Law Quadrangle Notes

The University of Michigan Law School

Volume 19, Number 2, Winter 1975

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The Cover: Graphics Designer Bill Howison has selected three historic photographs (thanks to Rob Jones, director of development, Law School, and the Michigan Historical Collections) centering around law activities. At top is a shot of the Law Building, the foundation and location of which eventually became Haven Hall, seen at lower right after one of its several renovations. Until the University Library Building was completed in 1883, the library was housed in the Law Building, a ca. 1877 view of which is the photo at lower left.

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u·m notes

New Program Offered In International Law

A new program in "Law and World Politics," designed to train international legal specialists, has been established at the U-M.

The graduate program combines the traditional Juris Doctor degree from the Law School and a master's degree from the Political Science Department. The first students will be formally enrolled in the fall.

"In a world of nuclear weapons, massive international trade, multinational enterprise and proliferating international bureaucracies, a modern lawyer is called upon to deal with problems requiring broad understanding of the forces of world politics," says law Prof. Eric Stein, who will coordinate the program along with Prof. J. David Singer of the Political Science Department. Stein is a specialist in international law, and Singer is known for his research on foreign policy and world politics.

Prof. Singer says the new program is designed to prepare "highly gifted men and women of all nationalities" for careers with internationally oriented law firms, national ministries of defense or foreign affairs, international governmental and private organizations, multi-national corporations, and the news media.

Under the program, students will be able to fulfill some requirements in law and political science at the same time, thus permitting them to earn the two degrees in three to three-and-a-half years. Normally it would take four-and-a-half years of study for the two degrees, while the J.D. alone usually requires three years at the U-M.

The program features a number of joint offerings in law and political science, including jointly sponsored research. A committee of faculty members in law and political science will administer the program.

The only other graduate program known to be offering concurrent law and political science degrees is at Georgetown University, according to Prof. Singer. But he notes the uniqueness of the U-M program in its "quantitative" and social science orientation within the political science field.

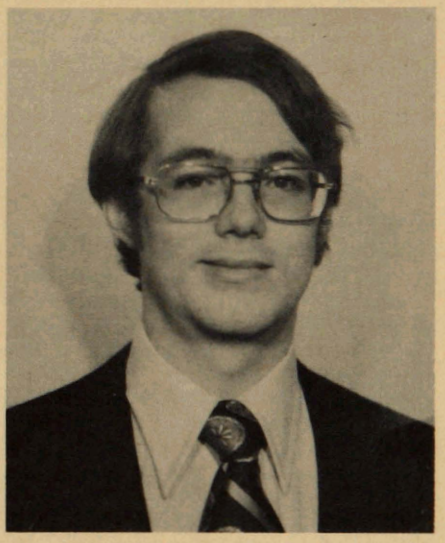
This will be one of several joint programs available to law students at the U-M. Other offerings include programs in law and natural resources, and law and economics.

Further information on the law and world politics program may be obtained from the Law School Admissions Office, 312 Hutchins Hall, or the Graduate School, 110 Rackham Building, The University of Michigan, Ann Arbor, Michigan 48104.

Two Grads Named Supreme Court Clerks

Two recent graduates of the U-M Law School have been selected as law clerks for U.S. Supreme Court Justices for the 1975-76 court term.

William J. Davey of Marshall, Mich., currently serving as law clerk to Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit, will clerk for Justice Potter Stewart. Christina B. Whitman of Rockford, Ill., now serving as clerk to Judge Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit, will clerk for Justice Lewis F. Powell, Jr. Davey and Whitman both graduated *magna cum laude* from the Law School in 1974.



William J. Davey

Christina B. Whitman

Davey received an A.B. from the University in 1971, where he was captain of the university debating team. In Law School, he served as article and administrative editor of the *Michigan Law Review*. Ms. Whitman earned an A.B. from the University in 1968 and an M.A. in Chinese language and literature in 1970. In Law School, she was editor-in-chief of the *Law Review*. Ms. Whitman is scheduled to join the U-M law faculty in August, 1976.

The selection of Davey and Whitman continues the Law School's representation among Supreme Court clerks. Currently, Ronald M. Gould, a 1973 graduate, is clerking for Justice Stewart, and John M. Nannes, another '73 graduate, is law clerk for Justice William H. Rehnquist.

Admissions Applications Exceed 4,000 Again

First-year applications for admission to the University of Michigan Law School have exceeded the 4,000 mark for the fourth straight year, but the total for last fall is down slightly from those of the past three years.

According to the latest report from the Law School's admissions office, there were 4,280 first-year applicants for admission to the current first-year class (not including transfer, summer session, and other special applicants). By contrast, there were 4,496 applicants last year and 4,915 in 1972 when the number of applicants reached an all-time high.

A total of 375 students are registered in the current first-year class. Of this number, 74 are women (which represents a slight decrease from the 83 figure of the previous year) and 44 are minority group students (up from 35 last year), according to the admissions report.

The report shows a continued increase in academic qualifications of first-year students. The current first-year class recorded a median score of 696 on the Law School Admissions Test, compared to a score of 690 last year. The median undergraduate grade-point average for the current first-year class is 3.61 (out of a possible 4.00), compared to 3.57 last year.

Among other statistics, the report shows that 51 percent of the current first-year class are from Michigan, with the remainder from 33 states and the District of Columbia.

Some of the students were schooled in other graduate fields. These include 15 first-year students who hold the Ph.D. degree, 41 with master's degrees, and 14 who are listed as having attended graduate school without receiving a degree, according to the admissions office.

Student Law Group Gets 'Mini-Grant'

The Environmental Law Society, a student group at the Law School, has been awarded a $7,644 "mini-grant" from the U.S. Department of Health, Education, and Welfare to assist Michigan communities with land-use decision-making.

A major focus of the project is the clarification of legal problems arising when local officials seek to halt or control new land development because of environmental considerations.

Across the nation, "controlled growth" proponents are receiving a legal challenge on two fronts, according to the U-M group.

First, developers claim they are entitled to compensation when they are not permitted to develop their land; and citizens have argued that growth restrictions infringe on their constitutional "right to travel," according to the U-M group.

U-M law Prof. Philip Soper, an environmental law specialist and adviser to the project, says recent court rulings have been inconsistent. Some courts have upheld land-use controls which restrict development, he says, while others have awarded verdicts to developers.

Soper also says conflicting approaches have developed over the "right to travel" issue.

"Last April, a lower federal court decision invalidated an attempt by the city of Petaluma in the San Francisco Bay area of California to control growth by restricting new housing development in the city. That decision is currently being appealed, with environmentalists supporting the city's position that the controlled growth plan is not unconstitutional," according to Soper.

As part of the project, the Environmental Law Society plans to conduct a series of land-use workshops in selected Michigan towns and to produce a written manual explaining relevant legal issues. The group now has a membership of about 25 law students.

James T. Banks and Jeffrey Haynes, student co-directors of the project, say Novi and Grand Haven, Mich., are among the communities expressing an early interest in the project.

The students say the workshops will include "simulation games" which allow participants to play the roles of various community interest groups under hypothetical conditions. The objective is to heighten players' awareness of land-use problems, as seen from many perspectives.

Such games are offered to community and educational groups around the state by the U-M's Extension Gaming Service. The University is a national leader in gaming research and development.

The Environmental Law Society is calling its project "PRELUDE" (Process of Enriching Land-Use Decision-Making). The students say the workshops will be designed for city officials as well as interested local citizens.

Among other activities, the Environmental Law Society this year has drafted state legislation to preserve wetlands in Michigan and has proposed administrative rules to make information of the Michigan Natural Resources Commission more easily available to the public. The commission is the policy-making body governing activities of the state Department of Natural Resources.

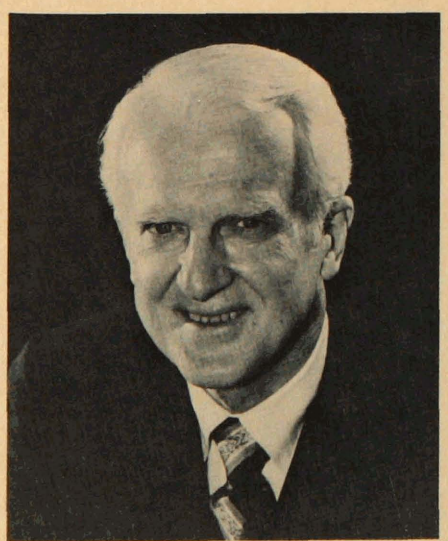
Sax's Environmental Law Upheld By Court

The recent Michigan Supreme Court decision upholding the state's 1970 Environmental Protection Act makes it clear that "concern for the

alumni notes

EDITOR'S NOTE: The following are items about U-M law alumni in the national news. A more complete listing of announcements about other law alumni will be carried each year in the summer issue of Law Quadrangle Notes, *along with the annual report of the Law School Fund. Alumni information should be sent to Prof. Roy F. Proffitt, Director, Law School Relations, Hutchins Hall, Ann Arbor, Mich. 48104.*

Philip W. Buchen, a 1941 Law School graduate and President Ford's former law partner, is serving as counsel to the president. Appointed to the post last August, Buchen was a senior partner in the law firm of Law, Buchen, Weathers, Richardson and Dutcher in Grand Rapids, Mich. He also served as executive director of the Domestic Council Committee on the Right of Privacy and was a member of the U.S. delegation for negotiations on international telecommunications. Both Buchen and President Ford received undergraduate degrees from Michigan, Buchen graduating in 1939 and the President in 1935. (President Ford took two courses at U-M Law School in the summer of 1937 and went on to receive his law degree at Yale.)



Philip W. Buchen

Mary F. Berry has been named provost of the Division of Behavioral and Social Sciences at the University of Maryland. The appointment places her among the highest-ranking black women academics in the country. In

Mary F. Berry

environment has not faded away," according to U-M law Prof. Joseph L. Sax, who authored the act.

Noting that the decision was unanimous, Prof. Sax said he considers the court's ruling to be a "ringing endorsement" for the environmental law. "It finally upholds the validity of the statute against constitutionl challenges," he said.

The state supreme court decision, last January, came in a suit filed by 56 landowners near Scottville on the northwest lower Michigan peninsula near Lake Michigan. They were opposed to a plan that would turn meandering Black Creek into a deep, fast-flowing waterway to prevent flooding each spring of crop land owned by two farmers. The plaintiffs argued that the project would lower the water table in the area and therefore damage wetlands.

The supreme court decision, which favored the plaintiffs, substantially widens the scope of the original Environmental Protection Act, said Prof. Sax.

Initially, he said, many people thought the act merely gave citizens the right to come to court and attempt to enforce other anti-pollution laws.

But now, said the professor, the effect of the supreme court decision "is to give every private entrepreneur and public agency a definite mandate to prevent pollution and environmental harm."

Sax pointed to the wording of the court decision which said that the Environmental Protection Act "imposes a duty on individuals and organizations both in the private and public sectors to prevent or minimize degredation of the environment which is caused or is likely to be caused by their activities."

Sax also stressed that the ruling requires judges to issue detailed findings of fact in deciding cases brought under the Environmental Protection Act.

"This is a significant measure," said Sax. "The practical effect will be to sharply minimize the chances of any courts or defendants merely tossing off environmental issues as insignificant. Courts are now required to justify each of their rulings in such cases."

Another effect of the decision, according to the professor, is to "place the burden of proof on defendants rather than plaintiffs" in environmental suits.

Specifically, the court held that once plaintiffs in a lawsuit brought under the act had shown that a project would harm the environment or was likely to do so, the project could not proceed unless the public interest compelled it and there was no "feasible and prudent alternative."

One of the most satisfying things to me," Sax said, "is that the ruling makes it clear that concern for the environment has not faded away. It affirms the fact that the original statute was meant to deal with an important problem which continues to need strong legal medicine."

Michigan's environmental protection law has served as a model for similar legislation in seven other states—Connecticut, Florida, Indiana, Massachusetts, Minnesota, New Jersey, and South Dakota.

addition to her law degree, which she received in 1970, Ms. Berry holds a Ph.D. in American constitutional history from the U-M and bachelor's and master's degrees from Howard University. She was adjunct associate professor of history at the U-M prior to her appointment in 1970 as acting director and later director of the Afro-American Studies Program at Maryland. She authored a book in 1971 titled *Black Resistance/White Law: A History of Constitutional Racism.*

David W. Belin, a 1954 law graduate, was chosen by President Ford to serve as executive director of the presidential commission investigating alleged domestic spying by the Central Intelligence Agency. Belin has served as counsel to the Warren Commission in 1964 when it investigated the assassination of President John F. Kennedy. He is also author of *You are the Jury,* a book that defends results of the Warren Commission investigation. Since 1966 Belin has been affiliated with the law firm of Herrick, Langdon, Belin and Harris in Des Moines, Iowa.

Law School alumnus **George R. Ariyoshi** has been elected governor of the state of Hawaii. He became the first American of Japanese ancestry in U.S. history to become a governor when he defeated his Republican opponent last Nov. 5 by a 22,000-vote margin out of a total balloting in Hawaii of 249,000. Ariyoshi is a 1952 graduate of the Law School.

David W. Belin

George R. Ariyoshi

Michigan Law School Receives High Grades

The University of Michigan Law School was ranked as one of the top law schools in the country in a survey of professional school deans.

The findings were announced in a recent issue of *Change,* a leading magazine in higher education. Rankings were based on the number of professional schools listed in the top five by respective deans.

"The deans were not asked to rank schools but simply to list the five they considered best in their field," said Perter M. Blau and Rebecca Zames Margulies, who compiled the study. "The rankings are based on the number of deans who mentioned a given school as one of the best." (Self-ratings—nominations of schools by their own deans—were excluded from the results).

Out of 134 law school deans surveyed, 105 responded. Law schools most frequently listed in the top five were Harvard, Yale, Michigan, Columbia, and Chicago.

Harvard received 101 nominations for top-five ranking, Yale received 86, Michigan had 73 votes, Columbia had 60, Chicago received 58, and Stanford had 45. Other law schools receiving votes were University of California at Berkeley, 19; New York University, 15; and Pennsylvania, 13.

