the subsidiary companies, of which the minority holders may be very few. This potential is likely to be increased by the movement for "going private," which will deprive minority shareholders of the few shreds of information that they now receive.

The second observation is that reform of corporate structure is not an invention of Nader, Stone and Ratner, but has been going on throughout the history of the republic. If business corporations have served America well, it is not because they have been left to go their own way. We should regard corporate structure in the same way in which IBM views its computers and Xerox its copiers. They may be the best, but they are never good enough. We are not so far ahead in the worldwide race for industrial and financial leadership that we can afford to be satisfied with what we have. We should search for every means of perfecting the principal instrument of this leadership—the business corporation.

you,  
the law,  
& the  
changing future



1952

1977

by  
L. Hart Wright  
Professor of Law  
The University of Michigan

Speech given on Senior Day for December  
Graduating Class, December 11, 1977

On the average, those among you about to graduate have lived through one-fourth of a century. If future historians, appraising those 25 years, looked only at the covers of the monthly magazine *U.S. News & World Report*, they would be reminded that there is a repetitive quality to life and a certain monotony. They might even conclude that, in your time, there was virtually no change in the American landscape.

Illustratively, the April 4, 1952 cover-page headline inquired, "Business Picking Up?"

Twenty-five years later, a 1977 cover rephrased the same question: "Business: Will It Pick Up?"

Similarly, the November 6, 1952 issue headlined "New Threat of Inflation." Though you may be unaware of the 1952 circumstances which justified that statement, you certainly were not startled by the echoing headline on the April 25, 1977 cover page, "Drive to Keep Prices from Soaring." The parallels continued. Indeed, on one occasion, the *U.S. News*' cover page explicitly recognized the recurring nature of major developments. For while the August 15, 1952 cover page had queried, "Food Shortages from Drought?", the April 4, 1977 cover page asked, "Drought: Will History Repeat Itself?"

But do not be misled. The materials between cover pages, over that quarter of a century, would have reflected, if at all accurate, something much more characteristic of that period, namely, the constant change and variety in the U.S. and world scenes.

In your short life, the U.S. has grown from 157 million to 215 million people, an increase of 37%. The rise in the world's population is even more spectacular, from 2.36 billion to just over 4 billion—an increase of 70%.

Though our population grew only 37%, the employed civilian work force jumped over 50%, from 61.3 million to 92.2 million, in part because when you were born only one third of all adult women held full-time jobs whereas now almost one half of a substantially higher population group have full-time gainful employment.

Fortunately for all of us, the United State's gross national product—measured in constant, not inflated dollars—rose at a much faster pace than the population, growing by 99.1% over your life.

It is precisely in the setting of such changing factual terrain that the thrust of our laws—through which we both reflect and channel human behaviour—is often most easily re-examined and modified as to both the rights and duties of people.

Illustratively, Wilbur Cohen, a former Secretary of HEW, would tell you that our country's faster paced economic growth, in the context of the relatively smaller population increase of those years, made it easier in our democratic society to modify significantly, through laws, the income-distribution patterns otherwise generated by our marketplace.

The "haves" had only to "share" that net increase with the "have-nots" (rather than give up something they already had) to make possible Medicare, Medicaid, AFDC, financial aid for students—to say nothing of the dramatic growth in social security benefits and beneficiaries. All of these were possible because doubling of our gross national product facilitated our doubling of federal tax receipts.

But the 25-year change in this one facet of your life bore not alone on quantity. While our present basic federal income tax law—the Internal Revenue Code of 1954—was adopted a scant two years after you were born, the changes in its technical complexion, wrought since then by amendments designed to encourage through incentives one type of human behavior or discourage through disincentives another type, has taken the Senate Finance Committee's professional staff over 4,000 pages to explain in lay language.

Having tired of counting those pages, to your imagination I leave the task of calculating the enormous range of statutory changes inspired over that period by 50 different state legislatures—affecting every field of law and, thus, every avenue of life.

However, constant change in our society, over your life, was generated not alone by alterations and innovations—literally thousands—in our statutory rights and duties. Responsible also were equally dramatic changes in the constitutional rights and duties of our people. The host of my brothers on this faculty who devote themselves to criminal law would probably never forgive me if, in such context, I ignored *Gideon*, *Miranda*, and their progeny. But more significant for most was the change wrought in the early days of your life when *Brown v. Topeka Board of Education* laid to rest *Plessy v. Ferguson*.

This constitutional change shortly after you were born, calling for an end, in education, to state-sponsored segregation by race, was followed quickly by a much wider range of judicially and congressionally mandated changes in our race relations. The aggregate provided the occasion and a framework within which, across this land, could emerge a not atypical by-product—an attitudinal change—a new spirit!

In proof! The President who took office in the year you are to graduate from Law School came from the South—unimaginable at your birth with *Plessy v. Ferguson* still supreme. Even more unimaginable back then: In large part he—a Southerner—owed his victory over a Northerner to massive support he received from Blacks in the South, the North, the East, and the West.

Again, who could have imagined at your birth that the most attention-generating case pending before the Supreme Court in the year of your graduation from Law School—*Bakke*—would involve the question of whether

our attitudinal change had led us to be over zealous in designing a formula for affirmative action programs covering minorities?

Legally inspired changes—a constant over your life—in our rights and duties, and ultimately in our attitudes, came not alone, however, from constitutional decisions or statutes. Justice Frankfurter could have been speaking of the common law when he said:

The search for relevant meaning [that is, the actual dimension of a typically not precisely defined common law idea] is often satisfied not by a futile attempt at abstract definition but by pricking a line through concrete applications.

Whether, in a given circumstance, this "pricking" of "a line [case-by-case] through concrete applications" only clarifies or instead actually re-directs or changes what had seemed to be the thrust of a common-law idea is less important here than the fact that this "pricking" is and will continue to be an evolutionary process which will continue to change our lives in an evolutionary manner.

Not surprisingly, the change in our life, wrought by a single common-law decision is often far less discernible than that associated with a new statute which covered terrain so important that it attracted the attention of an entire legislature. Yet, typically in any one year, the aggregate common-law evolution is sufficiently noteworthy to warrant, as to each field of law, a thoughtful law review article. And the aggregate common-law inspired change over your entire life would obviously then warrant, as to each field, far more than a single volume.

