

# Law Quadrangle Notes

The University of Michigan Law School

Volume 23, Number 3, Spring 1979



## Can Government Deal With Science?

# Law Quadrangle Notes

Vol. 23, No. 3 Spring 1979

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# briefs

## Hutchins Room 116 Is "Prototype" For Remodeling

A dramatic hardwood ceiling, soft beige carpeting, fluorescent lighting, semi-circular seating, oak desk tops, cloth-covered backdrop to decrease street noise—these are among the features of newly remodeled room 116 on the first floor of Hutchins Hall.

According to faculty and students using the remodeled facility, it is perhaps the quietest, most comfortable and most pleasing classroom in the Law School. And, they note, it is fast becoming the room most in demand at the School.

The basic idea of the remodeling was to reduce the physical distance between students and professor, increasing eye contact, and enhancing communication, says Prof. William Pierce. Former associate dean of the Law School, Pierce helped coordinate the year-long renovation.

Designers of the room's semi-circular seating arrangement sought to increase student contact by enabling students to look at each other as they talk, says Pierce. Finally, eliminating the din of traffic on State Street, which allows students and faculty to hear each other at normal speaking levels, was an important goal.

"It is very clear that the remodeling enhances teaching," comments Prof. John Jackson, current chairman of the faculty advisory committee on capital improvements. Jackson surveyed faculty members who had taught in the room recently, and he characterizes their comments as "very enthusiastic."

"We've effectively reduced by 50 per cent the maximum distance between the students and the professor," says Prof. David Chambers, one of the key advisers on the project. He explains that communication problems and distance between the students and faculty members were the main complaints expressed by faculty members in a survey taken by the capital improvements committee in February, 1977.

In response, the committee, with impetus from then-Dean Theodore St.





**Student finalists in the University of Michigan Law School's Henry M. Campbell Moot Court Competition in April (standing, from left) were: Fred A. Rodriguez, Steven M. Harris, Lawrence D. Wiethorn, James F. Wallack, Paul L. Criswell, Michael A. Weinbaum, Edwin D. Mason, and Mark D. Erzen. The judges (seated, from left): Dean Terrance Sandalow of U-M Law School, Justice Charles L. Levin of the Michigan Supreme Court, Circuit Judge Philip W. Tone of the U.S. Court of Appeals in Chicago, Judge Constance Baker Motley of the U.S. District Court for the southern district of New York, and Prof. John H. Jackson of the Law School. Four finalists were declared winners of the competition: James Wallack, Lawrence Wiethorn, Edwin Mason, and Mark Erzen. In the writing portion of the competition, winning the S. Anthony Benton Best Brief Award were Michael Weinbaum and Paul Criswell for the semi-final round, and Philip Klein and Mark Simonian for the quarter-final round.**

Antoine, decided to remodel room 116—"a room that did have problems, but not the worst," Chambers says. The group sought to use that room as "a prototype" for future improvements, and they selected room 116 because it was smaller and thus "more affordable" than modifying a large lecture room, he says.

Professors say benefits from the renovation are well worth the \$140,000 price tag. "There is enormous demand to get other rooms changed," Jackson remarks. "The only limitation is the cost."

The podium in room 116 was shifted from its raised position on the north end of the room to a lowered position near the east side wall. New semi-circular rows of desk tops were built on an incline, facing the lowered podium. The teacher in the room is surrounded on three sides by students.

Cloth covered panels, reducing outside noise along the western wall, are movable to avoid permanently covering the stained glass windows, says Chambers. Backed with a sound-retardant material, the panels are working well. In other classrooms bordering State Street, sirens and other traffic sounds often interrupt lectures.

In remodeling room 116, the School was also required to bring the facility up to building code specifications. Among other features, the room now has air conditioning for summer classes and a new door that provides improved access for the handicapped.

Another feature is a telephone outlet that will allow a direct computer hook-up for classroom demonstrations, notes Henrietta Slote, assistant to the law dean.

Slote characterizes the room as a cross between a seminar room and a large lecture classroom. With a seating capacity of 70 students, the new facility accommodates such diverse classes as conflict of laws and family law.

Despite the extensive renovations, "a good deal was done to maintain the atmosphere of the rest of the Law School while producing the benefits of the remodeling," says Chambers. "The architect, David Osler, went out of his way to preserve the feel of the Law School."

Osler is a "great admirer of the building," says Chambers. "He had no desire to put an incompatible room into a stylish old building."

Surprisingly, it was not the accommodation to style that drove the remodeling price tag up. Much of the

cost was "unavoidable and hidden," including such things as rebuilding the floor and making changes to meet the building code, says Chambers.—*Mark Simonian*

## Francis Allen: "Rehabilitative Ideal" Today Is Fading

"We have entered into an era in which concern is being expressed most strongly for the value of just punishment and for deterrence achieved by punishment, as contrasted to rehabilitative treatment" of criminals, maintains a U-M criminal law authority.

Delivering the Henry Russel lecture at the U-M in the spring, Prof. Francis A. Allen traced causes of the decline of the "rehabilitative ideal" to a general dissatisfaction with many social institutions today, to claims that prison rehabilitation does not work, and to the desire for more uniform sentencing of criminal offenders.

Allen is the Edson R. Sunderland Professor of Law at Michigan, and from 1966 to 1971 served as dean of the U-M Law School. The Henry Russel Lectureship, established in 1925, is the highest honor the U-M gives to senior faculty members.

America in the 1970's is undergoing what can be called "a crisis of belief," said Prof. Allen, "and this crisis provides unfertile ground for the rehabilitative ideal.

"It is not only criminal justice that has suffered loss of confidence in American society. All of the institutions traditionally relied on to develop character and social capabilities have similarly lost support. This seems clearly true of the family, schools, and religion," said Allen.

There have also been claims, noted the professor, "that rehabilitative techniques employed in American penology simply do not work, that there is no evidence that we possess the knowledge and techniques to prevent criminal recidivism."

Among other indications of our disenchantment with criminal rehabilitation are numerous legislative bills attacking parole and indeterminate sentencing, the imposition of adult criminality in juvenile courts, and explicit withdrawal of rehabilitative objectives from sentencing guidelines, according to the U-M professor.

Allen observed that confusion over the rehabilitative ideal caps decades of conflict between two clashing trends in criminal justice—one which presumes "blameworthiness" or "moral default" on the part of the offender and one which tries to rehabilitate him.

"The same public that is asked to support the criminal law and to condemn the criminal offense is also asked to embrace and provide financial resources for programs of correctional treatment that views offenders as the products of conditions over which they have little or no control."

Although the concept of moral culpability is scoffed at by behaviorists and other social scientists, it has remained a central principle in American criminal justice, noted Allen.

"Perhaps the most basic reason for the persistence and survival of the blameworthiness principle is that in many instances it expresses what might be called the popular understanding of criminality."

Thus, "a law-giver who has misjudged the community's sense of propriety and proportion by condemning acts that are widely approved or by authorizing penalties too extreme, may encounter the phenomenon of nullification: prosecutors may refuse to prosecute, juries may disregard the evidence and acquit, and judges may in myriad ways frustrate the enforcement of the law."

Despite failings of the rehabilitative ideal, said Allen, it has made at least one clear contribution:

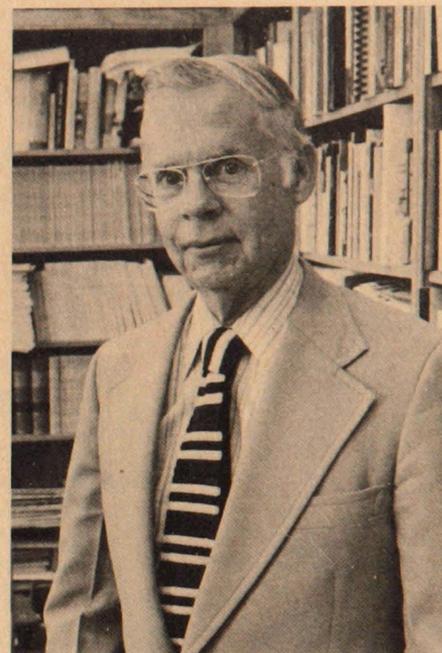
"Persons with strong rehabilitative motives have been the chief source of pressure for amelioration of the physical and moral environments of penal institutions.

"One may well inquire where the impetus for decency and humanity will come from in an era marked by the eclipse of the rehabilitative ideal," added Allen.

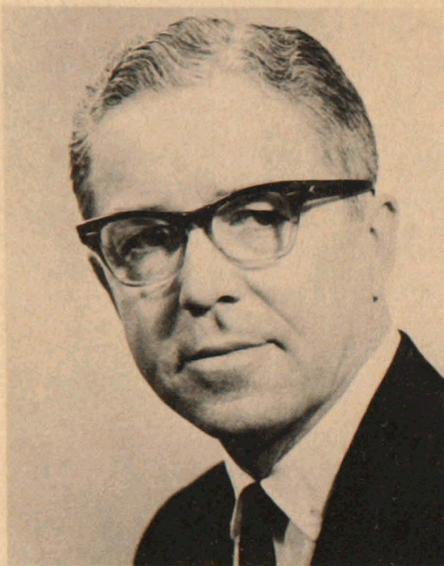
Among other publications, Allen is author of *The Borderland of Criminal Justice*, which explores the rehabilitative ideal and consequences of applying the system of criminal justice for essentially social services.

Allen has served as president of the Association of American Law Schools and chaired the U.S. Attorney General's Commission on Poverty and the Administration of Criminal Justice, the work of which led to the Criminal Justice Act of 1964 and other legislation.

The title of Prof. Allen's 1979 Henry Russel lecture was "Law as a Path to the World."



Francis A. Allen



Roy Proffitt

## Law School Annual Fund Reaches New High

Preliminary figures show that 1978 was another record year for the Law School Fund, reports Prof. Roy Proffitt, director of the fund.

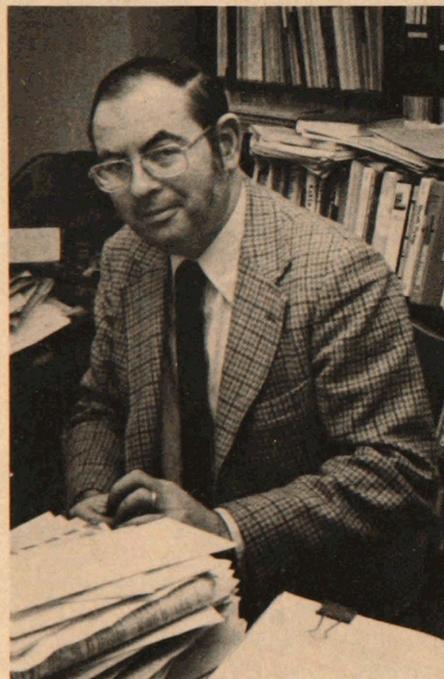
Total contributions were \$573,243.07 from 5,533 gifts. Both figures are new high marks, says Proffitt.

Campaigns each year run from Feb. 1 through the following Jan. 31. The full report of the 1978 fund campaign will be presented in the summer issue of *Law Quadrangle Notes*.

"There is scarcely an aspect of the Law School that has not been enhanced by the fund during the 18 years of its existence," observes Proffitt. "It would be difficult to overestimate the importance of private giving to the Law School's 'good health.'"

In the past 18 years, a total of \$5,458,866.48 has been given through the Law School Fund.

At the meeting of the fund's National Committee on April 7, David Macdonald (JD, 1955) of Chicago, who has served as chairman for the past two years, was succeeded by William A. Groening (JD, 1936) of Midland, Mich.



Yale Kaminsar

## "Exclusionary Rule" Debated By Kamisar and Judge Wilkey

Arguments of U-M law Prof. Yale Kamisar and Judge Malcolm Wilkey of the U.S. Court of Appeals, District of Columbia Circuit, debating the need for the "exclusionary rule" were featured in articles in recent issues of the national legal magazine *Judicature*.

The exclusionary rule bars the use in criminal prosecutions of evidence obtained in violation of the Fourth Amendment guarantee against unreasonable search and seizure. The rule was adopted by the federal courts in 1914 and imposed on the states as a matter of Fourteenth Amendment due process by the Warren Court in the 1961 case of *Mapp v. Ohio*.

"In recent years, the exclusionary rule has come under growing attack. Chief Justice Warren Burger, in particular, has expressed much unhappiness with the rule and deep

skepticism about its value," notes Prof. Kamisar.

In his debate with Judge Wilkey, Kamisar says he is challenging not only the views of Judge Wilkey but also those of Chief Justice Burger, whom he calls Wilkey's "ideological ally." The Kamisar-Wilkey clash is believed to be the first debate about the rule to appear in any legal journal since the early 1960's and, according to editors of *Judicature*, has generated more mail than anything ever published in the magazine's 62-year history.

Among points made by Kamisar and Wilkey in the magazine:

- Judge Wilkey claims that "the greatest obstacle to replacing the exclusionary rule with a rational process" (which he views as providing a direct remedy against the lawless police officer, but admitting the illegally seized evidence in a criminal case) is "the powerful, unthinking emotional attachment" to the rule by some lawyers and judges "heavily imbued with a mystique of the exclusionary rule as of almost divine origin."

Kamisar retorts that this cannot explain support for the rule "by such battlescarred veterans" as Roger Traynor (Chief Justice of the California Supreme Court in the 1950's and 60's and generally regarded as the greatest state judge of his time), Chief Justice Earl Warren, and Justice Tom Clark. Kamisar notes that Warren spent more years as a state prosecutor than any other person who has ever sat on the U.S. Supreme Court and that during the entire 24 years Warren spent in state law enforcement work his state (California) admitted illegally seized evidence. Indeed, says Kamisar, Warren was the California Attorney General who successfully urged Traynor and his brethren to admit illegally seized evidence in 1942. Years later, however, both Traynor and Warren became convinced of the need for the exclusionary rule. Kamisar also notes that Justice Clark, who authored the opinion in *Mapp v. Ohio*, was a former U.S. Attorney General and a former assistant attorney general in charge of the criminal division before that.

