Law Quadrangle Notes

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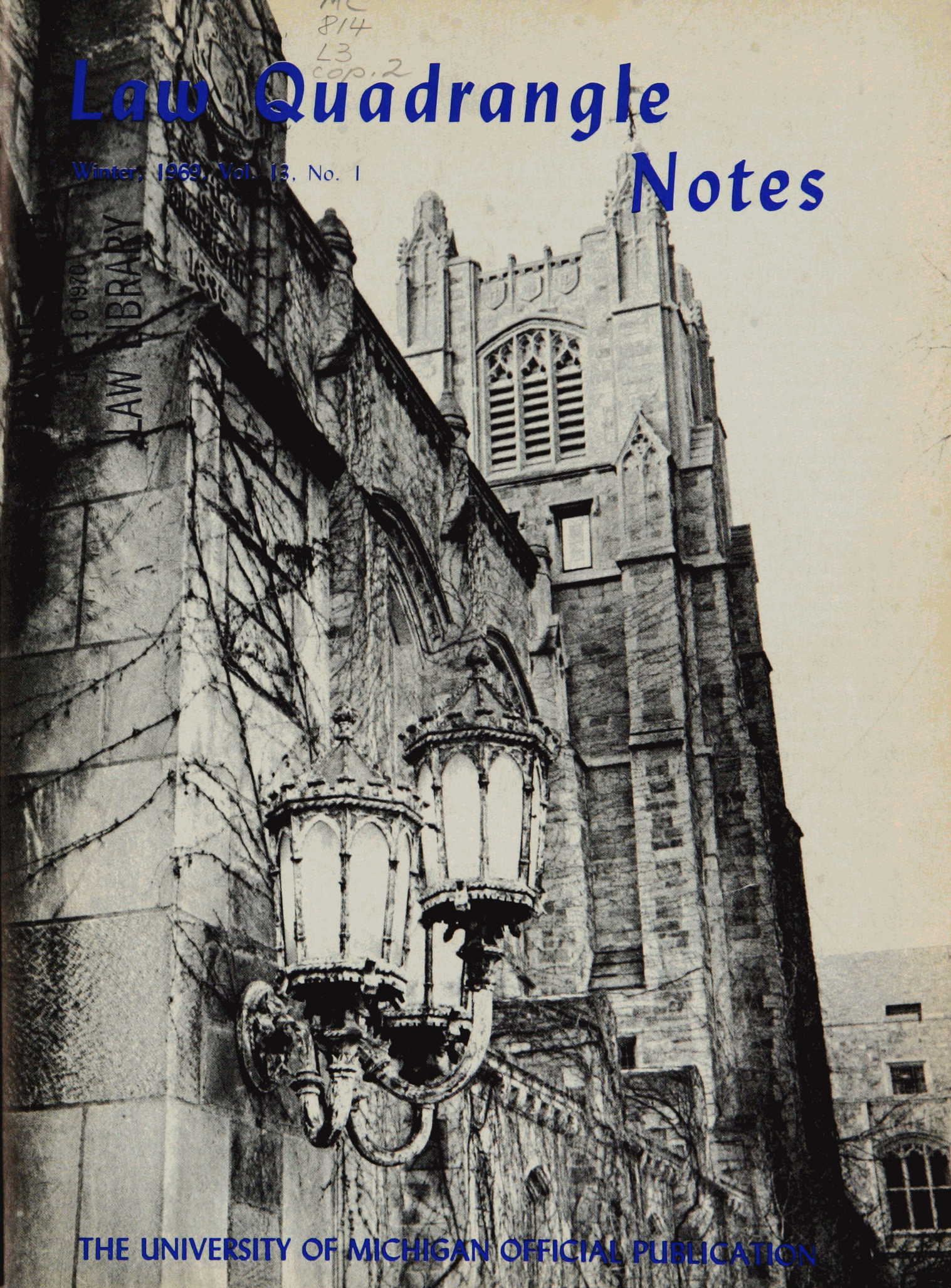

THE UNIVERSITY OF MICHIGAN OFFICIAL PUBLICATION

Prof. Carrington Directs Study of Law Curriculums

Sensing that the basic structure of the nation's legal education may be somewhat out of date, the Association of American Law Schools has commissioned a study of law school curriculums which will consider ways in which legal education might be adapted to the changing times.

The project is supported by funds of the Ford Foundation and will be conducted by a group yet to be named. Professor Paul D. Carrington of Michigan has been named to direct the project, and Professor William Klein of Wisconsin is Associate Director. A planning meeting was held in Ann Arbor on December 8, 1968. It was attended by Dean William Lockhart of Minnesota, the President-elect of the Association, and Professors David Cavers of Harvard, David Currie of Chicago, Thomas Ehrlich of Stanford, George Lefcoe of Yale, Carrington, and Klein.

Prof. Carrington noted that "most changes in legal education have come, and will continue to come, from the impetus of creative teachers as they go about their work. Only a modest contribution can be expected from a committee working at the abstract level of the Association. On the other hand, such a group will have the advantage of being unencumbered by the concern for personal relations which sometimes inhibits self-criticism and innovations at the operational level.

"Moreover, there are some lines of inquiry to be pursued which require greater resources than are available to most law school curriculum committees. The project will try to emphasize undertakings which it is best equipped to perform."

More specifically, Carrington suggested several possible inquiries which might be initiated. It might prove useful to try to stimulate interest in the use of modern educational psychology as a basis for curricular planning. It might be useful to give closer attention to the growing body of information about the sociology and economics of the legal profession to see what such information may suggest in the way of public needs that might be served by curricular adaptations.

It might also be useful to apply a national perspective to the problem of relating legal education to the needs of those deprived groups who are only beginning to understand that the law is for them, too, Carrington noted. It might be profitable to assemble and evaluate the many ideas now being developed for relating legal education more closely to the realities and techniques of practice.

Consideration might also be given to evaluating ways of preserving the conventional values of legal education while devoting less of the students' time to it, Carrington said. It is also possible that the project may attempt to evaluate the available methods for integrating law schools more closely into their parent universities so that mutual support can be gained for students of law and related disciplines.

Prof. Paul D. Carrington

At the present time, all of these are only possibilities, Carrington pointed out. The project is open-minded on such questions as specialization, the development of programs for training para-legal personnel, and the possibility of abandoning the standard three-year program in favor of programs of varying length designed to fit varying needs and ambitions.

Professor Carrington, who joined the University Law School faculty in 1965, has taught at Ohio State University. Before that he was on the faculty of University School of Law at Indiana and at University of Wyoming. He served as a teaching fellow at Harvard where he received his law degree.

Memorial Scholarship For Arthur M. Smith

The Arthur M. Smith Memorial Scholarship has been established at the Law School. Funds are being contributed by friends and former students of the late Judge Smith, one of the state's outstanding jurists and patent attorneys.

The annual scholarship will be awarded to a senior law student who plans to enter the patent law field. Judge Smith, who died suddenly last November, was a U–M alumnus and became Associate Judge of the U. S. Court of Customs and Patent Appeals in 1959. From 1952–59, he taught patent law at the University.

CONTENTS

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Prospective Law School Freshmen Want 'Options Open and Idealism Intact'

"Can I go to law school and work for a master's degree in another field?"
"How is law school relevant to solving problems of the cities?"
"What is Michigan doing about the law and the poor?"

These are the kinds of questions Assistant Dean Matthew McCauley hears repeatedly as he travels from campus to campus in the fall interviewing college seniors interested in the University of Michigan Law School.

"Most of these prospective students want to be able to keep their options open and their idealism intact when they come to law school," McCauley observes. "They seem to envision a career as a lawyer/mayor of a small city or a downtown social worker rather than as a practicing lawyer."

Responding to these questions, and the viewpoint which generates them, is an art of both persuasion and education. McCauley has prepared a description of courses and programs of study at the Law School which relate to these matters, and enjoys discussing the social relevance of law school.

But he also points out that law is largely a value-neutral tool, its doctrines frequently products of mundane dealings and forgotten social problems; that neither students nor professors of law are altogether altruistic; and that the law's career opportunities for direct social action are limited.

Such caveats generally go unheeded, McCauley suspects. In any event, his task for the long winter months is to review the nearly 2,500 applications which arrive before the April 1 deadline in order to select the year's entering class of some 350.

To a large extent the process of admission involves self-selection, a fact which surprised McCauley somewhat when he assumed the job which Prof. Roy L. Steinheimer largely developed and oversaw before he became Dean of Washington and Lee University Law School last fall.

Nearly all the applicants are able candidates. Few of those whose college grades and Law School Admission Test (LSAT) scores are at the lower end of the spectrum apply. Because the admissions committee of the faculty feels it is impossible to distinguish candidates with close grade point averages and LSAT test scores, McCauley looks carefully at letters of recommendation and extra-curricular involvements.

As the number of highly qualified applicants has increased every year, so has the importance of letters of recommendation. Unfortunately, says McCauley, many of these letters are disappointing, not for what they say, but for what they don't say. General letters of what-a-fine-young-man-John-is or what-outstanding-parents-John-has don't give the kind of detailed, frank appraisal of an applicant's intellect, maturity, personality, and ability that is needed. One letter comparing John to a former University of Michigan Law School student, indicating an intimate acquaintance with John's high-level academic work, or commenting on his demonstrated ability to write is far more helpful than several of the others.

