Law Quadrangle Notes

The University of Michigan Law School

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Criminal Insanity: An Expert's Report

Law Quadrangle Notes

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contents

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briefs

Browder, Kennedy And Wright Get Distinguished Professorships

Three U-M law professors, Olin L. Browder, Jr., Frank R. Kennedy, and L. Hart Wright, have been appointed to distinguished professorships at the Law School.

Prof. Wright will serve as the Paul G. Kauper Professor of Law; Prof. Browder will be the James V. Campbell Professor; and Prof. Kennedy will be the Thomas M. Cooley Professor.

The three professorships, which include annual stipends, are for five-year terms effective January 8, 1979. The Kauper professorship is being funded by contributions to the Paul G. Kauper Memorial Fund, named for the late U-M law professor; and the Cooley and Campbell professorships are supported by a gift from U-M Regent Robert E. Nederlander, a member of the Law School class of 1958. Cooley and Campbell were members of the original faculty of the Law School in 1859.

Prof. Wright, who joined the U-M law faculty in 1947, is an authority on U.S. federal and European tax procedures. Among other works, he is co-author of the book *Federal Tax Liens* and editor of *Comparative Conflict Resolution Procedures in Taxation*, to which he contributed major sections.

Recipient of undergraduate and law degrees from University of Oklahoma and a Master of Law from U-M, Wright in the 1950's prepared a major study of the Internal Revenue Service for which he received the Civilian Meritorious Service Award from the Treasury Department, the highest civilian award given by the government.

He has served for many years as consultant to the IRS, has drafted state tax legislation, and participated in many other government activities.

Dean Sandalow noted that Wright teaches "in one of the most difficult and demanding of legal subject matters. His work as a teacher is characterized by remarkably conscientious preparation, high intellectual demands on his students, technical proficiency, and sensitive concern for the broader issues of public policy."

Prof. Browder, a member of the Michigan law faculty since 1953, is a respected authority on the law of property and co-author of three law casebooks. He is also co-author of the encyclopedic *American Law of Property* and a frequent contributor to scholarly journals.

Recipient of the A.B. and law degrees from University of Illinois and a law doctorate from U-M, Prof. Browder has served, among other positions, as chairman of the American Bar Association's Committee Against Perpetuities and as a consultant to the Michigan Law Revision Commission in the drafting of the Michigan Powers of Appointment Act.

Dean Sandalow noted that Browder's scholarly work "reflects not only thoroughness and the craftsman's attention to detail, but a concern for the major themes of property law. . . He has been one of the Law School's most popular and effective teachers."

Prof. Kennedy, who joined the U-M law faculty in 1961, is an expert on bankruptcy who has held a number of important posts over the past 20 years.

From 1970 to 1973, serving as executive director of the U.S. Commission on Bankruptcy Laws, he was principal draftsman of the recently enacted Bankruptcy Act, the first comprehensive revision of the nation's bankruptcy laws in more than 75 years.

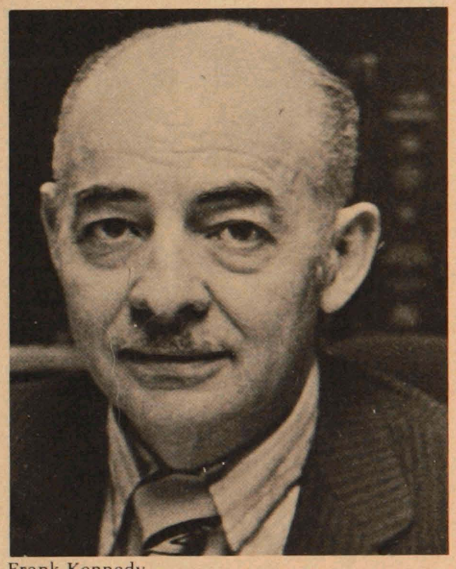
Between 1960 and 1976 he served successive five-year terms as reporter for the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the U.S.

He has also been reporter for the National Conference of Commissioners on Uniform State Laws in drafting the Uniform Exemptions Act; chairman of the National Bankruptcy Conference; and chairman of the Uniform Commercial Code Committee and the Secured Transactions Committee of the American Bar Association.

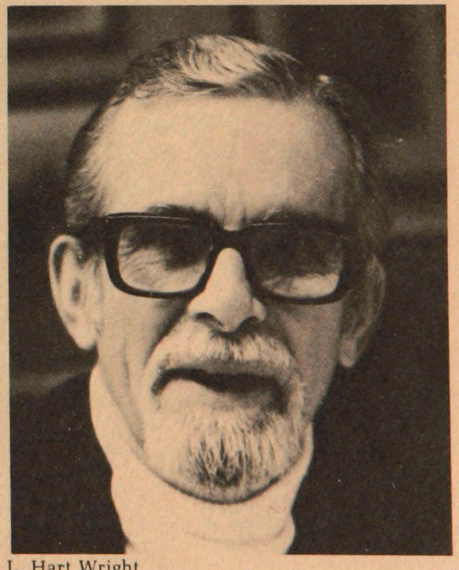
The holder of degrees from Southwest Missouri State College, and the law schools of Washington University and Yale University, Kennedy has written widely in his field.

His excellence as a teacher, noted Dean Sandalow, "is based not at all on histrionics, but on an unchallengeable command of an intricate and difficult subject matter; a tough, analytical mind; and patience in dealing with students.

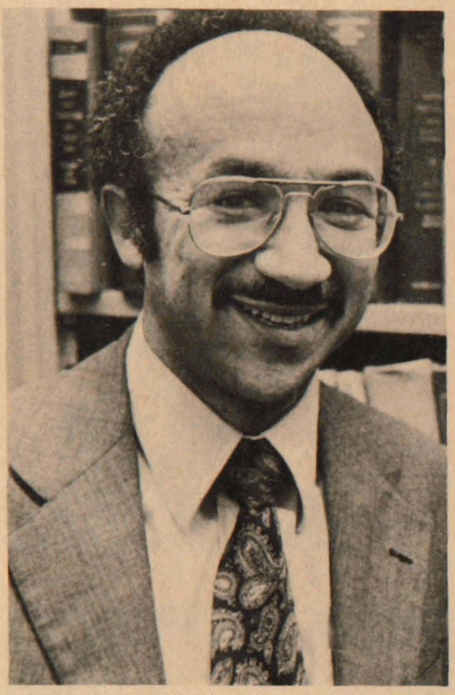
Olin L. Browder, Jr.



Frank Kennedy



L. Hart Wright



Harry Edwards

Bakke Case Has No Effect On Job Quotas, Says Edwards

What effect will the Bakke case, dealing with minority admissions in higher education, have in the area of employment?

A U-M labor law specialist says the ruling appears to give "strong support" for continuation of ratios and quotas in hiring and promotion, "retroactive seniority" measures and other court-ordered actions, provided there is a specific finding of past employment discrimination.

Speaking at the School of Industrial and Labor Relations at Cornell University, Prof. Harry T. Edwards noted that U.S. Supreme Court Justice Lewis Powell, who served as the crucial "swing man" in the 5-4 Bakke decision, "expressly approved of preferential quotas when predicted upon judicial findings of identified discrimination." Four other justices also approved these measures, said Edwards.

But the U-M professor warned that "there is some reason to worry that the Court may soon narrow its position." In particular, he cited the first post-Bakke employment case, "City of Los Angeles v. Davis," which will be decided by the Supreme Court this term.

"If the Court uses this case to impose a requirement of discriminatory intent in order to make out a case of discrimination under section 1981 (of the Civil Rights Act of 1866), then the result may be a damaging one to civil rights advocates," said the U-M labor law expert.

Edwards was at Cornell to receive the eighth annual Judge William B. Groat Alumni Award honoring his work as "teacher, lawyer, writer and labor arbitrator." The U-M professor is vice president of the National Academy of Arbitrators and has been active in many recent arbitration cases. He has also written widely in the field.

In the Bakke case, the Supreme Court ruled that the University of California-Davis Medical School could not use race as the sole criterion in setting aside 16 places in its entering class for minority students, at the exclusion of non-minority applicants.

