Law Quadrangle Notes

The University of Michigan Law School

Volume 19, Number 1, Fall 1974

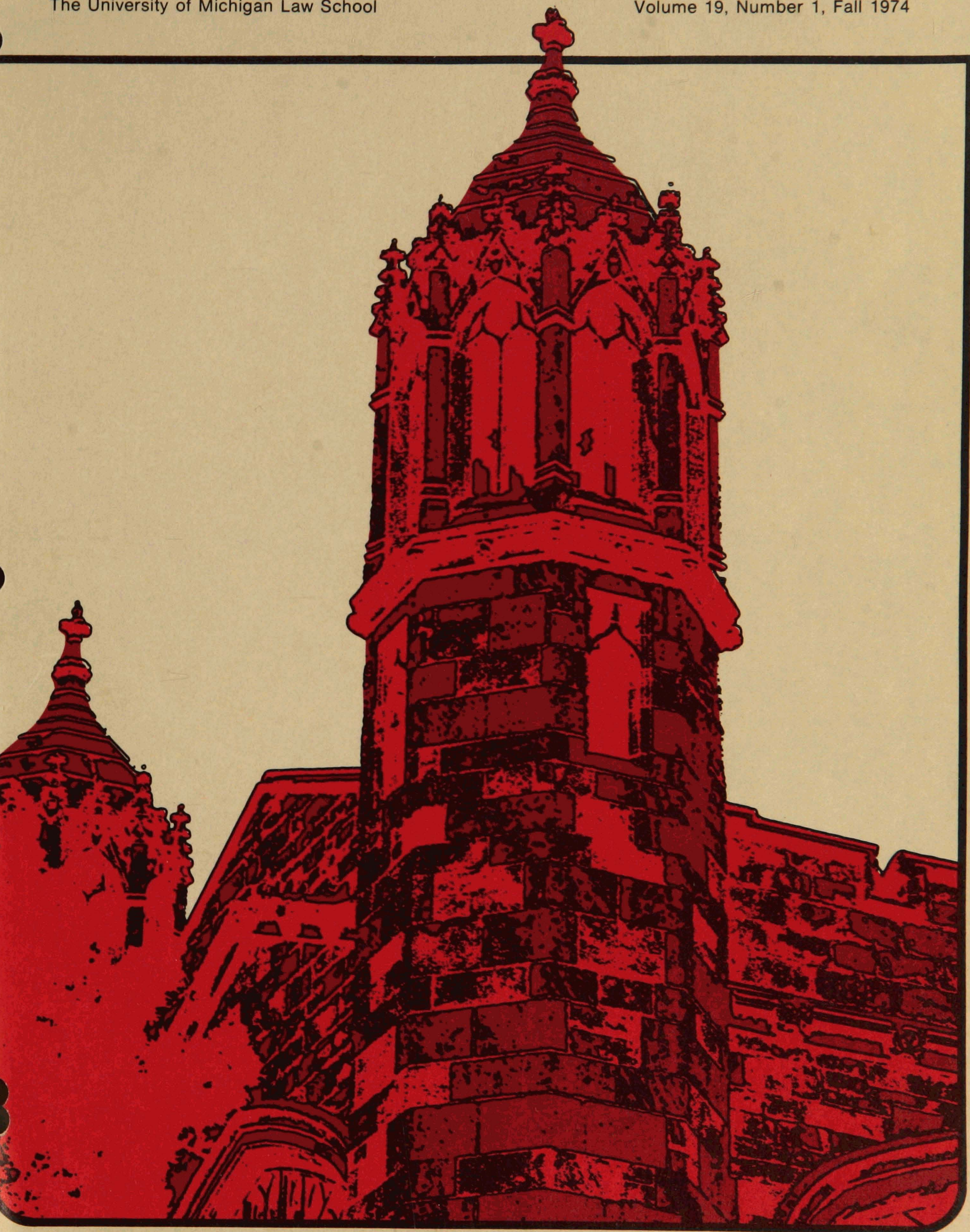

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Photo Credits: Mark Mestel—2, 3, 5, 11, 14; U-M Information Services—8; Bill Howison—13

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Vol. 19, No. 1 **Fall 1974**
Law Quadrangle Notes, issued quarterly by the University of Michigan Law School. Second-class postage paid at Ann Arbor, Michigan. Office of publications, 409 East Jefferson, Ann Arbor, Michigan 48104.

Send Form 3579 to: Law Quadrangle Notes, Law School, The University of Michigan, Ann Arbor, Michigan 48104.

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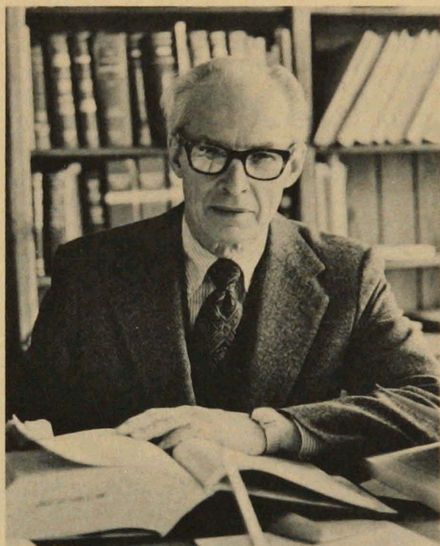
Alfred F. Conard Is Butzel Professor

Prof. Alfred F. Conard, a U-M law faculty member since 1954, has been named to the distinguished Henry M. Butzel Professorship at the Law School.

Conard will hold the professorship for a five-year term, succeeding Prof. Paul G. Kauper who died in May after serving as Butzel Professor for two consecutive terms.



Alfred F. Conard

In recommending the appointment, Dean Theodore J. St. Antoine noted Prof. Conard's contributions in personal injury law, European corporation law, and American legal education.

"Prof. Conard is one of the broadest-gauged, most original, and most forceful thinkers in American legal education," Dean St. Antoine said. "He will be a worthy successor to Paul Kauper as Butzel Professor."

Conard currently serves as chairman of the editorial advisory board of the Bobbs-Merrill Company and as editor of the corporation law volume of the International Encyclopedia of Comparative Law. From 1968-71 he was editor of the *American Journal of Comparative Law* and in 1972 he co-edited one of the standard casebooks in business law, *Enterprise Organization*.

Prof. Conard served as president of the Association of American Law Schools in 1971 and has been a leading advocate of clinical law programs as part of the law school curriculum.

His study on *Automobile Accident Costs and Payments*, completed in 1964 in collaboration with U-M Prof. James Morgan, served as a pioneer work in the "no-fault" compensation movement.

Among other activities, he was holder of a Guggenheim Fellowship and served as a visiting professor at the Salzburg Seminar in American Studies. He has been associated with many legal organizations, including the Order of the Coif and various units of the American Bar Association.

Prof. Conard joined the U-M faculty in 1954 after teaching at the University of Missouri, University of Kansas City, and University of Illinois. A graduate of Grinnell College of Iowa, he received a law degree from the University of Pennsylvania in 1936 and a master of laws and doctor of the science of law degrees from Columbia University.

The Butzel Professorship, named for an 1892 U-M law graduate, carries an annual stipend which is derived from an endowment Butzel willed to the University.

Words In Memory of Paul G. Kauper

The following is a resolution passed by The University of Michigan law faculty in memory of Prof. Paul G. Kauper:

Paul Kauper died in May, 1974, following a short illness, 38 years after joining the law faculty and when he was at the height of his powers as an active member of the faculty. The Law School lost a precious asset and the legal profession lost a master of constitutional law.

Law faculties occasionally have great teachers or great scholars, but only rarely are great teaching and scholarship combined in the person of one man as they were in Paul. His contributions to scholarship were many and enduring, and his influence on two generations of students was as important and enduring as that of any member of this faculty within living memory.

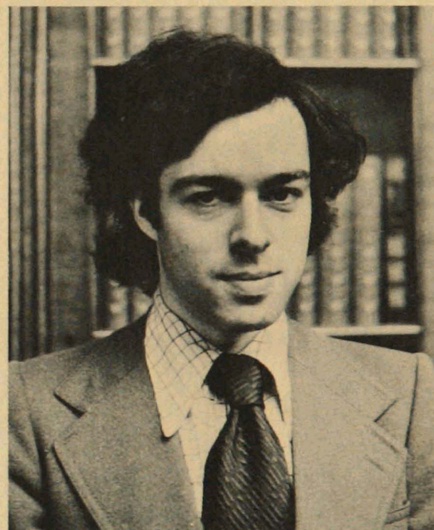
Paul's influence on students was due not only to his exceptional abilities as teacher and scholar but also to his qualities as a person. There is no need to recite his virtues for he seemed to have them all in greater degree than is the lot of most of us. His presence was an implicit communication to students of the role of lawyers as members of an honorable and sometimes even noble profession, and of the importance of law in an ordered society. If this communication is to come about in law schools, and it is of first importance that it should, this will be partly because students are aided in their learning by teachers of Paul's moral stature. When such a man gives the years of his life to the study and teaching of law, this says something about law and the legal profession as they should be and sometimes are.

Paul brought to the study of constitutional law an unusual knowledge of and sense of history, which enhanced his understanding of current problems and his prescience of emerging problems. His writings are an important part of the permanent repository of knowledge about constitutional law.

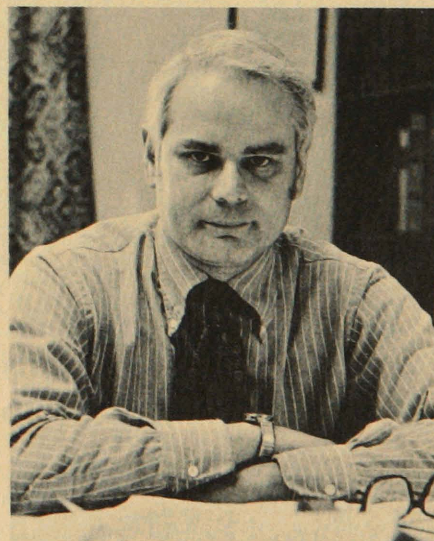
Paul's death was a great loss to the Law School because he had fruitful years to come, but his life was a permanent contribution to the life of the Law School of incalculable value.