In addition there will be those single common law decisions which break sharply with the past, impacting significantly and immediately on a wide range of people. Only illustrative are the occasions (1) when the Michigan Supreme Court overturned the earlier prevailing doctrine that certain non-profit institutions, such as hospitals, were free of tort liability for negligence, or (2) when yet other courts removed the earlier immunity which prevented one spouse from suing the other spouse in a tort suit, or (3) when courts, on their own, shifted from the notion in a tort suit that contributory negligence was a complete defense, to the practice of spreading damage assessments between parties on the basis of comparative negligence.

What, my young friends, has all this to do with today's ceremony? After all, you were not responsible for any of

the changes to which I have referred. Nor did change *qua* change begin in your time; nor will it terminate with today's proceedings.

Change—a constant of life—began with the beginning and its pace has always been rapid. Remember that the urbanized, relatively sophisticated America into which you were born was, only one full life span earlier, a predominantly rural nation. Of its mere 40 million inhabitants, of whom only 1% had graduated from high school, three-fourths lived on farms or in villages having less than 2,500 population.

Thus, though change is not peculiar to the quarter of a century in which you have lived, it is, nevertheless, peculiarly relevant to today's ceremony. In part, this is because endless variety and change characterized and so affected the common core of study to which your attention has been devoted here. In substantial part, our aim has been to help you sharpen your analytical skills so that hereafter you could help society determine how the variations in our constantly changing terrain should affect the substantive and procedural rights and duties of people. That will tend to be at the core of your task whether you are counselling, negotiating a settlement, litigating, appearing before regulatory or legislative bodies, or sitting as judge, regulator or legislator.

No doubt, in the life of a lawyer, there also is much that becomes routine. But it is the skill and thoughtfulness with which a person trained in the law deals with change that is most important to our society. Mere information that describes today's factual terrain, and gave loosely defined dimension to the law as you now understand it, is, of course, an important part of your mental equipment but only because, on some tomorrow it will be a very useful but only historical point of departure.

In short, it is the tasks of those tomorrows that will require the most sophisticated of your skills and wisdom. And the ensuing changes, to which your skills must be addressed, are certain—if viewed cumulatively in retrospect as of the now seemingly distant year you retire—to have been wide if not wholesale in thrust.

To justify the supposition that, within your professional life, there will be at least tens of thousands of micro-clarifications or changes in the common law, one need only count the number of cases—literally thousands—now docketed with our state supreme courts. Indeed, the product-liability legal changes which alone will unfold in just the remaining years of Ralph Nader's life are fairly awesome to contemplate.

And what a miscellany of legal changes could spring from any one of many demographic shifts due to occur. Half a century ago the number of men and women over 65 were equal; today for every 100 women in that age group there are only 60 men; and, if present differential trends continue, at your retirement there will be 2 women over 65 for each man over that age.

Yet the magnitude of the legal changes created by such population changes may be insignificant in comparison to those created by the energy problem. Cheap energy and cheap oil, available until the immediate past, helped create our national power and affluence. At your birth, petroleum was a "non-problem," subjecting us annually to substantially less than \$1 billion in import costs. Now, in the year of our highest trade deficit, the petroleum import cost for just the first 6 months exceeded \$23 billion. It is not inconceivable that by your retirement oil may be more or less unavailable at any price.

Affecting, but simultaneously cutting across the entire energy problem and generating its own independent legal changes, will be our rapidly growing environmental concerns.

But not all the multitude of domestic legal changes certain to take place in your time will be attributable wholly to changes in our own factual terrain. Christopher Columbus brought this land mass into the world; and never since has it stood outside it.

It was perhaps one thing for tiny Belgium to export, in bits and pieces primarily throughout Europe, half of its gross national product and import a similar amount. But oh how the world, and our nation with it, has been affected, and will continue to be affected in so many yet unknown ways, by our export of whole corporations, called foreign subsidiaries of which our domestic (but in truth multi-national) corporate parents now own well over 30,000.

But this development, shrinking this globe, was not a one-way street. For example, oil aside, it may have been tolerable for the Japanese to take over our television industry. But is it equally tolerable for a major producer in one of our most basic industries, Bethlehem Steel Corporation, to report, this last quarter, the largest quarterly loss ever incurred by an American corporation and, in the process, point at Japan? Certain to affect our laws in diverse ways is the recent congressional testimony of a former cabinet official to the effect that the new steel plant in Kimitsu, Japan, is three times as productive per

worker as the enormous but old United States Steel Company plant in Gary, Indiana. Further, on average, at 327 metric tons per employee, Japan's entire steel industry was said to be 25% more productive per employee than our own.

How too are the laws relating to our agriculture likely to be affected by the escalating food problems of the skyrocketing populations of the less-developed countries?

Be that as it may, at this point in time, your own individual skill, to react analytically and thoughtfully to changing terrain on helping a constituency of our society deal with rights and duties you simultaneously may be trying, creatively, to identify—is something you now are only about to put to the test in a real world context.

Why then celebrate with you now? The answer is simple enough.

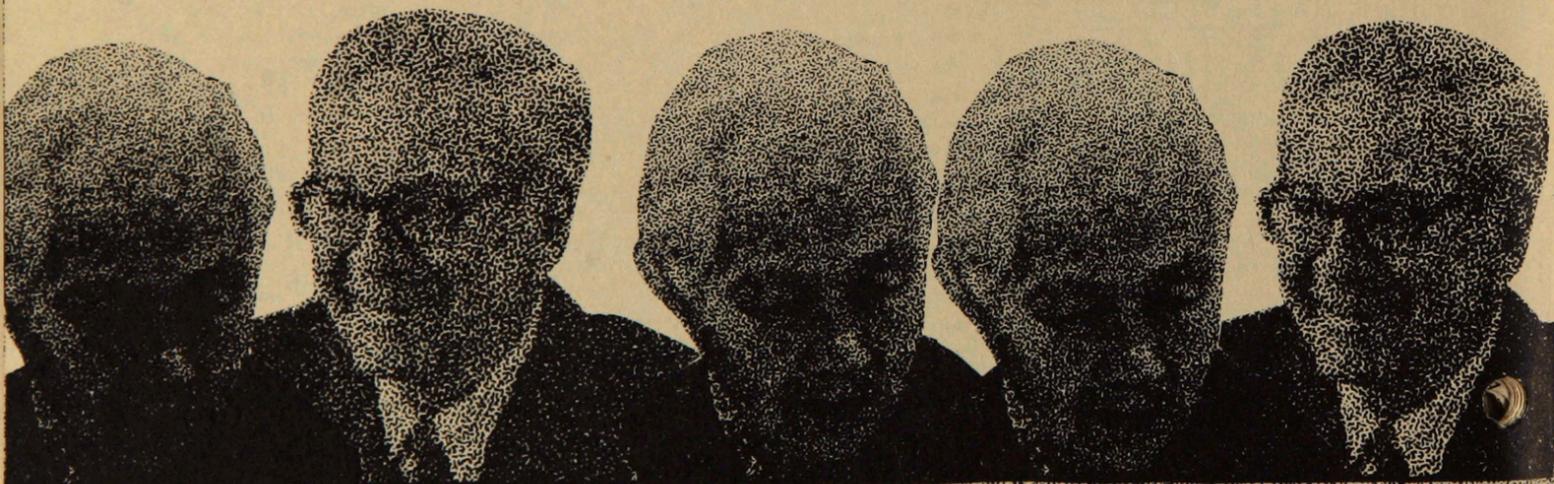
Because of your capacity and your industry, you were among the 80% of your generation who finished high school. You then were among the 32% of that 80% who, within the normal time, graduated from college. For three years since then, you have had to compete with peers who had met standards awesome indeed when viewed relatively. For three-quarters of you ranked in the top 10% of those across this land who took the Law School Admission Test.