Among other points made by Edwards regarding the effects of Bakke in the employment area:

—In view of Bakke, the courts are likely to continue to award preferential remedies—including preferential hiring quotas—in cases where previous discrimination has been proved.

—The courts, as in earlier rulings, will not allow a minority person to displace a non-minority person, even if the minority is a specific victim of discrimination. Thus, such a measure as "fictional seniority" (which could interfere with vested seniority rights of non-minority persons) has not and will not be awarded by the courts to minority persons.

On the other hand, such measures as "back pay," "retroactive seniority" and "front pay"—designed to recompensate victims of past discrimination without affecting the job status of non-minority persons—are more likely to be awarded by the courts.

—The most serious problem now raised by Bakke case is the continued legality of "voluntary" affirmative action taken by employers and unions to comply with federal Executive Order 11246 (which required affirmative action programs to be established by federal contractors). The voluntary programs, said Edwards, "may not stand up now without specific findings of discrimination."

Edwards also pointed to the significance of the Bakke case as an indicator of social sentiment regarding civil rights progress.

"If Bakke is seen as a further sign of retrenchment, then the net result may be to sap force from Title VII of the 1964 Civil Rights Act and other laws designed to deal with the problem of employment discrimination," said Edwards.

On the other hand, "if Bakke is seen as a clear statement from the Court in favor of race-conscious remedies, then it may serve to quiet the cries of 'reverse discrimination' being heard from those objecting to preferential remedies and affirmative action in favor of minorities and women."

Edwards also stressed that the need for "strong remedies" to eradicate employment discrimination is "no less now than it was a decade ago."

"The overall income gap between black and white families actually widened during the first half of the 70's. In 1970, the income of black families was 61 per cent of that of white families. By 1976, the gap had increased so that the income of black families was only 59 per cent of that of white families.

"The unemployment figures are equally disheartening. For example, the seasonally adjusted unemployment rate for all workers in August 1977 was 7.1 per cent; for black workers the unemployment rate was

15.5 per cent, the highest such rate since 1954.

"Women have fared no better," observed Edwards. "In 1976, the incomes of white women were only about 59 per cent of those for white men and 82 per cent of those of black men. Black women, with a double burden of discrimination, had incomes of only about 55 per cent of those of white men and 77 per cent of those of black men.

"Unfortunately, there appears to be less concern now over these continued patterns of discrimination against minorities and women. . . . The idealism and good hopes of a decade ago have faded into the defensive pragmatism of recessionary times."

Active in labor law work outside the University environment, Edwards, who is a member of the board of directors of the American Arbitration Association, recently served on arbitration panels for United Airlines and flight attendants, General Electric Corp. and the International Union of Electrical Workers, and U.S. Steel Corp. and the United Steelworkers of America.

Along with colleague James J. White, Edwards developed a course "The Lawyer as Negotiator" at U-M Law School and authored a book by the same title. His best-known book, *Labor Relations Law in the Public Sector: Cases and Materials*, is considered a leading textbook in the field.

Terrance Sandalow (left) and Eric Stein

European-American Study Announced By U-M Scholars

What role do courts play in the creation and maintenance of a continent-wide European "Common Market" marked by political unity, "tempered" competition, and freely moving goods, labor and capital? For the first time, a group of European and American experts has begun a comparative analysis of the experience on both sides of the Atlantic.

The study, centered at U-M Law School, is directed jointly by Dean Terrance Sandalow and Prof. Eric Stein. The Ford Foundation provided financial support and the Rockefeller Foundation has made available its Bellagio Study and Conference Center in Bellagio, Italy, for a conference scheduled for July 16-21, 1979 at which individual research papers will be the subject of group discussion. The

papers, with an introductory comparative essay, will be published at the completion of the study.

On the European side, says Prof. Stein, the principal source material for the study is the extensive case law—including some 2,000 cases—of the Court of Justice, the judicial organ of the European Community, in Luxembourg.

"In its jurisprudence this court has fashioned a coherent concept of a Community legal order," says Stein. Through a broad, purpose-oriented interpretation of the constitutive treaties, the court has succeeded in extending the direct impact of Community law upon individual citizens, with the corresponding increment of Community authority at the expense of the member states. In some quarters, the court has been criticized for pressing judicial law-making beyond the basic political consensus when it has sought to extend federal-type authority beyond the areas of customs unions, agriculture and competition, to such fields as social policy and foreign affairs."

Stein emphasizes that "the current debate over the direction and role of the Community Court suggests that the experience of American federal courts may be of interest to European scholars, officials, and members of the judiciary. Mr. Justice Holmes, among others, once opined that the power of the federal courts to deny effect to unduly parochial state legislation has been crucial to the survival of the Union. Careful study of the judicial role in the United States may, thus, yield important insights into the role that the Community Court can play in the integration of Europe. Conversely, since in the United States the line dividing federal and state powers is still fluctuating, the case law of the Court of Justice in the context of the general Community development may be quite instructive for Americans, particularly in certain areas where the Community, in spite of its shorter history, has grasped some nettles more firmly than the United States."

Stein notes that "any comparison of the American and Community evolution must, of course, eschew any idea of easy 'transplants' across the Atlantic. As any meaningful comparison, it must take full account of the crucial contextual differences—not least of which are the still limited scope of the Community's competence; the retention of ultimate legislative power in the hands of the Ministers instructed by national governments; and the fact that European Parliamentary Assembly performs only advisory functions in the law-making process."

"For American participants a joint study should offer enlightening insights into the dynamics of community building and more specifically into the working of a highly sophisticated and original multinational legal order; it should also enhance American understanding of a system that is faced with problems common to the post-industrial societies and that has played an increasingly important part in American governmental and private relations with Europe. A joint effort projected over a period of time should contribute to the formation of a cadre of scholars able to maintain an informed dialogue across the Atlantic."

The participants in the study—both those preparing texts and those involved in discussion groups—include members of the United States Supreme Court and of a State Supreme Court, members of the Court of Justice of the European Communities, the director general of the legal service of the European executive Commission, and constitutional law scholars and practitioners.

Papers to be presented at the conference cover a broad range of topics. The problems of removing restrictions on movement of goods in interstate (intra-Community) commerce are explored on the United States and Community sides respectively by Prof. Vince Blasi of U-M Law School and Prof. Henry G. Schermers of the University of Leyden, Netherlands. State tax discrimination is the subject of Prof. Walter Hellerstein of the Chicago Law School and Rolf Wägenbaur of the legal staff of the European Commission. Profs. Alfred F. Conard and G. M. Rosberg of Michigan Law School and Paul LeLeux, senior legal advisor of the European Commission, investigate state action restricting free movement of persons, "entry" of "foreign" corporations, access to employment and professions and supply of services across state frontiers. Justice H. Linde of the Supreme Court

of the State of Oregon analyzes restrictions on transport in interstate commerce as an area to illustrate the evolution of judicial methodology in the United States. In a more general vein, U-M law Dean Terrance Sandalow and Prof. Christoph Sasse of Hamburg University focus on the techniques and evolution of central law-making power and the role of the judiciary in defining its scope in relation to state power, while Prof. William Cohen of Stanford University joins Prof. Michel Waelbroeck of the Free University of Brussels in studying respectively the doctrine of "preemption" in American case law and emergent analogous ideas in European jurisprudence.

Justice Potter Stewart of the U.S. Supreme Court is among those expected to participate in discussion groups.

The study is a continuation of the research and teaching programs which have been carried on at the Michigan Law School since the late 1950's in cooperation with European scholars, officials and practitioners. Prof. Stein notes that a number of staff members of the Legal Service of the European Commission, including the present director general, did graduate work at U-M Law School. Earlier joint studies include the two-volume work *American Enterprise in the European Common Market* edited by Prof. Eric Stein and T. L. Nicholson, with contributions by, among others, Profs. Conard and L. Hart Wright; *Comparative Conflict Resolution Procedures in Taxation* edited by Prof. L. Hart Wright; *Harmonization of European Company Laws—National Reform and Transnational Coordination* by Prof. Eric Stein; and a series of teaching and research volumes, including the most recent *European Community Law and Institutions in Perspective* by Profs. Stein, P. Hay and M. Waelbroeck.

