Law Quadrangle Notes

The University of Michigan Law School

Volume 24, Number 3, Spring 1980

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Vol. 24, No. 3 Spring 1980

contents

Helen Betts Retires After 37 Years 1

Words Of Honor Fall Upon Her 2

Environmental Progress Over A Decade Cited By Prof. Sax 4

Symposium Slated 4

Public Interest Summer Law Jobs Financed By U-M Group 5

Marriage Tax "Penalty" Is Subject Of Study 5

Honorary Degree Caps Presidency Of Alan Smith 6

Talent Shines In "Law Revue" 6

events 7

alumni notes 9

The Multiple Choices of Harry Edwards 12
by Anna Brylowski

Sentencing: The Dilemma Of Discretion 16
by Jerold Israel

Police Interrogation and Confessions: The 1969's And 1970's Look Like History Now 22
by Yale Kamisar

Law Quadrangle Notes (USPS 893-460), issued quarterly by the University of Michigan Law School. Second-class postage paid at Ann Arbor, Michigan. Office of publication, 409 E. Jefferson, Ann Arbor, MI 48109. **SEND FORM 3579 TO:** Law Quadrangle Notes, Law School, The University of Michigan, Ann Arbor, MI 48109

Publications Chairman: Professor Yale Kamisar, U-M Law School; **Managing Editor:** Harley L. Schwadron, U-M Information Services; **Graphic Designer:** Phoebe McGuire, U-M Publications Office; **Production Editor:** John R. Hamilton, U-M Publications Office; **Law Student Writer:** Mark Simonian; **Law Student Photographer:** John Elam; **Contributing Writer:** Anna Brylowski; **U-M Briefs, Events, Alumni Notes:** written & edited by Harley L. Schwadron; **Typesetting & Printing:** U-M Printing Services

Photo Credits: Bob Kalmbach, U-M Information Services: cover, 1, 2, 6 (Smith), 16, 29; John Elam: 4, 7, 12, 13, 21, 26; Phoebe McGuire: 22; Paul Jaronski: 8

briefs

Helen Betts Retires After 37 Years

After graduating more than 8,500 of "her" law students, and issuing countless reminders to law professors to report their student grades in on time, Helen Betts has retired as registrar of the University of Michigan Law School.

Her retirement on Feb. 29 marked her 37th year at the Law School—26 as registrar and 11 as secretary to the directors of the American Judicature Society (a national organization promoting the efficient administration of justice). That organization had been situated on the fourth floor of Hutchins Hall before relocating to Chicago in 1954.

At a recent ceremony honoring Mrs. Betts on her retirement, Law School Dean Terrance Sandalow noted that "many students and alumni think the dean runs this law school, but they are wrong. This school for many years has been run by Helen Betts.

"A good example of Helen's proprietary attitude toward the school is her typical request to faculty to get their grades in because it's time for 'her' to graduate 'her' students."

In fact, most living alumni of the U-M Law School are "her" graduates. During her 26 years as registrar, she graduated some 61 per cent—more than 8,500—of the school's living alumni.

In addition, she has been in charge of the school's internal bookkeeping and many other responsibilities, ranging from updating the admissions catalogue and making sure exams were printed and stored safely, to scheduling rooms for special events.

Mrs. Betts' shoes will be hard to fill. Actually, her responsibilities will be divided among several Law School staff members. Cynthia Rosasco, who has been Mrs. Betts' assistant since October, 1978, and who had previously been recorder at U-M Hospital, will assume duties of Law School recorder. Joan Canzoneri, who held various positions with the School of Business Administration and the Accounting Department, will assume bookkeeping duties. Other of Mrs. Betts' duties will be absorbed by the offices of the Law School admissions director, Allan Stillwagon, the assistant dean for student affairs, Susan Eklund, and the assistant dean for administrative management, Henrietta Slote.

As Law School registrar, Mrs. Betts has served as the official keeper of student grades and the person authorized to release transcripts of students' records. From files in her office and from those kept in a separate Law School vault, the registrar is able to retrieve the complete records of students dating to the class of 1910. For alumni graduating between 1910 and 1895, single-page transcripts are available; and prior to 1895 the Law School maintains only the names of graduates.

"I have been very happy at my job," Mrs. Betts recalled in an interview. "I have particularly enjoyed the accomplishments of the Law School and its students. I've been pleased, for example, whenever someone like Harry Edwards, whom I knew in his student days, receives an honor such as his appointment as a federal judge." (Edwards, a U-M law professor and member of the class of 1965, was recently appointed to the U.S. Court of Appeals for the District of Columbia Circuit.)

"I've also known students who have had a really tough time making it through the school and who literally hung on by their shirttails in order to graduate. There are many who wanted to quit, but who hung on and made it through. These are examples of accomplishments, along with the honors given to talented students," said the registrar.

During her tenure as registrar Mrs. Betts served under six deans—E. Blythe Stason (now deceased), Allan F. Smith (now a U-M law professor after serving as interim president of the U-M), Charles Joiner (now a federal judge in Detroit), Francis A. Allen and Theodore J. St. Antoine (both U-M law professors), and currently Terrance Sandalow.

She joined the staff of the American Judicature Society in 1943 soon after her graduation from the Ann Arbor Secretarial-Business School, and served as secretary to the society's successive directors, Glenn R. Winters and Herbert Lincoln Harley, both U-M law alumni. Among other duties, Mrs. Betts compiled an "events" listing for the society's magazine, *Judicature*, and occasionally wrote a book review. When the society relocated to Chicago, Mrs. Betts was strongly recommended for the Law School registrar's post by Charles Joiner (then a professor) and hired on the spot by Dean Stason.

To this day, Mrs. Betts is proud that she was named one of the few non-lawyer members of the Judicature Society and continues to receive its magazine. She also recalls fondly her association with U-M students during her 26 years as registrar, and notes that many still send cards or drop by her office when they are visiting Ann Arbor.

Mrs. Betts was born on Ann Arbor's Old West Side 65 years ago. She married Wesley "Red" Betts at the end of her senior year at Ann Arbor High School. They have lived in Chelsea, Mich., for the past 30 years.

"Red" Betts recently retired after 29 years as a supervisor at Chrysler's Scio Township plant. The Bettses have two children and six grandchildren. Their son Theodore, who received an undergraduate degree in mechanical engineering and an MBA from the U-M, is an executive with Vickers, Inc., a hydraulic plant in Troy, Mich. Their daughter, Jacqueline Lindstrom, is married to the chief of police in Holland, Mich. One of the Bettses' granddaughters is currently a junior at U-M.

In 1971, Mr. and Mrs. Betts sold 56 acres of their 60-acre Chelsea farm and built a new house on the remaining four acres. Mrs. Betts says she looks forward to her retirement there, and plans to devote time to her gardening, stamp and coin collections, food canning and freezing, and their three dogs and a cat. H.L.S.

Helen Betts

Helen Betts and her deans—retiring Law School registrar Helen Betts poses with four of the six law deans under whom she has served. At a reception honoring Mrs. Betts on her retirement are (from left): Allan F. Smith, Charles Joiner, Mrs. Betts, Theodore J. St. Antoine, and Terrance Sandalow.

Words Of Honor Fall Upon Her

The following poetic tribute to Helen Betts was delivered by William W. Bishop, Jr., professor emeritus of law, at a Law School reception marking Mrs. Betts' retirement. The verses were the work of Elizabeth Brown, research associate in law at the School. The tribute also includes prose and poetry by some of the Law School deans under whom Mrs. Betts has served—Allan Smith (now a law professor after having served as interim U-M president), Charles Joiner (now a federal judge in Detroit), Francis Allen (a U-M law professor), Theodore St. Antoine (U-M law professor), and Terrance Sandalow, the current U-M law dean.

A Tribute to Helen L. Betts

Listen, all present, that you may hear
The true account of a long career
Which began in October of '54
When E. Blythe Stason, Dean of yore,
Informed his brethren that soon they'd lack
The help of Miss Murray upon whose back
Had been loaded the duties of Registrar.
He had feared he would have to search afar
For her successor, but he had found,
Mirabile dictu, right on home ground,
A perfect jewel, left behind
When Glenn Winters had moved to Chicago's clime,
Whom Miss Murray could train the way she should go
So that the faculty would not know
There had been a change. Without a stir
The training commenced. At the end of a year
A new Registrar sat in Hutchins Hall,
Her power acknowledged by one and all.
Helen Betts had commenced her work,
And for 26 years she has never shirked:
Diligent, reticent, balancing books,
Withstanding the impact of nasty looks,
Maintaining in order the Law School files,
(And wholly resistent to students' wiles),
Forestalling infringement of every rule,
Grades in on time for the Law School!
No one allowed to touch her papers,
For even a dean might cut some capers:
Mislaying a reference, removing a file,
Her records were kept in impeccable style.
Attempts at argument all gave way,
And Helen Betts maintained her sway.

True, there were changes: Dean Stason retired
And in Allan Smith the Law School acquired
Its dean number nine who, without undue persuasion
Has consented to speak on this happy occasion.

Allan Smith

My speech will be short
Though my mind's overflowing
With clauses and phrases
of tribute most glowing.

I never have known
In my own long career
A person from whom it was
better to hear.

That the books are in order
And everything's set
Than the person we honor
Our own Helen Betts.

Now, I am out of poetry, but I do want to add that one of the nice things about a University is the people who work in it. Especially, those whose work extends a long time. And I know this University has never had a more dedicated and devoted employee than Helen Betts, and we wish her all the best.

Next came Charlie Joiner with talents so dowered
That I shall confess I'm enough of a coward
To avoid competition. The floor is conceded
To that ex-dean and jurist whose comments are needed.

Charles Joiner

Dear Friend,

I tried to write a sonnet in your honor, in keeping with the spirit of this occasion. I could make the words rhyme. I could get the meter right. But the results didn't do justice to you.

It seemed to me that truth was more important than poetry, so I chucked the poetry. Here is the truth.

You have been and are a very dear friend of this great Law School.

You have contributed in significant ways not only to the school as an institution but to the many students and faculty since the middle 1950's.

You have a special place in the hearts of everyone who knows how this great school operates.

You have supported a great faculty and its several deans.

You have done it all well.

You have served with distinction and I for one am grateful to you.

I treasure the fact that I can call you "friend" and I am honored that you reciprocate.

My life is richer because I have had some contact with an institution whose policies you helped administer and because of you.

Thank you.

I wish you well.

May good health and happiness be with you for many years to come.

Francis Allen came next who, at one Christmas party,
Praised Helen in rhymes which were happy and hearty.
He wrote them himself and we wish he were here,
To read his own statements and add to our cheer.

Francis Allen

Any future history of the Law School will be seriously incomplete if it does not contain a substantial paragraph devoted to Helen Betts and her contributions toward keeping this institution on an even keel. For many years Helen with remarkable energy, dedication and skill, has handled a multitude of problems of great importance to all of us. One measure of her contribution is that ordinarily most of us are not even aware of the problems that she routinely solves. I can't say that she has by her discipline completely reformed the faculty's irresponsible ways, but she has come as close as anyone could. I want to thank her for her past important services to me and the School, and wish her all good things in the future. I am sorry that a long-standing commitment prevents me from saying these things in person.

Then came Ted St. Antoine, Helen's fifth dean,
With a smile so infectious that Helen would beam
Whenever he needed her records to use
For she knew that he never her records would lose.

Theodore St. Antoine

For seven years I had the good fortune to work in the Law School's front office with my own personal Mnemosyne. Mnemosyne was the Greek goddess of memory, and without the fabled memory of Helen Betts, I don't see how I could have handled the deanship.

It was Helen who reminded me that, thanks to a decanal oversight, Paul Kauper's term in his Law School chair had technically expired some two years earlier, and then saved me from further embarrassment by rushing through the reappointment papers *(nunc pro tunc)*. It was Helen who kept tabs on the overdue grades of one Y. Kamisar and one T. St. Antoine, pressuring us to make sure that one half of "her" seniors wouldn't fail to graduate. It was Helen who logged the safaris of our peripatetic faculty, and who let me know exactly when one more jaunt to Hong Kong or Brussels or Rio would bankrupt the Wolfson Fund.

I could go on. But perhaps it will be enough to add that Mnemosyne was not only the goddess of memory. She was also a Titan—and the Mother of the Muses. And that makes it truly fitting for me to salute, with deepest appreciation, all of Helen's other titanic strengths—and to say that only the Muses themselves could sing her praises properly.

Now comes Terry Sandalow, last dean who can claim
The use of a Registrar, whose portrait and fame
Are a part of the history of our own Law School:
Helen Betts, whose objective was: Work by the Rule!

Terrance Sandalow

During the first few years that I was a member of the faculty, I was puzzled to hear occasional comments by members of the faculty suggesting that Mrs. Betts had occasionally been testy in dealing with them, and that at times they even found her domineering. I was puzzled because I had never experienced any such problems. I always found her both exceptionally helpful and very pleasant. As the years went on, I came to understand why I was treated better than others—I grovelled.

Many alumni and students believe that the Dean runs the Law School. But those of us who really understand the inner workings of the School know that it is Helen Betts. The truth is best revealed in her own words, as when she tells us the difficulty the faculty is creating for her in her efforts to "graduate her students." Incidentally, it might be of interest to you that 61% of the School's living alumni were graduated by Mrs. Betts.