- Judge Wilkey argues, "We can see the huge social cost [of the exclusionary rule] most clearly in the distressing rate of street crimes—assaults and robberies with deadly weapons, narcotics trafficking, gambling and prostitution. . . . To this high price we can rightfully add specific, pernicious police conduct [such as police perjury, harassment, and corruption] and lack of

discipline—the very opposite of the objectives of the rule itself. . . . Compare the results in other countries—in England neither the police nor the criminals carry guns. Why? The criminals know that the police have a right to search them on the slightest suspicion, and they know that if a weapon is found, they will be prosecuted. Whenever a man is caught with a gun or narcotics in his possession in England or Canada, conviction is virtually automatic—there is no denying the fact of possession, there is not exclusion of the evidence, no matter how obtained.”

Kamisar retorts that Wilkey has presented no statistical support for his assertion that there is a causal link between the high rate of crime in America and the exclusionary rule and that no such empirical evidence exists. In the decade immediately preceding *Mapp* (1950-60), notes Kamisar, crime rose much faster in many states which admitted illegally seized evidence than in the District of Columbia, whose law enforcement officers were subject to the exclusionary rule. Kamisar also argues that although Michigan had an “anti-exclusionary rule” proviso in its state constitution from 1961-70 (when it was finally struck down as a violation of the federal constitution) which permitted its police to search for and seize firearms of all types without probable cause or any cause, the number of unregistered handguns increased dramatically, firearms robberies doubled, and homicides committed with firearms increased four-fold.

In addition, argues Kamisar, Wilkey’s attack on the exclusionary rule is really an attack on the Fourth Amendment itself. It is the constitutional guarantee itself, says Kamisar—not the exclusionary rule—which imposes limits on police operations. If the ban against unreasonable search and seizure were obeyed as it should be, and as we declare it should be, he points out, there would be no illegally seized evidence to be excluded.

Continues Kamisar, “Judge Wilkey points enviously to England, where ‘the criminals know that the police have a right to search them on the slightest suspicion. . . .’ [Emphasis added.] But what is the relevance of this point in an article discussing the exclusionary rule and its alternatives? Abolishing the rule would not confer a right on our police to search ‘on the slightest suspicion’; it would not affect lawful police practices in any way. Only a change in the substantive law of search and seizure can do that. And

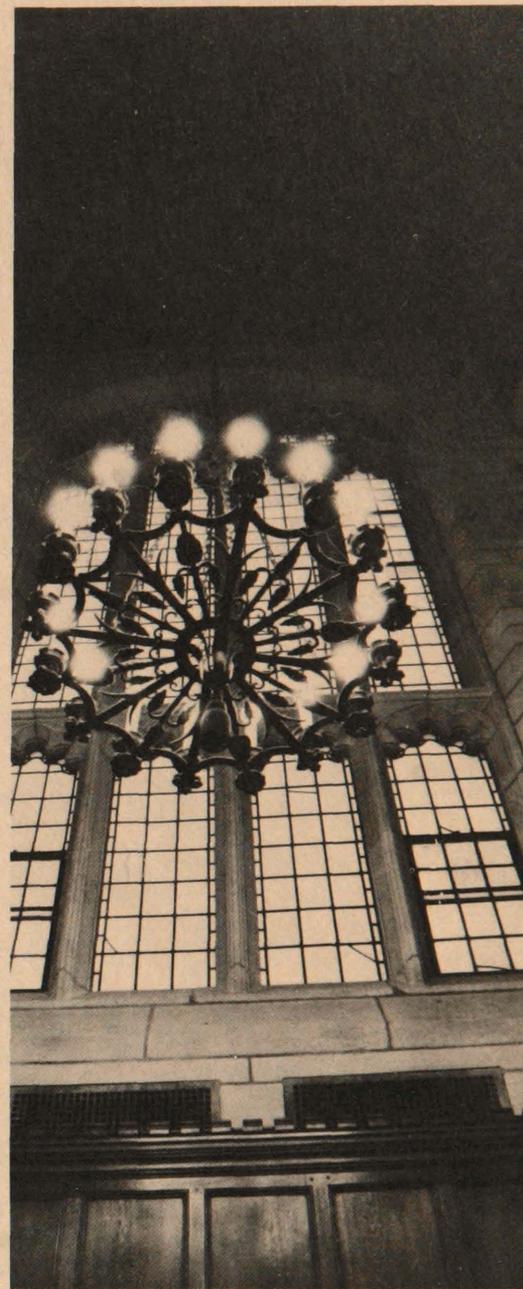
replacing the exclusionary rule with a [direct] statutory remedy against the government would not bring about an increase in unlawful police activity if the alternative were equally effective—and Judge Wilkey expects it to be ‘a far more effective deterrent.’ ”

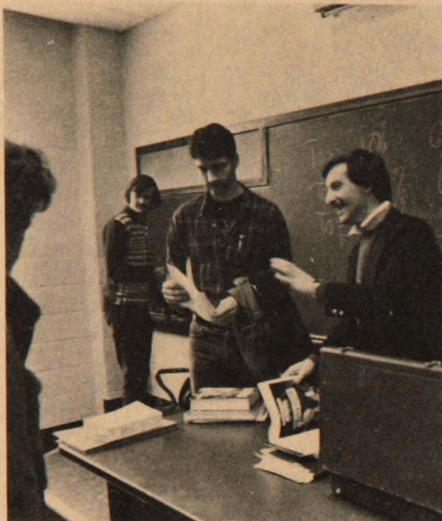
• Judge Wilkey maintains that the 1961 *Mapp* case “removed from the states both the incentive and the opportunity to deal with illegal search and seizure by means other than suppression [of the illegally seized evidence]” and he urges abolition of the rule to “permit in the laboratories of our fifty-one jurisdictions the experimentation with the various possible alternatives promising far more than the now discredited exclusionary rule.”

“For many decades,” counters Kamisar, “a majority of the states had no exclusionary rule but none of them developed any meaningful alternatives.” Between the time the Supreme Court adopted an exclusionary rule for federal prosecutions (1914) and the time the Court imposed this rule on the state courts (1961), observes Kamisar, the states had almost 50 years to experiment, but in this half-century “not a single state legislature nor a single law enforcement agency demonstrated that the search and seizure problem could be handled in other ways.” Insists Kamisar, “Abandoning the exclusionary rule without waiting for a meaningful alternative (as Judge Wilkey and Chief Justice Burger would have us do) will not furnish an incentive for devising an alternative, but relieve whatever pressure there now exists for doing so.”

• Judge Wilkey finds “the downplaying of available alternatives [to the exclusionary rule] most distressing in Professor Kamisar’s position.” Wilkey continues, “I do not really know whether any ‘meaningful’ alternative to the exclusionary rule emerged in any of the states prior to *Mapp*, but I do suggest that, wherever we have been and wherever we want to go, we start from where we are now. I propose Congressional action to provide meaningful alternatives to the exclusionary rule. Congress could directly provide federal remedies, and indirectly permit and encourage the states to provide the same or alternative remedies. In other words, the exclusionary rule could be abolished now, conditioned on the enactment of acceptable alternatives.

“I would prefer to see the exclusionary rule abolished conditionally with alternatives





Law student Stewart Feldman teaches an undergraduate accounting course at the U-M School of Business Administration.

provided simultaneously, but I urge abolition in any case. I do so because the rule is pernicious in its present form, and I am confident that more attractive alternatives would speedily emerge," says Wilkey.

Judge Wilkey says he is confident that "a majority of trial judges would find themselves in general agreement with my views. In any case, I think we should find out—not what judges think about my views, but what judges think about the exclusionary rule." He concludes, "I know of no body of Americans more qualified to define and describe the role of the exclusionary rule in the administration of justice in our country than trial judges. They apply it and live with it day by day. They must know intimately the good and the bad features of the exclusionary rule as it exists in reality, not in theory. They should be consulted."

## Law Students Double As Accounting Teachers

Ten a.m. The students file out of the classroom, finished with accounting class for the day. Meanwhile, the instructor hastily gathers his notes and dashes from the U-M School of Business Administration down the street half a block to the Law School. Once inside the Gothic building, he finds his classroom and takes a seat—as a law student.

For six men and one woman the above scenario is familiar, because they lead this dual existence, part-time accounting instructor and full-time law student. They combine the weekly routine of attending law lectures and giving accounting lectures, devoting anywhere from five to 25 hours weekly preparing themselves to face classes of 20 to 75 undergraduate students.

Teaching accounting is more than a job for these law students, although each is compensated for his teaching. All seven have substantial backgrounds in business or accounting. Most have passed their Certified Public Accountant exams and have been employed by major CPA firms. One student wants to combine his law and advanced business degrees for a teaching career.

"I've enjoyed teaching," says Jim Jordan, a second-year student from Saginaw, Mich. Jordan was the 1977 recipient of the prestigious Paton Accounting Award for the highest score on the CPA exam in the state of Michigan. "I couldn't pass up this opportunity. It's been very helpful to me and has added a new dimension to me as a student."

Says third-year law student Gordon Klein of Huntington Woods, Mich., "I was an undergraduate here and had taken the accounting course myself. I have always relished the idea of being on the other side of the classroom. Teaching has given me the opportunity to solidify this material in my own mind."

Being close to accounting is an important motivation to other students who teach. Stewart Feldman, a second-year student from Niagara Falls, N.Y., spent two years as a CPA on the national office staff of a "Big Eight" accounting firm. "Accounting is an area about which I have many thoughts and beliefs. Teaching is a unique opportunity to take my university education, my work experience in accounting, and my philosophy on business and offer these to an interested group of students."

Says Pat Kenney, a first-year law student from Cleveland, "I really like the fact that you can see the results. People really learn accounting. There is a great satisfaction in having the answer to someone's question." Kenney spent four years on the audit staff of a major accounting firm.

The part-time instructors acquire public speaking skills, useful for courtroom presentations. They are also able to integrate their law lessons with their accounting backgrounds, in preparation for careers in tax or securities law.

Gordon Klein, who expects to graduate in May, comments that the Southern California firm he is joining has a number of J.D./CPAs. Accounting is "an important background in taxation," he comments, adding that he hopes to put his CPA training and summer work experience in accounting to good use.

The tie-in between law and accounting has also helped the instructors explain accounting concepts to the business students. Stewart Feldman remarks that in defining commercial paper for his class, he called on his knowledge of securities regulation to give his students "a more specific grasp of what commercial paper is from a legal standpoint.

"And the concept of title from the accounting standpoint in the textbook

was outdated by the advent of the Uniform Commercial Code," Feldman says, noting that his law studies provided the correct approach for his accounting class.

Carrying the interrelationship one step further is John Robinson, a doctoral student in business and a third-year law student who hopes to continue teaching as a career. The Gering, Neb., native presently teaches tax classes to upper level students, and he says he finds his teaching "a good way to work your way through school."

Teaching also makes it easier to be a student and understand law professors, according to Robinson. He says he tends to emulate the professors he has admired in law school.

"I now appreciate the time involved to develop a smooth-flowing lecture," says Feldman. "And developing a two-hour exam for some 80 students benefits me in the way I approach my law school exams. They lead me to improve my test-taking abilities."

Perhaps the most demanding area for these instructors is the time commitment. Particularly for the first-year students, who face many time pressures, the constraints of a weekly teaching load can be difficult.

First-year student Mike McGuire from Farwell, Mich., says his 18 hours each week devoted to teaching, office hours, and class preparation take away from his study time.

Mark Lezotte, first-year law student from Dearborn Heights, Mich., concurs that juggling law school and teaching can be a problem. "Once I was proctoring an exam in the business school and worrying about one I had the next day in the law school."

Undergraduates can also be demanding of the instructors' attention, especially before exams. "I hold the record—1:30 in the morning," says John Robinson, adding that he now discourages students from calling him at home and emphasizes his availability during office hours.

Rather than give their students the answer outright, some of the law students say their law training has taught them to lead their students to the desired conclusion, step by step. This procedure allows their students to think through the accounting problem. "Because both law and accounting are problem oriented, this is the best way to teach," says one of the instructors.

The law student-instructors are granted freedom to teach their sections as they wish, according to accounting Prof. Wilbur Pierpont, who oversees the instructors. Pierpont,

former financial vice president of the University, gives these law students high praise. "They are all very good teachers. They get very good ratings from students," he says.

The opportunity for law students to teach in the business school became available because of the tremendous growth in the undergraduate enrollment in accounting courses, coupled with a shortage of Ph.D. students in the business school, Pierpont explains.

To fill the gap, the School of Business Administration in 1976 turned to law students with backgrounds in business administration and public accounting, including recent graduates with bachelor's degrees in business administration from U-M. Bolstered with early successes and continued high undergraduate enrollment, the law student teaching program has flourished, and Pierpont says he is anxious to find even more law students to teach in the business school.—Mark Simonian

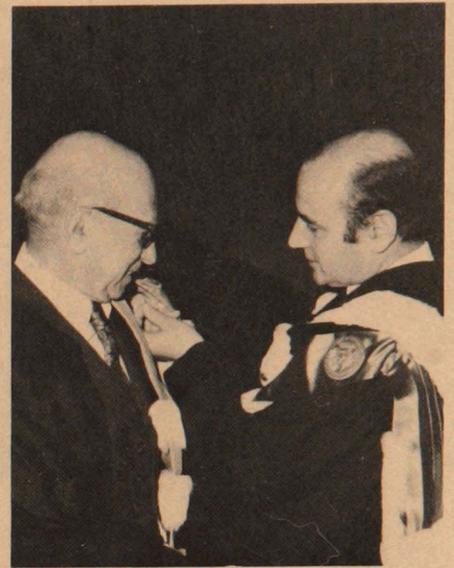
## Eric Stein Receives Second Honor

Eric Stein, professor of international law at U-M, received an honorary doctoral degree this winter from the French-speaking Free University of Brussels, Belgium.