Francis Allen Named to Russel Lectureship

Francis A. Allen, Edson R. Sunderland Professor of Law and former dean of the U-M Law School, has been named Henry Russel Lecturer for 1979.

The lectureship is the highest honor the University bestows on a senior faculty member. Prof. Allen, whose selection was recommended by the U-M Research Club and confirmed by the Regents Oct. 20, is to deliver the Russel lecture on March 20 on campus.

Prof. Allen "is one of the nation's most distinguished scholars of the law," notes H. N. Christensen, president of the Research Club. "In his writing he has addressed penetratingly the central problems of criminal law, so that his scholarship is held to have laid the basis for judicially inspired reforms."

Among other of his publications, Prof. Allen's book *The Borderland of Criminal Justice* explores the "rehabilitative ideal" and consequences of applying the system of criminal justice for essentially social services. And another recent book *The Crime of Politics: Political Dimensions of Criminal Justice*, focuses on possible subversion of agencies of criminal justice to serve political ends.

Among other public appointments, Allen was president of the Association of American Law Schools, president of the Illinois Academy of Criminology, and member of the Council of the American Law Institute. He delivered the Holmes lectures at Harvard University in 1972-73 and will deliver the Storrs Lectures at Yale during 1978-79.

He chaired the U.S. Attorney General's Commission on Poverty and the Administration of Federal Criminal Justice in 1961-63, the work of which led to the Criminal Justice Act of 1964 and other legislation.

A graduate of Cornell College (Iowa) and Northwestern University law school, Allen served on the faculties at Northwestern, Harvard, and University of Chicago before coming to the U-M. He served as dean of U-M Law School from 1966 to 1971. Each of the schools which he has served has awarded him a special honor.

Francis A. Allen

From left: Peter Ehrenhaft, Stephen Gibson, Peter Suchman.

events

"Antidumping" Conference

Necessity for U.S. antidumping regulations—which prohibit the "dumping" of foreign products in the U.S. at prices below which they are sold abroad—was debated by leading authorities at a fall Law School conference sponsored by the U-M student International Law Society and the American Society of International Law.

Papers by the speakers are to be published in the first volume of a new Law School publication, the *Michigan Yearbook of International Legal Studies.*

The anti-dumping regulations, the subject of proposed reform legislation before the Congress, were criticized by some speakers for discouraging foreign competition and fueling inflation.

But they were defended by speaker **Peter Ehrenhaft,** the U.S. assistant secretary of the treasury, who said antidumping laws could help keep U.S. prices down in the long run.

"If dumping goes unchecked, we risk a situation where some domestic producers will be wiped out, and foreign competitors may sell goods at monopoly prices," said Ehrenhaft, who is in charge of administering U.S. antidumping policies.

But economist **Walter Adams** of Michigan State University charged that the American consumer is being hurt by the antidumping regulations. For example, said Adams, such import restraints have been largely responsible for the spiral in steel prices since 1950.

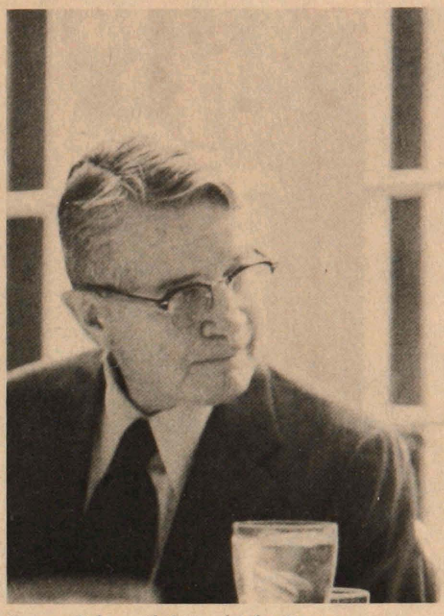
Adams argued that U.S. industries are being "artificially protected" by antidumping laws which "have served to stifle American entrepreneurial initiative in vying against foreign competition."

John Barcelo of Cornell University Law School urged that Congress either abolish the antidumping or establish more rigorous standards under which the regulations could be applied.

Barcelo said the major threat to U.S. industry involves "predatory dumping," where foreign competitors attempt to monopolize an overseas market. And such attempts at monopolization, he said, would be illegal under the Sherman Antitrust Act.

Other speakers at the conference included: U-M law Prof. **John H. Jackson,** attorneys **Bart Fisher, Noel Hemmindinger** and **Stephen Gibson** of Washington, D.C., attorney **John Cutler** of San Francisco, **Dieter Oldekop** of the Legal Service of the Commission of the European Communities in Brussels, attorney **Ivo Van Bael** of Brussels, and **Robert Hudec** of the University of Minnesota Law School.

Judge Cornelia Kennedy



George Palmer (left) and John Dawson

Alumnae Conference

A female judge has "significant potential for advancing the concerns of women," but she is limited in the types of actions she can take, U.S. District Chief Judge **Cornelia G. Kennedy** told an audience of about 75 women in the first annual U-M Law School Alumnae Conference in the fall.

Kennedy, chief judge of the U.S. District Court for the Eastern District of Michigan, is the first woman to hold such a position. She is a 1947 graduate with distinction from U-M Law School.

Kennedy warned that, under the Code of Judicial Conduct, federal judges are not allowed to make public statements on policy matters, solicit funds, confer with executive federal judges, or participate in political matters. A judge is also bound by the law and "must not be tempted to create one set of rules for women and another set of rules for another group of people," she said.

For instance, in sex discrimination cases, the remedies a federal judge may employ are bound by statute and reviewed by appellate courts. "A female judge will bring disrespect on herself for basing her decision on a sex-related basis," Kennedy said.

Despite these limitations, she said, there is a great opportunity for the female judge to promote the interests of women by striving to be outstanding in her work. "To achieve the same level of success, women have to be more proficient than men," Kennedy continued, suggesting that excellent performance by women in the legal profession will open the doors for greater numbers of women in law and on the bench.

The life of a federal judge is not an easy one, according to Kennedy. She described her average work day as beginning at 7:40 a.m. and ending at 6 p.m., with "homework" every night and every weekend.

Women are still underrepresented in the legal profession and especially on the federal bench, Kennedy said. Half of the women on the bench have been selected in the last two years, she noted.