Blau, who headed the study, is professor of sociology at Columbia and director of Columbia's Comparative Organization Research Program. Ms. Margulies is completing her doctorate in sociology at Columbia.

The survey also showed that "five universities with outstanding reputations—Berkeley, Chicago, Columbia, Harvard, and Michigan—have the greatest numbers of top-ranking professional schools."

In addition to the Law School, other high ranking schools at U-M were the School of Dentistry and the School of Public Health (both ranked first nationally); the School of Library Science and the School of Social Work (both tied for second nationally); the School of Music (third); College of Architecture and Urban Planning, School of Education, and College of Engineering (each ranked sixth); School of Business Administration and the U-M Journalism Department (each ranked eighth); College of Pharmacy (ninth); and the forestry program in the School of Natural Resources (tenth).

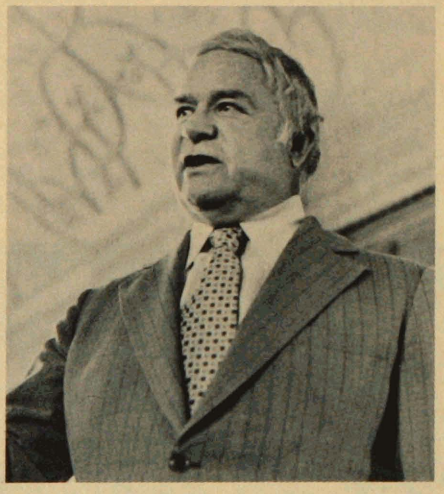
One of the most striking findings in the study, according to Blau and Margulies, is that "the reputations of professional schools depend on different conditions in different types of professions."

The study showed, for example, that "a school's annual budget is substantially related to its reputation in engineering, law, nursing, pharmacy, and social work, but not in business and education," the authors said. "In contrast, the size of a school's separate professional library is strongly related to its reputation in business, education, and law; considerably less in nursing; and almost not at all in engineering, pharmacy, and social work."

"The legal profession," they note, "has a codified body of knowledge that is distinct from the basic knowledge of any other discipline. Business and education, however, largely rely in their work on the basic knowledge of other disciplines, notably economics, psychology, and sociology. Hence, one would infer that advanced work in law requires a specialized legal library, whereas advanced work in business and education can be carried out utilizing the general university library. All law schools have their own libraries, while only one quarter of the schools in business and education do."

Recent Events

Ambassador **John R. Stevenson** (left), who has represented the United States at conferences on ocean pollution and other maritime issues, was the first speaker in a lecture series honoring U-M law Prof. **William W. Bishop, Jr.** (seated next to Ambassador Stevenson). Prof. Bishop will retire soon, after having served on the faculty since 1948. Bishop is Edwin DeWitt Dickenson University Professor of Law and co-director of the school's program in international legal studies. Ambassador Stevenson serves as the president's special representative at the ongoing Law of the Sea Conference, which was assembled to resolve such issues as pollution of the oceans, control over fishing and whaling, mining of seabed minerals, international shipping, and boundaries for control over coastal waters. Stevenson favors a 12-mile national territorial limit in coastal waters and a 200-mile zone where the coastal nation would have primary responsibility to safeguard natural resources.



Chesterfield Smith, who served as president of the American Bar Association during 1973-74, was in Ann Arbor recently for an annual dinner sponsored by the Institute of Continuing Legal Education. In remarks before the group, Smith advocated, among other things, lifting the long-time prohibition against advertising by lawyers. Such advertising would be in the public interest, said the Florida attorney, because it would help consumers choose competent attorneys with appropriate legal specialties. "The general public does not know which lawyers specialize in any field of the law simply because that lawyer cannot publicly designate a particular area in which he will concentrate his practice," according to Smith. He also suggested a number of other legal reforms, including mandatory requirements that lawyers periodically update their legal knowledge, and periodic evaluation of lawyers to demonstrate their continued competence at practicing law. The Institute of Continuing Legal Education, headquartered at U-M Law School, is a joint unit of U-M and Wayne State University law schools and the State Bar of Michigan.

SOME COMMENTS ON ENFORCEMENT ACTIVITIES OF THE ANTITRUST DIVISION

AND THE DIVISON'S ROLE IN LEGISLATIVE REFORM

by Professor Thomas E. Kauper, Assistant Attorney General, Antitrust Division, on Leave from U-M Law School

[Based on an address before the Antitrust Section of the New York State Bar Association at the Association's annual meeting January 22, 1975, New York City]

One of the most famous lines in English literature, famous perhaps only because we confronted it, usually under duress, in high school literature courses, asserts that "It was the best of times, it was the worst of times . . . ." In this line, opening *A Tale of Two Cities*, Charles Dickens stated what I believe has been viewed as a truth by anyone who reads it, whenever and wherever it is read. But I found myself musing about this dichotomy, as I listened to the president frankly advise

us that "The State of the Union is not good," and I wondered whether the Dickens description is accurate today. One's first reaction is no, that is instead only "the worst of times." But is it? I do not believe so, and I hope you do not either. We are in a time of change, and it is because of the hope of that change, and the challenge it presents, that these may also be "the best of times."

. . . [I]t has been quite a year for the [Antitrust] division. The AT&T case was filed in November. Over-all, on the enforcement front, we instituted 38 civil suits and 33 criminal actions in 1974, the highest number of criminal cases since 1962. Forty-seven of the total of 71 cases involved price-fixing in one way or another. One of those cases, *United States v. Oregon State Bar Association*, represents the division's first attack on anticompetitive practices of the organized bar. The decision in the government's favor in its case against the National Society of Professional Engineers, challenging a code of ethics provision against competitive bidding, has provided support for this effort. The statement by the district court that the contention that professional groups are somehow exempt from the antitrust laws represents "a dangerous form of elitism" is surely worth pondering.

But is was also a significant year in a number of other ways. It was a year in which, for the first time in a great many years, the division's resources have been significantly expanded. There was also major new antitrust legislation, increasing Sherman Act penalties, substantially repealing the Expediting Act, and imposing new consent decree procedures. So there is much in the past year one might talk about.

But it has also been quite a year for the nation as a whole. We have, in mid-stream, seen a new man assume the presidency. And while we may congratulate ourselves on our ability to transfer power smoothly, as indeed we did, we must also recognize that the events preceding that transfer contributed in no small measure to the lack of confidence which is so much at the heart of our problems today. Indeed, it was a year of political instability around the world. The energy crisis came upon us and others with a surprising suddenness. We have seen double-digit inflation, and recession with its rising unemployment. On the surface, then, it is easy to conclude that it surely is not "the best of times."

The dramatic nature of all that has occurred is reflected in the topic suggested for this conference, which is focused on inflation and shortages. When it was suggested in October that I discuss the role of the Antitrust Division "in these somewhat critical times," I assumed that inflation was the factor making these times "critical." But now, in addition, we face rising unemployment and recession; if the times were "somewhat critical" in October, they seem more so now, though perhaps for different reasons . . . .

Clearly, the primary remedy for these major problems is in macroeconomic measures of the kind proposed by the president. At the same time, however, and quite apart from the specific measures he proposed, the president has made clear that we need to move in new directions, to re-examine our existing institutions and not rely on old solutions to what are in part new problems. New directions are required, both for consumers, whose life styles must be altered, and for businesses. We must eliminate fat and become lean again. One new direction (at least considering recent history) clearly indicated by the president is a move toward strengthening of, and a return to, the free market as our primary economic regulator. This is not rhetoric, but a deliberate and significant choice, a choice rejecting the extension (urged by some) of government regulation and perhaps even government control of business.

What, then, is the relevance of the current economic conditions to the enforcement activities of the Antitrust Division? I think we must concede that decisions about enforcement matters cannot proceed in a vacuum. Shortages, for example, to the extent they exist, are an economic fact. In some cases . . . the fact of shortage may itself be a reason for filing suit. In others, it may provide justification for the conduct engaged in. There are major energy research needs, which may require some forms of joint effort. We may see increasing numbers of mergers resulting from the failure of business firms, though I would take this occasion to remind you that an otherwise unlawful merger can be justified on failing company grounds only if no less anticompetitive partner can be found, a requirement which we will continue to insist must be met.

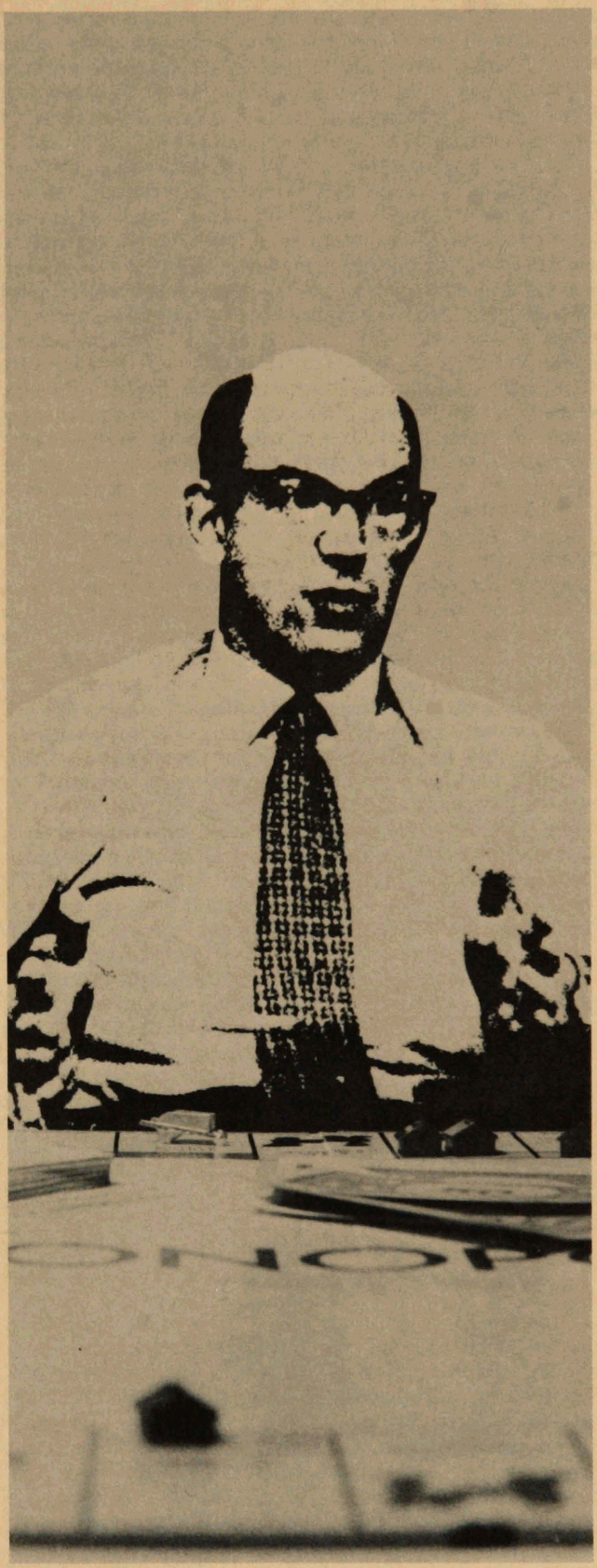
These, however, are in a sense details. On a broader scale, this is no time to slacken up enforcement efforts, or to ease up on or modify antitrust rules, merely because we are in economic difficulty. Some would disagree, and would argue that we should not further burden business with antitrust enforcement, at least until economic recovery is achieved. How far some would go in this direction is not clear; in the past, we have sanctioned some forms of price-fixing in the name of recovery. Most, I think, would agree that these efforts in the 1930s were a failure. But whether or not there is a sentiment to let the Blue Eagle fly again, some undoubtedly believe that antitrust enforcement is a good thing for good times and a bad thing for bad times. I strongly disagree.

Part of our present difficulty is a lack of consumer confidence in our economy and in our institutions. During past periods of recession, particularly during the 1890s, that lack of confidence seems to have arisen in part because of a public belief that the system was not adequately controlling serious abuses of economic power. I do not know how you read the American public, but I find that same concern one of the reasons for lack of confidence today. Thus, to allow such abuses, or even to appear to allow them, in the name of recovery seems self-defeating. To permit increases in economic power for the same reason would be even worse.

I think we also have enough experience to know that the very fact of sharply changing economic conditions, with its uncertainty and dislocation, can itself provide a strong motivation to fix prices, and to attempt to prevent the disruption of longstanding, economic relationships by allocating markets or other varieties of illegal self-help. Thus the incidence of violations may in fact increase during difficult times, and enforcement efforts must keep pace.

Nor is this a time to tolerate conduct which results in economic waste. There has been much discussion in recent months about the relationship between antitrust enforcement and inflation. We have put increasing emphasis, in our resource decisions, on conduct which directly results in price increases and restrictions on output. Thus, we have focused more than ever on the problem of price-fixing, in part in the belief that price-fixing does contribute to inflation. We do not suggest, of course, that an assault on price-fixing will cure inflation. But such an attack can, I believe, make a significant contribution. There has also been a continuing dialogue over whether concentration and pricing practices in concentrated industries have any relevance to inflation. As most of you know, economists disagree on this issue, some asserting that prices rise more slowly in highly concentrated industries than in those less concentrated. Others have asserted that even if this is the case, there is a ratchet effect arising from the fact that such prices also drop more slowly in times of recession, and thus never drop back to competitive levels. In any event, stickiness in prices itself tends to impede adjustment.

What all this suggests is that antitrust enforcement



[S]ome undoubtedly believe that antitrust enforcement is a good thing for good times and a bad thing for bad times. I strongly disagree.

must remain active whatever the general economic conditions we confront. If we are to rely on the free market as our fundamental regulator—and that is surely the direction of this administration—artificial restraints which make price levels unresponsive to changes in economic conditions, which encourage economic waste or slow innovation and cost reductions, are a barrier both to economic recovery and to reducing inflation. In large measure, many of the institutional problems we are attempting to deal with today are the result of ill-advised efforts to cure past economic difficulties by departing from free market principles. If we are to learn by experience, we will not repeat those mistakes today.