Was so selective a process required if the most demanding task ahead involved mere preparation of a deed?

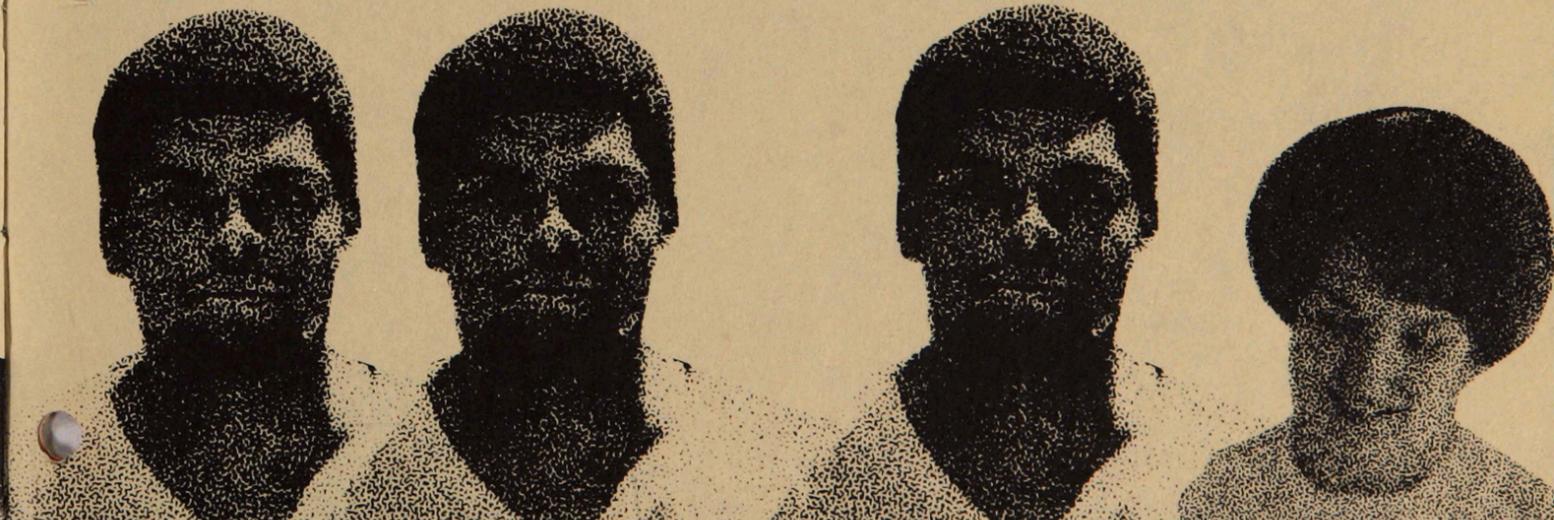
The short answer is that we have gathered here to celebrate your obviously successful response to society's institutionalized effort to hone to a fine edge the thought processes of the relatively few who are among those deemed best suited to help society's constituencies, at both macro- and micro-levels, deal with changing rights and duties in a rapidly changing and increasingly complex world.

Some of you have heard that on the occasion of Queen Victoria's Diamond Jubilee procession through the streets of London, a male Cockney, of considerable age, darted from the street-lined crowds in order to whisper a private greeting to his dignified, if dumpy, Queen as her carriage passed by. Were he here today, I believe he might have paraphrased his 1897 remark by saying: "Go it, my young friends, go it, so far, you've done it well!"

And so say I.



1952



1977/1952

1977



Some  
Impressions and  
Reflections on  
Observing Legal  
Proceedings in  
the People's  
Republic of  
China

by Sallyanne Payton  
Associate Professor of Law  
The University of Michigan

and Christina L. Whitman  
Assistant Professor of Law  
The University of Michigan

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"Through the use of force one causes  
men's mouths to submit; through  
reasoning one causes their minds  
to submit."

Very few foreign visitors have been allowed an opportunity to observe legal proceedings in the People's Republic of China. We were included in the first American group ever favored with a professional exchange legal tour. During the month of May 1977, we spent three weeks in China with a group of Black American judges and lawyers, headed by the Hon. George C. Crockett, Jr., Judge of the Recorder's Court of Detroit. Since we ourselves would be skeptical of the claim of a visitor to the United States who purported to have "studied" the American legal process during the course of a three-week visit, we make no claim to authority in these observations of the Chinese legal process. We offer our perceptions for whatever contribution they may make to the sparse Western knowledge of social control in the People's Republic.

Because of the composition of our group (Black Americans are considered Third World people for Chinese international political purposes) and the high esteem in which the Chinese hold Judge Crockett (a U-M law graduate), we were invited to observe legal proceedings and institutions previously barred to American visitors. The most memorable events of the trip were our visits to a criminal trial in Peking and a labor reform farm outside of Nanking. So far as we have been able to determine, we were the first Americans ever to have witnessed a criminal trial and may have been the first foreigners ever to have visited a labor reform farm. We also saw a divorce mediation proceeding in Nanking and toured the Shanghai prison. Throughout the trip we had opportunities to discuss what we had seen with judges of the local and national courts, with lay mediators, law professors, and law students. Everyone with whom we came into contact was cordial and forthcoming, an attitude that we attribute to the new relaxation in Chinese-American relations following the overthrow of the "Gang of Four."