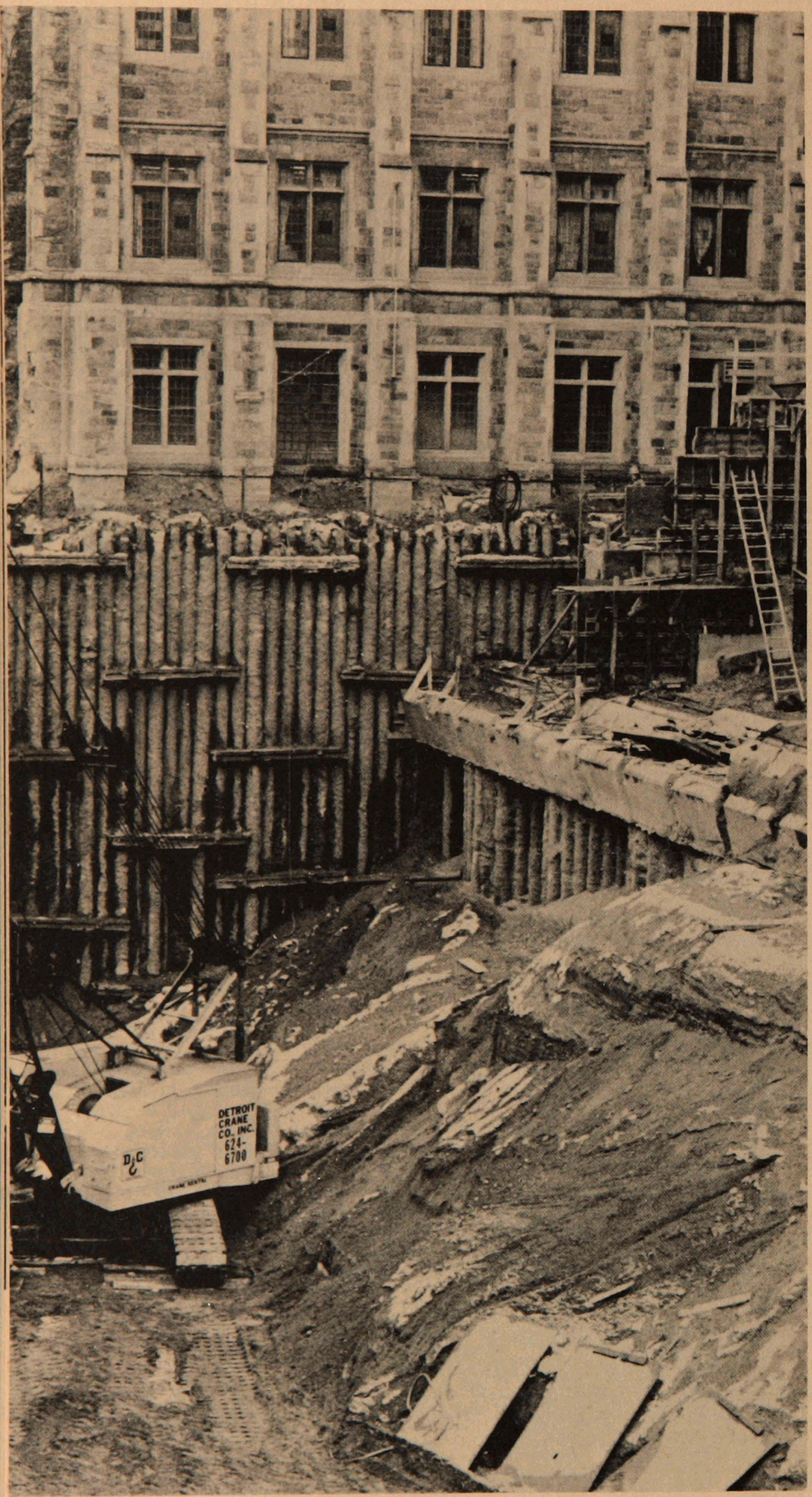
Because the Code of Judicial Conduct prohibits any women presently on the bench to promote the candidacy of other women for judgeships at any level, Kennedy said she was prohibited from supporting her older sister for a judicial position. Her sister, also a U-M Law School alumna, is Michigan District Judge Margaret Schafer of Farmington Hills.

Commenting on the possibility of a woman on the Supreme Court, Kennedy said she did not want to see a "token woman," but that she supports the idea of "women—lots of women—at all levels of the judiciary, including the Supreme Court."

It is "ironic," she remarked, that justice is portrayed as a woman, yet there are so few women in the judiciary.—*Mark Simonian*

Palmer Honored

George Palmer, professor emeritus of law at the U-M, was honored recently by the law faculty for his newly published four-volume treatise on restitution. Joining Palmer at a faculty luncheon was his former U-M colleague, **John Dawson**, who in 1969 co-authored a casebook on restitution with Palmer. After spending 30 years on the Michigan faculty, Dawson taught at Harvard for 17 years and has been at Boston University since 1973. Prof. Palmer retired from law teaching at U-M at the end of the winter, 1978, semester, after serving since 1946. His areas of specialty are trusts and estates, and restitution.



An unusual feature of the Law School's underground library addition won't be seen once the building is completed. As part of the excavation work, concrete cylinders—which were poured after 50-foot holes were augered into the ground next to the Law School—are being used to hold the soil in place near existing buildings.

This procedure differs from typical temporary retaining structures—steel beams driven into the ground and covered with vertical boards. The latter are being used for soil retention next to street areas bordering the excavation.

The poured concrete cylinders, which are being held firm by horizontal "tie rods" driven back into the earth, were chosen in order to help preserve existing Law School buildings, according to soil mechanics project consultant Ulrich W. Stoll.

"If attempts were made to install temporary restraining structures of conventional wood planks near the buildings, too much soil would be lost," says Stoll.

The engineer says "monitoring up to the present time has revealed no settling or lateral movement of existing Law School buildings" due to the construction work.

The photo was taken in November, 1978.

Professor Joseph Vining has recently published a book, *LEGAL IDENTITY, The Coming of Age of Public Law* **(New Haven and London: Yale University Press, 1978). Professor Jerry Mashaw of Yale Law School has written of it: "Vining's important contribution in surveying these developments is his imaginative treatment of the dialectics of legal process, particularly the continuing force of older ideas even as they are recognized as losing their resolving power. . . . There is no modern competition for this book viewed either as a treatise on standing, as a treatise on the relationship of public and private law, or as a treatise on the concept of legal personality." The following are excerpts from two of the eleven chapters of the book.**

Legal Identity = The Coming of Age of Public Law

By Joseph Vining, Professor of Law

The University of Michigan

From Chapter 1, *The Thread of Standing*

In 1929 the distinguished Chicago economist Frank H. Knight asked whether classical economics is not, in fact, an apologetic. The only ethical justification for the ideal of a pure, or laissez faire, market, he concluded, is the sanctity of the existing distribution of power and wealth—or property. The sanctity of property was a principle of order, like the divine right of kings, and so perhaps a necessary axiom, but it was also the basis for exploitation of the many by the few. "Whether the human race is capable of establishing order on a principle which does not expressly sanctify exploitation," he added, "remains for the remote future to determine."

Law is the vehicle of order. It cannot fail to reflect the values of its time. But it has an intellectual structure of its own and an inner dynamic. Law was never fully captured by economics, and law today, particularly that branch of it called "administrative" or "public," is in the course of supplying the principle of order for which Knight hoped.

That is the larger theme of this book, which may make it of interest to readers other than lawyers. The book also has a "technical" subject matter, which I have sought to keep from becoming too technical. The observations of general interest grow out of an inquiry into the evolution and future of the nonconstitutional law of *standing* in the federal courts of the United States.

Standing is part of the law of judicial jurisdiction, that law which defines the role of courts in society and is, of all law, the most judge-made. Standing in particular determines whom a court may hear make arguments about the legality of an official decision. One cannot read recent celebrated cases deciding whether a judge may listen to the arguments of this or that person, without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate. Yet there is no evidence of duplicity: The struggle is a serious one.

What we are witnessing is nothing less than the breakdown of individualism as a basis for legal reasoning. The political battles that surrounded the movement of legislatures into so-called social legislation appear to be over. While the courts as political institutions ceased imposing the tenets of judicial thought on the legislative process over a generation ago, those tenets were not then abandoned. They continued to operate within the judicial sphere, at the center of the law. The insights now replacing them, on which our legal system is in part actually operating today, make it possible to think that the father of the Chicago School would have been encouraged.

I use the term *individualism* cautiously but, I think, correctly. It has nothing to do with concern for the dignity, happiness, or importance of the individual. It defines rather a particular way of populating our thought with living units of reference, no more universal or basic than the various personifications of wind and water which have lost their vivid meaning for most of us. Instead of saying individualism is collapsing, I could appropriate the term and say that individualism—respect for each man as such and for what he truly is in all the fullness of his life and hopes—is only now coming into its own as it is perceived that individuals are not in fact known to the law. We achieve our ends, which we cherish as individuals, and we realize ourselves precisely because individuals are not legal persons.

Ultimately, then, this is a book about the problem of legal identity and legal personification. The judge personifies himself in giving content to the doctrine of standing. Standing defines his jurisdiction, his role, who he is when he acts as a judge. But in law, as in life, we cannot achieve a sense of identity without acknowledging the identities of those around us. For the judge, those around happen to be all the rest of us. When they work with the doctrine of standing, judges define who legal persons are, far beyond that central figure "the judge."

We who are around judges as they identify themselves are not, however, simply objects of judges' thoughts. The role of the judge lies in all of us. Donning black robes does not fundamentally change or add to the apparatus by which individuals perceive the cues that determine when a judge

may appropriately act. Those cues will not have meaning for "them" unless they also have meaning for "us," from whom "they" are suddenly plucked. In identifying a judge, we in fact identify ourselves.