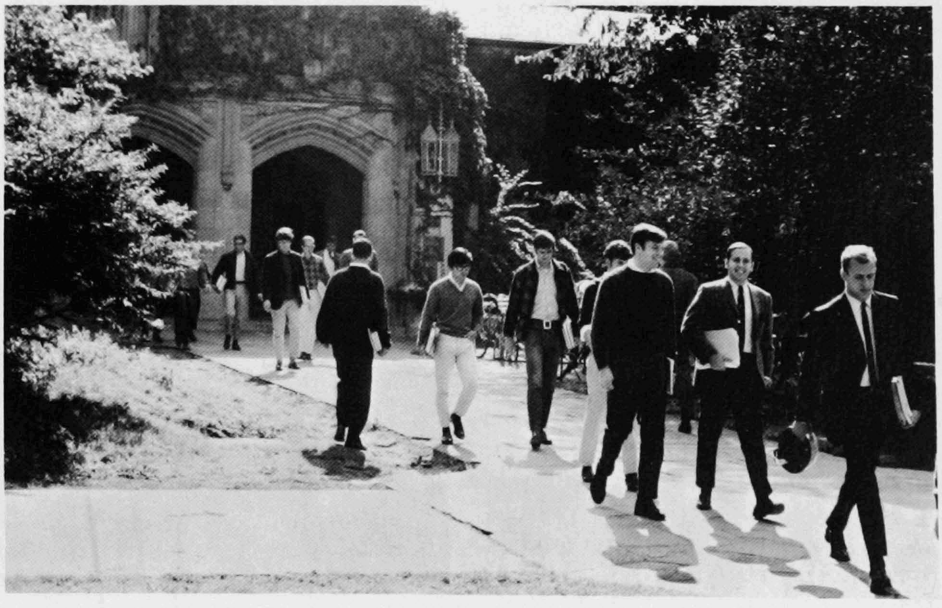
One of McCauley's intentions is to build up the School's contacts with people who can make substantive recommendations and have written letters for good students by sending them a special letter of thanks with a request for continued concern and assistance.

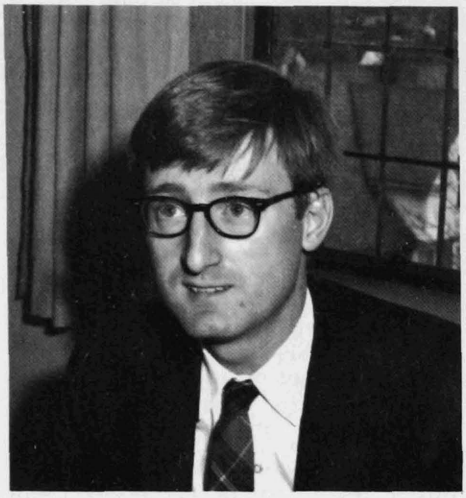
Along with letters of recommendation, an applicant's significant non-academic achievements are considered in the hope of finding students with imagination and enterprise. Graduate study, military service, work experience, and substantial undergraduate activities are included in this category.

A procedure which gives such factors greater play and provides the admissions process greater flexibility is the practice of reserving a portion of each entering class for marginal applicants and considering twice as many applications for that portion as can be accepted. This consideration is done by the faculty admissions committee, made up of Professors Gray, Kahn, Knauss, and White, which selects about 70 applicants. In case of otherwise equal applicants, the committee considers whether the person is a veteran, the son of an alumnus, or a resident of Michigan.

McCauley is working on several ways of refining the quantitative indicators. For example, although there are now various formulas for combining LSAT scores and grade point averages to produce a composite measuring figure, McCauley plans further analysis to increase the sophistication of these figures.

At present an applicant's grade point average is discounted by an adjustment factor which is based on the Law School performance of other graduates from the applicant's college. This, in effect, takes the applicant's educational background into account and provides a criterion independent of it. McCauley also hopes to analyze





Assistant Dean McCauley

the adjustment factor to make it more discriminating.

The quantitative research McCauley plans should result not only in more accurate measurements of applicants' qualifications, but in more time to consider factors which now exert only an incidental influence, such as geographical distribution, or distribution by undergraduate major or institution, if the admissions committee so desires.

McCauley also plans to establish a computer bank of information on the Law School's students and graduates, a project on which he's cooperating with Associate Dean Roy Proffitt.

In line with the Law School's policy of encouraging students from minority groups, McCauley's efforts involve searching for Mexican-American and Negro students who meet the School's standards. He finds his age—26—helps him talk to undergraduates, relate to their concerns and complaints, and explain the Law School to them.

Occasionally he encounters unusual problems. For example: What should be the considerations in whether or not to admit a qualified applicant who is blind?

McCauley is the youngest man to receive an assistant deanship in the Law School. He received his A.B. *cum laude* from Harvard and his J.D. from U–M. Just before joining the Law School administration he spent a year in Zambia under a fellowship awarded by the Program of East Africa Studies, Syracuse University.

Professor Sax Authors Book on Water Law

Professor Joseph L. Sax's recent book on water law departs from the traditional case and commentary approach.

Entitled *Water Law, Planning and Policy,* it emphasizes the factual background of several contemporary problems in water resources management—for example, New York City's water problems and the reallocation of water from the Pacific Northwest to the Colorado River basin—and allows the legal doctrines to emerge as they become relevant to the problem and as the student acquires the background to understand them.

In this book, published by Bobbs-Merrill as one of the Contemporary Legal Education Series, the materials overshadow the cases.

As Sax puts it: "Where I find it necessary to puzzle over judicial language to understand what is going on, then, and only then, do I reprint cases." (Sax published a western water law casebook with Pruett Press of Boulder, Colorado, in 1965.) Much of the text is excerpts from articles or Sax's own distillation of judicial developments or other information.

His justification for this approach is his "conviction that the legal issues of water resource problems cannot be isolated from economic, technical, and political considerations.

"I find it meaningless to talk of the proposed Northwest-Southwest diversion simply in terms of legal doctrines such as equitable apportionment or constraints on exportation. One must have some understanding of the impact and meaning of benefit-cost analysis, which is a critical factor in the evaluation of large-scale public works projects; and he must know something of the history of American water-planning institutions such as the Bureau of Reclamation and the Corps of Engineers.

"These questions are too important to be relegated to a brief footnote or two. I have thus inserted substantial extracts from writings in fields such as economics, political science and geography."

Prof. Joseph L. Sax

Prof. Robert J. Harris

Prof. Harris is the Democratic candidate for mayor of Ann Arbor. The election of a mayor and five City Council members will be held April 7. In announcing his candidacy, Prof. Harris issued a statement which read in part: "I seek the office of mayor because I think that Ann Arbor no longer can afford its traditional kind of indecisive, conservative leaders. We have many dedicated and qualified city employees, and a rare combination of natural advantages. . . . Ann Arbor, given the right elected officials, should lead the nation in finding solutions for urban problems. I believe we can create a city of excellence."

Visiting Professors Bring to Law School Varied Teaching Styles and Approaches

(Editor's Note: Three of this year's visiting professors were interviewed. Both Professors Herman and Graham returned to their home schools at the end of the fall term. Prof. Schwartz is teaching through the winter term.)

Lawrence Herman

Law teachers and lawyers should participate in the training of police, maintains Professor Lawrence Herman of Ohio State University College of Law.

He noted the popular outcry that Supreme Court decisions hamstring the police and hamper the prosecution obscures the fact that the police still have broad evidence-gathering authority. Searches without warrants incident to arrests are still permitted, for example.

"The police frequently don't realize how inexpensive in time and effort it is to adhere to due process," said Herman, who taught courses in substantive criminal law to policeman and highway patrolmen in the Cleveland area while on the faculty of Western Reserve University Law School from 1959–61.

Prof. Lawrence Herman

"Although police training manuals may be up-to-date and accurate, too often police and prosecution lecturers in such courses convey an exaggerated notion of the cost of following the Supreme Court's guidelines."

The advice required by *Miranda v. Arizona* can be given so the defendant understands it, insisted Herman, drawing in part on his experience under the Uniform Code of Military Justice rule similar to *Miranda* as a prosecutor for the U. S. Army Judge Advocate Corps in Stuttgart, Germany, from 1955–58.

Not only can the advice be given intelligibly, said Herman, but by filming or tape-recording the advice the prosecution's case and the defendant's rights can be protected cheaply and easily.

Herman said it is important to interpret these issues correctly to the lower echelons of police forces because what a policeman actually does is in large measure determined by what his immediate supervisor wants or will allow, regardless of how enlightened the commissioner of police may be about preserving constitutional safeguards.

Another means for promoting improved administration of the laws by police, suggested Herman, is to devise a system of recognition for officers who exercise good judgment and refrain from making unwarranted arrests or taking unnecessary steps.

In addition to criminal procedure, Herman is interested in substantive criminal law, particularly law reform. He taught first-year criminal law, in addition to family law, last fall in Ann Arbor.

He is involved with a committee doing the basic work of redrafting the corpus of Ohio substantive and procedural criminal law. "Although we have been significantly influenced by the American Law Institute's Model Penal Code, in our draft we are attempting to avoid the difficulties of instructing the jury which the Model Penal Code's often intricate language entails," Herman said.

Herman is also working on a book on Ohio criminal and civil evidence, and is active in a group working to abolish the death penalty in Ohio. "Legislative redistricting in Ohio has resulted in more legislators who are unwilling to vote for abolition, however," Herman commented.

A native of Cincinnati, Herman received his law degree in 1953 from the University of Cincinnati after majoring in English there as an undergraduate. He was working on his LL.M. at Northwestern—studying the legal aspects of brainwashing as a defense for U. S. soldiers charged with aiding the enemy while prisoners of war in Korea—when the draft called and he accepted an Army commission.

After his discharge in 1958, Herman worked for a year as clerk to U. S. District Court Judge Julius Hoffman in Chicago, before going to Western Reserve.

Kenneth Graham

Professor Kenneth Graham of the U.C.L.A. Law School plans to introduce a criminal procedure course based on the materials and approach he formulated while teaching at the U–M Law School, his alma mater, last year. He is concerned not so much with the constitutional aspects of the subject as its relation to fundamental concepts of procedure, whether civil, criminal, or administrative.

As a visiting professor at the U–M, he taught evidence and trials, appeals, and practice court in the fall and criminal procedure in the summer.

