Law Quadrangle Notes

The University of Michigan Law School

Volume 18, Number 3, Spring 1974

CONTENTS **law quad notes**

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Emra H. Ireland Fund Will Aid Needy Students

A gift of $115,674 to the University of Michigan Law School will serve as an endowment fund for needy law students.

The fund has been named in honor of the late Emra H. Ireland, a 1905 U-M law graduate who practiced law in Evansville, Ind., for more than 50 years. The scholarship was made possible through a bequest from his wife, the late Eva Coryell Ireland.

In announcing the new fund, Prof. Roy Proffitt, chairman of the Law School's Scholarship Awards Committee, said, "There are few needs of the School more important than trying to furnish adequate financial assistance to highly qualified students who, without such help, would be unable to attend the School."

Mr. and Mrs. Ireland were well known in Evansville for many years. Ireland began his practice of law there soon after his graduation from the U-M Law School, and he continued his legal practice until his death in 1958.

He had also served as city judge, city attorney, and president of the Evansville Board of Public Safety. Active in the Masonic lodges, he was chosen potentate of the Evansville Shrine. He also contributed to local and national activities of the U-M Alumni Association, serving as director of the national organization in the 1930s. Mrs. Ireland continued to live in Evansville until her death in January 1971.

U-M Graduates to Serve As Supreme Court Clerks

Two recent graduates of the U-M Law School have been selected as law clerks for U.S. Supreme Court Justices.

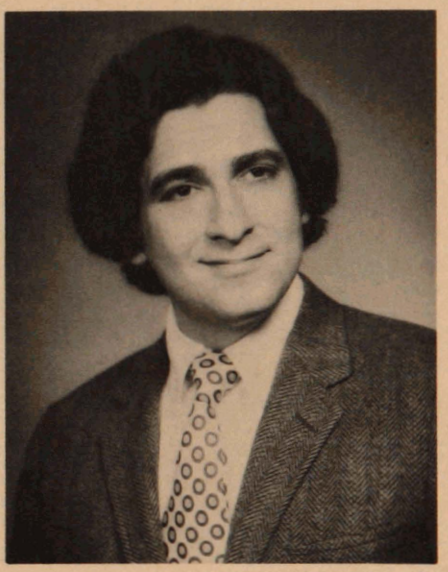
Ronald M. Gould, whose parents live in Kitchener, Ont., will clerk for Justice Potter Stewart; and John M. Nannes, from Findlay, Ohio, will clerk for Justice William H. Rehnquist.

Gould and Nannes both graduated magna cum laude from Law School in 1973. They will serve as Supreme Court clerks for the 1974-75 court term.

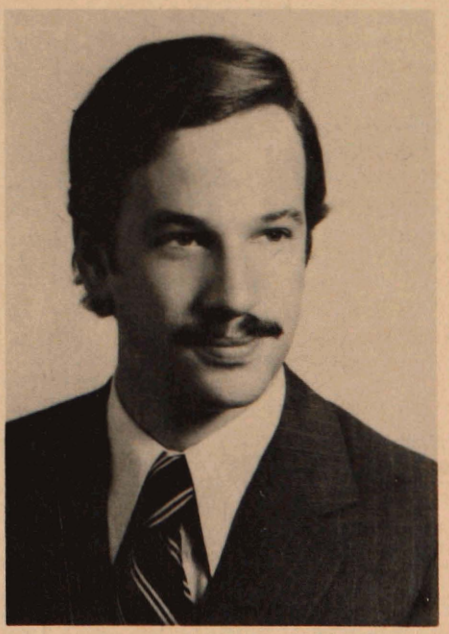
Gould received a B.S. degree in economics from the Wharton School of Finance and Commerce at the University of Pennsylvania. He is currently serving as clerk for Judge Wayde H. McCree Jr., of the U.S. Court of Appeals (Sixth Circuit) in Detroit. At Law School, Gould served as editor-in-chief of the *Michigan Law Review*.

Nannes received an undergraduate degree from the U-M School of Business Administration before entering the Law School, where he was articles and book review editor of the *Michigan Law Review*. He is now serving as clerk for Judge Roger Robb of the U.S. Court of Appeals in Washington, D.C.

The selection of Gould and Nannes continues the U-M's representation among Supreme Court clerks. Currently Terrence G. Perris, a 1972 graduate, is clerking for Justice Stewart, and Joseph C. Zengerle, a 1971 graduate, is law clerk for Chief Justice Warren E. Burger.

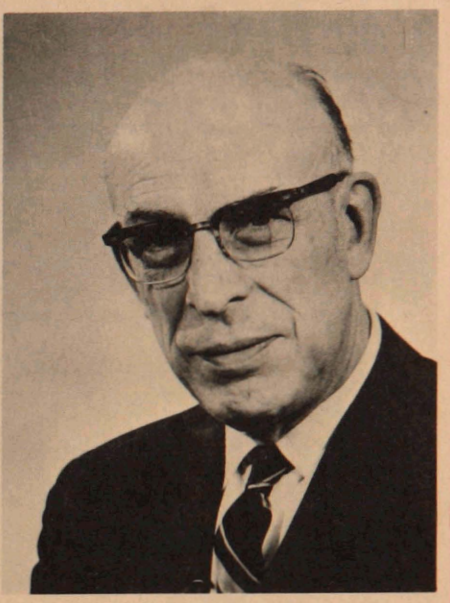


Ronald M. Gould



John M. Nannes

Professor Paul G. Kauper Dies At Age Sixty-Six



Paul G. Kauper

Paul G. Kauper, an internationally recognized authority on constitutional law and a member of the University of Michigan law faculty for 38 years, died May 22 in Ann Arbor at the age of 66. He had been in ill health for about a month.

He is survived by his widow, Anna; a daughter, Mrs. Carolyn Johnson of Vermillion, S.D.; and a son, Thomas, who is on leave from the U-M law faculty while serving as assistant attorney general in charge of the U.S. Justice Department's antitrust division.

Memorial contributions, were received by the Simpson Memorial Institute for Leukemia Research at U-M Hospital and by the memorial and library funds at Zion Lutheran Church, 1501 W. Liberty in Ann Arbor.

Dean Theodore J. St. Antoine said: "Paul Kauper was one of the finest classroom teachers and one of the most profound constitutional scholars of his time. That he should die while still at the height of his powers makes his loss doubly tragic for the whole world of legal education.

"The hallmarks of Paul Kauper's thought were breadth and balance. He was not given to passing enthusiasms, but devoted himself to such overarching questions as order and liberty, the state and the individual conscience, relations of the three branches of government, and human rights in the international community."

Prof. Kauper, who held the Henry M. Butzel professorship at the Law School, was a widely known author of legal books and had received many honors for his contributions as teacher and scholar.

Among his books are *Cases and Materials on Constitutional Law*, *Frontiers of Constitutional Liberty*, *Civil Liberties and the Constitution*, and *Religion and the Constitution*.

Kauper received honorary degrees from several universities, including the Heidelberg University in Germany and his alma mater, Earlham College of Indiana. In 1971 he was named Henry Russel Lecturer at the U-M, the highest honor the University bestows on a senior faculty member. In 1959 he was selected for the U-M's Distinguished Faculty Achievement Award for his scholarship, teaching, and public service.

Born in Richmond, Ind., on Nov. 9, 1907, Kauper graduated from Earlham College in 1929 and received a law degree from the U-M in 1932. After working with a New York City law firm, Kauper returned to the U-M in 1936 as assistant professor in the Law School. Throughout his career, constitutional law remained his major teaching and research interest, with special attention to questions of religious liberty and church-state relations.

Kauper was a member of many professional groups, including the American Bar Association, the Michigan Bar, and the American Judicature Society. He served as president of the National Order of the Coif.

He was also active in affairs of the Lutheran Church, serving as a trustee of the U-M's Lutheran Student Foundation and as a member of the Board of College Education of the American Lutheran Church.

Recently Kauper was one of several distinguished scholars chosen to deliver a series of lectures marking the upcoming U.S. bicentennial anniversary in 1976. He delivered his lecture last November at Old North Church in Boston.

Blanton, Buffam Win Campbell Competition

U-M law students William Blanton of Hodgenville, Ky., and David Buffam of Glen Cove, Me., were declared winners of the 1974 Henry M. Campbell Moot Court Competition at the U-M Law School.

Final arguments in the hypothetical court case were held March 12 before a distinguished bench that included U.S. Supreme Court Justice William H. Rehnquist, U.S. Circuit Judge Shirley M. Hufstedler of Los Angeles, and Marcus A. Rowden, general counsel for the U.S. Atomic Energy Commission. Also serving as judges were Dean Theodore J. St. Antoine and Prof. Alfred F. Conard of the Law School.