Rosberg, Waggoner Join Law Faculty

Two 1974 additions to The University of Michigan law faculty are Gerald M. Rosberg and Lawrence W. Waggoner.



Gerald M. Rosberg



Lawrence W. Waggoner

Rosberg, a *magna cum laude* graduate of Harvard College and Harvard Law School, clerked for a pair of distinguished judges before joining the U-M faculty. He served under Chief Judge David L. Bazelon of the U.S. Circuit Court of Appeals for the District of Columbia during 1971-72. The following year he clerked for Justice William J. Brennan, Jr. of the U.S. Supreme Court.

At the conclusion of the Supreme Court term in July 1973, Rosberg and his wife departed for Europe, where they traveled for almost a year. Rosberg was associated briefly with the firm of Covington & Burling in Washington, D.C., before coming to Ann Arbor this fall.

Rosberg, who was also a Supreme Court notes editor for the *Harvard Law Review*, teaches courses in civil procedure and conflicts.

Prof. Waggoner, the other addition to the faculty, taught at U-M Law School last year as a visiting professor before assuming a permanent position here in the fall.

A graduate of the University of Cincinnati and U-M Law School, Waggoner also holds a Doctor of Philosophy degree from Oxford University, which he attended on a Fulbright grant.

After serving two years in the Army on a joint staff assignment with the Department of Defense, Waggoner began his teaching career at the University of Illinois Law School, from 1968-72. He then taught for one year at the University of Virginia before coming to the U-M.

Waggoner is currently teaching courses in trusts and estates, estate and gift taxation, and a seminar in estate planning.

He has co-authored a text on family property settlements with Profs. Olin L. Browder and Richard V. Wellman and is currently working on a revised introductory text in trusts and estates.

A former member of the *Michigan Law Review*, Waggoner is married and has two daughters.

Rhonda R. Rivera Named Assistant Dean

Rhonda R. Rivera, a Michigan lawyer and educator, is the new assistant dean in charge of student affairs at the University of Michigan Law School.

Law Dean Theodore J. St. Antoine noted that "a large part of Ms. Rivera's activities will consist of student counseling and advising, covering a wide range of student problems. In addition to handling student registration and class scheduling, Ms. Rivera will serve in effect as the secretary of the law faculty."

Rhonda R. Rivera

Dean St. Antoine observed that Ms. Rivera's "background in the practice of law and in teaching and academic administration make her exceptionally well-qualified" for the new post.

A *cum laude* graduate of Douglass College of Rutgers University, Ms. Rivera received a master of public administration degree in 1960 from Syracuse University and a law degree, *summa cum laude*, from Wayne State University Law School in 1967.

After serving as a research economist for the Federal Reserve Bank of Cleveland, Ohio, she was an instructor in public administration at the Inter American University in Puerto Rico from 1962-64 and an assistant professor of economics and business administration at Hope College in Michigan from 1968-72. For the past two years she has been assistant dean at Grand Valley State College in Michigan.

A member of the Michigan bar, Ms. Rivera has practiced law on a part-time basis since her graduation from law school in 1967.

In her post at the Law School, she will succeed Bailey H. Kuklin who has accepted a faculty position at the University of Tennessee College of Law in Knoxville. Kuklin, a U-M law graduate and former Peace Corps volunteer, had served as assistant law dean since 1970.

Dean St. Antoine noted that Kuklin "occupied one of the most sensitive positions at the Law School, dealing daily with a host of student problems. He exhibited a rare blend of sympathy, mature judgment and firmness in the handling of an unusually difficult assignment."

Philosopher Rawls Is Visiting Professor

John Rawls, a noted legal philosopher, is spending the current academic year at The University of Michigan as William W. Cook Visiting Professor.

The professorship, administered by the U-M Law School, replaces for 1974-75 the Cook Lectures on American Institutions, which have brought distinguished speakers to the campus almost annually since 1944.

A well-known member of the Harvard University philosophy department, Prof. Rawls is offering a graduate seminar on "Ethics" this term and will teach a course on legal philosophy during the winter term.

U-M Law Dean Theodore J. St. Antoine says the new arrangement expands the original concept of the Cook Lectures by providing intellectual stimulation for faculty and students for a full academic year.

Prof. Rawls is best known for his book *A Theory of Justice*, published in 1971, in which he challenges traditional utilitarian notions with a new theory of justice for the individual.

The book was given the Coif Award by the Association of American Law Schools, which honors the outstanding work in the field of law over a three-year period. This was the first time the award was given to a work by a scholar outside the legal profession.

Born in 1921 in Baltimore, Rawls graduated from Princeton University in 1943 and received a doctorate there in 1950. He taught at Princeton, Cornell, and Massachusetts Institute of Technology before joining the Harvard faculty in 1962.

In addition to his book, Rawls has written numerous articles for professional journals. He is a member of the American Philosophical Association and the American Academy of Arts and Sciences, and served as president of the Association of Political and Legal Philosophy.

The Cook lectures and professorship at the U-M are named for William W. Cook, a New York lawyer who received an undergraduate degree from Michigan in 1880 and a law degree here in 1882. Among other gifts, Cook provided funds for the Law Quadrangle and established an endowment fund for legal research and for the Cook lecture-professorship on American institutions.

Members of the U-M Committee which selected Rawls as Cook visiting professor were Dean St. Antoine, Associate Law Dean William Pierce, Prof. Alfred F. Conard of the Law School, Prof. Sidney Fine of the History Department, Angus Camp-

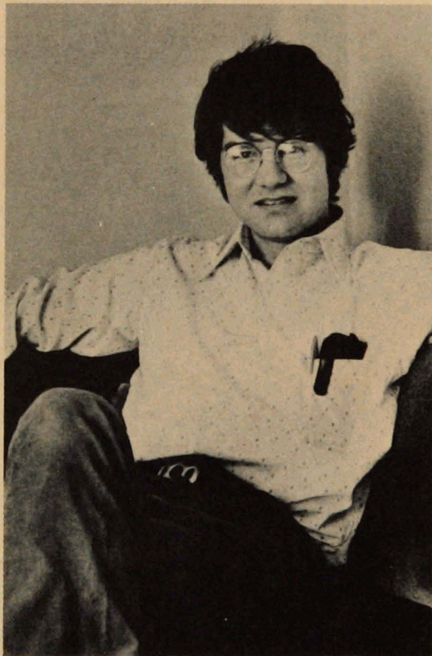
bell, director of the Institute for Social Research, and Frank H. T. Rhodes,vice-president for academic affairs.

Prof. Blasi Hosts Award-Winning Show

Few law professors have access to the airwaves, but Prof. Vince Blasi is an exception. Each week the constitutional law specialist is heard by a nationwide audience.

Blasi's radio show on current legal topics—"Law in the News"—is aired by U-M stations WUOM in Ann Arbor and WVGR in Grand Rapids every Monday. The show, usually five minutes in length, is also carried by National Public Radio which broadcasts it nationally.

Recently the show was awarded a Certificate of Merit by the American Bar Association. Only two other public radio productions out of 350 entries received similar awards this year.



Vince Blasi

Blasi said the program is designed to offer a more detailed description of important recent cases than is available in the conventional news media. The show frequently is conducted with a dialogue format. His guests have included fellow faculty members, distinguished visitors to the Law School, and occasionally students.

The degree of cooperation offered by his colleagues varies, Blasi said. He named Professors Kahn and Chambers as being the most willing participants. Others, he noted, have to be "dragged, kicking and screaming to the microphone."

Blasi estimated that his audience to a considerable extent is composed of college students who are interested in careers in the law. As a consequence, some of his programs have focused on trends in legal education, such as the growing use of seminars and clinical programs for teaching purposes.

More often, however, Blasi will take recent Supreme Court cases and after presenting a summary of the facts, the ruling, and the rationale of the majority and dissenting opinions, he will offer his own views on the constitutional issues. He said that he is careful never to over-editorialize, and, as a result, receives very polite mail.

Blasi, a 1967 graduate of the University of Chicago Law School, taught two years at the University of Texas Law School and one year at Stanford Law School before joining the U-M faculty.—*Phillip Maxwell*

Prof. Kamisar Praises Michigan Supreme Court

A University of Michigan law professor says the Michigan Supreme Court—unlike other state supreme courts—has outpaced a reluctant U.S. Supreme Court in providing important protections for the accused.

Speaking at a recent conference of Michigan judges at Mackinac Island, Prof. Yale Kamisar said landmark criminal procedure decisions of the U.S. Supreme Court under Chief Justice Earl Warren have now been undermined by recent decisions of the high court under Chief Justice Warren Burger.

But Kamisar praised the Michigan Supreme Court for maintaining the spirit of the earlier Warren Court rulings in such areas as the right to court-appointed counsel, search and seizure methods, and police lineup and identification procedures.

"In each area—most notably in the identification cases—the Michigan Supreme Court is taking a more expansive view of the rights of the accused than is the Burger Court," said the U-M professor.

"This is undoubtedly a source of concern and unhappiness for some, but not for me," Kamisar said. "It is important for at least one state court to show that the federal Constitution sets forth only the minimal standards of criminal justice."

In illustrating discrepancies between Warren and Burger court decisions, Kamisar recalled that the Warren Court had sought to offset the risk of misidentifications in police lineups by declaring it illegal for a lineup to be conducted without the presence of a legal counsel for the accused.

But, he said, this protection received a "devastating blow" in a 1971 Burger Court ruling which held that the accused has no right to counsel in a police lineup until he is indicted.

The effect of this ruling, according to Kamisar, was "to allow the police to manipulate the applicability of the right to counsel by conducting all identification procedures before the accused had been indicted."

In addition, Kamisar noted that last year the Burger Court "dealt the Warren Court lineup cases a second crippling blow by holding that an accused person has no right to have counsel present at any stage of the criminal process" whenever the police ask a witness to identify the suspect from a group of photographs.