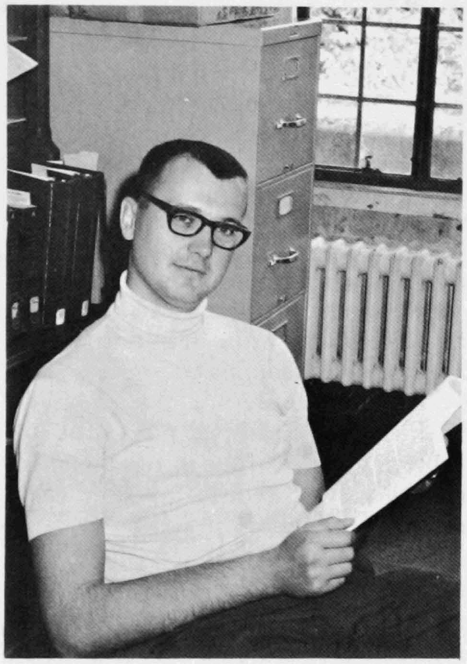
He said it would be more valuable to students if procedure were taught not as a service course which requires them to become conversant with the whole of a particular procedural system, but as a course with some jurisprudential significance.

"Why should it be compulsory for the future tax specialist to learn in detail about civil discovery, for example," Graham asked. "The basic problem with this approach is that procedure changes constantly. Far better the students see the life cycle of a procedural system—its birth as a product of reform, its increasing complexity as it ages, its eventual death as a

simpler system replaces it—and learn how and why this happens."

Graham is considering the possibilities of developing this approach into a basic first-year casebook.

He has written a study of California's experience in interpreting the *Miranda v. Arizona* decision based on the administration of several California cases under the California Supreme Court's interpretation of *Escobedo v. Illinois,* which anticipated the *Miranda* decision. It is entitled "What is 'Custodial Interrogation'?—California's Anticipatory Application of *Miranda*" and appeared in the U.C.L.A. Law Review in 1966. The article was used extensively throughout California in a program for criminal lawyers sponsored by the Continuing Education of the Bar.



Prof. Kenneth Graham

From Morenci, Michigan, Graham attended the U-M as an undergraduate from 1953–57, then was drafted into the Army upon graduation. At Fort Bliss, Texas, he taught guerilla warfare, map reading, and radar jamming to R.O.T.C. officers who were training to become missile officers. He found it particularly enjoyable to work with two California engineers in constructing novel devices to simulate jamming.

Before entering the Law School on the accelerated year-round program, Graham worked for a year in Detroit for an insurance firm and gained insight into the perspectives of businessmen and insurance claim negotiators.

He handled litigation and some labor cases for the Los Angeles firm of Gibson, Dunn, and Crutcher before joining the U.C.L.A. faculty in June, 1964.

For outside activity Graham plays basketball frequently—often with his U.C.L.A. students—and both collects and plays contemporary rock group popular music. As an undergraduate he was a member of several student jazz combos, and now likes to take his slide trombone and join a faculty-student group playing "cocktail jazz" for a law school function whenever it can be arranged.

Herman Schwartz

Sophocles' *Antigone,* William Burroughs' *Junkie,* Piri Thomas' *Down These Mean Streets,* and the Report of the President's Crime Commission constituted part of Professor Herman Schwartz's reading assignment in his first year criminal law class this past fall.

He wants his students to read such literary and empirical works in addition to the usual cases and statutes so they will develop some appreciation of the personal psychology and fundamental moral questions involved in crime and criminal law. He also tries to teach not just the doctrines of criminal law, but how the law is actually administered.

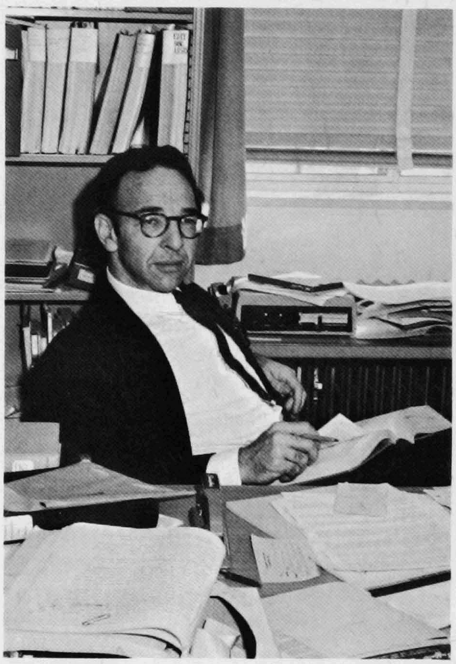
He hopes the students will see the problems of society which explode as crimes, and how the community tries to deal with these problems. The students will consequently be better prepared to know not only what the law is, but why it is that way and what it should be for dealing with those who break society's rules, Schwartz says.

This term, Professor Schwartz, who is on leave from the School of Law of the State University of New York at Buffalo, is teaching the course in antitrust, and a seminar on his particular field of interest—communications regulation.

In teaching antitrust, Schwartz assigns students to argue for or against one side of a problem situation based on the readings and cases while he sits as judge to guide the arguments and see that important issues are not neglected.

"This gives the student some practice in using materials and the facts as the client gives them to build an argument and in thinking on his feet to advance his client's case," Schwartz says. "It's an enjoyable kind of teaching, and, I think, relevant to training a student to practice law."

Before going to Buffalo, his practice in New York City with Javits, Moore, and Trubin, and, prior to that, with Kaye, Scholer, Fierman, Hays, and Handler, involved him extensively in trade regulation and anti-



Prof. Herman Schwartz

trust cases. From 1961–63 he was Assistant Counsel to the U. S. Senate Subcommittee on Antitrust and Monopoly, then chaired by Senator Estes Kefauver.

In 1967 Schwartz was a member of the Advisory Committee for the President's Task Force on Communications Policy and a consultant to the Task Force in one of his special areas—domestic and international satellite problems.

His over-all concern in these areas is how communications technology can be best controlled to benefit and create opportunity for the public. He is particularly concerned with what possible forms of ownership would most efficiently integrate the new satellite technology into the communications industry, in order best to im-

prove international communications and to promote the domestic public interest.

"The somewhat overworked way of posing the problem," Prof. Schwartz explains, "is to ask if in giving AT&T and the communications industry a large share of the ownership and control of Comsat, when the interests and goals of the two are often directly opposed, we haven't set the fox to guard the henhouse.

"Another concern of mine is whether the regulation and administration of these fearfully complicated economic and political questions in communications entities, such as Comsat, and public utility regulation in general, can perhaps only be understood by those with Ph.D.'s in mathematical economics. Does that mean that the rest of use can't determine whether what's done is actually in the public interest?"

Professor Schwartz's professional interests also encompass abortion law reform, police training and practices (including extensive writing on wiretapping and electronic eavesdropping), and de facto segregation.

He was the originator of the Erie County (N.Y.) Program of Police Training in Criminal Justice and its director from 1965–68. He was also a consultant on police-community relations for the National Advisory Commission on Civil Disorders.

Professor Schwartz has spoken and written widely on the harmful effects of present laws prohibiting abortion and recently gave a brief talk on the vagueness of most abortion statutes. He finds doctors have considerable difficulty knowing what they may or may not do under existing laws.

In 1964–68 he was counsel for the N.A.A.C.P. in *Dixon v. Buffalo Board of Education,* a suit before the New York State Commissioner of Education which successfully sought to compel termination of de facto segregated schools in Buffalo.

Professor Schwartz is a 1956 graduate of Harvard Law School. He also did his undergraduate work at Harvard, concentrating in philosophy and political science. Before entering practice in New York City he was a clerk for a year to the Hon. J. Edward Lumbard of the U. S. Court of Appeals for the Second Circuit.

Professor Watson Writes 'Psychiatry for Lawyers'

Professor Andrew S. Watson, M.D. of the University's law faculty is also a professor of psychiatry at the Medical School and spends considerable time counseling at Children's Psychiatric Hospital.

At the Law School, in addition to teaching criminal law and family law, he teaches a course called "Law and Psychiatry" which emphasizes scientific problems of the most widely held current psychiatric theory and their relation to law.

The materials for this course have recently been published as *Psychiatry for Lawyers,* a book Watson hopes "will help law students, lawyers, and judges make the substance and practice of law better conform to the realities of human behavior" in more effective counseling and advocacy and in more rational legislation and decisions.

The book presents an outline of human behavior and development, which Watson states is the "principal contribution which modern dynamic psychiatry can bring to the law." The theory of human behavior set forth draws heavily from concepts of psychoanalysis, and is notably (but not exclusively) indebted to Freudian psychodynamic theory.

Legislators and judges may find psychiatric knowledge of human behavior, however incomplete, preferable to less reliable hunches and intuition in their efforts to determine the advantages and shortcomings of a certain law or legal assumption, Watson notes. But he stresses that the scientists' role is to provide relevant information for these decisions, not to make judgments for the law.

Practicing lawyers can benefit additionally from knowing about the concepts of psychiatry in their daily counseling with clients, the subject of the initial chapter. Watson uses the lawyer-client interview as the frame of reference to introduce his discussion of a psychiatric theory of human behavior. "As everyone knows but many forget, to understand the man you must know the child. After we have demonstrated the kinds of problems raised in interviews with adult clients, we will proceed to describe their genesis."

Watson describes the periods of development of the human personality in chapters which are concluded with hypothetical problems, questions, and references to cases designed to elucidate the relation of psychiatric concepts to legal problems and concepts.

Throughout the book Watson defines his terms carefully and clearly, and reminds the reader frequently that it will not do to simply apply labels to a situation or person.

In his foreword, David L. Bazelon, Chief Judge of the U. S. Court of Appeals for the District of Columbia Circuit, states that Watson "suffers from no illusions that psychiatry can resolve age-old legal and moral questions. All (he) asks is that lawyers begin to explore the contributions behavioral science may be able to make to our legal system. His book is an excellent starting point for that exploration."

The book is published by International Universities Press, Inc., 239 Park Avenue South, New York, N.Y. 10003.

One of Professor Watson's research areas has been "Law Student Motivations: Relationship to Academic and Professional Success. He also has been studying psychotherapy of family units and clinical methods for management of the dying patient, among other topics.