Helen's proprietary attitude toward the School reflects her deep commitment to it and her dedication to its welfare. We are all grateful—and deeply in her debt—for that commitment and dedication. Helen, as a small token of that appreciation, we join in giving you this remembrance, in the hope that you will not soon forget us, that you will remember us as long and as fondly as we shall remember you.

Thus end the acknowledgements, tributes and praise
From us who've known Helen through numberless days.
Let it be crystal-clear that we will not forget,
That matchless of registrars,
Helen L. Betts.

Joseph Sax

Environmental Progress Over A Decade Cited By Prof. Sax

Over the past decade, Americans have come of age environmentally.

"They realize that environmental safeguards are not a luxury, and that the longer we delay in dealing with environmental problems, the greater threat they will pose to human health and safety."

So says U-M environmentalist Joseph L. Sax in evaluating environmental progress in the period from the first national "Earth Day" in April, 1970, to April 22, 1980, which was designated by President Carter as "Earth Day 2."

Sax, a U-M law professor, authored Michigan's 1970 Environmental Protection Act, the first law giving citizens the right to bring polluters to court, and is also author of the book *Defending the Environment*. On March 11-14, 1970, the nation's first "Environmental Teach-In" was held at the U-M, marking student involvement in the environmental movement.

Today, at the state and national levels, says Sax, basic environmental laws have been "deeply institutionalized" and are now a fixture of everyday life. He says Americans continue to demand a high quality environment for both health and aesthetic reasons.

But the U-M law professor acknowledges that "Americans are wracked by concern about energy." He says it is a matter of conjecture just how much the present energy crisis might erode environmental attitudes and protective regulations.

"Ironically, the present energy crisis made us the beneficiaries of progress on two issues that environmentally concerned citizens have struggled for," says Sax.

"One is the conservation of energy, a principal point of the whole environmental movement. It is unfortunate that we are forced to become more conservation-oriented under today's heavy economic pressures, but we might not have had to face such a crisis if conservation measures—such as removing artificial price lids on gasoline—were taken earlier. Such a move would have forced a switch to small, fuel efficient cars much earlier, and decreased the demand for fuel, as has occurred in Europe.

"Concern over the safety of nuclear power is also getting official recognition today, especially after the near disaster at Three Mile Island."

One of the marks of today's greater sophistication about environmental questions, according to Sax, is the realization that "environmental problems will not go away magically" and that delay in dealing with these problems will pose even greater hazards, as is the case with toxic chemical company wastes that were allowed to accumulate in Michigan.

In the legal arena, Sax says Michigan's Environmental Protection Act—which has been widely copied by other states—is "alive and well," having been frequently used by citizen groups and government agencies.

Recently the act was used in two cases seeking to halt drilling by oil companies on publicly owned land in Michigan's Pigeon River State Country Forest, he notes. In both cases, the Michigan Supreme Court denied the right to continue the drilling.

A third Pigeon River court contest was initiated on Jan. 29. Shell Oil Company has brought suit against the state Department of Natural Resources in Ingham County Circuit Court seeking the right to drill on privately owned land which it leases within the boundaries of the Pigeon River Forest.

Sax views this last case as an important test of Michigan's environmental commitments as weighed against the pressing need for development of its fuel resources.

On the national scene, Sax sees the "snail darter" case as a significant loss for environmentalists. Although continuation of the Tellico Dam project by the Tennessee Valley Authority was halted by the courts in order to save the unique fish species in the Little Tennessee River, Congress recently pushed through legislation authorizing construction to continue, Sax notes. Purposes of the initial law suit, in addition to protecting the snail darter, included saving one of the last free-flowing waterways in Tennessee and protecting farm land and historic Indian sites from being flooded.

Current Congressional action regarding powers of the Energy Mobilization Board will have important environmental consequences, says Sax. A major question is whether the board will have the power to waive environmental protection laws in order to pursue energy development.

Other laws, such as the Clean Air Act and the federal Water Pollution Act, continue to serve as "strong protective legislation," says Sax, despite some recent amendments yielding ground in the area of auto emissions.

And development of parks and wilderness lands still has strong support of Congress and the public, says Sax.

Symposium Slated

"Transnational Legal Problems of Refugees" is the topic of a colloquium, to be held January 20, 1981, at the Law School, sponsored by the *Michigan Yearbook of International Legal Studies*. Subtopics include migration and entry problems, resettlement, and refugee legal actions for damages. The 1981 edition of the yearbook will also be devoted to refugee problems.

Inquiries may be made to: Michigan Yearbook of International Legal Studies, Hutchins Hall, U-M Law School, Ann Arbor, MI 48109.

The 1980 yearbook deals with "National and International Regulation of Transnational Corporate Concentration." The yearbooks may be purchased from: U-M Press, 839 Greene Street, Ann Arbor, MI 48106.

Public Interest Summer Law Jobs Financed By U-M Group

A "Student Funded Fellowship Program" (SFF) at the Law School, which helps finance U-M law students in low-paying summer jobs with public interest organizations, continues to attract contributions.

Last spring, more than 100 Michigan law students contributed $3,500 to SFF. With this money, the student-operated organization was able to fund seven students in public interest and government jobs with amounts ranging from $100 to $700, according to the SFF student board of directors.

"Although in the past, students have sought their own jobs and come to SFF for funding, the board hopes in the future to develop contacts with the public interest bar to assist students in locating positions," says SFF.

"The organization has two major goals: to fund as many students as possible; and to raise each recipient's weekly income to $175.

"The board, as well as Michigan law students who support SFF, believe the program benefits the Law School and the legal community at large. Until it becomes financially feasible for law students to take public interest and public service jobs, these areas of the law will remain desperately understaffed and overworked."

When the SFF was first organized at the Law School in the spring of 1978, $2,700 was raised, and five students were funded in amounts ranging from $100 to $500.

Similar student solicitations take place at several other major law schools, including Harvard and Yale. "The students asked to contribute are those who have secured well-paying summer jobs, typically in large, urban, private law firms. The students who receive funds from the organization have jobs with low-paying or non-paying public interest organizations or in local, state, or federal government. The underlying purpose of the program is to encourage students seriously to consider careers in public interest law," according to SFF.

At Michigan, SFF is administered by a volunteer student board of directors. Currently composed of eight students from all three classes, the board directs fund-raising, evaluates applications from prospective recipients, and handles administrative matters with assistance from Prof. Roy Proffitt and the Law School Fund. The board has exclusive responsibility for selecting fellowship recipients and determining the amounts of money to be distributed.

"The SFF has maintained a broad definition of 'public interest law,' " note the directors. "Any legal position with a non-profit employer or with the government is eligible for funding. In its first two years, SFF has awarded grants to students working with legal aid, public defenders, district attorneys, prosecutors' offices, and in the area of rights of elderly and the handicapped, and problems of migrant workers."

The board notes that SFF hopes to continue expanding the number and size of fellowships, and is eager for support from the entire Michigan Law School community. Further information is available from the Student Funded Fellowship Program, 217 Hutchins Hall, Ann Arbor, MI 48109.

Marriage Tax "Penalty" Is Subject Of Study

Today in the United States, a married couple with each spouse earning $30,000 will pay an estimated $3,970 more in federal income taxes than their unmarried counterparts, if both couples take the standard deduction.

This seeming inequity, discussed in the *Michigan Law Review*, is attributable to the 1969 Tax Reform Act which created new tax rates for single people in order to offset some of the tax advantages of marriage. In the process, the legislation inadvertently created what amounts to a tax "penalty" for married people.

The disparity has led to a spate of year-end "quick divorces" as married couples attempt to list their official tax status as "single" on Dec. 31. In many cases, the couples will remarry after the new year.

Although the IRS has sought to invalidate these year-end tax avoidance schemes on grounds that they are "sham transactions," the courts are not likely to stand behind the IRS unless the legislation is changed by Congress, argues a "note" prepared by the *Law Review*'s editorial board.

Noting that such "sham transactions" by commercial firms have been found invalid in IRS legal actions, the *Law Review* article suggests that application of the same doctrine in divorce cases does not follow any "clear legislative purpose."

It notes, for example, that divorce is an area governed by individual state law (even in cases where a foreign divorce must be recognized on basis of the law of a couple's state of residence), and that it is doubtful the legislature desires to "federalize divorce laws" or intended purposely to create a marriage tax penalty.

"Admittedly, year-end divorce and remarriage schemes are troublesome tax avoidance devices. They violate notions of fair play and equity," notes the article.

"But if Congress is genuinely offended by the schemes it can attack them through direct rules. The IRS should not be allowed to lead the assault by applying a business doctrine to the most intimate societal unit."

Application of the "sham" doctrine by the IRS in divorce cases was first raised in 1976 after the "60 Minutes" television program featured some studies of marriages dissolved to save taxes.

After the show, the IRS "discussed the problem hypothetically in Revenue Ruling 76-255 . . . (which) suggests that the Internal Revenue Service will challenge divorces obtained in foreign jurisdictions whenever the couples intend to, and do immediately, remarry," notes the article. In addition to "letter rulings" in response to specific inquiries, the IRS has recently begun to challenge year-end divorce schemes in court.

Specifically, the IRS Ruling 76-255 held that: "Neither section 143 nor section 6013 of the (Internal Revenue) Code or the applicable regulations thereunder contemplates a 'sham transaction' designed to manipulate for federal income tax purposes an individual's marital status as of the close of the taxable year."

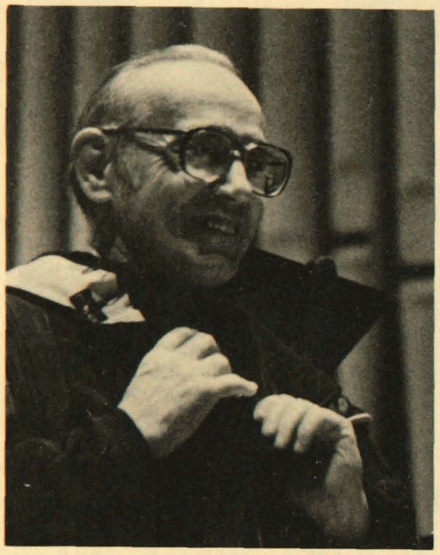
In the commercial sphere, application of the "sham" doctrine has turned on such questions as whether a commercial transaction actually exposes a taxpayer to real commercial risks (known as the "beneficial interest" test), or whether the transaction was motivated by any non-tax purposes ("motivation" test), notes the article.

The *Law Review* article argues that under both these tests, year-end divorces are not likely to be invalidated.

"Under the beneficial interest test, a year-end divorce would never be stricken as a sham because it inevitably exposes the couple to substantial, albeit brief, risks associated with loss of the legal, economic, and emotional benefits of marriage," suggests the article.

"The motive test, on the other hand, would plunge courts into hairsplitting

factual investigations under circumstances inconducive to productive inquiry. Whatever a couple's motivations for divorce, is it appropriate to expose them to IRS scrutiny?"



Allan F. Smith

First-year students perform as the "Last Clear Chance," offering a rock'n'roll satire of Law School life.

Honorary Degree Caps Presidency Of Allan Smith

In a complete surprise, the University of Michigan Regents conferred an honorary degree on Interim President Allan F. Smith at the University's winter commencement exercises in December.

Smith, a U-M law professor, returned to teaching at the Law School on Jan. 1, 1980, when Harold T. Shapiro, a U-M economics professor, assumed the presidency.

The Regents, in awarding the honorary Doctor of Laws degree to Smith, said that "rarely has a single person had such a telling impact on every facet of the University's mission.

"His excellent performance of the duties of president provided the Regents and the University community with the time required to conduct an orderly and successful search for the tenth president."

Smith, who received his law degree and doctor of juridical science degrees from the U-M, has been a faculty member since 1946. He was dean of the Law School from 1960 to 1965 and vice-president for academic affairs during 1965-1974.

Talent Shines In "Law Revue"

For the third straight year, the spotlight shined brightly on law students' musical, comedic, and dramatic abilities during the Law School talent show. Affectionately dubbed the "Law Revue," the show once again played to a standing-room-only audience of faculty and students in the Lawyers Club Lounge in March.

Ribald humorists, synchronized *a capella* singers, rock'n'roll parodyists, jazz musicians, and folk singers highlighted this year's revue. Interspersed among the acts were "Law School fantasies" brought to life, much to the delight of students in the audience. A few of the routines featured satiric odes to faculty members, received goodnaturedly by the faculty in attendance.

Brooke Schumm III, class of 1980, encored his performance of saxophone, leading the raucous audience through sing-alongs of old television theme songs. Eric Asmundsson, class of 1980, on piano and George Kirsch, class of 1982, on accordion assisted Schumm in providing musical interludes during set changes.

Revue Producer-Director Tamara Stewart, class of 1980, said after the show that she was pleased with the overwhelmingly favorable audience response. The Law Revue is "something creative, something other than objective," she remarked. "We get enough 'be objective, be rational, be factual' in Law School."

Stewart credited her veteran crew for much of the show's success. She shared the emcee chores with returning host Stephen Selbst, class of 1980. Behind the scenes, Steve Stojic, Dave Kantor, and Steve Lockhart, all class of 1980, handled the lighting, while Dan Conway, class of 1980, worked the sound board. Stage crew members included second-year students George Cole, Richard Cauley, and Charles Ryans, Jr.

Preparations for the show began six months before the performance night, with rehearsals scheduled two weeks prior, according to Stewart. The Law School Student Senate social committee again provided funding for the evening's jocularity.