And although the Burger Court did require that the photos be preserved for later examination at a trial, Kamisar argued that this measure "does not provide adequate safeguards against the police influencing a witness—through gestures, comments, or the order of photos displayed—to choose a particular suspect whom the police may think is guilty." The only adequate safeguard, the professor suggested, is for legal counsel to be present during the photo identification session.

What effect have these rulings had on the Michigan Supreme Court?

According to Kamisar: "Although the Burger Court has plainly given the lower courts great encouragement to cut down the original lineup cases, the Michigan Supreme Court has refused to go along."

He notes that in April 1974, by a 6-1 majority, the Michigan Supreme Court reaffirmed its earlier position granting the right to counsel in both photographic and lineup identifications "before as well as after the accused is formally charged with a crime."

Kamisar said the state supreme court has also failed to follow the federal court's example in cases dealing with "entrapment" (when police induce a person to commit a crime), "search and seizure" measures (when police seek consent to search for evidence in a person's home or office), and other cases involving the right to legal counsel.

In one recent ruling, for example, the U.S. Supreme Court declared that a poor person has no right to court-appointed legal counsel beyond the "first appeal" of a case.

But the Michigan Supreme Court had already adopted an administrative order providing free counsel for the indigent whose case is on second appeal, Kamisar pointed out.

Harris, Siegel, Wellman Take New Positions

Changes in academic status have been granted to two University of Michigan law professors, and another professor has accepted a distinguished professorship at the University of Georgia.

Serving as adjunct professors at the U-M in conjunction with private law practice are Profs. Robert J. Harris and Stanley Siegel. Harris has begun a private practice in Ann Arbor, and Siegel is with the Detroit law firm of Honigman, Miller, Schwartz and Cohn.

A member of the U-M law faculty since 1959, Prof. Harris was elected mayor of Ann Arbor in 1969 and served for two terms. As adjunct professor he will teach at the U-M Institute for Public Policy Studies.

Prof. Siegel, a U-M faculty member since 1966, was a consultant for the reorganization of the U.S. Postal Service and was author of Michigan's 1973 Business Corporation Act.

Prof. Richard V. Wellman has become the first person to hold the distinguished Robert C. Alston Professorship at the University of Georgia School of Law in Athens.

A Michigan faculty member since 1954, Prof. Wellman continues as head of a national probate reform effort. Wellman was chief draftsman of the Uniform Probate Code, which serves as a model for changes in state probate laws.

Student Group Urges Open Agency Files

The Environmental Law Society, a student group at the University of Michigan Law School, has urged the Michigan Natural Resources Commission to adopt administrative rules making agency information available to the public.

The Natural Resources Commission, composed of seven members appointed by the governor, is the official policy-making group governing activities of the state Department of Natural Resources.

Appearing before the commission, U-M law students Jeffrey Haynes and Andrew Marks said the agency's administrative rules, as proposed by agency staff, would allow "unfettered discretion of the agency to withhold information." Haynes serves as chairman of the Environmental Law Society and Marks is on the board of directors.

One instance of the agency's reluctance to release material, according to Haynes, occurred when a Detroit newspaper reporter was told he must "give at least five days notice" in order to obtain material relating to an environmental lawsuit. Haynes maintains that such an administrative procedure could be used as a weapon to block public access to the files.

In their remarks before the commission, the students argued that "the administrative rules should contain a strong presumption of public availability of materials." They suggested that "only limited specific exemptions from disclosure should be allowed" and also noted that liberalized rules "could set a strong precedent for other state agencies."

Among other activities, the U-M Environmental Law Society has drafted state legislation to preserve wetlands areas and has filed an *amicus curiae* brief urging judicial standards for cases under Michigan's Environmental Protection Act.

The student group also plans a series of conferences in Michigan cities "to alert citizens and government officials to the legal and practical issues involved in attempts by municipalities to self-limit their growth," according to Haynes. The project is funded primarily by a grant from the U.S. Department of Health, Education, and Welfare.

Haynes says another project is an *amicus curiae* brief before the Michigan Court of Appeals discussing the awarding of attorney fees and costs in environmental cases.

U-M faculty members for the student group are Profs. Joseph L. Sax and Philip E. Soper. Sax is the author of Michigan's Environmental Protection Act, the first state law giving citizens the undisputed right to bring polluters to court.

Clerkships Accepted By 24 Law Grads

Clerkships to state and federal courts have been accepted by 24 University of Michigan law graduates from the class of 1974.

Ten of the graduates have secured clerkships with judges sitting in federal circuit courts. Seven will clerk for other federal judges and seven will clerk for state court judges.

The graduates and the judges under whom they will serve are as follows:

Richard Babcock
The Honorable Orman Ketcham
Superior Court of D.C.
Washington, D.C.

Terrance R. Bacon
The Honorable Noel Fox
U.S. District Court
Western District of Michigan
Grand Rapids, Mich.

Clifford C. Barton
The Honorable J. P. Morgan
Supreme Court of Missouri
Springfield, Mo.

Arnold P. Borish
The Honorable Joseph S. Lord III
U.S. District Court
Eastern District of Pennsylvania
Philadelphia, Pa.

William J. Davey
The Honorable J. Edward Lumbard
U.S. Court of Appeals for the Second Circuit
New York, N.Y.

Bruce C. Davisdon
The Honorable John R. Brown
U.S. Court of Appeals for the Fifth Circuit
Houston, Tex.

Donald A. Davis
The Honorable Noel P. Fox
United States District Court
Western District of Michigan
Grand Rapids, Mich.

Janet E. Findlater
The Honorable Charles Levin
Michigan Supreme Court
Lansing, Mich.

Frank J. Greco
The Honorable Cornelia Kennedy
United States District Court
Eastern District of Michigan
Detroit, Mich.

James K. Jackson
The Honorable Philip Pratt
United States District Court
Eastern District of Michigan
Detroit, Mich.

Tom Koernke
The Honorable Anthony Celebrezze
U.S. Court of Appeals for the Sixth Circuit
Cleveland, Ohio

Jeffrey D. Komarow
The Honorable Edward A. Tamm
U.S. Court of Appeals for the D.C. Circuit
Washington, D.C.

Lawrence K. Lau
Chief Justice of Hawaii
Honolulu, Hawaii

Lawrence R. Mills
The Honorable Jay A. Rabinowitz
Chief Justice, Alaska Supreme Court
Fairbanks, Alaska

Stephen R. Moore
The Honorable James M. Burnes
U.S. Court of Appeals for the Ninth Circuit
Portland, Ore.

Irving Paul
The Honorable Jon Feikens
U.S. District Court
Eastern District of Michigan
Detroit, Mich.

Laurence A. Ramer
The Honorable Thomas McAllister
U.S. Court of Appeals for the Sixth Circuit
Grand Rapids, Mich.

Daniel E. Reidy
U.S. Court of Appeals for the Seventh Circuit
Chicago, Ill.

Michael G. Saughter
20th Circuit of Michigan
Allegan, Mich.

Michael J. Smith
The Honorable Albert J. Engle
U.S. Court of Appeals for the Sixth Circuit
Cincinnati, Ohio

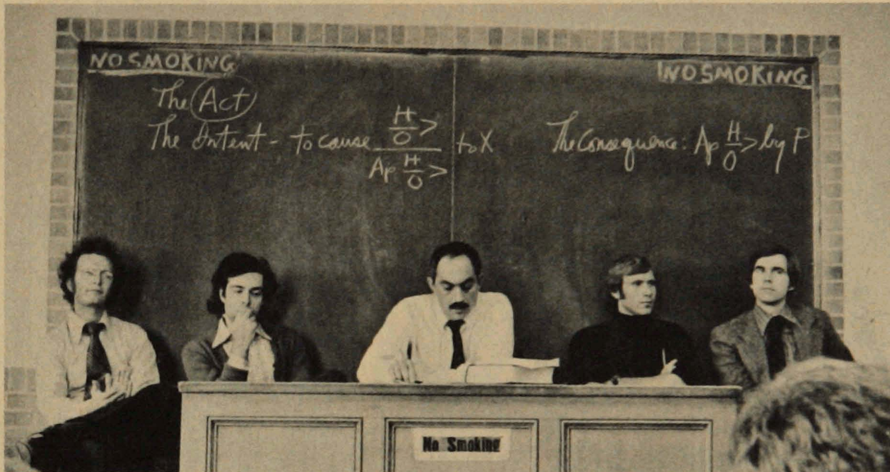
Curtis C. Swanson
The Honorable Joseph Wood
Chief Judge, New Mexico Court of Appeals
Santa Fe, N.M.

Denise Wacker
The Honorable John C. Godbold
U.S. Court of Appeals for the Fifth Circuit
Montgomery, Ala.

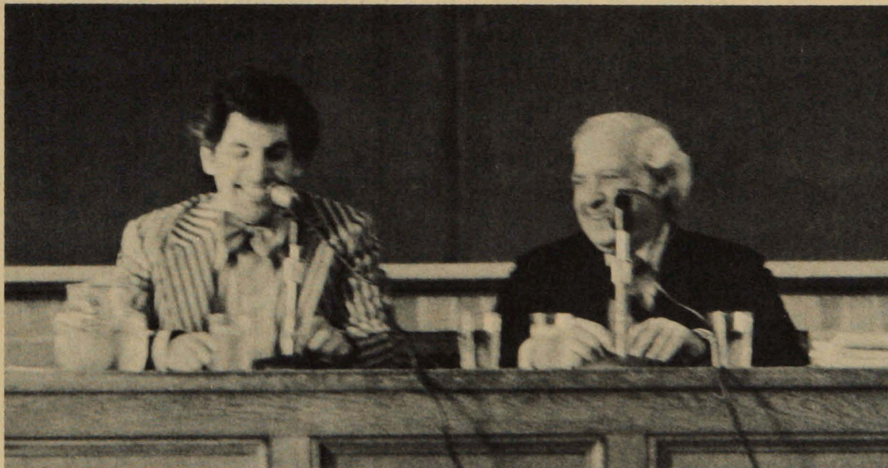
Christina B. Whitman
The Honorable Harold Leventhal
U.S. Court of Appeals for the D.C. Circuit
Washington, D.C.