Runners-up in the competition were students Alan Weinberger of Passaic, N.J., and John Kolinski of Detroit. The four finalists argued as teams, representing plaintiffs and defendants in a case dealing with environmental dangers of a nuclear power plant which a hypothetical electric company plans to build on the shore of Lake Erie. The winning team represented a shareholder who sought to halt construction of the plant on grounds that it would create "intolerable and uninsurable risk" which could bankrupt the company.

Five judges heard legal arguments by four student finalists in the 1974 Henry M. Campbell Moot Court Competition at the Law School. The judges (seated, from left): Dean Theodore J. St. Antoine; Circuit Judge Shirley M. Hufstedler of Los Angeles; U.S. Supreme Court Justice William H. Rehnquist; Marcus A. Rowden, general counsel for the U.S. Atomic Energy Commission; and Prof. Alfred F. Conard of the Law School. The student finalists from the left: David Buffam, William Blanton, Alan Weinberger, and John Kolinski.

The winners were announced at a banquet at the Michigan League. All four finalists received cash prizes donated by the Detroit law firm of Dickenson, Wright, McKean & Cudlip, and the names of the finalists will be engraved on a plaque at the Law School.

All first-year students at the Law School are assigned to case clubs and engage in legal writing and argumentation. The top 32 are selected to compete in the Campbell Competition in their second year. Following two elimination rounds, four finalists are selected to argue before a distinguished bench.

Student Drafts Legislation Regulating Commodities Trade

The commodities market—which involves trading of shares (or "futures") in such food staples as grain and soybeans as well as non-agricultural items—has surged to an unprecedented volume of trading as more investors speculate in staple goods during an inflationary economy.

One result has been uncontrolled fluctuations in commodities prices, which in turn contributed to the recent spiral of consumer food costs.

The situation clearly points to the need for more rigid government controls, according to a University of Michigan law student who has researched and drafted a federal bill that would create an independent federal agency to monitor the commodities market.

"The bill is designed to prevent abuses that could lead to even higher consumer food prices," says Ralph Gerson. "Another goal is to protect investors, who assume a big risk by speculating in commodities futures. With the great price fluctuations in recent years, it takes an investor who knows the commodities market really well to reap a profit from his investment."

The bill, introduced by Sen. Philip A. Hart (D-Mich.), was drafted by Gerson and Shirley Johnson, a U-M law graduate and member of Sen. Hart's legal staff. Providing assistance was William J. Pierce, associate dean of the Law School and director of the U-M's Legislative Research Center.

The bill, the proposed Futures Exchange Act, is one of five such proposals introduced recently in Congress, but Gerson stresses that it is the only bill that would completely overhaul commodities exchange regulations rather than merely amending previous legislation.

As Sen. Hart has pointed out, the current Commodity Exchange Act, in effect since 1936, "has been amended 18 times and is now almost incomprehensible." In addition, he says the current law has permitted widespread abuses, including price-fixing, manipulation of the market by giant grain companies, and secret dealings that climaxed in the unexpected sale of large quantities of U.S. wheat to the Soviet Union.

Basically, Gerson notes, speculators in the commodities market deal in "future contracts," which are agreements to exchange a specified quantity of a commodity at a future date at an agreed-upon price. He says the commodities market has also been widely used by grain companies, food processors and some farmers as a "hedge" against commodity price changes.

But a steady volume of commodities trade in the past has now been replaced by a highly volatile market, with a boom in speculation and great fluctuations in prices, according to Gerson.

"Suddenly the commodities market has become an important sector of our economy," he says, noting that the total volume of commodities trade reached nearly $400 billion in 1972-73, compared to only $81.3 billion five years ago.

Most dangerous, he says, is the fact that the Commodity Exchange Authority, a Department of Agriculture affiliate which now supervises the commodities market, is understaffed and has rarely exerted its authority to protect the consumer. In effect, the commodities market has been largely self-regulating, according to Gerson.

By contrast, the proposed legislation would increase the government's regulatory powers and impose measures to protect the consumer and limit abuses. Here are some major features of the bill:

—It would create an independent federal agency, the Futures Exchange Commission, which would have the power to track moment-to-moment action on the trading floor and to gain full disclosure from brokers on particular trade transactions. In effect, the commission would be able to spot potential manipulation of the market before it occurs.

—It would require brokers to inform clients of the high probability of loss in the futures market. In addition, it would require all persons who deal with the public, including brokers and investment advisers, to take examinations demonstrating their understanding of the futures market.

—It would require exporters and importers to report to the commission on trade negotiations, thus averting situations of feverish trading and distorted prices that followed the Russian grain deal.

—It would contain a broad provision prohibiting any person from engaging in unfair and deceptive practices, and allow the commission to impose more specific rules as problems arise.

Prof. Pierce Urges Rights For Handicapped

A University of Michigan law professor says it is a "national scandal" that mentally retarded and other handicapped children are routinely excluded from the educational system in many states.

And, he says, the same U.S. Supreme Court decision which outlawed school segregation on the basis of race may eventually be broadened

William J. Pierce

to apply to mentally, emotionally, and physically handicapped youngsters.

"The number of children who are excluded from school in the United States is difficult to ascertain," says William J. Pierce, who is associate dean of the U-M Law School and director of the Legislative Research Center.

"In Pennsylvania in 1972 it was estimated that as many as 50,000 retarded children were excluded entirely from schools. The President's Commission on Mental Retardation estimated that perhaps as high as 60 per cent of school-age children who were retarded were not receiving an education," according to Pierce.

Noting legal aspects of the problem, Pierce says the Supreme Court has not yet grappled with the question of whether there is an absolute right to an education under the Fourteenth Amendment to the Constitution.

A common argument used in favor of exclusion, however, is that "the excluded children are not in any objective sense educable or trainable," according to Pierce.

But he adds: "Educational literature would seem to indicate that this justification is not sustainable as a matter for fact. Most literature in the field would indicate that every child is capable of benefiting from education and training even though that education and training is relatively minimal."

Pierce also takes issue with classification systems used to place handicapped students in special education programs.

"The number of misclassifications has been shown to be dramatic in several studies," says the professor. "In Washington, D.C., it was found that two-thirds of the students placed in special classes in fact belonged in the regular program. Other studies show less dramatic results, but perhaps a misdiagnosis of at least 25 per cent of the children."

Pierce notes that a 1967 court decision in Washington, D.C. abolished such a "tracking" system on grounds that it discriminated against black and lower-class students. And when race was not a factor, he says, some lower courts "have held that the classification processes are subject to constitutional due process limitations."

"If the Supreme Court reaches the same conclusion, existing practices of most school districts will require substantial revision," Pierce says. "Furthermore, legislative imposition of standards may be highly desirable."

Specifically, Pierce urges adoption of standards requiring that a full evaluation of a child's needs be done by a competent expert, that the child and his family have the right to a hearing and legal representation prior to a special education placement, and that final determination be made by an official who is independent of the school system.

Pierce adds: "Ultimately . . . solutions to the problems of the exceptional child in the educational setting, which we may characterize as a national scandal, can be evolved only by the accretion of new knowledge and sustained research. . . . The continued failure of the government to provide funding for sustained, in-depth research undoubtedly will affect the capacity of the legal system to render justice."

Prison Minimum Wage Urged In U-M Study

Absence of a minimum wage for prison inmates has been a major factor in "the failure of the prison work system," but there is little chance of

prisoner wage reform under current law, a University of Michigan study suggests.

In light of previous court decisions which have consistently denied prisoners the rights of "employes" under federal and state labor laws, the study says that new legislation appears to be the only hope for equitable prison wages.

It also recommends such other reforms as the removal of state prohibitions against the sale of prison-made goods on the open market and the lifting of federal restrictions against transporting prison-made items in interstate commerce.

The study appeared in the *Journal of Law Reform*, a publication of the U-M Law School. The study was made by James J. Maiwurm, a law student and member of the *Journal's* senior staff, and Wendy S. Maiwurm, a graduate student at the U-M School of Social Work.

"As a practical matter," the Maiwurms write, "convict labor is no longer a threat to labor or business, and the implementation of the minimum wage proposal would eliminate labor's traditional complaint about competition from cheap convict labor."

The article also stresses that the reforms would not necessarily be costly, since wage-earning prisoners would become taxpayers and could even be charged for room and board. Equitable prison wages would also allow married prisoners to support their families, thereby reducing the welfare rolls, according to the study.

The article suggests that serious consideration be given to two recent federal legislative proposals—the proposed Omnibus Penal Reform Act, introduced by Rep. Ronald V. Dellums (D-Calif.), which would qualify all federal prisoners for the minimum wage; and a proposal by Rep. Edward R. Roybal (D-Calif.), which would make the minimum wage applicable to inmates at both federal and state prisons and mental institutions.

In commenting on prison work programs, the Maiwurms observe that "almost all penologists agree that productive work activity is central to inmates' rehabilitation." But the article cites several sources, including a New York State study on conditions leading to the Attica Prison uprising, in noting that:

"Idleness is the rule in prison today. . . . Much of the available work is unproductive, boring, and meaningless. . . . Prison industry jobs, when available, usually have little in common with jobs outside the walls.

