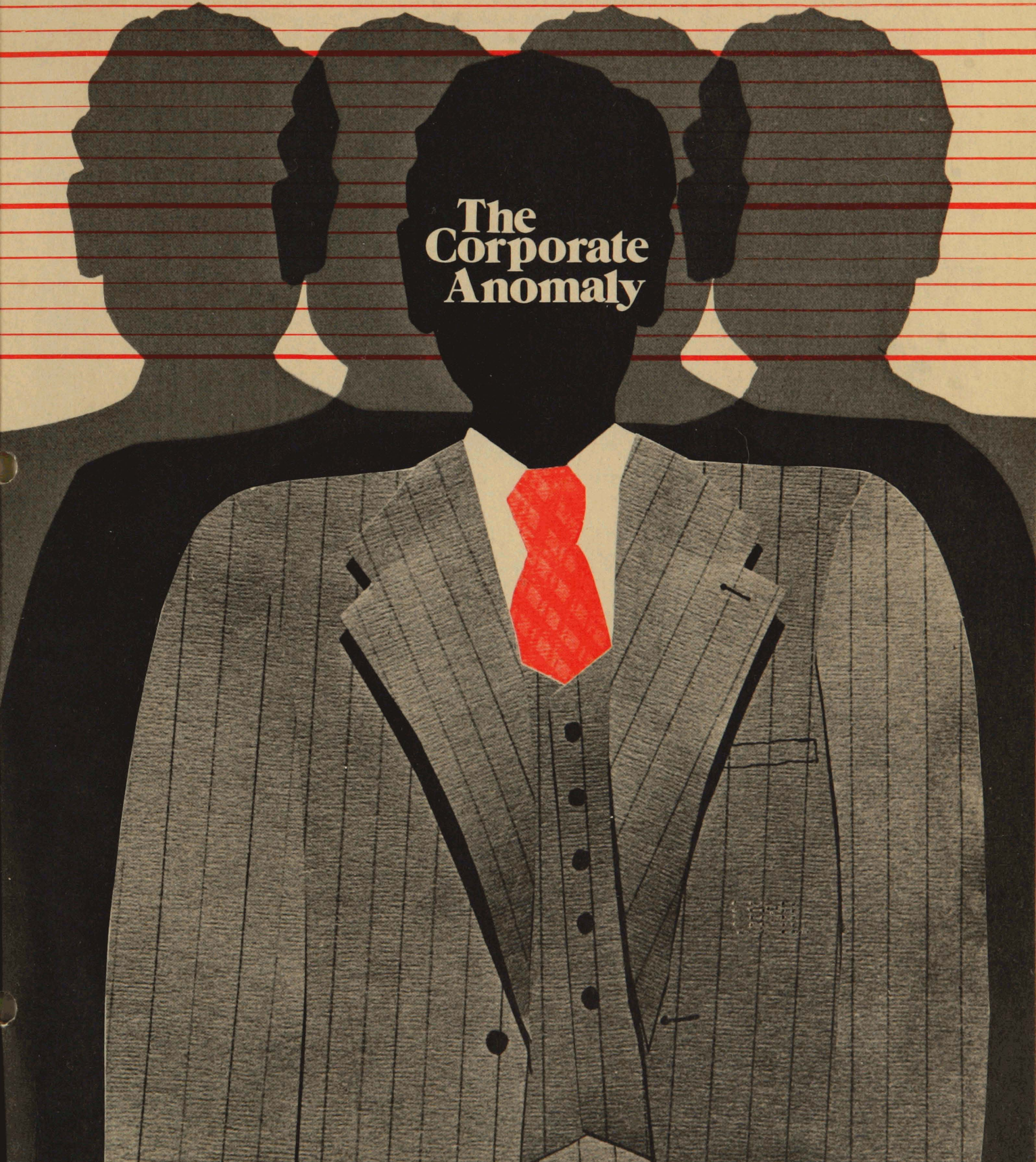


Law Quadrangle Notes

The University of Michigan Law School

Volume 22, Number 1, Fall 1977



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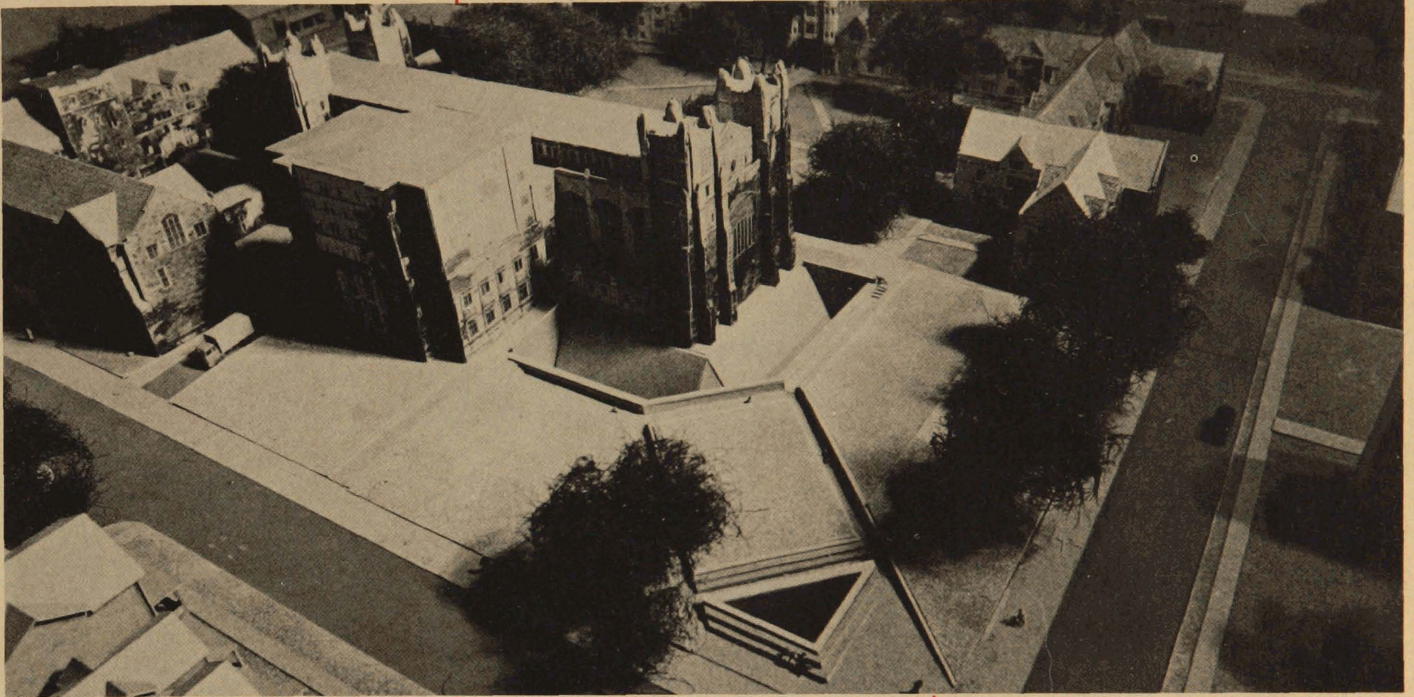
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Law Quadrangle model indicates location of underground addition.



Law Library Addition Will Be Underground

When The University of Michigan Law School decided to embark on a capital campaign for the construction of a law library addition, it faced a problem of blending a modernistic structure with the English Gothic style of the existing U-M Law Quadrangle.

Now that question is moot, since the Law School has opted for an underground library addition.

But for architect Gunnar Birkerts, there was still the problem of integrating an underground facility with the tradition-laden atmosphere of the Law Quad.

The widely acclaimed Birmingham, Mich., architect believes he has achieved a solution by designing "an underground structure with many of the virtues of an above-ground building with regard to light and exterior view."

In particular, the new addition will contain a 150-foot-long vaulting skylight facing the existing Law Quadrangle, giving users of the new structure an unobstructed view of the Law School's Gothic buildings.

Birkerts also sought to make the underground facility a place of light as well as intellectual enlightenment.

Through the use of limestone reflectors within a moat surrounding the skylight, additional daylight will be diffused into the busiest areas of the building.

"For the past several years I have been interested in finding new ways to project daylight deeper into buildings, including underground buildings," said the 52-year-old Latvian-born architect. "Much of my experimentation has dealt with the use of optics to increase available natural light."

Birkerts admits that, in taking on the U-M Law School project, he felt keenly challenged by the prospect of creating an addition to an existing complex of "high-level traditional architecture."

Among the initial exploratory designs for the library addition, besides the underground concepts, were Birkerts' proposals for a loft-type structure opening onto the Law Quad, with a receding roof which would not alter the silhouette of the Quadrangle.

"These initial designs were of an architecturally unobtrusive building that would attempt to blend into the Quadrangle," said Birkerts.

Eventually the Law School's Alumni Development Committee, in conjunction with the Faculty Building

Committee, settled on the underground concept—the same solution chosen by Harvard and Yale universities, where lack of space prohibited above-ground library additions.

Groundbreaking for the \$9-million structure is expected to take place in January, and the addition is expected to be completed by the spring of 1980.

Birkerts is the designer of the Federal Reserve Bank in Minneapolis, the south addition to the Detroit Institute of Arts, IBM's Corporate Computer Center in New York, Ford Motor Company's Visitor Reception Center in Dearborn and other award-winning buildings around the country. In addition to his architecture practice, he teaches architecture at Michigan.

Underground structures are nothing new to the architect. In 1972 Birkerts received a grant from the Graham Foundation for Advanced Studies in the Fine Arts to explore the concept of underground conduits for automated and semi-automated industry and related service systems, as a means of solving problems of urban congestion. In his widely acclaimed Federal Reserve Bank building in Minneapolis, about one-half the structure is below grade.

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The new Law School library addition, an L-shaped structure running parallel to Monroe and Tappan streets on campus, will extend three levels below grade and contain facilities for storage of some 200,000 books as well as microfilming facilities.

Of its 62,500 square feet, some 55,000 will be "usable space," including 20,000 square feet for book storage; 10,000 square feet for library staff space, including circulation, reference and microfilming facilities; another 10,000 square feet for carrels, study areas, and offices for the Michigan Law Review and the Journal of Law Reform and 15,000 square feet of "raw space" for future development.

Birkerts notes that one advantage of the underground location will be considerable savings in energy consumption. Because of insulating characteristics of the surrounding earth, the new facility is expected to consume as little as 25,000 BTU's (British Thermal Units) per square foot per year, as compared to a level of more than 100,000 BTU's for a comparable above-ground structure. This will mean a saving in both heating and cooling costs.