We were invited to observe a criminal trial conducted by the Peking People's Intermediate Court only a few days after our arrival in the People's Republic. We had already become familiar with the flat, spreading city crossed by wide boulevards. At virtually all hours these boulevards carry a flood of bicyclists. Motorized traffic is minimal; the few trucks and jeeps belong to factories, communes or government bureaus. All passenger automobiles are chauffeured and, we were told, either belong to government units or are available for hire to particularly favored individual citizens. Apart from traffic lights and policemen at a few major intersections, traffic priorities seem to be established by skill in maneuvering and liberal use of the horn. Peking streets are no place for an amateur. We were surprised, therefore, to find that the defendant in the trial we were to see stood accused of a crime that we thought we had left behind in the West: he had stolen a jeep and gone joyriding.

The trial was held in one of the virtually identical meeting rooms that we were to find everywhere in China—an open, white room decorated with large color pictures of the late Chairman Mao Tse-tung and current Chairman Hua Kuo-feng, and slogans written in Chairman Mao's calligraphy. This particular room was located in the defendant's place of work, the Peking People's Fine Arts Press. Most trials in China are held "on the spot," in the defendant's residence or factory, to ensure the participation of those who live and work with the defendant and know him best.

A Chinese trial, unlike our own, is not a forum for determining the defendant's guilt or innocence. No fact-finding occurs in the courtroom. An investigation of the facts has already been made, and the court has both the results of that investigation and a confession by the defendant in hand when the trial begins.

The initial investigation is made by the public security office (comparable to our police station) before the case is referred to the court. After the court receives the case, the judge "confirms the evidence" by making a second investigation that to some extent duplicates the one already made. She discusses the case with witnesses and participants in the alleged crime, with the defendant's family, friends, and co-workers, and with the supervising Revolutionary Committee at the defendant's workplace. The defendant has the right to call his own witnesses to talk to the judge. The investigation is wide-ranging because the judge is interested not only in the circumstances of the offense itself but also in why the defendant erred. These investigations place a heavy burden on court personnel. Our Chinese hosts were shocked at the weekly caseloads carried by the American trial judges in our group; they could not understand how the judges could conduct so many investigations in so short a time.

At some point in the investigation most defendants confess to the crime with which they are charged. We were told that these confessions are not "coerced" because no pressure is placed on the accused to confess unless extrinsic evidence indicates that he has committed the crime. Once such evidence has been found, however, the pressure to confess is considered a positive force, for it "demonstrates the power of the Party's policy" and "shows the defendant a way out" of the trap in which he has found himself. Our hosts also admitted that, without such pressure, few defendants would admit to their crimes.

Our hosts insisted that the defendant's confession does not necessarily end the investigation. If the security office or the court is not certain that it has come to a true understanding of the case it will continue to probe. The judges of the Peking Municipal Court indicated a willingness to investigate and re-investigate as long as necessary to reach total agreement on exactly what happened. Reaching a consensus of this sort is regarded as more important than the "efficient" processing of cases.

All of the fact-finding, then, is concluded before the trial takes place. The trial serves other, primarily educational, purposes. The theory is that the defendant is educated through "mass criticism" by his residence and work-mates who participate in the trial. These observers—"the masses"—themselves gain an increased awareness of criminal sanctions and the functioning of the legal system. Finally, the masses participate in determining the penalty to be imposed. The court's consultation with the people on the question of penalty is called "following the mass line."

The one concrete decision that is made in the course of the trial is the severity of the sanction to be imposed on the defendant. The judges will have discussed the sanction with the defendant's associates for some time before the trial, but the actual decision does not take place until the trial itself.

The defendant who had the misfortune of being an example to our group of "foreign visitors" and a similar Japanese group was a 22-year-old press worker. On an evening in November 1976, the defendant had gone with

other workers from the Fine Arts Press to see a movie, but he left early, splitting off from the group. He noticed a jeep left in front of a hotel by members of a visiting commune. Having stolen an "ignition" device at some earlier time, he now started up the jeep and took off down the main boulevard of Peking at some 60 m.p.h. Of course he had never learned how to drive, and his adventure soon ended in the expected fashion: turning a corner, he crashed into an elderly woman cyclist, leaving her uninjured but damaging her bike. The jeep hit a telephone pole and a wall, and would go no further. The defendant tried to run away, but he was captured by some passing motorists and was taken immediately to the local Public Security Office.



A professional judge and two lay assessors presided over the trial. The assessors, who assisted the judge in the pre-trial investigation and who have equal voices in deciding on the sanction, were both from defendant's factory. One was a cadre in charge of political work, and the other was a worker. The defendant was represented by two counselor-advocates—a fellow worker and a deputy workshop director, also from the factory. Two procurators, or prosecuting attorneys, from the Peking Municipal Public Security Bureau presented the "government's case."

Although the fact-finding had been completed, the results of the court's investigation were presented at length at the trial. Initially, the defendant was questioned by the judge. He was asked the familiar questions—his name, address, and occupation—but he was also asked for such data as his educational level, his birthplace, his family and personal background (in this case, worker-peasant), and the names, ages, and occupations of the members of his family. A statement of the facts of the alleged crime was read by a procurator, and the defendant was asked to make a public confession. His confession was very brief, and apparently unsatisfactory, for the judge "cross-examined" him at some length. She made him repeat the more shameful aspects of his story with more detail: "Did you say anything [when you got out of the car]?"

"I denounced the woman comrade and asked her, 'Where did you learn to ride a bike?'"

....  
"Did the car start [when you got back in to escape]?"

"No."

"Why not?"

"It had hit the wall."

After the defendant confessed publicly, the rest of the evidence was introduced. The assessors read written depositions from the owner of the stolen jeep and from the men who had captured the defendant at the scene of

the accident. None of these persons appeared at the trial, but the defendant was given an opportunity to challenge their accounts. The only witness actually present in the courtroom was the elderly victim. She was questioned at some length by the procurator and, again, the defendant was asked to confirm or deny what she had said. He disputed none of the testimony.

The defendant's recital of the facts of the incident was the least significant part of his public confession. After the presentation of the evidence he was asked to confess again—this time concerning the reason why he had committed the crime. His response was not surprising to our Western ears. The young man had simply wanted to see what it was like to drive a car. Besides, he didn't think that he would get caught. But he placed these motivations in a political context: he had been corrupted and wooed by bourgeois ideas; he had sought comfort and joy because he was not satisfied with what he had; he had been influenced by anarchism and had overlooked the study of the works of Mao, Marx, and Lenin. His crime was not "accidental" but was part of a general pattern of laxity in study and work. It represented an improper ideological point of view, rather than just a whim on an autumn night.