"The costs of the failures of the prison work system are enormous. Idle inmates do nothing to offset the cost of keeping them in prison, and untrained convicts are unable to support themselves upon release. Inmates, like other workers, rebel at being forced to do useless work. The present prison labor system breeds apathy, contempt, cynicism, and hostility."

The article notes that in 1972, inmates in federal prisons were paid between 17 and 49 cents per hour for work performed in prison industries, while wages in state prisons in previous years ranged from 4 cents to $1.30 an hour.

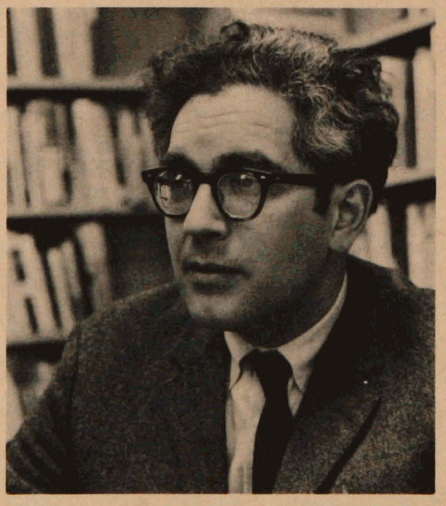
Typical of the judicial response to prisoner demands for a minimum wage, according to the article, have been cases where it was ruled that "in economic reality, no employment relationship exists" for convict labor under federal labor laws.

The article notes that under state law, the same standard has been applied to convict labor as that of the federal statutes. The authors stress that another major stumbling block to a favorable judicial decision is the "exception clause" of the 13th Amendment to the U.S. Constitution, which prohibits slavery or involuntary servitude except in the case of prisoners.

Thus, the article concludes that "there is presently no judicially cognizable right of prisoners to receive the minimum wage. If, as a policy matter, the minimum wage proposal is to be implemented, it must be done by new legislation."

Lecture Quotes

"The concept of a coerced cure in the correctional field is a dangerous delusion. . . . Education, vocational training, counseling, and group therapy should continue to be provided, but on an entirely voluntary basis. There should be no suggestion that a prisoner's release may be accelerated because of participation in such programs, nor that it might be delayed or postponed because of failure to participate."**—Prof. Norval Morris of the University of Chicago in delivering the Thomas M. Cooley Lectures at U-M Law School.**



"Much of the work of government agencies today has nothing to do with (racial) discrimination. Rather, their major concerns seem to be statistical inequities and the setting of goals and timetables. . . . It is one thing to say that a man has been discriminated against in buying a home; it is quite another to quote percentages of white and minority homeowners."**—Nathan Glazer, Harvard sociologist, in the William W. Cook Lectures on American Institutions, sponsored by U-M Law School.**

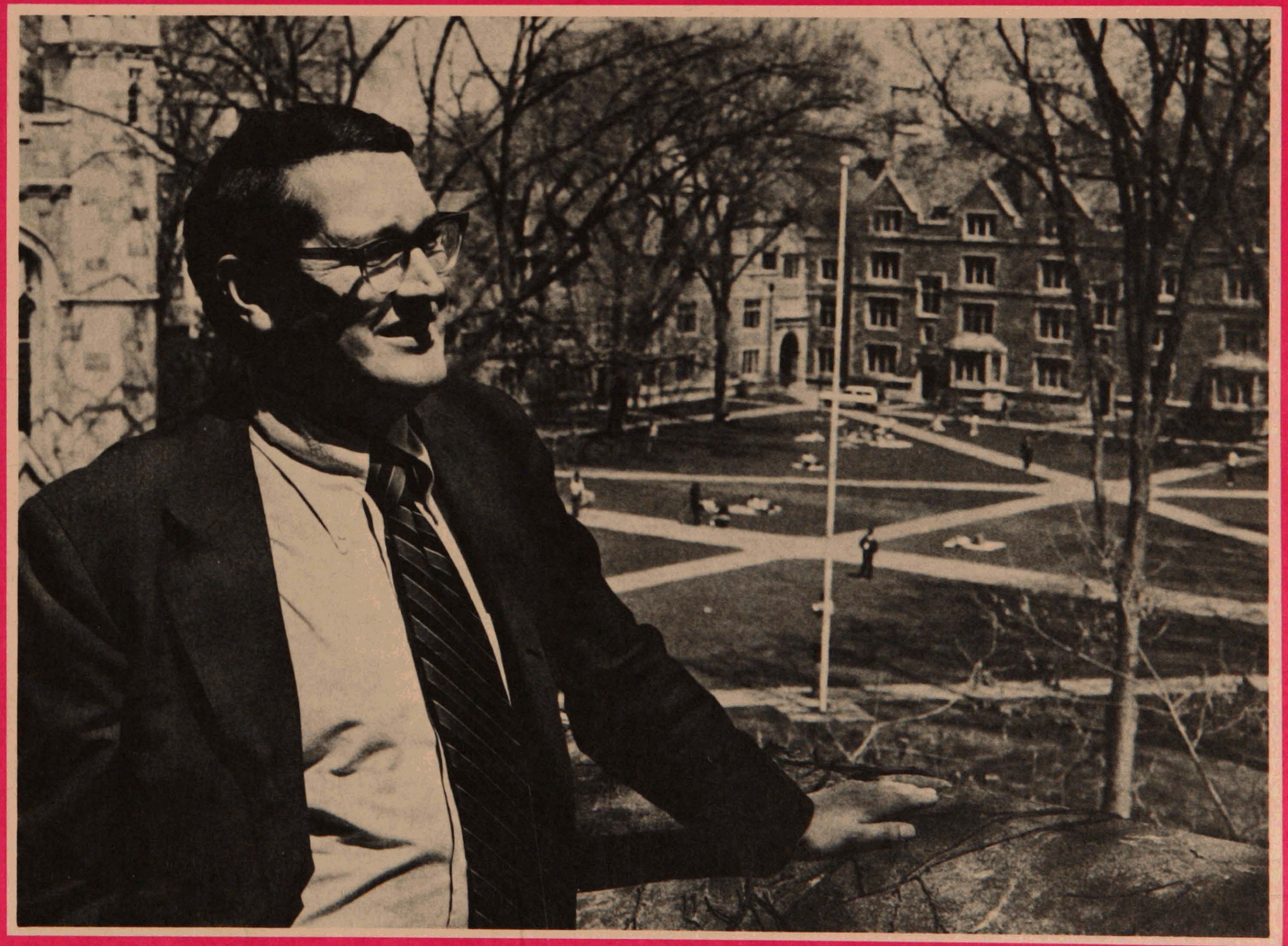
SOME COMMENTS ON ATTITUDES ABOUT, AND VALUES IN, LEGAL EDUCATION

by Dean Theodore J. St. Antoine

Based on the Dean's Report to the President of the University for the Year 1972-73

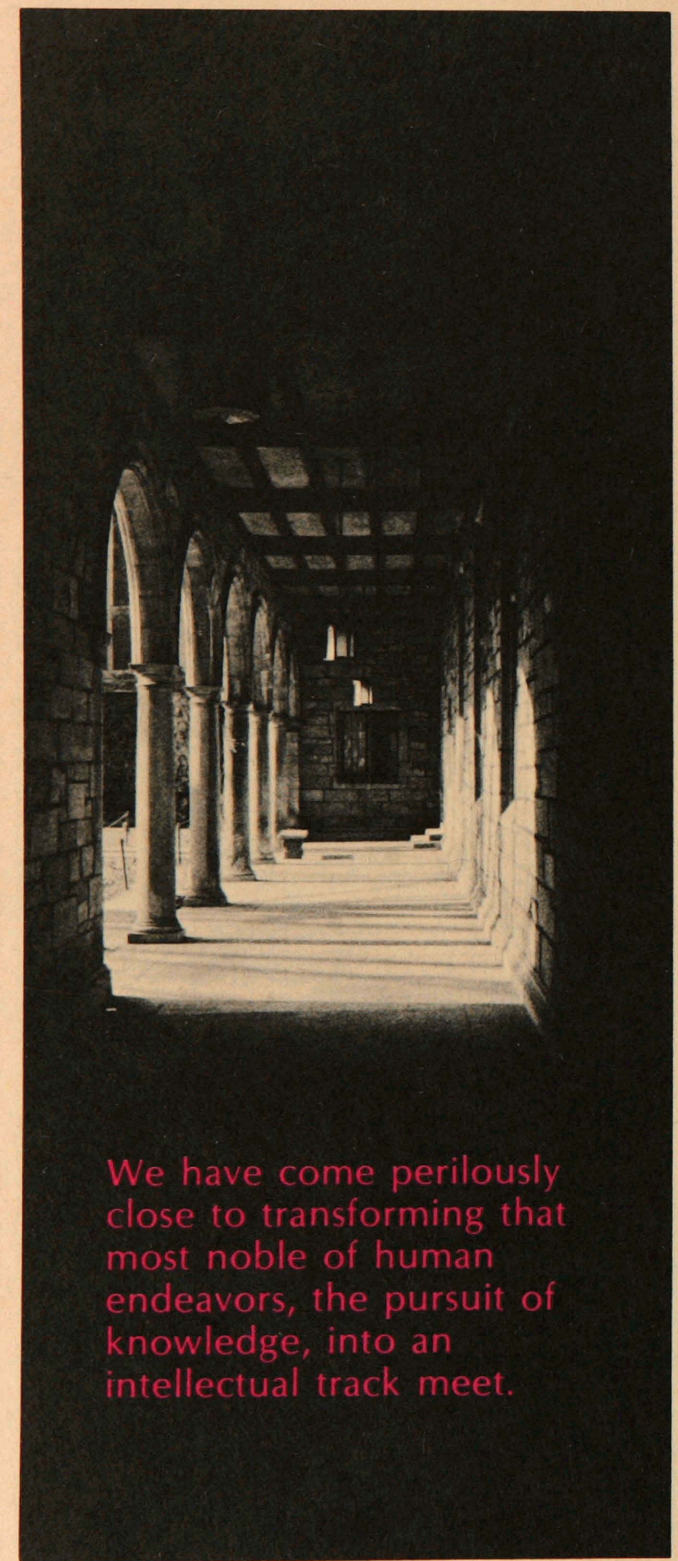
Over the next decade or so, I expect to see higher education, including legal education, become increasingly humane and value-conscious, increasingly discontinuous, and increasingly concerned with reconciling the competing claims of elitism and egalitarianism. . . . I should like to elaborate a bit on these points, and on their implications for the Law School.