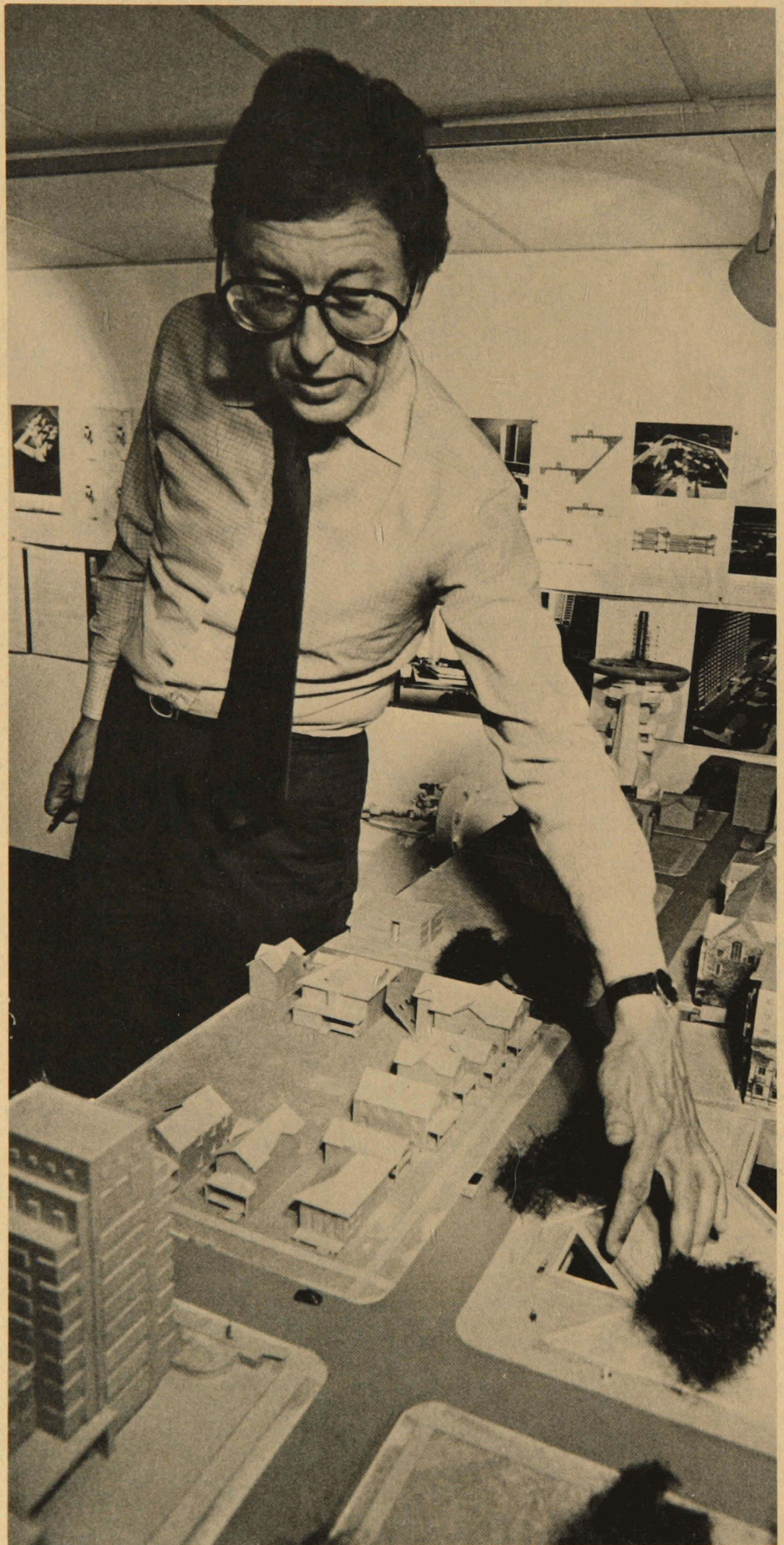
The structure will also be adaptable to changing Law School needs, with interior wall partitions which can be re-mounted in different configurations.

The building will actually have two skylights. Facing the Law Quadrangle with a northwestern exposure will be the large 150 by 26 foot vaulting skylight made of double glazed bronzed glass. In a southeastern direction will be a smaller, triangular shaped skylight.

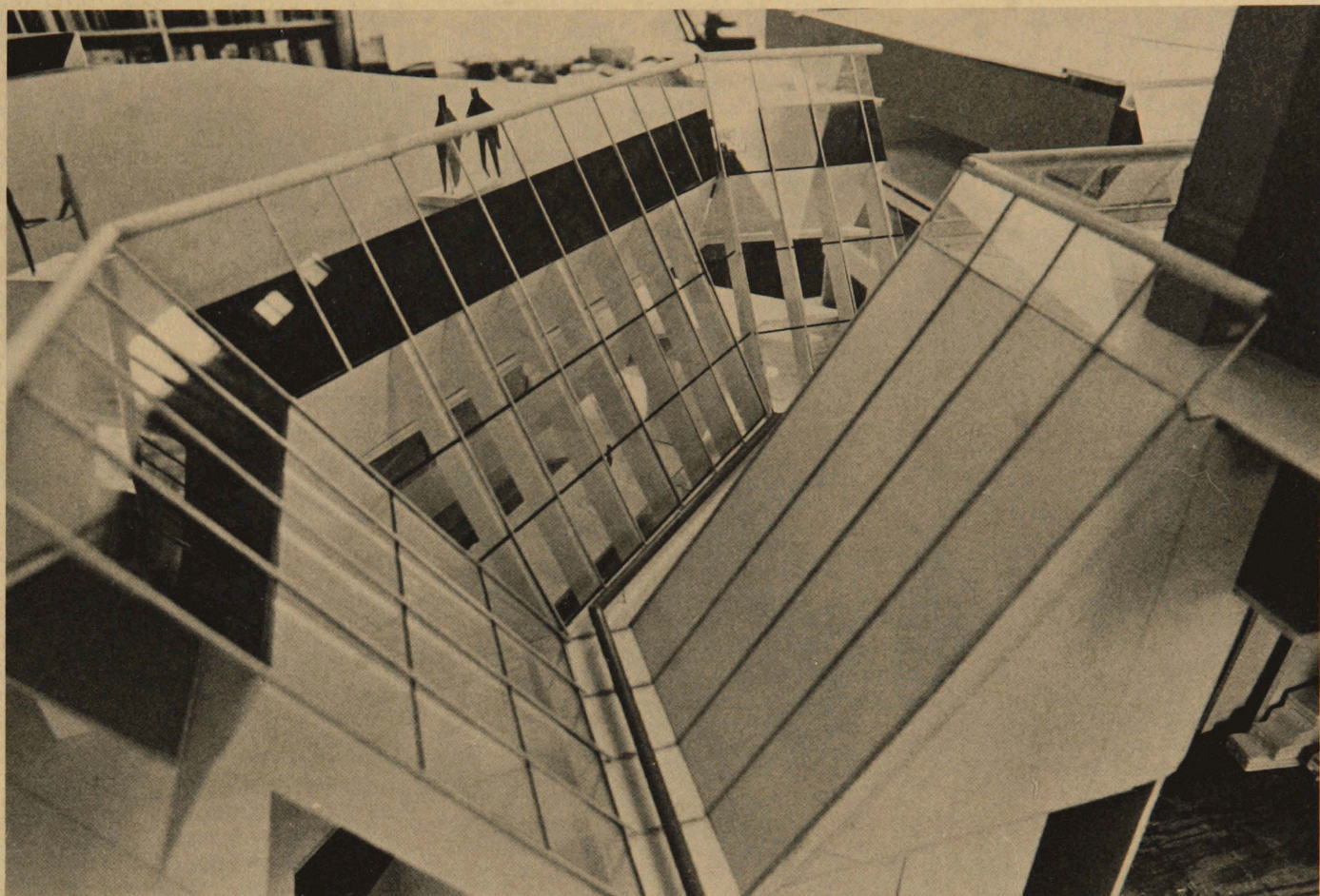
Birkerts notes that the skylights will bring natural light into the most populous central area of the L-shaped building, including the card catalogue area, offices and reading areas. The architect says floors of the three levels will be staggered to allow natural light to reach all the levels. Fanning out in separate directions will be two wings containing primarily stacks.

Despite its subterranean location, the library addition will not be without greenery. Plants will grow within the moat surrounding the skylight, and on top of the underground addition will be an open landscaped area. That area presently contains a surface level parking lot.

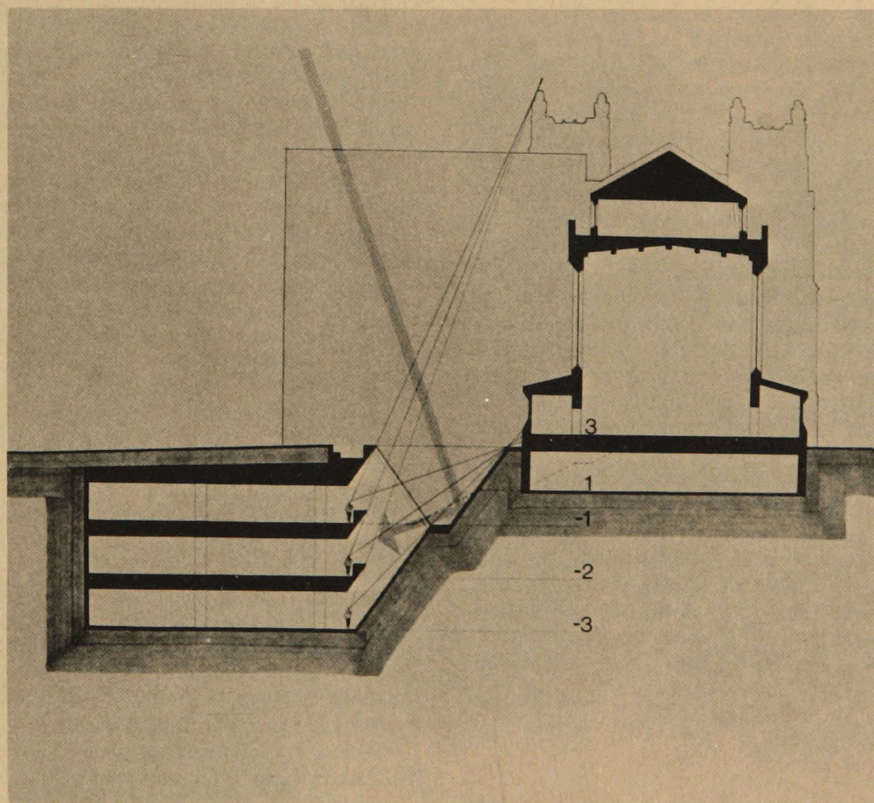
"If there is a deficiency in the present Law Quad," says Birkerts, "it is the parking lot at the Monroe and Tappan corner. Since that lot will be removed with the construction of the library addition, the result will be an enhancement of the beauty of the Law Quadrangle."—H.L.S.



Gunnar Birkerts



Model shows 150-foot-long vaulting skylight.



Arrows show diffusion of light into underground addition.

St. Antoine To Leave Post, Effective June 30

Dean Theodore J. St. Antoine has announced his intention to step down from the deanship on June 30, and a Dean Search Committee has been appointed at the Law School to find his successor.



Theodore J. St. Antoine

In a letter to U-M President Robben W. Fleming, St. Antoine said:

"In accordance with our understanding at the time I accepted an extension of my term as dean last year, I should like to confirm that I wish to conclude my service on June 30, 1978. Our capital fund-raising effort, which was announced publicly last fall, is off to a good start, and I have every hope that it will be substantially completed by the time my successor assumes office."

St. Antoine said, "Being dean of a great law school like Michigan has been an honor beyond any of my aspirations. The tasks have been challenging and the rewards great. Nonetheless, I ultimately regard myself as far more lawyer than administrator, and I think it is time for me to return to full-time teaching and research."

U-M law Prof. Francis A. Allen, who is heading the Dean Search Committee, said he hopes the committee can recommend a successor by the end of the year. The final choice will be made by the U-M Board of Regents.