Last May Stein received an honorary doctorate from the Flemish-speaking Free University of Brussels, and he is one of the few Americans to be honored by both institutions.

Stein was instrumental in establishing an ongoing exchange program involving students from U-M Law School and both the French and Flemish speaking institutions in Brussels. Formally established in 1972, the program has been in operation on an informal basis since the 1950's.

Stein notes that there are some 40 U-M law graduates, both American and European, now working as attorneys, corporate lawyers, and teachers in Belgium, including several on the legal staff of the Commission of the European Communities (Common Market). Claus-Dietrich Ehlermann, general counsel for the commission, holds a law degree from the U-M. A U-M law alumni group is now being formed in Belgium, notes professor Stein.



Eric Stein (left) and Rector J. Michot of Free University of Brussels



Stein, who holds the Law School's distinguished Hessel E. Yntema Professorship, is a specialist in disarmament and weapons control law and international business law. He has authored or coauthored a number of books on European Community law, test ban negotiations, and harmonization of international business law.

## **Problem of Confidentiality In Abuse Cases**

A provision of Michigan's Child Protection Law requiring social workers and other professionals to report suspected instances of child abuse or neglect has led to confusion on the question of confidential communication between client and professional, according to a University of Michigan child advocacy specialist.

Addressing the Michigan Governor's Conference on the Community Prevention of Child Abuse and Neglect in Detroit this spring, Donald Duquette said counselors' statutory obligation to report suspected child abuse cases to state authorities takes priority over confidentiality guarantees.

Duquette, a lawyer, noted that the 1975 Michigan Child Protection Law specifically states that such privileged or confidential communication is "abrogated" in order for treatment personnel to report child abuse cases or to present information in a child abuse civil court case. The only exception, he said, is confidential communication between lawyer and client.

Duquette heads the clinical law program of the U-M's Child Advocacy Project. Established in 1976, the project involves students and faculty of the U-M law, medical, and social work schools in dealing with problems of child abuse and neglect.

Duquette noted that, under the Michigan law, confidentiality is also waived in order for the state Child Protective Services (which has responsibility for child protection in Michigan) to gain information and assistance from other agencies and professionals in child abuse cases.

The major thrust of the act, said Duquette, is to ensure that instances of child abuse or neglect are reported to Protective Services and that action

is taken which is in the best interests of the child.

Duquette, who has been studying the confidentiality question under a grant from the Washtenaw County Coordinating Council for Children at Risk and the Michigan Office of Criminal Justice Programs, offered the following suggested guideline for professionals treating persons involved in suspected child abuse:

"Information must be shared with Protective Services, regardless of privilege, if it is directly related to inadequate mental or physical care received by a child suspected of being abused or neglected."

But there are some limitations, suggested Duquette.

In a psychotherapy session, for example, such intimate matters as "the patient's relationship with parents, early adolescence, sexual relationships, and current sexual dysfunction may all have been revealed to the therapist in addition to the admission of child abuse or neglect. If revealing the other information is not directly related to suspected child abuse and neglect, it seems that privilege would not be abrogated as to the secondary information."

Unlike public agencies, however, private agencies and professionals have no statutory mandate to enlist supportive services of other agencies or to bring matters into court, according to Duquette.

"Therefore, unless private agencies and professionals actually suspect child abuse and neglect—in which case they must report that information to the department—their duty to preserve the privacy and confidence of their clients remains intact," he said.

Duquette further explained, "Private agencies and professionals may be entitled to widen the circle of confidence to include professionals or community programs consulted for the benefit of the clients. The consultants, however, are bound by the same legal duty to preserve client confidences and to respect client privacy as is the original agency or professional.

"Coordinating scarce community resources is a serious problem in the area of child abuse and neglect. Appreciation of the legal ability to consult with others for the benefit of the client may improve services to families by allowing professionals and agencies to talk together more freely about client needs."

## Misleading TV Ads Raise Question Of Regulation, Says U-M Study

Use of subtle psychological techniques and misleading "cultural messages" in television ads—such as those implying that processed snack foods are nutritious or using scenic imagery to emphasize non-polluting aspects of snowmobiles or other vehicles—make these commercials a target for government regulation, suggests a U-M Law School study.

The study notes that widespread impact of these "implicit messages" in reinforcing "myths, stereotypes and prejudices" on the part of viewers.

"A snack food advertisement need not induce a purchase to suggest to the viewer that processed snack foods are nutritious. Although generally ancillary to advertising's commercial purpose, these messages touch upon every aspect of American life," said Fred Small, a 1978 Law School graduate who is now on the legal staff of the Environmental Defense Fund of Denver, Colo. Small's study appeared in the *Michigan Law Review*.

Frequently, says Small, "the impressions conveyed by product advertisements are at least partially the result of subtle psychological techniques. . . . The images they convey are often false, in that they are contradicted by undisclosed facts."

Small notes that strict new regulations have been proposed for children's television advertising by the Federal Trade Commission (FTC).

Among other things, the FTC's February 1978 recommendations would ban all television advertising directed at preschool-aged children, ban televised advertising directed at children up to 11 years of sugared foods posing high dental risks, and require that commercials featuring other sugared foods be balanced by nutrition and health messages financed by advertisers.

The U-M study suggests that the FTC's recommendations raise the question of regulation of television advertising in general, especially advertising whose "implicit messages" foster misleading ideas about such important issues as nutrition, the environment, and sexism.

Among television advertising regulatory schemes which may have some merit, according to the U-M study:

—The FTC, upon determining that an advertising practice is unfair or deceptive, could order a correction or "fair presentation of the facts" by the advertiser.

—The so-called "fairness doctrine," which requires equal time for competing social or political views on TV shows, could also be required for television advertising which is deemed to have a strong cultural impact. But thus far, such a measure has been strongly resisted by the Federal Communications Commission, in view of the heavy financial burden it would place on broadcasters.

Televised food advertising presents the strongest case for regulation by the FTC, according to author Small.

"That so powerful an educational tool should be used to encourage unhealthy eating habits in a malnourished nation is the most offensive and harmful form of unfairness," he writes. "As part of the price of access to television, food advertisers should be assessed the cost of corrective nutritional messages, both informational and motivational."

From a legal point of view, says the U-M study, proposals to regulate false or deceptive advertising would not appear to violate constitutional mandates, although the U.S. Supreme Court has maintained that "the free flow of commercial information" is itself in the public interest and constitutionally protected by the First Amendment.

"Although the issue has not been directly before it, the Court has stated that the protection accorded commercial speech presents no obstacle to regulating false, misleading or deceptive advertising to ensure 'that the stream of commercial information flows cleanly as well as freely,'" writes Small.

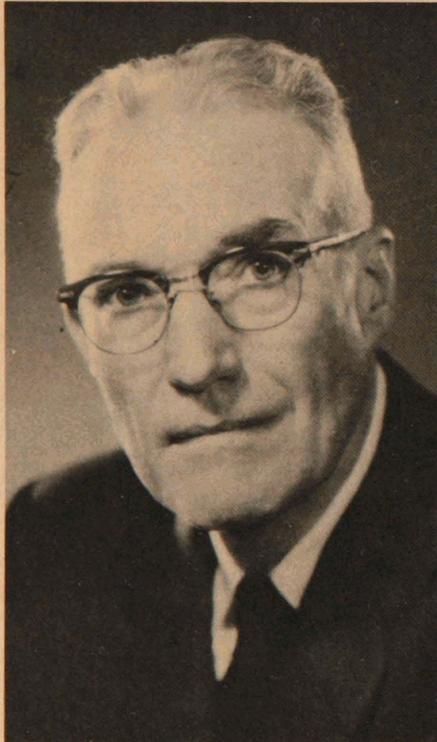
Among recent precedents, notes the article, is a case heard by the Court of Appeals for the District of Columbia Circuit (*Warner-Lambert Co. v. FTC*), in which the remedy of corrective information to counterbalance deceptive television product advertising was upheld as constitutional.

"Americans have a justified fear of anyone deciding for them what they 'ought' to see and hear," concludes Small. "Television broadcasting, as presently structured, forces an uncomfortable policy choice between delegating this decision wholly to corporate advertisers or permitting representative government to intervene on behalf of perceived public interest.

"Whether called 'education,' 'acculturation' or 'advertising,' propaganda is constantly broadcast to television viewers. The question is whether it is to be accountable to the public."



Cover of Spring 1979 issue of *Michigan Quarterly Review*.



Henry K. Ransom

## U-M Magazine Aims At Wide Audience

The *Michigan Quarterly Review*, originally purely a literary journal, has now expanded its scope to emphasize articles of general interest, while it continues to publish quality fiction and poetry. The magazine is published at the U-M.

The change is inaugurated in the *Review's* spring, 1979, issue titled "The Moon Landing and its Aftermath." Focusing on the broad cultural implications of the space achievement, the issue contains articles by astronomer Carl Sagan, President Jimmy Carter, Notre Dame University President Theodore Hesburgh, U-M aerospace engineer Harm Buning, historian and Pulitzer Prize-winning poet Peter Viereck, and many others.

U-M law Prof. Francis A. Allen, who serves on the *Quarterly Review's* editorial board, notes that some future articles in the magazine are likely to have a legal slant.

The first such contribution from the field of law, appearing in a future issue of the magazine, will be Prof. Allen's 1979 Henry Russel Lecture at U-M, "Law as a Path to the World."

The *Michigan Quarterly Review* may be purchased at Ann Arbor bookstores in the campus area for \$2.50. The annual subscription rate is \$9 for four issues. Further information is available from *Michigan Quarterly Review*, 3032 Rackham Building, U-M, Ann Arbor, Mich. 48109.

## Henry King Ransom Professorship Is Established

The Law School has established the Henry King Ransom Professorship of Law, supported by an endowment created by a professor emeritus of surgery at the U-M Medical School.

U-M law Dean Terrance Sandalow noted that the professorship, which includes a \$2,500 annual stipend, will be filled at a later date.

Prof. Henry Ransom, whose gift supports the professorship, is an Ann Arbor resident who had been associated with the U-M for 52 years prior to his retirement from the Medical School faculty in 1968.

A native of Jackson, Mich., he received the A.B. degree in 1920, the M.D. in 1923, and a master's degree in

anatomy in 1934, all from Michigan. He became assistant professor at the Medical School in 1929, rising through the ranks to full professor in 1950. For an 18-month period from 1957-59 he was acting chairman of the department of surgery.

Prof. Ransom has been a member of the board of governors of the American College of Surgeons, a founding member of the American Board of Surgery, an editor of the *Archives of Surgery*, and a contributor of many articles to surgical literature. He is also surgeon emeritus at St. Joseph's Mercy Hospital in Ann Arbor.

## Addendum

In addition to the names mentioned in the last issue of *Law Quadrangle Notes*, two other members of the Law School's class of 1978 were awarded judicial clerkships. The U-M graduates and the judges under whom they are serving:

Dennis Earl Ross  
The Honorable J. Edward Lumbard  
U.S. Court of Appeals  
for the Second Circuit  
Bridgeport, Conn.

Stephen J. Field  
The Honorable Walter R. Mansfield  
U.S. Court of Appeals  
for the Second Circuit  
Bridgeport, Conn.

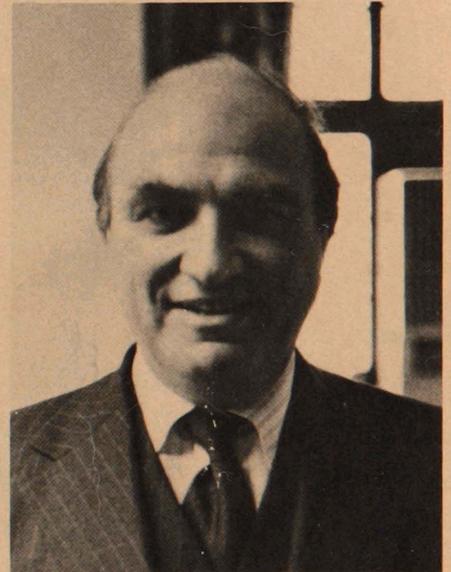
# events



Robert H. Bork

Profs. **Robert H. Bork** of Yale Law School and **Norman Dorsen** of New York University School of Law, delivering the 1979 Thomas M. Cooley Lectures at U-M Law School, agreed that there has been no coherent First Amendment theory, based on Supreme Court cases over the years. The two professors examined "The Burger Court and Free Expression" in the three-part lecture series in the fall.

Dorsen, who is currently chairman of the board of directors of the American Civil Liberties Union (ACLU), concluded that, surprisingly, property interests have played a major role in First Amendment decisions, although this theme has been largely overlooked by constitutional scholars. "Based on a review of court cases, one can observe a pattern whereby free speech has received protection when it coincides with property interests," said Dorsen. For example, in one case, said the professor, a man who taped a peace symbol to an American flag was exonerated because the flag was his



Norman Dorsen

own property. And cases dealing with the presence of adult movie theatres in neighborhoods have frequently turned on such questions as the effect of those theatres on surrounding property values, according to the NYU professor. Dorsen went on to suggest criteria for a model "maximum protection theory" under the First Amendment.

Bork, who served as U.S. Solicitor General from 1973-77 and as acting U.S. Attorney General during 1973-74, argued that case law in recent years has moved away from "the protection of democratic free speech" as a central issue in First Amendment cases. Instead, he said, more and more cases have focused on obscenity and press rights. "An adequate theory of the First Amendment should be based first and foremost on the political free speech question," said Bork. The professor also said that, in his opinion, contribution limits on political campaign spending constitute an inhibition of "the amount and effectiveness of free speech."