Prof. Andrew S. Watson

Impact of Computers On Credit Bureaus

by Professor Arthur R. Miller

Statement before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the U.S. Senate, December 11, 1968.

I am deeply honored by the invitation of this Subcommittee to participate in these important hearings on credit bureaus. Although the invitation was tendered less than a week before this statement had to be submitted, which gave me virtually no time to prepare adequately, I feel that the subject matter of these hearings is so important that I am pleased to be here to offer what little assistance I might give to this body despite the pressures of time.

I am compelled to begin with a disclaimer. I admit to being a professor of law at the University of Michigan Law School; but I deny having any special competence in the fields of antitrust or monopolization or economics. My last—indeed, my only—exposure to these subjects was as a student at the Harvard Law School in 1958 in a course offered by Professor Donald F. Turner. Nor do I claim any expertise in the areas of credit, credit bureaus, or commercial law.

Unless I have badly misconstrued the Subcommittee's invitation, I assume that I have been asked here because of my deep involvement during the past two or three years in the field of computers and the law. By this I mean the study of the ways in which modern computers and the allied information transfer technologies will impact and challenge vital aspects of our business, cultural, social and private lives so as to require a reaction and perhaps a doctrinal adjustment by our legal system. The areas in which I have been active include the interaction of computer technology and personal privacy, copyrights, patents, education, and, to a lesser degree, communications and judicial administration. In this connection, I have had the privilege of appearing before the Senate Subcommittee on Administrative Practice and Procedure during its investigation of computers and privacy and the Senate Subcommittee on Patents, Trademarks, and Copyrights during its hearings on the question of computers and copyrights. In addition, I have expressed my views on these subjects in articles in the Michigan and Minnesota Law Reviews, the Atlantic Monthly magazine, and a number of other publications.

Thus, I perceive my function as being primarily one of offering a few observations as to the impact that computers and related technologies will have on the ways in which credit bureaus will function in the future and the form that industry may take a decade or two from now. I assume that one of the basic concerns of the Subcommittee is the possible effects these transformations of the credit bureau industry may have on competition. Thus, with apologies for my limited appreciation of antitrust law and policy, I will try to suggest ways in which a computer-based credit bureau industry may raise serious questions under existing principles and philosophies of competition.

The Computer and Its Applications

All too often computer technology is viewed simply in terms of its ability to process, store, and retrieve data. We are all well aware of the enormous capacity of computers to reduce large quantities of information to miniaturized electronic notation and to reproduce selected portions of that store almost instantaneously. It is now a common cliché to note that the entire informational content of the Library of Congress can be reduced to machine readable form, stored in a small bedroom-sized room, and retrieved by the typing of a command on a computer terminal.

> A number of people who seem to have the gift of perceiving the future believe that these innovations are as significant as the invention of movable type.

If I can convey but one essential fact to the Subcommittee this morning, it is the following: the computer is not simply a sophisticated indexing or adding machine, or a miniaturized library. It is also the keystone for a new communications medium whose capacities and implications are today but beginning to be perceived. When localized computer systems are interconnected by one or more of the modern communications vehicles (telephones, microwave relays, satellites, and lasers), we will have the technological ability to move large quantities of informa-

Prof. Arthur R. Miller

tion over vast distances in units of time (anoseconds) that are so imperceptible they are difficult to comprehend. A number of people who seem to have the gift of perceiving the future believe that these innovations are as significant as the invention of movable type. In the future, information may not be thought of in terms of alphabetical imprints in a book but rather as holes on punch cards, magnetic fields on tapes or discs, electrical impulses moving through the memory core of a computer, and, perhaps radiations generated in vats of complex chemicals. Given these possibilities, it is peculiarly appropriate for this Subcommittee to be examining the future shape of the credit bureau industry—an industry that is entirely dependent on the ability to manipulate information.

In addition to the communications characteristics of computer technology, two other aspects of the new machines should be noted as potentially relevant to the Subcommittee's study. First, the increased speed and versatility of the new computers, combined with drastic reductions in cost, permit users to gather and store quantities of information and to undertake the kind of analyses of data that were never feasible before. One esoteric example of this new capability is the computerized formulation of complex models of our environment based upon large numbers of variable characteristics, which permit scientists to predict behavior and phenomena with high degrees of accuracy. "Multivariate" analyses of this kind, however, create a need for detailed information rather than the types of summaries that social scientists and other information users have traditionally employed.

> It is now possible to use the same basic data again and again for difficult analytic purposes. From the point of view of analysis, the original unaggregated microinformation offer [sic] greater potential than tabulations of a more aggregative nature. Where relationships of data inherent in the basic reporting unit are important, aggregate tabulations often hide more than they illuminate. (Report of the Committee on the Preservation and Use of Economic Data to the Social Science Research Council (April, 1965) (the Ruggles Report).)

Given this increasing demand for "microdata," and the demonstrated tendency of organizations to gather and exchange more information as their data-processing capabilities expand, the inevitable result will be a heightened ability to use data for variant purposes. The implications of this for the credit bureau industry will be described in a later section of this statement.

Another, and perhaps even more significant, development in computer technology is the widespread use of "time sharing" systems in which a central memory unit is linked to a number of remote terminals. The economic factors leading to this development are not difficult to discern:

> Under the traditional batch-processing method, access to the computer was limited to one user at a time, although even the most complex scientific problems consumed less than 10% of the computer's capacity. This kept data processing charges high and limited the market for computer services. Multiple access computers make it possible to soak up this excess capacity. Indeed, computer power may experience such drastic cost reductions that it will be priced as low as, say, electricity. (Irwin, The Computer Utility, Competition or Regulation?, 76 Yale L.J. 1299 (1967).)

Although the bulk of this on-line data processing currently is transmitted over lines leased from telephone companies, it would be fallacious to regard the data processors and the common carriers as discrete entities even at the present time. The remote-access, time-sharing computer system possesses the capability of switching the messages among several different customers, which is a hallmark of the communications common carriers; at the same time, computer firms are considering the feasibility of using private microwave systems to connect data centers. To complete the circle, the telephone system is beginning to convert its electro-mechanical switching devices to electronic equipment, which will give it the capabilities of a data center, and Western Union is establishing computer centers in order to provide customers with data-processing services. This pattern of agglomeration and growth has been termed an "almost biological" development of a natural monopoly, similar in kind and magnitude to the past networking of railroads and telephone systems. These movements in the data-processing and transmission industries have been the subject of considerable concern to the Federal Communications Commission during the past year (F.C.C. Notice of Inquiry, Docket No. 16979) and I will return to them and their relevance to this Subcommittee's hearings at a later point.

Because of their flexibility, the use of modern computer systems has been proposed for a wide variety of private and governmental functions. In addition to proposals for a federal National Data Center to consolidate government statistics programs, a number of state and local governments and the Federal Bureau of Investigation have begun computerizing a variety of records, frequently in systems that permit remote access from multiple terminals. In the private sector, computerized information systems have been adopted by hospitals, a variety of businesses, and educational institutions; future applications of the new technology are a fertile field of speculation, particularly when the possibilities of mating computers with other communications media and various kinds of remote sensing devices are considered. It is against this constantly accelerating trend toward computerization and more sophisticated utilization of the technology that we must view the implications of the computer on the credit bureau industry.

A Computerized Credit Bureau Industry

At the risk of repeating what earlier witnesses may have presented to the Subcommittee, I would like to indicate some of the ways in which the new information technologies currently are being utilized by the credit bureau industry and how they may be employed in the future. It is obvious that the genius of the new computer technology is peculiarly well suited to the needs of an information

gathering, processing, and disseminating business such as the credit bureau. The basic stock in trade of these companies is the acquisition of large quantities of data that can be readily manipulated so that particular items from the information store can be made available in a relatively short period of time. Thus, it is not surprising to learn that the credit bureau industry has been active in the field of computerization for several years.

As early as September, 1965, Credit Bureau Data Corporation inaugurated a large scale, on-line computerized credit information system in California. In 1967, that company tied its Los Angeles and San Francisco offices together to provide, in effect, a statewide computer credit network. During the same year, Credit Data opened a computerized center in New York City and plans are under way for a computerized center in Detroit. Credit Data uses IBM equipment and responds to telephone inquiries from subscribers by reading the print-out of the computerized record on the potential borrower. The response time averages two minutes.

At present, Credit Data serves an area with a population of over 35 million people and, according to its President, Dr. Henry C. Jordan, has credit information on over 20 million Americans already in computer storage and is adding new files on approximately 50,000 Americans each week. It is interesting to note that Credit Data's original data base was secured by convincing a number of California banks to turn over their credit apparatus to them; Bank of America alone gave Credit Data 8 million items. It seems clear that Credit Data Corporation will continue to develop regional credit notes and interconnect them by wire or microwave relay to establish a national credit data network. It also seems reasonable to forecast that large subscribers to Credit Data's services will be provided with remote access to terminals to gain direct entry into the computerized files of the bureau in order to reduce the cost of responding to inquiries. Thus, a request for information at one point in the system would provide access to relevant data maintained anywhere in the system.

The Associated Credit Bureaus of America has been working on computerization since August, 1965, when research began on a real-time computer system for member credit bureaus. The ACB system has been installed in Dallas and Houston, Texas, and another operation exists in Chicago. There currently are more than 2,000 credit bureaus in the association, serving 365,000 credit granters, and maintaining files on approximately 100 million Americans.

In September of this year, ACB announced that it had signed an agreement with International Telephone and Telegraph Corporation to provide ACB members with computerized credit reporting services. The new ACB-ITT system will offer local credit bureaus the option of computerizing their own operations without bearing the heavy financial burden of buying or leasing computer equipment and developing their own data processing systems and programs. According to Harold S. Geneen, President of ITT: "ITT is currently accelerating its programs for the establishment of an international system of data processing service centers, supplementing existing operations in England, Sweden, Germany, and France." Mr. John L. Spafford, Executive Vice-President of ACB, added: "This system will combine the most advanced communications and computer technologies through the use of 'third-generation' computers, standard communications lines, and a variety of typewriter-like or visual display terminals." At the moment, computerization by individual bureaus within the association is contemplated. However, given the resources of a company such as ITT, the raw data available in the files of the more than 2,000 credit bureaus that are members of the association, and the inexorable march of computer technology in terms of increased speed and capacity and declining costs, the networking capacity and the implications of the ACB-ITT operation seem obvious.