The committee began soliciting names for a possible successor from U-M faculty and alumni around Oct. 1, narrowing the choices to "only serious possibilities" in November, according to Prof. Allen. The position is also being advertised nationally.

Other members of the search committee are Profs. Frank R. Kennedy, Jerold H. Israel, James J. White,

Gerald M. Rosberg and Sallyanne Payton, and U-M law students Robert Santos and Steven Berlin.

In a letter to Dean St. Antoine, President Fleming said, "The respect and admiration which all of us have for you has made your tenure a very productive one for the Law School. I am sorry you have had to spend so much of your time on fund-raising, but the new library will be largely a monument to your efforts."

Appointed to the Law School deanship in 1971 for a five-year term, St. Antoine was re-appointed to the post in 1976 with the expectation that he would step down after a two-year period.

During his time as dean, the Law School embarked on the first capital campaign in its 117-year history with a goal of \$10 million, including \$8 million for the construction of an underground library addition. (See story on the library addition elsewhere in *Law Quadrangle Notes*.)

Under St. Antoine's leadership, the Law School expanded its clinical law program, revamped its legal writing and advocacy program, and placed greater emphasis on interdisciplinary studies involving such fields as psychiatry and the social sciences.

New programs included a course on legal ethics and personal values, and clinical law offerings dealing with tax law, child abuse and problems of aging.

In addition to his teaching and administrative duties, St. Antoine has remained active in the labor field. He served as president of the National Resource Center for Consumers of Legal Services in Washington, D.C., a group which publicizes pre-paid legal plans, and was also appointed to a 26-member national task force to improve procedures of the National Labor Relations Board.

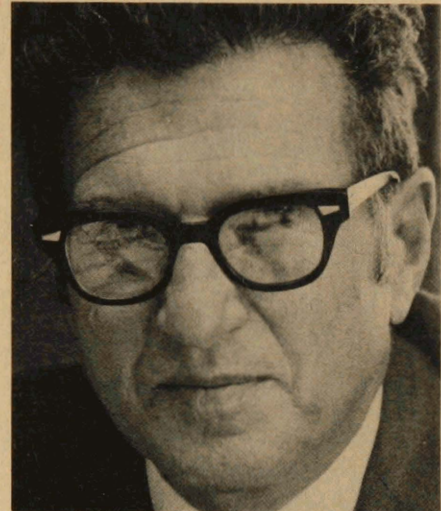
On the state level, he served as chairman of Gov. William Milliken's special Workmen's Compensation Advisory Commission, which produced a study of the state's problems in the workmen's compensation field.

St. Antoine was recently named program chairman for the American Bar Association's Section of Legal Education and Admission to the Bar.

A member of the U-M law faculty since 1965, St. Antoine previously practiced labor law in Washington, D.C., mostly at the Supreme Court level.

Prof. Peter Steiner Named to CED Post

Peter O. Steiner, professor of economics and law at The University of Michigan, has been elected chairman of the Research Advisory Board to the Committee for Economic Development (CED), a national business-oriented public policy advisory group.



Peter O. Steiner

Made up of some 200 business leaders, the CED issues research and policy statements on national and world economic matters, including such questions as U.S. energy policy, revitalization of American cities, performance of the U.S. economy, and relations among industrial and less developed countries.

The Research Advisory Board, which includes faculty members from several universities, serves "to channel academic input into the CED's research and policy discussions," notes Steiner. Another U-M faculty member currently serving on the advisory board is Prof. Paul W. McCracken of the School of Business Administration.

Steiner was elected by CED trustees for a two-year term as Research Advisory Board chairman, beginning during the current year. He had served as a member of the board for the past two years.

In 1976 Steiner was elected to a two-year term as president of the American Association of University Professors. The author of many books and scholarly articles, Steiner recently won the U-M Press Book Award for his newest book, "Mergers: Motives, Effects, Policies," published by the U-M Press in 1975. He has been professor of economics and law at Michigan since 1968, and from 1972-74 was chairman of the U-M department of economics.

Sax Urges Control Of Land Bordering Parks

At Redwoods National Park in California, nearby activities of a private lumber company have caused erosion, stream siltation and the unsightly visual effects of widespread forest clearcutting.

In Virginia, U.S. Park Service officials and environmentalists have recently voiced concern over a proposal by a major hotel chain to build a "theme park" next to Manassas National Battlefield Park.

And in Pennsylvania not long ago, a private entrepreneur's plan to build a large tower on private land overlooking the battlefield site of Gettysburg National Military Park resulted in a bitter court controversy.

These examples illustrate the need for new federal legislation setting firm guidelines for U.S. Park Service regulation of private lands within and adjacent to federal parklands, says University of Michigan environmentalist Joseph L. Sax.

Writing in the Michigan Law Review, the U-M law professor said he takes particular issue with Park Service legal advisers who for years "concluded that the federal government may not constitutionally regulate private holdings beyond park boundaries."

Citing a number of legal precedents to the contrary, Sax said these supposed legal obstacles have stymied many park officials. "While intrusive activities have increased all around them, park managers have stood by nervously, sensing that they were caring for helpless giants," said Sax.

The U-M professor, who authored Michigan's landmark Environmental Protection Act in 1970, said he advocates Congressional action on two fronts:

- Regarding private lands within parks, the Park Service should "be given authority to exercise general police power to the full extent necessary to maintain the parks for the purposes for which Congress established them."

- Regarding land beyond park boundaries, the Park Service, in lieu of police power, should be given the broad mandate to curb "nuisance-like activity" through regulations, land acquisitions, and litigation.

"For example," said Sax, "while

aesthetic nuisance is still recognized only sporadically in American law, protection against visual intrusion is central to the mission of the Park Service.

"Thus Congress ought to grant explicit authority to control, and to prohibit, structures like the Gettysburg tower and the high rise hotel that has been built on the outskirts of the Great Smoky Mountains National Park but is strikingly visible from many places within the park.

"Similarly," said Sax, "authority should be given to control the development, on external lands, of massive amusement parks that would bring major land clearings, substantial structures and hordes of patrons within the sight and sound of park visitors."

Sax said the issuance of wide-ranging regulations would be the likely means for the Park Service to curb nuisance activities.

At the same time, he said, "rather than attempting to deal with every possible problem by enacting a statute that gives the Secretary (of the Interior) open-ended authority to promulgate regulations, Congress ought to empower the Park Service to litigate whenever unanticipated activities may endanger a park."

In support of the view that the Park Service may regulate activities beyond park boundaries, Sax cited such court cases as *United States v. Alford* (1927), *Camfield v. United States* (1897) and *Kleppe v. New Mexico* (1976).

Outside the legal sphere, said the professor, the main obstacle to legislative action appears to be the long-standing tradition of local land-use control.

"Intrusion upon traditional local land-use regulation presents practical and political concerns that must be taken into consideration during the formulation of a policy for the Park Service," said Sax.

"The problem, then, is to devise a regulatory policy Congress might enact that is both responsive to the needs of the national parks and yet not unwisely incursive upon the traditions of local land-use control."

Prof. Allen Reappointed Sunderland Professor

Prof. Francis A. Allen has been reappointed as Edson R. Sunderland Professor of Law at U-M Law School.



Francis A. Allen

The appointment is for a five-year term and includes an annual stipend from the Law School's Sunderland Endowment. Prof. Allen has held the Sunderland professorship since 1972.

Prof. Allen "is one of the leading figures in American legal education, especially noted for his work in the field of criminal law," said U-M law Dean Theodore J. St. Antoine.

Allen served as U-M dean from 1967-71 and also taught at Northwestern, Harvard and Chicago, as well as the U-M. From 1976-77 he served as president of the Association of American Law Schools.

Among other accomplishments, Allen from 1961-63 was chairman of the U.S. Attorney General's Commission on Poverty and the Administration of Federal Criminal Justice, which laid the groundwork for legislative reforms in the treatment of the indigent accused in federal courts.

Earlier, he served as drafting chairman for the 1961 Illinois Criminal Code and as chairman of the Advisory Committee of the Illinois Sex Offenders Commission in 1952-53. He has also been a member of the council of the American Law Institute.

In addition to many articles in law journals and other publications, he wrote "The Borderland of Criminal Justice" (1964) and "The Crimes of Politics" (1974), and edited "Standards of American Legislation" (1965).

Rationale Challenged For Dual Media Rights

The rationale for the Supreme Court's tradition of according full First Amendment protection to the print media, while imposing regulations on the broadcast media, has never been convincingly explained, according to a University of Michigan law professor.

Writing in the U-M Law School's *Michigan Law Review*, Lee C. Bollinger says that, while he agrees with dual treatment of the media, he believes the Supreme Court has followed "the right path for the wrong reasons."

"There is a powerful rationality underlying the current decision to restrict regulatory authority to broadcasting," said Bollinger, "but it is not, as commonly supposed, that broadcasting is somehow different in principle from the print media and that it therefore is not deserving of equivalent First Amendment treatment."

Citing some of the arguments favoring control of broadcasting, Bollinger agreed that "the major networks do control the content of prime time television." But at the same time, said the professor, "the major wire services such as Associated Press and United Press International similarly control much of the national news reported in newspapers throughout the country, although perhaps to a somewhat lesser degree."

Rather than continuing its present "schizophrenic" stance on the matter, Bollinger said it would make more sense for the Supreme Court to permit Congress to authorize controls for a portion of the mass media, "but not throughout the press."

"Viewed in its entirety," wrote Bollinger, "access regulation (that is, providing viewer access to balanced political, social and other ideas) is both desirable and dangerous. In light of the double-edged character of access regulation, the Court's appropriate response is to affirm congressional authority to implement only a partial regulatory scheme."

"Only with this approach, with a major branch of the press remaining free of regulation, will the costs and risks of regulation be held at an acceptable level."

Bollinger emphasized that the court "should not, and need not, be forced into an all-or-nothing position on this matter; there is nothing in the first amendment that forbids having the best of both worlds."

The professor went on to note that "one advantage of a partial regulatory

system is that the unregulated sector provides an effective check against each of the costs of regulation.

"A partial scheme offers some assurance that information that might not be disseminated by the regulated sector of the press will nevertheless be published by the unregulated press. If, for example, a local broadcast station chooses not to cover a debate between two prominent mayoral candidates because of equal time obligations, then the public will still be informed of the event by the local newspaper.



Lee C. Bollinger

Bollinger also noted that "a partial scheme offers some assurance that governmental use of the regulatory authority to bludgeon the press into an official line will not suppress the truth. If, for example, the *Washington Post* had curtailed its Watergate investigations to ward off what it might reasonably have perceived to be governmental pressure to have the licenses of its subsidiary radio stations revoked, other newspapers free of governmental entanglements, such as the *New York Times*, would still have continued the investigation."

The professor noted that the concept of dual treatment has already been proved effective under the present system.

The Federal Communications Commission (FCC) "has, on the whole, been extraordinarily circumspect in the exercise of its powers" with regard to broadcast media, wrote Bollinger. "It is reasonable to assume that this self-restraint is explained in large part by the constant juxtaposition of the autonomous print media, representing our continued respect for the ideal of the free press, against the regulated broadcasting media."

