Law Quadrangle Notes

The University of Michigan Law School

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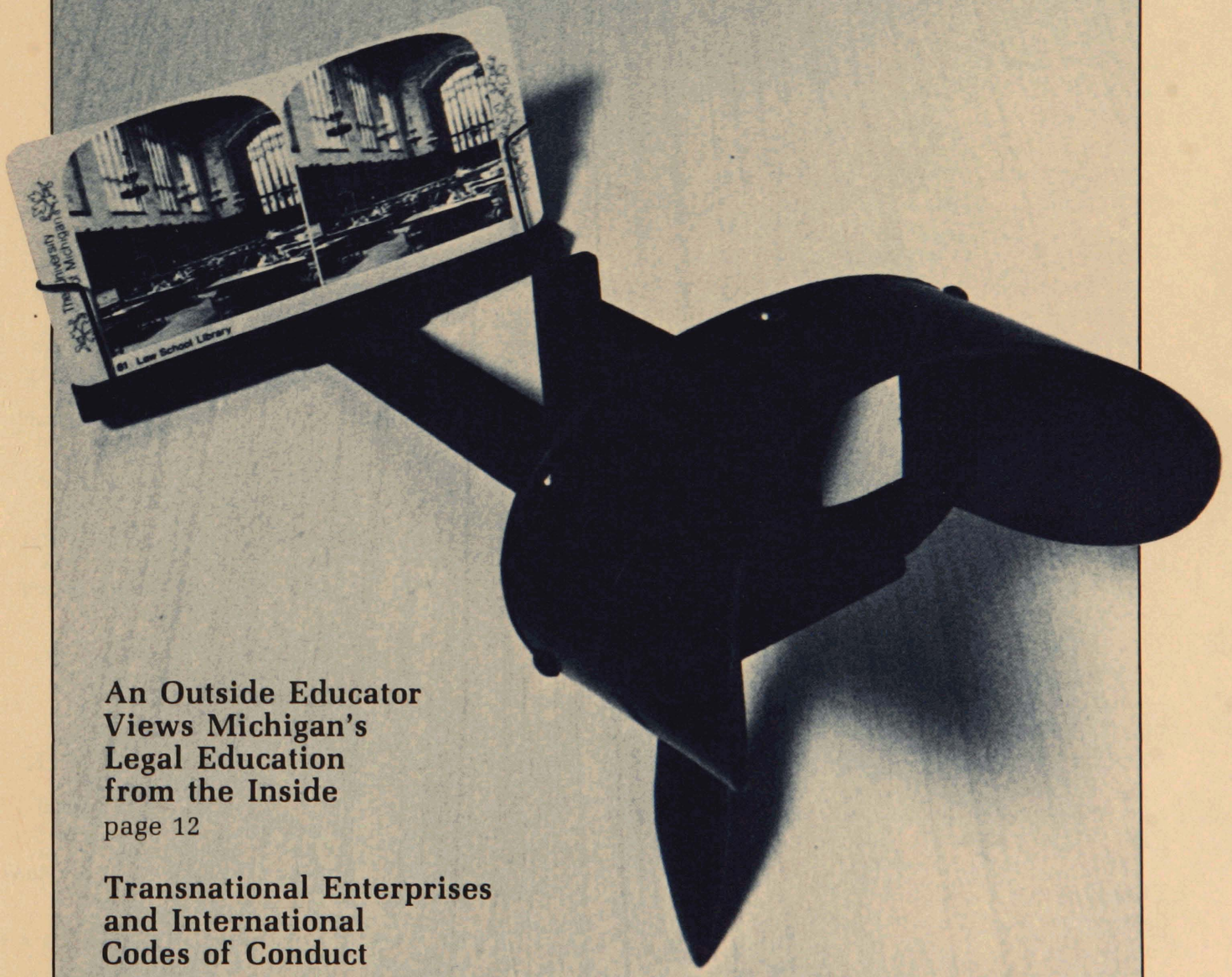

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Volume 25, Number 2, Winter 1981

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briefs

Law Schools Face "Identity" Problem, Says U-M Professor

Law schools in the United States and Canada are undergoing an "identity crisis" as they attempt to provide broad interdisciplinary and "humanistic" education and at the same time meet the demands for practical legal skills training, according to U-M law Prof. Francis A. Allen.