The inquiry undertaken here can be only a preliminary exploration of a large and currently neglected subject. Maitland and Durkheim approached the modern process of personification through their studies of the law of corporations at the end of the last century. I hope this essay will prompt others to pick up the thread of their work and to be curious again about the referents of the "he's," "she's," and "its" that insert themselves so easily and pervasively in legal writing and legal argument. We do personify and create identities throughout the law, and perhaps must. There is no mere play on words in suggesting that we cannot experience the twentieth-century difficulties of personal and national identity, which are undeniably acute, and expect to escape problems of identity in the intellectual structure of law.

From Chapter 9, *Persons, Values, and Equality*
Section headed "Individual Life and the Process of Government"

If values are so mixed within an individual, pulling him this way and that like the motorcyclist who loved quiet but also self-expression, or the housekeeper who loved the whiteness of her curtains but also her job and the product of the manufacturer who produced the soot, how are they to be served? The individual cannot realize them all simultaneously. In pursuing one he may harm another more than he would want and so defeat himself. The ordinary person, aware of and accepting the complexity and the surprise of the world, senses that this must be so more often than not. He is also without time, information, or technique to know the ultimate structure of his wants. How often we hear ourselves and others say, "I never knew how important I thought that was until now." Presented like Faust or Christ with a series of ready-made worlds, some of which had more children and less quiet reflection, others the reverse, some more rewarding jobs and less greenery, other the reverse, most if not all men and women being truly honest would say they could not choose. We want it all, they would wail: serenity and heart-racing challenge, privacy and society, white curtains and employment. There may indeed be no ultimate structure of our wants. The inner world no less than the outer is too complex to be centrally ordered or controlled, a place to be known as much as possible but always still full of surprises, and never dull. And there is change—or at least we call it change. How often have we also heard ourselves or others say, 'I never knew I really didn't care about this until I had it." Is that change or discovery? It really doesn't matter. The fact is that the meaning of a thing for us and our desire for it are different at one time and at another, thus upsetting any previous calculations we may have made in reliance upon our estimation of its importance. Religion does not solace; irreligion is not freedom; white curtains no longer delight.

How then can we live with ourselves? Why are we not paralyzed in this welter of desires and promptings? Why are we not canceled out by all that is within us? For most assuredly we are not. Most live vigorous and purposeful lives, acting, deciding, arguing, and criticizing with a sense of movement and development. The reason is that we personify our various values and trust our fate to the persons we create. As individuals we identify ourselves now with one, now with another, perhaps give some of our time each day to a number of them. But we do not choose, because we know we are connected to all those that have meaning for us, whom we understand. It is they who contend in legislatures, courts, and agencies, pushing for attention, recognition, and realization of "their" interests. And in their creation is the origin of government, rather than in a social contract among individuals that could, if one reflects about the matter for a moment, never treat with one another as wholes, or in the dictatorial imposition of the will of an individual that would, if again one reflects about the proposition, not know himself better than any of those of our acquaintance.

It is not peace we seek, but self-realization, with all the variety that implies. In personifying our values and lifting the contention among them outside ourselves, we raise the possibility and live in the hope that we will realize them all. If we cannot choose among them, then our only course is to eliminate the necessity of choice so far as possible. That is the process of government, finding a way, accommodating, harmonizing, searching, experimenting, discarding, trying again. The curtain lady need not choose between being an environmentalist, a consumer, an employee, or a stockholder. There is no inconsistency in her "belonging to" the Sierra Club, the Consumers Union, a labor union, and an investment club. When they speak they urge their particular claims, but their object will be the devising of an institutional structure that will produce outcomes satisfactory to them all. Unlike true adversaries—or disputants over rights of property—who seek to triumph and exclude, these persons must seek to cooperate and create. They cannot really want to annihilate each other, for like the head and the stomach in the fable, they are not separate. They may forget the fact and occasionally overreach, but they eventually rediscover that they are parts of the same human being.

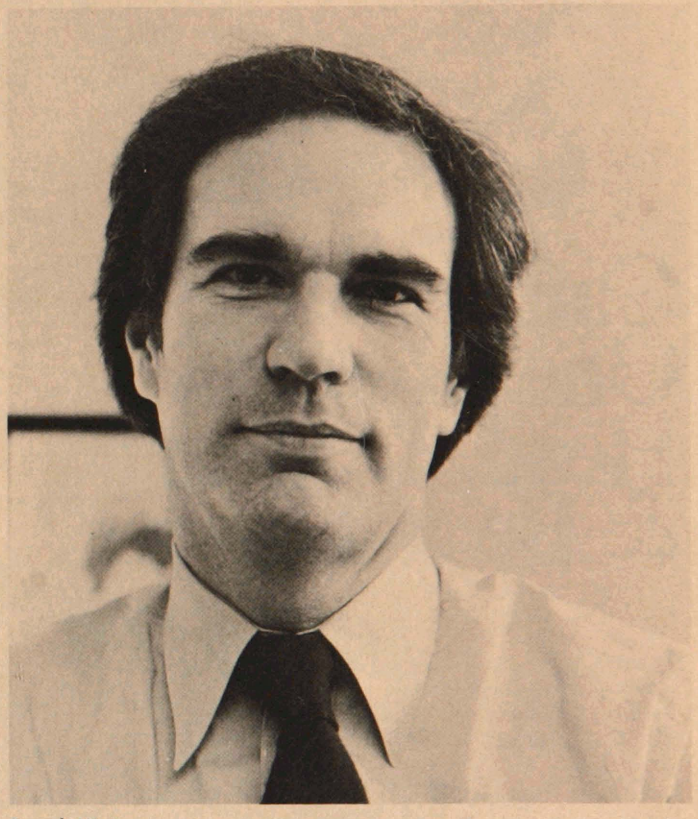
Sections headed "The Equality of Values and the Place of Results in Law" and "The Equality of Persons"

Legislation results from a process, not from the will of a centrally organized intelligence. But we do personify the legislature and the legislative role. We say an individual is "a legislator," and courts recognize harm that an individual suffers "as a legislator." We must therefore ask, Is it here at last that values are ranked and ordered? And again, on reflection, I think we must admit that they are not and cannot be. Legislators and the "persons" to whom they listen may discuss and agree that this or that value should or should not be taken into account, or be taken into account to a greater or lesser degree, in the decision-making process of a particular agency. The legislator may create an agency to pursue a value or change the jurisdiction of agencies with

the hope that, though a value is not pursued directly, its realization will emerge in the interaction of the results of decision-making processes devoted to other ends. In disposing of claims and complaints and problems, however, the legislator will be engaged only in adjustment. Like the individual and the agency the legislator too must wait and see what the results will be and decide then whether they do not satisfy and whether and how to make further changes in the process. He cannot redesign the process as a whole. He accepts it, yes, insofar as he does not go further in changing it; and in accepting it he "legitimates" the results that are produced by the process as a whole, with the realization of some values to some degree and the defeat of others. But he accepts it because he must. Where everything depends on everything else and nothing is fixed even for the moment, he would not know where to begin a completely new design. The notion of replacing or redesigning a system or machine "as a whole" or "from the ground up" assumes a context of the given around the system in question.

Thus, the legitimation of the results does not mean that the results reflect the relative importance of the values they realize. By injecting a new statute and specific commands to specific decision makers into the extant matrix of statutes devoted to the pursuit of the whole range of public values, the legislature does not locate its current concern on a scale of importance. It does not rate one value more important than another. It says only that a particular value is being neglected. The judicial posture that there is no standard for saying the policy enforced by one statute is more important than the policy enforced by another (for instance for the purpose of awarding attorneys' fees or allocating judicial time to one or another kind of case), which is at first so puzzling and apparently disingenuous in view of courts' continual weighing and balancing of factors in particular cases, becomes understandable. There is no standard of choice, no structure of values, not because morality is subjective and the law objective (and therefore amoral), but because choices are in fact not made. Is it more important to preserve human life or to preserve the meaning in human life? Surely we cannot say. It is not that we do not know or cannot know because something is hidden from us; it is that we do know that each is equally important. What is life without meaning or meaning without life? The answer is nothing. How many farm laborers should starve that a poet may eat? How many old people should be immobilized that the young may be given greater mobility? The answer is none. No individual, much less judge or legislator, could pretend that he could reduce these claims to some common coin and choose between them. Persons are indeed equal before the law, although individuals as such manifestly are not.