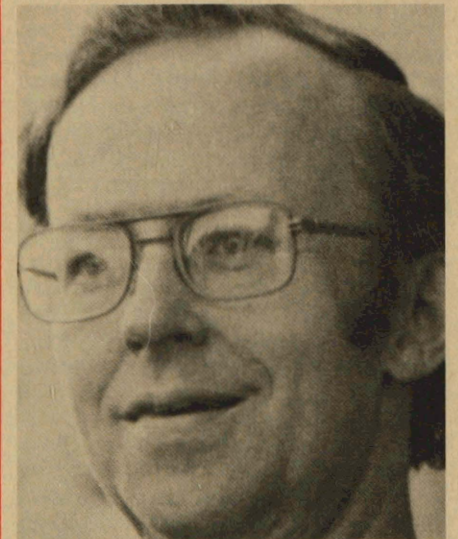
One important question likely to face the Supreme Court in the near future, according to Bollinger, is whether the FCC has statutory authority under the Communications Act of 1936 to impose access regulation on cable television. Bollinger suggests that the court ought to require Congress to make the decision on the question.

But, he warned, "the history of the Commission's treatment of cable does not inspire confidence in its judgments in this area. There is considerable evidence that the Commission has been more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology."

If the court were to decide the issue, Bollinger recommends that, "given the potential of cable technology to alter significantly the television medium, together with the important First Amendment interests at stake in the access question, the Court should find that the imposition of access regulation on cable is beyond the scope of the Communications Act."

Prof. Gray In Tokyo For 1977-78 School Year

Prof. Whitmore Gray, who teaches international law at U-M Law School, has received a grant from the Japan Foundation to conduct research in Tokyo during the 1977-78 academic year.



Whitmore Gray

The research focuses on "Resolution of Contract Disputes in Japan: Case Studies of Negotiation, Arbitration and Litigation." During the year Gray will be attached to the law faculty at Tokyo University as a visiting scholar.

Each year the U-M Law School receives a number of Japanese lawyers as graduate students, and Prof. Gray says he plans to interview a number of these alumni in connection with his research preparing case studies of the settlement of contract disputes in Japan.

During the summer Gray was named by the U.S. Educational Commission in Japan as distinguished lecturer for the 1977 Kyoto American Studies Summer Seminar. The seminar brought together as participants faculty from Japanese and other Asian universities for an intensive two-week program of advanced study. Gray presented a series of 10 lectures on the subject "Contemporary American Contract Law: Form and Substance."

A member of the U-M law faculty since 1960, Prof. Gray was recently elected to associate membership in the International Academy of Comparative Law.

At U-M he teaches courses in contract law, French and German law, Soviet law and Asian law.

Translator of the civil code of the Russian Republic, Gray served as general reporter for the topic "Judicial Decisions and Doctrinal Writings as Sources of Law" at the 1974 Tehran Congress of Comparative Law, and will prepare a general report on "Product Liability Law" for the 1978 Budapest Congress.

He has also had considerable Asian experience. He gave a number of previous seminars in Japan and in 1974 and 1975 spent two semesters at the University of Kyoto as the first foreigner to be appointed visiting professor of law.

Laws Imply Noncompliance, Argues Law Review Article

Since most of our laws "are introduced with the expectation they will sometimes be broken," it might make sense for legislatures to "design laws which make allowances for anticipated noncompliance," argues an article in the *Michigan Law Review*, published by The University of Michigan Law School.

"Typically, making such an allowance involves promulgating a rule that is stricter than that which one would otherwise promulgate if noncompliance were unexpected," writes Irving Seldin, a 1977 U-M law graduate and now a member of a Philadelphia law firm.

"The intended result of such an adjustment is that less societal harm

would be produced by violations of the stricter rule than would be produced by violations under a more lenient rule chosen with (incorrect) expectations of universal compliance," argues Seldin.

The U-M law graduate cited, among other examples, a hypothetical situation involving the 55-miles-per-hour automobile speed limit.

"Assume that past experience indicates that, given the maximum penalties deemed appropriate for speeding violations, and given the limited resources available for policing the highways, drivers tend to exceed posted speed laws by 10 percent," Seldin says.

"To obtain optimal traffic flow, therefore, the speed limit could be posted at 50 miles per hour and enforced as vigilantly as any other speed limit. The result of introducing this law is that the common travel speed of drivers would be 55 miles per hour, and traffic flow would be maintained at the optimal level."

Seldin notes that a major advantage to the more stringent laws is that no extra enforcement resources would have to be applied to achieve the intended results.

One example of an actual regulation that is made to be broken is the rule that "criminal juries are legally obligated to refrain from nullifying" the law, according to Seldin.

He contends "there is considerable sentiment among courts and commentators that some instances of nullification have desirable results."

Among the arguments favoring this view, according to Seldin, are the following:

- "A significant function that nullification may serve is that of tempering rules of law by common sense brought to bear upon the facts of a specific case."

- "Many legal rules are rough instruments, constructed with general purposes in mind. While a particular legal rule might produce consequences that are beneficial on the whole, particular applications of the rule might produce injustice."

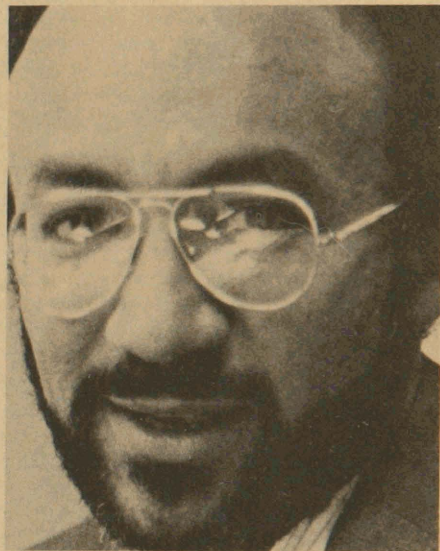
- "Through nullification, the jury is sometimes able to prevent cases of injustice or hardship that particular applications of an otherwise useful rule might create."

Seldin also argues that the nullification rule can "properly be viewed as 'made to be broken'" because the rule has been retained despite the desirability of violations.

"Even though violations of the rule are desired, juries have not been given the legal right to nullify," he points out.

Prof. Harry Edwards Returns To Law School

Harry T. Edwards has returned to the U-M Law School faculty after two years at Harvard Law School, one as visiting professor and the second as a tenured member of the faculty. He originally joined the U-M faculty in 1970.



Harry Edwards

Returning was a family decision, says Edwards. "My wife and I realized we had reached a point where we had to decide what was best for the future of the whole family. After being away from Ann Arbor for two years we realized we missed it more than we could have imagined."

While he enjoyed Harvard professionally, Edwards found Boston impersonal. He feels there is closer contact in Ann Arbor both with students and other community members. "Ann Arbor is a warm community," he says. "It allows for a more manageable life while affording easy access to numerous cultural and recreational activities."

Edwards and his wife, a learning disabilities specialist, have a son, 9 years old, and a daughter, 6.

Although he is back in his office, Edwards will not resume teaching duties until the 1978-79 school year in order to finish a number of research projects. Major among these is a book he is writing on the legal problems of higher education.

This is a burgeoning field of legal activity, according to Edwards. Of primary concern to administrators is what they perceive as over-regulation by the federal government encompassing such areas as affirmative action for both students and employees and strings-attached grants.

Faculty interest centers on curriculum control and tenure as protection against dismissal, notes Edwards. Other important problems concern issues of state sovereignty versus university sovereignty, how decision-making should be allocated among faculty, administration and the legislatures, procedural due process and First Amendment free-speech rights.

The areas of tort and contract liability are also expanding with recent suits filed by students claiming inadequate instruction in certain classes, says Edwards.

Collective bargaining involving institutions of higher education is such a large field that Edwards says he may not include it in this book but treat it separately in a labor law text.

In addition to the book, Edward continues labor arbitration work, including membership on the Board of Governors of the National Academy of Arbitrators. He also serves on the International Women's Year Commission which will hold its final conference in November. He is revising the Labor Arbitration and Collective Bargaining book and is considering a second edition of his Public Sector casebook.

He continues to work with the Harvard Institute for Educational Management and will teach in that program during the summer.—Joan J. Fahlgren

Jackson Writes Casebook On International Law

"Interdependence" is a catch word in describing international economic relations. Partly due to the dramatic dismantling of trade protection, at least among the industrialized non-communist world, economic trends in one country today tend quickly to have economic consequences in other countries.

The post World War II international economic system that presides over this growing interdependence is currently under great stress. Unemployment, drastic shifts in commodity prices, stagnation in developing countries, political instability and uncertainty in many countries, have lead to pressures and challenges to the "Bretton Woods System," which rests primarily on the trading rules of the General Agreement on Tariffs and Trade and the monetary rules of the International Monetary Fund.

Consequently it is understandable when U-M law Prof. John H. Jackson states in his recently published casebook, *Legal Problems of International Economic Relations* (West Publishing Company), that "preparing a book on the subject of international economic regulation is like trying to describe the landscape while looking out of the window of a moving train—events tend to move faster than one can describe them."

In preparing his book, Jackson relied not only on more than a decade of teaching and research on the legal structure of international economic systems (Jackson is author of *World Trade and the Law of GATT* published in 1969 and now widely viewed by governments and practitioners as the classic work on the law of GATT), but also on several years' experience as general counsel for the U.S. President's Special Representative for Trade, when he was responsible for U.S. legal work in international trade negotiations, and worked with the U.S. Congress in developing the Trade Act of 1974.

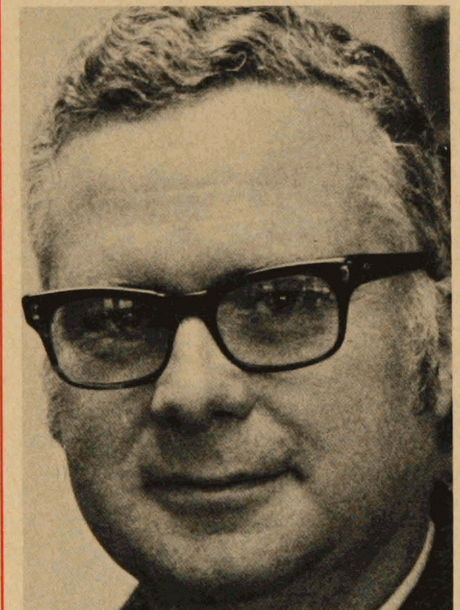
One of the thrusts of his new book is the integration of national (especially U.S.) regulation and international regulation of international trade. Thus in considering subjects such as tariff negotiations, dumping duties, escape clause proceedings, export controls, and monetary regulations, the objective of the book, says Jackson, is "to look at the legal principles and processes as they affect decisions regarding international economic relations, whether the decisions be those of private citizens, or enterprises, or government officials.

"A major emphasis of this book is on trade in goods and related monetary problems, because these are generally at the center of economic relations. But many fundamental legal and constitutional problems—for example, the complex power relationships between the President and Congress—also apply to many other international economic subjects," according to Jackson.

Another emphasis of the book is the "legal processes of international economic regulations in context," says Jackson. "The context obviously includes difficult conceptual and empirical questions of economics and

political science, of sociology, history, and especially overall foreign policy. But the emphasis here is on those subjects which have developed relatively sophisticated rule systems."

Jackson emphasizes the need to be sensitive to the differences between the viewpoints and approaches of the lawyer on the one hand, and economists or political scientists on the other. He suggests, for example, that "the lawyer is often more concerned with precision, with individual problems, and with the practical limitations on realizing objectives, than his counterparts from other disciplines. The economist skillfully analyzes the overall or macro effects of various policies and sees them in statistical terms. Often a political scientist does likewise.