Speaking this fall at the dedication of a new law building at the University of Victoria, Canada, Prof. Allen said law schools can no longer live in the past and ignore the humanistic and scientific approaches of other academic disciplines.

"Members of the traditional professions like the law are today required to share authority and prestige with the practitioners of other and newer disciplines," noted Prof. Allen, who served as U-M Law School dean in 1967-71 and as president of the Association of American Law Schools in 1976-77. Currently he holds the Edson R. Sunderland Distinguished Professorship at the Law School.

"Much of this change stems from new knowledge, most of it discovered and cultivated in universities, that offers more penetrating explanations of conditions and events than the traditional professions were able to supply," he said.

In the legal field, for example, the "rise of theories of social causation of crime or of genetic or psychological conditioning of human behavior" has opened the door to practitioners of the sociological, biological and psychological disciplines, noted Allen.

What this means for law schools, stressed Allen, is that sophisticated methods of fact-finding and analysis used by other fields have become necessary for many kinds of legal inquiry and even for the practice of law.

As a result, the law school is drawn more deeply into the "central intellectual current of university life," said Allen.

Concurrent with this trend is the call for greater emphasis on "skills training" to improve the competence of young lawyers, noted Allen.

"The reconciliation of humanistic legal education with demands advanced under the rubric of competency may be no simple or certain thing," the professor warned.

"The danger is that sincere and able professionals may be disposed to impose rigid requirements with reference to course content or mode of instruction on the law schools with little thought about the impact of such requirements on the schools' ability to achieve its other numerous and vital goals.

"Insofar as legal education is concerned, I can think of no greater tragedy than that the pressures of modern events and attitudes should weaken our commitments to the humanistic ideal and induce us to accept a regime of narrow vocationalism, a regime directed to the goal of what a former colleague of mine described as 'instantaneous practicality.' "

But Allen expressed the hope that, ultimately, "the essential needs for improved instruction in practical lawyer skills can be accommodated to an educational regime founded on the humanistic idea.

"Educational policy in the law schools during the closing years of this century is likely to become increasingly pragmatic, consciously experimental. We shall have to distribute our eggs among many baskets.

"It seems likely, therefore, that if the law school is to flourish as part of the university, the law school must become an even more pluralistic community than it has yet become."

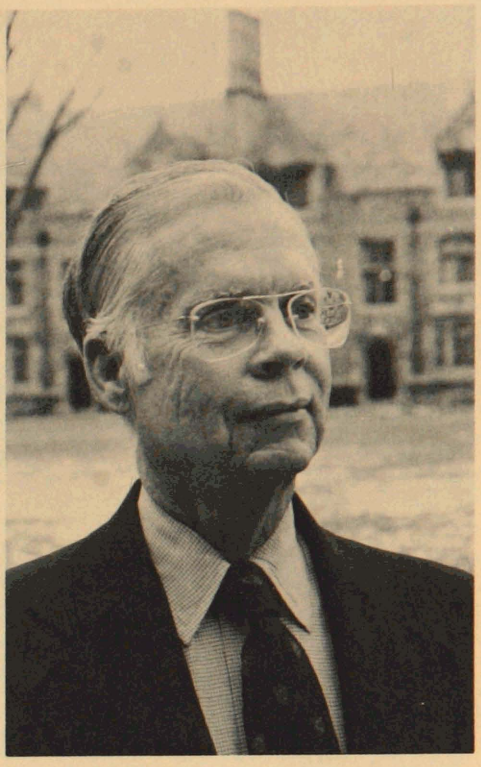
Honorary Doctorate Awarded To Allen

Prof. Francis A. Allen of U-M Law School has been awarded an honorary Doctor of Laws degree from the University of Victoria in Victoria, British Columbia, Canada.