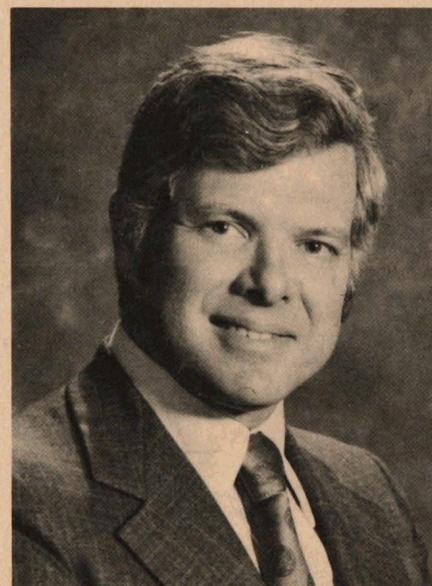
# alumni notes



Sally Katzen

□ **Sally Katzen**, 1967 Law School alumna, has been named by President Carter as general counsel of the U.S. Council on Wage and Price Stabilization. Katzen, who assumed the new post on April 1, previously was a partner in the Washington, D.C., law firm of Wilmer, Cutler and Pickering. A graduate of Smith College, she became the first woman editor in chief of the *Michigan Law Review* while a U-M law student. After graduation, she served as law clerk to Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit.

□ **David A. Brock**, a 1963 graduate of the Law School, has been named associate justice of the New Hampshire Supreme Court, filling a vacancy created by the retirement of Chief Justice Frank R. Kenison. Previously Brock had served on the New Hampshire Superior Court for two years, was in private law practice in Concord and Manchester, N.H., and from 1969-72 served as U.S. attorney for New Hampshire. A native of

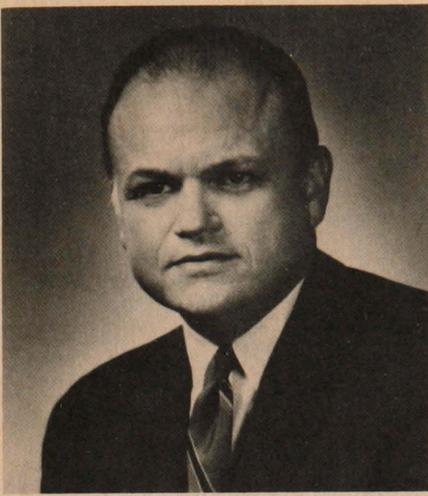


David A. Brock

Stoneham, Mass., Justice Brock received the B.A. degree from Dartmouth College and served as a lieutenant in the U.S. Marine Corps from 1958-61. Brock and his wife, Sandra, and their six children reside in Hopkinton, N.H.

□ Five U-M Law School alumni are among the U.S. representatives in the 96th Congress which convened this year. Among the long-time office holders are **Lucien N. Nedzi** of Detroit, who has served in Congress since 1961; **Robert B. Duncan** of Portland, Ore., a representative since 1962; and Rep. **Guy Vander Jagt** of Michigan, in office since 1966. Newer members of Congress are **William M. Brodhead** of Detroit, first elected in 1974, and Rep. **Richard A. Gephardt** of Missouri, in office since 1976.

Lucien Nedzi, representing Michigan's 14th Congressional District, is a 1948 U-M graduate and a 1951 graduate of the Law School. After practicing law in Detroit for nearly a decade, he was elected to Congress in 1961 and recently won re-election to a



Lucien Nedzi



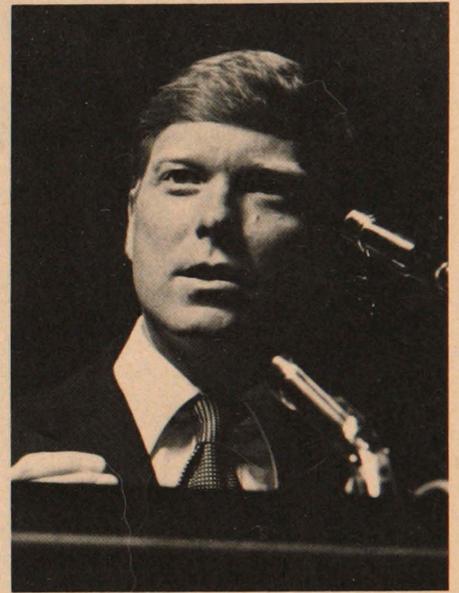
Guy Vander Jagt



Robert B. Duncan



William M. Brodhead



Richard A. Gephardt

10th consecutive term. He is a senior member of the House Armed Services Committee and chairs its Subcommittee on Military Installations and Facilities. He is also the ranking Democrat on the House Administration Committee, chairman of the Subcommittee on Libraries and Memorials, and vice chairman of the Joint Committee on the Library.

Robert B. Duncan, a member of the Law School's class of 1948, is now serving his fifth term in the House as representative from Oregon. In 1962 he was elected to the first of two terms representing Oregon's fourth Congressional District and in 1974, 1976, and 1978 was elected from Oregon's third district. He serves on the House Appropriations Committee, while his subcommittee assignments are transportation (of which he is chairman) and interior, where he has worked with timber, range, minerals, and other aspects of the natural resources agencies. A Democrat, he received his B.A. degree from Illinois Wesleyan University. He practiced law in both Medford and Portland, Ore., before his election.

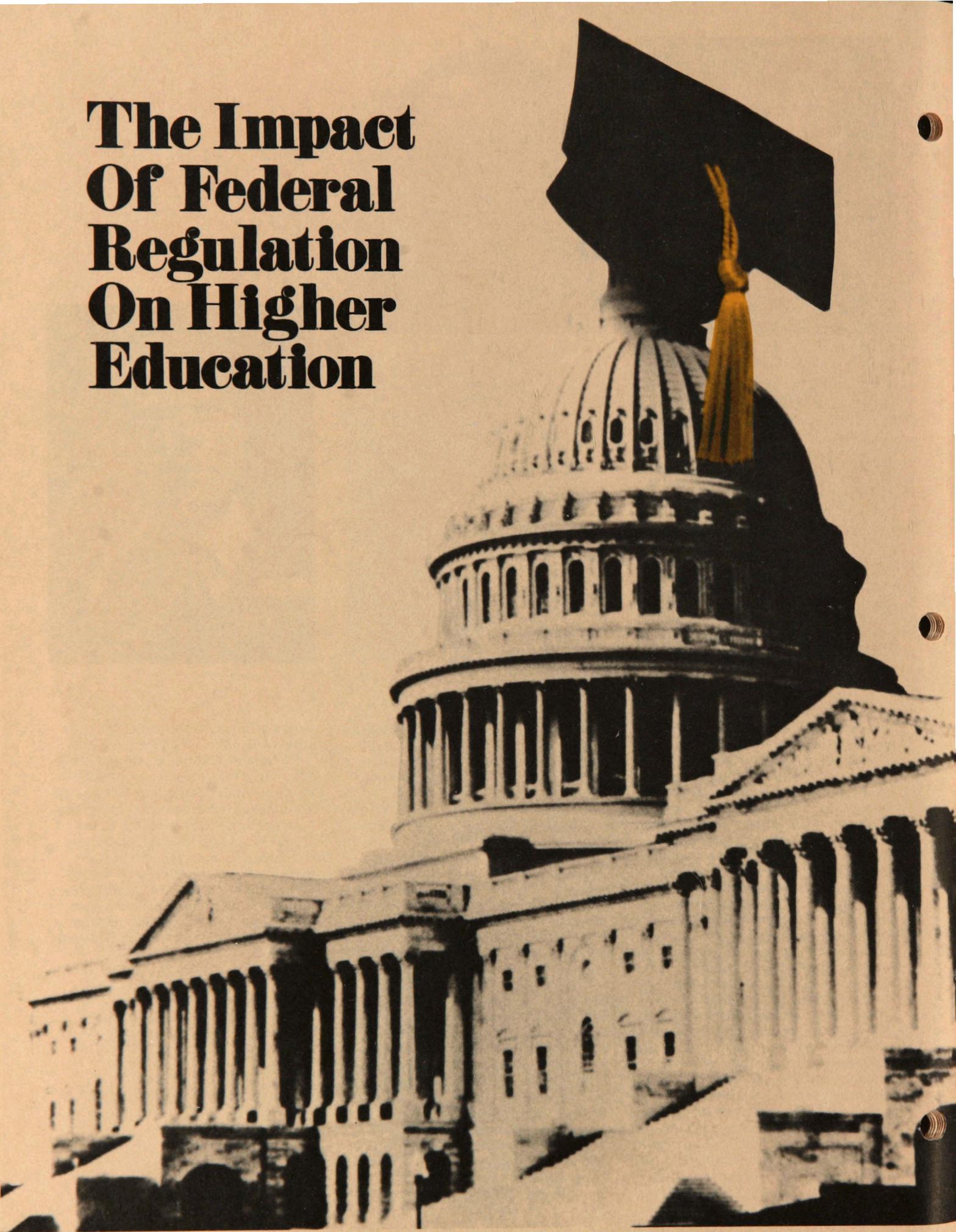
Guy Vander Jagt, representative of Michigan's ninth Congressional District, is a member of the Law School's class of 1960. A graduate of Hope College, he also earned a Bachelor of Divinity degree from Yale University. Vander Jagt has played a Republican leadership role in the House, serving as chairman of the National Republican Congressional Committee. He serves on the Ways and Means Committee, the committee's Subcommittee on Public Assistance and is also a member of the Subcommittee on Trade. Before his election to Congress, Vander Jagt served as state senator in the Michigan legislature from 1964-66.

William M. Brodhead, who represents Michigan's 17th district, is a graduate of Wayne State University and received his law degree from the U-M in 1967. He serves as a member of the House Ways and Means Committee and the subcommittees on health and public assistance. He practiced law in Detroit from 1968-70 and served four years in the Michigan House of Representatives, specializing in legislation concerning

urban affairs and the rights of consumers. Brodhead is a Democrat.

Richard A. Gephardt, representing Missouri's third district, is a 1965 graduate of the Law School and a 1962 graduate of Northwestern University. A Democrat, he is a member of the House Ways and Means Committee, the Budget Committee, the Social Security Subcommittee, and the Oversight Subcommittee. Before his election in 1976 he was a partner in the St. Louis law firm of Thompson and Mitchell and served for five years as a St. Louis city alderman.

# The Impact Of Federal Regulation On Higher Education



By Harry T. Edwards  
Professor of Law,  
The University of Michigan

This paper was written by Prof. Edwards following a presentation on the same subject at the Harvard Institute for Educational Management during the summer of 1978. The paper will form the basis of a chapter in Prof Edwards' forthcoming book, *Higher Education and the Law*, to be published by Harvard University in July, 1979.

### Some Historical Perspectives

For years institutions of higher education, especially in the private sector, operated relatively free from direct regulation by the federal government; during the nineteenth century, private colleges subsisted mostly on private donations. The traditional legal view in the nineteenth century was that society was served not merely by the continued existence of private colleges but by their continued independent existence. This view, which was best articulated by Justice Marshall in the now-famous *Dartmouth College* case, rejected the notion that private colleges were required to function pursuant to a "public trust" merely because the education of the young was of great benefit to society. Justice Marshall thus questioned:

That education is an object of national concern and a proper subject of legislation, all admit. . . . But is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property so far that the will of the legislature not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

There is good evidence to at least suggest that the decision in *Dartmouth* mirrored prevailing political science viewpoints concerning the proper relationship between government and institutions of higher education in the late eighteenth and early nineteenth centuries.<sup>1</sup> Although several "state universities" had been established by the turn of the nineteenth century, notably in Georgia, North Carolina, South Carolina, Tennessee, and Virginia, private universities were allowed to exist mostly free from state control. Thus, *Dartmouth* seemingly endorsed a dominant societal view that supported "the right of initiating groups to control what they had created, to gain from the state equal privileges with all other groups and to retain them even against the state itself."<sup>2</sup>

*Trustees of Rutgers College in New Jersey v. Richman*, 125 A2d 10 (1956), decided nearly 150 years after Justice Marshall had rendered his opinion in *Dartmouth*, provides an interesting contrast. Rutgers, a private college administered by a self-perpetuating board of trustees, had, for 30 years prior to the time of litigation, been receiving increasing amounts of money from the New Jersey treasury. In the mid-fifties the state legislature passed a charter amendment bill, very much like the one at issue in *Dartmouth*, transferring almost all meaningful control of the college to a board dominated by public appointees. Two important factors serve to distinguish Rutgers from *Dartmouth*: first, Rutgers could not survive financially without a continued and, in fact, dramatically increased infusion of public funds; second, the Rutgers College board of trustees had consented to the proposed takeover by the state. The Rutgers opinion accepts as given the financial

dependence of Rutgers on public funding and concludes that through this relationship the college had evolved from a private institution, whose trustees were fiduciaries carrying out a private charter and the wishes of its donors, to an "instrumentality of the state whose property and educational facilities are impressed with a public trust for higher education of the people of the state" (125 A2d at 17).

It is hardly surprising that the state saw fit to take over Rutgers in the circumstances there presented. What is most interesting about the Rutgers case, however, is the rationale offered to support the result achieved. When one reads Rutgers, it appears that the Chancellor's opinion leaps from an assertion that (a) private funding is a characteristic of a private institution to a conclusion that (b) no institution can remain "private" and receive public funds. This second proposition surely is not self-evident nor does it follow from the first.

The problem Rutgers faced is a problem faced today to a greater or lesser degree by many institutions of higher learning: the exercise of broad governmental power that may attend government largesse. The notion that Rutgers, a private institution, should lose some autonomy when it chose to accept state money seems, on balance, quite proper; public funds, after all, must serve some "public purpose." What seems problematic, however, is the assumption advanced in Rutgers that the basic educational "purpose" being served will remain uncompromised by drastic changes in academic management and control.

The theoretical and philosophical questions raised by *Dartmouth* and Rutgers are questions which must be addressed in dealing with the impact of federal regulation on higher education. One question is whether public money imposes a "public trust." If it does, who decides whether that trust is being furthered or breached and by what standard? Does the standard change with the proportion or amount of public funds? Second, does the infusion of public money bring not only increased public oversight but also an erosion of the special nature of the institution itself? That is, assuming that it is possible in 1979 to distinguish between "public" and "private" colleges and universities, is this distinction meaningful?