People and values in legal education. The law is a demanding and competitive profession, and it should not be surprising that the preparatory training is demanding and competitive, too. Yet in recent years the law schools, along with other educational institutions, have been sharply criticized by many students on the ground that the intensity of the competition, and the impersonality of



the atmosphere, are demeaning and inhuman. Much of the debate has focused (too narrowly, I believe) on the almost symbolic issue of grading.

In the eyes of critics, the traditional letter grades and numerical averages exaggerate differences among students of equivalent capabilities, fail entirely to take account of the many personal qualities essential for success in practice, and distort the educational process by placing the emphasis on standardized testing rather than on individual learning and development. Defenders argue that graded examinations are often a necessary spur to mastering the subject matter of a course; that it is better for employers to base selections at least in part on reasonably objective academic records instead of on superficial appearances; and that careful (and comparative) grading helps fulfill one of the most vital purposes of all education: self-knowledge on the part of the student, a sense of who one is and where one stands in relation to one's fellows. I shall not enter this debate, except to suggest that the force of the arguments on either side indicates some compromises may be in order. Indeed, our faculty moved in that direction during the past year, by giving upperclass students the option of taking about a quarter of their courses on a pass-fail basis.



We have come perilously close to transforming that most noble of human endeavors, the pursuit of knowledge, into an intellectual track meet.

My concern is not so much with the grading controversy, however, as with the malaise it reflects. The more derogatory statements about the rigor of law school instruction and evaluation may be quite wrong, but I sympathize with what I see as the fundamental complaint behind all the rhetoric. We have come perilously close to transforming that most noble of human endeavors, the pursuit of knowledge, into an intellectual track meet. We have almost made the laurel wreath more important than the runners in the race.

In his novel, *The Inheritors*, William Golding tells how the Neanderthals, whom he depicts as a gentle, fun-loving race, succumbed to a cunning, aggressive, and more "advanced" species—our own. The author's heart plainly lies with the more primitive victims, but the lesson is that the building of civilization required the skills and drive of their successors. So, too, a gracious lifestyle may have characterized the liberal arts colleges of an earlier day, but the conquest of a vast continent and the exploitation of its resources called for the technical and administrative know-how that perhaps only our modern, service-oriented multiversities could impart. Nonetheless, we have paid a price for our achievements, and it may be time to rechart our course.

Today, in the wake of a world population explosion, massive environmental problems, and a deepening energy crisis, there are signs of a profound shift in attitudes about societal goals and the nature of professional success. We hear less about conquering distant frontiers and more about restoring our own communities—less about amassing material goods and more about improving the quality of life. Universities establish residential colleges and small-group instructional programs to break down the barriers of numbers and to integrate learning and living. Medical schools emphasize the need for treating the patient and not merely treating the disease. The law schools have not remained aloof from these developments. More and more, the aim is not only to teach "the law," but also to teach "lawyering"—not only to produce well-trained legal technicians, but to imbue our students with a sense of what it means to their clients, to society, and to themselves to be practicing attorneys. New courses like clinical law, with its stress on live client contact, and new methods in old courses, like the melding of law and psychiatry in family law, are employed to enlarge the students' understanding of the lawyering process as a humane as well as an intellectual art.

Any effort to deal fully with the law and legal practice must eventually face up to the sensitive question of values. The law schools, at least in recent decades, have approached this problem rather warily. Good teachers will force their students to press a legal analysis to the point where all logical fallacies are uncovered, competing policies are identified, and perhaps even a sophisticated cost-benefit appraisal is made. Then the teacher usually stops, possibly with the wry remark, "Well, the choice here is a political question," or "What's left is a value judgment." To halt at this stage is surely the safest course. Most of us are rightly uneasy about the risk of sliding from teaching into indoctrination; we are all too aware of our deficiencies as political or moral

philosophers; and we do not relish exposing ourselves to our students as something quite different from coolly commanding craftsmen of the law.

Yet throughout the world of education there are murmurings these days about the adverse consequences of neglecting the consideration of values, and harbingers of change are appearing. In the secondary schools, one finds a renewed interest in a systematic study of the subject of values, although steps are being taken gingerly for obvious reasons, and the approach is termed "value clarification" in order to stress the absence of indoctrination. In the colleges, many students have grown restive at the increasingly quantitative orientation of much of social science. In the legal field, our own Paul Kauper has been calling attention to the vital function of the undergraduate schools in helping to refine the values of the young men and women who are destined to go on to law school and become tomorrow's lawyers.

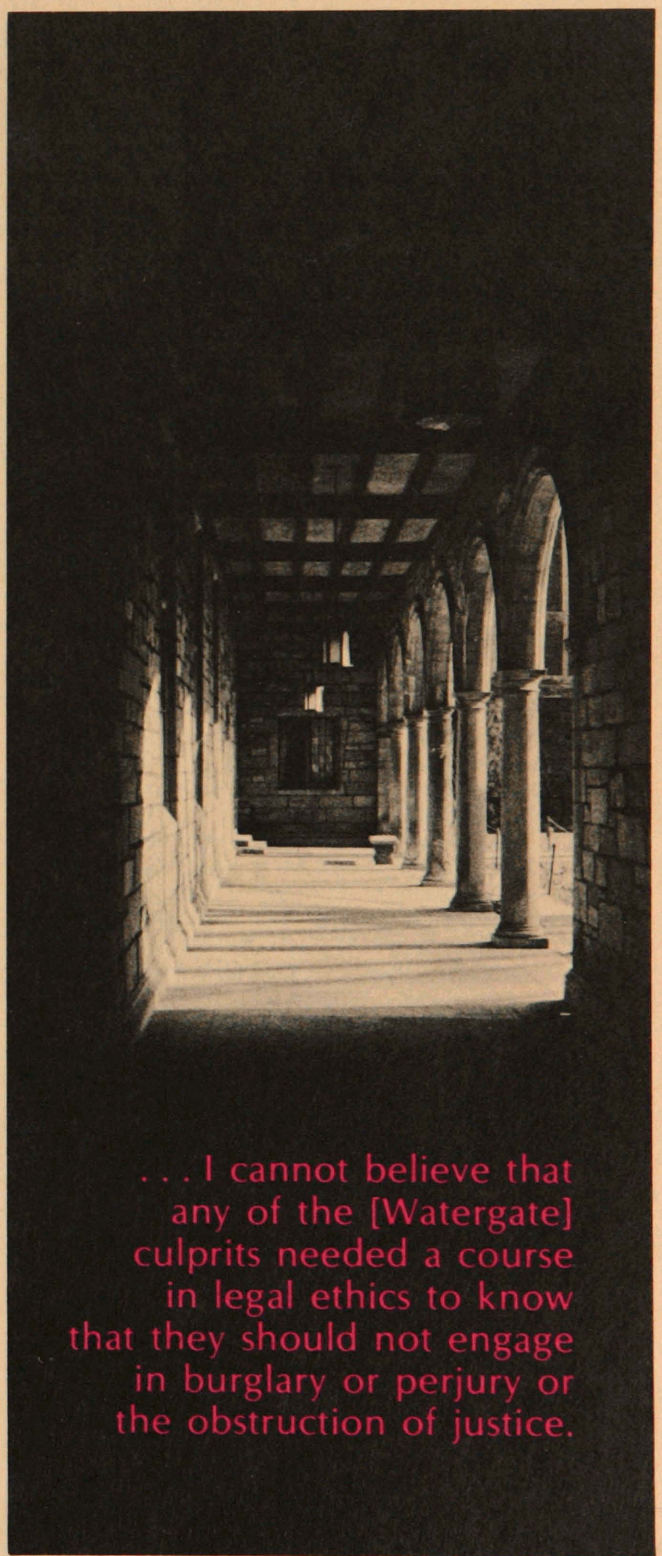
While family, church, and earlier general education may be the major influences on a law student's values, I have increasingly come to believe that the law schools cannot escape all responsibility. The meaning of a value, like the meaning of any other concept, must necessarily be sharpened, and perhaps modified, by each particular context in which it is encountered. Until a law student sees one or more values put to the test in the setting of a particular legal issue, he or she cannot fully comprehend that value or group of values. Only then can the student assess those values insofar as they bear upon the resolution of the given legal question. I find it hard to imagine that the student would not be helped in that assessment by the inquiries and comments of a thoughtful teacher.