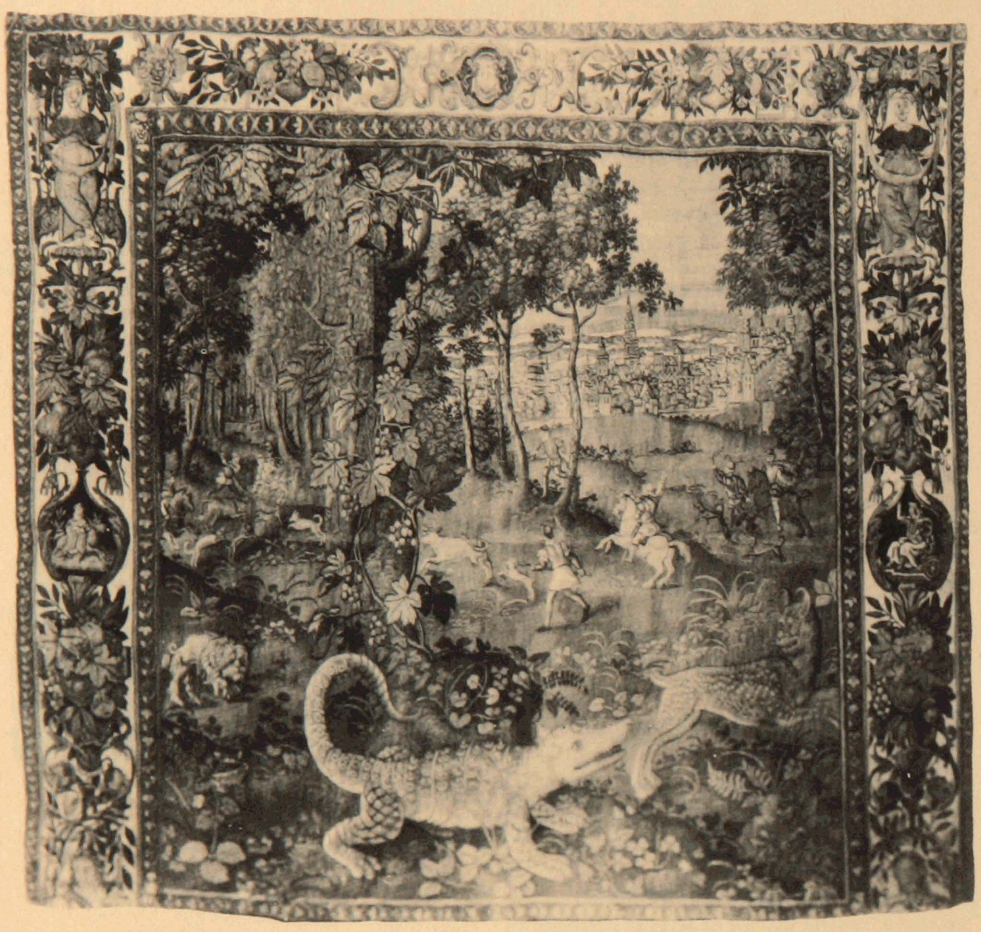
Prof. Allen received the honor and delivered an address Nov. 15 in ceremonies marking completion of a new law building on the Victoria campus.

The citation honoring Prof. Allen said, in part:

"Francis Allen was born and educated in the United States and, over the course of a long university career, he has acquired an internationally recognized reputation. This distinction is due not only to the



Francis A. Allen



Recovered Flemish tapestry dates to the 16th century.

considerable public service which he has given to his country in the fields of criminal justice and civil rights, but also to the quality of intellect which he has consistently brought to the teaching of law and to scholarship. It is with regard to both these achievements, and in particular for his outstanding contribution to teaching and scholarship, that we would honour him here in Canada today.

"His service as a law clerk to chief Justice Vinson of the United States Supreme Court between 1946 and 1948, a period which created reciprocal warmth and respect between the two men, was to mark the beginning of a career which has seen him sit on numerous public commissions, and teach as a law professor at the universities of Northwestern, Harvard, Chicago, and Michigan. He was dean of Michigan Law School from 1966 to 1971.

"His several books and many articles on legal education, criminal law and justice truly reflect the quality of the man who was invited as Holmes Lecturer at Harvard in 1973, Baum Lecturer at the University of Illinois in 1975, and, in 1979, the Storrs Lecturer at Yale and the Russel Lecturer at Michigan. This attainment is itself a most rare distinction.