John H. Jackson

"The lawyer is frequently forced to resolve individual problems, either those of particular citizens or those of a particular circumstance, often involving competing policy goals—both (or all of them) valid, but necessitating compromise. Likewise the lawyer is often a person who is asked to implement a policy and faces practical obstacles to such implementation. . . . In some cases however, the lawyer is forced to (uncomfortably) play the role of the guardian of long-run goals (preserving a constitution, for example) against those who strive for short-term expediency."

The book is designed for use in a three semester hour course, similar to that which Prof. Jackson gives at the Law School, entitled "Law of International Trade and Economic Relations." Jackson also teaches a seminar

in special legal problems of international trade. Recently he was asked by the State Department to give a series of lectures and conferences in Brazil.

In illustrating the significance of the book to lawyers as well as law students, Jackson cites several paragraphs from a series of problems that are presented in the introduction of the book:

—"Suppose your business client is trying to decide whether to build a plant in Europe so as to manufacture and sell small appliances there, or alternatively to expand his manufacturing capacity in the United States with a view to shipping products to Europe for sale there. How can he find out what are the trade barriers to exporting to Europe? How stable are those barriers (or lack of barriers) likely to be over a 20 year period? Consider also the reverse situation—goods shipped from Europe to the United States.

—"If a plant to manufacture tires is established in a developing country such as Mexico to benefit from lower cost labor, what are the long term probabilities that the product of that plant will be able to be imported into the a) United States, b) Europe, or c) Japan incurring no increase in government barriers to such imports? Would these imports benefit from zero or low tariffs accorded to developing country products?

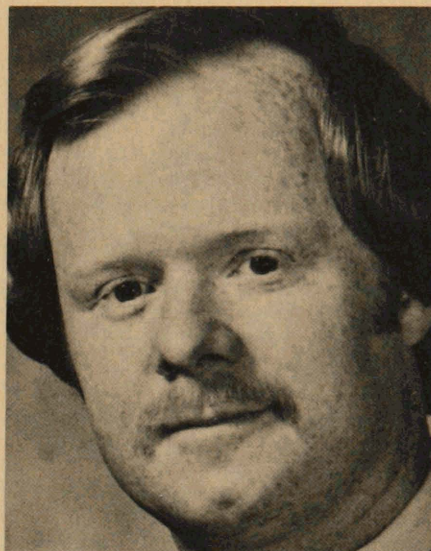
—"Is the international economic legal system adequate to the stresses of today or the near future? Should it be reformed? Can it be reformed? If so, how?"

Hal Carroll Joins ICLE Seminar Staff

Hal O. Carroll, a Birmingham, Mich., attorney with eight years' legal experience, has joined the staff of the Institute of Continuing Legal Education (ICLE) where he will be in charge of developing new seminars.

"Hal Carroll's actual practice experience will prove a valuable asset in planning seminars for Michigan attorneys," said ICLE Director Austin G. Anderson. "We expect him to play an active part in the development of ICLE's greatly expanded program for 1978."

In the coming year, noted Anderson, ICLE plans more than 50 new seminars for the practicing attorney.



Hal O. Carroll

Headquartered in Ann Arbor, ICLE is a joint unit of The University of Michigan and Wayne State University law schools and the state bar of Michigan. ICLE seminars are conducted throughout the state.

A 1969 graduate of U-M Law School, Carroll has been with the firm of Goldsmith, Yaker and Goldsmith of Birmingham for the past eight years. He has taught legal courses at the Queen's University of Belfast in Northern Ireland, Macomb County Community College and Oakland University in Rochester.

He is a member of the Corporation, Finance and Business Law Section, the Taxation Section and the Probate and Trust Law Section of the state bar of Michigan. He is also a member of the American Society of Legal History, Phi Alpha Delta law fraternity and the British Society of Public Teachers of Law.

1977 U-M Law Graduates Receive Clerkships

Eighteen 1977 University of Michigan law graduates have received clerkships with federal and state courts and similar agencies.

The names of the graduates and the judges under whom they will serve:

James Bliss

The Honorable Robert J. Danhof
Michigan Court of Appeals
Lansing, Mich.

Nancy Bosh

Michigan Court of Appeals
Detroit, Mich.

Russell Bruemmer

The Honorable William Webster
8th Circuit Court of Appeals
St. Louis, Mo.

Gaylen Byker

The Honorable John Feikens
Eastern District of Michigan
Detroit, Mich.

Robert Cassey

The Honorable Philip Pratt
Eastern District of Michigan
Detroit, Mich.

Alexander Domanskis

The Honorable Edwin A. Robson
Federal District Court for Northern Illinois
Chicago, Ill.

Eileen English

Michigan Court of Appeals
Detroit Prehearing Division
Detroit, Mich.

Richard Epling

The Honorable Charles L. Levin
Michigan Supreme Court
Southfield, Mich.

Mary Fielding

Michigan Court of Appeals
Lansing, Mich.

Greg Gelfand

The Honorable John Fiekens
Eastern District of Michigan
Detroit, Mich.

Robert Jerry

The Honorable George E. MacKinnon
District of Columbia Circuit
Washington, D.C.

Michael Marrero

The Honorable Timothy S. Hogan
U.S. District Court
Cincinnati, Ohio

Susan Miner

Justice Bistline
Supreme Court of Idaho
Boise, Idaho

F. Dennis Nelson

The Honorable Donald Holbrook
Michigan Court of Appeals
Washington Square Building
Lansing, Mich.

William Paul

The Honorable Thomas Gee
Fifth Circuit Court of Appeals
Austin, Tex.

James Strichartz

Michigan Court of Appeals
Detroit, Mich.

David Westin

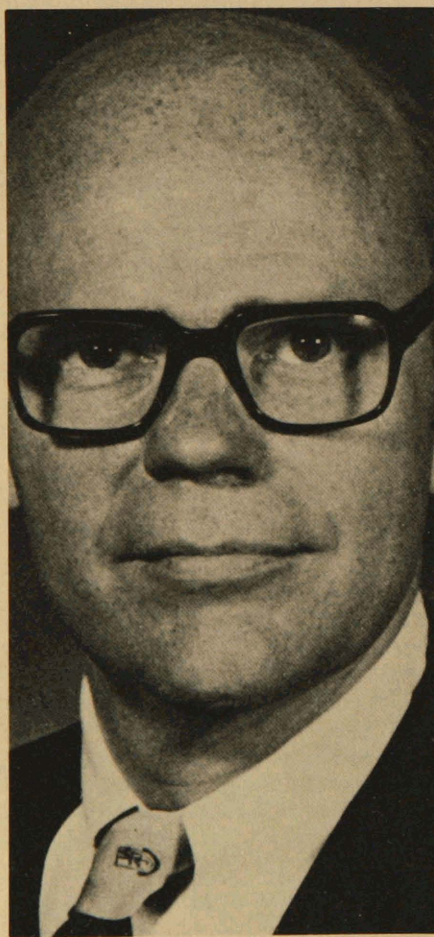
The Honorable Edward Lumbard
Federal Court House
New York, N.Y.

Andrew Zack

Chief Administrative Law Judge
Zwerdling
Federal Power Commission
Washington, D.C.

alumni notes

David R. Macdonald, a Chicago lawyer and a member of the U-M law class of 1955, is the new national committee chairman for the U-M Law School Fund, serving through 1978. A partner with the firm of Baker and McKenzie in Chicago, Macdonald was recently elected a director of the Chicago City Bank and Trust Co. For the past year he served as U.S. Under Secretary of the Navy, having been nominated by former President Ford. From 1974-76 he was Assistant Secretary of the Treasury, in charge of enforcement, operations and tariff affairs. Previously Macdonald had been a partner with Baker and McKenzie for 12 years. He received the B.S. degree from Cornell University before attending law school. At U-M he was assistant editor of the Michigan Law Review and was elected to the Order of the Coif. He served in the U.S. Army from 1955-57 and was also a member of the Naval Reserve.



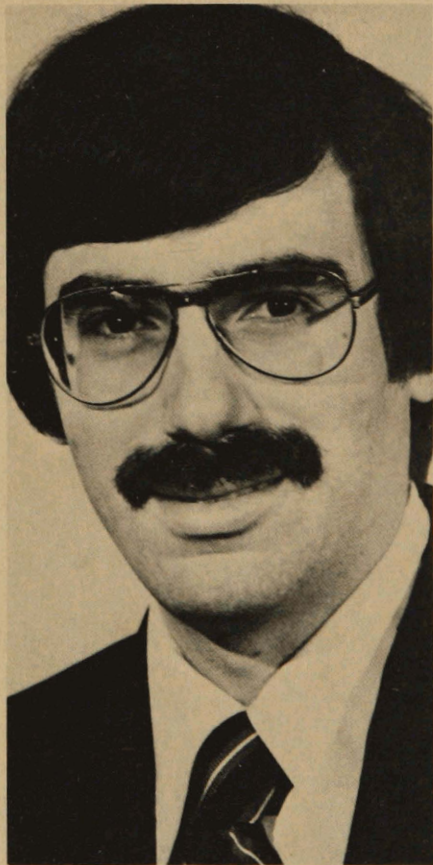
David R. Macdonald

Nolan A. Bowie, who graduated from the Law School in 1973, is the new director of the Citizens Communications Center in Washington, D.C., a public interest law firm which is considered in the vanguard of the "broadcast reform" movement. The center has played a part in legal challenges to "media monopolies" in many cities, one of the most significant cases resulting in a District of Columbia Court of Appeals ruling last March that newspaper publishers may not own broadcasting facilities in the same city, and vice versa. Among other activities, notes Bowie, the center has represented groups in legal suits seeking equal employment opportunity within the broadcast industry and greater citizen involvement in the Federal Communications Commission. Other U-M law alumni employed at the Citizens Communications Center include **Wilhelmina Reuben Cooke** (class of 1973) and **Edward J. Kuhlmann** (1966). The center supervises an extensive intern program for students interested in communications law.



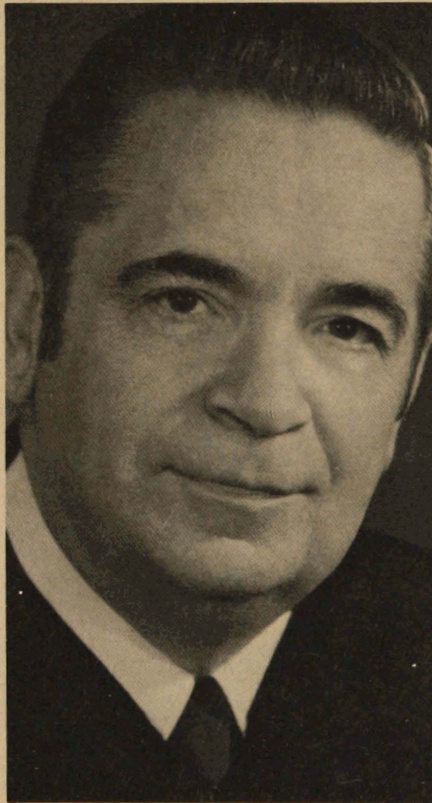
Nolan Bowie

Leslie J. Goldman, a member of the Law School class of 1970, is a newly appointed assistant administrator of the Federal Energy Administration (FEA), heading the FEA's Office of Energy Resource Development. The office has responsibilities for initiating and monitoring activities involving all energy sources, including oil, gas, coal, solar and geothermal. Since 1973 Goldman has served as special counsel to the Senate Commerce Committee's Subcommittee on Oil and Natural Gas Production and Distribution. A native of Chicago, he graduated from the U-M in 1967 before attending law school here.