I of course do not mean to say that the law professor should abuse his position by proselytizing, subtly or otherwise. But it is one thing for a conscientious teacher to refrain from making a student's ultimate value choice for him, and quite another to refuse so totally to come to grips with these fundamental issues that the student is left to infer that value judgments are no significant part of a lawyer's function. I am enough opposed to this notion of the lawyer as moral cipher that, in order to combat it, I would be prepared to accept the possibility of an occasional misstep by an overzealous faculty member.

These musings lead naturally into the melancholy subject of Watergate, which this year produced more mail for me from judges and lawyers than any other topic. Many letters decried the affair for bringing the legal profession into disrepute with the American public, and suggested that the law schools should take preventive action by requiring all students to pursue an extensive course in legal ethics. Now, I would not wish to underestimate the unfavorable repercussions of Watergate for the organized bar, and I take considerable pride in the excellent semester-long elective course in professional responsibility that has been offered at this Law School for the past several years. But I still think this whole matter must be kept in proper perspective.

First, although I concede the public has linked the bar with Watergate, almost none of the lawyers implicated in the affair were practicing attorneys. Most were politicians or administrators who happened to hold law degrees. Furthermore, an energetic, flinty set of lawyers can be credited with key roles in bringing the wrongdoers to justice. Second, I cannot believe that any of the culprits needed a course in legal ethics to know that they should not engage in burglary or perjury or the obstruction of justice. While I have already expressed my support of the law schools' paying more attention to the place of value judgments in the development of substantive law, and while I would be happy to see this approach extended to questions concerning standards of professional conduct, I am speaking here about the subtler, knottier aspects of legal rule making. On basic questions of moral right and wrong, I feel that most persons will come to law school with their values already formed, and our capacity to affect their thinking, even if we wished, is probably marginal.

Having said all this, I nonetheless agree that the law schools bear a substantial part of the responsibility for the ethical standards of the profession. In a host of small but revealing ways, implicitly and explicitly, a law teacher in every conventional course conveys to the students a sense of their calling, whether shabby or exalted. Moreover, I feel that the law schools, through their courses in professional responsibility and legal ethics, face a problem about the raising of lawyers' standards that has nothing to do with sermonizing, and is



. . . I cannot believe that any of the [Watergate] culprits needed a course in legal ethics to know that they should not engage in burglary or perjury or the obstruction of justice.

every bit as challenging intellectually as the problems to be encountered in any other course.

I start with the premise that most of us make our moral choices within relatively narrow limits. Those limits are largely set for us by the role we play, by the societal function we have assumed or have been assigned. We may have greater or lesser freedom in selecting our role, but once in it we tend to conform generally to the norms of behavior established by our peers. The Thomas Mores who will risk their heads by going counter to the tide are few and far between. The lesson, as I see it (and I should hope this would be deemed an attempt at constructive analysis, not cynicism), is that ensuring right conduct on the part of lawyers is more a problem in the structuring of the profession than in the reforming of its members.

An alumnus who is a highly successful partner in one of the nation's leading law firms has written me suggesting that a central vice of the profession may be the lawyer's right to form a full-time, permanent relationship with a single client. His fear is that financial dependence could lead to a loss of professional independence. Now, I am not at all persuaded that we should take such a drastic step as forbidding institutional law departments. They clearly promote the efficient delivery of legal services, and my hunch is that many institutional counsel are actually more secure and independent than some private practitioners, who may be much too concerned about getting and retaining clients. Nonetheless, I sympathize greatly with the basic approach of this alumnus. Instead of relying on preaching to improve conduct, he wants to build safeguards into the system itself, which will make it more likely that lawyers will act in an honorable and responsible fashion.

Whether one thinks in terms of modest but perhaps critical modifications in the machinery of the bar, such as making the chairmanship of a state grievance committee a normal stepping stone to the presidency of the bar association, or in terms of such fundamental changes as revising the qualifications for practicing law, I am convinced that it is through the careful consideration of these and other possible institutional adjustments that a law school (or the practicing bar) can contribute the most toward improving the ethical performance of the profession. And that brings me to my second topic.

Discontinuity in legal education. George Bernard Shaw thought youth too precious to waste on the young; I have become reconciled to this squandering of youth, but not to the parallel squandering of education. In an age when the half-life of knowledge is a decade or less, it is anomalous that a youngster might enter nursery school at the age of four or five, move in lock step through graduate or professional school until the age of twenty-five, and then never re-enter a formal educational program during the remaining half-century of his or her existence. For a lawyer in the last third of the twentieth century, it would be professional suicide. Yet as I talk to judges around this progressive state of Michigan, it becomes clear that nothing is more distressing to them than the deficiencies of knowledge and technique on the part of many lawyers who appear in their courts. Simple (or gross) incompetence must, in my opinion, be considered a far graver problem for the bar than the aberrational behavior of Watergate.

At the very core of professionalism is the capacity for disinterested judgment. This, too, is jeopardized when a lawyer realizes that a proposed legal reform may threaten a skill or a specialty he has become dependent upon during his career. To minimize this danger, and to ensure society of an adequate supply of capable, "obsolescence-proof" lawyers, we must have an extensive, effective program of post-degree legal education.

Michigan is already blessed with one of the country's best post-degree programs, operated through the Institute of Continuing Legal Education. Under the direction in recent years of our faculty's John Reed, ICLE has presented a wide range of excellent conferences and short courses for practitioners in this and other states. Typically, however, an ICLE program will run no longer than a day or two. Even with highly qualified personnel and the most careful preparation, this format is inherently limited. All too often, as the critics have charged, it will partake more of "continuing legal information" than of "continuing legal education."

What is needed, I believe, are intensive programs of a month or so, which practitioners would undertake periodically throughout their careers. This would offer a far more realistic prospect of keeping the mass of the bar abreast of the latest developments in their profession. Perhaps even more, it would afford an opportunity for some quiet, concentrated thinking about the underlying problems of the law and of a person's particular area of law. Out of such unhurried reflection, away from the rush of day-to-day practice, might emerge a far deeper appreciation of just what it means to be a professional.

Since lawyers, like most persons, tend to follow the path of least resistance, I do not expect to see large numbers of practitioners rushing off on their own accord to pursue such a regimen. Ultimately, I think extended post-degree studies, or some equivalent mode of self-qualification, will have to be mandated by the appropriate authorities in the various states as a condition of continuing licensure. The first step may well be to recognize formally the existence of specialization in the law, and to authorize lawyers acquiring expertise through prescribed courses, or otherwise, to hold themselves out to the public as specialists. The president of the American Bar Association sees this coming in the next half decade.

I do not know exactly what role the law schools will play in all this. But we can be sure that in some way they, or their individual faculty members, will be deeply involved.

A postscript on elitism and egalitarianism. Nothing I have said in these annual reports has provoked so much reaction as my comments last year on elitism and egalitarianism. While I concluded with the pious hope that there could be a "proper accommodation of competing values," I discovered that I still had managed to be too elitist for some and too egalitarian for others. At least I was confirmed in my view that reconciling these conflicting claims is one of the persistent problems of higher education.

A favorite target was my suggestion that, starting with a pool of "qualified" law school applicants, "we might seriously consider reserving, at least experimentally, a certain number of places in each beginning class for selection on a random or other nonquantitative basis." The notion of random selection received such a buffeting that I am ready to concede it is an idea whose time has not yet come. I remain convinced, however, that we should not turn entirely over to the computer the determination of the future composition of the legal profession. Room is left for an intelligent exercise of discretion in selecting applicants at least in part on the basis of nonquantitative data.