After confessing, the defendant was told to turn and face the audience of his peers. He stood with his head bowed, his hands behind his back, while one by one the "masses" rose to offer him criticism, to probe the root causes of his crime. Many spoke, both old and young, and they all, like the defendant, blamed the crime on the defendant's deficient political consciousness. The speakers pointed out that the crime had occurred in the nation's capital, where it had jeopardized the lives of the Central Committee and foreign visitors. Furthermore, it took place in November of 1976, a time when the rest of the country, especially the youth, were criticizing the bourgeois anarchism of the Gang of Four; the defendant, in contrast, was perpetuating this anarchism. Most significant was the defendant's condescending attitude towards his elders and others who had tried to encourage him towards better habits in work and study. The speakers, all co-workers of the defendant from the Fine Arts Press, appeared to express real resentment and animosity towards him. They obviously saw the crime as only the latest, if the most serious, infraction by an obstinate and proud young man.

The defendant was led from the courtroom before the second part of the trial, the purpose of which was to discuss an appropriate punishment. The procurators and the advocates had earlier played their only forensic roles by presenting the arguments for and against a severe sanction. The procurator had stressed that defendant's crime was planned and deliberate, and that it posed a serious danger to those on the streets of the capital. The advocates had agreed, but had pointed out that little damage had actually been done. They also emphasized that the defendant was a first offender, that he had made a full confession at a relatively early point in the investigation, and that he was of good class origin. Their crowning argument was that he had been influenced by the teachings of the Gang of Four, an influence that would no longer have the power to sway susceptible youths.

Now, in this second stage of the trial, the judge asked the observers—"the masses"—for their opinion. She rose and came from behind the table where she had been sitting. She transformed herself from a stern authority figure into a smiling and skillful leader of a group discussion. Again several people spoke. Their suggestions ranged from three years' imprisonment to one year of supervised work in the factory under the guidance of the "masses." The judge made sure that everyone who wanted to speak had his or her chance,

and finally summarized the views of the group—return to the factory with two years' supervision.

The decision, however, was not yet final. The judge called a recess, during which she consulted with the two lay assessors. Since the conference room upstairs was also the room in which foreign visitors were briefed and given refreshments, we witnessed the decision process. Against the cacophony of conversations in English, Chinese, and Japanese, the panel agreed that two years of supervision in the factory would be appropriate. Their decision was cleared with the chief of the criminal division of the Intermediate Court and with the Revolutionary Committee of the defendant's factory, all of whom had also been present at the trial. All agreed. We were later told by the judge that if approval had not been forthcoming, discussions among the masses, the court, and the officials would have continued indefinitely until a consensus was reached. In this case, the presence of foreign guests undoubtedly imposed some time limitations, but we were given the impression that in deciding on the sanction, as in making the pre-trial investigation, reaching a consensus was more important than judicial efficiency.

Court resumed downstairs, with the defendant and the masses present for the announcement of the verdict. After the verdict was rendered, the judge concluded with a lecture. She enumerated the lessons to be learned from the trial: (1) A good class background and a life in post-Liberation China will not make a good citizen in the absence of diligent political study; (2) the Gang of Four sabotaged the Revolution by branding the disciplined as "slavish lambs" and poisoning the minds of easily misled youth; and (3) the masses, armed with Mao's thought, can be relied upon to fight crime and protect the social order of the capital, as they did here by catching the defendant "on the spot" of the crime. The defendant was led away by two Public Security Bureau men in white tunics; the court filed out.

The sentence imposed on the defendant bears some resemblance to what we call probation, although supervision is the responsibility of a committee of security workers from his place of work, rather than a professional court employee. This committee will make a monthly report on defendant's behavior and will organize people in his family and neighborhood, as well as in the factory, to watch the defendant and to set him straight if he shows signs of going astray. He is under closer surveillance than other citizens, but suffers no decrease in salary nor other restrictions because of his status.

The entire trial process, we were told, had been telescoped for us. Ordinarily, there would be several mass criticism meetings before the court and the people agree upon a final disposition. Yet we had the impression that a real decision had been made in the course of the morning. The disagreement among the observers concerning the length of the sentence did not seem to be feigned for our benefit. And the anger and frustration of the defendant's co-workers communicated an emotional involvement in the case that we could understand.

The trial, with direct participation of the defendant's peers, and the sanction, which again draws upon the people to bring the erring defendant back into their community, appeared to be a very effective means of reforming social deviants. We were told that most minor criminal matters are handled locally by the revolutionary committees without requiring any court involvement at all, and that recidivism is relatively rare.

This effectiveness is purchased at a price that we in the United States are unwilling to pay—a willingness to use great peer pressure to extract conformity. And it presumes a social consensus about the way a good citizen

should think as well as behave that simply does not exist here.

Had the defendant in the Peking criminal trial been considered too difficult to be supervised and reformed by his co-workers, he would most probably have been sent to a labor reform farm. Our Chinese hosts were adamant in insisting that the term is "farm," not "camp," a conscious effort to distinguish them from Soviet detention facilities.

The labor reform farm that we visited was in Kiangsu Province, about 150 kilometers outside of Nanking. It had been established in 1951. This farm, set in lovely groomed countryside, housed 2500 prisoners. We were told that 80 percent had been convicted of regular criminal offenses, and that 20 percent were "counter-revolutionaries." The average age of the inmates was 30 years; the youngest was 25 or 26 years old. Most had been convicted of speculation, rape or corruption (which seems to mean embezzlement in our terms). They were serving terms of from three to 10 years. We were told that the inmates had come from all levels of society and that virtually all were literate, although some might have had a low cultural level. There were no persons from ethnic minority groups at this farm.

The farm is economically self-supporting. We were told that it has 8000 *mou* of cultivated land (a *mou* is between 1/3 and 1/6 of an acre depending on the province), on which the inmates produce rice, tea and other agricultural products. They also operate a ball bearing factory. We were served a sumptuous lunch derived entirely, we were told, from the produce of the farm. The inmates' ordinary schedule is eight hours of labor and two hours of study per day, one day in 10 for rest.