The issue might be better framed by addressing the differences between educational and noneducational institutions. Perhaps the mission of institutions of higher education cannot be performed in an environment regulated to a degree appropriate for a steel mill. If this is so, attention should focus not on the public-private dichotomy but on the important differences between the "community of scholars" and other potential subjects of government regulation.

However, claims of institutional "specialness" will be given short shrift by those who follow the Rutgers line of reasoning. Education serves a public purpose; it is a public good. Therefore, the public will inevitably contribute money and demand some degree of public input and control. On this view, Rutgers was rightly decided. Perhaps the Chancellor there was merely recognizing fiscal reality and social need; "ivory tower" and "community of scholars" arguments may represent pedagogical concepts which are luxuries society can no longer afford to support with public money.

On the other hand, it is clear that focusing on the public purpose of education yields no ultimate answers. If education is a public good, society's responsibility is to provide it in the most effective way. The central question remains: is education best provided by educational institutions which are highly regulated or relatively autonomous? If the former, the Rutgers approach may be correct; if the latter, the proper view may be that public money ought to be given to institutions of higher education, whether public or private, in line with a policy that emphasizes the value of academic freedom.

Another issue which goes to the heart of the problem is that of when "regulation" becomes "control." There is no real debate that at bottom line universities are subject to minimal standards of regulation. For example, in the area of equal employment opportunity they clearly are not and should not be entitled to discriminate against Blacks because they are black. It is equally clear that direct governmental control over hiring, promotion, or tenure will be seen by universities as intolerable intrusions. The gray-area cases necessarily provide the most argument: an institution will fight for "autonomy" in "academic" matters and "authority" to administer its "internal affairs." The waffle words are obvious: on the one hand they reflect important and abiding policy choices and issues; on the other hand, "regulation," "control," and others, as applied, may be no more than labels used to express the institutional interests of the speaker.

### The Current Situation in Focus

A study of "law and higher education" will of necessity focus in large measure on relationships between the federal government and institutions of higher learning. One sort of federal "law" of importance to educators is judge-made law, the paradigmatic example being a Supreme Court decision construing the United States Constitution. Such a decision may alter or redefine the "law" in areas such as due process, equal protection or freedom of expression.

The so-called "Warren Court" of the 1960s handed down a number of landmark decisions in the areas of school integration, student conduct, political and civil rights, and due process that had a significant impact on educational opportunity and educational institutions. However, the "Burger Court" of the 1970s has been a less activist court, especially in the enforcement of individual rights, and it appears instead to have embraced a philosophy of judicial abstention. As a consequence, it is unlikely that the current Court will be the source of new "law," except that which seeks to restrict or overturn the constitutional doctrines of the more activist Warren Court.

In contrast to the somewhat diminishing importance of judge-made law, at least on the federal level, is an impressive and significant increase in the impact of federal legislative and administrative control on higher education. In the last twenty years, the nature of federal involvement with four-year colleges and universities has changed in a dramatic fashion. In the fifties the federal government saw these institutions as important to scientific and medical research and as the provider of specialized education to a younger generation whose size and aspirations had grown enormously since the Second World War. Congress responded to these needs with appropriations to finance the construction of new facilities and to provide scholarships and low-cost loans to students themselves.

By the 1960s government support had increased to the point where government aid in many cases was likely to exceed a quarter or even a half of a given university's budget. Increasing dependence on Washington was a fact of life but one viewed by many as a necessary cost of the support and maintenance of first-rate graduate departments and research facilities. However, as the character of the link between Washington and academe evolved from one of financial dependence to one of financial dependence-coupled-with-regulation it began to be called into question.

In his report to the Board of Overseers for the year 1974-75, President Derek Bok of Harvard University argued that:

The government has begun to exert its influence in new ways to encourage colleges and universities to conform to a variety of public policies. Some of these efforts have merely taken the form of extending familiar pieces of

social legislation . . . to cover higher education. But the government has recently acted in ways that strike more directly at the central academic functions of colleges and universities.

—Rules have been issued to regulate the internal operations of educational institutions by requiring them to grant equal admissions to women and minority groups, to institute grievance procedures in cases of alleged discrimination, and to open confidential files for student inspection. . . .

—The work of scientific investigators has been regulated by restrictions affecting fetal research and experimentation on human subjects.

—Rather than simply increase federal aid to universities, Congress has cut certain programs and expanded others in ways that dramatize the power of the purse to alter the shape and priorities of the university. . . .

In retrospect, it is not surprising that government chose to play a stronger hand in influencing higher education. If universities accepted huge sums in federal aid for research and training, public officials could not fail to pay attention to the way in which the tax dollars were spent. . . .

Nevertheless, the rising tide of government intervention has begun to provoke serious concern from many colleges and universities. Kingman Brewster has pointed to "a growing tendency for the central government to use the spending power to prescribe education policies." In his colorful phrase, the government has adopted a philosophy best described as "now that I have bought the button, I have a right to design the coat." Other critics have complained of the mounting costs of complying with federal regulations, especially at a time when all educational institutions are hard pressed for funds to maintain essential academic programs.

Government officials have also had some sharp comments to make about the attitudes of college and university spokesmen toward Washington. Congressman John Brademas expressed these criticisms well by calling for "a little more information and a little less admonition from the higher education community." Beneath these complaints lies a deeper concern. The quality of government regulation does not depend simply on the intelligence and judgment of public officials but on the adequacy of the information and advice that these officials receive to assist them in their work. . . .

It is important to examine these complaints and consider how public officials should employ their powers over our colleges and universities. Federal support has played an indispensable role in strengthening higher education. Having given its aid, the government is bound to continue exercising supervision if only because higher education has become so large and the functions it performs so critical to the society. Yet precisely because these functions are so important, it is vital that the government use its powers wisely to protect the public interest without weakening the institutions it seeks to regulate.

A university administrator is presented with a scheme characterized by excessive bureaucratization, expense and competing institutional values, often in situations in which priorities have not been established or stand in conflict. Faced with this picture, the university administrator must develop a model for analyzing the "cost" of regulation and compliance and standards for assessment of the positive and negative results achieved by the enforcement of and compliance with various schemes of federal regulation.

## Types of Federal Regulation

When one considers how federal regulation impacts on the human and financial resources of four-year universities and colleges, it is helpful to distinguish the various types of regulation.

One category of regulation includes laws designed to affect relationships between institutions of higher education and individuals. In many such cases, enforcement may contemplate a *total* termination of federal funds in the event of noncompliance. (Under this form of regulation the government may also retain the power to cut off funds in categories two and three noted hereinbelow.)

A second category of regulation includes direct "grant fund" programs, *with strings attached*. Noncompliance with the "strings attached" forms of regulation may result in either the loss of the specific grant funds or the total termination of all federal monies given to the institution for any purpose.

A third category of regulation includes programs providing for an infusion of government money to satisfy more general educational and training needs of society and to enrich institutions of higher education (e.g., Comprehensive Health Manpower Training Act of 1971, 42 U.S.C. §292b). Money in this third category may be given with no strings attached, except, of course, that the money must be used for the appropriated purpose.

During the past 15 years there has been a massive increase in federal regulation whether by Presidential Executive Order or Congressional acts passed pursuant to the Spending Power and the Commerce Clause under Article I Section 8 or pursuant to Section 5 of the 14th Amendment. Some examples are:

1. *Executive Order 11246 (as amended)*—Prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin by all federal government contractors. Subject to specified limitations and regulations established by the Office of Federal Contract Compliance, contractors (including universities) are required to establish and maintain affirmative action programs to eliminate and prevent discrimination.

2. *Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d)*—Prohibition against exclusion from, participation in, denial of benefits, and discrimination under federally assisted programs on the basis of race, color, or national origin.

3. *Title IX of the Education Amendments of 1972 (20 U.S.C. §1681)*—Prohibits educational institutions that receive federal funds from discrimination on the basis of sex.

4. *Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e)*—*Equal Employment Opportunity Act*—Prohibits (with minor exceptions) employment discrimination on the basis of race, color, religion, sex, or national origin. The Act creates the Equal Employment Opportunity Commission (EEOC) and empowers it to prevent acts defined by Title VII as unlawful by investigating charges of discrimination, effecting conciliation when appropriate, and bringing a civil action when conciliation fails. In addition Title VII creates a private right of action in certain circumstances.

5. *Buckley Amendment (Family Educational Rights and Privacy Act 20 U.S.C. §1232g (1974))*—Regulates and limits the use to be made of information in student files.

6. *Rehabilitation Act of 1973 (29 U.S.C. §794)*—Section 504 provides that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance."

7. *The Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484*—Expresses a Congressional determination that overspecialization in the medical profession has resulted in an inadequate number of

primary-care physicians. Since persons in the health professions are viewed as a national health resource and the federal government shares the responsibility of assuring that they are available to meet the health needs of the American people, the act states that "it is therefore appropriate to provide support for [their] education and training . . . in a manner which will assure the availability of health professions personnel to all of the American people."

## Is Compliance Practicable?

Institutions of higher education face increasingly complex bureaucracies administering extensive, overlapping and sometimes inconsistent regulations. For example, in the area of equal employment opportunity, employment practices of higher education institutions are regulated and administered by:

1. Equal Employment Opportunity Commission
2. Department of Labor
3. Department of Justice
4. Various state agencies

These agencies (along with private party litigants in certain cases), enforce:

1. Title VII and Title IX of the Civil Rights Act of 1964
2. §§ 1981 and 1983 of the Civil Rights Acts of 1866 and 1871 (42 U.S.C.)
3. Executive Order 11246
4. Rehabilitation Act of 1973
5. State laws

Or, looked at in the context of a more narrowly drawn problem, a university or college dealing with the problem of sex discrimination in the area of faculty hiring and promotion must consider the application of at least five pieces of federal and state regulation:

1. Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972)
2. The Equal Pay Act of 1963 (29 U.S.C. §206) (amended by the Education Amendments of 1972)
3. Title IX of the Education Amendments of 1972
4. Executive Order 11246 (as amended by E.O. 11375)
5. State Fair Employment Practices acts

This proliferation of regulation has resulted in protest or at least expressions of serious concern from university administrators and federal regulators alike. The administrative agencies are being whipsawed by the conflicting demands of their two constituencies: the regulated institutions pressuring them for practicable solutions and the public and especially designated beneficiaries of regulation seeking "full compliance."

## The Buckley Amendment: A Paradigm

How does a representative piece of federal regulation impact on the human and financial resources of an institution? A useful answer must involve an applied as well as a theoretical analysis.

For example, the Buckley Amendment, which reaches far into the affairs of institutions of higher education, was passed without benefit of full public hearings or committee consideration of the abuses at which it was directed or the costs it would impose. One cost to be measured is financial and administrative. Thus, for instance, the "cost" of compliance to a small, financially strapped college may be measurable not only in dollars but in academic programs unfunded.

In addition to paper work and bureaucratization, the Buckley Amendment has also imposed "costs" in terms of

academic discretion which may negatively affect other federal policies. Admissions officers may claim that recommendations in student files have become blander and less informative; hence admissions decisions must often be made on the basis of grades and scores on standardized tests not geared to producing an optimally diverse or unbiased pattern of acceptances.

Yet another problem which has received some attention is the implications of the Buckley Amendment for educational researchers; some have contended that the "privacy aspects" of the law may in some instances render the university unable to evaluate its own performance because of lack of access to its own information.

### Some Perspectives on the Regulation Issue

In a more general vein, there are a number of important policy questions that must be answered in any examination of the impact of federal regulation on higher education. Some of these questions are outlined hereinbelow:

*Individual Versus Institutional Rights*—Although protection of the rights of groups and institutions under the rubric of freedom of association has certain intellectual appeal, how do we deal with our suspicions about the motives of those who protest that their group will be injured or destroyed if exposed to external regulation? The problem becomes more complex when the form of regulation at issue is one designed not to serve general governmental aims but to protect the rights of individuals. Essentially the problem posed is one of perspective. When regulation is imposed on a small institution by the federal or state government, the institution looks small and helpless. But if looked at from the perspective of an individual whose rights are being protected from intrusion or denial by the institution, the problem looks quite different.

*Perceived Versus Actual Impact*—Granting the need for and appropriateness of certain forms of federal regulation, how do we measure impact on an educational institution? Can we meaningfully distinguish and compare *perceived* impact and *actual* impact? This impact may be measured in terms of its cost, whether to the institution or to government, or in terms of its resultant measurable social change. For example, in the case of HEW-mandated hiring of women faculty under E.O. 11246 we might ask:

1. How many women would not have been hired by institution X but for federal policy, federal intervention or threat of sanction? Did these people fill existing positions?
2. How do these women compare to other faculty in terms of performance, retention, promotion, and tenure?
3. At what cost to the institution was this "progress" achieved? We might inquire as to *subjective costs*: Was financial or other discretion eliminated? Was institutional dignity somehow violated? We would also wish to measure *actual cost in dollars*: How much has been spent on hiring and salaries? How much has been spent on public relations and "compliance" paperwork?
4. At what cost to government was this progress achieved? Can we determine the cost of obtaining compliance at this institution? Can we estimate total program cost and divide by the number of jobs procured? Can we measure the extent of the litigation in which HEW is involved on this issue? In relation to good results? In relation to number of cases settled informally by other procedures?

*The Concept of Regulatory Maturity*—The way in which an academic institution copes with a given regulatory scheme may be related to the "maturity" of the legislation itself or the institution's relationship with the relevant administrative body. One thesis might be that new, and hence as a practical matter unknown, legislation will create a level of institutional uncertainty which is bound to engender a storm of protest addressed more to the

uncertainty itself than to the merits or demerits of a new program. On this theory, any start-up cost is *perceived* as extremely high and as requiring protest purely as a matter of principle. On the other hand, difficulties reported in dealing with mature schemes of regulation would tend to focus more on details and problems of actual implementation and to reflect on on-going relationships between the institution, government agency, and a relevant public.