This may explain why we continue to believe that as a society we are devoted to equality. Individuals are not equal in the sense of equivalency, "being" the same or "having" the same, and we have no intention of trying to treat them as such. Equality of opportunity means only that persons with separate identities are not mixed. A "wrestler" does not lose the object of his striving to an "entrepreneur" or an "heir." Wrestling matches are not to be bought or inherited. Wrestlers are to be treated as wrestlers, not as "heirs" or "entrepreneurs." Otherwise equality of opportunity has nothing to do with equality. To say that a wrestler and a runner who enter a room have "equal opportunity" to get a bowl of food placed in the corner is to say only that one prefers strength over speed. To say they have equal opportunity to get a bowl of food placed at the end of the next block is to say that one prefers speed over strength. Critics of laissez faire ethics are justly impatient with equating equality of opportunity with equality as an ethical ideal, and if this, or uniformity, were all that "equality" meant, then our talk of equality would be delusion or worse. But equality means something else. It refers to equality of persons and the shared values they represent, and in this I think we do believe.



Joseph Vining

Can One Retain Head & Heart & Be a Lawyer?

by

Francis A. Allen,
Edson R. Sunderland
Professor of Law
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[The following speech was delivered at the University of Detroit Law School Graduation on May 20, 1978.]

There is a false sophistication that scoffs at ceremonies such as this. Actually, however, we celebrate our rites of passage all too tamely. Instead of an hour or two on a Saturday afternoon, this celebration should extend continuously over at least three days. There should be singing, dancing, tom-toms, and colorful tribal costumes. The fruit of the vine should not be neglected. Tales should be told of heroic deeds in the past and boasts made about future triumphs. No doubt some members of this class have already begun private celebrations of this sort, and very likely sounds of revelry will be heard tonight throughout the metropolitan area. But many of us will claim to be too busy or, more to the point, are too self-conscious to mark this graduation with the uninhibited enthusiasm it deserves.

I do not need to tell the members of this class or their parents and spouses that there is much to celebrate. Liberation from the classroom and freedom from tuition bills are only two of the causes for celebration. And after nineteen years or more of formal schooling, these will be recognized as real gains, even though we know that new travails and regimentations lie ahead. It is even possible that in the years to come some in this class will think back on their law school days as a kind of golden age in their lives. Nostalgia is fine, but in ceremonies of this sort we are concerned less with the past and more with liberation and prospects for the future.

And what of the future? I wish to speak not about the future of society or of western civilization. We are understandably preoccupied with these large issues, and members of this class will necessarily be deeply involved in their resolution. But I should like to focus today on more personal questions. This class is facing a great change in life. New issues must be faced, and already familiar human dilemmas will reappear, but in new and puzzling forms. For thirty years my avocation has been that of law-student watching, and in pursuing this hobby I have for a generation heard law students express their concerns about their futures, about their lives as professional persons. No doubt these fundamental anxieties, on the whole, have remained much the same. Yet there have been important changes in emphasis; and if I am not mistaken, I have heard more frequently in recent years questions about how young people entering the practice of law can preserve their integrity and autonomy while performing their professional roles. Is it possible to be a lawyer without large sacrifices of basic human qualities? Often the question is put something like this: How can I be a lawyer and hang on to my head? And sometimes, how can I hang on to my heart?

It is not only law students who are asking these questions. There is an unease in this society about de-humanizing influences at work in the modern world, an unease that has pervaded the thought, not only of the young, but also of their elders. Ultimately, of course, questions of this kind must be answered by each person for himself or herself. Solutions prefabricated by others are likely to be less than useless, which, of course, in an age of psychologism has not prevented the rise of a major industry devoted to the mass production of human happiness.

But even though, in the final analysis, achieving human status is the responsibility of each individual, it may be possible to identify false starts that some seem to be making. One of the things that appear to be of concern to my students (perhaps students at the University of Detroit are made of sterner stuff) is that lawyers, particularly young lawyers, are asked to work too hard. If I shall be required to work as much as I am told (students say to me), when do my own satisfactions get realized? How can I avoid becoming a human sacrifice on the altar of the work ethic? Confronted by such unease, some students are looking to leisure time for their salvation. In leisure one finds the periods of self-realization, it is said; the preemptory demands of professional practice must be resisted and held in check in the interest of human values.

It is certainly true that some lawyers work too much and that they would live longer and do better work if sensible programs of leisure and recreation were integrated into their lives. All lawyers need periods of refreshment and renewal, and an important item of self-knowledge comes with the discovery of those activities that most effectively produce this rehabilitation. Yet I cannot escape the judgment that many in our society, including some young lawyers, are placing altogether unrealistic demands on leisure as a solution to the problems of living. Indeed, the theory of salvation through leisure is a profoundly depressing one. It rests on the assumptions that satisfactions are not to be gained in one's job, craft, or profession and that self-realization is possible only when one is separated from the drudgery of his work. Existence is thus made up of long and

sterile periods of toil, lightened only by temporary escapes from the job when, and only when, human potentialities can be realized. In this view our lives are divided between the desert and the oasis, and, unless one is unreasonably wealthy, most of one's time will be spent in the arid regions.

Such assumptions do not provide an appropriate foundation for living. In the future as in the past, one must find in his or her labor an important source of satisfaction and humanity. Without this capacity one, at the very outset, loses his grasp on both head and heart.

For the past decade and one-half, young persons have joined their elders in castigating the society of which they are a part. Objects for criticism, unfortunately, have proved to be in abundant supply. This thorough-going criticism of our civilization and its institutions was perhaps overdue; at least it was probably inevitable. But an age of criticism and weakening confidence is a time of danger, and one of its perils is a tendency to attribute to social and institutional failures defaults that are, in fact, matters of individual responsibility. In recent years I have heard many students complain that the world they are entering will force them to do things they know are wrong. Surely this is not a complaint that an autonomous human being can permit himself to voice. If we find ourselves saying "yes" when we should say "no," if we ignore or defy principles of right action in our professional and personal lives, the responsibility can not be transferred to some abstraction like "Modern Society" or "The System." The pressures and temptations are great, and the obstacles to the ethical life confronted by lawyers are especially formidable. But in what age and in what society have men and women participating actively in the life of their times been spared pressures and seductions? Why are we peculiarly entitled to a regime of morals-made-easy? One willing to attribute his default to forces acting upon his life from the outside compounds his immorality with a forfeiture of human dignity. For an evil-doer who assumes responsibility for his wrong retains at least a modicum of dignity. One who seeks exculpation in external circumstances possesses none.

In considering how to retain head and heart even though a lawyer, some students have expressed still another concern. This, in my judgment, is a concern that should be more widely felt and articulated. Is there not a danger, these students ask, that caught up in the demands and excitements of law practice, we shall lose our intellectual curiosity and commitments? How can we avoid spending all our professional energies on the technical needlework of society, activity that may at times be engrossing and at times socially important, but which contributes insufficiently to fundamental understanding of the world of which we are a part? The questions are important. The law school, more than any other institution, is a training ground for leadership in this society. How can we be sure that lawyers know enough about the right things to perform adequately the tasks of leadership? Take one example: The future, like the present and past, will be profoundly molded by the rise of new knowledge. The new genetics, psychotropic drugs, computer technology, electronics, new sources of energy, are creating a society replete with potential and peril. How do we as lawyers think about these issues, anticipate their nature, and make wise provision for their resolution? One may be tempted to delegate these problems to the universities and the law schools, and certainly they do confront legal education with serious issues of scope and method. One contribution of great significance that young lawyers can make is to support in the schools from which they graduate a conception of legal education broad enough to make significant contributions to basic understanding of the world in which the lawyer performs his professional role. But the responsibility is not simply that of the universities. No law school can provide complete preparation for the tasks of understanding and leadership. And if we are to have lawyers capable of providing wise direction in these times, it will be because some lawyers have accepted the onerous obligation of continuous self-education, an effort at understanding going well beyond that required to satisfy the immediate demands of law practice. Where does time and energy come for this task? They must be found. That with sufficient effort they can be found is demonstrated by the fact that we encounter lawyers every day who, although caught up in vigorous and successful law practice, have earned for themselves this broader understanding and something approaching wisdom. What is at stake are not only matters of social concern. Retaining broad intellectual commitments is essential to individual satisfactions, to hanging on to one's head.