The farm operates with 200 staff people. Security is provided by a unit of the People's Liberation Army. The director of the farm disclaimed knowing how many PLA soldiers were in the unit. He emphasized that security was ensured by the very isolation of the farm: prisoners' heads are shaved, and they would be noticed and returned by peasants in the surrounding countryside were they to attempt to escape. As he put it: "We supervise the criminals not by walls but by the power of our policies."

The theory of reform is that criminal behavior is caused by reactionary world outlook. The farm officials further indicated three specific objectives in their work: first, criminals must confess their crimes and obey the law (including farm rules); second, they must be educated in the general socialist system and understand the trend of history through studying the classic works of Marxism-Leninism and the Thought of Chairman Mao; third, they must be taught specifically the pitfalls of despising labor and have their laziness drilled out of them. The prisoners live and study in groups, and must elect a group leader and a deputy group leader. Within their units they are required to practice criticism and self-criticism; however, in response to specific questions, we were told that a living unit is not responsible for the behavior of its individual members, that an individual is responsible for his own reformation. Corporal punishment is not used; the officials told us that they "respect the personalities" of the prisoners.

The technique of reform is to combine punishment with leniency. Thus, the prisoner is praised for repentance. The officials talked of "mobilizing the criminal with enthusiasm for his transformation." If the officials think they have seen a real transformation, they may recommend to the court that the sentence be reduced or the prisoner be released early.

On the other hand, the penalty for recalcitrance may be high. The officials talked of "isolating the small group

of diehards." We were told that a prisoner who is not making appropriate progress would first be warned. His misdeeds would then be recorded. If he persists, he might be placed in confinement. Finally, the farm officials might recommend that the court lengthen the term of imprisonment. If the court were asked to modify a sentence, it would conduct a hearing at the farm itself. In most cases the sentence served is the one originally imposed.

Farm officials denied having to deal with two problems that most concerned the trial judges in our group: the youthful offender, and recidivism. The average age of inmates at the farm was quite high by American standards; we were told later that especially difficult youths can be sent by their neighborhood units to special educational reform facilities rather than undergo criminal process. Our hosts in Peking and at the labor farm told us that recidivism is quite low, both among persons placed on probation and among persons who are released from the farm. When a person is released from the farm, he is given a work assignment in a community and is expected to become a self-supporting, respectable citizen. We were told that the usual practice was to return him to the community from which he came, with a guaranteed work assignment and living arrangement. It might be expected that those persons most likely to commit future offenses would reveal their tendencies during their incarceration, and might receive longer sentences pursuant to the recommendation of farm officials.

The farm consists of wide expanses of land broken by one-story, functional buildings: the main complex, the hospital, factories and living compounds. Living condi-

tions on the farm are spartan. The prisoners live in barracks. The one that we saw had a single platform about 25 feet long by nine feet wide, 18 inches off the dirt floor. Each prisoner has a straw mat, spread on his narrow portion of the platform, with a beautiful coverlet folded neatly at the head. We later learned that these coverlets are contributed by the prisoners' families. Stowed at the foot of each prisoner's portion of the platform is a low stool; the prisoners obviously use the platform ledge for study. Between each two mats is a shoulder-high bookshelf bearing a set of the works of Chairman Mao. A connecting room of the building is a library and recreation room. It was decorated with prisoner essays extolling the value of hard work, promising not to steal property from other prisoners and to abide by the farm rules, and indicating their struggle towards socialist consciousness. The essays in the residential areas of the detention facilities concentrated intensely on individual self-improvement, while the essays in the factories were exhortations to greater production.

We walked through the tea factory and the ball bearing factory, where the prisoners seemed to be singleminded about their work and, predictably, rather sullen. There was no talking. The prisoners were supervised by cadres with red lettering on their shirts. We saw no weapons. Behind the administration building in which we were briefed, however, there was a 10-foot masonry wall with broken glass imbedded in the top.

Bureaucratic details were difficult to acquire. The farm is responsible to the Public Security Bureau of Kinangsu Province. The director disclaimed knowing if there were other such facilities in the province, and said that he did not know how many prisoners had been admitted and released during the year. He said that he received his policy and operating instructions from the

superior leadership of the provincial Public Security Bureau, and had no contact with his counterparts at other institutions.

Criminals whose offenses are more serious are neither returned to their home environments nor sent to labor reform farms where they engage in factory and agricultural work in a rural environment. Instead, they are placed in jails, such as the Shanghai Municipal Prison, which we visited in mid-May. Life in the prison is certainly harsh, but again education and rehabilitation are given much more emphasis than in our institutions.

The Shanghai Prison was built by the British in the early years of the twentieth century (1906-1925). It is a mammoth black compound of large brick buildings, a bleak reminder of the powerful foreign enclaves in chaotic pre-Liberation China. The prison, which has been used by both the British and the Kuomintang to house prisoners, contained 2,753 prisoners (200 of them women) at the time of our visit. They were serving sentences ranging from three years to life, and a few were under suspended death sentences. (Offenders sentenced to capital punishment in China typically receive a two-year suspended sentence. If they convince the authorities that they have taken significant steps towards reform in that time, their sentences are reduced.) The prisoners ranged in age from 18 to 60-70 years. They are segregated according to sex and according to the severity of their sentence. Those serving life sentences or sentenced to death are kept separate from the others.

Living conditions in the Shanghai Prison are very poor by our standards. The cells are small, no larger than 6 feet by 8-9 feet; each cell houses three people. Our hosts pointed out that in pre-Liberation times each cell housed at least five or six prisoners. The furnishings in the cells are simple: a large, low wooden platform covers most of the floor, and a box housing the prisoners' sleeping quilts stands in the middle. Washcloths are hung on the cell bars. Between each two cells, is a small bookshelf holding the basic works of Mao, Marx and Lenin.

The prisoners were dressed in worn clothing and all the men had shaven heads, but they looked healthy. Medical care is not taken for granted in China, and this institution, like many others we visited, is proud of its Chinese and Western medical facilities. Prisoners receive day-to-day care from other inmates trained in medicine and stationed on each floor. The prison also contains a hospital unit, which includes a radiology laboratory, an herbal medicine laboratory, and two operating theatres, which are used three or four times each week. The entire complex was spotlessly clean but dark and unattractive to Western eyes. (One of the more sensible decisions made by the Chinese is that, in a land of scarce resources and burgeoning needs, it is not important to paint the halls of public buildings every few years.)