Another theory would be that institutions find it less burdensome to comply with new regulations when standards are somewhat amorphous and enforcement lax, and more difficult to comply with exacting standards later on. If a pattern were to emerge, it would be possible to derive a compliance model based on statute maturity that would be capable of generalization and refinement.

*The Concept of Regulatory Process*—Does the form of regulation matter? If what we are talking about is the preservation of both educational institutions and legislatively expressed substantive moral values, are there patterns of regulation or enforcement more likely than others to serve these competing ends? Could a partial answer be found in political process? For example, before issuing proposed regulations under §504, the Department of Health, Education and Welfare held 10 meetings across the country to which interested parties were invited to offer their comments and recommendations concerning implementation. Former HEW Secretary Mathews expressed satisfaction with the results of this "early and more meaningful" public involvement in the regulatory process. Discussion in the proposed rules (45 CFR Part 84) highlights modifications made in response to public comment. Mathews' expressed goal was to make HEW more "legislative"; under his leadership HEW actively sought public input in order to make more "representative" decisions. The agency's orientation was to negotiation and conciliation rather than enforcement. Policy choices in favor of public input are intuitively satisfying, but we must attend to substance as well as form: Do they result in regulations better suited to the legislative purpose? Do they result in regulations more likely to engender compliance? Do they result in regulations better only for the vocal interest groups involved whose motives or needs may be in conflict with those of the "public" generally?

*Who is the Proper Decision-Maker*—This suggests the question of where policy judgments should be made and that of where in fact they are made. Is a particular question properly one for Congress, for an administrative agency, or for the university itself? Assuming a principled basis on which to decide such theoretical questions, it remains a matter of practical interest to learn what really happens and at what level. Whether in Congress, HEW, or the University, is it a general or a foot soldier who is likely to make the critical choices?

*Talk May Be Cheaper than Compliance*—Policy choices can be made through appropriations without any ostensible change in the substantive declarations of existing statutes. How does an educational institution deal with regulations when, due to inadequate manpower or funds or changes in the political climate, the enforcement effort is seriously diminished? How does nonenforcement affect short-run decisions such as whether to hire individual A or B? How does it affect long-run decisions and planning, such as whether to invest thought and effort in developing a full-scale affirmative action plan? Further, should we be concerned about keeping regulations on the books which invite random and discriminatory enforcement?

*What Protection Does the Community of Scholars Need? What Protection Can Society Afford to Render?*—There seems to be a generally accepted belief that institutions of higher education are "special" and deserving of special treatment; if educators hope to advocate this view to inform

national policy, it must be defined and limited. If some freedoms are essential to the "community of scholars," we need to know what they are and what values they promote.

Assuming that we can identify qualities essential to the existence of the community of scholars, we must consider in any given case whether academic integrity should be permitted to override competing values. More specifically:

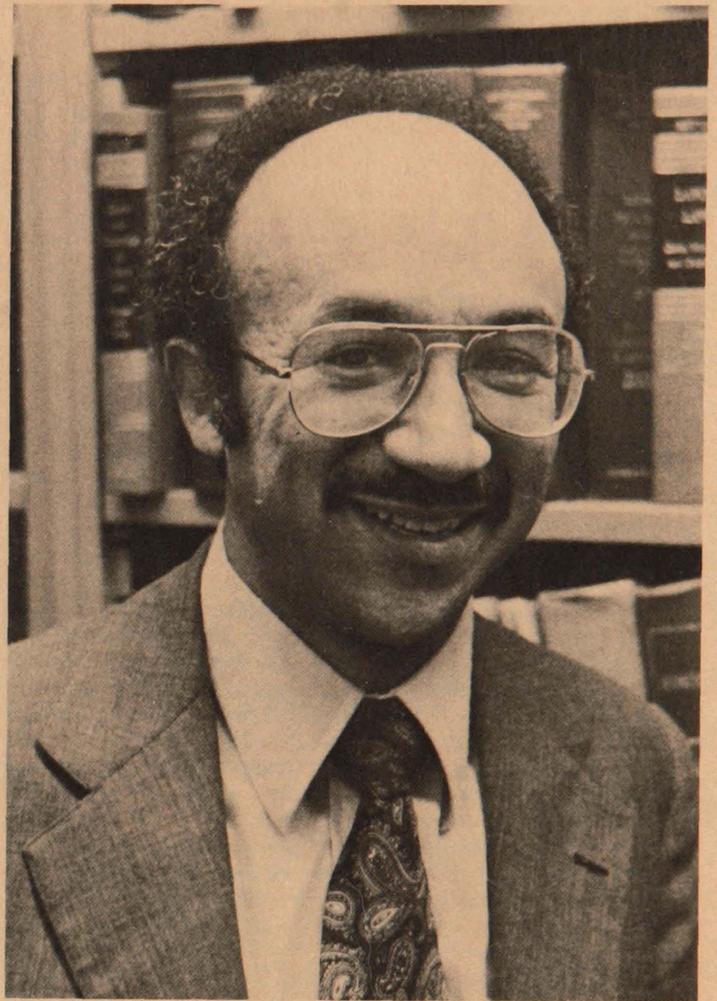
1. In some cases will academic needs out-balance federal goals altogether? This question asks whether the essential nature of the university qua university can withstand certain forms of intrusion.

2. In other cases, e.g., equality of educational opportunity, federal regulation is clearly appropriate. Should the special nature of educational institutions mandate particular methods of federal treatment and proscribe others?

The aim of these questions is to isolate and identify some of the considerations relevant to an analysis of the relationship between legislative or administrative "law" and higher education. Clearly, the same or similar issues will arise in the context of judge-made law as well. It is hoped that these questions will provide the reader with some stimulus for reflection.

#### References

1. See, e.g., B. Bailyn, *Education in the Forming of American Society*, Vintage Books, 1960, pp. 41-47; H. J. Perkinson, *Two Hundred Years of American Educational Thought*, David McKay Co., 1976, pp. 41-48.
2. B. Bailyn, *supra*, at 47.



Harry T. Edwards

# Can Government Deal With Science?

By James A. Martin, Professor of Law, The University of Michigan

The following is an adaptation of a speech delivered by Prof. Martin at the Sixth Life Sciences Symposium at the Los Alamos Scientific Laboratories in New Mexico. The proceedings, including Prof. Martin's speech, will be published in the *American Industrial Hygiene Journal* under the general title, "The Impact of Energy Production on Health: II. The Development and Communication of Health Information."

## The Problem

Of the many people who make important political or social decisions in this country, very few are scientifically trained. Yet it is obvious that many of the most important decisions facing us depend very heavily on the answers to questions that are outside common experience and in the realm of science or technology. A list of a few of the more obvious problems in the news confirms the pervasiveness of underlying scientific issues: nuclear waste disposal, cancer-inducing chemicals, sources of energy, control of harmful chemicals in the environment, etc.

We do, of course, have methods for answering the scientific questions that underly these problems. Policy makers have science advisors. Administrative agencies hold hearings in which the testimony of experts is received. Fact-finding committees are formed. Advisory panels composed of lay people and scientists are asked to investigate problems, make findings, and suggest solutions or possible courses of action. Courts listen to the testimony of expert witnesses. Pressure groups appeal to the decision makers or to the public in the hopes that the public will apply pressure to the decision makers. Each of these is a method of answering scientific questions, though, of course, they vary considerably in their reliability and desirability.

To the naive, the problem of finding the best approach might seem an irritatingly simple one to solve. After all, the scientific method is widely known and understood by experts. Why can't a bit of common sense, good faith, and the scientific method take care of the problem?

The answer lies in the basic differences between the product of the scientific method and the needs of policy makers. The scientific method produces hypotheses, attempts to test them, and treats as provisionally verified those that cannot be refuted. But no scientific theory, however hoary its credentials, is ever finally verified. Probably the best-known example of the dangers of overconfidence in science is Newtonian physics, whose reign was long enough to have raised it to the status of scientific dogma. Kant is said to have believed that the principles of Newtonian physics could be derived from pure reason. Twentieth-century observations suggested by Einstein, however, showed that Newtonian physics is merely a close approximation of the way the universe runs.

In contrast to scientists who can wait forever for a correct answer, politicians and policy makers need to make decisions within limited periods of time. Often it is literally more important that a decision be made than that it be correct. Even in less drastic cases, the extra certainty that might be derived from waiting longer is not worth the cost of delaying the decision. If Congress or the Department of

Energy needs to make decisions on how much money to put into fusion research, it is somewhat counterproductive to wait until one is absolutely certain that fusion research will be successful. If the question is whether or not to ban a certain food additive on the grounds that it may cause cancer, delay may both increase the number of possible cancer cases and increase the economic dislocation in businesses which manufacture or use the additive.

## Some Proposals

Clearly, the scientific method and the needs of the policy makers are at odds. Clearly, something other than the scientific method per se is necessary to give provisional answers to the policy makers. One of the more publicized

methods for answering the scientific questions underlying policy decisions in the past several years has been the "science court" proposal of Dr. Arthur Kantrowitz of Avco-Everitt Laboratories.

Kantrowitz, and a presidential advisory commission he headed, proposed a quasi-legal procedure of some detail. The essence of their suggestion lies in the following points: (a) A science court should decide only scientific questions and not make value judgments. (b) It should employ both advocates and judges. Advocates should be selected from the parties actually involved in the underlying dispute, and

judges should be chosen for their learning in the area and for their impartiality. (c) The basic procedure would require each side to make proposed findings limited to assertions of fact.

Findings as to which there was agreement would be taken as accepted. Hearings would be held concerning those that remained. Hearings would allow cross-examination, either oral or written, under some informal procedure. After considering the evidence, the science court would pass on the disputed proposed findings, making findings of its own, the sum of which should lead to a decision on the underlying scientific question, e.g., does saccharin cause cancer in human beings, and if so, to what degree and under what circumstances? The science court would not, under the proposal, try to suggest what should be done with the answers to the questions proposed—it would not, for example, recommend that saccharin be banned, sold freely, or whatever. These questions would be answered by the policy makers, enlightened by the findings of the science court.

I have, of course, glossed over many problems, such as how to select adequate judges. Each of these questions has been given careful thought and each has, in my opinion, an answer that is plausible enough to make a test of the science court worth trying.

Although the "court" in "science court" may be somewhat inappropriate, it is an indication that Dr. Kantrowitz looked to the legal model for fact-finding. Why should the legal model, famous through popular television programs for its histrionics and its susceptibility to manipulation and error, be a model for providing answers to scientific questions?

The main reasons, I believe, are two: First, the more glaring weaknesses to the legal, fact-finding method are not inherent serious weaknesses; they can be minimized. That they are not minimized in the legal system itself is attributable to a host of social, political, and historical factors which a new institution, intelligently planned, might be able to avoid. Second, the chief virtue of the legal approach is that it is responsive to the need for producing answers that are "final" for the particular dispute in question—"final" and reasonably reliable. In particular, the legal system has one technique that seems peculiarly suited for ferreting out the truth, where possible: the device of cross-examination—the opportunity for opponents to question each other about their positions. One of the chief frustrations of modern discourse is to read two learned discussions of an issue which reach opposing results and which never seem to answer each others' arguments.

To be sure, the science court is not the only proposal that has been made in connection with the problem of finding accurate scientific information on which to base policy decisions. The advisory panel approach mentioned earlier, was employed to make suggestions both in Cambridge and Ann Arbor with respect to municipal policy toward recombinant DNA research. An intriguing experiment called the National Coal Policy Project brought people from the coal industry and various environmentalists to seek solutions to environmental problems of coal usage. Participants were required to agree to abide by a kind of golden rule which forbade, for example, withholding





pertinent information or lightly impugning the motives of others. The approach is elaborated as "the rule of reason" of Professor Milton Wessel at New York University School of Law. The sponsors reported pleasure with the outcome of the meeting, though it should be noted the approach depends rather heavily on the good will of the participants. Yet another proposal that has been made recently is the "conflict-clarifying conference" proposed by Washington attorney Don Scroggin, which calls for the various representatives of conflicting views to submit position papers which summarize the data and rationales leading to their conclusions. At a conference a referee would preside over the production of a final paper. The paper would include agreed-upon statements and reference to areas of disagreement, each party addressing the areas of disagreement in the same language and explaining the reasons for an inability to reach consensus. As Scroggin has noted, it is very similar to the early stages of the science court procedure, but stops short of an official determination on the grounds that general agreement is the only acceptable definition of "scientific fact" and that conclusions beyond scientific fact are necessarily value laden.

### Goals to be Achieved

Undoubtedly, I have glossed over numerous other proposals of various types. In the face of so many proposals it becomes advisable to ask whether or not the goals of any such effort can be articulated. I believe that they can (and for the basic expression of some of these goals I am indebted to Scroggin).

The first goal must be accuracy, so far as possible. Just as important, we must recognize limitations on our abilities to achieve accuracy—an essential corollary of the goal of accuracy is the quantification of ignorance. Any process chosen must not only make educated guesses, but must also attempt to tell us how probable or reliable those guesses are. A second goal is that factual decisions be separated from policy decisions. Scientists are not particularly well equipped to tell us whether cigarette smoking creates an *unacceptable* risk of cancer, though they may be well qualified to tell us whether it creates a risk of cancer, and if so, how great that risk is. Scientists are no more (or no less, for that matter) qualified to assess the acceptability of a risk than others; thus, their value judgments should not be artificially magnified by association with their scientific expertise.

Though the unacceptable-risk issue may be an obvious example of policy decisions that should not be made by our truth-finding device, a less obvious (and thus perhaps more "insidious") kind of policy decision is the question of how to proceed in the face of ignorance. Take, for example, the question of what should be done if it is concluded that there is insufficient information on the possibility of a nuclear accident from a fission reactor. How to proceed in the face of this ignorance is clearly a policy question rather than a scientific question. But what if, as often happens, such issues occur much earlier in the fact-finding process—for example, when mathematical models are used that must assign certain values to variables whose true values are not in fact known? Such factual assumptions, no matter how justified, imply decisions as to how to proceed in the face of uncertainty. Any process that makes such assumptions must, therefore, clearly identify them for the policy maker and indicate how they affect the certainty of the answer to the overall scientific question.