While there are powerful reasons for promoting excellence and insisting on high standards, some persons bring an almost passionate fervor to their defense of admissions on a straight "merit" basis. Surely there is an unexamined premise here. Is it self-evident that places in the major law schools must be handed out to individuals like so many achievement awards? Could a rational argument not be made that a healthy sense of distributive justice might call for admitting those with the greatest potential for improvement, rather than those with the greatest record of success? Or, more seriously, are the law schools not under an obligation to give some thought in setting admissions policy to the kind of legal profession that will best meet the future needs of society? . . .

THE EUROPEAN COMMUNITY INSTITUTIONS — WILL THEY SUSTAIN A UNIFIED EUROPE?

by
Professor Eric Stein

This article reproduces a speech delivered by Professor Stein at a regular meeting of the University Research Club held February 20, 1974.

We lawyers are concerned with laws and with governmental institutions that make laws and enforce laws. In our moments of humility—some people feel that lawyers do not have many such moments—we wonder how much impact laws and institutions really have on men and on society. Yet it was Tom Jefferson, no lover of laws and institutions, who wrote:

> I am certainly not an advocate for frequent and untried changes in laws and institutions but I know also, that laws and institutions must go hand-in-hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with a change of circumstances, institutions must advance also, and keep pace with the times.

In contemporary Western Europe, the problem of adapting institutions to a profoundly changed environment has emerged as a central issue.

The "Three Europes": A Persistent Ambiguity

By the end of the second World War, national governmental structures on the Continent were weakened to the point of collapse. The process of political reconstruction was marked from the beginning by a pervasive ambiguity. Should new institutions be built so as to preserve the nation-state with all its trappings of national loyalties and rivalries, or should there be new transnational institutions which would dilute or supercede the nation-state and provide a constitutional foundation for a unified Europe? Today—29 years later—the ambiguity is still with us.

Three clusters of European institutions have surfaced which correspond to three different strains of European policies: the institutions of a "greater Europe," comprising most Western European states; the institutions of Atlantic Europe; and the institutions of "little Europe" of the six which has only recently been enlarged to include the United Kingdom, Denmark, and Ireland.

Winston Churchill provided the vision of a unified and democratic "*greater Europe*," organized in a Council of Europe with an assembly of elected peoples' representatives as the central policy-making institution. But when it came down to brass tacks the Churchill rhetoric evaporated, and the British labor government, backed by the Scandinavians, scuttled the transnational idea. Today, the Council of Europe comprising 18 states does have an assembly of deputies drawn from national parliaments, but this assembly has no power and little influence. The limited power the Council of Europe was given was shifted to a Committee of Ministers, a conventional intergovernmental organ, and the council has proved a moderately useful, essentially intergovernmental institution. It produced a "bill of rights" for the member states, the European Convention on Human Rights, which is enforced by a commission and a Court of Human Rights; and it has also served as a useful forum for debates and marginal treaty making.

The second group of institutions which comprise Atlantic Europe result from forces outside Western Europe: the threat from the Communist East, and the alliance with the United States. On the military side, NATO is essentially an intergovernmental institution of nation-states. The NATO integrated commands, an elaborate Kafkaesque network of international military headquarters, has some unusual institutional elements; but its long-term impact on European institutional evolution is questionable, particularly since France withdrew from these commands in 1966. On the economic side, Atlantic Europe has found its institutional expression in the Organization for European Economic Cooperation, OEEC, another purely intergovernmental institution with no transnational features.

The first and most important task of the OEEC was to make sure that Marshall Plan aid was used to help revive intraregional trade, and in this sense the OEEC provided an indispensable foundation for subsequent progress toward regional economic integration. Yet, whatever progress has been made toward regional integration and toward transnational institutions "beyond the nation-state" has been made in the context of the third type of Europe, the "*little Europe*" of the Six.

When it became obvious that a unified greater Europe was a vain illusion, leadership in six continental countries: France, Germany, Italy, Belgium, the Netherlands, and Luxembourg, took the first real step toward a transnational organization by setting up the European Coal and Steel Community (ECSC) in 1951. The principal objectives underlying the establishment of this community were: first, to place steel and coal production in the member states under the control of a supranational authority to ensure that the war-making potential of the Ruhr area in particular would never again be used for national military adventures; second, to help rebuild steel production facilities to meet the pressing demands from the Korean War; and third, but not least, to provide a basis for further supranational institutional development toward a unified Europe. The British were invited to join but refused because they were unwilling to accept the supranational institutional structure of the community.

The next step in the development of transnational European institutions was the radical proposal in the mid-fifties for a European Defense Community that might have changed the face of Europe. It called for a single European army, a European military budget, and a European ministry of defense. This plan would necessarily and logically have led to a political community, a quasi-federal type of organization. This was the magic moment of postwar Europe. Five of the six member states ratified the Defense Community Treaty, but the French government declined to submit the plan to the French Parliament, and that was the end of the plan. It was a time of bitter disappointment for dedicated Europeans and for American champions of European integration as well. John Foster Dulles' outcry of "agonizing reappraisal" still reverberates in the corridors of the "old" State Department.

The Europeans managed to assemble the debris and by 1957, as a result of Dutch and Belgian initiatives, the Six agreed on two significant new undertakings: the European Atomic Energy Community (Euratom), and the European Economic Community (EEC) which is now generally called the Common Market. In these new communities, the supranational features of the Coal and Steel Community reappeared in a diluted form, but the essential characteristics were maintained. Again the British were invited to join and again they refused, not only because the institutional features would impair the "sovereign powers" of the British Parliament, but also because they were unwilling to go along with the projected common agricultural policy. The nostalgia of the Commonwealth and the hope of maintaining a special relationship with the United States also played a part in their decision. This time, however, the British recognized the risks to their trade and political interests of staying out. In order to put themselves in a better bargaining position vis à vis the new Common Market, the British, along with the Scandinavians and the European neutrals, organized the European Free Trade Association, a new trading block of "the outer seven."

With Europe "at sixes and sevens" and an interblock trade war a possibility, the United States stepped in to

help to reorganize the OEEC, the economic institution of the "Atlantic Europe," into the Organization for Economic Cooperation and Development, or OECD, in which both Canada and the United States became full members, and which was to serve as a bridge between the two trade blocks. In fact, the organization gradually changed its feathers, and with the admission of Japan became a forum for industrialized nations at large, beyond Europe and beyond the Atlantic, with useful functions particularly in the field of monetary and economic policy and aid to less developed countries.

In the early 1960's the British government, if not the British people, began to face the realities of the initial success of the Common Market and of Great Britain's own changed position in the world. Britain applied for admission to the Common Market first in 1963 and then again in 1967, and both times it was vetoed by General DeGaulle. Not until 1972 was the French veto lifted, and as a result, on January 1, 1973, Britain along with Ireland and Denmark became full members of the three European communities (ECSC, Euratom, EEC).

For the first time in history, there came into existence an institutional framework comprising all four major European actors—France, Germany, the United Kingdom, Italy—whose membership is indispensable for a unified Europe. How do these institutions work, how have they performed thus far, and are they likely to sustain an integrated unified Europe?

The Common Market: Reality or Illusion?

Central to the legal framework is the European Economic Community Treaty, the Common Market Treaty. It has two principal features. First, it is a "treaty-constitution" because it establishes law-making, executive, and judicial institutions. Second, it lays down rules of economic and social law which are superimposed upon national laws of the member states. Some of these rules are fairly specific with fixed deadlines set for specific implementing measures.

For example, there was a deadline for setting up a customs union, that is for removing all tariffs and other obstacles to the free movement of goods throughout the territory of the community, and for erecting a common external tariff around the community on goods coming in from outside. The customs union of the Six came into being in July 1968, 18 months in advance of the deadline. By 1977 the process of absorbing the three new members into the customs union should be completed. The community has bargained as a unit, represented by its commission, in trade negotiations with non-member countries, including the so-called "Kennedy round" in Geneva. It has been said—with a bow to the famous FDR rhetoric—that the Common Market Treaty sanctions four freedoms: the freedom of movement of goods including agricultural products; freedom of of movement for workers, so that, for example, Italian workers have been able to seek jobs in the North; freedom of movement for entrepreneurial talent; and freedom of movement of capital, so that, for instance, a German company may establish, finance, and manage a subsidiary in France under the same conditions a Frency company could.

Other treaty rules serve to protect qualified competition, very much like our antitrust laws, and these rules have been enforced by substantial fines imposed on companies. A community-wide single patent will become available. A new, common, multi-phased sales tax, the value-added tax, has been introduced as a first step toward harmonizing national tax systems. National commercial legislation, company laws, government purchasing regulations, and technical standards for products in community commerce are in the process of harmonization with a view to building a coherent European industrial base, although this process has proved slow and extremely difficult.

> In its present form, the [European] community process is not only undemocratic but also burdensome and slow, encrusted with bureaucratic trivia and marked by an absence of what the Europeans call 'political will'.