—Mark Simonian

events

Daniel Bell delivers the Cook Lectures on American Institutions. (The dark glass lenses are to aid in the recovery from Bell's recent eye surgery.)

Cook Lectures

A Harvard University sociologist said the United States and other developed countries will become post-industrial "information societies"—devoting a major effort to the "production and distribution of knowledge" and high technology—while developing countries assume a greater share of industrialization.

Delivering the 1980 William W. Cook Lectures on American Institutions this winter at the U-M, **Daniel Bell** said industrial output by developing nations will grow from today's figure of 6.6 per cent to 17 per cent of world output by the year 2000. He also said there will be a "new international division of labor" due to large populations of young people in many developing nations. The lecture series was sponsored by U-M Law School.

At the same time, Bell predicted a "de-industrialization" of the West, as marginal companies in such fields as shipbuilding, steel, and automobile manufacture find it more difficult to compete.

Bell, a founding editor of *The Public Interest*, a journal on public policy, said the decline of goods production in the United States is likely to be offset by the growth of information processing and service functions.

"We have already begun the shift from a goods producing to a service society. Today, 70 per cent of the labor force can be considered to have a service orientation," said Bell, noting that 24.5 per cent of the United States' Gross National Product today is attributable to the processing of information and knowledge.

Some sociologists have predicted that one major shift resulting from this emphasis on high technology and information will be the creation of a "new elite class"—including scientists, applied service professionals (such as doctors and lawyers), administrators, teachers, and cultural performers—according to Bell.

"The class struggle will become translated into governmental budgets as institutions compete for their share of the funds," said Bell. He noted that, unlike industrial products, theoretical knowledge is a "public good" and thus less likely to be carried out for private profit.

Another problem in a post-industrial information society, said Bell, is that the capacity for "rapid innovation and change" may cause a restructuring of corporate enterprise. Some jobs may become quickly outdated as a result of new automated processes and continued competitive pressures between East and West, he said.

By far the most sweeping changes, according to Bell, would involve a transition from written word to video image through the advent of new teletext systems. These systems for consumers would combine information in reference books, newspaper classified ads, telephone yellow pages, among others, and be available at the touch of a button through a viewing screen, he said.

In law, advanced information retrieval systems will eventually be able to classify and order knowledge stored to help attorneys answer cognitive and intellectual problems, Bell said.

Video systems will also significantly alter mail delivery, through facsimile and electronic mail, as well as revamping military control in war, where the President could view local and overall tactical situations and make centralized command decisions from the White House, Bell said. He also suggested a greater flexibility in control of man's environment through the modeling and communication of weather conditions.

Technological changes and the "centrality of image" have already had a vast impact on the nation, Bell commented. "Revolutions in

Judges in the 1980 Henry M. Campbell Moot Court Competition, seated from left, are: Associate Dean James J. White, Judge Joseph T. Sneed, U.S. Supreme Court Justice Bryon R. White, Judge Patricia M. Wald, and Professor Peter Westen. **Student finalists,** standing from left, are: Suellyn Scarnecchia, Maria A. Perez, Gregory A. Spaly, Peter R. Silverman, Michael E. Lowenstein, Gary S. Simon, Peter O. Shinevar, and David Foltyn. Declared overall winners on the annual competition were Shinevar, Foltyn, Lowenstein, and Simon.

transportation and communications in the last 40 to 50 years have created for the first time a national society," he said. With television, he noted, we have a national set of effects of "the common imagery on a common screen."

This new "national society" has produced a dramatic shift in politics, where government now has become "the focal point of decisions," Bell said. Technology has also spawned the growth of "mobilization politics," of obtaining governmental action through mass marches and demonstrations, such as those organized by the late Dr. Martin Luther King, Jr., according to Bell. After King appeared on television, pleading for solidarity behind his civil rights marches in Alabama, "in a period of 24 hours, 10,000 people were flying down to lend him support," Bell said.

In the future, Bell envisioned that video systems will provide the "instant referendum," an immediate opinion survey of voters across the country. "Increasingly, the old notion of the party machines and party membership loses meaning," he added, explaining that parties are related to the structure of mass appeal. With a new, expanded role of video in politics, fund raising and canvassing for votes can be more efficiently run on a national level, Bell suggested.

Despite the political unification in his vision of the future, Bell saw "large new mass disjunctions," particularly on an economic scale. "For the first time we now begin to have an international economy which in no way is matched by political structures which are able in any effect to exercise controls. Even the definition of market no longer makes sense in terms of old notions," he said.

Campbell Competition

Two teams of students were declared winners of the 1980 Henry M. Campbell moot court competition at the University of Michigan Law School.

In the final round of the competition on April 1, the students presented oral arguments in a hypothetical case before a distinguished panel of judges, including U.S. Supreme Court Justice Byron R. White.

The winners were: a team composed of Peter R. Shinevar of Gaylord, Mich., and David Foltyn, West Bloomfield, Mich.; and a second team of Michael E. Lowenstein, Pittsburgh, Pa., and Gary S. Simon, Skokie, Ill.

The runners up: Suellyn Scarnecchia, Ann Arbor; Maria A. Perez, Troy, Ohio; Peter R. Silverman, Toledo, Ohio; and Gregory A. Spaly, Ann Arbor.

All eight finalists will receive the Henry M. Campbell Award at the U-M Law School's Honors Convocation in recognition of their being selected as the top participants in the school's legal advocacy program.

This year's competition focused on two hypothetical cases involving the right of a pregnant woman to have an abortion in the manner of her choosing. Also serving as judges were Judge Joseph T. Sneed of the U.S. Court of Appeals for the 9th Circuit in San Francisco, Judge Patricia M. Wald of the U.S. Court of Appeals for the District of Columbia Circuit, and Associate Dean James J. White and Prof. Peter Westen of U-M Law School.

The Campbell Competition also honors students for the preparation of the best legal briefs.

Selected for "best briefs" in the semi-final round were a team of Peter O. Shinevar and David Foltyn (who were also declared winners of the oral portion of the competition) and a team of Richard Bouma, Kentwood, Mich., and Thomas Richardson, East Grand Rapids, Mich.

Selected for "best brief" in the quarter-final round was a team of David W. DeBruin, Downers Grove, Ill., and Randy Mehrberg, Great Neck, N.Y.

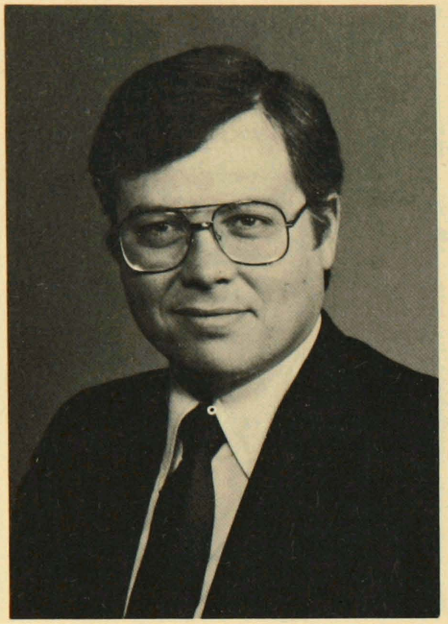
alumni notes

From left are Admiral Thomas B. Hayward, chief of naval operations; Captain William A. Cockell, executive assistant to the chief of naval operations; and Captain R. J. (Jack) Grunawalt, special counsel to the chief of naval operations.

☐ Two members of the Law School class of 1959 who have followed careers in the U.S. Navy are now serving in high posts with the Office of the Chief of Naval Operations in Washington, D.C. **Captain William A. Cockell, Jr.,** is the executive assistant to the chief of naval operations (Admiral Thomas B. Hayward) and **Captain R. J. (Jack) Grunawalt,** a member of the Judge Advocate General's Corps, is special counsel to the chief of naval operations.

Actually Cockell has served on the immediate staffs of the last three chiefs of naval operations, having been a special assistant to both Admiral Elmo R. Zumwalt, Jr., and Admiral James J. Holloway III. Among other naval duties, he commanded the guided missile destroyer U.S.S. Farragut, headed the Strategic Concepts Section in the Office of the Chief of Naval Operations, commanded Destroyer Squadron Thirteen in the Pacific Fleet, and was assistant chief of staff for plans and policy, U.S. Pacific Fleet. Selected for promotion to rear admiral in 1979, Cockell will receive the elevation in the summer of 1980. "My current assignment as executive to the chief of naval operations involves running his office and immediate staff (of which Jack Grunawalt is a part), managing work flow, following up on execution of CNO decisions, and accompanying the CNO on his frequent trips to fleet units and foreign countries," says Cockell. "Selecting the Navy line rather than law was a hard decision—both were attractive alternatives. I have never regretted the decision—the Navy has been an exciting and rewarding career. But I must say, though I have not practiced law, the intellectual discipline and analytical capability one acquires from a legal education have been a pronounced asset in my naval career."

Captain R. J. Grunawalt received a B.A. in history from the U-M in 1956 and entered the Navy upon graduation from U-M Law School in 1959. He also graduated from the Naval Justice School and the U.S. Army Judge Advocate General's School at Charlottesville, Va. Before becoming the special counsel to the chief of naval operations in 1976, he had been assigned to the Office of the Assistant Secretary of Defense for International Security Affairs, and was fleet judge advocate under the commander of the U.S. Seventh Fleet. He served an extended tour in Southeast Asia as deputy director of the U.S. Naval Law Center in DaNang, Vietnam, director of the Naval Law Center in Guam, and staff judge advocate for the commander of the U.S. Naval Force, Marianas Island. In his present post, Grunawalt advises the chief of naval operations on legal matters relating to military justice, international law, authority and responsibility of the chief of naval operations, military personnel, and legislative matters. Grunawalt is a member of the bars of the U.S. Supreme Court, U.S. Court of Military Appeals, and the Michigan Supreme Court. His military awards include the Meritorious Service Medal with Gold Star, the Joint Service Commendation Medal, the Navy Commendation Medal, the National Defense Service Medal, the Vietnam Service Medal, and the Republic of Vietnam Campaign Medal.

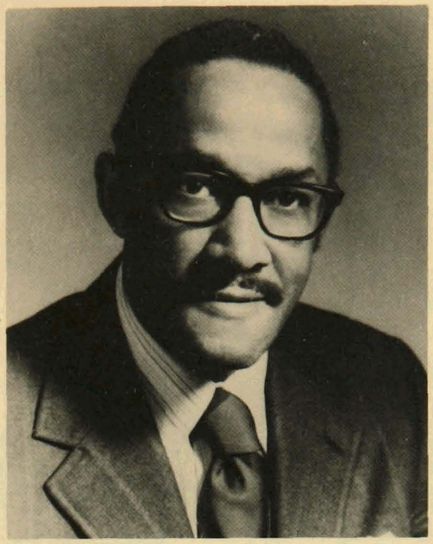


Joseph C. Zengerle

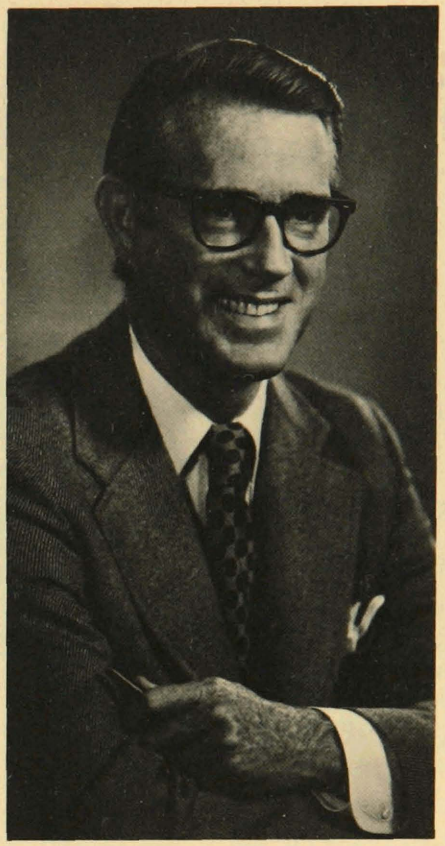
George E. Lohr

☐ In another branch of the military, 1971 U-M law alumnus **Joseph C. Zengerle** was sworn in Feb. 15 as the assistant secretary of the Air Force for manpower, reserve affairs and installations. He had been nominated for the post last December by President Carter. The swearing in ceremony was administered in February by Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia Circuit, for whom Zengerle served as law clerk during 1972 and 1973. Among other posts, Zengerle was an associate with the Washington law firm of Arnold and Porter, and during 1973 and 1974 was law clerk to Chief Justice Warren Burger of the U.S. Supreme Court. He received a B.A. from the U.S. Military Academy in 1964 and, along with his wife Lynda, earned a J.D. with honors from U-M Law School in 1971. A Vietnam veteran who served as a special assistant to the U.S. commander during the Tet offensive, Zengerle has been active in improving the status of Vietnam veterans. As a sideline to his regular legal work, Zengerle in 1977 co-founded a national organization, the Vietnam Veterans of America, and has written articles and made television and radio appearances on behalf of this group. His wife, Lynda, has also been in the public spotlight. A partner in the Washington, D.C. law firm of Leighton, Conklin, Lemov & Jacobs, she was cited in various newspaper articles for her success in combining motherhood (the Zengerles are parents of two young sons) with a legal career. She was also quoted in one recent New York Times series on the Immigration and Naturalization Service, one of Mrs. Zengerle's areas of practice.