Further documentation of the movement of the credit bureau industry toward computer-based operations seems unnecessary. Suffice it to add that other companies have plans under way for providing credit services and an organization known as Hooper-Holmes, which seems to maintain a file of derogatory information, also has developed a computer base for its operations. Other likely candidates for computerization are Retail Credit Company, which apparently does more than simply provide credit data and maintains dossiers on 42 million Americans, and Credit Bureau Reports, Inc., which operates as a mechanism for switching distant requests to local bureaus.

Implications of a Computerized Credit Bureau Industry

At this juncture, I would like to suggest some *possible* implications of the trend toward computerization of credit information. I have underscored the word "possible" in the preceding sentence simply to remind the Subcommittee of my earlier disclaimer of any expertise in the fields of antitrust or economics and to emphasize the fact that at present we are not dealing with actualities but rather are engaging in crystal ball gazing. Thus, I fully recognize that I may be guilty of having a vivid imagination or perhaps being obsessed by the Buck Rogers quality of the new technology, and I certainly do not wish to make any claim to clairvoyance. I simply will try to suggest several possible implications for the future in the area of competition within the credit data industry. The pressures of time and space necessitate a rather sketchy presentation.

I will not deal with what is the most obvious implication of an expanded and computerized credit bureau industry—the threat to individual privacy. That subject has been dealt with at length by other Subcommittees of both Houses of Congress and my views have been presented there and in law journals and other periodicals. Of course, should members of the Subcommittee desire to speak to that issue, I would be most happy to pursue the subject and to respond to any questions.

Perhaps the most striking potential consequence of the trend toward computerization is centralization of power within the industry. The incredible growth of Credit Data Corporation since it began to operate on a computerized basis just a few years ago and the implications of an on-line national computer network operated by the Associated Credit Bureaus of America indicate the possible emergence in the future of but a limited number of

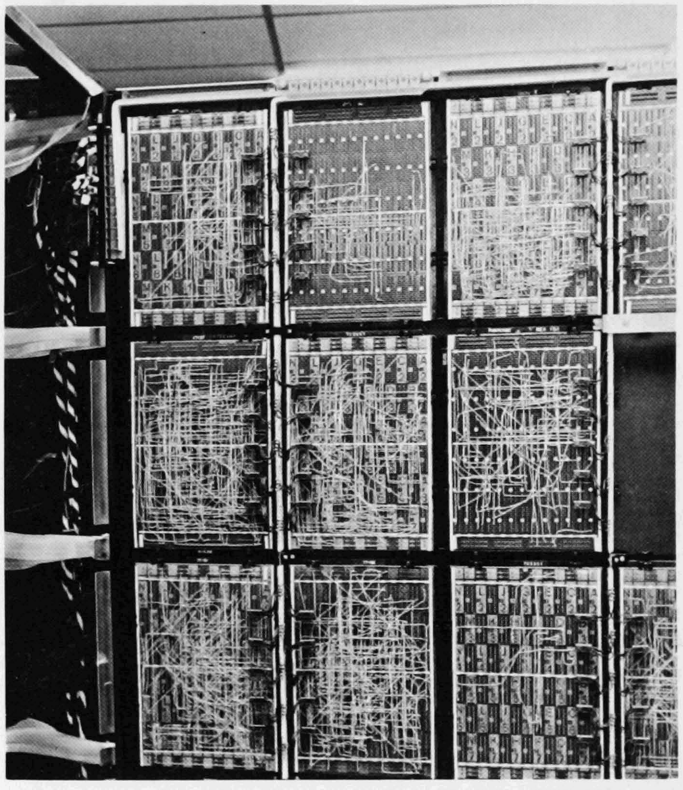
credit reporting services or networks. The realities of the situation are that the costs involved in acquiring and operating the capital equipment needed for a computer network, coupled with the cost of developing the massive data bases necessary to operate in this field, let alone the data bases that will be necessary to compete five, ten, or twenty years from now, will make access to the industry an extremely difficult thing to achieve. Moreover, it must be recognized that storage capacity, speed of response, and the ability to transmit data over large distances, are essential to successful credit bureau operation, which means that a computer-based system is likely to be the only way to survive competitively in the future. Thus, although there now are numerous independent and unaffiliated credit bureaus, there is a serious question as to whether they will be able to continue to operate in a field dominated by one of a few national computerized credit data networks.

There is a natural and close affinity between those who possess raw information and those who control the technology needed to manipulate and disseminate that information.

Of course, sheer size or centralization of power in a limited number of competitors is not necessarily an evil, if efficiencies and economies are the result and these are passed on to the network customers. Given a credit bureau industry operating on a network format, an oligopoly structure seems natural and, from the perspective of allocating communications resources (e.g., transmission lines or band widths), desirable—as long as uniform pricing and unduly high profit levels are not the result.

There are manifestations of this aggregation of power in the credit data industry that clearly represent a potential danger, however. Close attention must be given to the interrelationships not only among the computer-based credit bureaus themselves but also among the bureaus and the common carriers who will transmit and disseminate the data, the computer manufacturers and systems companies who prepare the hardware and the software that will make the network function, and the credit granting agencies who will be the primary, although not the exclusive, users of the credit information. Mergers and contractual relations within this vertical complex deserve close scrutiny.

There is a natural and close affinity between those who possess raw information and those who control the technology needed to manipulate and disseminate that information. The recent spate of marriages between computer manufacturers and book publishers offers what may be a prevision of the possible future structure of the credit information industry. In the computer-publisher context, we can expect the development of fully integrated information systems—the publishers, through their vast array of author-publisher contracts and ever-increasing library of copyrighted works, controlling the raw material for the nation's literature and the computer companies controlling the modes of disseminating that literature through a new medium of communication. By the same process, a small number of credit networks may be able to secure virtual control over the sources of credit information, because of *1*) their special relationship and leverage with the credit granters (the Credit Data-California banks experience), and *2*) the possible future barriers against entrance into the credit bureau industry. The panorama can be made even starker if you add the possibility of cooperative action between the credit bureaus and the communications companies (the ACB-ITT model).



Another potential concern stems from the likelihood that the capacities of the new technology will cause credit bureaus to acquire higher levels of information about individual and corporate borrowers than they have in the past. If we assume that the cost of storing, retrieving, and transmitting a unit of information will continue to decline, we also can assume that credit data networks will tend to obtain more information. In addition to the obvious threat to privacy inherent in the existence of credit bureaus maintaining extensive dossiers on individual Americans, it seems clear that the enlarged information pool of the future may be used for commercial purposes beyond traditional credit granting, especially if some aspects of the information become tangential or remote from what has hitherto been regarded as typical financial data.

The credit network of the future may be used by insurance companies, bill collectors, all levels of government, employers in a variety of industries, and anyone in need of specialized mailing or solicitation lists. What

today generally is a simple service for credit granters may tomorrow emerge as a full time, all purpose information gathering and reporting network. Some indication of the growth in functions of credit bureaus is found in Credit Data Corporation's computerized credit card charge authorization program.

The possibility of this transformation taking place would be increased if either the common carriers or the computer manufacturers entered the credit data field. Since computer hardware and leased communication lines are substantial elements in the cost of a computer network, the independent credit networks might be forced to offer a greater variety of information services to get maximum utilization of their data bases in order to offset the natural cost advantages of the computer manufacturers and common carriers. This in turn might encourage a further increase in data accumulation by the credit networks, which might be accompanied by a great deal of information interchange (coercively or voluntarily) between the network and each of its clients, many of whom may not be credit granters. The spectre of this type of centralization of information in an unregulated private company or group of companies is not a particularly attractive one. Variant information services that today are performed by a large number of independent companies and investigators may someday be performed by one or a small number of large capital aggregations.

As a practical matter, the decision whether to grant credit to a particular customer may be made, or at least affected, by the credit bureau network if it acts not only as a conduit of credit information but also as an information evaluator or provides recommendations to its subscribers.

A computerized credit bureau industry also may have some ramifications on the decision-making process of credit granters. A tendency toward centralization in the information gathering and supplying field will tend to reduce the number of sources to which the credit granter is able to refer during the decision-making process. It also might have the correlative effect of increasing the credit granter's reliance on the data supplied by his credit bureau. In addition, a computer based network—among ACB members, for example—will create a pressure toward uniformity as to the information collected and uniformity in the manner in which information is recorded and reported. A degree of uniformity will be necessary to insure that a computer language and format is employed that is compatible with the equipment used by all network members so that the information can be transmitted and reproduced in a meaningful form at each of the terminals on the network. Indeed, the ACB already has developed a credit-reporting language that is suitable for computer use.

Thus, the possibility exists of an agreement among network or association members that only certain types of information will be collected or supplied to subscribers. An agreement of this type, although defensible in terms of economies of operation, would seem to have the same type of anti-competitive tendencies as an industry or association agreement that only products of a certain description would be manufactured—a practice whose legality seems doubtful under Standard Sanitary, 226 U.S. 20 (1912). The possibility also exists that standardization of credit reporting will be employed as a device for securing uniformity in a number of other areas of network activity, including pricing.