This class is graduating when, as usual, the legal profession is under attack. As usual the profession has earned criticism and, also as usual, the criticism expressed is in large part uninformed, including that emanating from public figures of some prominence. These adverse judgments have created discomfort and unease in many law students. It would be irresponsible to ignore the critics of the profession. They should inspire both thought and action directed to professional self-improvement. But they ought not unsettle graduating seniors unduly or cause them to question their vocational choice. It is not easy to hang on to head and heart and be a lawyer. But this is not easy regardless of what career one undertakes. Holmes, you recall, came to the conclusion as a young man that "it is possible to live greatly in the law." He said "possible," not "easy." Certainly he did not say "inevitable." This is not a world in which good things are easy or inevitable. The possible is the best that we can expect. It is possible to be a lawyer with head and heart intact. It is possible, in the wonderful phrase of Sir Francis Bacon, to enter the profession dedicated to "the glory of God and the relief of man's estate."

Francis A. Allen

criminal insanity:

An Expert's Report

**by Andrew S. Watson,
Professor of Psychiatry and
Professor of Law,
The University of Michigan**

[The following report is taken from the second edition of Dr. Watson's *Psychiatry for Lawyers* and is reprinted with permission of the publisher, International University Press. In a foreword to the new edition of Dr. Watson's book, Professor Bernard L. Diamond of the University of California (Berkeley & San Francisco)—one of the nation's leading experts on forensic psychiatry—points out: "Other books which attempt to relate psychiatry and law . . . present the legal aspects of mental health problems, and as such they perform a necessary service to the relationship of the two professions. But none gives lawyers the specific information derived from psychodynamic psychiatry which they so badly need in their practice of the human side of the law. This is admirably accomplished in Dr. Watson's book."

[The report which follows was sent to counsel in a real case. Only the names and some other identifying data have been modified to protect the parties involved from further public perusal. The defendant, the road manager for a musical group, had stabbed to death one "Rosetti," who had retained the services of the musical group. In this case the defendant was ultimately found not guilty by reason of insanity.]

Psychiatric Examination and Study of
Samuel T. Bridges, Jr.

At the behest of counsel, John Condon, Esq., and following the reading of a substantial amount of interview material about Mr. Bridges, I saw him on the 29th of January, 1971, for a period of approximately five hours. The purpose of my examination was to ascertain his mental state and mental capacities at the time he killed Rossetti by multiple stab woulds on 30 April 1970.

In order to do this, I permitted him to talk very freely about himself and his life before I took him explicitly over the episode of the killing.

It became instantly apparent that Sam is a remarkable young man. He proceeded to tell me in meticulous detail about his past history. As he progressed, I was struck with the fact that he was far more concerned about reporting the past to me accurately than he was about any particular consequence his comments might have. He elaborated in detail, to a degree which made one feel that it was going to take weeks to come to the end of his history. This was frequently fretted with dramatized bits in which he would emulate the voice modulations and behaviors of the persons about whom he was reporting. It was easy to understand his behavior and to relate it to reports of his past. At no time did I have any impression that he wished to lie or distort information. (I shall make no detailed repetition of the information I elicited, since that is fully transcribed. That transcription is now indexed.)

As my examination proceeded, it was my intention to attempt to find out the *causes* for his behavior. In theory, this is the result of the way he was reared and, therefore, I sought to gain a clearer image of his childhood and youthful growing up experience. (This has since had some corroboration through an interview with [the defendant's] parents. . . .) It is a fundamental, theoretical assumption that an accurate estimation of his accumulated images of the past will define and delimit the patterns of coping behavior which he will utilize in the recent past, the present, and the future. While these memories are not historically accurate, they do precisely demonstrate what Sam took from the past and built into his own images of life. These became his finite repertoire of adaptive techniques which he would use and will use for dealing with life.

One of the crucial foci is to perceive Sam's *self-image*, his identity. This is the set of internalized psychic images, gained from contact and experience with important persons in the past, which become the models for how one behaves. To a considerable degree, they are drawn from those who perform the functions of mothering and fathering for a person.

One of the most instantly striking characteristics of Sam is his intense, indeed zealous, concern over what I would call justice. He is constantly evaluating the fairness of things. Indeed, the episodes which he described with the most passion always centered around this issue. From the time he was a small boy, how people treated him and how he treated them was a matter of great concern. He *needed* to live up to agreements that he made and would expect others to do likewise. Since this process often runs counter to competing wishes, some accommodation means must be found, and Sam did so. From an early age he became legalistic with a degree of skill that would do justice to a good lawyer. As he would define his contract with people, he would always tend to build into it some kind of small logical loophole which would allow him to gain the things he wished without actually breaking his word. He would then be prepared to argue vehemently and effectively for what he wished. This attribute he gained and polished from and with his father.

Mr. Bridges, Sr., apparently had a similar relationship with his father. This paternal grandfather was a hard-working, rigid type of person who dealt firmly with his children and saw to it that they did the right thing. One gathers that he was a very domineering kind of person who at the same time commanded love and affection. Sam's father carried this behavior into his own relationship with his sons. He clearly cares about them, but does not quite understand the tensions which build up between them. Sam has deep conflicts over his relationship with his father; though he has emulated several of his father's attributes, he does not feel much conscious love for him.

From his mother, Sam gets another important attribute of his personality. In typical maternal style, she is the "understanding" parent, more concerned with how people relate to each other than she is with issues. She tended to side with Sam, but in a relatively nonaggressive way. Interestingly, Sam is not able to say much about his mother: a striking fact when related to his tremendously vivid memory of nearly everything. His voice softened when he spoke of her, and most of his distress subsequent to the homicide relates to how he feels about its effect upon her. Much of the detail of her impact upon him is drawn from my discussion with the parents. It is clear that she does not believe in any kind of open fighting, and she retreats into silence whenever she is accosted. In this regard, on every instance during the interview with Sam, when he would describe a situation in which he clearly had to be angry, he would reveal a self-conscious laugh. This mark of tension revealed a strong inner feeling about the dangers of aggressiveness. He wishes to be a nice person, and he will clearly mobilize massive effort to do that which will make him lovable. If he is positively identified with anything, there is no limit to what he will do in the way of expending his work and energy.

In growing up from childhood, several kinds of coping mechanisms were to become the principal metier for Sam. First of all, he would develop the need and capacity to perform any task with compulsive perfectionism. Coupled with this, he saw himself as able to do anything to which he set his hand. To maintain such an image it became important to carefully select only those activities which would be done to perfection. Things which would be difficult for him because of their creative necessity he would tend to avoid, using the defense of rationalization. For example, he withdrew swiftly from college for the stated reason that he

did not like the hazing activities. It was my impression that he was fearful that he could not do some of the work assigned there, as well as not be able to "look good" to his new associates. On the other hand, Sam would undertake activities that are quite frightening to most and carry them out with an impressive aplomb. For example, he made several hundred sky dives, carried out under what appeared to me to be frightening circumstances. This capacity to psychologically *deny* danger and risk was to be markedly demonstrated in the relatively recent past in relation to his sexual exhibitionism. Though he became aware of this grave risk-taking tendency, and felt badly after the fact, his feelings ahead of time were completely devoid of any sense of danger.

These important psychological attributes are seen clearly over and over again during his growing up. Sam would work intently and effectively on those things which he believed were important, while he would tend to avoid things with which he could not readily identify. Despite very excellent intellect, he did not do well in school. On the other hand, while he was in the Navy, he performed excellently and was selected to carry out high demand jobs, such as working on the nuclear reactor in the submarine service. These episodes of childhood accommodation demonstrated excellent performance as long as he could identify closely with them. As soon as he could not, on some kind of highly logical and rationalized basis, he would attempt to withdraw. If he felt that his withdrawal was just, he would go to any end to carry it out. A good illustration of this was his method for getting discharged from the Navy when he felt that he was being dealt with unfairly.