☐ **George E. Lohr,** a member of the Law School class of 1958, was appointed to the Colorado Supreme Court by Gov. Richard Lamm. Justice Lohr had previously served as judge for the Ninth Judicial Circuit in Colorado (and as chief judge since 1976), where he presided over two of the most sensational criminal cases in recent Colorado history—those of murderer Theodore R. Bundy and singer Claudine Longet. In the Bundy case, Lohr in December, 1977, issued a controversial ruling that the state couldn't seek the death penalty against Bundy because Colorado's death penalty law was unconstitutional. His ruling was upheld by the Colorado Supreme Court. Among other positions, Lohr has served Colorado as water judge for Water Division 5; as counsel for Snowmass American Corporation (developers of the Snowmass-at-Aspen resort) and for Real Estate Affiliates, Inc.; corporate counsel for Janss Corporation of Thousand Oaks, Calif.; and partner in the Denver law firm of Davis, Graham & Stubbs. A native of Gary, S.D., Lohr graduated from South Dakota State University in 1953, and served in the U.S. Air Force from 1953 to 1955 before attending Michigan Law School.



Cecil F. Poole

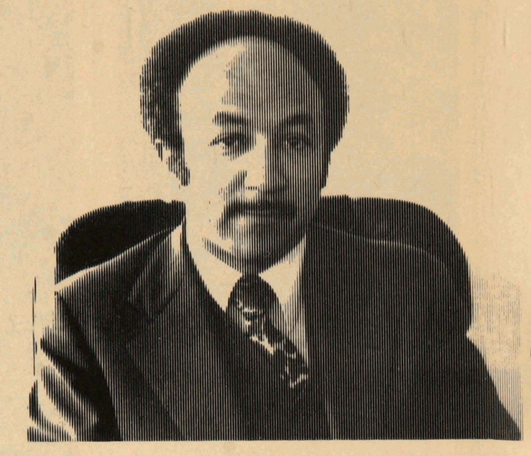


Charles B. Renfrew

☐ **Cecil F. Poole** of the Law School class of 1938 has recently become judge for the U.S. Court of Appeals for the Ninth Circuit in San Francisco (the court's jurisdiction includes California, Oregon, Nevada, Montana, Washington, Idaho, Arizona, Alaska, Hawaii, and Guam). Judge Poole had been on the U.S. district court bench for the northern district of California since 1976. After receiving both the A.B. and a law degree from Michigan, Poole went on to receive an LL.M. from Harvard University in 1939. He served as assistant district attorney for the city and county of San Francisco from 1949 to 1958 and was legal counsel to California Gov. Edmund G. (Pat) Brown from 1959 to 1961. He became U.S. attorney for the northern district of California in 1961, remaining in that post until 1970. Poole was a law professor at University of California at Berkeley, and has been affiliated with the law firm of Jacobs, Sills & Coblentz in San Francisco.

☐ **Charles B. Renfrew,** member of the Law School class of 1956, was sworn in in March as the deputy United States attorney general, second in command to Attorney General Benjamin R. Civiletti. Renfrew had served on the federal district court bench in San Francisco, and was previously an antitrust lawyer with the San Francisco law firm of Pillsbury, Madison and Sutro. As deputy attorney general, Renfrew will direct programs on criminal law enforcement, including such cases as the Federal Bureau of Investigation's Abscam and Brilab inquiries. Renfrew was born in Detroit Oct. 31, 1928, and grew up in Birmingham, Mich. He served two years in the Navy before entering Princeton University in 1948 and was a lieutenant in the Army for two years after graduating from Princeton. He went to work in San Francisco soon after graduating from Michigan Law School in 1956. In preparation for the focus on criminal law cases as deputy attorney general, Renfrew handled more than 250 criminal cases as a U.S. district judge. He visited federal prisons, attended disciplinary headings, and followed the performance in prison of those he had sentenced.

Harry Edwards (right) with Chief Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit, at Edwards' swearing-in ceremony February 27.
photo: City News Bureau, Inc., Washington



The Multiple Harry

by Anna Brylowski
Contributing Writer

Exiting the elevator, one finds a large square room filled with shelves of books, seemingly far removed from the street noises below, even from the daily activities around Hutchins Hall and its constant student traffic—a silent place, ringed with offices, further insulating it from the world. This is likely to be one's mistaken first impression upon reaching the 10th floor of the Legal Research Building. Nothing betrays the keen sense of life and activity that immediately is felt upon opening one of the sparsely placed doors around the hushed square. A phone rings; behind another door a consultation begins; several students suddenly emerge from somewhere among the books and are eager to be admitted to one of the doors. It is an advantage under these conditions to be able to enter an ante room and to claim a pre-arranged appointment. The click of the receiver tells of a finished phone talk; the door of the inner office opens and Professor Harry Edwards, this man so much in demand, greets you leisurely, as if he had all the time in the world for an interview.

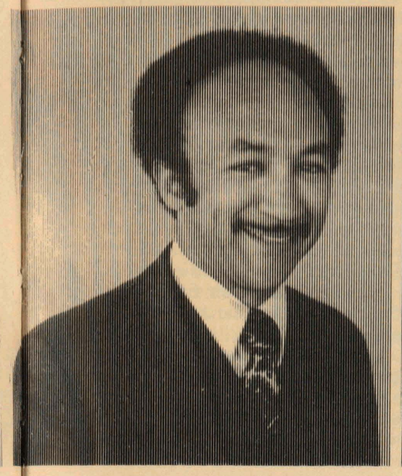
The apparent contradiction between the serenity of the place and the bustle of activity is heightened by the knowledge that this is something of a farewell visit to the man named by President Carter to the U.S. Court of Appeals for the District of Columbia Circuit.

Professor Edwards, a graduate of Cornell University (1962) and the University of Michigan Law School (1965), a labor lawyer with Seyfarth, Shaw, Fairweather & Geraldson in Chicago, Illinois (1965-1970), and a Professor of Law (at Michigan, 1970-1976, Harvard 1976-1977, and Michigan 1977-1980) will not be with us much longer despite the Law School's success in reclaiming him from Harvard two years ago.

Before departing for his new adventure in Washington, he has agreed to review his rich legal career for the *Law Quadrangle Notes*.

To begin, Edwards has to his credit a five-year successful legal practice in representing management. In retrospect he sees it as having been a rewarding profession in itself and as an invaluable preparation for the teaching and research he eventually undertook at the Michigan Law School. He enjoyed his years with the Chicago firm because of the opportunity to become an expert in labor law, "to arbitrate, to be involved in court litigation and actual negotiation." Did he not see representing management as a disadvantage for that aim?

"When you represent management, you very often are representing the institution that is making the decision. I felt that if I could have some impact on that decision making, I was going to achieve a result as quickly, if not more quickly, than persons on the other side. So, in a number of cases where I felt that there were larger interests at stake than were originally stated by the clients, I would suggest to them that their vision was too parochial and that we should explore some wider possibilities to take into account human needs that might not have originally been stated. In many cases I found clients very receptive to a re-definition of the problem which would result in a remedy that would avoid litigation. And so long as I could find a way for the clients without costing them any kind of irreparable harm in terms of productivity, they were very receptive to my repackaging the problem in such a way that it would achieve some larger benefits. I did not feel handicapped representing management, not at all."



Harry Edwards (left) and Judge David L. Bazelon of the U.S. Court of Appeals for the District of Columbia Circuit. Judge Bazelon's decision to assume "senior status" after 30 years on the court, including many years as chief judge, created a vacancy which Edwards was selected to fill.
photo: City News Bureau, Inc., Washington

Choices of Edwards

Besides, Edwards thinks his practice in labor law has helped him to have a larger picture of the subject matter he now teaches (labor law; collective bargaining and labor arbitration; negotiation; equal employment opportunity law; labor relations law in the public sector; higher education law). In law practice he came to understand human dynamics: "In labor law you were constantly dealing with people—in collective bargaining and in other like situations. I think one of the best things that practice did for me was to alert me to the fact that in law school we are too often inattentive to human needs, the problems that arise by virtue of breakdowns in human exchanges. Too often we focus on the logic of the law, a rational approach apart from a human need. Sometimes we are impatient with human frailties. In pursuit of the rules of the law we often forget the human flaws. I think I try very hard as a teacher and in my relations with students to keep that in mind."

Dedicated to his law practice, near the point of partnership, Edwards did not think of teaching and the pursuit of scholarship as being more rewarding than his experience as an advocate. "I must say, though, that I have no regrets about my decision to teach, and probably as important to me as anything in teaching has been my time with students." He enjoys working with them in the classroom as well as with his research assistants out of class, many of whom have been sources of inspiration and are friends as well. Edwards even finds it invigorating to know that he "demands a lot" from his students, believing that challenge brings excitement to class work for teachers and students alike. Most of his students at Michigan, while complaining about it, can meet his challenges "head on," he adds proudly. He also values the time spent in private conferences with his students, discussing their goals, aspirations for the future, changes they might be able to effect once they go into practice in whatever form that may be. "It is hard sometimes to find the time to do that, and I think we all get anxious when a student knocks on the door, because we say to ourselves, 'My heavens, how am I going to get this article done or get ready for class or answer this phone call and these letters,' but then we realize that after all they are paying our salaries with tuition and that is what we really are all about—the business of teaching."

Being a prolific scholar in his field, Edwards finds classroom experience advantageous to that end: "The opportunity to teach is the opportunity to think out loud and to explore and test some of the thinking." He believes his students have been very helpful in providing a focal point for his ideas which eventually became a source for his articles and books.

He feels fortunate to have come to Michigan at a time when a larger number of black students, other minority students, and women had gained admission. "When I graduated," Edwards reflects, "I was the last of three black students; the other two had graduated a year before, and I think when I left there were none. The three of us had often joked about the fact that maybe we did something wrong because no one followed." Now, however, things have changed for the better. He believes it is important that the prestigious institutions of the country (Harvard, Yale, Columbia, Chicago, Michigan) provide minority groups and women with the opportunity to study there, since it is a well known fact, especially in the legal profession, that graduates from these institutions have a head start in placement. They gain access to important positions (in corporate offices, in major private law firms, government positions, and judgeships) where they are enabled to affect

some of the decisions that are made in society. "Only this way can our society become a democracy in a true sense."

Summing up the value of his teaching career, Edwards sees it as an experience that has allowed him to be "a free spirit" to attempt a variety of pursuits: to relate to students and colleagues, to serve as an arbitrator, to work in Amtrak and with the National Academy of Arbitrators, and to think and write about different aspects of the law. "I love having the time to explore different roads, and I think they all help me grow. I wear myself out, but I think it is a great personal gain for me. I feel I am at a high point of my life, and I think that is because I am in teaching and in scholarship. I have been allowed to think about things and to argue with people to get them to see my way and to effect some changes in society from an academic base."

A great deal of this creative thinking is reflected in Edwards' writings—his many articles and four casebooks. Which of his many titles does he consider the most important? "I measure the importance of my work against the number and quality of responses about it that I get from people in the field." In this respect, his writings on labor relations law in the public sector, his study on arbitration and external law for the National Academy of Arbitrators, all his writings on employment discrimination, and his most recent work in higher education and the law have been publications of importance.

Perhaps one of the most knowledgeable assessments of Edwards' professional writing comes from Professor St. Antoine, a friend and an expert in the field of labor law: "I would be very hard pressed to think of any faculty member his age (he is only in his late thirties) in our field who has written as much good stuff as Harry. And he has written in a wide range of fields and has not picked out the most obvious things to deal with. For example, when he first started to write about the problems of discrimination in employment, he did not deal with race necessarily, which some might have expected. He dealt with sex discrimination and religious discrimination, and the articles that he wrote were extraordinarily perceptive."

St. Antoine praises the impeccable scholarship and originality evident in Edwards' publications: "Harry never believes in talking off the top of his head. He has conducted some very thoughtful, comprehensive surveys through people out in practice. He has written widely in areas that were not necessarily yet fashionable. So he was an original in what he chose to talk about, and he was creative in what he had to say. He has been most influential, and he has been cited frequently by other scholars and by the courts. He has already made major contributions to the development of the law of employment discrimination, the law of public employment unionism, and the law of education—a brand new field that he launched into at the time when he went to Harvard and in which he has maintained an interest. He has now produced, at the age of 39, four books in collaboration with colleagues: an extraordinary, prolific achievement."

The newest development in Edwards' varied legal career is his well publicized selection for appointment to the U.S. Court of Appeals for the District of Columbia Circuit, often called the second most important court in the nation. He was quoted by the press at the time of his selection as being "highly gratified" to be considered. Always ready to investigate new possibilities, Edwards sees his coming judgeship as yet another challenge to put his varied legal background to good use. He anticipates that his "decision-making and decision-writing experiences in arbitration will be beneficial to [him] on the bench," and he states: "I hope that the breadth of my experiences both in and out of the Law School has allowed me to survey the human condition enough to be able to make wise decisions as a judge."

Edwards admits that being a judge will be a very different way of life from his academic routine with its freedom to think and write without statutory or constitutional constraints. These limitations "focus" a judge upon paying scrupulous attention to the laws and to the constitution he is attempting to enforce. He does not have room to make a mistake here and there or to put forth an "off base" point as one has when writing an academic article. A judge cannot write an opinion that is "frivolous" or "silly," because it may "cost the government, or the individual; and so the consequences of a judge's actions are immediate, and they may be disastrous if he makes a mistake." On the whole, the judgeship will mean, Edwards thinks, a higher level of discipline to live by than his academic experience has required; but, being a new challenge, it should also bring its own excitement. And there might even be more time to be reflective and to ponder alternatives. "I hope that this is not wishful thinking," Edwards concludes. He is looking forward to living in Washington "as an interesting prospect" and says he is very curious to see how he will react to the whole new experience ahead of him.