Another consequence of standardization is that all of the credit granters who are considering lending money to a particular borrower are likely to receive precisely the same information even though they make their inquiries of different members of the network. Furthermore, if, as suggested earlier, the credit bureau industry of the future will offer only a few sources of credit information, it is unlikely that one potential credit granter will procure markedly different information from that obtained by any of the other potential granters even when different systems are used. If all potential credit granters have identical information at their disposal, their decision making may well follow a similar pattern, thereby reducing competition among the credit granters. Furthermore, as a practical matter, the decision whether to grant credit to a particular customer may be made, or at least affected, by the credit bureau network if it acts not only as a conduit of credit information but also as an information evaluator or provides recommendations to its subscribers. Credit guides and blue or black books already are a commonplace. In addition, practices of this type may well be necessary in the future if the accumulated information about consumers increases to the point at which the mass must be distilled for the user by the network.

A final note about the potentially undesirable aspects of the computerized credit bureau network of the future. Other than Credit Data Corporation, which is an individual company, future computer networks in this industry are likely to develop on a cooperative or association basis. The ACB is an illustration of this. The ACB is a trade association, which, on the basis of cases such as Associated Press, 326 U.S. 1 (1945), may be prohibited from refusing to deal with or acting in a discriminatory manner toward nonmembers insofar as utilization of the network is concerned. Indeed, it is my understanding that the ACB already is subject to a consent decree. As a trade association, the ACB and any other network of computer bureaus must be viewed with a degree of concern and their practices with regard to standardization, information exchange, and self-policing kept under scrutiny. All I am expressing at this point is a general cautionary note about trade associations and a particular concern about the possibility of an association's denying access to its network to another member of the industry.

Before closing, I would like to state unequivocally that

(Continued, page 19)

Public Employees *And Strikes*

by Professor Theodore J. St. Antoine

Based on an article in the October 13, 1968, "Dissent" column of the Detroit News.

Should school teachers, or any other group of public employees, be allowed to strike? Is the right to strike necessary for effective collective bargaining? Are there feasible alternative ways to deal with labor disputes? All these questions lost their theoretical flavor and became intensely practical for many parents of school-age children when a rash of teachers' strikes broke out in Detroit, New York, and other cities throughout the country. More and more strikes by public employees can be expected in the future.

Collective bargaining—the negotiation of the terms of employment between an employer and a union acting on behalf of the employees—is relatively new in the public service. Today, the federal government and about twenty states recognize the right of their employees to have unions represent them in bargaining over at least some subjects. Almost always, however, public employees are forbidden to strike. This, of course, is the law in Michigan.

Unions argue that denial of the right to strike strips collective bargaining of much of its meaning. Without the power to engage in a group work stoppage, employees are said to lack the economic muscle needed to back up their demands. Employers may have the duty to "bargain," but they are under no obligation to reach any agreement. Eventually, if there is no settlement, the employer—the school board or other public agency involved —can put into effect whatever terms of employment it wants. As the unions look at it, only the possibility of a strike can ensure that the negotiations are not a sham, with the employer just going through the motions. After all, the strike threat is the union's teeth, and who takes a toothless tiger seriously?

In response to these arguments, several reasons are usually given for denying public employees the right to strike:

- The state is a "sovereign." It exercises the ruling power in the community, and a strike against it would be an improper interference with its sovereignty. This sort of contention exhibits all the quaintness of allegory. It has little to do with the realities of democratic society in the twentieth century, where the people are sovereign and government must be responsive to the citizenry.
- While the laws of the market place determine what funds a private employer will have for employee compensation, the amount available to a public agency is set by the legislature through its budget appropriations, or by the electorate through its millage votes. A strike introduces an inappropriate, nonpolitical element in the legislative process. There is more force to this point, but it comes too late.

Collective bargaining itself, not just the strike, brings the "nonpolitical element" into the legislative process. Surely we should be past the stage of arguing that collective bargaining won't work in public employment because all budgets are subject to political controls. That's a bit like the conclusion of some aerodynamics experts that it's physically impossible for the bumblebee to fly. We've now had enough experience with collective bargaining among public employees to know that, whatever the theoretical objections, it, too, can work. True, public employers must make careful estimates of the funds they'll have on hand to meet commitments. But private employers also have to make such estimates. And especially difficult situations can be handled by an agreement to provide a certain scale of benefits "on condition" appropriations prove adequate.

- Although strikes in private industry chiefly affect the immediate parties, work stoppages in public employment may deprive the whole community of essential services. This argument against the right to strike in the public sector is only partly true. Certainly, a community cannot do without police and firefighting services, and most persons would agree that policemen and firemen cannot be permitted to strike. But apart from a few such extreme instances, strikes by public employees may have no greater effect on the community than strikes in private employment.

A strike in a basic industry, like steel or autos, for example, has a significant nation-wide impact. Can anyone say with assurance that it's worse to have Johnny miss a few days of school? And a work stoppage in a local transit system or electric utility is going to have exactly the same economic consequences, regardless of whether the enterprise is publicly or privately owned. Whatever else may be said about strikes in these circumstances, there seems little sense in outlawing those which happen to involve "public" employees.

Perhaps some opponents of strikes in the public service

(Continued, page 19)

Prof. Theodore J. St. Antoine

A Possible Answer To Probate Avoidance

by Professor Richard V. Wellman,
Chief Reporter, Uniform Probate Code Project

Excerpts from speech at annual meeting of the Indiana State Bar Association, October 24, 1968.

The subject I want to discuss this evening should not be a topic for post-banquet speech making. It concerns the law of succession to property at death. The topic should be as dull as the alphabet.

But, succession, or probate as it's more likely to be called, is currently quite controversial. This fact, though possibly useful to would-be speech makers, is unfortunate. There should not be any controversy about the rules protecting individual freedom in regard to personal savings. The fundamental principles; e.g., the premise of private property that a decedent's unused savings should go as he indicates in his will, or to his heirs if he leaves no will, are not disputed or disputable. Nor can the troubles of the area be attributed to contentiousness of survivors and other claimants. Wills are rarely challenged, and the occasional challenges are usually unsuccessful. Creditors of decedents, protected in many situations by security or insurance, if not by survivors concerned about family credit ratings, are not a notable source of controversy. Indeed, the controversy arises from the charge that we have more rules than we need.

Perhaps the presence of elaborate rules and procedures causes survivors to forego natural contentiousness. Perhaps we should accept the ponderousness of our system as the price for desirable tranquility. Still, there are other explanations for lack of disputes, which seem particularly applicable to small estates. Inheritance is a family matter. We are quite accustomed to the idea that an estate owner is free to dispose of his savings as he pleases. Hence, when there is something to inherit, the recipient gets money he should not have counted on. It's like a voluntary tax refund. The old warning against looking gift horses in the mouth has a message about the attitude of inheritors. Moreover, any economic advantage one set of survivors might gain over another by stirring up trouble, would be countered in most cases by displeasure and resentment from persons who usually will be relatives or close acquaintances, rather than strangers. In sum, therefore, many of the usual components in succession tend to lead survivors to resolve any differences privately and amicably.

At some point, however, the size of the inheritance becomes large enough to induce would-be successors to disregard various environmental restraints in an effort to get something, or to get more. Whether this phenomenon exists in fact, or only in the minds of would-be decedents and their fiduciaries, is problematical. In either event, persons counseling owners of substantial estates are not likely to agree that survivors will not be contentious or that they will be able to resolve their differences without outside assistance. To them, a complex system of succession may tend to prevent problems before they become serious.

Nonetheless, in estates of the size most frequently encountered, the picture should be one of peace and harmony. Paradoxically, however, the factors in modest estates which should indicate legal tranquility appear to have contributed indirectly to the current hue and cry about probate. In any event, it is clear that we have a controversy about probate law. It is identified by the words AVOID PROBATE. Mr. Norman Dacey, author of *How to Avoid Probate,* struck a raw nerve, as he learned to his delight, when his paperback of about 50 pages of text and 291 pages of duplicated forms ran first on the nonfiction best seller list in the early months of 1967. Total sales of this expensive packet of legal forms has passed 670,000. Dacey's charges were pretty specific and pretty serious. They include: *1)* that probate law is archaic; *2)* that probate procedure is needlessly complex and exists principally for the benefit of lawyers and probate judges; *3)* that as a result, succession through probate is terribly time consuming and costly; and *4)* that lawyers cannot be trusted to give sound estate planning advice because of conflict of interest—that is, the conflict between what's good for the client, and the lawyer's interest in probate fees.

His advice was explicit and alarming. Do not trust the law of succession. Opt out. Avoid probate by the use of self-declared trusts of various assets and by use of joint tenancy designations.

Unfortunately from the view of those who dislike Dacey's charges, there is much in them that cannot be denied. This is particularly true as we focus on the estate of modest size and the relationships most commonly encountered in succession. Probate laws in almost all of our

Prof. Richard V. Wellman

states, including some with recently adopted codes, are undeniably obsolescent. For example, intestacy laws almost everywhere continue to divide estates between the spouse and children of a decedent even though this pattern hasn't made sense since the family farm ceased to be the dominant feature of American family organization a couple of generations ago.

Intestacy laws almost everywhere continue to divide estates between the spouse and children of a decedent even though this pattern hasn't made sense since the family farm ceased to be the dominant feature of American family organization a couple of generations ago.

Moreover, modern probate procedures are best explained by reference to colonial times. Then, our rule which assigns personal property of decedents to publicly appointed local officials at least served to protect local interests against unwanted claims from afar. This ancient starting point explains a heritage which haunts probate procedures in many states today—that the administration of an estate requires a judicial proceeding. The assumption is as doubtful as it is costly. The burden it imposes on succession has become more apparent as the Supreme Court has made lawyers realize that easy judicial notices via publication or posting cannot be trusted as due process if better notice is possible. The absurdity of the assumption is nowhere more apparent than in our crowded cities where low paid probate clerks go through the motions of checking receipts against items of expenditure listed in accounts of personal representatives. One coming on such a scene from abroad might assume that outlays of public moneys rather than private family distributions were involved. However, he would soon learn that routine big-city probate audits are superficial affairs which serve best to remind us how futile it is to use public offices to check private family transactions.