Timonth E. Whitsitt
The Honorable Robert B. Lee
The Colorado Supreme Court
Denver, Colo.

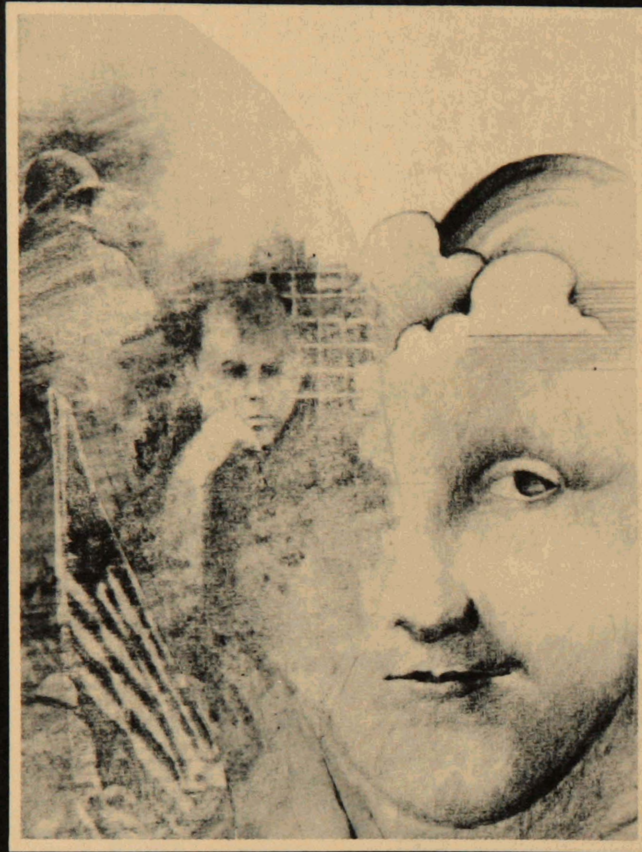
RECENT EVENTS



Five U-M law professors who had served as U.S. Supreme Court clerks discussed their experiences at a recent Law School seminar. From left are: Peter K. Westen, who clerked for Justice William O. Douglas; Gerald Rosberg, clerk for Justice William J. Brennan, Jr.; Jerold H. Israel, clerk for Justice Potter Stewart; Lee C. Bollinger, clerk for Chief Justice Warren E. Burger; and Philip Soper, clerk for Justice Byron R. White. The seminar was conducted as part of a constitutional law class taught by Prof. Vince Blasi.



Chief Judge David L. Bazelon (right) of the U.S. Court of Appeals in Washington, D.C., spoke recently at U-M Law School on "The Insanity Defense in Criminal Law." Here he is accompanied by U-M law Prof. Robert A. Burt, formerly a law clerk under Judge Bazelon.



A Reflection Upon Amnesty

The Case For Alternative Service

A Reflection Upon Amnesty

by Professor Joseph L. Sax

This commentary was written especially for *Law Quad Notes* by Professor Joseph L. Sax and, along with the accompanying article by Professor Douglas A. Kahn, served as a basis for a recent law faculty seminar on amnesty.

With a single stroke Gerald Ford converted the amnesty problem from a peripheral political issue into an operative program. Considering how little the public in general was agitated about amnesty, the existence of any sort of program today is remarkable. As late as mid-1972, a *Newsweek* poll showed only 7 percent of the public in favor of unconditional amnesty, and by April 1974, that figure had risen to just 34 percent in the Gallup Poll.

While some of those to whom Mr. Ford's program is now available will doubtless take advantage of it, public attitudes about amnesty will continue to be highly important over the next several years for a number of reasons. Many resisters and deserters will not bring themselves within the terms of the present program; of those who do, the question whether to shorten or rescind the terms of alternative service will remain. It is a continuing feature of the amnesty question that with each passing year public attitudes become more sympathetic, and historically (as with our own War Between the States) amnesties tend to be granted in stages, with the terms over time becoming increasingly generous. Perhaps most significantly, we ought to ask some hard questions about the broader meaning of an obligation of alternative service.

It seems fair to begin with the assumption that most Americans fall neither in the category of those who feel that unconditional amnesty is the only morally acceptable decision nor of those who demand that war resisters be treated like any other criminals. Rather, the majority appears to view the President's program as an appropriate solution to an ambiguous problem: Those who refused to participate in the Vietnam War had much justice on their side; still, obedience to even dubious legal commands must hold a high priority in a society that prizes stability and cohesion.[1] As against the risk of being killed in combat, languishing in a federal prison, or being permanently separated from family and home, the requirement of two years alternative service seems magnanimous. Moreover, it is widely thought desirable that vigorous young men should devote a brief period of their lives to public service in hospitals or other such places where aid is badly needed and can be ill-afforded.

However seductive such a compromise may at first appear, I am persuaded that it cannot withstand analysis. Let us take a look at the claims for imposing a requirement of alternative service at this time. They are, so far as I can tell, four in number. First, it can have a deterrent effect for the future, setting a precedent that refusal to serve in the armed forces should not be lightly undertaken; second, it may have a punitive effect, making the point that legal disobedience, even for good reasons, should not be given a status of acceptability; third, it im-

(Continued on page 8)

1. My comments here are directed to those who stand in this middle group and not to those who oppose all amnesty on principled grounds. My views on amnesty generally are set out in "The Amnesty Problem," *Law Quad. Notes*, Vol. 16, No. 3, p. 25 (Spring, 1972).

The Case For Alternative Service
A Reply To Professor Sax

by Professor Douglas A. Kahn

Professor Sax advocates that unconditional amnesty should be granted to Vietnam draft evaders and deserters, and he contends that the condition of alternative service imposed by President Ford, while superficially attractive to some, is unsupported by an acceptable rationale. While I harbor misgivings concerning the grant of any type of amnesty for Vietnam evaders and deserters, I have concluded that amnesty should be given provided that it is conditioned on the performance of some service such as that required by President Ford's program. Obviously, this places me squarely at issue with Professor Sax, and I will attempt to detail the specific areas where our analyses or perspectives diverge.

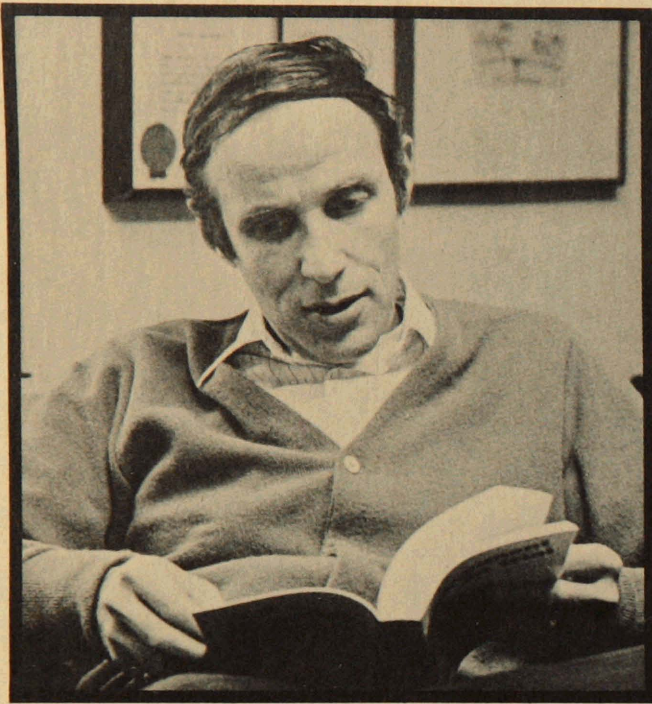
First, we should note that the question of amnesty is a political question and therefore that the granting of amnesty and the form it takes should be determined principally by political considerations. Secondly, a consideration of whether amnesty should be unconditional should begin by determining the grounds for granting any form of amnesty. Obviously, there will not be uniform agreement on those grounds, and I would expect that Professor Sax and I would discover our first area of disagreement in our respective resolutions of that issue. Nevertheless, I will examine those grounds for amnesty that occur to me.

One rationale which might be offered in support of an amnesty policy is that the war was "illegal" because it was not declared in accordance with the terms of the Constitution or some similar contention. I do not wish to discuss that issue (partly because of space limitations and partly because I do not regard it seriously), but I would note that apart from the legality of the war, I personally feel quite certain that the draft was legal. In any event, I suggest that there is not sufficient political support for the view of illegality to warrant granting amnesty for that reason, and as I stated previously (and I assume that this statement is not controversial), the granting of amnesty rests primarily on political considerations.

Another ground for amnesty would be to serve as an official admission of the errors of judgment and morality made in prosecuting the Vietnam War and to serve as a recognition of the merits of those who resisted it. While undoubtedly there are many Americans who would favor such an admission, I do not think it would be seriously suggested that there is sufficient political support for that position to warrant its adoption. Parenthetically, I should note that by "political support," I do not refer to congressional action but rather I mean to refer to the position held by a majority of American citizens—albeit I realize that one's appraisal of the majority's position is something less than an educated guess. Regardless of whether the war constituted an error of judgment and/or morality, I believe that a significant majority of Americans regard the act of evading the draft or desertion as reprehensible.

A third ground, which I believe is the position adopted by Professor Sax in his paper, is that amnesty is an appropriate vehicle for repairing the current division in our country by wiping the slate clean and hopefully thereby putting behind us the internal turmoil caused by

(Continued on page 11)



Joseph L. Sax

(Continued from page 7)

ports a version of fairness, indicating that draft resisters ought not to be treated better than were qualified conscientious objectors, and ought to bear at least some burden commensurate with that borne by those who served in the military forces. And fourth, some may be concerned that an unconditional amnesty would represent an official symbolic statement that the war was wrong or illegal, a determination that many may feel ought to be avoided or at least finessed.

I do not find any of these claims persuasive. As to deterrence for the future, it is a virtually uniformly held position among experts on the criminal law that for deterrence to work it must be swift and sure; that is, the sanction must be imposed quickly and the nature of the sanction must be clear and certain to the person whose behavior is sought to be affected in the future (and to others who may be so tempted). It is also undoubted that deterrence works best for conduct that is rationally calculating, and works least when the conduct is the product of passionate or deeply held feelings.