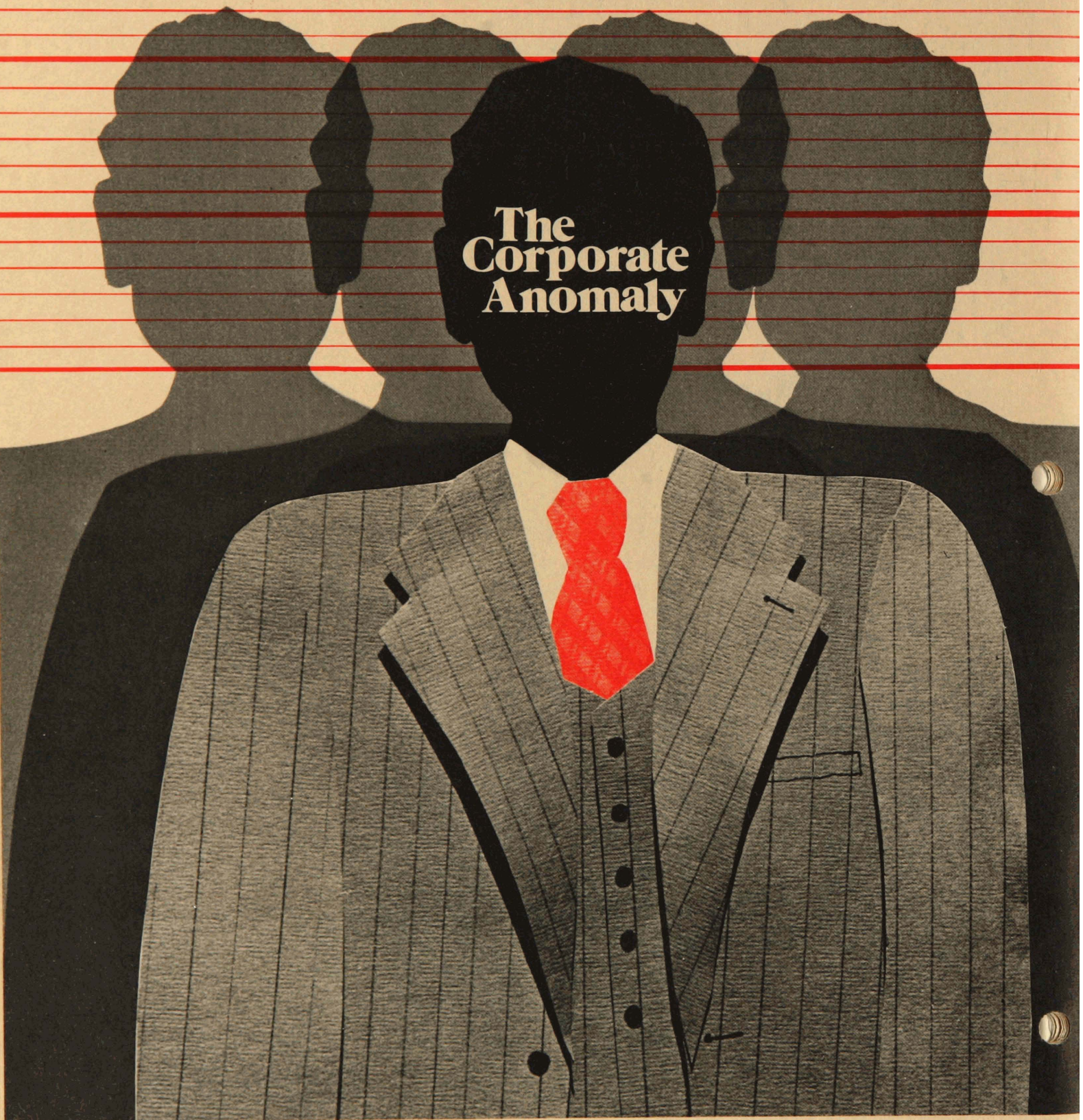
Leslie J. Goldman

A new member of the Maine Supreme Court is Justice **David A. Nichols**, a 1949 graduate of the U-M Law School. Formerly a Maine Superior Court judge, Justice Nichols was sworn in last spring as the seventh member of Maine's highest court. The new position was created by the state legislature in 1975, but Gov. James B. Longley had delayed making the nomination in order to conduct a thorough search for the new associate justice. A graduate of Bates College, Nichols was admitted to the Maine and Massachusetts bars in 1949 and practiced law in Camden, Me., before being admitted to the Superior Court bench. He is past president of the Maine Trial Lawyers Association and a judicial fellow of the American College of Trial Lawyers. He represented Maine for 15 years on the American Bar Association's House of Delegates, and also served on its Board of Governors.



David A. Nichols

**The
Corporate
Anomaly**



by Alfred F. Conard, Professor of Law,
University of Michigan Law School

The closing chapter of Professor Conard's recent book, *Corporations in Perspective*, has been translated into Italian and published in the periodical *Avvocatura degli Enti Pubblici*. Excerpts from the chapter (in their English version) are reprinted here.]

Whatever one thinks about the relevance or irrelevance of entity concepts, one must acknowledge that corporations present an anomaly to every known legal system. One basis of the anomaly lies in the fact that lawmakers have always written laws in contemplation of individual human beings as the subjects of their commands. This is true not only of the decalogue of Moses (Thou shalt not commit adultery), and the U.S. constitution (No person shall be deprived of life . . .), but even of twentieth century economic laws, of which the principal violators are certain to be corporations. In the Securities Act of 1933 the criminal penalties are visited only on those who violate "wilfully" (a very human characteristic), and they consist of imprisonment (which is impossible for a corporation) and of a fine of \$5,000 (which is ridiculously small for a corporation). For a great many corporate registrants, the fine is less than the registration fees, to say nothing of the lawyers' fees and brokers' commissions.

The anomaly has existed as long as corporations have been known. It gave rise to a chapter in the Digest of Justinian on how corporations should sue and be sued in a procedural system designed primarily for individuals. The anomaly has become progressively more troublesome as corporations have become more and more dominant in all phases of life. Business corporations in 1970 transacted about 85 percent of all business, and nonbusiness corporations conducted a very large though incalculable fraction of religious, educational, health and recreational activities.

Jurists have responded in many ways to the challenge of applying the individualistic precepts of legislation and jurisprudence to corporate behavior.

In some situations, they abandoned any attempt to fit the corporate subject in the individualistic bed. Pope Innocent IV noted the impossibility of applying excommunication—the routine sanction of ecclesiastical justice—to corporations. Coke noted a number of other incompatibilities when he said that corporations "may not commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but

by attorney. . . . A corporation aggregate of many cannot do fealty . . . it is not subject to imbecillities or death of the natural body, and divers other cases. . . ." This solution persists today with regard to imprisonment; although corporations are often adjudged guilty of imprisonable offenses, judges pass over the imprisonment penalty without even a comment.

In some other situations, judges have refused to grant corporations rights which are granted to individuals on the ground that the lawmaker had no intent to benefit corporations. A classic instance in U.S. constitutional law is the holding that a corporation is not entitled to the "privileges and immunities" of citizens. Justices Black and Douglas stubbornly insisted that the fourteenth amendment guarantees of life, liberty, property and equal protection should not be applied to corporations, since they were clearly outside the contemplation of the amendment's draftsmen and ratifiers.

On a broad front, however, judges have applied very broadly to corporations the same rights and duties which they had previously applied to individuals. In the Yearbook cases, it was generally assumed that religious and municipal corporations could receive and convey property. That is what made it important to know whether the claimant was a corporation. A universal canon of construction declares that corporations are comprised when "persons" are designated. An elaborate imagery has been evolved to determine whether corporations are "inhabitants" or "residents" or "present" for purposes of venue. Even when the legislative categories fit very oddly on corporate subjects, jurists have found means of forcing the corporations within the pigeon-holes.

Moreover, draftsmen of legal documents are finally learning to think about corporations, as well as about rugged individuals, when they write laws. The Constitution's grant of jurisdiction of suits "between citizens of different states" has been supplemented by a provision that a corporation shall be deemed a citizen of the state by which it was incorporated and also of the state in which it has its principal place of business. In international treaties it is

usual to provide that companies as well as individuals are included in the assurance of equal treatment for foreigners. The European Economic Community Treaty provides that "companies . . . formed in accordance with the law of a member state . . . shall . . . be treated in the same way as natural persons. . . ." The West German constitution of 1949 gave domestic corporations the same rights and duties as individuals.

But the number of legislative texts in which the position of corporations is stated is very small, and was formerly even smaller. Jurists have had to decide for themselves

portant fact about corporations is that they are composed of people. People organized in corporations have a somewhat different aspect than people acting individually, chiefly because the benefits and burdens and powers of decision are so dissipated among the members of the group. When General Motors sues or is sued for a million dollars, it is hard to have any feeling of certainty about who is about to be helped, hurt, corrected, or vindicated. It is nevertheless true that each such suit has some effect on the investors, or the employees, or the customers of the enterprise.

For this reason, the jurists of the Roman Empire, the canonical contemporaries of Innocent IV, the 15th century English justices, and the United States Supreme Court justices of the nineteenth and early twentieth centuries

whether to apply to a corporation a law, or a principle of law, which speaks of individuals; and, if so, how. Repeatedly they have sought to find the answer, or to justify the answer they have found, by an inquiry into the nature of the corporation. Is it real or fictitious? Is it merely another name for its members, or is it something distinguishable from its members.

There is no answer that will satisfy all, because a corporation is as diverse as an elephant, and will always have different meanings to different observers. To Herman Kahn, writing on the "Future of the Corporation," corporations appeared as the monster that preempts most of the nation's productive resources, and spews out its capricious variety of goods and services. By Peter Drucker, exploiting "The Concept of the Corporation," the corporation was viewed as a managerial hierarchy, whose lines of internal selection, promotion, influence and command determined the productivity of the organization. For Adolph Berle and Gardiner Means, analyzing "The Modern Corporation," corporations were forms of private ownership which had lost both their privacy and their owners.

All these views have validity, and all are useful in deciding some of the questions which corporations present to the legal system. They do not, however, cast great light on the more routine questions of how corporations should be fitted into a juridical order whose sentences speak of individual human beings. For these questions, the most im-

were wise in deciding that corporations could sue and be sued, could receive and convey property, could have access to federal courts, and could claim the protection of due process of law, even if their reasons were sometimes unexpressed, inconsistent, or fictional. To decide otherwise would be to penalize those individuals who choose to pool their labors and resources to accomplish objectives which individuals cannot accomplish by themselves.

There is no inherent obstacle to recognizing groups as the holders of rights. Rights to possess property, and duties to compensate for outrage, may have belonged to families and tribes before they belonged to individuals. In classic Roman law, the rights and duties were assigned to the family head—the pater familias—but they continued to benefit and burden the members collectively. However, the assignment of rights and duties to the family head permitted the formulation of law in the individual precepts to which we have become accustomed. Individualization has also been furthered by the association of secular law with canon law and moral principles, which are concerned with the individual soul.