This is not to say that the probate situation is the product of a conspiracy by lawyers against the public, as Dacey suggests, or that probate laws do not work very well in many situations. Rather than a conspiracy, what we have is the natural product of understandable conservatism in regard to changes of basic law. Coupled with this, we have a situation in which the basic law works well for persons of wealth who know that their affairs involve values which may invite trouble unless there is careful planning. These persons, whose affairs tend to be unusual, are rarely bothered by rules designed for the average person because they see to it that custom-made charters govern their estates.

But there is a vacuum of consumer interest in regard to the laws which impact most directly on the person whose estate is very modest and whose affairs are average. This vacuum has been principally responsible for the neglect of our estates' codes. Legislatures respond to pressure. Decedents obviously pose no political problems, nor do the more thoughtful prospective decedents who can protect themselves by planning. Survivors tend to be happy with their windfall. Hence, probate laws have remained largely unchanged for generations, because the groups principally concerned with them—the lawyers and probate court officials—have found that they work very well for what they see to be the important cases; e.g., the big estate where planning occurs, and the bitterly contested case. Moreover, these professionals are paid to make rules work, rather than to question or to change them. Finally, until recently at least, there has been almost no pressure for change. In a sense, the legal profession has demonstrated its technical proficiency by making the old laws work as long and as well as they have.

If, as I have suggested, probate laws which work unjustly for the average person are the product of history and historic indifference, one might expect that better legislation would appear rather quickly in this day of rising emphasis on estate planning. The combination of steadily rising levels of affluence, complex federal and state tax laws with burdensome rates, and more and more public awareness of the advantages of planning which our burgeoning estate planning industry has generated, has made hundreds of thousands of persons newly conscious of their estates.

With the aid of paid and free advice, they are learning that succession via probate runs directly against such usually desired objectives as privacy in regard to family property matters, avoidance of delay in transmission at death and avoidance of periods of artificial non-liquidity following death. Joint estates, life insurance, living trusts, and various extra-legal devices which avoid the shortcomings of probate are being utilized with steadily increasing frequency. Still, probate substitutes involve some personal and legal inconveniences when compared to the will. And, many people are sufficiently resentful about being pushed toward probate-avoiding devices by bad law that they would gladly support legislative correction of the probate problems even though they also may move to protect themselves.

But, new statutes to correct probate problems are not going to be promoted or written by laymen. Lawyers must do the job and most other lawyers must support the results. How do lawyers view the probate problem? That is the question!

My premise in regard to probate reform is that Dacey is simply wrong in suggesting that lawyers will not support probate law changes. There are too many reasons why lawyers should jump at the chance to get probate laws on a modern track. Let me elaborate.

Traditionally, the principal service of lawyers in relation to the succession process has involved the counseling of personal representatives and survivors. There are no better clients. But, the importance of this role is shrinking in direct correlation to the extent to which individuals are using devices to avoid probate. Of course, an important new role for lawyers, garbed in the catchy words "estate planning," has developed. These words

used to mean will drafting. But, much modern estate planning is likely to center around non-probate devices. Indeed, if the sales of Dacey's books are any indicator, we should accept that many laymen may shy away from use of a will. Surely, the layman is interested in substitutes. Seeing that the lawyer has no insurance, mutual investments, or joint accounts to sell, the layman is likely to believe that the lawyer can meet his estate planning needs only where the estate is large enough to warrant use of a trust.

Dacey is simply wrong in suggesting that lawyers will not support probate law changes. There are too many reasons why lawyers should jump at the chance to get probate laws on a modern track.

Of course, if laymen also realized that lawyers might assist them with small trusts using family trustees, as well as with many other devices, and that, indeed, a lawyer is an expert in probate avoidance, the problem I'm concerned about would not be so severe. And, I'm told that a good deal of new interest in estate planning by lawyers has been stimulated by the Dacey furor. But, lawyers also concede that much of this business probably would have come to them anyway. And, any wide-spread discussion of the law of estates, whether it is focused on the inadequacy of present rules, or on the advantages of a new code, would probably have its effect in moving people to law offices.

I conclude, therefore, that the new "avoid probate" emphasis in estate planning works in several ways to discourage persons from using lawyers as estate planners. First, it is related to charges that the law is defective and that lawyers are responsible for the defects. Second, it has deprived lawyers of their best known stock-in-trade for estate planning—the will. Third, it has made lawyers appear to be useful only in regard to estates of unusual size and complexity.

Most estates are not of unusual size and complexity, at least as far as estate owners are concerned. The practicing bar surely should be concerned with any trend which might indicate that most estate owners will understand they need some planning, but also may imagine that lawyers have little to offer them.

One of the most disconcerting aspects of this trend is that lawyers may not be the professional to whom the young family man, whose estate is still quite small, may turn first in his search for assistance in financial planning. By the time this kind of person gets to a lawyer, his affairs have become complicated and much untangling becomes necessary. Worse, he may not get to the law office at all.

As a service industry, we can't afford a posture that makes us appear useless to the average man. The other side of the coin is equally disconcerting. It is that present trends are shrinking the area of utility of estates lawyers to the point where their livelihoods may depend on continuance of a few relatively narrow provisions of our federal tax laws.

On a somewhat more mundane level, when lawyers do participate in modern estate planning, the shift in the timing and character of their service means that they are working more for estate accumulators than for estate inheritors. There are significant differences between these groups in regard to their tolerance for legal fees. If put to a choice, wouldn't lawyers prefer to be employed by inheritors? If so, there is additional reason for skepticism about the proposition that the lawyer's role in modern estate planning will make him uninterested in probate law reforms.

So, probate law dilemmas are lawyer's dilemmas. The probate controversy should not embarrass us—it should delight us. It has given us a great opportunity to solve some old problems. It remains to be seen, however, whether lawyers will make the proper response to the probate controversy. In some instances to date, lawyer organizations have moved in exactly the wrong way. Consider the action of the New York County Bar Association. That group sued to enjoin distribution of the Dacey book in New York on the ground that the author was engaged in the illegal practice of law. This action, having the effect of saying the public shouldn't read matters lawyers do not want them to hear, simply tended to prove Dacey's charges that the bar would do whatever it could to keep the public from learning something about probate. Even if the suit in New York had resulted in a lawyer victory, which it did not, the practicing bar in general was seriously damaged by this emotional outburst. As you can imagine, the litigation was publicized to the hilt by Mr. Dacey.

A somewhat more typical reaction by various lawyers has been to write and speak of the danger of following the Dacey form book approach to probate avoidance. In the main, these pieces have done a good job of discrediting Mr. Dacey's advice concerning how probate is to be avoided. But, the reasoned answer sometimes seems to interest a smaller circle than the emotional attack.

Moreover, many lawyer responses to Dacey's charges fail to offer the layman a practical solution to his estate problem. The usual message has been either that probate is not so bad after all, or that only lawyer drawn trusts are safe. But, once they take a look, persons can see for themselves that probate routines are expensive and senseless as applied to the ordinary estate. Also, the advice that everyone should see a lawyer is increasingly impractical. Owners of ordinary estates are the ones who have been so frightened by the turmoil about probate. Many of these persons, being newly arrived in the status of having enough to worry about, do not know any lawyer. The suggestion that they find one is troublesome, too. It sounds expensive. Lawyers are busy and the general practitioner who serves the walk-in trade is becoming hard to find. Even if the layman with a modest estate can locate an estates lawyer, more likely than not he will encounter a product of recent law school and CLE em-

phasis on estate planning oriented around federal tax problems. If so, he may end up with a monstrous estate plan which will be worth its price only if all of his relatives suddenly die without plans and he is later wiped out in an airline accident causing gobs of double indemnity and travel insurance to fall into the pot.

These observations suggest the parameters of the probate problem. Obsolete laws and outmoded administrative institutions threaten to trap estates lawyers and to strip them of their traditional and principal function. Interest in estate planning for persons with complex affairs has diverted professional attention so that the loss of customary function does not appear to be as alarming as reflection suggests may be the case. To correct the problem, major and meaningful steps must be taken to restore the confidence of the owner of small estates in the probate system. But, lawyers must offer the solutions. The general area of probate has been of such pervasive importance to lawyers for so long, that the process of getting lawyers to concede that the present system is defective, and to apply their energies vigorously to its correction, stirs up professional doubts and emotions that threaten to render the bar impotent in the matter.

Hopefully, the rapidly maturing Uniform Probate Code may provide some answers if it is approved by the Uniform Law commissioners when they give it final consideration this July. The project which is producing the Code is one for which every lawyer may claim credit. Originated by subcommittees of the American Bar Association, financed almost entirely by lawyers' bar dues and gifts channeled through the American Bar Foundation, the project has been active since late 1962. Because it was well underway long before Mr. Dacey touched the public's sensitivity, it offers an explicit rejection of the charge that lawyers will never act on their own to sweep away probate dead wood. Moreover, the major features of the evolving Code will provide an affirmative, professionally considered response to the major complaints about existing law.

Let me become more specific. The heart of the Code is its system of probate administration. The basic scheme here is not very original, but it may be both useful and acceptable. The idea is to offer the various major features of the different probate systems presently followed in our fifty states, as options, in a single system. Thus, under the draft Code, it will be possible for persons representing an estate to secure probate of a will very promptly after testator's death by application to a non-judicial official of the probate court. Only a mandatory five-day delay to permit family coordination and to discourage races is involved. Probate without notice which permits a will to be put into effect without being finally adjudicated is an old and respected feature in many states which have long permitted what is usually called "common form probate." However, if the parties desire a binding adjudication of the will's validity, the draft Code offers an appropriate, optional procedure. Either non-notice, or formal probate can occur without administration. But, if persons want to collect and transfer assets, administration will be a practical necessity because only an appointed representative can protect transfer agents and others.

An executor or an administrator in intestacy may be appointed with no more fuss than is required to probate a will, just as it is true in many states today. After securing letters, a personal representative under the Code becomes a kind of statutory trustee with the necessary powers and protections to permit him to accomplish the entire job of collecting assets, paying debts, selling land or intangibles as needed to raise necessary cash, and distributing the estate to the successors. If desired, all of these steps can be handled without further court orders. Again, however, isolated adjudications to answer particular questions or general orders settling accounts are available as desired.