Put another way, I do not see in current economic conditions any reason for a diminution of our enforcement efforts. If anything, they suggest the need to intensify these efforts, in a way which is able to take into account changes in the competitive effects which may be brought about by the status of the economy as a whole. We are not prepared to tolerate price-fixing any more today than we were six months ago. We are as concerned with abuses of, and growth in, economic power today as we were in the past. In short, antitrust enforcement is as good in bad times as in good, and perhaps even more important.

Our strong emphasis on price-fixing will continue. We have now forwarded to our field offices a number of investigations, based upon comparative price analyses of regional markets by our Economic Policy Office. Based on past performance, a number of prosecutions may result. We will also continue our efforts against anticompetitive arrangements in the service sectors of the economy. I foresee no changes in the applicable merger standards. And we will continue our review and investigations in a number of highly concentrated industries.

On the regulatory front, we will continue to participate in a wide variety of agency proceedings . . . . Many members of the antitrust bar have expressed concern over the complexities arising from the interplay of antitrust rules and regulation, and some have suggested that the Antitrust Division's efforts have added greatly to this confusion. The way to handle these problems, they suggest, is not through particular proceedings but through legislation. We all must concede that there is some uncertainty, and so rather than talk [on this occasion] about our litigation or advocacy role in regulatory proceedings, I would like to address instead the division's role in legislative regulatory reform . . . . It is a time for change, for new directions. It is a time to reexamine, and to ask whether we really are doing things as well as we should.

Following the president's call last October for a study of federal regulatory activities and their possible adverse economic impact, we began the complex task of studying the various federal regulatory agencies and certain regulatory activities of the executive branch.

These studies are designed to be (and I assure you they will be) in-depth looks at the statutory mandates of the agencies, the background and stated historic purpose of the existing regulatory schemes, and the actual operation and economic effect of the current system. We will be looking hard at the relationship (if any) of the existing schemes to their stated or historic purpose, and what specific effects on economic efficiency the current schemes have. Finally, we will attempt to isolate specific desirable regulatory goals, and fashion the necessary legislative changes which must be made to blend the statutory mandate and directions of the regulatory agencies to those specific goals in such a way as to eliminate unnecessary and wasteful economic restraints.

With this general approach in mind, let me touch on the major areas we are working in. First, and probably

most important, is transportation, with major emphasis on surface and air transportation.

Transportation regulation has been a topic of discussion and analysis for some years now, both within and outside the government. Despite all this discussion, and despite the general agreement that reforms are necessary, no real reforms have been made.

This lack of reform has not been for lack of effort. In 1971, the administration submitted the Transportation Regulatory Modernization Act of 1971. In 1974, it proposed the less comprehensive Transportation Reform Act of 1974. Neither of these bills was passed by the Congress. It has become clear that no reform is likely until the public realizes why it is necessary, and one of the goals of our work is to present a reasoned and rational analysis of the current regulatory system, its strengths and its weaknesses.

Those who have listened to me in the past know that I believe quite strongly that surface and air transportation suffer from excessive economic regulation, and that this excess regulation results in substantial economic waste. Prices are high, more fuel is consumed than is really needed, and environmental problems are created that could be avoided. The ultimate effect is higher costs to the consumer and, since transportation costs are part of the price of almost every product, these higher costs have quite general application throughout the economy.

In examining how to improve the performance of our surface transport system we are considering a number of issues. These include entry and exit rules, and licensing restrictions, particularly commodity, circuitous routing, and backhaul requirements. We are studying ratemaking procedures and the possibility (and effect) of the elimination of antitrust immunity for most rate bureau activities as well as for mergers and acquisitions. Clearly, any reforms must be consistent with assuring that common carriers in fact serve all shippers on reasonable terms which can be ascertained in advance.

The basic goal, obviously, is to eliminate economic regulation where it is unnecessary or counterproductive, and to insure that continued regulation is properly directed so as to permit affirmative economic regulatory action only where necessary to meet some clearly defined economic goal. Here again, we are seeking in these bad times to learn from our adverse experiences in dealing with past bad times. The one lesson that is crystal clear is that governmental regulation is not a panacea, and may indeed exacerbate rather than cure the problem.

In air transportation, we are also studying the desirability of easing entry and exit restrictions. The effect of the elimination of CAB control over rates is being carefully considered, along with the idea of phasing out such controls over a period of years. Existing antitrust immunities are also being given careful attention. Based on the experiences of intrastate air transportation in Texas and California, more flexible entry and pricing policies have the potential of providing considerable public benefits. . . .

Another major area of study is the financial field. We worked on and strongly supported the administration's 1973 financial reform proposals, and this past experience has formed a base for our current efforts. Many of the changes contained in the 1973 proposals will undoubtedly find their way into our conclusions. But for this study, we are not limiting our consideration to past legislative efforts. For our review to be complete we must look at and consider the effects of such additional questions as, for example, restrictions on entry, and whether more precise rules are needed to control bank expansion by merger and acquisition. It may well be that significant changes in the existing regulatory and antitrust rules will appear desirable if our financial institutions are to be effectively and efficiently regulated. The development of electronic technology for the delivery of banking services renders this analysis even more essential and the evolving character of that technology must be given significant weight in any rational economic analysis of financial regulation. . . .

Another whole area of economic regulation which may no longer serve any legitimate purpose is agriculture. The treatment of cooperatives, under the Capper-Volstead Act, poses a number of issues of both structure and behavior. There are significant regulatory activities, carried on under the aegis of the Agriculture Department which are being carefully reviewed. For instance, is there a continuing justification for the elaborate system of federal milk marketing orders? What of the price support programs of various and sundry kinds dealing with a wide variety of agricultural assistance programs? Does the basic concept of "parity pricing" continue to make economic sense? Marketing orders and marketing agreements, and the mechanisms and procedures utilized to adopt and implement those arrangements, are also areas of concern, as are such indirect regulatory devices as import quota programs.

About the only conclusion we have yet been able to draw from our work in the agriculture area is that it is enormously complicated. The regulatory schemes appear to be overlapping and complex, and the stated or intended purposes of this maze of regulations have in some cases been obscured by the mists of history. We are not the world's experts in this field, but hopefully we will be able to provide some new perspective on this massive regulatory system, whose very existence is largely unkown to the consuming public.

We are also devoting considerable resources to such areas as communications, where among other questions the regulation of cable television presents important issues; the securities field, where such developments as the consolidated tape, the central market and the forthcoming elimination of fixed commission rates promise great changes; anti-dumping statutes and procedures; natural gas pipelines; electric utilities; ocean shipping; broadcasting and insurance. . . .

As you can see, we have not been bashful, and it may well be that our schedule calling for completion of the complete Regulatory Reform Project by the end of February may be somewhat optimistic. Still, I think you would discover by talking to the division personnel who are involved in this work that we are not simply spinning wheels. A large number of division lawyers and economists are devoting a considerable portion of their time to this project, and they are working hard. I attach high priority to this effort, and we will have a final product in the near future.

Consideration of legislative proposals cannot be limited solely to classic economic regulation, and so we are also examining legislative proposals more directly in the antitrust field. Two areas warranting new attention, I believe, are the Robinson-Patman Act and fair trade.

The Robinson-Patman Act was adopted during the Depression, with little thought given to its effect on long-run economic efficiency. Today, given our general concern with the state of the economy and our specific need to promote economic efficiency, Robinson-Patman clearly deserves re-examination. There are obviously several alternative methods of dealing with the act. It could be left as it is. It could simply be repealed. It could be amended to perserve special remedies against anticompetitive price discrimination but eliminating language which discourages legitimate price competition. We are not at all certain yet what the best course is. What is clear is that we need to be thinking about it and, to the extent necessary, doing something about it.

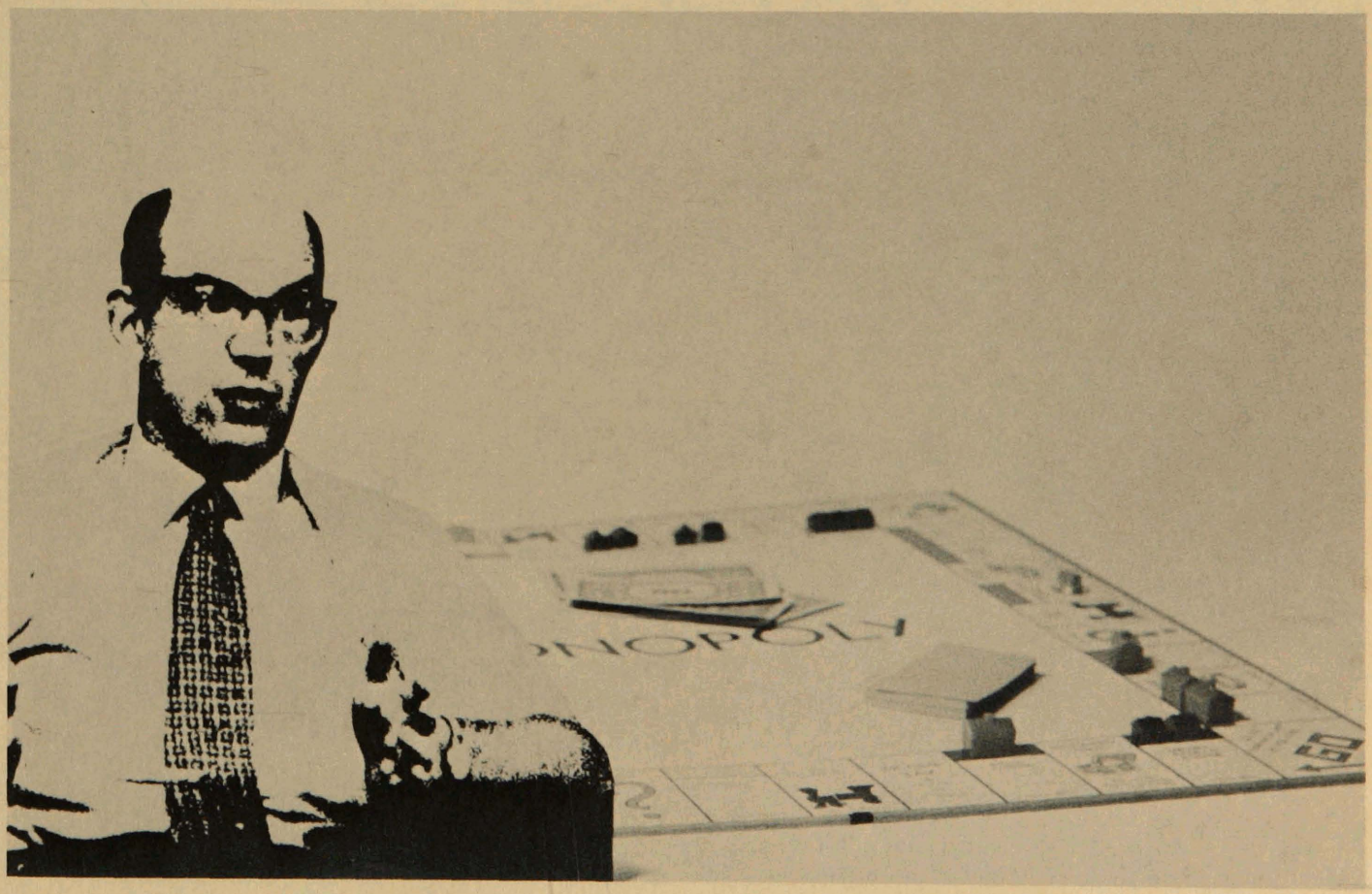
I have previously indicated my feeling that it is past

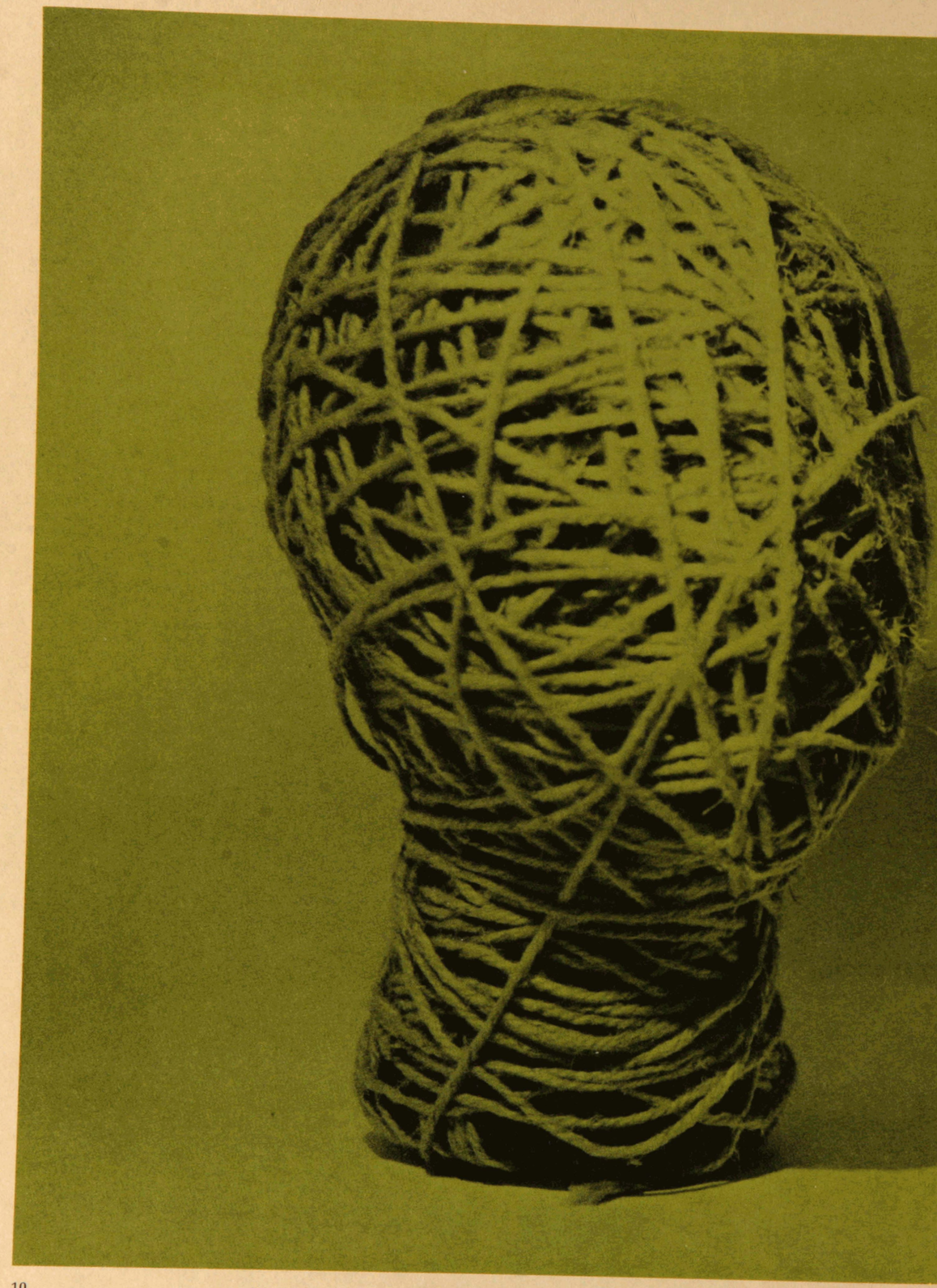
time for the federal fair trade enabling statues, the Miller-Tydings Act and McGuire Act, to be repealed. This legislation is a sibling of Robinson-Patman, conceived during the same period. Today, however, there is a consensus among economic observers that the existence of fair trade practices results in higher prices; indeed, that is now recognized as the very reason for the continued existence of fair trade laws. But in addition to these direct economic losses, fair trade laws and the practicies they allow may well have other adverse economic impacts. Fair trade price lists may spill over into non-fair trade states, in the form of "suggested retail" price lists, thus resulting in a higher price level generally for particular products. Fair trade practices also frequently provide a convenient cover for other clearly illegal collective restraints. Finally, fair trade prices when enforced introduce undesirable rigidities into the retail price structure and contribute both to the maintenance of inefficient firms and to excess capacity in the distributional chain. In these days of higher and higher prices, when we are searching for ways to free up economic marketplaces and allow market forces to effectively operate to promote efficiency, the fair trade laws are an anachronism which have no place in our economic system.