The community has negotiated a network of associations and free-trade arrangements with almost 40 European and African states and it has become the largest trading unit in the world. Intra-community trade has grown at a much faster rate than world trade, from 6.7 billion dollars in 1958 to more than 49 billion dollars in 1971. Considering where Europe started in 1945—and considering European history before 1945—these are significant if not revolutionary accomplishments in which the new institutions have played a prominent part.

But the Common Market Treaty aims at more than a customs union and common market; it envisions a gradual coalescence of national economies into an economic, monetary, and ultimately, political union. Here, however, the treaty rules are loose, there are no deadlines, the powers of the institutions depend upon the will of the governments—and progress has been limited.

Wide divergencies persist between monetary policies of the member governments, with French, Italian, and British currencies floating separately. The European Monetary Cooperation Fund for assistance in short-term balance-of-payments difficulties and a closer cooperation of central banks are the only concrete accomplishment toward the ambitious plan for pooling national reserves in a monetary and economic union. There has been virtually no progress toward common policies to control inflation, common regional policy to help backward areas in Europe, or common transport and energy policies; and little by way of common approach to social welfare and employment policies or protection of environment. Despite the oil crisis, the only relevant community rules on the books are directives requiring the governments to keep a minimum oil supply as a reserve, to complete their national legislation, and to consult with each other, although there are plans for a community-wide system of monitoring the oil market and harmonizing prices. In the field of political foreign policy, a rudimental arrangement provides for periodic consultation at official and political levels, but there is no central secretariat because the members have not been able to agree on a location.

The Institutions: Law-Making and Judicial Processes

Two principal organs in the European Economic Community make community laws and policies: the European Commission and the Council of Ministers. The com-

[T]he euphoria generated by British accession and the consequent enlargement of the [European] community has now given way to a feeling of acute crisis. The concept of a unified Europe as an emergent third power in a bipolar world system has met with stark reality. . . .

mission is composed of 13 men appointed by common agreement among the national governments. These men are supposed to be entirely independent from their respective governments. The commission was given the exclusive right of legislative initiative, the right to propose new policies and new laws to the second main policy-making organ, the Council of Ministers. The council is an intergovernmental body composed of one minister from each of the nine national governments. So the commission proposes, and the council enacts. The commission is conceived as the organized impulse and the common conscience of the community. The council is to act on the commission's proposals, in principle by weighted majority vote; it is to reconcile conflicting national interests, but it cannot alter a commission proposal unless all the ministers agree.

Before the council enacts a law (some of the laws are "directly applicable" in all member states just as our federal laws have direct effect throughout the United States) it must consult two other bodies, one political and the other economic. The political body is the European Parliamentary Assembly which is composed of deputies from the national parliaments of the member states. The Assembly rechristened itself the "European Parliament," but in principle the basic treaty gave it only the power to advise the principal organs. Its advice need not be followed—and often is not followed—by the ministers, and that has been a source of frustration and irritation for the deputies.

The council must also consult the Economic and Social Committee representing major special interest groups: employers, workers, and the so-called "third group," including consumers. The authority of this body is again confined to offering opinions which are not binding, and its influence has been even more limited than that of the European Parliament. Thus the law-making process is essentially in the hands of the two "executives": the commission and the Council of Ministers.

The commission, with a staff of 6,800, also sees to it that community law is observed. It may enforce this law against individuals and companies by binding orders and fines, and it may bring recalcitrant governments before the Court of Justice of the communities in Luxembourg. The bulk of the court cases, however, consists of two categories: judicial review of the acts of the community institutions for conformity with the treaty, and interpretation of community law on request from national courts. When a question of interpretation of community law is raised in a case before a national court, that court may, and if it is the court of last instance, must, refer the question to the community court for a ruling that is binding upon the national court. Governments, community institutions, and to a more limited extent individuals and companies, have standing before the court.

In its case law, the court has evolved a coherent and imaginative doctrine of a separate community legal order which has direct effect on "Common Market citizens" and within its sphere is normatively superior to the national legal orders, a superiority that national courts must recognize. The court has been concerned from the outset with maintaining the proper distribution of power and authority among the national and community institutions. Most recently, it has begun formulating ways of protecting basic civil and economic rights of individuals against possible impairment by community law on the basis of principles common to the national constitutions of the member states.

More than 1,000 cases have come before the court thus far. The court is perhaps the only institution which has worked the way the most "pro-European" of the "founding fathers" may have intended.

The Institutions: A Shift Toward National Power

All institutions brought to life by a constitutional act evolve in a way—to paraphrase Mr. Justice Holmes' musing about our own Constitution—"which could not be foreseen completely by the most gifted of its begetters." The community institutions are no exception.

The original ambiguity continues to haunt the community enterprise. On one hand, the commission, the court, and the parliamentary assembly are transnational or supranational organs, representing the "beyond-the-nation-state" concept; while the council, controlled by the national governments, asserts the predominance of the nation-state.

Over the years a significant shift has occurred in the delicate power balance between the transnational and nationally controlled organs. To counter the influence of the commission's extensive staff and expertise, the Council of Ministers has built up its own bureaucracy, including a new, powerful body which was not contemplated in the original treaty. This is the Committee of Permanent Representatives, composed of the heads of the permanent missions to the community which each member government maintains in Brussels. Each mission is headed by a senior diplomat supported by substantial national staffs. It is this group which in reality receives the proposed drafts from the commission; it negotiates with the commission, and frequently rewrites the commission's proposals before they come up for action by the ministers, whose action often is little more than a formality. The emergence of this group of national diplomats and bureaucrats was one of several developments which have tipped the power balance substantially from the commission back to the national capitals and to the council.

The second development in that direction took place in 1965 when General DeGaulle ordered the French representatives in the community to embark on the "empty chair policy;" that is, to boycott the community organs as a protest against what he felt was a power grab by the commission. The ensuing six-months' deadlock between France and the other five members ended in an arrangement which in effect did away with what some have viewed as the essential supranational feature of the Common Market Treaty, that is, the possibility of a majority vote in the Council of Ministers. For all practical purposes, voting has disappeared from the Council and all decisions involving national interests of any significance are negotiated *ad infinitum* until all the ministers agree.

These institutional changes have been symptoms of changing attitudes. It is clear that today all major policy decisions are made not in Brussels, the European capital, but in the national capitals, with the commission participating as an honest broker, as a midwife, as a repository of information and expertise in what is essentially a continuing intergovernmental negotiation.

The Cloudy Crystal Ball

What is the prognosis for the European community institutions? The crystal ball is particularly cloudy at this juncture. One rather interesting fact is sometimes overlooked. Since 1971, the community has been in the process of acquiring important financial resources over which its institutions will have direct control. By next year the entire proceeds from customs duties and levies on goods coming in from third countries and, if necessary, a fraction of the revenue from the national value-added tax will be flowing into community coffers instead of national treasuries. These funds—more than $5 billion—cover community budget expenditures (more than $4 billion to finance the agricultural policy), and control of these funds will be shifted from national parliaments to the community executives, the ministers in the council, and the commission. Some Europeans—particularly the Dutch and the Germans, but the British as well—have felt this to be inconsistent with parliamentary democracy. To meet this concern, the role of the European Parliamentary Assembly in the adoption of the community budget has been increased somewhat, and there are proposals on the table for broadening the assembly's budgetary power still further, and also for associating it more closely with the law-making process. But that is a question for the future.

In its present form, the community process is not only undemocratic but also burdensome and slow, encrusted with bureaucratic trivia and marked by an absence of what the Europeans call "political will." The famous "spill-over" doctrine, according to which the integration process would advance from one economic sector to another while at the same time "upgrading" the community institutions, worked initially. But the spill-over to vital economic issues with important political implications has not occurred thus far, not to mention a spill-over to political policy.

To put some steam behind the machinery, the governments have recently introduced a new and "extra-constitutional" institution, the so-called Community Summit, a highly publicized series of meetings of the heads of states and governments. These periodic encounters invariably conclude with ringing declarations which are intended to set guidelines for the community institutions and infuse new enthusiasm into the European idea.