A final goal for any system that purports to answer scientific questions for policy makers seems obvious but is rarely referred to: the method chosen for determining scientific facts should be economical. Vastly important issues may justify vast efforts and expenditures to reach

accuracy, but a grand court of scientific inquisition is hardly justified to help determine whether a few thousand dollars should be trimmed from a NASA budget.

### Emphasis on Procedures

I think that this last consideration may be the tail that ought to wag the dog. In other words, I would suggest that no single approach is the solution to the problem of obtaining accurate scientific information for a wide range of policy makers. Indeed, one of the problems with the science court proposal may be that it is so grandiose that it is appropriate only to a very limited class of problems of great national significance. The science court *procedure*, on the other hand, might be used by existing governmental agencies, with modifications to take into account their own peculiar circumstances, especially reasonable economic limitations. I understand that Dr. Kantrowitz has recently proposed such an emphasis on procedure rather than institutions. In light of the goals listed above, however, certain elements should be considered central to any procedure adopted. Some methods are simply better than others.

First, some form of cross-examination should be preserved, though not necessarily in the formal legal sense. Intelligent direction by some sort of referee can minimize the opportunities for abuses such as witness badgering. What must remain, however, is the requirement that the opposing positions face each other and address the issues in the same terms and in the same forum, each being required to explain their own view of the reasons for the differences between conflicting positions.

Second, as noted above, uncertainty should be labeled and, where possible, quantified.

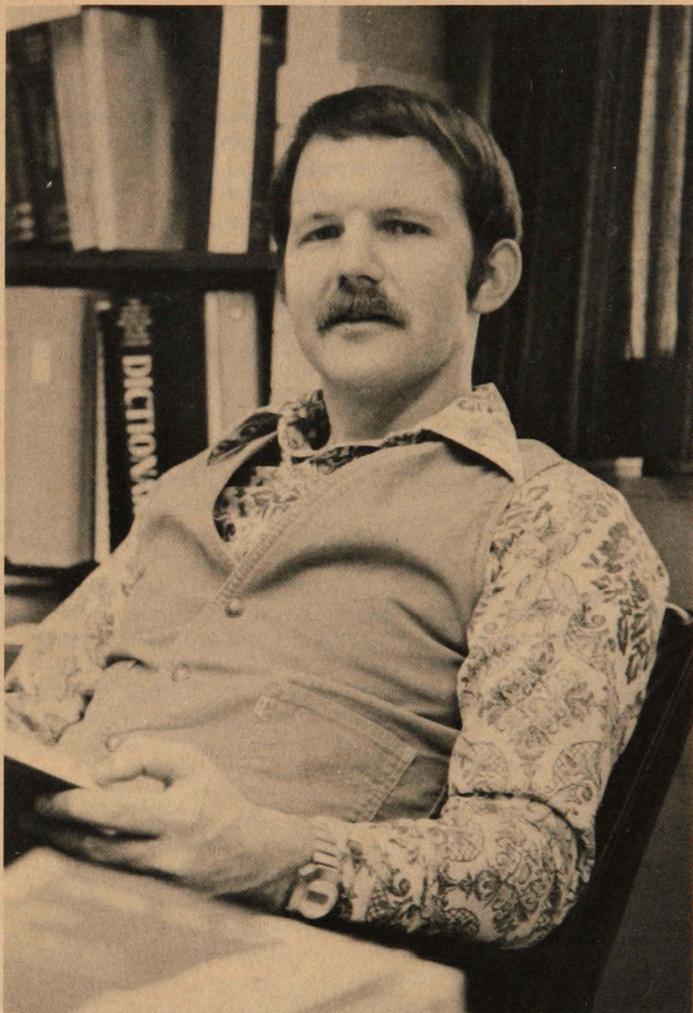
Third, proceedings must be conducted with impartiality. Neutral judges or referees are probably the best guaranty, and where possible openness and public scrutiny can help encourage impartiality.

These considerations are quite general, of course. If there is to be a move at the national level toward rational scientific policy making, I would suggest two steps to advance that goal. First, the appointment of a task force somewhat like the commission headed by Dr. Kantrowitz. This group would be charged with the function of drafting a set of general procedural guidelines, incorporating the general goals just mentioned. Having performed this function, the group could be dissolved. Then, second, a more permanent group could be constituted to assist decision-making bodies, such as administrative agencies, in applying the general procedural guidelines produced by the first group to the particular problems of the agency, coming up with a procedure tailor made for that agency. At the same time, following the suggestion of Professor Abraham Sofaer of the Columbia Law School, certain pervasive substantive problems—such as determining whether certain chemicals are cancer causing—might be addressed by task force groups that could suggest a uniform procedure best designed for the particular substantive issue.

By adopting fact-finding procedures, rather than urging entirely new institutions, success is more politically achievable. Changes are more commonly wrought by evolution than by revolution. The approach of modifying existing methods rather than creating new institutions also has the virtue of preserving as yet unappreciated virtues of current methods for fact-finding. We should be humble about our abilities to invent entirely new methods of accomplishing important goals. The present means by which we make our decisions, however defective, are unlikely to be totally unresponsive to current needs. A kind of Darwinian principle guarantees that *totally* useless institutions won't survive.

These suggestions may lack the pizzazz of a science court, with all its glittering images of marble columns and the like.

A friend has already "warned" me that I wouldn't get asked for interviews about this suggestion, as I was after I wrote about the proposed science court for the *Michigan Law Review*. So be it. The people whose job it is to make decisions are suspicious of radical change. We all are—often justifiably. Whether they are right or wrong in resisting radical change here, the real hope for any change lies in helping decision makers tinker with what they have, and thereby gaining their cooperation, rather than suggesting altogether new institutions that will diminish their authority.



James A. Martin

# Some Current Thoughts On Treaty-Based Federalism

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This essay is based on a paper prepared for the occasion of Prof. Covey T. Oliver's retirement from a distinguished teaching career in international law at the University of Pennsylvania Law School. A somewhat different version will appear in the *University of Pennsylvania Law Review*.

In a series of lectures delivered in 1974, Professor Oliver raised some fundamental questions on modern federalism: is federalism "declining," is there such a thing as a treaty-based federation, and is it legitimate to classify the European Economic Community as "an incipient," or "semi-" or, perhaps, "meta-federal structure for governance"?<sup>1</sup> These questions were asked—and answered—more than five years ago, a substantial segment of time in our era of change. Have Oliver's answers stood the test of time?

## Is Federalism Declining?

Out of some 140 (now some 160) entities recognized as states, Oliver observed that not more than a dozen are federal in form. "No independent observer has been found who would classify the Soviet Union as a functioning federalism," and there is "substantial doubt" on this score concerning the Federal Republic of Brazil and other socialist and non-socialist federations which are also essentially "de facto unitary states." The list of formally federal states that do have realistic claims to being functioning federal structures is thus reduced to a handful: Australia, Austria, Canada, the Federal Republic of Germany, India, Malaysia, Switzerland, and the United States. Oliver suggests, however, two additional dimensions:

"(i) the partial federation known as the European Communities and (ii) the possibilities for federalism as the road to regionalism elsewhere. . . ."

While federalism "may not be growing—indeed may be declining—in national State systems, it is growing and probably will continue to grow in regional systems and thus to be a major means for evolution beyond the present structure of the world community."

Today, the diagnosis of the state of federalism must be, if anything, even more tentative. Admittedly, the trend toward increased centralization has continued in the Federal Republic of Germany and, it has been generally assumed, in the United States as well. Yet the federal revenue-sharing legislation has increased the financial clout of the states, and the current political rhetoric directed against the remote central government and its bureaucracy has brought about some loosening of federal controls over regulated industries. There has also been a certain resurgence of regional feelings and solidarity and some support for allowing the states a greater margin of freedom in matters of strong local or regional interest. In



1976, for the first time since the early New Deal era, the Supreme Court of the United States invalidated the application of a regulatory act of Congress to state government activities as an unconstitutional intrusion on state sovereignty (*National League of Cities v. Usery*, 426 U.S. 833 (1976) ), but it would be most improvident to view this five-to-four decision as a swallow heralding a new summer for judicial federalism in this country. In fact, persistent demands for additional health, education, and welfare services, consumer and environmental protection, and for industrial subsidies have worked for still further centralization and more bureaucracy. Apart from the exasperation with the overgrown central bureaucracy, the primary issue of the day in the perennial tension situation built into the American federal system has been the power contest between the federal Congress and the post-imperial Presidency, rather than a question of federal against state power. The overbureaucratization, we may note in passing, is perhaps accentuated by, but is certainly not confined to, federal structures. In the neighboring Canadian federation, putting aside the worst-case scenario of disintegration, the trend surely does not point away from some form of federalism if the country is to remain a viable nation-state.

In Europe, remarkable mutations are taking place in some of the archetype unitary states which may harbor seeds of federal patterns. In Italy, the "regions" which until recently were little more than a constitutional mirage have now been given a firm statutory basis, and regional assemblies were selected whose legislation is subject to review by a central judiciary. Belgium is galloping toward a federal framework apparently as the only system capable of containing the linguistic controversy. In France, the Napoleonic centralism is subject to considerable stress by regional interests ranging from Brittany to Corsica and by a growing demand for increased local participation in governance—a trend manifested not only in politics but also in economic life and in education. Evidence of similar pressures has appeared in the new Spain as well. However, perhaps the most unexpected developments have occurred in the United Kingdom where the Dicey-fostered (if not manufactured) myth of "parliamentary sovereignty" has been under some stress in the face of new realities. No lesser authority than Lord (then Lord Justice) Scarman has raised the need for a "new constitutional settlement" that would assure in Britain the continued observance and normative superiority of the European Community legal order and also the enforcement of the European Bill of Rights, accepted by the United Kingdom in the European Convention on Human Rights with its transnational institutions, the Commission and the Court of Human Rights. Last but not least, the "devolution" of power from Westminster to Scotland remains a distinct possibility even after the failure of the recent referendum; if put into effect in one form or another, it may mark the end of the classic United Kingdom structure and require an umpiring function between the central and regional authorities. Lord Scarman's solution would include "entrenched provisions (including a Bill of Rights)" and a "Supreme Court of the United Kingdom charged with the duty of protecting the Constitution."<sup>2</sup>

If federalism in mature federations reveals a continuing accretion of central regulatory authority, it is in a sense paradoxical to see in the United Kingdom as well as in Belgium and Italy a reallocation of power from national governments to subnational regions. The just-mentioned European transnational arrangements, the European Community, and the European Human Rights Convention, also reduce or restrain national power, in favor, however, of the new transnational institutions. Clearly, complex and often conflicting forces are at work here. It should become clearer by the end of this century whether, in this tri-level perspective, the traditional "sovereign" nation-state system

will be replaced in Europe by a structure of a still undetermined shape, marked by a heavier reliance on the ethnically, linguistically, or economically based regions on one hand and the transnational institutions on the other.

### Treaty-based Federalism

Another fistful of nettles grasped by Oliver is the question of whether there is such a thing as a treaty-based federalism. For whatever it may be worth, one may recall the argument that, concurrent with the separation from Great Britain, the thirteen states in North America were "in a state of Nature toward each other" and the union was formed by a "compact" among them rather than by a constitution written by the "people." The Supreme Court rejected the "compact" doctrine in *McCulloch v. Maryland* (17 U.S. (4 Wheat.) 316 (1819) ), and later again in the context of Justice Sutherland's fanciful theory of external sovereignty (*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) ). One may speculate, however, whether the course of federalism in the United States would have been significantly different (all other factors remaining equal) if the "compact" view of the formation of the Union had been generally accepted.

A more fruitful line of inquiry is the problem of whether the European Community, which is exclusively treaty-based, may be legitimately viewed as an incipient federal structure. Although the final returns obviously are not in as yet, it is probably safe to say, at the risk of ruffling some positivist-formalist feathers, that from a strictly normative viewpoint it has made little difference that the Community was established by a network of treaties rather than by a formal constitution. This is due primarily to the impact of the Court of Justice whose case law was adumbrated by Oliver and brought up to date most recently by Professors Casper, Bridge, and Riesenfeld.<sup>3</sup>

From its inception, the Court of Justice has construed the European Economic Community Treaty in a constitutional mode rather than employing the traditional international law methodology of treaty interpretation. The treaty, the Court held, is more than an ordinary international agreement creating mutual obligations between states parties; it created "a new legal order" in which members have limited their sovereignty, and it conferred rights and imposed obligations, not only on the member states but also directly on nationals of the member states which national courts must enforce. The treaty itself mandates that Community "regulations," a form of legislation enacted by Community institutions, are "directly applicable" law in national courts and administrative agencies. The Court has, however, progressively expanded the concept of directly applicable Community law to comprise all provisions in the constitutive treaty itself and all Community acts that do not require further implementation by either the national or the Community institutions and thus are capable of being given direct effect. As a consequence, the question of whether an individual party is able to enforce a right derived from a given Community law provision has turned increasingly on issues such as the purpose of the provision (whether it purported to create a "private cause of action" in addition to its regulatory purpose), on standing to sue before the Court of Justice itself, or on the selection of a proper remedy before national tribunals which under the treaty must certify questions of Community law to the Court of Justice for a "preliminary ruling." The way the Court of Justice has defined the scope and, as we shall see below, the effect of a "directly applicable" provision has little similarity to Chief Justice Marshall's definition of a "self-executing" treaty provision (*Foster and Elam v. Neilson*, (2 Pet. 253 (U.S. 1829) ).