Once again he stresses the importance of black people in key positions of the legal profession: "I think it is very important, for example, that a person like Amalya Kearse be appointed to the U.S. Court of Appeals for the Second Circuit, and that Thurgood Marshall was appointed to the Supreme Court and Leon Higginbotham to the U.S. Court of Appeals for the Third Circuit, because these are positions that we for years have not assumed. It gives a vivid example to have people like that on those important courts with strong, able voices to be heard. It helps the cause of equal opportunity because of the model that they provide."

Looking back on his rich career, what would he consider the high points of it? Does he have any regrets, any sense of failure?

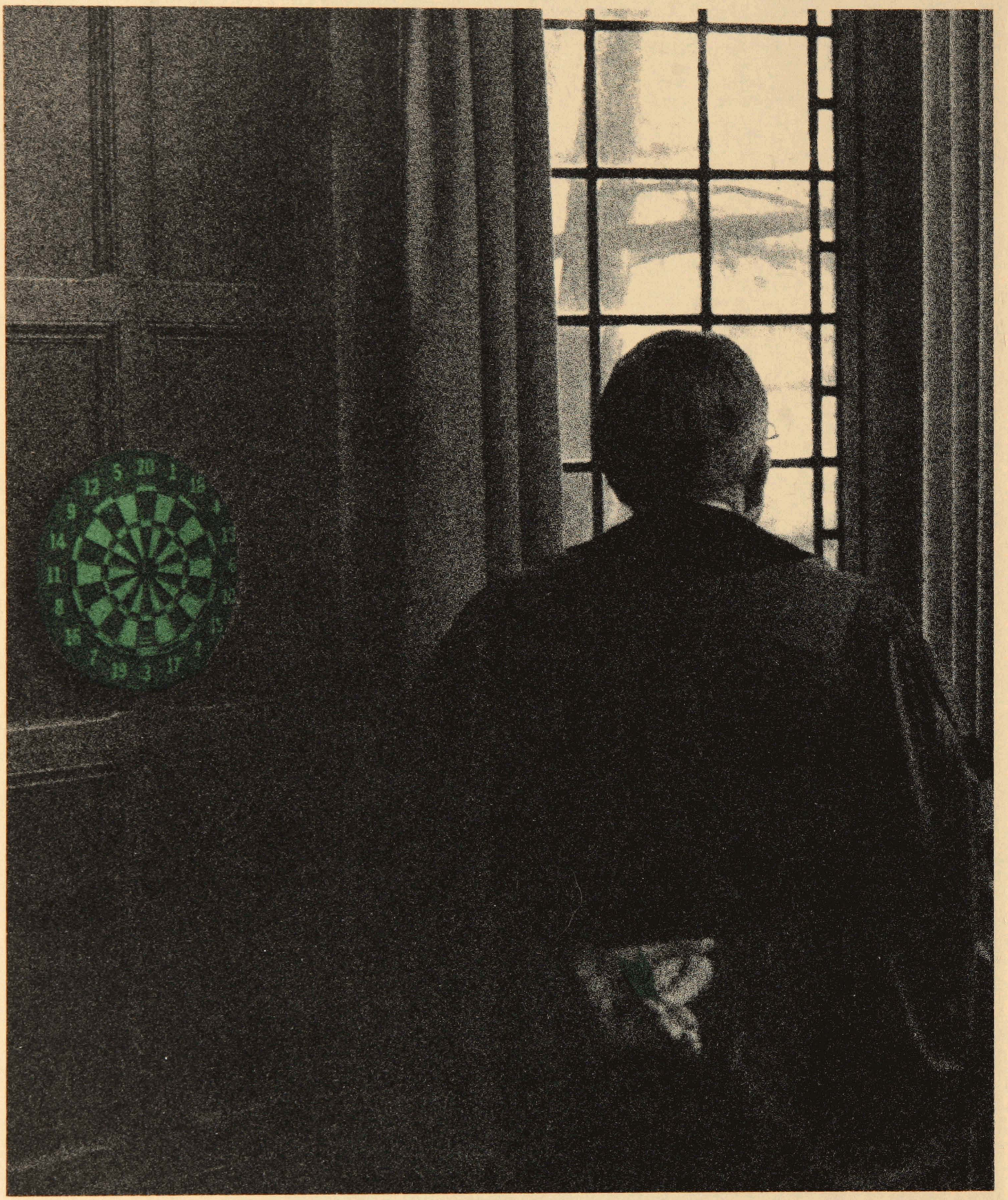
"I have never worried much one way or another about professional failures. I think you win some and you lose some, but my greatest concern is that I don't want my children and my family to say that there were some things that we should have done that we didn't do because I was always occupied. And I guess that is the thing that I am most nervous about. Professionally the experience has been marvelous. I think it had a lot to do with my desire to run many different roads. It had a lot to do with my upbringing—with my grandfather, who was a lawyer and just a wonderful person, and my mother, who gave me enough rope to pursue new challenges; since coming to Michigan, my father (a Michigan State legislator for 25 years) has been equally supportive. My grandfather and my mother were tremendous prods. Failure did not cross their minds. You did not think in terms of failure. You thought in terms of 'What else is there to do?' and 'Let's go explore the next opportunity and have some fun.' With that kind of spirit when you are growing up, you don't worry about how you are being measured because you are measuring yourself. And so the test for you is always a personal one."

With a wisdom gained through close family ties established throughout generations, Edwards talks about the concept of success in very human terms. He values the support and strength he gains from those closest to him: "My family represents some of the best things in life that I keep looking for and reminding myself are goals toward which I have to continue to aspire. My wife has been a tower of strength and as beautiful a person as I have ever met; fortunately our children take after their mother. If

there are occasions when I get taken with some of my own achievements, I think my children have helped to put me back on a more real plane, just by their presence and sometimes by their observations, reminding me that I am just another person. They have been a wonderful leveling factor for me. During my non-working hours, I look forward to time with my children. I spend a lot of time coaching soccer and basketball teams on which my son plays and participating in the Indian Princess program with my daughter. I love working with youngsters, although the time never seems to be adequate. They have such boundless energy; they can be exhausting but invigorating."

This firm belief in the value of human contact Edwards shared with the Law School graduates in his commencement address last December: "I can only tell you . . . that in the end analysis your relationships with your spouse, children, close friends, and parents will prove to be much more significant than any case that you ever try."

When St. Antoine speaks with pride but also regrets about Edwards' appointment to one of the most important courts in the country, he is very likely expressing an attitude shared by the rest of the Law School's faculty: "I have some mixed feelings about Harry's going to the Court of Appeals for the District of Columbia Circuit. On one hand, I am extremely happy for the Court and all the litigants whose cases will be handled by him. And in some respects I am even happy for Michigan—that we bask in his reflected glory. But I also can't help feeling a little sorry for us for having lost such a stellar performer and for the generations of students that won't have the benefit of his teaching. Harry is a great classroom teacher. Students both here and at Harvard have shouted his praises to the heavens. And from what I have seen of him in lectures and panel discussions, he is fully entitled to that kind of praise. So he is a major loss to the institution and a major gain to the Court of Appeals for the District of Columbia Circuit."



SENTENCING: the dilemma of discretion

by Jerold Israel
Professor of Law
The University of Michigan

[The following excerpts are taken from Professor Jerold Israel's revision of the late Hazel B. Kerper's *Introduction to the Criminal Justice System* (West Publishing Co. 1979). This book is a widely used beginning text for undergraduates. It concentrates on presenting a broad overview of the basic features of the criminal justice process. This is Professor Israel's first experience writing for undergraduates, and he reports that it is "far more difficult, in many ways" than traditional law review writing. Since sentencing reform is a major topic of concern today, we thought this excerpt might prove of interest to those of our readers who may have only a passing familiarity with the current controversy. Footnotes have been deleted.]

As we have seen, judges usually have substantial discretion in sentencing. Most states give them considerable leeway in choosing between probation and imprisonment, in setting the term of imprisonment under either an indeterminate or determinate sentencing structure, in deciding whether a young offender will be given the special benefits of a youthful offender statute, and in determining whether to impose consecutive or concurrent sentences for multiple convictions.

In some jurisdictions, judges even have the final say as to whether an extended term will be imposed under a habitual offender charge. Judicial discretion in sentencing is one of the most hotly debated subjects in the criminal justice field today. Few experts are satisfied with the present system, but there is a sharp division among the critics as to what reforms are needed. Some argue that extensive judicial discretion is basically correct, but minor modifications would be valuable so as to more carefully control the exercise of that discretion. Others argue that the discretion must be taken away from the judges and either placed elsewhere or largely eliminated from the sentencing process.

To fully appreciate the issues in this crucial debate, one must have some answers to at least three questions. Why did we give judges extensive sentencing discretion in the first place? What have been the advantages and disadvantages of judicial discretion? What alternatives are available, and what are their advantages and disadvantages? After lengthy discussions, experts remain in disagreement as to the appropriate responses to these questions. We will attempt merely to summarize some of the more substantial points they have made.

Individualizing Sentences: The Need For Discretion

We noted in Chapter Five that the movement toward indeterminate sentences (and judicial discretion) reflected an interest in accommodating the several objectives of punishment. Indeterminate sentencing was designed to achieve rehabilitation as well as deterrence, to avoid needless incapacitation while still obtaining a punishment sufficient to serve the legitimate needs of retribution. The development of probation reflected these same concerns, although the primary emphasis here clearly was on rehabilitation. The overall objective of our sentencing philosophy was to make the punishment fit the offender as well as the offense. This was an objective that required individualized sentencing based upon the facts of the individual case. It was an objective that lent itself naturally to broad judicial discretion.

There are those today who contend that our emphasis on rehabilitation has been misplaced—not because it is an inappropriate goal, but because it remains largely beyond our capacity. Yet even if this controversial premise is accepted, the need for individualized sentencing hardly disappears. If one looks to incapacitation, deterrence, or even retribution, there is still need for individualization. Let us consider, for example, five cases of kidnapping. No. 1 is a woman whose baby died, and who took another woman's baby from the hospital. No. 2 is a young man whose girl-friend said she was breaking up with him. He put her in a car and drove her around for 24 hours trying to persuade her to change her mind, while her frantic parents tried to locate them and the girl did everything she could to get away. No. 3 is a divorced man who took his own child from its mother who had legal custody and refused to tell the mother where the child was. No. 4 is a kidnapper for ransom who kept a young woman buried in a box fitted with air tubes for breathing in order to make it impossible for searchers to find her, and who demanded $200,000 from her wealthy father. No. 5 is a woman accomplice of the kidnapper for ransom. She assisted in the kidnapping because she was in love with the kidnapper and was also threatened by him. She did everything she could to keep the kidnapped girl alive when it was possible for her to do so.

The offense charged in each of our five cases is identical—kidnapping. The legislature has drawn some general distinctions in defining that crime, but it can hardly take into consideration all of the factors that distinguish one kidnapping from another and one person's participation from that of his accomplice. Even if one were concerned only with retribution, somebody must be given authority to distinguish between these five cases. The evil in each is hardly equivalent to the others even though the same crime is involved. A sanction as severe as imprisonment should not be imposed without drawing more careful lines that relate to our retribution objective. Of course, once we add consideration of deterrence and some degree of rehabilitation, we must consider more factors and there is even greater need for individualization. In sum, individualization probably would not be as essential if we had fewer punishment objectives and they did not so frequently clash, but even if we shifted our focus so that deterrence or retribution became the dominant theme—as some say we should—a certain amount of individualization (and hence discretion) would still be needed.

Factors Affecting Judicial Discretion

How in fact have judges utilized the discretion they have received? Have they emphasized factors that relate to the several goals of punishment? Most experts believe that they have done so, although many would say that there has been too much emphasis on one factor or another. While the weight given to particular factors varies with the judge, almost all judges have tended to look to the same basic elements. The first, and probably the most significant, is the seriousness of the offense as it was carried out. As we saw in our five kidnapping cases, the gravity of the actor's wrongdoing is not always revealed simply by the punishment category in which the legislature places the particular crime. A sentencing court will want to know if the case involved special aggravating circumstances that made the defendant's conduct more serious than that of other offenders who commit the same crime. Though a violent act is not a formal element of the crime charged, did the defendant here actually threaten harm to his victim? Did he involve minors in the commission of the crime? Did he pick upon a victim who was particularly vulnerable? Did the planning, sophistication or professionalism of the crime indicate premeditation? On the other side, the court also will want to know if the case involved special mitigating factors that suggest a lower sentence: the defendant may have been a passive participant or may have played a minor role in committing the crime; the defendant may have exercised special caution to avoid harming the victim; the defendant may have acted under the influence of alcohol or extreme emotional stress; or the victim may have been an initiator or provoker of the incident. Our list of mitigating and aggravating factors is not complete, but only illustrative. As we have noted, several of the recently adopted determinate sentencing provisions include lists of specific aggravating and mitigating factors to be considered by the judge.