Taking these accepted principles of deterrence, it is clear that the conduct with which the present program deals falls very far on the non-deterrable side. By their very nature, amnesties usually come considerably after the event, when involvement in the fighting has ended and passions have cooled on all sides. In addition, government's response to claims for amnesty are inevitably tailored to the particular event involved and cannot be expected to be uniform from one war to another.

Our own history makes this latter point quite clear. American experience with amnesty, from the time of George Washington, has varied widely depending on the moral and political goals sought to be achieved. An amnesty may be needed to bring political opponents back "into the fold," as was the case in the War Between the States. It may be desired to cope with laws that have been unmanageable, as with the Whiskey Rebellion; it may be undertaken during wartime, in a limited way, to deal with inability to recruit and hold soldiers, as happened in our early history. It may be wanted only to deal with retrospective efforts to untangle mistakes and blunders in the conscription process, as was the case with the Truman amnesty board.

And, of course, one must expect congressional attitudes toward amnesty to reflect feelings about the particular war in question. For example, it is not surprising that no general amnesty was declared following World War II, considering the overwhelmingly favorable public attitudes about that war. Similarly, there is no reason to know, should the problem arise in the future, whether we would be dealing with a war like the Vietnam War, World War II, or the War Between the States, each of which might quite properly call for different attitudes toward those who opposed the war.

I can say from personal experience, having talked with a great many young men who were considering draft refusal and with many who had refused or deserted (in Stockholm and Paris, in 1967), that the question of the "precedent law" of amnesty in the United States was never in any discernible degree a factor in their decisions. Nor, indeed, if it had been, could I (or anyone) have told them what the appropriate precedent was or would be. Should one have told them to read up on the Whiskey Rebellion, on the 1860's, or on the situation in France following the Algerian War?

One might say that if the United States set a precedent *now*, and determined to follow it, we *would* have a clear rule to which future potential draft refusers might look. But I think it fair to say that no such precedent could be binding, for no Congress can bind the future, nor would it want to in such a complex situation. Consider whether a Congress sitting in 1840 should have set a precedent that it would have felt bound to follow in 1868 or 1872.

As a final word on deterrence, I want to emphasize that one need not sympathize or agree with draft resisters to be confident that deterrence through the medium of amnesty laws will not be effective. Thus, whether one thinks that some draft resisters responded to deeply held moral feelings, or to simple but powerful cowardice, you can be quite certain that in either case a reasoned consideration of future congressional legislation would not moderate their feelings. If indeed, as may be the case with some who oppose amnesty, they feel many draft resisters were merely afraid to die, that is the emotion least likely to be affected by what the government does half a dozen years after the event.

Beyond the specific issue of deterring draft evasion and military desertion, is there a claim to be made for conveying the general message that legal disobedience is disapproved? Certainly there is, though I have elsewhere observed that we often are tempted to articulate an excessively rigorous view of the need for strict law enforcement.[2]

However one deals with this problem in general, the amnesty situation seems a peculiarly inapt setting in which to implement a broad position of general deterrence. The reason is an eminently practical one. Most amnesty programs are wholesale enterprises; they undertake to deal with thousands of cases in a single stroke. Of necessity, they include the full range of individual situations, from those who acted out of the highest principles with the most appealing extenuating circumstances to some who merely feared to die or who would be unwilling to serve their country under any circumstances. They include as well some who, had the selective service laws been more equitably or carefully administered, would have been held exempt or classified as conscientious objectors. Such circumstances would seem to present the weakest case for insisting on a solution that incorporates the general social principle that failure to obey the law is to be condemned.

If, then, the situation is one in which, by virtue of an enormous range of individual cases, we must perforce make a general rule inappropriate to some of those who

2. See Sax, "Civil Disobedience," *Saturday Review*, Sept. 28, 1968, p. 22.

will be affected by it, our problem is not solved by pointing to a general rule in favor of general deterrence. We must choose between two imperfect positions. Since the original meaning of amnesty is of a "forgetting," there is support in tradition for taking the least rigorous path. The literal meaning of amnesty is not accidental. It represents a tradition that permits a society to deal compassionately with those who opposed a war without in any way dishonoring those who served valiantly. It says to all that we respect all who followed inner duty's call, whichever way that call may have led. If the concern is for fairness, respect for each individual's choice might seem a reasonable response. It is worth keeping in mind that appellations like cowardice, duty, opportunism, and the like are the monopoly of no group. To join the army, with its rather modest risk of death even in wartime, is not *ipso facto* a more courageous act than was taking the high risk of a lengthy jail term or the highly uncertain fate of those who fled the country. And these were the real alternatives draft-age men faced.

It should be noted, too, that societies not known for their softness toward criminality have made just such choices following even more divisive and bitter controversies without a discernible loss in social stability. France following the Algerian War (where a full general amnesty was declared) and we ourselves after the War Between the States are as good exemplars as any.

Is there any way to grant unconditional amnesty without having it read by some as a recognition that the war was wrong? Perhaps not, but by the same reasoning a requirement of alternative service and an oath of allegiance would have to be read by as many as an official statement that the war was justified. However one chooses to resolve this dilemma, it should be recalled that our own history supports the grant of a full amnesty standing together with whatever view the government chooses to take of the merits of the war. On Christmas Day 1868, President Johnson proclaimed:

> unconditionally and without reservation, to all and every person who . . . participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States.

The reason, the president said, was "to secure permanent peace, order and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people."

Perhaps the goal of amnesties ought to be an effort to divest them of all symbolic connotation and let them stand only for a recognition that it is time to attend to what President Johnson called—more than a century ago—the task of renewal and restoration. Perhaps, too, it is wise to try to disentangle the fate of individuals from the burden of symbolic public acts.

Finally, I turn to the question of alternative service. There is an initial ambiguity here that ought to be faced. Are we to think of alternative service as a mild form of punishment given to criminals for whom some element of extenuation is appropriate; as a responsibility fairly to put evaders and deserters in the same category as CO's, who of course were not criminals at all; or as a step toward implementing a duty of service to the nation which might be appropriate generally, without regard to the amnesty question?

I have already indicated why I think the punitive approach is inappropriate. As to creating equality of status with conscientious objectors, I am persuaded that such a view is guided by a misplaced sense of fairness. It should not be forgotten that many CO's during wartime do not serve involuntarily. They are quite willing to devote themselves to national service but balk only at being conscripted into the violence associated with military service. Beyond this, alternative service for CO's during wartime and in the midst of widespread conscription is a practical compromise. It is a means—and an appropriate one, in my view—to deter irresponsibility at a time and in a setting where deterrence makes good sense; that is, in the midst of a war where the immediate alternatives of being shipped off to combat or being left alone could well present an overwhelming temptation to some to shirk their duty. At such a time, it seems clear that all the arguments in favor of deterrence are at their strongest and it is to be expected that a government will treat draft evaders and deserters rigorously, and will have a restrictive policy toward those who claim conscientious objection status.[3] It is however precisely the difference in deterrence policy during the war, and some years subsequent to it, that suggests the fairness and propriety of different policies in the respective circumstances.

As to fairness with respect to those who performed military service, I indicated above that amnesty need not be, and historically has not been, viewed as implying invidious distinctions among those who went wherever duty called them. If, however, the notion is that fairness to those who served in the armed forces during wartime can only be achieved by requiring public service subsequently, a disturbing new view of social obligation may be emerging.

That issue is the notion of alternative service as a useful device to provide needed public work. I do not suggest that the present amnesty plan overtly or even consciously incorporates such a broad view. But I do think the very ambiguity of our position about war resisters as wrongdoers, and our inclination to put aside—in a concern for fairness—a reluctance to conscript persons into public service except in times of national exigency, poses the prospect of a troublesome change in our principles of personal liberty.

It would, I think, be a fine thing if many young people felt a sufficient sense of community obligation that they would devote a few years to public service. However, a penal approach to the achievement of such goals seems misdirected. It has some of the same uncomfortable connotations as imposing on naughty children an obligation

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3. To say that it is appropriate for the government to deal rigorously with evaders and deserters during wartime is not to say that it is inappropriate for juries before whom selective service prosecutions are brought to bring in verdicts of acquittal if they are persuaded—as representatives of the community—that the war is unjust. See my article "Civil Disobedience," cited above, and also my article "Conscience and Anarchy: The Prosecution of War Resisters," *The Yale Review*, Summer, 1968, p. 481.

to attend church regularly. One may wonder whether two such distinct goals ought thus to be yoked together.

Alternative service incorporates an additional and even more troublesome problem. For it takes a step in the direction of—let us give it its proper name—involuntary servitude. I am concerned that our long experience with military conscription, even in peacetime, has dulled our sensitivity to how much any such notion strikes against our fundamental notions of personal freedom.

I find it very strange that in a country where many people are strongly agitated by the government telling citizens how to manage their business, how to use their property, how much they may charge for their services, or even what they may buy, there seems to be so little revulsion against telling people how they must spend two years of their lives.

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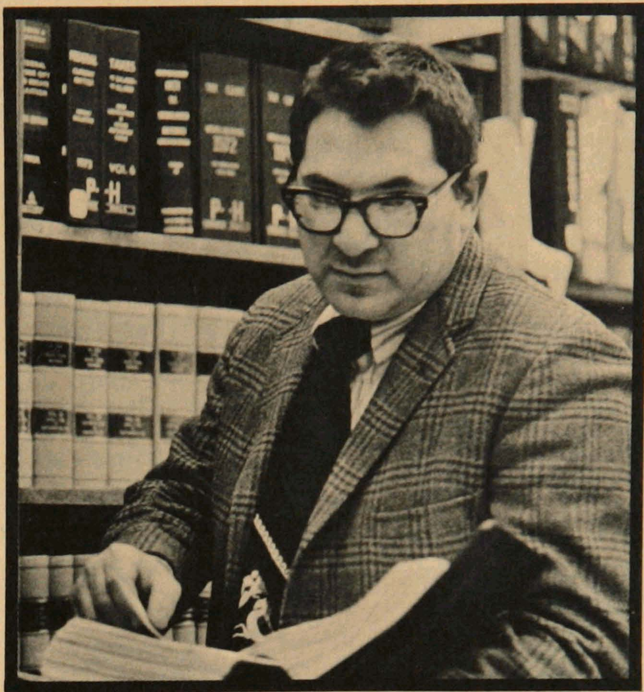
If we begin to move toward a policy of having the state require all its young people to give several years of their lives to a service that the state deems appropriate, we must not forget the problems of state intervention that have so regularly plagued other governmental programs. Who is to decide what constitutes useful public service and what does not? How are we to have assurances against misuse and exploitation when young people are farmed out to work involuntarily to enterprises that need not pay them the wages obtainable in the marketplace? What protection will we need against a misuse of the power to control several years of productive livelihood, to grant exceptions for some, and to have the full weight of this obligation fall upon those least able to resist it?