Finally, we continue to believe that passage of the proposed amendments to the Antitrust Civil Process Act would significantly aid our efforts to more vigorously and effectively enforce the antitrust laws. Antitrust cases are, as you know, complex and extensive litigation proceedings generally requiring lengthy investigations and frequently resulting in the accumulation of voluminous data. Passage of the Antitrust Civil Process Act in 1962 was extremely helpful, but it has become clear that the act has some important limitations. Thus, even today, the speed with which our investigations can be conducted depends to a significant extent on the level of cooperation of persons having relevant information. The proposed amendments to the act would significantly increase our authority to compel the production of relevant information by providing us the ability to require written interrogatories, to take oral testimony, and to require the production of documents from individuals as well as corporations with relevant information. The net effect of these amendments would be to expedite particular investigations and thus allow us more effective use of our limited resources. We believe these amendments are very important and we would hope that the Congress could affirmatively act on these amendments within a very short time.

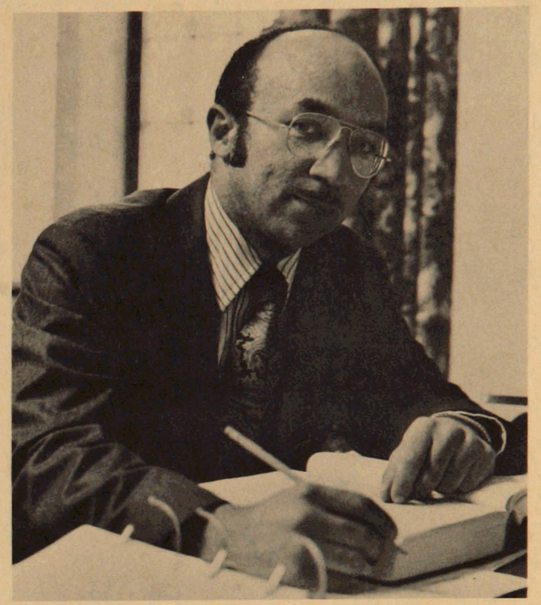
Let me now end where I began. That the times are bad no one can deny. But it is not a time for gloom. It is not a time for patchwork solutions. And it is not the time, in haste, to repeat the mistakes of the past and depart from our free market mechanisms. But it is a time of opportunity, a time for ideas, for reform, for self-examination, and a time to make this nation lean and tough. How we respond will ultimately determine whether this truly was the best or worst of times.

In large measure, many of the institutional problems we are attempting to deal with today are the result of ill-advised efforts to cure past economic difficulties by departing from free market principles.





Substantive Legal Developments Under Title VII



by Professor Harry T. Edwards

This article is based on a paper delivered by Professor Edwards at the Illinois Institute of Continuing Legal Education, Chicago, Ill., on October 25, 1974. Citations to cases will be furnished on request to Professor Edwards.

During the past few years, the proscription against employment discrimination under Title VII has been an expanding concept, embracing more and more employment practices formerly believed to be sacrosanct. As a result of this conceptual expansion, equal employment opportunity has become a powerful legal principle. This is best seen by the fact that the impact of Title VII and related laws is now being felt at all levels of employment. No longer is Title VII merely a tool for the blue collar worker; it is now being used effectively to challenge job practices affecting teachers, policemen and firemen, white collar workers, lawyers, technicians, managers, and the like.

Given this tremendous impact, it is impossible now to simply "highlight" substantive legal developments under Title VII. The legal precedents are too manifold and the issues too complex. Therefore, rather than attempt to outline all of the recent developments under Title VII, I would like to discuss several important substantive developments which have caused the proscription against employment discrimination to be an expansive legal concept.

The Griggs Decision

Following the passage of Title VII, some of the early court decisions dealing with race discrimination developed a new approach focusing on discriminatory *effects* (rather than intentions) to challenge a great variety of employment practices which excluded minorities from positions in the job market. This new interpretive approach reached maturity in the Supreme Court's landmark opinion in *Griggs v. Duke Power Co.*, where the Court issued the following rulings:

The objective . . . of Title VII is . . . to . . . remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. . . .

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. . . .

If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . .

Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. . . .

The *Griggs* decision is obviously one of the most profound and significant Supreme Court opinions handed down during the past several decades. The opinion is significant because it accepts, almost without equivocation, the need for and concept of equal employment opportunity. It is profound because it literally appears to define the proscription against discrimination under Title VII in the broadest possible terms. The *Griggs* decision plainly says more than what was necessary to decide the particular case; it is, in short, a policy directive to the lower courts to rigidly enforce the Congressional mandate against employment discrimination.

For the most part, the lower courts have been able to interpret and apply *Griggs* without difficulty. The language in *Griggs* is so sweeping in places, however, that it has raised several important and difficult issues which may eventually have to be resolved by the Supreme Court. However, since the lower courts have been dealing with these issues with greater frequency during the past two years, I would like to raise and discuss several of them with you.

Does Title VII Cover Pure "Effects" Discrimination?

The federal courts have consistently applied the *Griggs* rule to cases involving the present consequences of past discrimination. A recent example of this was seen in *Head v. Timken Roller Bearing Co.* In *Head*, the Sixth Circuit rules that a "limited bid" seniority system (under which entry to certain higher skilled and highly paid jobs required previous experience in specific qualifying occupations) might violate Title VII if it perpetuated the effects of prior discrimination. The court also ruled that the departmental seniority system was unlawful. The company had argued that every request for a transfer made by a black employee was granted; the court noted, however, that "even if this is accurate, it is irrelevant. The question is not whether [the company] prohibited blacks from advancing to better jobs, but whether it discouraged them" by enforcing the departmental seniority system.

The courts have also held, with greater frequency, that "past discrimination" under *Griggs* may be shown by statistical evidence without regard to motivation. This approach was recently followed in *Meadows v. Ford Motor Co.*, where it was held that the employer was guilty of sex discrimination by maintaining a policy requiring production workers to weigh at least 150 pounds. The court relied on facts showing that 80 percent of all women between the ages of 18 and 24 could not satisfy the job requirement, whereas 70 percent of all men in the same age group could meet the weight limitation. "Past discrimination" was shown by reference to statistics which indicated that no women employees had been hired on the production line until April 13, 1972. Since there was no clear evidence to show that there was a direct correlation between weight and strength, the rule was found to be violative of Title VII.

The difficult question which arises under *Griggs* is whether Title VII covers the "*present* effects of *present* discrimination." The *Griggs* case presented a factual situation involving the "present effects of past discrimination," and, as to this, the Court ruled that:

practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

However, the Court's decision also appears to outlaw the "present effects of present discrimination." On this point, the opinion states that:

If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.

At least two circuits, the eighth and the ninth, have ruled that Title VII covers pure "effects" discrimination.*(Wallace v. Debron Corp.* and *Gregory v. Litton Systems, Inc.)*. The Eighth Circuit decision in *Wallace* was handed down in 1974. In *Wallace*, the court held that the discharge of a black employee because his wages were garnisheed twice within a 12-month period might violate Title VII. The employer, for purposes of gaining a summary judgment, conceded that its facially neutral garnishment policy subjected a disproportionate number of blacks to discharge from employment. However, the employer argued that only those facially neutral employment practices which have the effect of perpetuating prior racially discriminatory practices are violative of Title VII absent a showing of business necessity. The Eighth Circuit rejected this argument, adopted instead the rationale of *Johnson v. Pike Corp. of America*, and then ruled that:

For us to take any position other than one which requires that all employers remove all artificial, arbitrary, and unnecessary racial barriers to employment would be inconsistent with the broad purposes of Title VII; would permit many employers (those with no past history of discrimination and new employers) to erect such barriers; and would result in an inequitable and unequal enforcement of the Act.

The employer in *Wallace* also argued that "there can be no Title VII violation when dismissal from employment is caused by an employee's *voluntary* conduct under-

The Griggs decision . . . is, in short, a policy directive to the lower courts to rigidly enforce the Congressional mandate against employment discrimination.

taken with knowledge of the consequences. In rejecting this contention, the court simply stated that "there is no evidence in the record that garnishments generally are the result of voluntary conduct undertaken with the knowledge of the consequences." However, it is noteworthy that the court did not expressly reject the "voluntary conduct" theory.

An interesting side issue apparently arose during the district court trial of *Wallace*. The district court judge upheld the validity of the garnishment rule and reasoned that if the rule were invalidated as to black employees then the continued enforcement of the rule against white employees would result in an unlawful preference for a minority group. In reversing the lower court, the Eighth Circuit ignored this argument, apparently recognizing it to be patently absurd. It must be assumed that if a rule is invalidated pursuant to Title VII it could not thereafter remain in force against all employees other than black employees.

Since the only two circuits considering the issue have read *Griggs* to cover pure effects discrimination, and since the Equal Employment Opportunity Commission (EEOC) guidelines plainly embrace such conduct, the issue may be resolved without the necessity of further Supreme Court review. Indeed, it is not at all unreasonable to read *Griggs* to proscribe *any* employment practice which is not job-related and which has a disproportionate impact on a protected class of persons covered by Title VII.

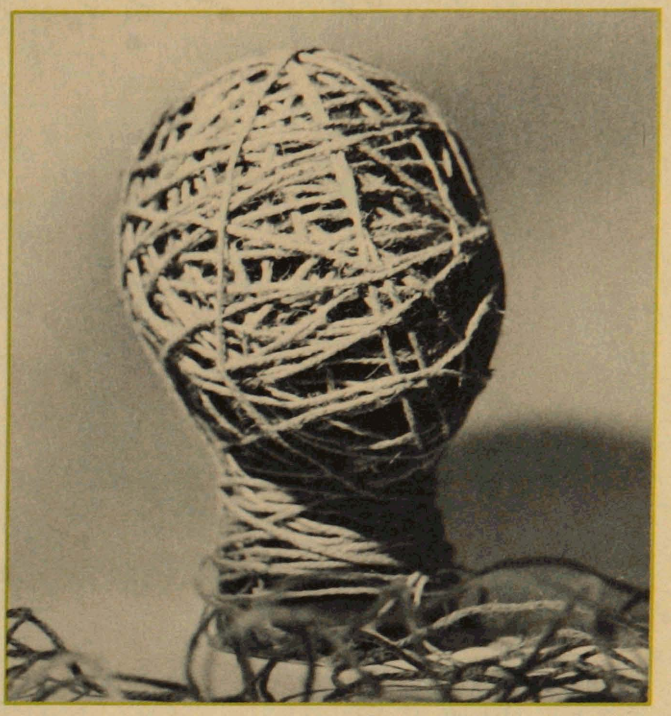
Statistical Data Used to Measure The "Present Effects of Present Discrimination"

If it may be assumed, *arguendo*, that Title VII was intended to cover the present effects of *present* discrimination, a question remains as to how to measure "disproportionate impact" on a protected class. Unfortunately, the EEOC and the courts have thus far failed to establish any clear guidelines for the measure of "disproportionate impact," and the matter has consequently become a significant issue of concern for defendants in Title VII cases. One of the problems in this area is that several EEOC opinions and some court decisions simply conclude that a challenged employment practice has a "disproportionate impact" without describing the statistical evidence used to reach the conclusion.

For example, in EEOC Decision No. 74-34, an employer's policy of discharging employees who incurred two or more garnishments was held to be unlawfully discriminatory against minority employees who were statistically more likely to suffer wage garnishments than the general population. The EEOC found that "the proportion of racial minorities among the group of people who have had their wages garnisheed is significantly higher than the proportion of racial minorities in the general population." To support this conclusion, the EEOC merely pointed to the fact that the company's records demonstrated that "of the four employees who suffered wage garnishments between March of 1971 and March of 1972, three were Negro." The EEOC also cited *Johnson v. Pike Corporation of America*.

In *Johnson v. Pike Corp.*, the court relied on statistical data from Los Angeles County, plus some national economic data, to support a conclusion that the employer's garnishment rule had a disproportionate impact on minority persons.