Judges also will look to the character and background of the defendant. Has he been convicted of previous offenses? Has he "served time" before? Has he engaged in a pattern of violent conduct which suggests that he poses a serious danger to society? What is his attitude towards this crime—has he plead guilty, made restitution to the victim, assisted the police in convicting his accomplices? Does he have social stability indicating that he may be able to stay out of trouble? Relevant factors here include his family ties, employment record, possible addiction to drugs, and the character of his friends and associates. Many judges are concerned that such factors tend to discriminate among socio-economic classes, favoring in particular the defendant from a middle-class community. However, available evidence suggests that such offenders are less likely to repeat certain types of offenses (e.g., burglaries) than other prisoners who have far less to look forward to when they are returned to the community.

Another factor likely to influence the judge is the community attitude toward the crime and the offender. If there is special community fear of the particular type of crime, or outrage as to the particular case before the court, the judge may feel that the community's demand for retribution or deterrence should be reflected in his sentence. Reviewing a sentence of two years imprisonment and five years suspended sentence for two counts of forcible rape, the Supreme Court of Alaska rejected that sentence because it failed to give sufficient weight to "community condemnation of the offender's anti-social conduct." The trial court had relied primarily upon the defendant's potential for rehabilitation, but the Alaska

Supreme Court stressed that that interest did not justify ignoring the need for "the reaffirmation of societal norms, for the purpose of maintaining respect for the norms." In light of that need, the sentence was too lenient: "A substantially longer period of actual confinement was called for . . . [so as to] bring home to[the defendant] the serious nature and consequences of his crime and to reaffirm society's condemnation of violent and forcible rape."

The judge's exercise of discretion in sentencing also is likely to be influenced by his perspective of the state's corrections system. The nature of prison life and prison programs may be a deciding factor in choosing between probation or imprisonment or in setting the term of imprisonment. When there still is some hope for rehabilitation, and the judge views the prison system as almost inevitably having a negative impact on an offender, the judge is more likely to turn to probation. Where the judge has decided on imprisonment, the conditions under which time will be served may influence his determination as to the appropriate minimum term. Life in an antiquated, maximum security prison obviously is somewhat different than life in a modern, minimum security institution. The judge may be impressed (or depressed) by the prison system's rehabilitative programs. Where he has some confidence in those programs, he may hesitate to impose a high minimum for fear that it will interfere with the parole of the prisoner at that point when he is most likely to achieve a successful return to the community. Judges are aware that holding a prisoner beyond that point may be counterproductive. It can lead to bitterness and a reinforcement of the attitudes which led the offender to prison in the first place. On the other hand, if the judge believes that the corrections system offers little hope of rehabilitation or that the parole board takes too many unjustifiable risks, he may be inclined to impose a higher minimum sentence.

Judges also take into consideration the impact of the sentence upon the administration of an overburdened criminal justice system. They recognize that if concessions are not given for guilty pleas, the backlog of cases to be tried may grow so heavy as to almost cause the system to collapse. They also recognize that, where prisons are overcrowded and new prisons are not being built, the parole board may be in a position where it is forced to release a prisoner for every new prisoner it receives. In such situations, high maximum terms are meaningless. Prisoners will be released long before their full terms are served (even without consideration of liberal good time allowances). Indeed, a high minimum may be unwise even though the judge is confident that this offender should be incapacitated for a substantial period of time. The judge has no way of comparing this offender to others that the parole board also must consider for possible release. Assuming that overcrowding will require the parole board to release some prisoners who are far from good risks, the judge may hesitate to tie the board's hands with a high minimum, thereby possibly forcing it to take an even greater risk in paroling a less deserving prisoner.

Improper Factors

While judges are divided as to the weight that should be given to some factors (e.g., a guilty plea), all agree that certain factors should not be considered. A sentence clearly should not be based on the race, sex, or the social status of the offender. Yet we frequently hear of studies that supposedly show that sentences are strongly influenced by these clearly irrelevant factors. One particularly disturbing study presented by counsel in the Supreme Court's death penalty cases pointed out that the capital punishment was more often imposed on black defendants than white defendants. Other studies, however, suggest that if all other factors are kept constant, race and sex have little if any significant impact on sentencing. . . . A major difficulty presented in evaluating available data is that race and sex can be determined from a surface analysis, but underlying factors that may provide alternative explanations often are found only in confidential presentence reports.

Disparity In Sentencing

A major complaint leveled against judicial discretion in sentencing is that it produces "sentencing disparity." Unfortunately, the label "sentencing disparity" is used in many different ways. If it refers simply to different sentences for persons convicted of the same crime, then it is not necessarily an evil. A prisoner who receives a higher sentence than a fellow prisoner convicted of the same crime quite naturally complains that the system is not "fair." Fairness, however, must be judged in light of the proper objectives of sentencing. The prisoner's higher sentence may be the product of a variety of factors relevant to those objectives, such as his extraordinary violence in the commission of the crime or his long criminal record. Disparity justified by such factors is not a cause of concern, although further efforts may be needed to educate the public as to the reasons for its existence.

Disparity due to sentencing based on irrelevant factors is, on the other hand, an evil that should be eliminated. We already have noted the disagreement as to the existence of disparities based on race, sex, or social status. Many argue that such disparities have not yet been shown to be a major problem. There is general agreement, however, that another form of unfortunate disparity does exist—namely sentencing disparities produced by the differences in the sentencing philosophies of individual judges. Different judges will take different views of the gravity of the same crime. One judge may abhor narcotic violations and "come down hard" on all narcotics offenders. Another may view narcotics users as victims of the "pushers" and reserve harsh sentences for major dealers. Judges also differ as to the weight to be given to particular sentencing objectives. One judge may emphasize the possibilities of rehabilitation, while another may be concerned primarily with making the offender "pay his debt to society." Thus, the individual judge's value judgments obviously play some role in sentencing. We are uncertain, however, as to how greatly sentences are influenced by these variations among judges. Are we talking about an occasional disparity produced by the idiosyncratic views of a "hanging judge" or is this an everyday problem influencing sentences in many cases?

Sentencing institutes held throughout the country suggest that differences in judicial philosophies may have an impact in a significant number of sentencing decisions. At these institutes, various trial judges are given hypothetical cases and asked to indicate what sentence they would impose. They have not seen the defendant, of course, but they are given a fairly complete picture of the offense plus all of the information as to the defendant's background that would be available in the ordinary case (age, prior record,

drug use, education, etc.). While the proposed sentences do tend to cluster at certain points, they also disclose considerable disparity between some judges. For example, in one bank robbery case presented to 48 federal district judges, the average maximum term proposed was slightly over ten years, but the responses of individual judges ranged from five to eighteen years. In a hypothetical heroin possession case considered by the same group of judges, 36% would have granted probation, while the remainder would have imposed incarceration ranging from three months to the statutory maximum of two years. After participating in such institutes and noting the different approaches of his colleagues in sentencing, one federal judge concluded: "[O]ur laws characteristically leave to the sentencing judge a range of choice that should be unthinkable in 'a government of law, not of men.' "

Alternatives: Assisting Judges

How should improper disparity in sentencing be eliminated? Some commentators argue that judicial discretion is a basically sound idea requiring only minor modifications to eliminate the more extreme disparities. They suggest the use of sentencing guidelines, more sentencing institutes where judges share ideas, and stronger appellate review of sentences. Such programs, they argue, will produce greater uniformity without eliminating the opportunity for individualizing sentences. As they see it, the primary need is to increase communications among judges and between judges and the correctional system.

One of the more innovative programs for increasing the information shared by judges utilizes statistical analysis of sentences currently imposed by judges. Sentences are analyzed in light of a series of variables to determine the weight being given to each. Then the key variables are arranged on a grid that produces a series of different sentencing categories for each offense. Looking to the variables in the case before him, which include such factors as the offender's educational level and age at the time of his first conviction, the judge can place the case in a particular category, which will tell him what sentence commonly is given to this type of defendant in this type of case. While current guideline programs do not go far, some commentators argue that there should be a presumption against sentences outside the guidelines. If the judge should impose a sentence that does not fit within the guidelines, he would be required to state his reasons for deviating from the guidelines and his decision would then be subject to careful appellate review. A major criticism of this proposal is that it might lead to "robot sentencing." Judges could become so hesitant to go outside the guidelines that they might sentence without regard to the unique circumstances of individual cases.

Alternatives: Parole Boards and Sentencing Commissions

Some critics of judicial discretion contend that the suggested modifications, even if they could produce greater uniformity, would not be satisfactory. The problem, as they see it, is that the modifications only would produce more consistent adherence to sentencing policies that reflect a consensus judgment of the judiciary. These critics share the doubts, expressed by many judges themselves, as to whether judges are well equipped to set sentencing policies. They agree with Justice Frankfurter, who once noted:

> We lawyers who become judges . . . are not very competent, are not qualified by experience, to impose sentences where any discretion is to be exercised. I do not think it is in the domain of the training of lawyers to know what to do with a fellow after you find out he is a thief. I do not think legal training gives you any special competence.

Assuming one accepts this view, the question arises as to who should be the recipient of the discretion currently given to judges. The two most common suggestions are the parole board and a special sentencing commission.

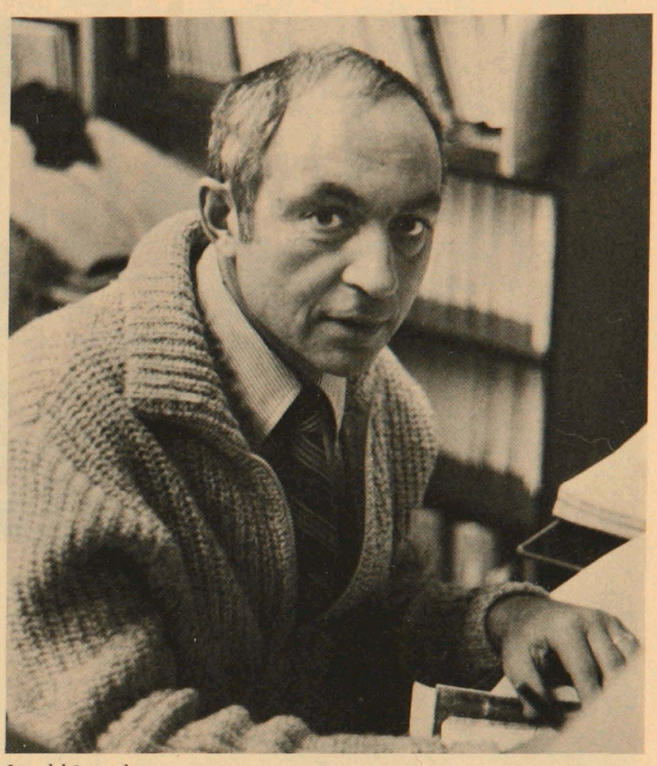
At one time, most opponents of judicial discretion argued that more authority should be granted to the parole board. The ideal, as they saw it, was a system under which there was no minimum sentence and the maximum was set by statute. The key was to provide as much indeterminancy as possible so as to increase parole board discretion. The advantages of parole board sentencing supposedly were: (1) parole boards are centralized agencies and thus more likely to provide statewide uniformity of treatment of similar cases; (2) the parole board could be staffed with experts on human behavior; (3) parole boards are more likely to use a scientific approach in sentencing, considering many variables; and (4) parole board sentencing might decrease the control that prosecutors exercise over the sentencing process through plea bargaining. Of course, even if parole board sentencing provided a successful alternative to judicial discretion in setting the term of imprisonment, it did not furnish a complete solution for those opposed to judicial discretion. The judge still would retain discretion over the issue as to whether or not to grant probation since a parole board deals only with imprisonment.

Broadened parole board discretion was promoted in many states until the mid-1960's. Then, the tide seemed to turn. Today, as we saw in our discussion of determinate sentencing, there probably is more opposition to parole board discretion than to judicial discretion. The complaints against parole board discretion are many, but the most significant is that parole boards tend to emphasize the wrong factors in determining whether a prisoner should be released. They place too little emphasis on the nature of the crime, it is argued, and too much emphasis on how well the defender has done in prison. The latter factor, critics suggest, has little predictive value. Prisoners participate in "rehabilitative" programs in prison because they know they must do so to obtain their early release. Prisons are, in effect, drama schools that force persons to act as if they were rehabilitated according to our stereotyped views of proper behavior. Moreover, the critics continue, it is questionable whether prisoner behavior is a good predictor of community behavior in any event. Professor Hans Mattick once noted, in discussing the role of prisons: "It is hard to train an aviator in a submarine." His colleague Norval Morris then added: "It is even harder to predict his flying capacity from observing his submarine behavior."

In recent years, the sentencing commission has replaced the parole board as the primary candidate for assuming discretionary authority in sentencing. So far, no jurisdiction has adopted the commission proposal, but Congress, in particular, is giving it serious consideration. The commission would be composed of a variety of persons with something to contribute to sentencing—penologists, lawyers, clergymen, sociologists, and perhaps, ex-convicts. The function of the commission would not be to sentence in

each case. Rather, it would issue guidelines based upon policies that it had developed. In many respects these guidelines would be similar in form to the judicial guidelines previously noted. The primary difference is that the commission's guidelines would be based on policies formulated by the commission rather than policies reflected in current sentences set by judges. To preserve some flexibility, judges would be given limited discretion to depart from the guidelines in exceptional cases. It is anticipated, however, that the guidelines would be controlling in 85-90% of all cases. Departures from the guidelines would be subject to appeal.