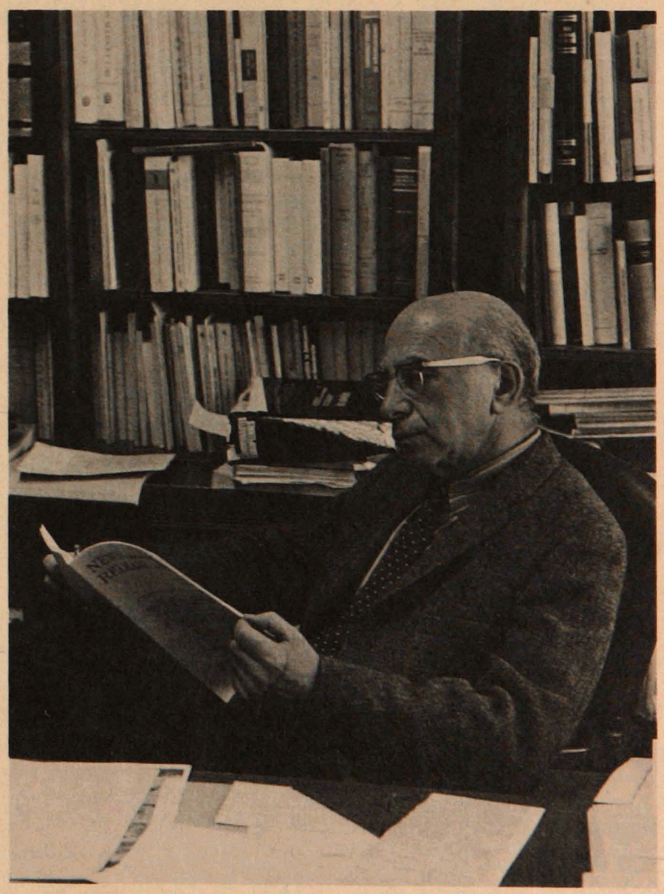
The most recent variant of the summit was the so-called "fireside summit" in Copenhagen which most would agree was anything but a success. The idea was that this time the heads of states and governments would get together without a formal agenda and without formal preparation by the bureaucrats. As soon as the statesmen assembled in the Danish capital, it became apparent that the Dutch wanted to talk about their energy plight, the British about regional policy, and the French about a "political union" in the Gaullist image. But the meeting was effectively taken over by the representatives of four Arab governments who appeared ostensibly without any invitation.

In the broader context, it is clear that the euphoria generated by British accession and the consequent enlargement of the community has now given way to a feeling of acute crisis. The concept of a unified Europe as an emergent third power in a bipolar world system has met with stark reality: the affairs of the Middle East, so crucial to Europe, are being settled without Europe, and European economies have proved immensely vulnerable in the oil crisis. The scramble for separate deals with oil-producing countries makes a mockery of unified European solutions.

By an unhappy coincidence, at a time when vital decisions in long-range common interest call for firm and enlightened leadership, national governments in all the member states are weak. The demands of the people of Europe upon their national governments have been rising—as they have been in the United States—and these demands have pressured the governments to pursue national interests without regard to common interests even though, paradoxically, many of these demands cannot be satisfied in the context of the individual nation-state.

I for one do not see much substance in the talk about a break-up of the community. There is no alternative for Europeans except unification in one form or another if they want to recapture some of their influence and provide solutions for their major problems. But it is equally clear that to achieve this, to make decisive progress, the present institutions will have to be reinvigorated.

Any substantial advance from a customs union to an operational economic union would require member governments to relinquish significant powers in favor of the commission and of the European Parliament. National political and bureaucratic elites are not in the mood to move in this direction at this juncture, and there is no grass roots pressure to edge them on. Consequently, the present institutional structure which sustains a customs union may remain more or less unchanged for some time to come. When the integration movement is "relaunched" (to use the Brussels jargon) the resulting institutional framework is likely to resemble the loose Canadian-type federation rather than the centralized United States pattern. Essential policy decisions on the sharing of resources and adjustment of competing interests will still be made in continuing negotiations between national and transnational authorities at all levels and in a variety of arenas.



Professor Eric Stein

The Art of Oral Argument

by the Hon. Shirley M. Hufstedler
Judge,
U.S. Court of Appeals for the Ninth Circuit

Based on a speech delivered at the Henry M. Campbell Memorial Competition Banquet, March 12, 1974

Judge Hufstedler

Oral argument is an art, but it is not a gentle art, nor can it be, because oral argument is an integral part of decision making and nothing about making hard decisions is gentle.

Moot court arguments, both in brief and in oral advocacy, are superb teaching devices. Yet, I have some reservations about them. Almost all competitions, including this splendid Campbell Competition, wind up before the moot supreme court. Today's case, modestly, only tackled the intricacies of federal jurisdiction, abstention and comity, justiciability, corporation law, federal and state control of the development of atomic energy, class actions, standing, and the survival of the environment. Constitutional law was no more than a brooding omnipresence. More often, a moot court competition places the competitors in Supreme Court combat on the outer reaches of developing constitutional law. Now, that is heady and infectious stuff. These competitions perhaps should bear a warning label from the solicitor general: "May be dangerous for the young lawyer's legal health," because the structure of the competition prepares the new lawyer for a legal argument he is least likely to make in a form he is least likely to see until years after the incandescence of his moot court experience has dulled to an ember.

I utter this subdued warning because the combination of moot court competitions and casebooks bulging with opinions from rarified appellate courts may lead neophyte lawyers to believe that arguments before trial courts and the earthier appellate courts are not much different from those appropriate in the Supreme Court of the United States. In fact, a lawyer who makes the same kind of arguments to each level of the state and federal hierarchies is going to turn up a loser, unless the advocate has an archangel on his or her shoulder—preferably Moses, with tablets, suitably inscribed. That is not because the intellectual girth of judges automatically expands with each rise in the judicial ladder and not because a case in the Supreme Court did not begin in a trial tribunal. Rather, it is because the institutional roles and functions of each court are different, and effective argument must be addressed to the institutional concerns and restraints of each level of courts.

Argument before a trial court is supposed to fit the evidence into a unified composition, to brush in the lights and shadows, to throw the images into perspective, and to press the whole into a legal theory supported by statutes or case authority that leads the court irresistibly to the advocate's predetermined result. While not fudging the facts nor obscuring pertinent statutory and appellate law, the advocate leans hard on any existing law favorable to his cause and seeks distinguishing features of every authority that looks the other way. Unless he is writing on a totally clean precedential slate, the advocate has little or no occasion to expound his views of policy. He gets nowhere by attacking an opinion of a higher court, to which the trial court is bound, on the ground that the precedent is aging and wrong, because it is a brave trial judge or a foolhardy one—depending on your point of view—who thinks his task is to overrule the law laid down by a court that can reverse him. Of course, the trial advocate must know how to lay the appropriate challenge in the trial court to preserve his points for the higher courts who have the power to correct their bygone brothers' mistakes.

Intermediate appellate courts have functions very different from either trial courts or courts of last resort. Their duties are a mixture of error correction in the individual case and institutional functions, by which latter term I mean supervising lower courts, filling interstitial spaces in statutory and case law, and, from time to time, striking out a few paces on a new jurisprudential path. Broad-gauge policy making is only rarely a part of these courts' institutional concerns. Arguments addressed to these courts are most effective when the advocate can persuade the courts that existing precedent controls, or if it does not, that it need be nudged only a little to reach his conclusion.

Arguments addressed to courts of last resort exercising discretionary review are very different creatures because the function of these courts is to establish overarching precedents and policy for every level of the judicial system below their lofty perches. Here's the place to topple the eroded cases. Here's the place to argue your legal and social philosophies—at least to the extent that you have reason to believe a majority of the court may find your arguments convincing. In these

courts, the advocate must realize that he would not be there unless some of the judges believed that prior law was inadequate to dispose of the case. The concern of these courts is not so much where the law has been as where it should be going. The function of courts of last resort, exercising powers of discretionary review, is not correcting error in individual cases. The overriding function is setting precedent and policy, although such courts may perform incidental error correction.

Apart from shaping arguments to the functions of each level of courts, a successful advocate must know how the particular appellate court handles oral argument. It is essential to learn about the internal operating procedures of each court in order to frame an effective argument. In the unimaginative cant of appellate courtese, there are "hot and cold" benches. "Hot" benches are those in which all of the judges always read the briefs before argument. "Cold" benches are those in which the judges never read the briefs before argument. Among the hot courts, some are scorchers and others are tepid. Scorchers like the United States Supreme Court do a good deal of independent work on the case before oral argument. Woe to the advocate whose preparation quit before the Court's did. Obviously, the kind of argument the advocate makes depends enormously upon what kind of temperature that court runs. Cold bench enthusiasts are not slothful; the judges who practice the method defend it on a basis of the joys of free-wheeling advocacy. I confess that I have never been an adherent of the benefits from ignorance, and I should rescue myself from judging the cold benchers' case.

The attitudes of different appellate courts towards oral argument are as varied as Darwin's singular group of finches. As you are aware, oral argument is highly valued in the Supreme Court, if it is well done. Questioning from desultory to devastating must be anticipated. The same attitude prevails in most federal appellate courts. Other appellate courts may simply tolerate oral argument as quietly as possible. No appellate lawyer is worth his fee if he has not done the basic research to determine how the particular court conducts argument and the role which that court assigns to oral advocacy.

The purpose of moot court argument is to use the bench to teach appellate advocacy to law students. The purpose of advocacy in the real appellate world is to use the advocate's powers to teach the bench. At its best, appellate oral advocacy is among the most enlightening and exhilarating of the teaching arts.

I have thoroughly enjoyed teaching and being taught by the Campbell Competition. I have not only the hope but also the expectation that the fine promise shown by the Campbell competitors will mature into virtuoso performances in the coming years.