In EEOC Decision No. 74-92, the rejection of a black job applicant due to his arrest record was found to be violative of Title VII where statistical evidence indicated that arrest inquiries had a disparate impact on minorities. The commission relied on local statistical data which showed that many more blacks than whites



were arrested for assault offenses. The EEOC also relied on national population statistics which indicated that black persons tended to be arrested more frequently than white persons.

These three decisions, and others like them, are problematical only because they do not reveal when plaintiffs should be allowed to use statistical data from the nation as a whole to prove that a particular employer's practice or rule has a "disproportionate impact." On the other hand, if local and national statistical data served equally well to prove "disproportionate impact" in the arrest record and garnishment cases, then the EEOC and the court may have deemed it unnecessary to distinguish between these different measures of disproportionate impact. However, the decisions do not address this issue and, therefore, they offer no useful guidance on the point.

A different and possibly a better approach was adopted by the Fifth Circuit in *Johnson v. Goodyear Tire and Rubber Co.* In *Johnson* the court ruled that the employer had violated Title VII by requiring Negro employees hired into the labor department to have a high school diploma as a condition for transferring to other departments. The court ruled that diploma requirement had an ascertainable discriminatory impact on prospective black employees because the 1960 census revealed that only 39.9 percent of the blacks living in Texas possessed a high school diploma, as compared with 66.9 percent of the white population; and only 25.3 percent of the blacks living in Houston possessed a high school diploma, as compared with 45.8 percent of the white population. The 1970 census statistics for Texas and Houston revealed that although the educational gap was closing it had not been dissipated. The employer argued that the statistics should be limited to the 16-24 age group and to blacks living in the immediate Houston area. The court rejected the employer's contentions and ruled that:

> Goodyear's geographic and age limitations conveniently ignore the recognized mobility of today's black labor force and the obvious fact that the potential labor pool cannot be limited to one particular age group. A "young" black individual, whether age 25 or 45, is a potential employee in the Goodyear plant. Moreover, a black individual of rural Texas today may be an active participant in the Houston labor pool tomorrow.

The Fifth Circuit approach, which appears to measure "disproportionate impact" by considering statistics from the relevant "job market," is seemingly consistent with the approach used by the Supreme Court in *Griggs*. In *Griggs* the Supreme Court measured "disproportionate impact" by looking at census figures which showed that only 12 percent of the black males in the state of North Carolina had completed high school, compared with 34 percent of the white males in the state. Thus, the *Griggs* opinion, while not explicit on the point, at least tacitly adopted a "job market" (and not a national) measure of disproportionate impact.

The "job market" measure of disproportionate impact will likely prevail once the issue has been fully argued and resolved by the courts. The "job market" concept, at least as defined by the Fifth Circuit, is not a restrictive concept. The applicable "market" may include an entire state or an entire region of the country. In *United States v. Georgia Power Co.* the Fifth Circuit looked to statistics from the "South" as a whole to measure the disproportionate impact of a particular employment policy. This approach, which might also include national statistical data for employers who recruit nationally, is a useful and practical mechanism for the measure of disproportionate impact. Under this approach, an employer is forced to recruit in a wide but not unreasonable geographic area. In addition, the "job market" approach properly takes account of worker mobility by recognizing that prospective employees will travel reasonable distances to new jobs. Furthermore, this approach recognizes, at least implicitly, that "national" statistical data is not always the best measure of disproportionate impact.

Example: If "job market" statistics are used, a given rule may have a disproportionate impact on white persons; however, if national statistics are used the same rule may have a greater disproportionate impact on black persons. Such a situation may not really be troublesome because the rule, if not justified by "business necessity," would be unlawful in either case.

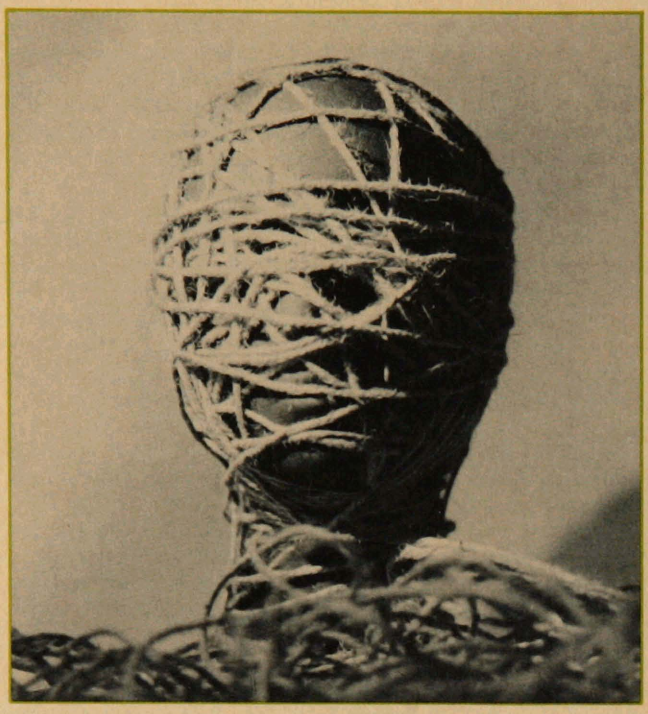
Example: A more troublesome situation would arise where an employer enforced a rule which had an unlawful disproportionate impact on black employees on the basis of national statistics but an equal impact on black and white employees when evaluated in terms of "job market" statistics.

Validation of Employment Tests

Probably the most important and the most difficult issue arising under *Griggs* concerns the validity of employment tests. The *Griggs* decision has been uniformly interpreted to require that employment tests actually measure or predict job performance. The use of any employment selection procedure which has an adverse impact on a protected class is considered to be violative of Title VII unless the procedure has been validated. However, non-validated tests are not violative of Title III *per se*; a violation will be found only when a test which has not been validated has an adverse impact on a protected class.

In the years since *Griggs*, governmental and judicial scrutiny of testing procedures has become an extremely important part of the process of policing employment discrimination. The standards and regulations used by the various agencies charged with enforcing equal employment opportunity have become so complex and confusing that many employers are doubtless tempted to scrap testing altogether and rely on mere random selection. Some have even suggested that this was the intent of the regulations in the first place.

During the past year and a half, there has been a movement to develop a set of uniform guidelines which can be used by federal officials at the Department of Justice, Department of Labor, Civil Service Commission, and the EEOC in the enforcement of equal employment opportunity. In August of 1973, an Equal Employment Opportunity Coordinating Council (EEOCC) published its first draft of a set of uniform guidelines. Following publication of these guidelines, the EEOCC invited criticism and comments from interested groups. Subsequently, in July 1974, a second draft of the uniform guidelines was published by the EEOCC.



One of the controversial aspects of the original uniform guidelines was the broad definition given to the term "test." In the first draft of the guidelines all standardized tests, plus all application forms, personal history interview forms, physical and work history reports, and interviews which were rated by some kind of formal scale were considered tests. However, the second draft of the guidelines defines "test" more narrowly, to include only "standardized, formal, scored, or quantified measures . . . used as a basis for employment decision." Furthermore, the second draft of the guidelines plainly excludes informal personnel procedures, "such as unscored or unstandardized interviews," from the definition of test.

The latest draft of the uniform guidelines also adopts the four-fifths rule for determining adverse impact. The four-fifths rule operates as follows: the employer keeps separate records relating to the selection rate for the affected minority group and for the majority of the employees. If the selection rate for any protected group is less than four-fifths of 80 percent of the rate for other groups, this is viewed as constituting evidence of adverse impact.

The guidelines mention three methods of validation—criterion-related validity, content validity, and construct validity. Regardless of which method is used, the guidelines require that job analysis be conducted. This is necessary in order to evaluate whether the test measures the individual for the job. Obviously, an employer who has only vague notions of what the job entails will be hard pressed to justify the job-relatedness of any test. If the position in question is one with rather sophisticated duties, professional job analysis may be necessary.

Once the job analysis is completed, the test may be shown to be job-related in accordance with one of the three methods of validation mentioned in the guidelines. Time will not allow me to analyze the validation procedures described in the guidelines. It is enough to

say at this point that the proposed guidelines are significantly more rigid and precise than the existing EEOC Guidelines On Employee Selection Procedures, 29 CFR 1607.

The guidelines clearly indicate that employment tests should be validated pursuant to some professional standards, such as those stated by the American Psychological Association, in *Standards for Educational and Psychological Tests* (Washington, D.C. 1974). The courts, with rare exception, have also generally required employers to validate tests pursuant to professionally accepted validation procedures *(U.S. v. Georgia Power Co.)*. However, in a few special circumstances, where the use of professional validation procedures would be unfeasible, the courts have allowed "homemade" validation procedures to pass muster under Title VII.

The guidelines also suggest that "differential validity" studies may be required to validate certain employment tests. On this point, the guidelines note that:

> When one racial, ethnic, or sex group characteristically obtains lower scores on a selection instrument than another group without corresponding differences in job performance, use of the selection instrument may unfairly deny employment opportunities to the group that obtains the lower scores.

Thus far the courts have failed to conclusively state whether "differential validity" tests are required by Title VII. The Fifth Circuit, in *U.S. v. Georgia Power Co.*, noted that "differential validity" may be required where "the possible fair employment implications are so great as to require separate racial group validation of tests . . . [and where] there exists an available minority race sample of adequate size to conduct such a study."

Apart from some of the more difficult issues heretofore raised, the federal courts have generally been rigid in enforcing the existing EEOC regulation requiring that "evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job" (29 CFR 1607, 4(c)).Recent cases have continued to adhere to this standard:

1) Tests which rely on subjective discretionary evaluations by white supervisors, which tend to perpetuate past discrimination against blacks, are unlawful.

2) High school diploma requirements, which are not shown to be job related, have been held to be unlawful.

3) "General knowledge" which is not job-related is not a valid basis for job screening.

4) However, several courts have recently ruled that "experience" may be a bona fide qualification for promotion.

5) It is also interesting to note that the proposed new "uniform guidelines" make it clear that "selection procedures may be used to predict the performance of candidates for a job which is at a higher level than the job for which the person is initially being selected, if it is probable that the individual . . . will progress to the higher level job within a reasonable period of time." This guideline may resolve one of the issues left open by the Supreme Court in *Griggs*.

An interesting decision involving employment tests was recently handed down by the Fourth Circuit in *Young v. Edgcomb Steel Co.* In *Young*, the plaintiff had been denied a promotion on the basis of his test score on a Wonderlic test, which was found not to be job-related. The district court properly found a violation of Title VII, but denied Young his promotion on the basis of errors in spelling, grammar, and punctuation in his complaint to the EEOC, and his mispronunciation of the names of some of his co-workers when he testified. Needless to say, the Fourth Circuit reversed, holding that the district court action was an improper usurpation of a management function. The case was remanded to the district court to enter a decree requiring the employer to re-evaluate Young's qualifications for the next opening using non-discriminatory, objective, job-related standards.

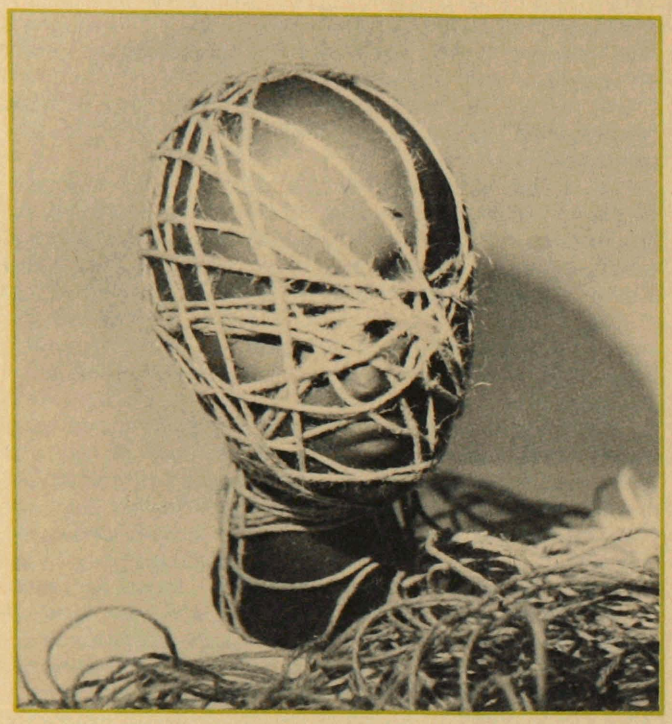
The standards and regulations . . . have become so complex and confusing that many employers are doubtless tempted to scrap testing altogether and rely on mere random selection.

The Legality of Quota Remedies under Title VII

During the past few years, issues relating to quota remedies and claims of reverse discrimination have flowered in a number of legal contexts. The constitutional debate over the legality of quota remedies was recently fueled by the Supreme Court's decision in *DeFunis v. Odegaard*.

However, the problems relating to preferential goals and percentage quotas have not heretofore been serious issues under Title VII. Very few courts have had occasion to deal with these issues and, until recently, very little publicity has been given to the problem. All of this may change as a result of a 1974 decision handed down by the Second Circuit in *Rios v. Steamfitters, Local 638*. The *Rios* decision squarely raises and resolves the issue of the legality of quota remedies under Title VII. In *Rios*, the district court found that the defendant union had a long history of excluding non-whites from union membership and refusing non-whites access to the union apprenticeship program. To remedy this discrimination, the district court ordered the union to submit an affirmative action program design to secure the admission of a sufficient number of non-whites to membership "to achieve a minimum goal of 30 percent non-white membership by July 1, 1977." The Second Circuit upheld the district court's use of numerical goals, citing two factors as being determinative. First, the facts disclosed a pattern of long-continued and egregious racial discrimination which permeated the steamfitting industry, precluding qualified non-white applicants from gaining membership to the union. Second, the court observed that: "the objective of a remedial quota is a limited one. It seeks to place eligible minority persons in the position which the minority would have enjoyed if it had not been the victim of discrimination."