The supporters of the sentencing commission claim that it would bring the following strengths to the sentencing process: (1) greater uniformity in sentencing without loss of flexibility; (2) centralization of policy-making authority in a single body; and (3) greater professional expertise. Critics raise the possibility that it too would lead to "robot sentencing." They doubt that true individualization of sentencing can be obtained by a weighted analysis of variables. Actuaries may use that technique in setting life insurance rates, but sentencing requires consideration of too many intangibles. Only the judge who is close to the case and the community, they argue, can appropriately evaluate the sentencing needs of the particular offense and offender.

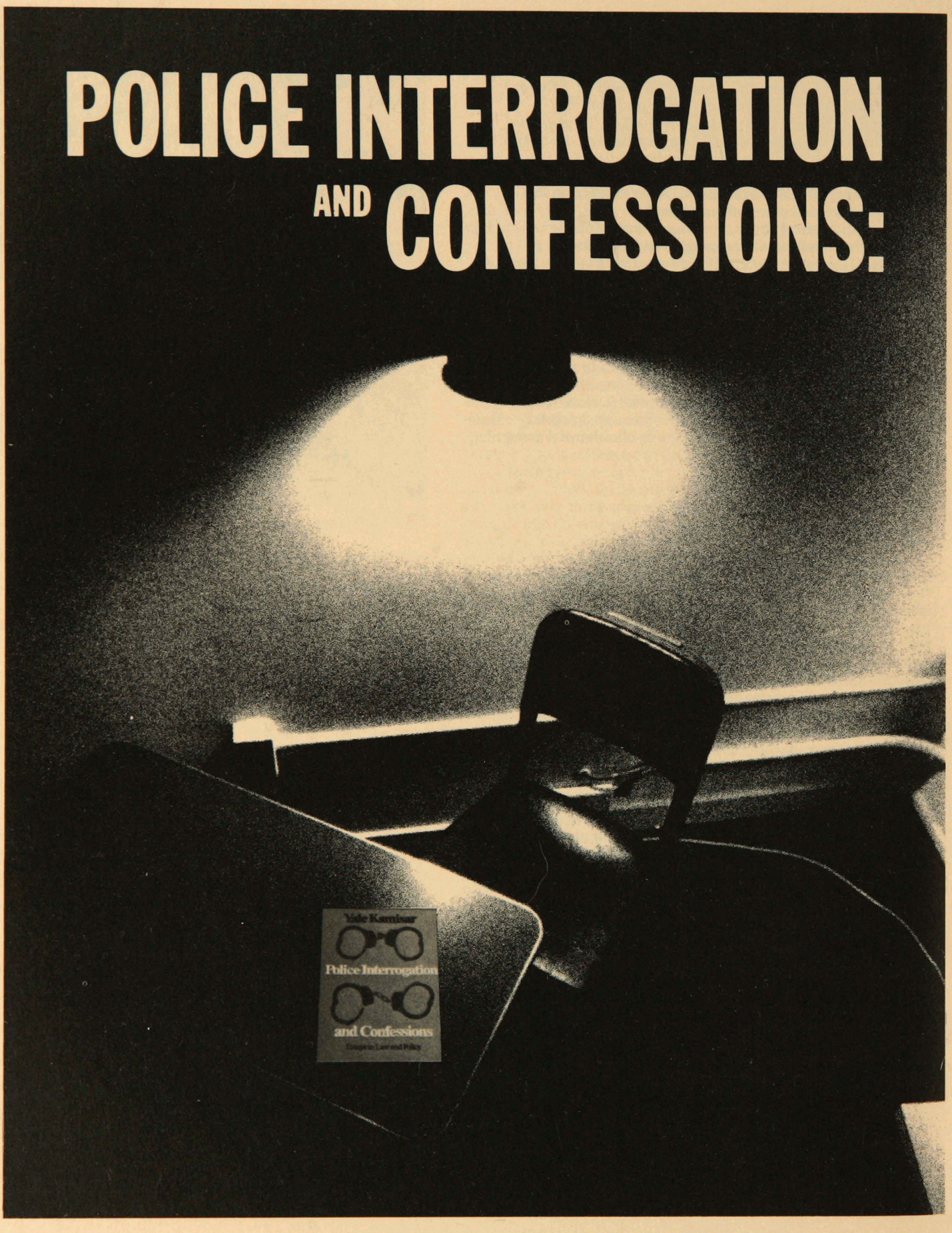


Jerold Israel

Alternatives: Legislative Controls

Another group of critics of judicial discretion would like almost to eliminate discretion altogether. Individualization, they argue, is not a worthwhile objective. More emphasis should be placed on uniformity and certainty of punishment. In their view, the legislature should exercise primary control over the sentence. This group favors legislative classification of various crimes as non-probationable. It also favors fairly tight legislative control over the terms of imprisonment, as provided in the California presumptive-determinate sentencing structure. Opponents view this approach as reflecting an almost total rejection of the rehabilitative goal. Moreover, they question the legislature's capacity to properly assess sentences even from the perspective of retribution and deterrence. The legislature, they note, is too far removed from the criminal justice process to set specific guidelines. If it miscalculates, it is not in a position to make a quick adjustment. The passage of new legislation is a time consuming process.

POLICE INTERROGATION AND CONFESSIONS:



The 1960's and 1970's look like history now.

by Yale Kamisar
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[The following is based on Professor Yale Kamisar's introduction (written on December 30, 1979) to his newly published *Police Interrogation and Confessions: Essays in Law and Policy* (University of Michigan Press, 1980). These essays, written over two decades, constitute an historical overview of the Supreme Court's efforts to deal with the police interrogation-confessions problem from pre-*Miranda* days to the present time and provide provocative analyses of the issues that have confronted the Court along the way.

Before deciding to publish a collection of Kamisar's essays on confessions, the University of Michigan Press asked for evaluations from two of the current leading writers on the subject, Professor Joseph D. Grano of Wayne State University Law School and Professor Welsh S. White of the University of Pittsburgh School of Law. Professor Grano wrote: "These essays, singularly or as a whole, are unrivaled in the literature. . . . The starting point for a student of the area. . . . Required reading for anyone contemplating the directions the Court should take in the future." Professor White commented: "There really is no competing work in the field. . . . No one explores fundamental issues of constitutional law more intensely and more incisively. No one writes with more power and clarity."]

Despite appearances to the contrary, I never planned to write a series of articles on police interrogation and confessions. My first article on the subject, "What Is an 'Involuntary' Confession?", was not part of a grand design but merely a response to an invitation by the *Rutgers Law Review* to review a new edition of the Inbau-Reid interrogation manual. Until then, although I had written a number of articles on other criminal procedure issues, I had never wrestled in print with the police interrogation-confessions problem.

When, in 1963, I did finally get around to writing about confessions (the Inbau-Reid "book review" grew into an article and was published as such), it was later than I thought. Before I had finished the project, Winston Massiah (who had lost in the United States Court of Appeals for the Second Circuit) and Danny Escobedo (who had lost in the Supreme Court of Illinois) were seeking review in the United States Supreme Court, and one Ernesto Miranda—whose case would, in three years, push even the famous *Escobedo* and *Massiah* decisions off center stage—had been arrested for, and had confessed to, kidnapping and rape.

Thus, although I was unaware of these cases at the time, let along the significant ways in which they would change our thinking about the law of confessions, my first confessions article turned out to be one of the last ever written about the "voluntariness"—"totality of the circumstances" test (at least until the 1980s).

I had no intention of starting work on another piece about the subject so soon after the appearance of my Rutgers article, but a year later a member of the Magna Carta Commission of Virginia, Professor A. E. Dick Howard, persuaded me otherwise. For one thing, Professor Howard assured me that my remarks could be quite brief. For another, since my first article on the subject had been published, the Supreme Court had handed down two very interesting and highly controversial cases, *Massiah* and *Escobedo*. And after all, as Professor Howard reminded me, the 750th anniversary of Magna Carta does not come along every day.

So I agreed to give a talk at the College of William and Mary in February of 1965, contrasting the largely unregulated and unscrutinized practices in the police station—the "gatehouse," where ideals are checked at the door and "realities" are faced—with the proceedings in the courtroom—the "mansion," where the defendant is "even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated." How, I asked, can we reconcile the proceedings in the "mansion" with those in the "gatehouse"—through which most defendants journey and beyond which many never get? How can we explain why the Constitution requires so much in the "mansion," but means so little in the "gatehouse"?

When published some months later, along with essays by Professor Fred E. Inbau and Judge Thurman Arnold, in *Criminal Justice in Our Time*, my remarks, "Equal Justice in the Gatehouses and Mansions of American Criminal Procedure," were anything but brief. I had spent months revising and expanding the original William and Mary speech. . . .

A number of commentators who had arrived on the scene before me contributed much to my early writing on the subject: Professors Francis Allen, Albert Beisel, Charles McCormick, Bernard Meltzer, Monrad Paulsen and Claude Sowle; and a young civil liberties lawyer (who was to file a splendid brief in the *Escobedo* case), Bernard Weisberg. But the root from which I drew the juices of indignation, I am convinced, was the tape recording of the six-hour interrogation in the 1962 *Biron* case.

This was not simply a tape recording of a confession (they are not that rare), but of the interrogation itself—beginning with the first interrogator's opening remark (there were five interrogators in all) and the suspect's initial response. The decision to record the interrogation was not made with the intent to offer the tape in evidence or with any expectation that it would ever appear in the record. (Some of the interrogators didn't even realize that their remarks were being taped.) Most, if not all, of the detectives who interrogated Biron had been questioning murder suspects for years. There is no reason to think that the essential thrust and basic features of the Biron interrogation were any different from those that these same detectives had conducted in dozens of other cases. Indeed, if the various "how-you-do-it" and "how-we-did-it-ourselves" manuals are any indication, the "interrogation atmosphere"

established by Biron's interrogators and most of the tactics they employed were standard practice. Yet, as far as I know, the *Biron* confession—the only one accompanied by a tape of the interrogation—was the only confession obtained by any of Biron's interrogators that a court ever excluded.

If the Biron interrogation had been an extraordinary instance of "wrenching from [an accused] evidence which would not be extorted in open court with all its safeguards," the tape recording would have been a good deal less troublesome. But it was not "an exhibit in a museum of third degree horrors." For the most part, rather, it was a vivid illustration of the kinds of interrogation practices that at the time satisfied the best standards of professional police work and fell within the bounds of what the courts of that day called "fair and reasonable" questioning. Even the state supreme court that struck down Biron's conviction (on the narrow ground that false legal advice by the police had vitiated the confession) repeatedly characterized the interrogation sessions as "interviews."

"Interviews"? How can anyone who listens to the tapes call the interrogation sessions that? How can anyone listen to the insistent questioning of Biron and to the many different ways his interrogators urged, cajoled, and nagged him to confess without feeling the relentless pressure, without sensing Biron's confusion and helplessness, without getting the message—confess now or it will be so much the worse for you later—and without wondering: what ever happened to the privilege against self-incrimination and the right to the assistance of counsel?

A year after the "gatehouses and mansions" essay appeared, the Supreme Court decided *Miranda*—the case that has come to symbolize the Warren Court's "revolution" in American criminal procedure. *Miranda*, especially the three *dissenting* opinions in the case, produced the only "self-initiated" confessions article I have ever written, "A Dissent from the *Miranda* Dissents."

For some time I had been one of those who had applauded the direction in which the Warren Court was moving—catching heavy fire for doing so in various meetings of the Advisory Committee to the American Law Institute's *Model Code of Pre-Arraignment Procedure* project and in other professional gatherings. Thus I welcomed *Miranda*. But when, a short time after the decision had captured the headlines, I attended the annual meeting of the American Bar Association, it was plain that I was in the distinct minority. When I met with the chief justices of the states (whose annual meeting was held at about the same time) and participated in a series of confessions "workshop sessions" with them, I was struck by their overwhelming opposition to the recent confession ruling.

Even before the imperfections in Chief Justice Warren's opinion for the Court in *Miranda* were brought into sharp focus by the new prodding of the facts of subsequent confession cases, it could not be denied that various portions of the long opinion left something to be desired. But there would be no shortage of commentators to spotlight these warts and blemishes. I feared, however, that in the hue and cry over *Miranda*, few, if any, would dwell on the weaknesses in the *dissenting* opinions. (It is much easier, it has always seemed to me, to take pen in hand when one is distressed by a decision than when one is content with it.)

In my judgment—and this was the primary thrust of my article—the *Miranda* dissents were far more vulnerable to criticism than the majority opinion. Although the *Miranda* dissenters still proclaimed the virtues of the old "voluntariness" test, the old test had proved to be highly elusive, largely unworkable, and woefully ineffective. Although the *Miranda* dissenters expressed astonishment at how the Court had managed to bring the privilege against self-incrimination into the police station, more wondrous, I thought, was how the courts had managed to keep it out for so many years.

About a decade after I had said a few good words for *Miranda* (and many bad ones about the old "voluntariness" test), the death of my senior colleague, Paul G. Kauper (1974), and the retirement from teaching of my old adversary, Fred E. Inbau (1977), caused me to return to the confessions topic.

Kauper's proposed remedy for the third degree was written way back in 1932 (when he was still a third-year law student)—four years *before* the Supreme Court first imposed the "voluntariness" test on the states as a matter of fourteenth amendment due process. Although he was not the first to offer a judicially supervised interrogation procedure as the solution to the "confessions problem," he seems to have been the first to deal in any comprehensive way with the practical, policy, and constitutional considerations involved in such a proposal. When the editors of the *Michigan Law Review* asked me to re-examine Kauper's article in the light of 40 years of subsequent developments, I could not resist the opportunity to do so.