Perhaps in the general relief to lift the burdens of Vietnám from our shoulders, and in the midst of our ever strong temptation to soften the edge of principled decision by alluring compromises, we risk forgetting a lesson long ago provided by the Supreme Court in a not unrelated setting:

> In order to . . . develop ideal citizens, Sparta assembled males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest. *Meyer v. State of Nebraska*, 262 U.S. 390, 402 (1923).]



Douglas A. Kahn

(Continued from page 7)

the prosecution of the Vietnam War. Referring to the Civil War amnesty as a precedent, Professor Sax suggests that a major purpose of an amnesty is to renew and restore confidence and fraternal feeling among the citizenry. Of the various reasons offered for granting amnesty, this desire to restore unity appears to be the most widely held, and indeed it is that purpose which led me to favor some form of amnesty.

It is important, however, to consider who is to be the object of this quest for unity. Initially, it should be noted that while there are similarities between the present situation and the post Civil War period, there are also great dissimilarities. The Civil War was fought to maintain the unity of the nation, and if all those who participated in the rebellion (which included the great majority of Southerners) were punished for their participation, the prospects of obtaining a lasting unity would have been slim indeed. Moreover, despite the revolutionary characterization of the war, the post-war position of the South was similar to that of a conquered nation and amnesty was consistent with that reality. A more analagous example would be the treatment afforded to deserters from the Union Army, and, while that situation also presented different issues from the Vietnam War, after my brief and concededly incomplete inquiry, I was not able to determine that any deserter was given unconditional amnesty.

The purpose of seeking unity through an amnesty might be aimed at seeking to re-unite the nation with its prodigal children who departed the country, or through the symbolic act of terminating the last vestige of the war it might be aimed at regaining the participation in our national activities of those members of our society who (though they remained within the country's boundaries) were alienated by the war, or it might be aimed at both groups. My own personal reason for accepting an amnesty program is to unify those who have remained within the jurisdiction of the United States; I see no intrinsic benefit in inducing the evaders and deserters to return other than as an effort to minimize the division among those who remained.

In seeking to mollify those who strongly urge amnesty, however, we must not overlook the substantial number of persons who strongly oppose the granting of an amnesty of any kind. We will have no unification if we mollify one group at the cost of alienating an equally substantial or even larger group. Consequently, an amnesty conditioned on alternative service is a political compromise in the best sense of that term. It takes into account two widely divergent and strongly held views and seeks a middle ground which provides enough to each group to meet their basic demands even though neither group gets all of what it wants. Indeed, where political action is a resultant vector of sincerely held but irreconcilable positions of major segments of the society, the democratic process is operating at its optimum. If either or both groups are totally dissatisfied with the Ford program, then the compromise failed, but despite grumbling that has not yet happened; and even the failure of the compromise would not prove that it should not have been tried.

I regard the desirability of compromising this issue as a sufficient justification of the Ford program. However, there are additional and independently sufficient reasons for conditioning amnesty on alternative service.

The act of desertion or draft avoidance was not a mere technical legal violation but was a serious offense and a morally reprehensible act. If society fails to punish those acts, it will condone grievously illegal behavior. Professor Sax seeks to minimize the significance of those illegal acts and suggests that society often adopts "a more rigorous position against civil disobedience than is appropriate to the complexity of life." However, the crimes committed by these young men were not mere trespasses on private property or even relatively minor destructions of property. By shirking their obligation to serve in the armed forces, the deserters and evaders did far more than harm some amorphous fictional entity called the government of the United States, they harmed specific individuals—namely, the young men who served in their place and who would not have been required to serve but for the acts of desertion or evasion by those for whom amnesty is now sought. While many of those who filled in the ranks left bare by the deserters and evaders undoubtedly were not subjected to combat, it is reasonable to assume that a number of them were subjected to the risks of combat and that a portion of those who engaged in combat suffered severe consequences. Where an individual fraudently evades his income tax liability, it is

> **I**f . . . there is a consensus in this nation that the acts of the evaders and deserters were reprehensible, then the symbolic condemnation of those acts is quite appropriate, and in no event should the Government signal its approval of those acts.

regarded as a serious criminal act; but that action merely shifts a disproportionately larger tax burden to his fellow citizens and typically the amount falling on any one citizen is relatively small. The action of the evaders and deserters was far more serious; each evader shifted his burden of service and all risks attendant thereto to a single innocent fellow citizen.

I should also note that the decision to punish serious illegal actions does not depend upon a deterrence rationale. If, during a domestic quarrel, a man killed his wife, he should be punished for that crime even if there is no likelihood that he will ever sin again and even though such punishment is not likely to deter other spouses from doing away with their mates in the heat of an argument. Similarly the punishment of draft evaders and deserters does not rest on a determination of whether such punishment will deter others.

Many persons contend that draft evaders were motivated by altruism rather than by a highly developed sense of self-preservation. Undoubtedly, altruism was the principal motive in some cases. Undoubtedly, in many cases, self-interest was the dominant motive. I suspect that in a large number of cases, these motives were so intertwined that the young men themselves could not determine whether they were seeking to save all of humanity or only one specific member. Where it can be demonstrated in an individual case that a young man's dominant motive for fleeing the country was to comply with his moral standards, the flight might well have been a courageous act; but even then his behavior would not necessarily be regarded as laudatory—action which I regard as reprehensible (in my moral judgment) does not become laudatory in my eyes merely because the action was motivated by good intentions. Moreover, while an individual's defiance of the draft may have been altruistically motivated, his flight from the country to avoid prosecution almost certainly was not.

An individual's adherence to his own conscience is a mitigating factor in determining the proper punishment to be imposed, and in appropriate cases, a prosecutor might refrain entirely from prosecuting such an individual. Concededly, it is not feasible to provide a case by case review of the actions of all the deserters and evaders, and the subjective nature of the inquiry makes the determination of even a single case very difficult. But, the fact that some might qualify for prosecutorial discretion or for a reduced punishment does not justify granting a blanket indulgence to all those who fled unless there is a conviction that at least a majority of those who fled were primarily motivated by altruistic considerations. There can be no hard evidence on this question, and so we can do little more than resort to our intuition. For myself, I am skeptical of the altruistic motives of those who preserved their own safety at the sacrifice of the safety of others, particularly where they fled to avoid the consequences of their acts. Consequently, I believe that a substantial majority of the evaders acted primarily in response to what they regarded to be their self-interest,[1] and therefore I cannot justify an unconditional amnesty. The assumptions that a person makes as to the likely motives of the evaders and deserters will likely be based on that person's view of human nature, and perhaps others will hold a less cynical view than I.

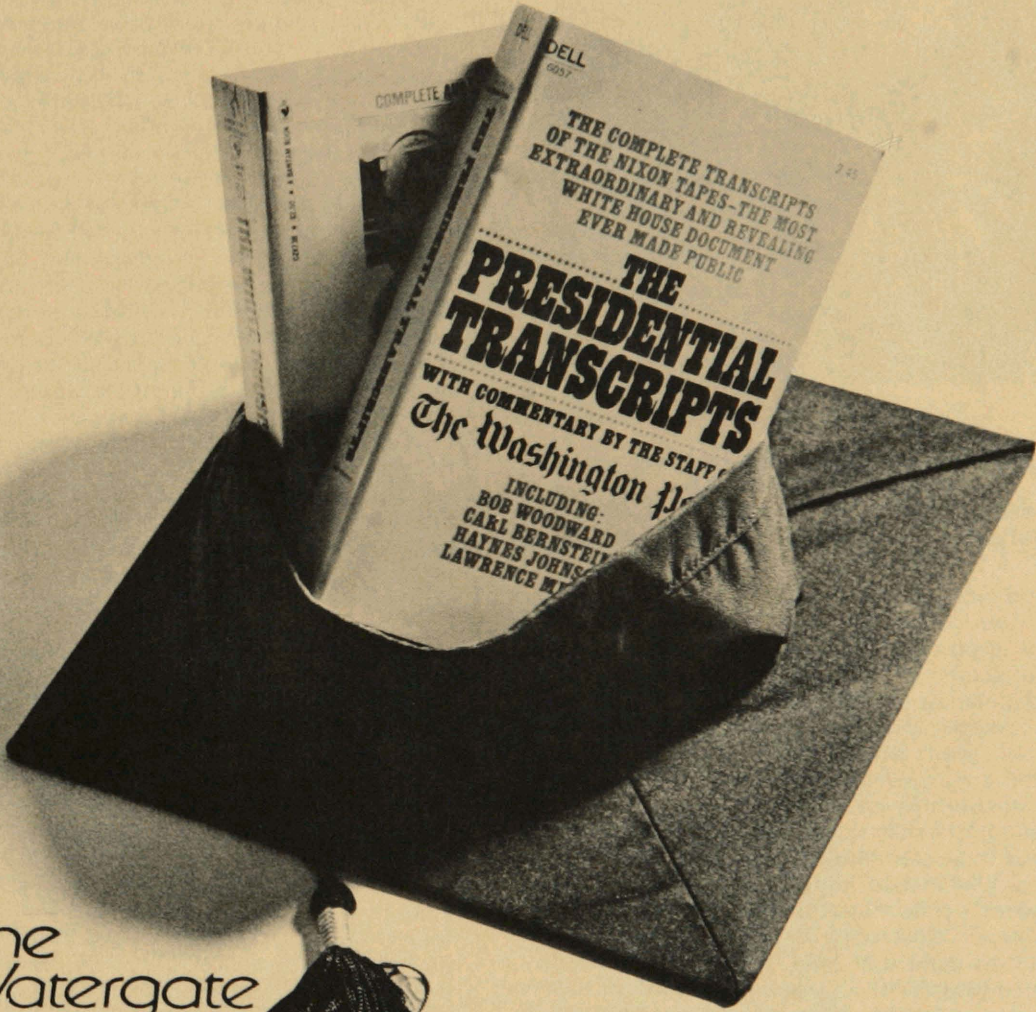
In any event, given my assumptions, President Ford's program is both reasonable and magnanimous. To obtain clemency, an evader must accept a mild and inoffensive sanction; he must devote two years to "good works." Professor Sax describes this as involuntary servitude and indeed it is; so is the draft and so are the prison sentences imposed on those who refused to serve in the draft but who did not flee the country. The servitude imposed on the returnees will likely be far more palatable than was military service during war time or was a prison sentence. Indeed if the evaders did flee because of a commitment to altruism, the requirement that they work for the betterment of society should be a particularly gentle sanction.