Section 703(j) of Title VII provides that the statute shall not be interpreted to require an employer or union "to grant preferential treatment to any individual or group on account of an imbalance which may exist with



respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community . . . or in the available work force. . . ." The defendant in *Rios*, not surprisingly, claimed that section 703(j) barred the quota remedy. The Second Circuit, however, flatly rejected this contention and ruled that section 703(j):

> was intended to bar preferential quota hiring as a means of changing a racial imbalance attributable to other causes than unlawful discriminatory conduct. It does not prohibit the use of goals to eradicate the effects of past discriminatory practices. . . . The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy.

For some reason, the Second Circuit also felt constrained to mention and distinguish *DeFunis v. Odegaard*. In a passing reference, in a footnote, the court observed that:

> [DeFunis], which involved the constitutionality of preferential law school admissions, is clearly distinguishable, since that case does not involve the use of quotas to eradicate past discrimination. Moreover, unlike the entering class in the law school which had a fixed number of places, the union does not have a set or maximum number of members.

The court's attempt to distinguish *DeFunis* is questionable. Furthermore, the reference to *DeFunis* is gratuitous and unnecessary because the issue raised in *DeFunis* was never decided by the Supreme Court.

The decision in *Rios* also rejects the defendant's claim that a quota remedy is an unconstitutional form of "reverse discrimination." On this point the court noted that "the Supreme Court has recognized that 'mathematical ratios,' although forbidden if specified as a permanent or 'inflexible requirement,' may serve as a 'useful starting point in shaping a remedy to correct past constitutional violations.'" *(Swann v. Charlotte-Mecklenburg Board of Education)*.

Although the court accepted the principle of quota remedies, it nevertheless questioned the 30 percent figure selected by the district court. On this point, the Second Circuit observed that "the membership of the [union] is not drawn from the entire population. It has consisted of male workers over 18 years of age. Women have never sought to become steamfitters." The court opinion then goes on to suggest that "statistics as to the population of this work force during the pertinent period should provide a more accurate base than total population statistics for determining what would have been the percentage of non-white membership, absent discrimination, in the union." The court of appeals would presumably limit the quota remedy to a figure of about 20 percent because the opinion observes that "19.79 percent of the total work force over 16 years of age in the area over which the union has jurisdiction consisted of black and Puerto Rican males."

It is noteworthy that the court chose to intentionally exclude women from the potential labor force. This surely was a questionable judgment, for it reinforces a forbidden stereotype about the role of women in the job market.

The Second Circuit in *Rios* cited numerous judicial decisions supporting the proposition that a preferential goal or quota is a legitimate remedy to eradicate the effects of past employment discrimination. However, most of the decisions cited involved employment discrimination cases in the public sector (arising under Section 1983 of the Civil Rights Act of 1871), or cases arising under Executive Order 11246 (which forbids discrimination by government contractors). In the public sector, the courts are often faced with the argument of "reverse discrimination." The courts, however, have tended to avoid this constitutional question by limiting preferential hiring orders. Usually, before an order for preferential hiring is issued, the following conditions must be met:

1) There must be a finding of a history of discrimination against a protected group or statistical evidence showing a pattern of gross discrimination;

2) Members of the preferred class are required to satisfy job related employment tests;

3) The order is almost always temporary;

4) The order is sometimes conditioned to take account of the availability of the preferred group in the geographic areas nearby the place of employment;

5) And there is usually a finding that other available affirmative relief would be inadequate to overcome the present effects of the existing discrimination *(Castro v. Beecher; Commonwealth v. O'Neill; Morrow v. Crisler; Bridgeport Guardians, Inc. v. Civil Service Commission; Carter v. Gallagher; Porcelli v. Titus; NAACP v. Allen)*.

The *Rios* opinion is significant because it is one of the few decisions upholding the use of a quota remedy under Title VII. Five circuit courts of appeals have now approved the use of preferential goals and percentage quotas as remedies for unlawful discrimination under Title VII. It is interesting, however, that only one of these decisions *(United States v. N. L. Industries)* affords actual job preference on the basis of race. All the remaining cases which have arisen under Title VII compel either union membership or admission to a union apprenticeship program, which may or may not result in "job preference" for minority persons.

Whether or not the Supreme Court ultimately rules that quota remedies are barred under Title VII by section 703(j) is a matter that remains to be seen. However, the issue may be moot from a practical standpoint. For one thing, quota remedies are available in "race discrimination" cases under section 1981 of the Civil Rights Act of 1866 *(Carter v. Gallagher)*. For another thing, quota remedies are also available in the "public sector," under section 1983 of the Civil Rights Act of 1871, in cases involving race, sex, and national origin employment discrimination. There is also some authority to suggest that section 1981 includes claims of "race discrimination" brought by either black or white persons. Thus, even if section 703(j) is interpreted to forbid the use of quota

remedies under Title VII, quota remedies will still be available in many cases of employment discrimination under either section 1981 or section 1983. The most significant group of cases in which no quota remedy could be given (if Title VII is construed to forbid the use of such remedies) would be sex discrimination claims in the private sector.

Two recent cases decided by the Supreme Court in 1974 give some further support for preferential remedies, albeit in different legal contexts. In one case, *Morton v. Mancari*, the court ruled that the Indian Preference Statutes, which give Indians preference over non-Indians for hiring and promotion in the Bureau of Indian Affairs, were not repealed by the enactment of the 1972 amendments to Title VII. The court ruled further that the Indian Preference Statutes do not amount to racial discrimination in violation of the Constitution. In the second case, *Kahn v. Shevin*, the court upheld the constitutionality of a Florida statute giving "widows" a five hundred dollar exemption from property taxation. A male "widower" challenged the constitutionality of the statute after he was denied an exemption; the Florida Supreme Court found that the classification "widow" was valid because it had a "fair and substantial relation to the object of the legislation" of reducing "the disparity between the economic capabilities of a man and a woman." The Supreme Court held that the challenged tax law was reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden. The Court also ruled that the state law was not arbitrary even though it discriminated in favor of a certain class.

It is interesting and somewhat curious to note that Justice Douglas wrote the opinion for the majority in *Kahn v. Shevin* and he also authored the rather disjointed and somewhat incomprehensible dissenting opinion in *DeFunis v. Odegaard*.

Sex Discrimination

There have been relatively few significant court decisions in the area of sex discrimination under Title VII during the past year. Indeed, the most important case involving a claim of sex discrimination which was decided in 1974 arose under section 1983 of the Civil Rights Act of 1871.

In *Cleveland Board of Education v. LaFleur*, the Court ruled that school boards violated the due process clause of the fourteenth amendment by maintaining and enforcing maternity leave rules that required pregnant teachers to quit their job without pay a specified number of months before anticipated childbirth. The Court's holding on this point is vitally important because it is the first time that the Supreme Court has *clearly* recognized the female as an *individual* in an employment discrimination case. The language in the opinion states plainly some of what was left unstated by the Court in *Phillips v. Martin Marietta*; i.e. that the challenged rule was unlawful because it contained:

> an irrebuttable presumption of physical incompetancy, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

The Court also struck down a school board rule which prohibited a woman teacher from returning to work until the next regular semester after her child was three months old. On this latter point the Court rendered the following opinion:

> . . . Of course, it may be that the . . . rule is based upon another theory—that new mothers are too busy with their children within the first three months to allow a return to work. Viewed in that light, the rule remains a conclusive presumption, whose underlying factual assumptions can hardly said to be universally valid.

Although the *Cleveland Board of Education v. LaFleur* case arose under 42 U.S.C. § 1983, the principles stated should plainly be applicable in a Title VII case. The Court suggested as much in footnote No. 8.

In another 1974 opinion, the Supreme Court ruled that a state disability insurance program that excluded from coverage disability caused by normal pregnancy and childbirth did not violate the equal protection clause of the fourteenth amendment. The California law established a disability insurance program that paid benefits to persons in private employment who were temporarily unable to work because of disability not covered by workman's compensation. The program was funded entirely from contributions deducted from employees' wages. However, the program excluded "any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter." The Court noted that the state had a legitimate interest in attempting to maintain the solvency of the disability fund at a one percent annual level of contribution and noted further that:

> There is nothing in the Constitution . . . that requires the state to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has.

The Court also indicated that the California law did not involve "discrimination based upon gender as such." Rather, the Court stated that the "insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensible disabilities."

The dissenting justices in *Geduldig v. Aiello* argued that "by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for the disability compensation; a limitation is imposed upon the disabilities which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex." The dissenting opinion cited *Reed v. Reed* (where the Supreme Court unanimously struck down a provision of an Idaho probate code giving preference to men over women

Cleveland Board of Education v. LaFleur [marks] the first time that the Supreme Court has clearly recognized the female as an individual in an employment discrimination case.

when persons of the same entitlement class applied for appointment as administrator of a decedent's estate); and *Frontiero v. Richardson* (where the Court ruled unconstitutional federal statutes which declared that spouses of male members of the armed forces are dependents for fringe benefit purposes but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support).

The result in *Geduldig v. Aiello* really is not surprising since the case was decided on equal protection grounds and the Court has not as yet clearly found "sex" to be an inherently suspect classification under the equal protection clause. However, even though footnote No. 20 in *Geduldig* appears to suggest that distinctions involving pregnancy do not constitute discrimination because of sex, the *Geduldig* decision still may not be found to be controlling under Title VII. The EEOC Guidelines on Sex Discrimination require employers to treat disabilities caused by pregnancy as temporary disabilities under any health or sick leave plan and most federal district courts considering the problem have ruled that an employer violates Title VII by excluding pregnancy-related disabilities from sickness and accident benefit programs. The specific question as to whether *Geduldig* will be deemed to be controlling under Title VII was recently certified for opinion by the Second Circuit, so the issue may reach the Supreme Court for final resolution in the near future.

The only other important sex discrimination case to be decided during the past year arose under the Equal Pay Act. In *Corning Glass Works v. Brennen*, the Court construed the term "equal work" under the statute and then made it clear that the only way a violation can be remedied under the Equal Pay Act is for the lower wages to be raised to the higher wage level. In this case, the Court's ruling meant that the employer could not correct violations by simply opening the higher paid (male) jobs to both sexes as vacancies occurred, even though this might prove to be more than a token gesture and many women might be transferred into the higher paid job.

Title VII and Private Arbitration

Probably the least surprising and most publicized employment discrimination case decided in 1974 was the Supreme Court ruling in *Alexander v. Gardner-Denver Co.* The decision finally resolved the long-raging debate concerning the effect of a prior arbitration decision on employment discrimination claims under Title VII. *Alexander*, in the tradition of *Griggs*, is particularly noteworthy because the Court unhesitatingly and categorically rejects the contention that private arbitration may be used as a bar to individual employment discrimination claims under Title VII.

The facts in *Gardner* were relatively simple. Following a discharge by his employer, a black employee filed a grievance under the collective bargaining contract. The grievance, which claimed that the discharge resulted from racial discrimination, was eventually appealed to arbitration. In the interim, the employee filed a charge with the Colorado Civil Rights Commission and this charge was subsequently processed by the EEOC. The arbitrator then ruled that the discharge was for cause, and the EEOC later found no reasonable ground to believe that Title VII was violated. The employee nevertheless brought an action in district court alleging unlawful discrimination under Title VII. In reversing the two lower courts, and ruling against the employer's position, the Supreme Court made it clear that the doctrine of "election of remedies" was inapplicable. Rather, the Court observed that Title VII involved statutory rights which were distinctly separate from employees' contractual rights, even when the violation of both may have

[The Alexander case] unhesitatingly and categorically rejects the contention that private arbitration may be used as a bar to individual employment discrimination claims under Title VII.

resulted from the same factual occurrence. In short, the Court made it clear that an employee does not waive his cause of action under Title VII by processing a contract grievance claim. This is so because the arbitrator's authority is confined to resolution of questions of contractual rights, regardless of whether they resemble or duplicate Title VII rights.

The Court also plainly rejected the reasoning of the Sixth Circuit in *Dewey v. Reynolds Metals Co.* The Sixth Circuit in *Dewey* had relied on the doctrine of election of remedies. In a later case the Sixth Circuit described *Dewey* as resting on the doctrine of equitable estoppel and on "themes of *res judicata* and collateral estoppel." *(Newman v. Avco Corp)*. The Supreme Court in *Alexander* observed, however, that "the policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel."

The decision in *Alexander* plainly does not forbid the arbitration of employment discrimination claims. However, the Court does reject the "deferral standard" which had been adopted by the Fifth Circuit in *Rios v. Reynolds Metals Co.* On this point, the Court noted that:

> We think . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.

However, the opinion in *Alexander* hedges somewhat on the deferral question. In footnote No. 21, the Court says:

> We adopt no standards as to the weight to be accorded an arbitral decision. . . . Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight.