Although the physical living conditions of a Chinese prison are much inferior to ours, more care is taken to provide for a productive and varied prison life. Relatively little time is spent in the cramped cells. They are used primarily for sleeping, eight hours each day. Eight additional hours, we were told, are spent in the prison factories; two hours more, in study; and the rest of the time, in recreational activities. "Recreational activities" seem to vary. We passed a spirited game of basketball in a



"We supervise the criminals not by walls but by the power of our policies."



courtyard between two buildings, but a short walk away in another courtyard we saw a circle of men trudging in a dejected circle.

The most powerful sanction is the ability of the prison officials, with the cooperation of the court that convicted and sentenced the prisoner, to increase and decrease his sentence in response to his behavior. Each prisoner is given a fixed sentence, but good behavior can lead to early release while the sentence of an intractable prisoner may be extended indefinitely. There are other sanctions for bad behavior—first a warning, and then “confinement.” We were told, however, that there is no corporal punishment. Flogging and cursing of prisoners by guards are strictly forbidden.

The official concern for the rehabilitation of a prisoner does not end with his release. The revolutionary committee of the prison works with the committee of the work unit to which the released prisoner is assigned to place him in a job, a residential unit, and a small group where his political education will continue.

The most remarkable aspect of prison life in China is the belief in society's ability to change the habits and thoughts of the inmates and the real effort, made with extraordinary investments of manpower, to effectuate that change. But, again, the cost—in terms of individual privacy, autonomy, and freedom of belief—is very high.

We now regress in time, back to Nanking, and switch to the civil side of the Chinese legal system. While in Nanking, we were taken to a divorce mediation session. The wife, whom we shall call Mrs. Lu, had requested that she be divorced from her husband, Mr. Chin (Chinese women retain their own names upon marriage). Mrs. Lu is a worker in the Nanking handkerchief factory; Mr. Chin is a worker in the Nanking People's Printing Press. Mrs. Lu had complained that Mr. Chin preferred his son by their marriage to her two children by her previous marriage; that he drank and smoked too much; and that he was not democratic in the management of the family finances. These are not grounds for divorce in China; what we witnessed was the intervention of the community, even the judicial system, in resolving a marital dispute.

Mrs. Lu's first husband had died of liver cancer in 1965, leaving her with two small children. Her neighbors introduced her to Mr. Chin, who had never been married. Their marriage in 1967 was registered with the Neighborhood Committee. At first they got along well; Mr. Chin was a model stepfather and husband. He played with and fed the children; he took them to school; he took Mrs. Lu's mother to the hospital for her acupuncture treatments when she became ill. After their son was born, however, his attitude changed: he preferred his own child, neglected her two older sons, and began to engage in the behavior of which she finally complained.

By 1976, Mrs. Lu sought the intervention of the authorities. She first went to the court in September 1976. The court referred the complaint back to her neighborhood conciliation committee, which made repeated unsuccessful efforts to bring about an agreement. The conciliation committee told them that a divorce would be harmful to both of them, and to the children. The judge who presided over the session that we witnessed had herself participated in these conciliation sessions, going to the residence and the factories where both parties were employed. The judge explained to everyone that this meeting was being held “to speed up the period for the parties to give up their incorrect ideas.” She said that the parties' thinking had changed during the conciliation period, but that as of the opening of the meeting there was still some distance between them.

The meeting was held in a very plain conference room of a building near the residence of the parties. Approximately 30 people were present, representatives of the neighborhood and factory conciliation committees, plus our group of 20 American observers and our interpreters. The judge opened the proceedings with a recitation of the facts as outlined above. She welcomed the representatives of the factory committees to join the meeting, and said that she hoped that they would take part and speak freely. She then addressed the parties: “This proceeding shows that the Party and the people's government have concern for you and for family life. Be strict with yourself, lenient towards others. Modestly listen as well as talk.” In contrast to the judge in the Peking criminal case, who was an authority figure throughout at least the first part of the trial, this civil judge played the part of social worker/counselor. Within the first few minutes she had elicited from Mrs. Lu the information that she no longer wished a divorce, because of her own age (39) and the welfare of the children, and that she would like for Mr. Chin to behave better towards the children and the finances and to drink less (we do not know how much is too much in China).

However, the issue in the case was personal ideology, which had to be explored. In conversation with the judge, Mr. Chin admitted that the root of the problem was his individualistic ideology, which was inconsistent with promoting production. In particular, his mistake lay in regarding his child as his own property. Children are the successors of the country, not the private property of their parents. Divorce wounds the children and is therefore bad for grasping revolution and promoting production. Moreover, their family dispute had taken up the time of other workers from their factories. The judge agreed.

Now the representatives from the factories spoke. A woman from the handkerchief factory pointed out that both Mrs. Lu and Mr. Chin were of worker background, the class that had been suppressed in the old society but had become master in the new. They both had a deep love for Chairman Mao and Chairman Hua. They had married freely, liberated from the old custom of match-making. She opposed the divorce, echoing the observation that divorce would be bad for the children, who are the successors to the country. Parents no longer have to depend on their children for support in their old age; parents have a duty to educate their children to be proper successors and to prevent revisionism.

Several other representatives from the factories and the neighborhood spoke in praise of the new social order, equal rights for women, solving contradictions among the people, and family stability. No one thought the parties should divorce. Mrs. Lu and Mr. Chin agreed that they should not divorce. The court agreed that they should not divorce, and told us why. The foundation of the marriage was knowing and loving one another. In the beginning, they helped one another. The children got along well. Contradictions of the sort that led to this proceeding are normal. Public opinion is the opinion of the masses. In this case, the masses (meaning the workers from the factories and the neighbors) do not think that a divorce is proper. Contradictions within this marriage can be solved by criticism and self-criticism. The three points alleged by Mrs. Lu in her complaint are not fundamental contradictions justifying divorce.

The court then produced a conciliation agreement that had been prepared previously. In it, Mrs. Lu agreed to resume family life and to withdraw her complaint. Mr. Chin agreed to treat the children equally, to make them his responsibility. Both agreed to handle the domestic economy through discussion. Mr. Chin agreed to drink

and smoke less. They both agreed that if new contradictions emerged they would be handled in the spirit of unity-criticism-unity.