Another ground for imposing a service requirement is the inequity of granting an unconditional pardon when draft resisters who remained in the United States were jailed. I take it to be a basic premise of justice that persons committing similar acts be treated similarly to the extent possible. Evaders and deserters defied the law requiring military service and fled the country to avoid punishment for their acts. Others defied the same laws and were subjected to prison sentences therefor. It would be inequitable to permit the returnees to escape from any punishment when the only difference between their acts and those who served a jail sentence is that the returnees fled after or while committing their crimes. As previously noted, there are strong political reasons for not subjecting the returnees to a prison sentence, but it is necessary to impose some sanction upon them (such as the relatively mild sanction of alternative service) to provide a semblance of equity and even then the returnees are given preferential treatment. The requirement of relatively equal treatment is not only of concern to those who are treated unequally but also is of concern to all of us who live under our legal system since we have an interest in seeing that our system deals fairly with all who are subjected to its processes.

Finally, we reach what for many may be the most important consideration of all. The imposition of conditions on the granting of an unconditional amnesty has symbolic meaning which has stimulated much of the controversy surrounding the Ford program. An unconditional amnesty will be read by many as an official recognition that the actions of the evaders and deserters were justified. On the other hand, the condition of service (which does constitute a sanction) signals a condemnation of the returnees' acts. Indeed, newspaper interviews with a number of war resisters suggest that their principal objection to the requirement of service is that they are unwilling to accept a judgment of condemnation. The resolution of this question rests on political realities. If, as I believe, there is a consensus in this nation that the acts of the evaders and deserters were reprehensible, then the symbolic condemnation of those acts is quite appropriate, and in no event should the government signal its approval of those acts. However, if I have misjudged the situation so that, in fact, a majority of Americans approve of the acts of those who fled to evade military service, then a symbolic approval of those acts would be warranted. In this connection, note Professor Sax's observation that as of April of this year, the Gallup Poll indicated that only 34 percent of the population favored unconditional amnesty.

1. While the contention has been made that the self interest of evaders and deserters would have been better served by their yielding to the draft, I doubt that the majority of evaders viewed their interests that way at the time they fled the country, and even with hindsight I am not convinced that they erred in their evaluation of the risks.

A weighing of such risks would not merely consider the probability of being sent into combat, it would also consider the extent of the consequences of losing that gamble.



The Watergate Lawyer Syndrome: An Educational Deficiency Disease

by Andrew S. Watson

Andrew S. Watson

An address delivered at the graduation ceremony, University of Pittsburgh Law School, May 25, 1974. Besides his U-M Law School professorship, Prof. Watson is a professor of psychiatry in the U-M Medical School.

Important and omnipresent though lawyers are in this country, they often do not enjoy high social esteem, and the pejoratives applied to them across time have been numerous and scathing. Just now the unfoldings of Watergate and the other unethical and criminal episodes carried out by lawyers in our government are likely to do little to enhance a graduating lawyer's pride for his new profession. Perhaps this partially accounts for the strange fact of having a psychiatrist address a graduating class of law students. Whatever the reason, I am greatly pleased by your invitation, and take this opportunity to speak about a psychiatric condition I will call the Watergate syndrome, one cause of which I shall trace to the nature of legal education. If I am correct in my description of this syndrome and its origins, you will already have been exposed to the malady so I intend also to give a little prophylactic advice which may help you ward off the dangers of the disease.

You graduate from a university whose seal bears the words *veritas et virtus*, truth and virtue, and there can be no more appropriate standard by which a lawyer or any other professional should live. One hallmark of a good professional is dedication to the best interest of clients or patients, even as he earns his living and gains his own sense of wellbeing while carrying out the work. In addition, lawyer-professionals, because they are officers of the court, have a duty to see that justice is done. This means that lawyers are involved constantly with an inbuilt conflict of interest through which they must thread their way in a professionally responsible manner. No wonder the great need for virtue, and how fortunate we are that there are not more and worse Watergates! Only high sensitivity to self, joined with great sophistication about the technical obligations and procedures of the legal profession, can keep one from falling prey to the all -too- human vulnerability of being seduced by self- interest.

Law schools have convincingly demonstrated their capacity to hone the minds of their students so that when they graduate they possess excellent intellectual skill to carry out the complex analytical tasks which lawyers perform in our society. For this accomplishment I have only the highest praise, and nowhere in the university is this task done better: this means that truth-seeking by lawyers will be done with consummate intellectual skill. There remains, however, the need to understand better the complicated emotional reactions which join as well as interfere with intellect when one is searching for elusive Truth. Regretably, law schools do little to facilitate this kind of knowledge, and in my opinion, they actively inhibit its growth. It is this deficiency in legal education which is a partial cause for Watergate, and for which law schools must bear some responsibility. To graduate students into situations with a known professional risk for which they have developed no coping—capacity is similar to sending a man into a lions' den without knowledge of how to deal with fear. It is poor training in either case, and it leads to lots of casualties and catastrophies.

Everyone "chooses" their vocation by responding to a multitude of hidden motivational forces, and those who elect to study law are no exception. Not the least of these is a desire to be somebody and to enjoy status among their fellows, but there are three other emotional needs which also seem to be particularly important. First, many if not most law students have a strong psychological need to come to grips with the powerful and disquieting emotion of aggression. This primeval instinct in us all provides the driving force for many of the things we do in life and is the locus for a large part of all of the socializing activity every culture imposes upon its members. It is also the deep-seated and invisible well-spring for much of our sense of good and evil, right and wrong, and the way in which we manage these concepts is closely related to how we feel about the way we live our lives.

The second important emotional need in those who choose law is to seek a high degree of order and predictability in life. While all human beings have this need to predict, law students have it to a higher degree. For that reason when you encountered the seemingly predictable unpredictability of the law while studying torts and contracts during the first year, it was an unsettling experience: "The knowne certaintie of the law. . ." vacillated and appeared ephemeral and you had to adjust to that stress.

Finally, law students have or did have a substantial amount of sheer idealism coupled with the desire to help their fellow man through the use of law as an instrument for social reform. Not all of this feeling was built on logical observation of the world around you, and because of this it was vulnerable to the inevitable challenge or attack which always occurs in a good law class. When these psychological needs about agression, orderliness, and altruism came into violent collision with the Socratic case-method in the classroom, many psychological wounds were incurred which I fear have not healed by graduation time. The pain of those wounds and that encounter required some kind of remedy, and for the most part, none was dispensed. Instead of coming out of this learning experience with the ability to perceive yourselves as the successful possessors of a capacity to face and deal with high emotional stress, too many of you had to take the all-too-human route of covering over your anxiety and self-doubt with a kind of pseudo-callousness in order to alleviate the pain: that is the source of the Watergate debility. Let me describe how I think this happens.

The human species, in common with all other animals, perceives danger when certain things are *felt*. An encounter with risk triggers pounding pulse, sweaty hands, rapid breathing, and a variety of other bodily responses.

These reactions reflect a whole train of physiological events which are dedicated to fighting or running away from the danger: what physiologists call Cannon's Law. To ignore these body signals and the thoughts they inspire is to turn off the early-warning system which gets a person ready for action, hopefully modulated by an alerted mind. It is just on this point that I believe we must indict the methods of legal education. Instead of helping students learn how to make use of these signs of impending risk, the Socratic method, used in a way Socrates did not, potentiates that unique human ability to hide ideas and feelings from consciousness by driving them into unawareness through the use of various symbolic processes. When this happens, the resulting insensitivity and unawareness can lead to unprofessional and unethical behavior which is totally outside of the lawyer's capacity to control. I think that many of these bright young lawyers who were to become "the President's men" fell prey to this problem.

Let me make it very clear that I am *not* saying that this vast display of skullduggery is *just* due to legal education. It verges on the trite to note that a very substantial part of every person's character and moral sense is tentatively molded well before he arrives at elementary school. On the other hand, all the way through high school and well into college and law school models for imitation are being avidly sought by nearly everyone. Peers, family friends, teachers, and even law professors will be used to help form the final self. In this way, earlier inclinations toward character-shape will serve as the framework around which later attitudes will develop. Also, ultimate concepts about morality and appropriate social behavior will not only reflect values which have been actively taught, but also come from innate antisociability which goes unresisted or which is positively reinforced by modeling. It is in relation to this process of identity formation that the form of pedogogy in law schools has important implications.