Inbau had been an outstanding interrogator himself and had taught many hundreds of others how to practice the art. He was the leading police-prosecution spokesman in academe and a longtime critic of the Court. Not only had he joined with others in criticizing the Warren Court for handing down *Escobedo* and *Miranda*, but a generation earlier he had also reproached the Stone Court for deciding *McNabb* (1943) and *Ashcraft* (1944).

Moreover, although many had attacked the *Miranda* decision, none had done so with Inbau's gusto. *Miranda* was the case that Inbau had feared, and had tried to head off, for most of his professional career. Nor was it any comfort to him that the *Miranda* opinion had quoted from or cited his manuals no less than ten times—never with approval. "If *Miranda* is a monument to anyone," Judge George Edwards had observed at the time, "perhaps it is to Fred Inbau."

I had, as the editors of the *Journal of Criminal Law* described it, "tilted swords with Inbau many times, both in print and face-to-face." So when the *Journal* editors invited me to sum up and reflect upon Inbau's rich, colorful career, I could not refuse.

When I started writing my comments on Kauper's article, I did not know that I would end up finding a modernized version of his proposal, what I called the Kauper-Schaefer-Friendly model,* as attractive an alternative to the *Miranda* model as I did. Nor did I know that I would express as much disappointment in *Miranda* as I did. Similarly, when I started work on the piece about Inbau I did not think I would view him as sympathetically as I wound up doing. In a sense each article "wrote itself."

Perhaps the best examples of how articles can "write themselves" are the last two essays in this collection. No sooner had I finished the Inbau piece than the *Georgetown Law Journal* editors asked me to write a short preface to their "Circuits Notes" (an annual survey of federal appellate decisions dealing with criminal procedure), reminding me that Justice William O. Douglas had written the preface the previous year.

*In the late 1960s, first Justice Walter Schaefer and then Judge Henry Friendly, two of the most eminent critics of *Escobedo* and *Miranda*, had in effect returned to and built upon the old Kauper proposal.

I yielded. I had become quite interested in a new confessions case, *Brewer v. Williams* (the so-called Christian burial speech case),† and the Georgetown editors readily agreed that it was a case worth highlighting in a preface to the "Circuits Note." All that was expected of me, and all I promised myself I would do, was a three- or four-page comment on the *Williams* case. Surely I could do that in a few days. Besides, it would be nice to "succeed" Justice Douglas, if only in one respect.

The roots of the 1977 *Williams* decision were to be found in the 1964 *Massiah* case. Decided only a few weeks before the more famous *Escobeda* case, *Massiah* seemed to say that the filing of an indictment, or the initiation of other adversary judicial proceedings, marks an "absolute point" at which the sixth amendment right to counsel attaches. Until the recent decision in *Brewer v. Williams*, however, there was good reason to think that *Massiah* had only been a steppingstone to *Escobedo* and that both cases had been more or less displaced by *Miranda*. But *Brewer v. Williams* made plain that despite the Court's shift from a "right to counsel base" in *Escobedo* to a "compelled self-incrimination base" in *Miranda*, the *Massiah* doctrine was still very much "alive and well." It had emerged as the other major Warren Court confessions rule.

In the process of revivifying *Massiah*, however, the *Williams* case, I feared, had blurred the *Massiah* and *Miranda* rationales. Although this was not clear from the *Williams* opinion, the *Massiah* doctrine has nothing to do with "custody" or "interrogation," the key *Miranda* concepts.

When Massiah made incriminating statements, he was unaware that he was dealing with a government agent. He thought he was simply talking to a friend and co-defendant. There is no indication that he was ever "interrogated" (as that term is normally used) or "compelled" to speak or "restrained" of his liberty in any way. But a government agent had "deliberately elicited" statements from him after he had been indicted and retained counsel and while he was out on bail. The government, *Massiah* held, cannot do this—*either* directly, by means of a uniformed officer, *or* indirectly, by means of a "secret agent"—once adversary judicial proceedings have been initiated. *Massiah* represents a "pure right-to-counsel" approach.

The suspect in the *Williams* case was plainly in "custody" when given the "Christian burial speech," and arguably the speech was a form of "interrogation." Thus, the incriminating disclosures *might have been* excluded on *Miranda* grounds. But the *Williams* Court chose to decide the case on the basis of *Massiah* rather than *Miranda*. Once it did so, once it chose to rest on "sixth amendment—*Massiah*" *rather than* "*fifth amendment-Miranda*" grounds, there was no longer any need to consider whether the Christian burial speech constituted police "interrogation." All that mattered was that a government agent, by means of the speech, had deliberately elicited incriminating statements from a person after adversary proceedings had commenced against him. (Moreover, although I do not think this is necessary to trigger the *Massiah* doctrine, Williams was also represented by counsel at the time.)

†Williams, suspected of murdering a young girl in Des Moines, Iowa, surrendered himself to the Davenport, Iowa, police. Captain Leaming and another Des Moines detective went to Davenport to pick up Williams and drive him back to Des Moines (some 160 miles away). By the time the two Des Moines officers arrived in Davenport, adversary judicial proceedings had already commenced against Williams, and he had already retained counsel. On the return trip, admittedly in an effort to induce Williams to reveal the location of the girl's body, Captain Leaming remarked to Williams: "[Y]ou yourself are the only person that knows where the little girl's body is. . . . I feel that [the parents] should be entitled to a Christian burial for [their] little girl [and that] we should stop and locate [the body] on the way [back to Des Moines]."

Nevertheless, the *Williams* majority evidently thought it important, if not crucial, to establish that the Christian burial speech did amount to "interrogation"—but all four dissenters insisted it was not. The Christian burial speech, I am convinced, did *happen to be* a form of "*Miranda* interrogation," but *it did not have to be* in order for the *Massiah* doctrine to have protected Williams.

What I have said above is pretty much all I wanted to say, and planned to say, about the *Williams* case in my preface to the "Circuits Note." Somehow, however, what began as a very modest project took on a life of its own. Before I was able to call a halt—more than a year, 130 printed pages, and 600 footnotes later—two separate articles had more or less "written themselves."

The three- or four-page preface had already grown into a 15-page foreword when I dipped into the *Williams* record to clarify a point. I had a great deal of difficulty ever getting back out. I found the record incomplete, contradictory, and confusing.

For one thing, although neither the Supreme Court nor other courts which had mulled over the Christian burial speech seem to have been aware of this, the police captain who had rendered the speech had given one version of it at a pretrial hearing and, in my view, a significantly different version at the trial itself. Moreover, as I read the record, there was a distinct possibility that during the five-hour drive to Des Moines, the captain had delivered more than one Christian burial speech. But this point, along with many others, had never been adequately explored at the trial.

Williams sharply disputed the captain on many points but, as might be expected, no court paid any attention to what he had to say. Yet whenever the captain got into a "swearing contest" with Williams's lawyers, as he did on three occasions, he lost every time. Doesn't this raise serious questions about the swearing contest the captain won when he disputed Williams?

The woefully inadequate *Williams* record underscored the need, whenever feasible (and I think it was feasible in the *Williams* case), to record all police "interviews" or "conversations" with a suspect, and all warnings and "waiver transactions" as well. Why, after all these years, were police interrogators still able to prevent objective recordation of the facts? A police interrogator, no less than the rest of us, is inclined to reconstruct and reinterpret past events in a light most favorable to himself. As long as he is permitted to be "a judge of his own cause" in this sense, *any* confessions rule, I feared, would be "a house built upon sand."

What began as a textual footnote describing the unsatisfactory condition of the *Williams* record grew into a separate section—one that eventually became so large that it dwarfed the rest of the article. (Moreover, I had yet to complete the rest of the article.) There could be only one solution, and the Georgetown editors, growing frantic at my inability to finish the piece, quickly concurred: I had to pull out the analysis of the record from the unfinished manuscript and run it by itself as the foreword to the "Circuits Note." Thus emerged "Foreword: *Brewer v. Williams*—A Hard Look at a Discomfiting Record."

I agreed that at a later date I would return to and complete my appraisal of the various *Williams* opinions in light of *Miranda*, *Massiah*, and other cases and that I would publish this discussion as a separate second article. Eventually I did— but not before adding three major sections that I had never contemplated writing when I first took on the assignment.

In the course of presenting some hypotheticals designed to illustrate the differences between the *Miranda* and

Massiah approaches, I discovered that the applicability of these doctrines to the use of "jail plants" and other "secret agents" was a good deal more complicated than I had suspected. This led to a 25-page treatment of that subject. Although, as I have already indicated, I was convinced that "interrogation" was constitutionally irrelevant for *Massiah* purposes, I, too, could not resist the temptation to discuss whether, *in any event*, the Christian burial speech did amount to "interrogation." This led to a twenty-page discussion of the general problem.

At this point I had done all that I had originally set out to do, and considerably more. But I felt the article still needed an "ending." It had grown so large that it was no longer enough simply to compare and contrast how the *Miranda* and *Massiah* doctrines worked. I felt the need to appraise their relative strengths and weaknesses and to consider the merits of a third approach as well—New York's *Donovan-Arthur-Hobson* rule. Under the New York rule (a first cousin to *Massiah*), regardless of whether adversary proceedings have commenced or whether the suspect is willing to waive his *Miranda* rights, once an attorney "enters the picture" (a phone call to the police department central switchboard will suffice), the state is prohibited from "interfering with the attorney-client relationship" by questioning the suspect in the absence of counsel.

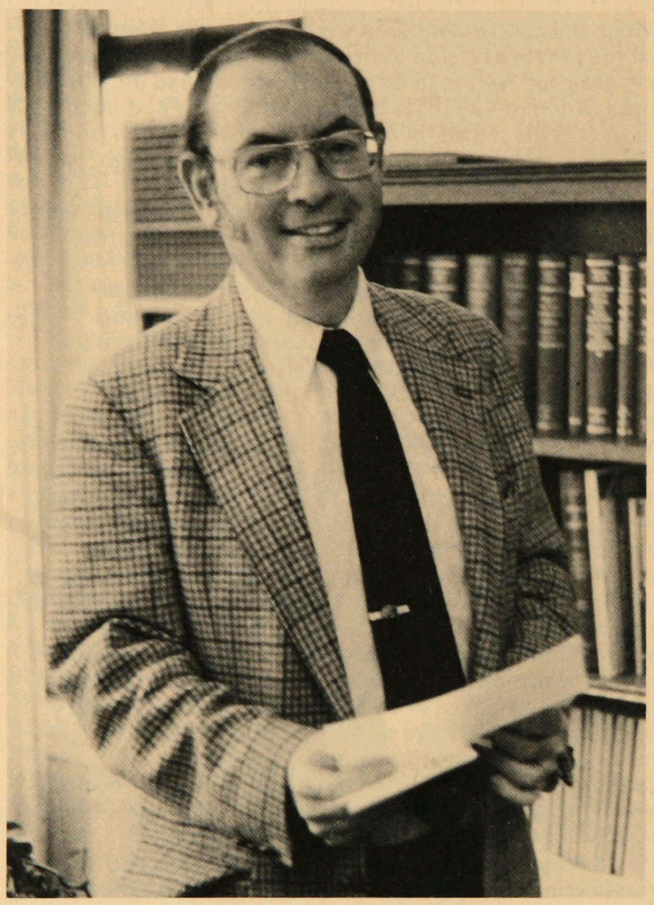
The *Massiah* doctrine and the New York rule each have a certain neat logic and a strong symbolic attractiveness, and it is not inconceivable that either or both will outlast *Miranda*. After 30 pages of "further thoughts," however, I concluded that there was less to be said for *Massiah* or the New York rule than for the basic *Miranda* approach. Whatever its shortcomings, *Miranda* tried to take the "police interrogation"—"confessions" problem by the throat. I did not see how the same could be said for either *Massiah* or the New York rule. Both, rather, turn on nice distinctions that seem unresponsive to either the government's need for evidence or a suspect's need for "a lawyer's help."

Thus emerged what is, by a wide margin, the longest confessions article I have ever written—"*Brewer v. Williams, Massiah,* and *Miranda:* What Is 'Interrogation'? When Does It Matter?"

The early and middle 1960s were exciting times for students of criminal procedure. The 1970s, if less exciting, were no less interesting. Nor were they without controversy. Depending upon one's viewpoint, they were a time of re-examination, correction, consolidation, erosion, or retreat.

History, it has well been said, "never looks like history when you are living through it. It always looks confusing and messy. . . ." [John W. Gardner, *Hazard and Hope*, in No Easy Victories 169 (1968).] But the 1960s and 1970s look like history now. Hopefully the combination of these seven essays, written during a period of unprecedented change in American constitutional-criminal procedure, constitute a useful historical overview of the Supreme Court's efforts to deal with a most troublesome and most controversial cluster of problems. Hopefully, too, these essays contribute significantly to an analysis of the constitutional and policy issues that confronted the Court along the way.

In the 1960s those who shared my outlook on the criminal justice system celebrated various victories. But events in the 1970s reminded us that here, as elsewhere, "there is no final victory. However great the triumph, it is ephemeral. Without further struggle, it withers and dies." [Francis A. Allen, *On Winning and Losing*, in Law, Intellect and Education 16 (1979).] In the 1980s we may have to remember what Allen, Paulsen, and other commentators of the 1950s never forgot—there is no final defeat, either.



Yale Kamisar