In modern times, as family solidarity has declined and the industrial revolution has demanded larger economic units, the individuality of property ownership and debt-bearing has become less and less practical. Individuals have had to unite their resources and their labor in industrial corporations for economic purposes, in incorporated parties for political purposes, and in incorporated churches for religious purposes. It is through these and similar organizations that modern humans attain most of their economic and cultural objectives.

It would be fatuous to say that these corporations, in which moderns live and move and have their being, are fictional. But, as Timberg pointed out, there have been many fictions about corporations. It was a fiction to say that a corporation was a "citizen," or that it "resided" in a particular judicial district, or that it "wilfully" violated the Securities Act. If person means "individual human being," it is a fiction to say that a corporation is a person.

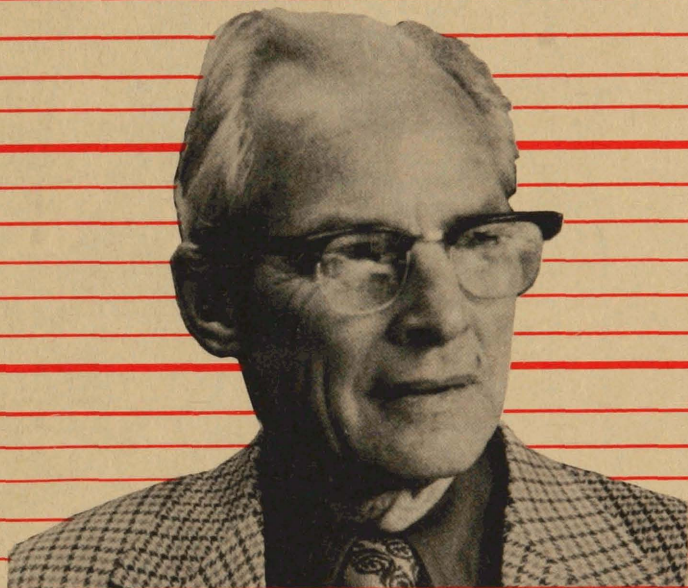
combine some part of their objectives. To ignore the interests which people seek to advance by these combined efforts would point the way back to a world of patriarchal enterprise, education and religion. If the law is to protect the activities to which a large majority of humans devote their lives, it must deal with corporations.

In the wake of an organizational revolution, corporations are the instruments through which contemporary humans serve one another, and through which they satisfy their private wants, from automobiles to religion. If we remember that cities and school districts are also corporations, we can say the same of many public wants.

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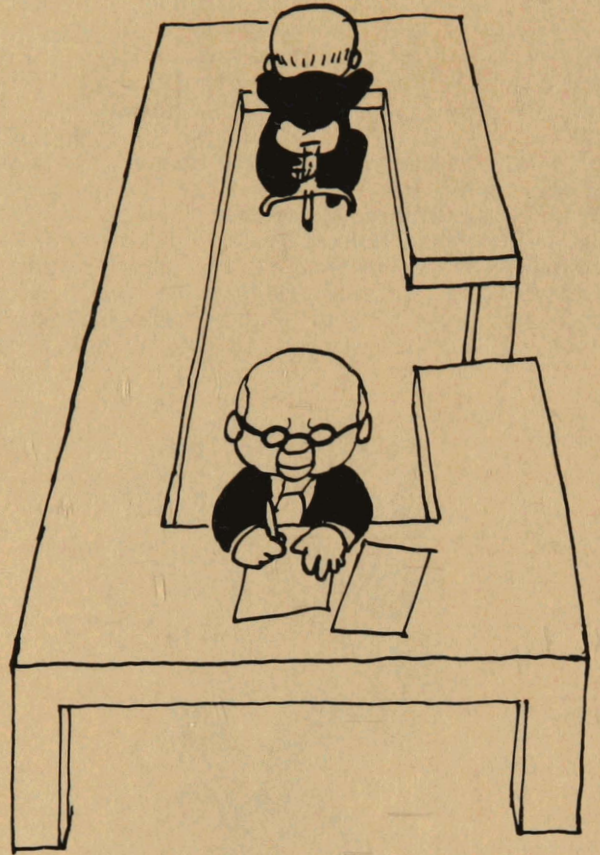
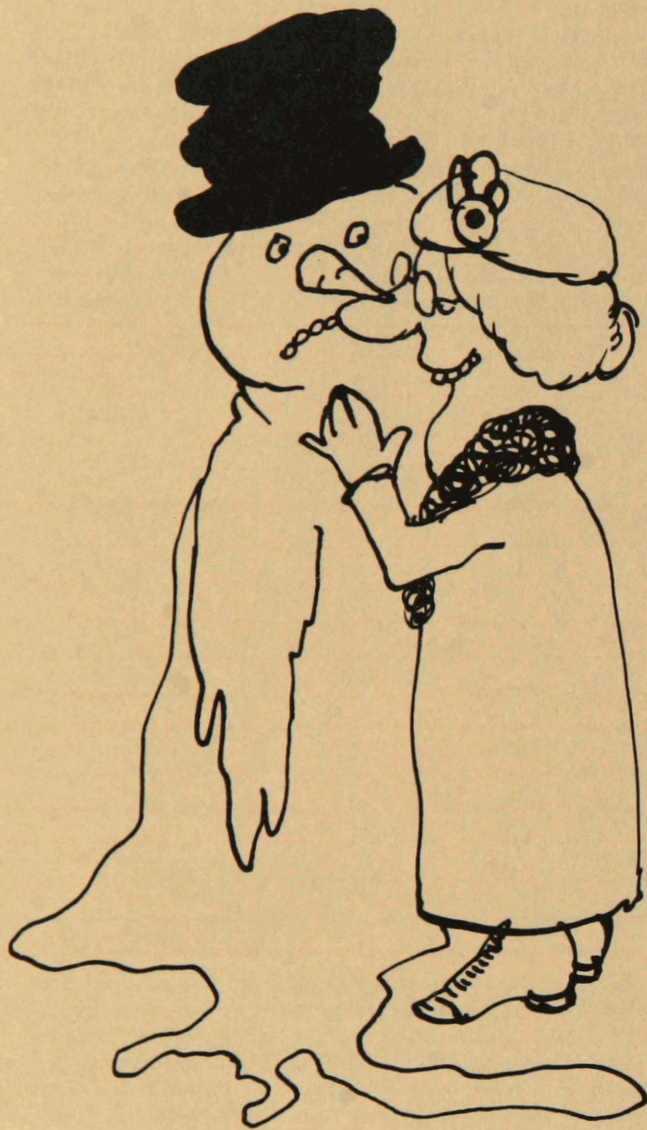
It is equally vacuous to say that a corporation is "invisible." It is true that one cannot see General Motors all at once, but neither can one see Los Angeles all at once; yet both are very visible. Nor can one see both sides of an individual at once, nor the family and property relationships with which the law deals when the individual stands before the court.

We should also discard as manifestly false the hoary assertion that a corporation exists only in contemplation of law. It is true that the state may refuse to grant it the most elemental rights, as the Supreme Court denied the rights of *Dred Scott*, and the Code Napoleon deprived certain felons of all civil rights, declaring them "civilly dead." Although the law ceased to contemplate them, *Dred Scott* and the prototypes of *Jean Valjean* continued to exist. Legislatures have occasionally decreed that a corporation should "cease to exist" when it failed to pay its taxes, but this is a mere play on words. Experience reveals that corporations continue to buy and sell and pay federal income taxes after they have "ceased to exist" under state law; the state recognizes the fact by retroactively validating their transactions when they are reinstated. As the French jurists have put it, there is a moral existence which may precede and may follow juridical existence.

When these paradoxes about corporate existence are laid aside, we are free to think about corporations as enterprises whereby humans combine some part of their resources to

Our thought patterns remain far behind the facts of our social life. This may be because so much of our literature is based on a more individualistic state of society, or because of the greater simplicity of thinking about individual actions and reactions. Perhaps we suppress our consciousness of corporations because they are the instruments through which we are obliged to surrender our labors and our money to the convenience of our human fellows. Whatever the reason may be, we tend to speak and think in terms of individual rights and duties, rather than of corporate ones.

Judges must, however, respond to the realities of an organized world, even if armed largely with individualistic statutes and doctrines. They have been resourceful in finding ways of imposing some corporate debts on corporate members, in admitting corporations to courts under a clause which speaks only of "citizens," and in accomplishing other necessary ends. Venerable maxims about the invisibility and the fictionality of corporations have clouded their explanations, but have not completely blocked their progress. By the middle of the twentieth century, judges had largely emancipated themselves from the bondage of these ideas, and were prepared to solve corporate problems in the light of the functions to be served.



The diplomats met to agree that the world of all wars should be free. They concurred in a norm on the size and the form of the table where they'll disagree.

I knew a young woman named Lowman who so hotly adored a snowman that when it dissolved she profoundly resolved to ever but ever trust no man.

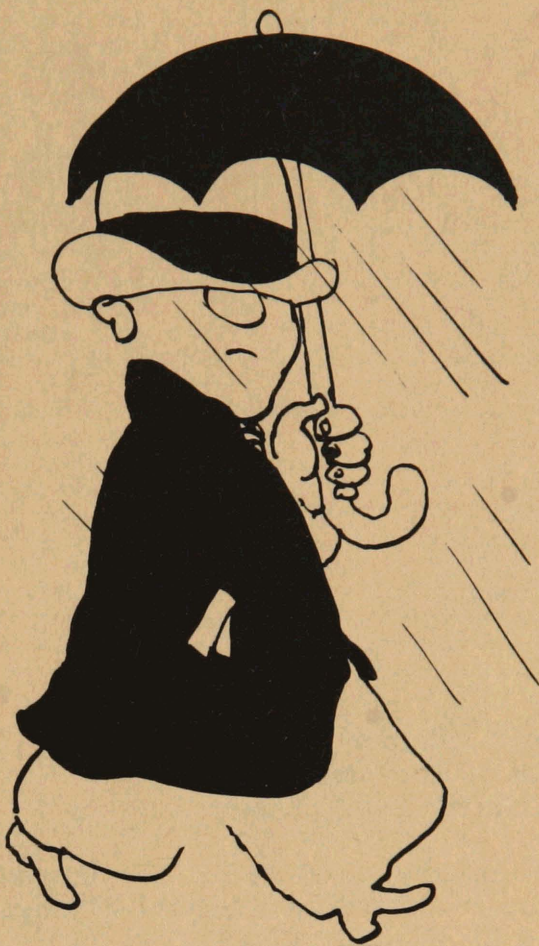


Games International

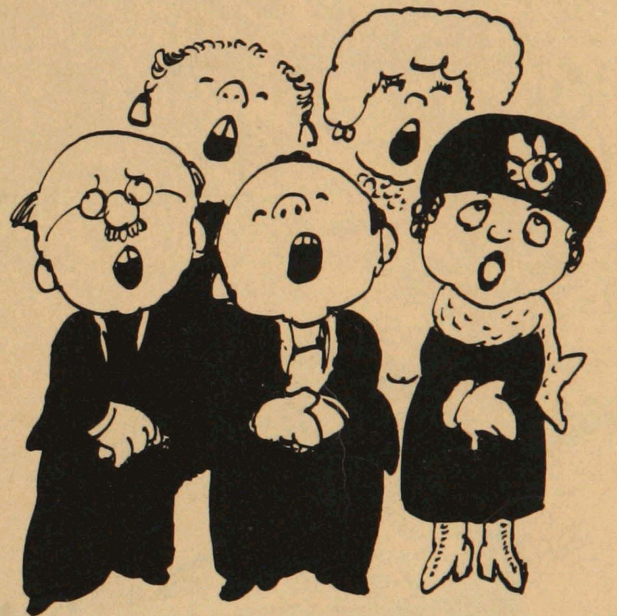
There are many ways for lawyers to find relief from courtroom pressure, international meetings, and take-over deadlines.