A woman worker from the handkerchief factory now thanked the judge for showing that the court serves the people. She said that Mrs. Lu and Mr. Chin should thank their Party and their government, and show gratitude to

what we had learned at the labor reform farm, our hosts told us that each prisoner must be "active in labor," "prove that he is law-abiding," and, most importantly, "bow his head and admit his guilt." The prison officials admitted that there were a few "diehards who will never shed tears before they see their coffins," but most prisoners are not so resistant.



their comrades. All of the people who participated in this conciliation have a deep proletarian confidence, are grasping the key link and promoting production. They are all studying Volume Five of Chairman Mao's work. A new high tide of learning from Taching (an oil field that serves as a model for industry) is emerging. Unite in the family first, then efforts can be concentrated on the job. A male worker from the printing press also thanked the court and hoped that the parties would accept her advice and suggestions.

Life in the prison is designed to carry out the government's policy of "reform through labor." That means a heavy emphasis on production. Most of the men work in the printing and knitwear factories contained in the prison complex, while a few do small-scale manual labor in cellblock areas, (for example, assembling watches). The women produce rubber sheeting goods in their cellblock. The pace in the prison factories is more frenetic than any we had seen elsewhere in China. The workers gave all their attention to their work, not even stopping to glance at the Western visitors. In other respects, however, the factories are like others we had visited. We saw the same blackboard essays in colored chalk criticizing the Gang of Four and praising the teachings of Chairman Mao and Chairman Hua. There are also quota charts showing each worker's progress. In addition, lined paper with themes written by individual prisoners on their transformation under the guidance of Chairman Mao are posted throughout the work and study areas. Guards are everywhere, but they are relaxed and inconspicuous.

Ideological education is another key component of "reform through labor." In all segments of Chinese society political study is primarily carried out through small groups organized to study the works of Mao, Marx, and Lenin. The prison is no exception, and we observed group discussions in the women's unit and in the hospital ward. The prisoners are also brought together to listen to political broadcasts. And the prison adopts a policy of "going out and inviting in"—taking the prisoners to visit factories and agricultural communes, and inviting workers, peasants, and soldiers into the prison to give lectures.

All this education has a price. A Chinese prisoner, unlike his American counterpart, cannot simply keep his mouth shut and serve his time. Some improvement in attitude is necessary before he will be released. Echoing

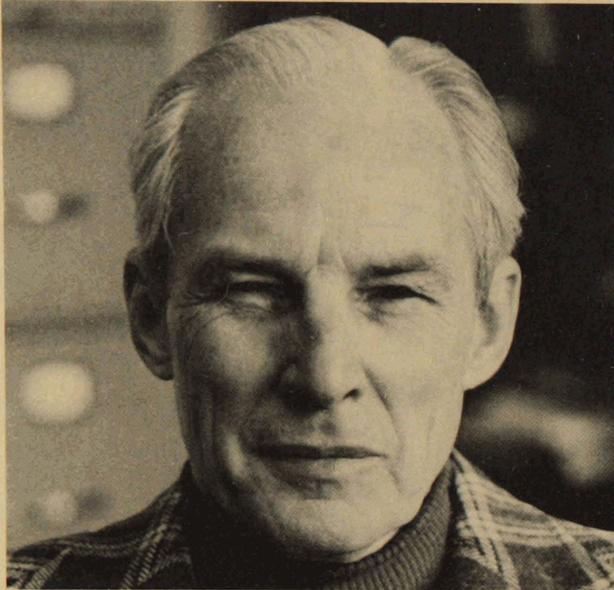
Mr. Chin now sincerely thanked the party, and Chairman Mao and Chairman Hua, pointing out that if the dispute had occurred in the old society it could not have been resolved among the people. He complimented the judge on following the teachings of Chairman Mao. Both parties agreed to resolve any future contradictions in the spirit of today's meeting. The judge then complimented everyone on helping to resolve this dispute. She said that the court supports and helps the masses, relies on the masses, and with the efforts of all, achieves good results. Everyone applauded and smiled.

After the meeting, we talked with this judge, who told us that she herself would supervise the implementation of the conciliation agreement. If Mrs. Lu is not satisfied, she may once again ask for the help of the court.

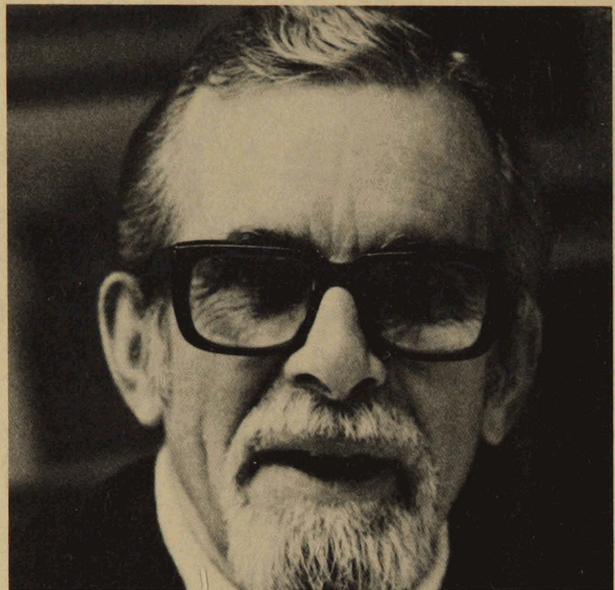
The background of this judge is, we think, characteristic. She graduated from junior middle school in 1950, immediately following Liberation, and became a legal cadre. She has attended the legal institute (a sort of abbreviated law school) in Kiangsu Province twice for six months each time. We asked her what she studied there; she replied that they studied the classic works of Marxism-Leninism and the Thought of Chairman Mao, plus the written law, but the judges mainly learn from practice. She informed us that the Supreme Court sends its cadres (administrative personnel) to the provinces to make sure that correct policies are being carried out, appeals being rare in the Chinese legal system.

Candor compels the admission that there was not much drama in this divorce proceeding. The outcome was foregone, as, indeed, it had been from the moment when Mrs. Lu filed her complaint with the court. We suspected that the presence of foreign visitors had a good deal more effect on the timing and the outcome than had been the case in the Peking criminal trial. However, we found the proceeding interesting as an illustration of the tension between the ideal of equal rights for women within the marital relationship, on the one hand, and the social and political importance of family stability, on the other. The government was not willing to grant dissolution of the marriage; but it was willing to invest considerable effort to bring the parties to a mutually acceptable compromise. How well these compromises work in practice, however, we cannot tell: as the meeting broke up, Mrs. Lu looked unmistakably glum and Mr. Chin looked slightly smug.

# authors



Alfred Conard



L. Hart Wright



Christina Whitman



Sallyanne Payton

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