When law students spend three years in an atmosphere which teems with intellectual activity and ideas, but which at the same time constantly obscures, downgrades, or actively criticizes emotional issues and reactions, being very bright students, they get the point! They logically deduce that if they are to be competent, effective, and respected lawyers, they must learn how to banish emotionality from their lawyer work. Such a goal obviously seems difficult, but, in fact, it is totally delusional. On the other hand, it is possible to learn how to imagine that intellect has been separated from emotion. Regretably, that is an all too common result of much legal education since little or nothing is presented in the current curriculum to teach a person how to know and deal with the ubiquitous emotional responses to professional stress. In addition, because these tensions and potential problems are at first highly palpable to law students and cause them much pain and anxiety, they are forced by psychological necessity to do something to alleviate their discomfort. They defend themselves against such unpleasant feelings by learning how *not* to feel, and this is an ominous result. The everpresent and complicated conflicts of interest between the lawyer's normal but self-centered concerns with material success and status, and the professional obligation to serve the client's interest while acting as an officer of the court, may then go unapprehended. This places these self-serving concerns beyond the reach of conscious control, especially when the heat is on! One of the results of this educational process is that many, and often the best, of law graduates move to the wild and wooley world of practice ignorant of the "enemy" within. Given the psychological inclinations which brought you to study law in the first place, the desensitizing result of this educational process may lead to a long-lasting and socially important result: a strong tendency to be unaware of, and therefore inappropriately responsive, to the emotional conflicts which are so common in a lawyer's work situation.

There is one important characteristic of the reward system for professional behavior which should be especially noted. Most of the work which a lawyer does for his client in relation to questions of ethics and professional behavior takes place in private and within the confidentiality of the lawyer-client relationship. The many large and small decisions that counsel makes responsive to both his clients' best interest and to the demands and restrictions of the law never come into public visibility. Because of this, there will be no public acclaim, nor even the quiet nods of collegial approval for a job well and ethically done. Counsel's gratification about handling these difficult problems skillfully must come almost completely from within himself in the form of self-knowledge and self-satisfaction. Although this is a very fragile reed which can grow and gain strength only from prolonged nurturance by peer support, teacher encouragement, and the presence of good examples of how to do it, of necessity, it is the main support for appropriate professional behavior. This ability to carry out self-regulation, self-criticism, and self-pay-off takes a great deal of guided experience to learn and build into one's psychological functioning. Failure to emphasize and reinforce this kind of satisfaction throughout a law student's professional training process increases the likelihood that such a capacity will never develop fully, and in turn that lack will greatly increase the incidence of unethical and unprofessional behavior by lawyers.

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If my hypothesis is correct, there should be a great deal of attention given to the teaching of these professional skills in law school and that attention should not be limited to the traditional course which merely presents the Code of Ethics in a highly intellectualized form. Instead there should be many occasions in classes when a student's attention will be focused on learning how to *feel*, consciously identify, and acknowledge their normal and inevitable self-seeking inclinations and conflicts. Many opportunities should be offered to encounter and struggle with the knotty ethical conflicts which arise so often in law practice. Responses which reflect unethical attitudes in the student should be confronted clearly and the presence of such attitudes should not go unchallenged.

In addition to including this kind of discussion in the context of traditional courses, each student should have at least one required course of the type now offered in the optional clinical programs. However, these clinical courses almost uniformly need to be supplemented by

the presence of a teacher with the kind of psychological skill which would enable him to interpret student behavior which reveals the ethical conflicts. This person might need to be a psychiatrist, a psychologist, or a social worker who could help students learn about feelings and ideas as they relate to conflicts about professional behavior. If such a teaching process were introduced into the law school curriculum, it would begin to approximate the kind of experiential learning which occurs in the other professional schools where skill in dealing with the psychology of inter-personal behavior is taught.

Finally, it would be appropriate for several selected courses to include in their final exams a problem-solving question involving a professional ethics conflict. Failure to answer these questions satisfactorily could lead to obligatory enrollment in a special course which would present more of the same kind of problems and experiences described earlier. It might even be required that students pass this material in order to graduate. The fact that law schools at present do little or nothing to teach these skills when their characteristics are fairly well understood leads me to the conclusion that wittingly or unwittingly, they aid and abet the disability which contributed substantially to the behavior we saw in Watergate and its aftermath.

All last summer we watched and heard the Nixon men as they testified before the Senate committee about Watergate. We were aghast at the criminal and unethical acts that these men, many of them lawyers, had committed. Several attractive, intelligent young men who very clearly had gotten themselves into career-destroying binds before they realized what had happened to them, and it was a sad spectacle to witness. And their chief, who has come to refer to himself in the regal and Papal third person or as "the President," merely remarked that these men were apparently guilty of excessive zeal! This was said at the same time he was commenting about their stupidity or their intellectual lightweight during the oval office discussions on how to hide the team's unlawful behavior from the public. Some have argued that this behavior should not be charged up to lawyers because it did not occur while they were acting in lawyer roles. But bar ethics committees, on the relatively infrequent occasions they take action, make no such distinction. If a lawyer is found guilty of a crime committed in or out of his lawyering role he will usually be disbarred on the theory that a willingness to breach the law anywhere jeopardizes public trust in the bar's integrity. We are being urged by some just now to abandon that rather compelling logic.

During the course of the Senate hearings, Mr. Nixon's law-trained associates provided many examples of how they failed to behave appropriately in their important jobs. As Young and Countryman pointed out in their *New York Times* article of May 12, 1974, the president and his staff have a fiduciary responsibility to the people of this country which demands an even higher standard of performance than mere avoidance of criminal behavior. Instead of fulfilling this high duty, these men seem to have turned off their own perception and intellection as they blindly followed the direction of those who worked in the inner sanctum drawing up the plays for the team. An example of this was revealed in an exchange between Senator Weicker and Mr. Kalmbach, the president's former counsel:

> *Senator Weicker:* Now, as an attorney, you are telling me that you would commence activities that in effect might risk your entire career on a belief that such activities were proper and necessary to discharge a moral obligation that had arisen in a manner unknown to you.
>
> *Mr. Kalmbach:* Yes sir. It is a matter of absolute trust in Mr. Dean and later in Mr. Ehrlichman. It is incomprehensible to me, and it was at that time, I just didn't think about it, that those men would ask me to do an illegal act.

Another example is to be found in Egil Krogh, who ultimately confessed to a charge of perjury, but whose former law professors hailed the conscientious and intense social concern he demonstrated while he was a student. In his own statement to the court before sentencing, he acknowledged how the "Plumber's Unit" attacked the core of each citizen's constitutional right to privacy:

> As official government action, as I have come to see it, it struck at the heart of what this government was established to protect, which is the individual rights of each individual. It was never my intention, while serving in the White House or while serving as the director of the special investigations unit, for that to take place; but it did.

Mr. Krogh then went on to note how he had enjoyed the very rights he denied others during the U.S. attorney's investigation of his case.

Why did he commit those acts which his teachers never would have predicted and which he did not want to do? The judge made a shrewd diagnosis when he said,

> A wholly improper, illegal task was assigned to you by higher authority and you carried it out because of a combination of loyalty and *I believe a degree of vanity*, thereby compromising your obligations as a lawyer and as a public servant. [italics added]

The vanity the judge referred to is probably all, or mostly all, an inner and unknown psychological force which was therefore beyond Krogh's conscious control. He needed to know more about himself and his motivations if he was to behave the way he had wanted to behave.

We also had the opportunity during the Watergate hearings to observe several of the wives of those who testified. Since I am convinced that your future success as lawyers will deeply involve your relationship to your wife or your husband, permit me to make a few remarks on this subject. Since it is widely known that "the law is a jealous mistress" let me urge your other partners to fight vigorously and early for their rights regarding your destiny. It seems reasonably clear that a spouse should have some equitable right to participate in any decision which might lead their lawyer partner to jail or to disbarment. Let me use Mrs. Jeb Magruder as an example.

On the NBC *Today* show of March 29, 1974, Mrs. Magruder was interviewed by Barbara Walters. In a way which is typical for concerned spouses, it seemed to me that Mrs. Magruder made many shrewd observations which might have been helpful to her husband's future. (This appears to be confirmed in an article by Magruder in the *New York Times Magazine* of May 19, 1974.) She appeared to be well aware of the contagion effect of the president's modeling of "hard work" and "team spirit" and how this led to a kind of "tunnel-vision" in her husband. She described how much he had enjoyed working for John Mitchell, and how he still admired him, despite the fact that he called Magruder "a damned liar" when he alleged Mitchell's part in the cover-up. Mrs. Magruder detailed how her husband wishes now to talk to young people and help them understand the dangers of too much ambition. As I listened to this pleasant but beleaguered woman, I wished that she had been a more fiery advocate for her perceptions. That might have helped her husband discover himself in time to avoid falling prey to the Watergate syndrome; perhaps that is what Martha Mitchell was trying to do with her husband. At any rate, I suggest that the spouses of this graduating class have a vested interest in their partner's professional behavior and if you see or feel anything that alarms you, don't remain silent: hassle now and save later. It can help your partners learn how to see themselves better; it can potentiate a better marital partnership; and it may save you from the sad events that fell to Mrs. Dean, Mrs. Magruder, and others.

These illustrations of emotional myopia or character cowardice can be repeated many, many times and it

recalls Gordon Strachan's melancholy admonition for young people to "stay away" from government jobs. What irresponsible leadership that has lead to such a forlorn warning, and what an unfortunate waste of youthful zeal if that advice were to be followed.

It is too late for any remedy in legal education to benefit you who graduate today, and at best you may be forewarned to proceed with a restless skepticism about the inner motivations for your professional integrity. In addition to urging you all to revitalize your old feelings of social altruism, I hope that I will succeed in leaving each of you with a small but persistent doubt about yourselves so that you will spend the rest of your careers as lawyers wondering why you're doing what you're doing. This kind of introspection, shared occasionally with a trusted colleague or your spouse, may lead you to greater self-awareness and sensitivity and a heightened capacity to deal with the inevitable conflicts of interest that constantly confront a working lawyer. Such initial discomfort may help you resolve knotty professional problems with and for your clients in ways that will let you feel good about yourself, secure in the knowledge that *you* did the right thing, That kind of professional behavior facilitates good sleep; it fosters the admiration of your fellows who must place their trust in you; and in the end, you will feel good about what you have become. In that way, your work as lawyers will provide you with pleasure, reward, and self-esteem. I sincerely hope that all of you will accomplish these ends and I wish each of you my congratulation and a *bon voyage*.

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