Dr. Hans W. Kopp, a Swiss lawyer who received his master's degree in comparative law from Michigan in 1958, now heads a leading international law firm in Zurich, Switzerland. A stately villa overlooking Lake Zurich houses his firm's elegant offices where he spends his ten-hour working day. As a colonel in the Swiss Army's General Staff he has headed the Swiss Association for Civic Education from 1963 to 1973. In his "spare" time he has authored a number of scholarly books including a widely acclaimed study of parliaments.

At night time, Kopp busies himself with his extensive collection of African art but more recently his wife has observed him bending pensively over his writing pad just before turning off the light. Mrs. Kopp, the first woman summa cum laude graduate of the Zurich Law Faculty and the first woman mayor ever elected in Switzerland, salvaged the discarded scribblings from the wastepaper basket



A skier named Willibald Dope
was exceedingly charmed by a slope.
He took it in schuss
and fell on his puss.
The church choir sang "Heavenly Hope."

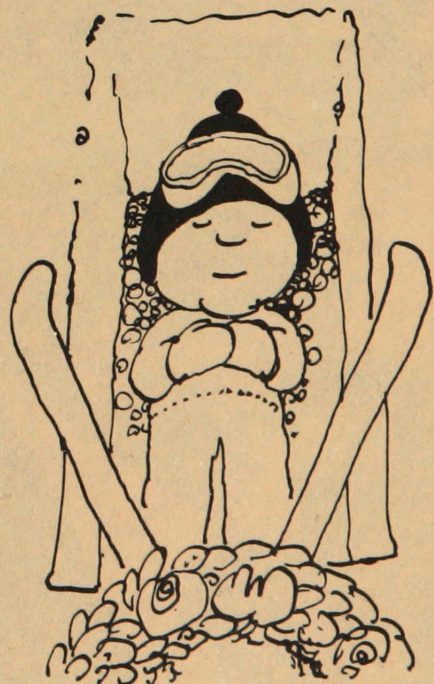


A man went embarrassed in rain,
in the main with complaint of great pain.
With a hat on his head
he repaired to a shed
but it leaked so he fled there in vain.

Lawyers Play

when she discovered that they contained a series of limericks on every conceivable subject, ranging from weather to the United Nations. At a dinner party, she casually mentioned her husband's new diversion to a publisher friend. The result was an illustrated book of limericks which sold out shortly after it first appeared in Swiss bookstores.

In the summer of 1975, Professor Eric Stein of the U-M Law School visited Zurich before assuming the visiting professorship at the Institute of Advanced Legal Studies in London. He too was intrigued by Kopp's book. The result was a translation from German into English. The editors of *Law Quadrangle Notes* thought that the readers might enjoy a sample of the original drawings and Stein's English version.*



*The translation from Hans W. Kopp, *Ein Mann ging verlegen im Regen*, is authorized and illustrations by Fredy Sigg are reproduced with permission of Benziger Verlag Zürich, Köln © 1975.

LEGAL SUCCESS AND LEGAL FAILURE

by Peter O. Steiner
Professor of Economics and Law,
The University of Michigan

[An address delivered at the 1977 Honors
Convocation at the University of Michigan
Law School, April 15, 1977.]



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Introductions that focus on my multiple claims to your attention remind me uncomfortably of an encounter I had with a wealthy, retired Greek shopkeeper on the tiny Dodecanese island of Simi. His attempts at gracious entertainment of my group (already made difficult by our need for an interpreter) were repeatedly interrupted by his newly adult nephew, recently back from many years of foreign studies, first in Munich and later in London. When the young man left at last, our interpreter praised the young man's extraordinary linguistic fluency. The old man raised his eyebrows, shrugged and said "Now he's ignorant in three languages."

We honor you today for your demonstrated fluency in an alien tongue. But my anecdote is not the theme—at least not the main theme—of my remarks today. In the 15 to 20 minutes I have been given, it would be pretentious to attempt to educate, edify, or subvert you. If my colleagues have failed to do these things in the last three years, it is surely too late now. I wish instead to comfort some of you and annoy others with an outsider's view of the lawyer's role. I say outsider because I am not a lawyer, merely a member of the guild by association.

My topic is "Legal Success and Legal Failure," but I shall talk chiefly about legal success. With the iceberg whose tip was Watergate so plainly in mind there is little chance of our forgetting legal failure. My principal point is that legal success or failure is not correlated with the individual lawyers success, financial or forensic. When I say not correlated I mean both that it is not correlated positively and that it is not correlated negatively.

I urge you to reject the view of a legal career as a choice between, on the one hand, honor without profits (perhaps in the form of the sack cloth of *pro bono* work) and, on the other hand, of profits without honor (in league perhaps with the firm of Cravath, Cutler, and Ellis). I do not denigrate the virtues of low-paid legal or public service, of *doing good instead of doing well* in Washington, in Ypsilanti, or in Hattiesburg, but I shall not focus on it now.

I want to suggest an economist's view of traditional legal employments. That view starts with the economist's view of the world. Economists have a small number of important insights. Two that I remember are: First, that *markets work*, and second, that *markets fail*. There is a vital role, albeit not the same role, for lawyers in each circumstance.

Market Success

Let's start with market success, whose ambit is the range of activities where private pursuit of selfish gain promotes the public welfare. Markets often do work, but I shall not today help you count the ways. The realm of market success is the realm of free competitive interchange and trade, and its praises have been often sung, never more eloquently than by an otherwise forgotten 19th century economist (Bascom) who described this world as "more provocative of virtue than virtue herself." In this world, however, Adam Smith's invisible hand is likely to be guiding the economy from within the lawyer's glove.

When economists speak of "gains from trade," they mean the gains from specialization that can not be realized unless efficient trade is there as well. The lawyers role here is facilitative: the contracts, the property rights, and the institutions that make exchange possible and efficient require negotiation, effectuation, and enforcement. Economists often speak of transactions costs—sometimes they speak of them as if they were an impediment to the transaction—and it may thus appear that the label "transaction cost" is pejorative. Not so; costs, here and generally,

are payments necessary for the use of factors of production, and factors of production are essential to the output produced. Such transactions costs, both that part incurred by private parties to the transactions and that paid by taxpayers as part of the institutional infrastructure in which the transactions occur, are payments for valuable services rendered. They are not one bit less worthy than the costs of raw materials, of factory labor, of machinery, or of quality control. To be sure, in a world without transactions costs one might not need lawyers, but so to say is no more interesting than to say that in a world without friction the wheel would exist only to amuse small children, and that we would not need energy to move goods and people from place to place. I can not emphasize this point enough: the services of lawyers, judges, process servers, are neither ornamental nor inherently wasteful—but vital to the workings of a market system. Obviously such costs, as any other class of costs, can be excessively high, but given reasonable choice and given competition, there is certainly at least a strong presumption that people not only pay for value received, but pay little more than is required.

Thus, even if you decline to wear a T-shirt saying "I am a transaction cost," relax. Be not dismayed if you are but the grease of commerce. You need not feel noble to be noble. Where markets work it is the alchemy of Adam Smith not altruism or self-abnegation that converts the long green to the true blue.

Market Failure

I turn to market failure. There are many kinds of well-defined market failure. Monopoly is one. Presence of externalities (third party effects) that, being outside the market, are improperly considered is another. Perhaps most important of all is the existence of so-called collective consumption goods, including not only national defense and hurricane warning systems but also more ephemeral things like justice, for which there is no effective economic market in which to register demands or to induce supply.

In coping with each of these forms of market failure, lawyers play central roles. A major reason is that correction of market failure typically requires government activity, and lawyers dominate governmental processes, not only the

judiciary, but the legislatures, the regulatory agencies, and the top administrative positions. The reasons for the domain of the lawyer being much greater than is strictly necessary are of some importance to my thesis. A popular but cynical explanation is that "it takes one to know one" and that only lawyers are evil-minded enough to cope with anti-social behavior. This is superficial, and thus likely wrong. I would not, however, go so far as to reject wholly the maxim of Stanley Surrey (when he was reforming taxes at the Treasury) that while politicians, economists, and law professors might be trusted to tell him what to do, only expensive private tax lawyers were competent to tell him how to do it.

There is a more fundamental reason for legal dominance of the correction of market failure. It is that in the area where markets fail, virtually every decision is redistributive—one group cannot usually be made better off without making another worse off. Hence, one cannot avoid the quicksand of interpersonal equity. It is necessary to decide not only *what*, but *who*. Who shall gain and who shall lose? Economists, obsessed by allocation, tend to be impatient with the questions of distribution: inefficiency not inequity is their *bete noir*. As the distinguished Jamaican economist W. Arthur Lewis put it: "Equity is the mother of confusion."

Reformers, lobbyists, and true believers ignore the problem of redistribution, while economists label it "2nd order," which is our technical phrase for something we are about to neglect. Lawyers embrace redistribution; they revel and cavort in the quicksand where others sink. Why do the rest of us tolerate it, indeed foster it? It is not (as you may have believed) because of your innate godlike qualities, nor because of your wisdom, or your purity of heart and purpose. Nor even because of your certification by a Committee on Character and Fitness. It is instead the general (if only implicitly perceived) acceptance of the key legal (but non-economic) value: process is vital to the integrity of outcome. One can reasonably decide who only by exquisite attention to procedure. How is a matter decided, how reviewed, how appealed? Decisions in the non-market sector are inherently adversarial. Decisions are made legitimately—sometimes badly, sometimes well—only if there is opportunity for ardent advocacy. Because of this, both the deciders and the pleaders must know how to use and (surely no less) how to disabuse the tricks and traps and rules of advocacy.

There is reinforcing additional factor in the lawyer's role: a central question that is prelude to policy action is the actual existence (as distinct from the theoretical possibility) of market failure, and it is a question likely to be in dispute. The identification of market failure of familiar and of novel kinds, the difficult tasks of distinguishing between market failure and market success in the activities of giant firms and petty tradesmen, of public agencies and private groups, each requires disputation, advocacy and, ultimately, resolution in *procedurally acceptable ways*. These ways, which alone confer legitimacy, are the special domain of the legal process. Here, neither more nor less than in the area of facilitating market function, these activities are for the public welfare not because of the motives of the advocates or their clients—which may be venal or crass as often as noble—but because of the process. Process cannot assure integrity of outcome, but it alone can make it possible.

Legal Success

Legal success, in my sense, arises both where markets work and where markets fail by making efficient, fair, and even wise decisions possible. That this has relatively little to do with the efficiency, fairness, or wisdom of the advocate is (perhaps surprisingly) a matter of some comfort. These are attributes in short and uncertain supply, and it would be unfortunate if we had to depend upon them.

Legal systems fail, not when lawyers become venal or rich by using the arts of advocacy to the fullest, but only when they subvert the process. A skilled advocate can become a dangerous despot. It can happen here.

I've delayed the awarding of your honors long enough. I congratulate you collectively but none the less warmly. I hope that you may prove to deserve the honors. You will if you contribute to the success of the legal system and/or expose its failures.

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