It is my impression that Sam had a long-standing conflict about whether or not he was going to achieve an adequate masculine capacity. Having seen many pictures of him as a little boy, which his mother brought with her to her interview, I can imagine that he might have been self-conscious as a child. He had markedly "bucked teeth" for which he had years of orthodontia without remarkable success. His mother mentioned that he always felt that he had a "weak chin." Some of his subsequent activity strikes me as being evidence of a powerful need to maintain masculine integrity. This probably fed into his notions of justice, which were to become an important determinant of his condition at the time of the homicide. In typical grandiose way, Sam explicitly and implicitly informed me of the "hundreds" of girls with whom he had slept. (His mother informed me that he would sometimes tease her with comments like this. She would never understand their purpose.) As time passed, it became clear that some kind of deteriorative process was taking place. At first experimentally and "for kicks" but later on more and more compulsively, sexual behavior came to be a kind of exhibitionistic shock maneuver. Women would be slept with without any "romancing." Similarly, exhibitionism was performed on the streets in a more and more compulsive way. As this process advanced, anxiety mounted. By the time of the homicide, Sam himself had become quite convinced the he was "sick" and needed some help.

Another important sequence of development to delineate is his work history. Sam clearly loved the music and the musicians around whom he worked. He apparently became an extremely proficient road manager whose very compulsiveness fostered top performance under stressful circumstances. Though he had changed artists and groups several times, the reasons always related to the fact that they were not working well and therefore Sam could not be satisfied with the end result. When he left his next-to-last job, with Pete Jones, he did it in anger and frustration. Jones was becoming more and more non-functioning and Sam could not stand this. This resulted in some anger between himself and his boss, Tom Woods, which left uneasiness in Sam because he did not believe that he should have departed under these circumstances. When the opportunity arose to manage the Smithville Boys, a group with whom Sam could identify fully because of their artistic skill, he leapt for the job. He vowed that he would never again let Tom down, nor would he quit. "You'll have to fire me." About a year before the homicide, Sam embarked on the road career of that group. Since it was new and therefore not yet highly profitable, the moving had to be largely by driving. This necessitated a rugged, demanding road schedule, one which led progressively to utter and total exhaustion for Sam. Secondly, the differing philosophy of the Smithville Boys put Sam in a certain amount of confusion and conflict between his needs for meticulous predictability and the Smithville's almost altruistic desire to play good music for the kids even if they couldn't afford it. Thirdly, due to the hectic nature of this schedule, Sam began to rely more and more on the use of amphetamines to keep awake and carry out his work. This kind of regimen can cause one to totally deplete one's energy reservoir far beyond normal before collapse occurs. The end result is that when the breaking point occurs, one has far less reserve upon which to draw than under ordinary fatigue situations. This, too, had been building up in Sam for several days prior to the homicide. . . .

Before moving to the description of the stressful event which led to the homicide, one more point should be made. For several years, Sam had had with himself a suicide pact. On a conscious level, the reason given was to assure that he would not lose any of the excitement of current life through excessive caution and putting off to the future. He firmly believes that many people do not enjoy life because they invest too much in the future, thus surrendering to what he views as a kind of cowardice which is self-defeating. It is my impression that on an unconscious level, Sam was confronting himself with a kind of testing to see whether or not he could truly perform. Like taking large risks, he would either prove himself or die in the attempt. By minimizing the effects of death, he would thus facilitate his masculine competitiveness. This view is not dissimilar from the writings of several of the existentialists. It is my impression that as Sam's overall functioning was progressively deteriorating, his old belief,-that one should die while one is ahead, was slowly rising to the surface. He very nearly acknowledges this as he talks about the killing. I gather some of his early comments following his arrest tend to confirm this position.

The straw which broke the camel's back fell into a kind of typical stress circumstance for Sam. For several days before the killing, and especially the day before, Sam was of the impression that the Paulo-Rossetti combination was out to "slick" him. The several changes in the contract and their refusal to deliver the money due convinced him of this fact. Also, he had made an open vow to the band that they were not going to be slicked. This was one of those circumstances in which Sam felt that he could legitimately take on the thwarting person. The only problem was that he approached it in such a state of fatigue that he would have far less than his usual control capacity with which to regulate himself.

At the time he went to confront Rossetti, he had erected the image of a Mafioso type. He assumed he would be seeing a dark, pin-stripe dressed person who was out to cheat him. He decided to take the knife along to "cut" him, if necessary. He says that he had no idea whatsoever about what he meant by that, and I believe him. At the time he arrived and saw Rossetti, he was suddenly confronted with a pleasant looking elderly man whom he in fact liked. This immediately threw him into confusion and he found that he no longer wanted to cut him. He thus began to contemplate ways in which his plan could be alerted. He decided that if

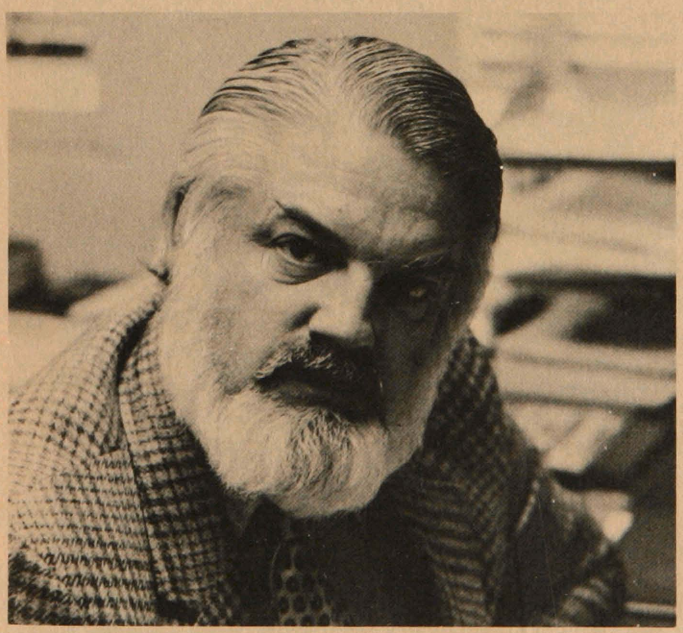
the man were to plead that he had no money, then he, Sam, "could help him out" and thus not have to collect the money. This would permit him to be free of his "vow" in a perfectly "logical" way. The discussion between the two men resulted in phone calls between Sam and Paulo, and the way Paulo and Rossetti passed the responsibility back and forth further confirmed Sam in the belief that he was being slicked, and further raised his anxiety about the implacableness of his dilemma. Following the phone call, when he went back to talk further with Rossetti, he took the knife and held it under his jacket. He reports remembering how sharp it was and he began to wonder "How am I going to get the knife back into the case?" He describes a very bizarre conflict between the need to get the knife into the case without cutting himself and the need to somehow get out of his confrontation. He then reports a brief period of amnesia, and when he next found himself, he had his hand against Rossetti's stomach, and heard his surprised comment, "What are you doing?" He remembers thinking to himself, "What am I doing? What in the fuck am I doing?" Then people began to scuffle and to pull him away from Rossetti.

It is my impression that this period of amnesia, which I shall describe as a dissociative episode, was the result of his powerfully conflicted impulses to kill the person who was slicking him and the wish to maintain the image of himself as one who does not hurt, but rather helps his fellow man in need. Because he could not resolve this dilemma consciously, it became necessary to obliterate consciousness, and thus choice-making, and his action was dominated by the now untrammeled aggressive impulse.

The result of this episode, with all of its potential symbolic meanings (which I cannot yet fully delineate) was to enforce his abstract sense of justice, get himself out of the job situation which was progressively deteriorating, possibly to terminate his life.

This control failure had appeared on two previous occasions: first the episode in Macon, at which time he emptied a revolver at a fleeing car; and secondly when he smashed the typewriter in the Western Union office. On each of these occasions a similar confrontation had occurred and there was a similar loss of control. However, at the time of this last episode, there was greater fatigue, greater impairment of capacities due to the effects of amphetamines, and thus much higher risk.

It seems very clear to me that there is a valid defense of "not guilty by reason of insanity."



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