This passing comment may raise some serious problems in the future. If the district courts view this Supreme Court statement as a general license to defer to arbitration decisions, then the primary principle of *Alexander* will be severely diluted upon implementation. The difficulty with the Court's caveat is that it allows for deferral with no standards to guide the lower courts. Even worse, the Court in *Alexander* suggests that the

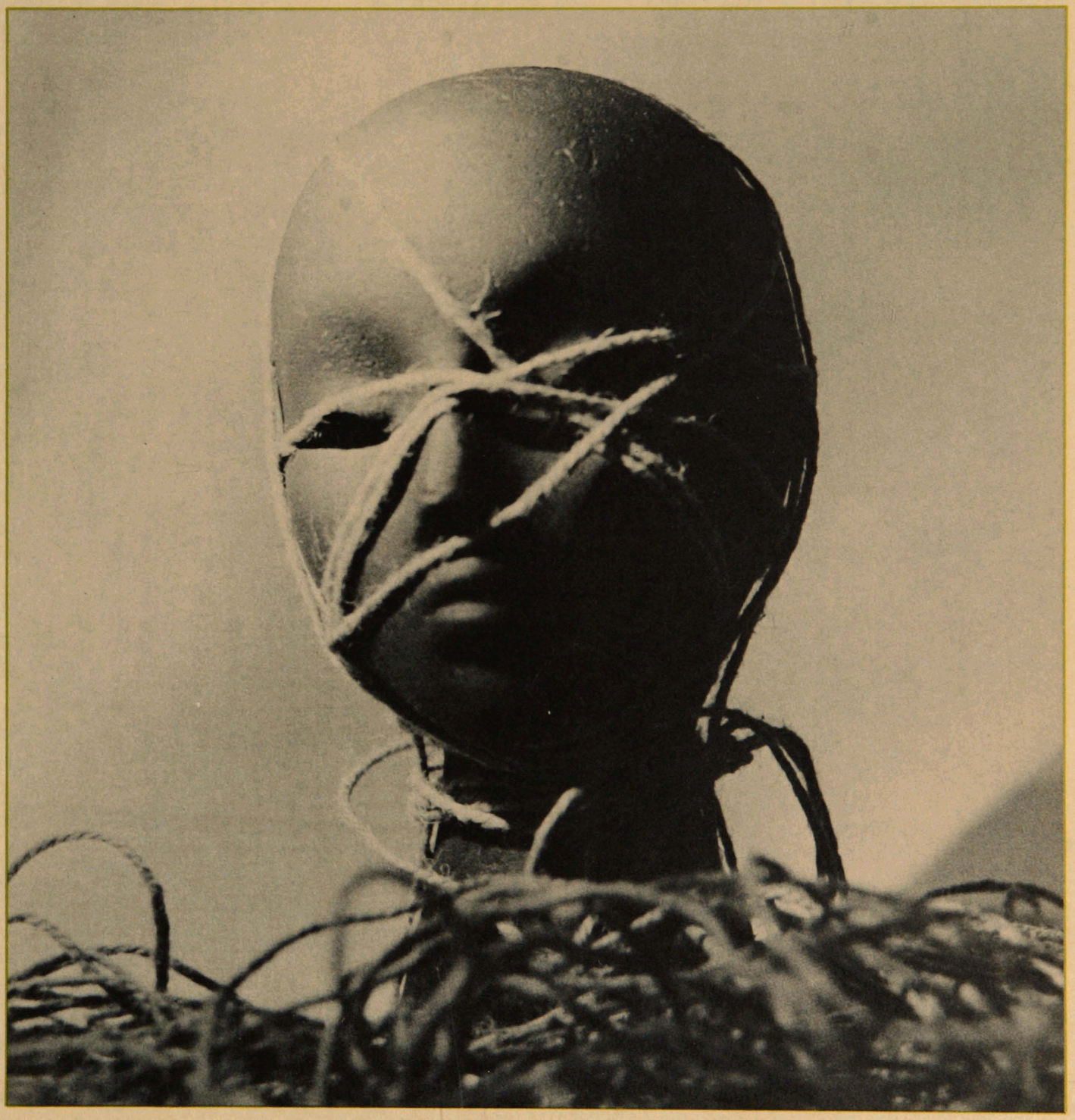
lower courts should consider "the special competence of particular arbitrators" in deciding whether to accord an arbitration decision "great weight." It certainly is not clear how the court would propose that "special competence" should be judged.

It should also be noted that, under the terms of the *Alexander* decision, a union may apparently still be found guilty of a breach of the duty of fair representation if it fails to prosecute employees' legitimate claims of employment discrimination under a contract grievance procedure.

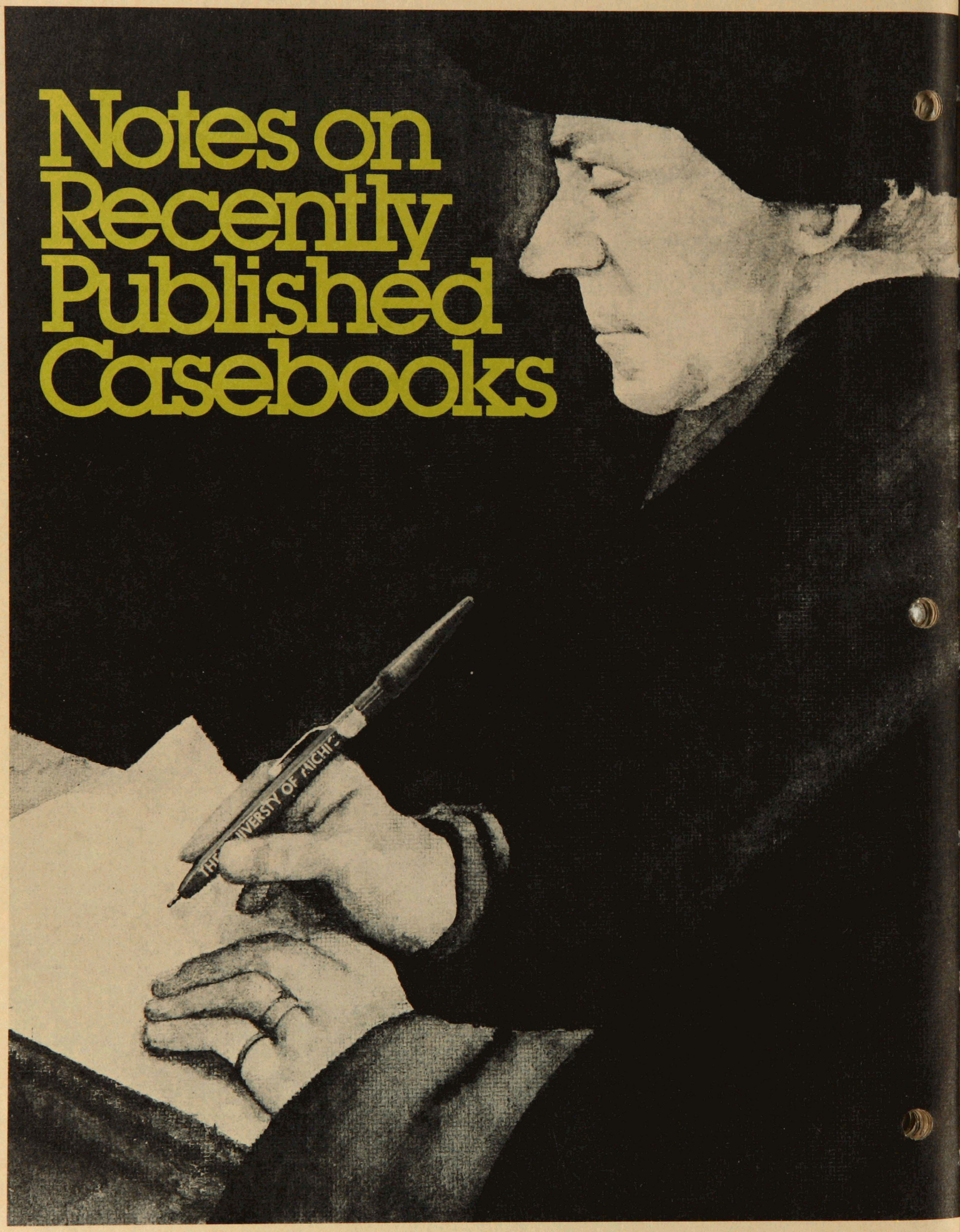
Conclusion

Time will not permit me to review a number of additional substantive issues of importance which have recently arisen under Title VII. For example, the *Detroit Edison* case, in which a federal district court assessed $4 million in punitive damages against the employer, and $250,000 against the union, for malicious discrimination under Title VII, obviously raises a host of important issues. There have been a number of recent cases construing the "reasonable accommodation" requirement and the "undue hardship" exception in religious discrimination cases under Title VII. The Supreme Court recently ruled that discrimination against aliens was not discrimination on the basis of national origin under Title VII *(Espinoza v. Farah Mfg. Co.)*; and there have been several interesting cases recently decided involving employment discrimination claims by federal employees against governmental agencies.

These cases, along with the others already mentioned, serve to highlight the continuing impact of Title VII.



Notes on Recently Published Casebooks



with apologies to Hans Holbein the Younger, ca. 152

Editor's Note: The following are summaries of recently published law casebooks written by professors from the Law School in collaboration with other lawyers and professors. These are the casebooks covered:

Cases and Materials on the Employment Relation, by Professors Wex Malone of Louisiana State University Law School, Joseph W. Little of University of Florida Law School, and **Marcus L. Plant** of U-M Law School.

Labor Relations Law in the Public Sector: Cases and Materials, R. Theodore Clark, Jr., of Chicago, and **Emeritus Professor Russell A. Smith** and **Professor Harry T. Edwards** of U-M Law School.

Cases and Materials on Property: An Introduction to the Concept and the Institution, by Professors Peter W. Martin of Cornell Law School, and **Charles Donahue, Jr.**, and **Thomas E. Kauper** of U-M Law School.

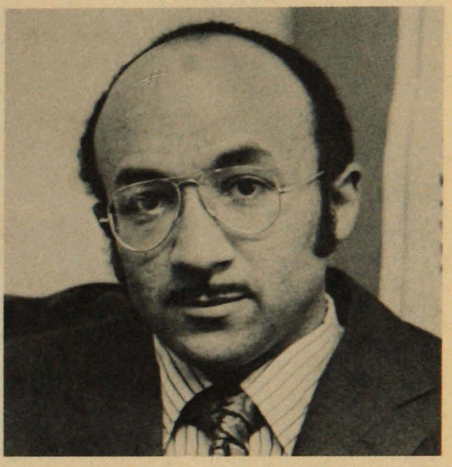
Teaching Materials on Commercial and Consumer Law, by Professors Richard Speidel of University of Virginia Law School, Robert Summers of Cornell Law School, and **James White** of U-M Law School.

Labor Relations Law: Cases and Materials, by Professor Leroy Merrifield of George Washington University National Law Center, and **Dean Theodore J. St. Antoine** and **Emeritus Prof. Russell A. Smith** of U-M Law School.

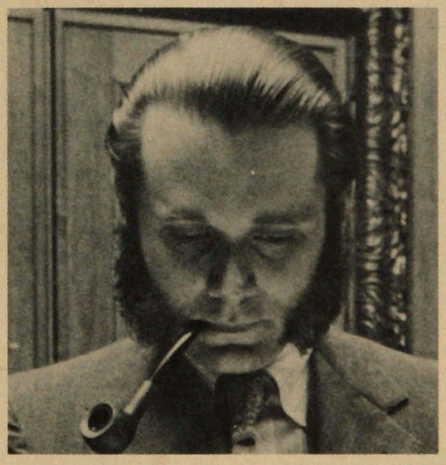
Modern Criminal Procedure: Comments and Questions, by Professors Wayne LaFave of Illinois Law School and **Yale Kamisar** and **Jerold Israel** of U-M Law School.

Marcus L. Plant

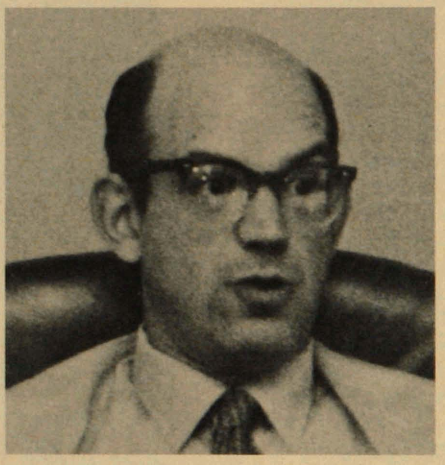
Russell A. Smith



Harry T. Edwards



Charles Donahue, Jr.



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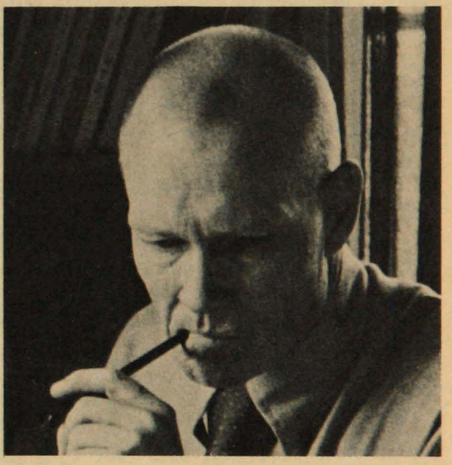
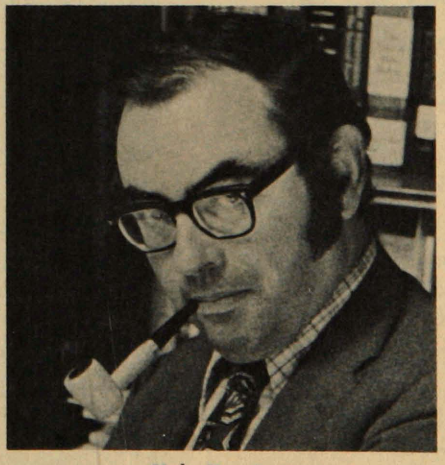
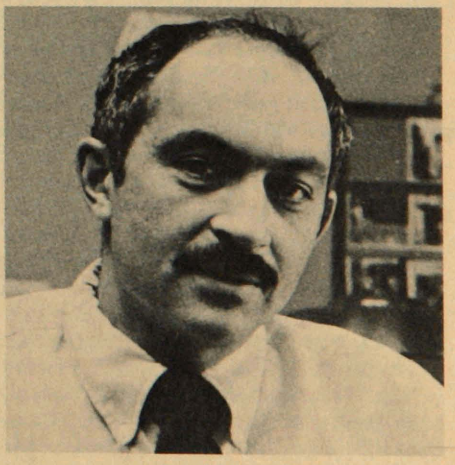


James White

Theodore J. St. Antoine



Yale Kamisar



Jerold Israel

Cases and Materials on the Employment Relation

Prior to the 1950s, workmen's compensation received only incidental treatment in the law schools of the United States. Usually it occurred in the course in torts as a part of the examination of strict liability. In some instances the subject was treated in courses on agency, being brought into the discussion of respondeat superior. Such neglect existed even though workmen's compensation statutes had been enacted in many states and in some instances had been on the books 30 years or more.

Certain unfortunate consequences were attributable at least in part to this neglect. One was that lawyers and judges who had to deal with workmen's compensation problems tended to interject torts concepts into their arguments and decisions, thereby distorting the intended operation and effect of the statutes. Another was that lawyers in general practice were often reluctant to accept workmen's compensation cases; the statutes appeared to be long and complicated and the fees were disproportionately small in view of the time commitment required to handle an occasional case without basic familiarity with the field. A consequence of such reluctance was that claimants' cases tended to concentrate in the hands of a relatively few specialized firms in the industrial areas.