In a companion line of cases, reflecting at times a spirited dialogue with the highest national tribunals, especially the

Italian Constitutional Court, the Court of Justice established the rule that in the event of a conflict between Community law and national law, national courts must apply Community law over prior, subsequent, and even constitutional national law. In the latest of this group of cases, the Court held in 1978 that an Italian judge must disregard national law conflicting with Community law as soon as it is faced with the conflict in a case before it and may not wait for an adjudication by the Constitutional Court as would have been required by the Italian procedure (Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Monza, [1978] E.C.R. 629). Commenting on this latest exuberant decision, two British constitutional experts considered it logical, while two others exclaimed: "This may be good Community Law, but I submit that it is not good British Constitutional Law," and "This is exactly what our fundamental constitutional rule forbids."<sup>4</sup>

The European Economic Community Treaty contains no supremacy clause but the Court of Justice discovered one in the interstices of the new legal order. Moreover, the Court turned its relatively slim jurisdictional base into a procedure approximating appellate review of national law for conformity with Community law. The result is reminiscent of John Marshall's combined creations in *Marbury v. Madison*, *McCulloch v. Maryland*, and *Gibbons v. Ogden* (1 Cranch 137 (1803), 17 U.S. (4 Wheat.) 316 (1819), 22 U.S. 9 (Wheat.) 1 (1824)).

In a third line of cases of a significant constitutional import, the Court dealt with the Community's status in international law. International law, the Court held, is supreme in the Community, and therefore a national court must apply a "directly applicable" provision of a treaty between the Community and a third state even if it should conflict with Community law (Joint Cases 21-24/72, *International Fruit Co., NV v. Produktshap voor Groenten en Fruit*, [1972] E.C.R. 1219). Relying again not just on the text of the treaty, but on its *esprit* and *économie*, the Court refused to limit the Community's power to enter into international agreements with third states to instances expressly authorized in the treaty and proceeded to define the Community's treaty-making power as paralleling in subject matter its internal law- and policy-making competence (Case 22/70, *Commission v. Council*, [1971] E.C.R. 263). This definition, although aptly termed as "the exact reverse of *Missouri v. Holland*," has had a similar effect of extending the central treaty-making power, and it has been broadened still somewhat further in cases handed down more recently (see e.g. Cases 3/76, 4/76, 6/76, *In re Kramer*, [1976] E.C.R. 1279).

The extent to which judicial authorities in the member states have accepted the Court's rulings is nothing short of remarkable, all the more so since the opinions called for important adjustments in national constitutional practice, including the introduction of judicial review of national legislation in those member states where it was unknown.

The exceptions to the general acceptance have until most recently proved less serious than one might have anticipated. In the *Internationale Handelsgesellschaft* case the German Federal Constitutional Court did not reject the principle of Community law supremacy, nor did it invalidate a Community act that the Court of Justice earlier upheld. The Constitutional Court indicated, however, with three justices dissenting, that "in an exceptional case" it may refuse enforcement of a Community act if it finds that such an act deprives an individual citizen of one of his fundamental rights enumerated in the German Basic Law (Constitution). This position, echoed also by the Italian Constitutional Court, is justified, the German Court explained, "by the present status of integration within the Community." At this stage, the majority opined, the Community lacks appropriate institutions for resolving a

conflict of this nature: The law-making is in the hands of the executive (the Council of Ministers with the Executive Commission) rather than a democratically elected Parliament, and no "codified catalogue of basic rights" exists in the Community law.<sup>5</sup>

Responding, as it were, to this reservation of national judicial power, the Court of Justice reaffirmed the rule of an unqualified supremacy of Community law, but it indicated that it will itself protect basic individual rights as a "part of the general principles of law," taking account of "common constitutional traditions of the Member States" and "international agreements for the protection of human rights in which Member States participate. . . ." (Case 4/73, *Nold v. Commission of the European Communities*, [1974] E.C.R. 491). In a later case the Court of Justice referred to the European Human Rights Convention to which all nine member states are parties as an appropriate source, suggesting a link between the two, thus far separate, aspects of the emerging European constitutional system (Case 36/75, *Rutili v. Minister of Interior*, [1975] E.C.R. 1219). The heightened concern for basic human rights has stimulated a debate on the means that the Community should employ for a more effective protection of these rights: Should the Community legislator enact a Bill of Rights? Should it be left to the Court of Justice to develop such a bill progressively on a case-by-case basis? Or should the Community as a "person" in international law become, or be considered, a party to the European Convention on Human Rights? The last alternative appears to be under consideration.

The venerable and haughty French Conseil d'Etat, which in an early notorious case refused to certify a genuine question of Community law to the Court of Justice, has subsequently followed the proper procedure, as did the courts in the other member states. However, in a 1978 decision, the Conseil refused to give direct effect in French law to a Community act (a "directive") which the Court of Justice held to be self-executing despite the fact, relied upon by the Conseil, that according to the letter of the Treaty any "directive" required implementation by national institutions (No. 11604, *Minister of Interior v. Cohn-Bendit*, Dec. 22, 1978). The Conseil's decision rendered in what was essentially a moot case constitutes the first act of open defiance of the Community Court's authority as an umpire between Community and national power and a rejection of the Court's basic approach to the constitutive treaty. The Conseil d'Etat has added its voice to the still sporadic but strident criticism of the Court in certain French political and journalistic quarters, not unrelated to the electoral campaign for the European Parliament. There is no indication thus far that the Community Commission will want to stage a confrontation with the French government by making use of its authority to hold France responsible before the Court of Justice for violating Community law.

This brief glance at the Community's living law readily reveals—behind the veil of the indigenous nomenclature and jargon—distinct federalist elements that meet the criteria suggested by Oliver for the phenomenon of treaty-based federalism. An inquiry into treaty-based transnational structures outside Europe, in Latin America and Africa, is beyond the confines of this gloss. Suffice it to say, however, that none of these structures possesses a judicial tribunal organized and functioning in a way comparable to the Court of Justice. It is appropriate at this point to cite Oliver's own conclusion:

Further reflection shows that the strongest parallel between successful national federations and the European "transnational" one is that in all of them judicial resolutions of issues of federalism by the highest judicial organ of the federation are accepted without

resistance by the constituent State judicial organs. In a very real sense, the unifying force is respect for the "rule of law"—not merely in the conventional "inter-national" sense of adherence to *pacta sunt servanda* as a basic principle of the international law of treaties—but of something more: sense of sharing of normative hierarchy and of professional conditioning to work in an organic *corpus juris*. One might say of the partial federation of Europe: it exists and it functions because all the European judges involved live and work on that assumption and the politicians do not intervene against what the judges do.

### The Caveats

This sunny view of the judicial role in building the European Economic Community and, more generally, any positive appraisal of the Community as an incipient federal structure calls for a series of caveats.

First, the federal-type pattern functions only in areas of the customs union, free movement of factors of production, agriculture, certain aspects of social and regional policies, competition, harmonization of legislation and technical standards, and foreign commercial policy. In these areas the Community competence is delineated in the treaty in more or less express terms. Beyond this, the Community organs were able, within limits and subject to some criticism particularly in Great Britain, to invoke the "implied powers" in Article 235 as a legal basis for expanding their legislative competence to new fields not mentioned in the treaty, such as environment and consumer protection. However, the federal-type pattern has not extended to the important "second generation" problems, such as the projected economic and monetary union, common energy, industrial, research and development, and general regional policies. These are subject to a process of difficult and protracted intergovernmental negotiations with limited results thus far. These negotiations will not become any easier with the planned accession of Greece, Spain, and Portugal. The recent decision to launch a new "European Monetary System" backed up by a \$33-billion credit fund may prove a milestone on the road toward a common European currency, if the governments in fact take the progressive steps. Although the national governments are no longer able to use a variety of traditional instruments of national economic policy, they have been unwilling—due to domestic pressures—to transfer the additional economic and monetary policy powers to the Community and help create the necessary Community instrumentalities. Ernst Haas whose "spill-over" theory of integration enjoyed great popularity in the heyday of the European unification movement, has invented a new, equally poetic term to describe the present state of affairs: the Community is, he writes, in a state of "asymmetric overlap."<sup>6</sup>

The second caveat relates to the fact that the Community's powers are confined in principle to the economic and social sectors; other vital areas remain within the exclusive competence of the "sovereign" member states, and therein lies another source of tension inherent in partial integration. Foreign commercial policy, traditionally an important tool of national foreign political policy, has come within Community orbit, yet the foreign political policy itself remains within the exclusive competence of national authorities, subject only to voluntary consultation procedures in a system of committees of national diplomats, organized outside the Community framework.

The last caveat concerns the role of the Court of Justice itself. It is next to axiomatic, and the experience in the United States provides ample supportive evidence, that if a federal tribunal arrogates to itself judicial power to define the line between federal and state competences on the basis of more or less general constitutional allocation, it will

invariably incline toward increasing the reach of the federation, with a concomitant increment of its own authority. This, as we have seen, has been happening, *mutatis mutandis*, in the Community as well.

The critics of the Court have articulated two related concerns. First, it has been said that "in less than twenty years, the constitutionalization of European Community law has led to the point where, as in the United States, the supremacy of law seems to mean the supremacy of judges. . . ." with the "specter of substantive due process" looming over the Community and the "judges using very vague and general provisions to make policy decisions of great magnitude according to their own preferences."<sup>7</sup> In fact, the Court did assert its power to apply "principles" such as "reasonableness" (or "proportionality" or "equality") in adjudicating the compatibility of Community regulations with the constitutive treaty, but it has used this power sparingly; the number of Community legislative acts struck down as invalid has been minimal and they were of little long-term importance. It cannot be seriously argued that the Court has thwarted or challenged the Community legislator. Of greater impact in this respect were the Court's rulings bearing upon the validity of member states legislation and curtailing the competence of the member states, particularly in the foreign relations field and sex discrimination in employment. In my judgment, however, the record is far from one justifying alarm.

A more legitimate concern goes to the current slowdown in the integration process rather than to the judicial activism as such. The Court has constructed, as we have seen, a bold, over-arching doctrine which provides an effective base for a federal-type structure and is likely to continue applying it with vigor. On the other hand, the legislative process of shaping common policies from divergent national policies has not progressed significantly beyond the customs-union, common-market state. If anything, national economic policies in the 1970s have been drifting even further apart, thus blocking progress toward an economic unity. It is this contradiction that raises a legitimate apprehension that the Court may assume an excessive role in solving questions requiring political solutions and that it may attempt to carry forward the process of integration beyond the basic political consensus on which its legitimacy depends.

If the Community institutions were to be completed in the federal pattern, common policy decisions would logically be made in the European Parliament. That body, however, plays today only an advisory role in Community law making and the plan for direct elections by universal suffrage scheduled for June, 1979, does not contemplate a change in its formal powers. A lively debate has centered on the question whether the elected Parliament will succeed in increasing its authority in fact, if not in law.

The European federalism will remain "incipient" and the integration partial for some time to come, with no certainty whatsoever as to the ultimate form of transnational governance in Europe. The French Prime Minister offered an alternative view of the future in his address at Strasbourg on November 19, 1978:

[We] want a confederal Europe, by which I mean a union of states that are associated with one another, but still preserve their independence, states that consent to make concessions in their sovereignty in specific areas and by carefully defined agreements, as required by the ties of association. We are not building Europe from scratch. That is why the united states of Europe cannot be based on the same concept as the United States of America. The building blocks of Europe are old nations that have their own traditions, history and sensitivities and also their own interests. . . .

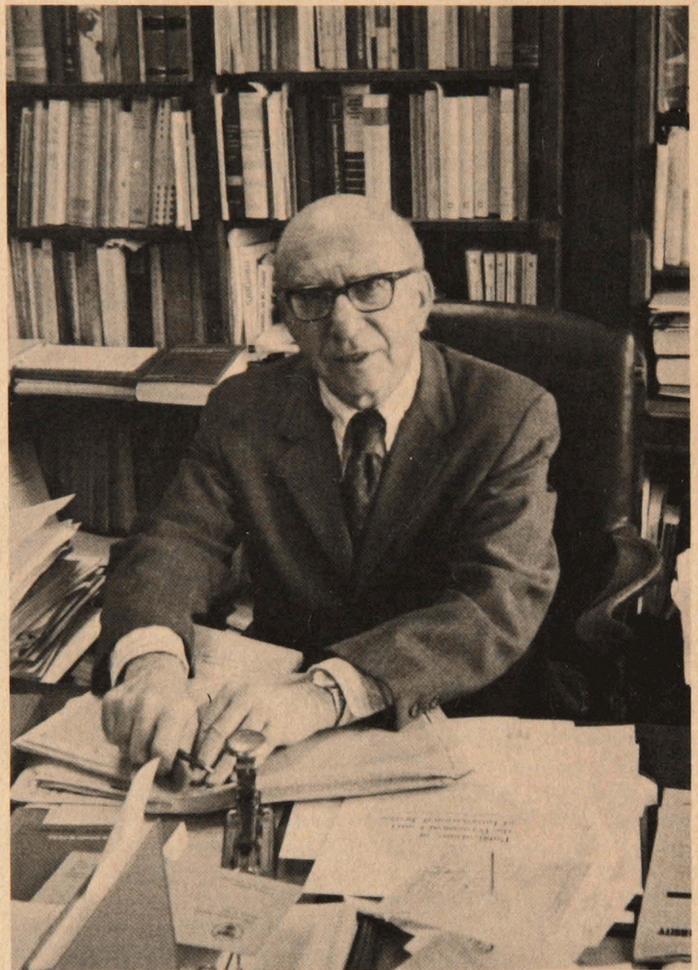
Neither federalism nor supranationality, but a patient march toward confederation.

Another Frenchman, Jean Monnet, who invented the Community-process idea, wrote in his memoirs:

I have never doubted that one day this process will lead us to the United States of Europe; but I see no point in trying to imagine today what political form it will take. The words about which people argue—federation or confederation—are inadequate and imprecise. What we are preparing, through the work of the Community, is probably without precedent. The Community itself is founded on institutions, and they need strengthening, but the true political authority which the democracies of Europe will one day establish still has to be conceived and built.

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