The Code accepts the proposition that the probate court's proper role in regard to settlement of estates is to answer questions which parties want answered rather than to impose its authority when it is not requested to see that otherwise peaceful settlements are correct. This idea, though it would change the law in Indiana, is not novel in American probate law. Pennsylvania procedures and practice have long sanctioned settlement of estates without any activity by public offices or officials other than common form probate and routine issuance of letters. New Jersey procedures are similar. New York's surrogate courts have little to do with personal representatives after appointment. In Georgia, Texas, and Washington, wills effectively can provide that the probate court shall not supervise the work of executors, and all well-drawn wills in these areas routinely so provide.

The draft code rejects the feature of existing law which tends to compel every married person to make a will or employ a will substitute.

But, the draft Code offers the option of supervised administration which features, like the present Indiana Code, the necessity of a court-ordered distribution of assets to close the judicial proceedings which are deemed to have been initiated by probate and issuance of letters. All that is required is that some interested person request supervision by the court and that a need for it exists.

What's new about the procedural package? In a sense, nothing is new because each procedure has its tested counterpart somewhere among the states now. But, the extension of familiar, easy procedures to intestate estates and the presence in the Code of clear options to handle various steps in testate or intestate administration, with or without court orders, will offer new advantages in procedure for every state.

In two other respects, however, the draft code offers somewhat newer ideas for improvement of succession in the United States. The most important is a new basic pattern of succession to intestate estates left by married persons. The old system, found almost everywhere in this

country, divides between spouse and children of intestate decedents. The Code alters this so that the first $50,000 will pass to the spouse, and any excess over $50,000 will be divided between spouse and children. There is a variation from this pattern if all children are not the children of both the decedent and the surviving spouse. The new pattern is deemed to reflect what an overwhelming majority of married persons want. An impressive amount of data shows quite clearly that married persons of ordinary means do not want their estates divided between their spouse and children. If the children are young, expensive guardianships result from a parent's death without a plan. If the children are grown, their heirship may well reduce the spouse's share below what should be provided for predictable needs. Moreover, reducing the surviving spouse's share in favor of children deprives the survivor of a degree of control over children's inheritances which may be useful to bolster ties when problems of old age might strain the relationship.

Thus, the draft code rejects the feature of existing law which tends to compel every married person to make a will or employ a will substitute.

This new pattern of heirship, coupled with efficient procedures for intestate estates, should tend to reduce pressures on persons of modest means to make wills *or* avoid probate. In a sense, the Code offers a statutory estate plan which should be wholly satisfactory for most persons of modest means who have no unusual testamentary wishes. Thus, the drafts offer the legal profession an answer to the question of how to accommodate the large bulk of estate owners without diverting professional attention from the increasing demands of persons with complex affairs. It will be much easier to give advice about intestacy than to mass produce wills. Moreover, we will have some assurance that the unadvised will not be so badly treated by the law as to damage the public image of property institutions.

Second, the new Code, if widely adopted, will go far to reduce the problems of planning via wills for persons who own property in several states. Estate planning by will and testamentary trust presently is handicapped in regard to persons who may change residences from one place to another, or who would invest in land in more than one state. Lawyers, who are so important to persons who prefer to manage their own affairs, should vigorously support uniformity of estate law because it will increase the range and value of the planning devices which lawyers are uniquely well equipped to handle. Also, lack of uniformity of estate law may be pushing persons who anticipate moving about these United States toward nationally managed investment pools, and the pre-packaged estate plans which go with them. I have no quarrel with these arrangements if they are preferred over owner-controlled investments *on the merits.* We should see, however, that individualized ownership is not unduly handicapped by legal anachronisms.

The Uniform Probate Code thus offers some positive answers to current probate dilemmas. Properly explained and properly used by lawyers assisting survivors, it will offer a much easier answer to worried owners than Mr. Dacey's. It would go something like this: "Relax; keep your property for yourself; inheritance is safe and, like any alternative, as cheap or expensive as your survivors and creditors make it." Shortened, the message might simply be: "Save your money. Probate is O.K."

The new Code would let lawyers carry out this kind of promise to the public. When survivors of a decedent who did not avoid probate seek legal counsel, the attorney will find it easier to give efficient service, for many of the old procedural drawbacks are gone. The Code makes it possible to avoid public disclosure of assets of a decedent. Court-appointed appraisers are eliminated. Probate bonds, which every testator avoids when he can, will not be needed unless demanded by survivors. Awkward, judicial sales of real estate should become a thing of the past.

The legal system will offer protection, but will not force it. As a corollary of less required paperwork and fewer adjudications, legal fees in individual cases may go down, but if general confidence is restored in the probate system the over-all effect should be a marked increase in the number and size of estates in which lawyers may be involved.

Still, there are substantial risks that the Code will not become the answer to probate avoidance. The principal worry lies in the difficulty of marshalling lawyer opinion behind the project. There are some who believe that the probate controversy is a tempest in a teapot and that it would be a mistake to undo settled law in response to the new found public interest in estates. I am convinced, however, that these views are wrong. In my five years of work on the Code, I have heard from dozens of laymen, and I've discussed these matters with lawyers from every part of the country. Most lawyers concede that the law needs to be improved. The public wants a change of law. If there's doubt on any point, it relates simply to whether lawyers will react affirmatively to the obvious demand for change.

> Present trends, if unchecked, dictate that **probate avoidance** will become the main road . . . (and) suggest that estates law and lawyers will become increasingly irrelevant to the ordinary person's estate problems.

Much of the pressure for change has been tempered so far by publicity to the effect that the Uniform Code project would result in significant improvement. The word has been: "Be patient. We are working on it." If the organized bar disappoints the public and follows the advice of the "stand-patters" on this one, it will be inviting a new and serious wave of anti-lawyer opinion which I, for one, do not believe it can afford. Moreover, it will be missing a golden opportunity to get public support for law changes that are badly needed in order to get the will, the lawyer's stock-in-trade, back into the circle of approved methods for handling many estate planning demands.

It remains to be seen whether we lawyers can agree on

anything so pervasive and so important to the general practice of law as this project. If we can, and *if* we use the resulting new law intelligently, we'll have our answer and that of the public to the probate avoidance controversy. If we cannot, we won't block changes in probate law and practice. Present trends, if unchecked, dictate that *probate avoidance* will become the main road with wills and intestacy becoming infrequently encountered by-ways. Present trends also suggest that estates law and lawyers will become increasingly irrelevant to the ordinary person's estate problems. Our failure to agree on a useful new Code won't change these trends. It will prove only that lawyers as a group are so incapable of constructive reform that they cannot even agree on changes which seem necessary to the perpetuation of the profession as we have known it. I, for one, am not ready to believe that this will be the case.

IMPACT OF COMPUTERS, from page 12

although this statement might contain what some would term a "parade of horribles," it is not intended in any way to suggest that I oppose or even have reservations about the desirability of computerization in the credit data field. The obvious efficiencies and economies in time and money that will accrue should benefit all users of credit information. Moreover, I firmly believe that one consequence of the recent debate over computers and privacy will be a recognition of the need to develop procedures for exploiting the new technologies while at the same time safeguarding the fundamental right of a citizen to be let alone. Thus, I have every confidence that the credit data network of the future will more adequately protect individual Americans from unwarranted invasion of their privacy than the existing information systems seem to do. My objective in this statement simply has been to explore the possibilities of the future and highlight those sensitive areas that require continued vigilance by this Subcommittee and the other governmental organizations charged with the development and enforcement of this nation's antitrust and related policies.

In conclusion, I would like to reiterate my gratitude to the Subcommittee for its invitation to appear here today and voice what I admit to be highly tentative observations about computers, credit bureaus, and competition. I hope that in some small measure I have contributed to these extraordinarily worthwhile hearings, which to me represent a very desirable recognition by the Congress of the need to study the manifold ways in which the new technologies affect our society.

PUBLIC EMPLOYEES, from page 13

are actually hunting bigger game. Their real target may be strikes of every kind. The present preoccupation with public employee strikes could be just a temporary tactic. Obviously, the best place to start an anti-strike campaign is where strikes have never been recognized as lawful. Discussing the problem of strikes in general would take me far beyond the subject of strikes in public employment. But a couple of points are worth emphasizing.

The strike, or more precisely the threat of the strike, has oiled the machinery of private collective bargaining for a long time, enabling groups of workers to meet their employers on equal footing. In this sense the strike has served a valuable social function. Nevertheless, we may be entering a new era, in which resort to the strike, at least in certain industries, is simply too costly to the public at large to allow the unfettered use of this particular weapon.

It has quietly been accepted, for instance, that the country cannot afford a nation-wide railroad strike. There has not been such a strike since right after World War II. When one loomed in 1967, Congress quickly passed a statute providing for a type of compulsory arbitration to forestall a shutdown. In our increasingly interdependent industrial society, strikes in various basic industries could become as intolerable as strikes on the railroads. Alternative devices for handling labor disputes such as compulsory arbitration, may come into play more and more. If the parties cannot reach agreement themselves, a government tribunal may step in and impose a binding settlement.

So drastic a change in our traditional system of free collective bargaining should not be instituted without a clear showing of grave need. For my purposes here, however, the important lesson is that the possible prohibition of work stoppages in critical industries has nothing to do with public employment as such. If a line must be drawn between permissible and forbidden strikes, it should be drawn according to the actual economic and social impact on the community, and not according to the "public" or "private" status of the strikers.

Ultimately, laws depend for their effectiveness upon voluntary acceptance by the vast majority of the decent persons in the groups regulated. Without such acceptance, the police and the courts are powerless to uphold the law, as our experience with prohibition proved. We see another demonstration of this truth when the words on the statute books were defied by a highly respectable, normally law-abiding group—public school teachers. In my view, the teachers were basically right. The law should not forbid them to strike merely because they are public employees.

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