In 1953 a one-credit course (fifteen sessions) was inaugurated at the Michigan Law School. In 1963 the course was enlarged to two hours of credit concurrently with the publication of a set of teaching materials edited by Professors Wex Malone of Louisiana State University Law School and Marcus L. Plant of the U-M Law School. The subject became popular and during the next decade a large number of law schools inaugurated two- or three-credit courses in workmen's compensation.

Many persons interested in the problems of working people became increasingly sensitive to the fact that most law schools do not offer much instruction in other legislation of importance in the lives of workers. There are courses in "labor law," but they usually center on problems related to unionization and collective bargaining. Repeated suggestions were received by the editors of the original materials suggesting expansion to include some of these other areas.

In response to this apparent need the original editors together with Professor Joseph W. Little of the University of Florida Law School have produced a new work: *Cases and Materials on the Employment Relation.* It compresses the treatment of workmen's compensation and adds cases, statutes, and textual materials on unemployment compensation and job placement; regulation of wages, hours, and working conditions; financial security for aged and disabled workers; and job anti-discrimination legislation. The number of class hours devoted to the subject matter in the U-M Law School has been expanded to 45 and all of the foregoing subjects are covered with the exception of the job anti-discrimination legislation, which is dealt with in the course in labor law. The new course, named "Workmen's Social Legislation," has evoked a stimulating response. A number of the students enrolled in the class in the fall term 1974 had had previous contact with various phases of social legislation in their pre-law school experience. The treatment of unemployment compensation generated exceptional interest as the unemployment situation began to intensify around the country, particularly in Michigan.

In the forty-third American Assembly held at Arden House, Harrison, New York, in November 1973, attention was given to the general topic "The Changing World of Work." The following statements appeared in the report of that Assembly:

> Something, clearly, is stirring. In part, we are witnessing changes in personal values that are seen and felt not only in the United States but around the world. In part, we are experiencing the latest chapter in the continuing story of the quest for fulfilling American goals and aspirations: a fair and equitable society; an opportunity for each citizen to participate in the forces that affect his life; a confirmation that the democratic process does, indeed, work for all. Now the challenge is emerging at the most basic level of work itself. The questions have come down to society's responsibility to provide a higher quality of working life and increasing opportunities for those millions on the fringe who for so long have endured the reality of a life in which all our fine talk about job enrichment and job humanization is meaningless.

The new teaching materials focus on what American legislatures have done to provide a "higher quality of working life and increasing opportunities" for workers and those who desire to be workers. It is not intended solely for the student who intends to be a "peoples' lawyer." Any lawyer in modern general practice will be confronted sooner or later with legal problems bearing upon workers' activities and protections. He must deal with such problems or employ someone who can.

There are collateral benefits in the study of these subjects. The materials provide an opportunity to examine distinctions between judicial and administrative decision-making and how they fit together. By studying the evolution and structure of existing social programs students gain knowledge and insight into the processes of legislative policy-making and the influence of constitutional restraints and judicial precedent upon them. The treatment also compels realization of unfilled gaps in the responses to conditions sought to be remedied by

the several programs. The materials and courses will benefit not only those who intend to work directly in the fields involved; they will prove valuable also to those in cognate areas of law and even in areas that on the surface have no seeming connection with the specific topics treated.

Labor Relations Law in the Public Sector: Cases and Materials

The first edition of *Labor Relations Law in the Public Sector: Cases and Materials* (1974) represents a truly significant pioneering venture by Emeritus Professor Russell A. Smith and Professor Harry T. Edwards, both of the U-M Law School, and R. Theodore Clark, Jr. (U-M '65) of Chicago. The book is the first comprehensive casebook and text dealing with labor law in the "public sector" in the United States. And it is a formidable volume—over 1,200 pages plus a detailed "Statutory Appendix."

In the preface, the authors note that the "basic objective" of the book is to "provide a separate set of teaching materials for use in law schools and in other educational contexts"; however, they also point out that an effort has been made to include "relevant materials which will be of interest and value to those directly concerned on a working basis with public sector labor relations (lawyers, administrators, officials of labor organizations, and public employees)." To achieve these goals, the authors effectively use statutes, executive orders, attorney general opinions, and commentaries by some of the outstanding scholars and practitioners in the field, along with the usual labor board and appellate court decisions, to highlight the dynamic growth of public sector labor relations at all levels of government during the past two decades.

The preface states several premises which underlie the preparation of the book. First, "public sector 'unionization' and collective bargaining represent the most important development in 'labor relations' since the post-Wagner Act period of the 1930s and 1940s . . . . While labor relations law in the public sector has naturally drawn heavily on private sector precepts and models, it has also involved major departures, in response to numerous problems peculiar to the public sector." Second, the authors state that, in their judgment, "a law school curriculum is incomplete which does not afford students the opportunity to examine in some depth the parameters, important variations and problems of public policy embodied in this area of the law." Finally, the authors note that "although the body of 'law' in the public sector is now substantial, it is still in the formative stage," and they express the hope that the book will "raise significant policy questions for consideration in connection with the proper course of the development of labor relations law in the public sector."

The basic text deals exhaustively with the transfer of private sector bargaining concepts to the public sector; in particular, the chapters dealing with "Establishment of the Bargaining Relationship," the "Obligation and the Duty to Bargain," "Union Security," and the "Enforcement of the Collective Bargaining Agreement" raise legal issues which are frequently seen in the private sector. However, there is a wealth of materials in the book covering issues unique to the public sector, most notably

chapters dealing with the "Right to Strike," "Settlement of Collective Bargaining Impasses," and "Political and Civil Rights of Public Employees." The last cited chapter, which alone runs to more than 200 pages, covers a host of constitutional problems affecting employment relations in the public sector which are rarely if ever seen in the private sector.

Contemporaneous with the publication of the casebook, a new three-hour course, entitled "Labor Relations Law in the Public Sector," was added to the U-M curriculum during the 1973-74 academic year. Over 100 students at U-M have elected to take the course since its introduction last year.

Cases and Materials on Property: An Introduction to the Concept and the Institution

Last fall, Professors Charles Donahue, Jr., and Thomas E. Kauper of the U-M Law School and Professor Peter W. Martin of Cornell Law School published a new property casebook entitled *Cases and Materials on Property: An Introduction to the Concept and the Institution.*

The book represents a new approach to teaching first-year property. Since the general adoption by American law schools of a first-year property course in lieu of a number of more specialized first- and second-year courses, the tendency has been to use commerical transactions in land as the organizing theme for the first-year course. The Donahue-Kauper-Martin teaching materials are based on the view that this organizing theme gives too much emphasis to commercial land transactions and not enough to property generally, to property as a legal idea and as a set of legal institutions. As the authors state in their preface: "With the gradual abandonment of re-

quired courses beyond the first year, we must face the fact that the first-year property course may be the only property course which the student ever takes. In our view, it *will* be the only property course he takes, if he gets the idea, rightly or wrongly, from the first-year property course that property consists of a series of detailed and usually incomprehensive rules which he will have to look up if he is ever called upon to examine the title of a piece of suburban real estate."

The new casebook contains materials for a basic introduction to both the jurisprudential aspects of property and to a number of its practical aspects. In some cases this has involved restoring to the first-year property course material that was fast disappearing from the law school curriculum entirely—such as personal property. In some cases this has involved at least a survey examination of material that is normally postponed to second- and third-year courses, such as the basic policies governing the devolution of wealth from generation to generation. In some cases it has involved integrating into the basic course quite modern topics which have heretofore been treated as add-ons, such as an introduction to environmental law and a consideration of the policies of both public and private law concerning housing for various economic strata of society.

The overriding organizational theme is property—what is it, how is it used. The book, therefore, contains introductory materials on property as it appears in a number of constitutional cases and excerpts, illustrated by cases in which they are used, from writers on the various jurisprudential theories of property.

The book is eminently a first-year book. The material is designed with the view that a principal, even a primary purpose of a first-year course is to introduce students to legal method. Cases are selected not only with a view to illustrating the basic rules of property, but also with a view to teaching students the gentle art of reading cases. Quite elaborate notes give the basics of the procedure necessary to understand the cases and introduce certain general concepts which run across a number of areas of law, such as the distinction between law and equity and the importance of remedy. Further, the book contains a healthy dose of material on the way in which law develops, the role of lawyer as advocate, adviser, and policy-maker, the relationship between law and society, and the difference between the Anglo-American and other legal systems.

The book is thus a teacher's book. It is written by men who obviously feel that both the topic of property and the teaching of first-year students is interesting and exciting.

Teaching Materials on Commerical and Consumer Law

Teaching Materials on Commercial and Consumer Law (2d ed. 1974), by Professor James White of the U-M Law School and Professors Richard Speidel (Virginia) and Robert Summers (Cornell), intensifies the authors' efforts to "de-dullify the subject."

As the authors put it, "we have cases, yes, and enough, but not *ad nauseum*." The new edition accentuates the use of problems and the "problem emphasis" facilitates stress on business contexts, and on the varied roles of lawyers in those contexts. The volume contains an extraordinary amount of "straight text," often designed to free a teacher from compulsions of classroom coverage or to widen the common background of understanding students bring into class, which, hopefully, will elevate the whole level of discussion. But the text is not always exclusively informational. Some text explains plans of attack on blocks of materials or provides "lead-up" for problems posed, or suggests ways of organizing materials, or furnishes jurisprudential insight and perspective. In addition to the aforementioned materials, the authors offer dialogue, imaginary opinions, demonstrations of problem solving, memoranda, and other variety.

Commerical and Consumer Law strives to foster perspective, disposition, and skill required for effective commercial planning, for in this field private ordering is at the fore. Further, the book seeks to capitalize on the Uniform Commercial Code, and at two levels—by calling on the student to think about general problems of codification, as well as about many specific problems of code interpretation and construction. In addition, the book dwells on the inter-relations between law and practice—on what has been called "the practical basis of the legal rules and the legal basis of the practices."

The second edition includes new treatments of accommodation parties, insurance as it affects sales, documents of title, and of the buyer's consequential damages. It adds four new chapters on protecting the consumer (mainly in credit transactions) which account for the 300-page increase in the size of the book.

Labor Relations Law: Cases and Materials

The authors of the recently published fifth edition of *Labor Relations Law: Cases and Materials*, Dean Theodore J. St. Antoine and Professor Emeritus Russell A. Smith of the U-M Law School and Professor Leroy Merrifield of the George Washington University National Law Center, have accomplished what many authors of new editions strive for, but few achieve—expansion in coverage but a reduction in over-all size. Despite the addition of many cases handed down since the previous edition was published in 1968, a significantly enlarged treatment of public employment bargaining and an entirely new section on equal employment opportunity, thoughtful consolidation of older materials has produced a relatively trim volume (1,156 pages), some 40 pages thinner than its predecessor. The authors have sought only to present "core materials" on the new topics, without attempting to provide anything like the exhaustive coverage available in the new Smith-Edwards-Clark materials on *Labor Relations Law in the Public Sector*, discussed above.

The casebook is based on the assumption that the field of "labor law" has become so vast that a basic course should confine itself primarily to the law of labor-management relations, "with perhaps a brief look at the law of union-member relations." The authors are of the view that "to avoid undue dilution," the more practical aspects of negotiating and administering labor agreements (including arbitration) should be left for separate treatment—preferably where the "problem" method can be employed. Thus, in dealing with collective bargaining, the book concentrates on the "legal framework," not on specific contract clauses or the way arbitrators resolve day-to-day disputes.

One of the features of the book is that all major substantive parts, and a goodly number of subdivisions, are introduced by short excerpts from labor economists, industrial relations experts, practicing attorneys, and other non-decisional sources. These "introductions" are designed to shed fresh light on the subjects covered by the more traditional statutory and case selections and to stimulate further reading in relevant extra-legal materials.

Modern Criminal Procedure: Comments and Questions

The increasing size of successive editions of *Modern Criminal Procedure: Comments and Questions* and the three major revisions these teaching materials have undergone in the last nine years evidence the continuing rapid changes in the field and the growing attention being given it in the law schools.

When the first edition was published in the fall of 1965 (a mere 565 pages), only a few law schools offered as many as one separate short course or seminar on the subject. The newly published fourth edition, co-authored by Professors Yale Kamisar and Jerold Israel of the U-M Law School and Professor Wayne LaFave of the Illinois Law School is a rich, weighty volume—1,572 double-column pages plus various tables and appendices—which provides the basis for three different courses on the subject: (1) a course dealing almost exclusively with police practices and discretionary enforcement (e.g., search and seizure, electronic surveillance, lineups, confessions, prosecutor's discretion); (2) a course placing primary emphasis on the post-"police practices" or "investigation" phases—from bail to post-conviction review; and (3) an alternative single course "surveying" all aspects of criminal procedure, utilizing the opening sections or introductory notes in the 27 chapters as "points of departure" for a discussion of various problems raised throughout the chapter. During the current academic year some 450 U-M law students elected to take these three courses.

As in the previous editions, in addition to the exhaustive notes and questions, the authors have greatly enriched the case materials with extensive extracts from illuminating and stimulating books, reports, articles and speeches. The book extracts, summarizes, discusses, or refers to some 3,000 cases and over 700 law review comments and articles. Because of the current concern over the need for legislative attention to problems in the administration of criminal justice, extensive use is made of proposals growing out of such recent law reform efforts as the American Bar Association's *Standards for Criminal Justice*, the American Law Institute's *Model Code of Pre-Arraignment Procedure*, and the National Conference of Commissioners on Uniform State Laws' *Uniform Rules of Criminal Procedure* (a project for which all three authors served as co-reporters).

Although the over-all size of the new edition has increased somewhat, the authors made strenuous efforts to compress and summarize "older matter' to make room for new material. Most chapters have remained about the same length and a few have even been significantly reduced in size, e.g., those on confessions, entrapment, and right to counsel. Far and away the greatest increase has occured in the chapter on "Arrest, Search, and Seizure," where, it may fairly be said, "the action is." The chapters on discovery, grand jury, and guilty pleas have also undergone considerable expansion.

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