"The warmth and sheer intellectual strength of his teaching are vividly remembered by all those students who over the years have participated in his classes. This gentle and scholarly man thus epitomizes all that we would honour in the profession of university teaching . . ."

Tapestry Mystery Now Is History

The "Cook Tapestry Mystery"—a case almost as bizarre as some Sherlock Holmes tales—may soon be solved.

In 1929, University of Michigan Law School alumnus William W. Cook, donor of the Law Quadrangle, donated three tapestries to the Lawyers Club—two 16th-century Flemish "Game Park" tapestries and one late 15th-century French hunting tapestry.

During their years of use as decorations at the Lawyers Club, each of the tapestries had been stolen as a prank and returned to the Law School.

But one of the Flemish tapestries, a 7-1/2 by 8 foot work depicting a hunting scene with an alligator prominent in the foreground, was stolen in 1972 and has never been seen since, according to U-M officials.

This fall, the tapestry turned up in a Detroit auction house.

Art experts say the piece is in "excellent" condition for a 400-year-old work, according to Diane Nafranowicz, director of the Lawyers Club, who was responsible for reporting the recent discovery of the tapestry to police and insurance company officials.

"All three tapestries were stolen at one time or another, probably as student pranks," says Nafranowicz. "One was found in a student's room in the Lawyers Club where it was used as a rug. Another was returned through a Detroit attorney's office."

Once the missing tapestry is returned to the Lawyers' Club, Nafranowicz says the Law School will consider ways to display the works while protecting them from theft.

One possibility, according to Nafranowicz and Associate Dean James J. White, is to display the tapestries in a secure area of the new underground Law Library addition, once that building is completed.

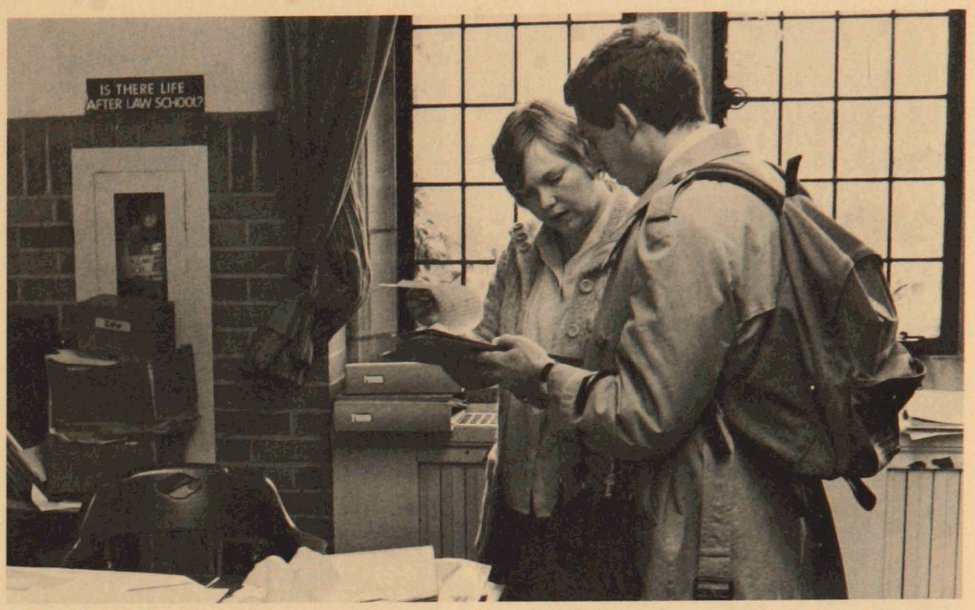
In 1976 a local art appraiser, Joanne Winjum (who holds master's and doctoral degrees in art history from the U-M), was retained by the Law School to appraise the two Cook tapestries then in the school's

possession. At that time Mrs. Winjum also viewed a photograph of the stolen tapestry.

It was Mrs. Winjum who made the identification of the missing tapestry in October at the Detroit auction gallery. The tapestry had been consigned to the gallery by a Kalamazoo woman who claims to have bought the work from the landlord of an apartment she had rented. As of this writing, police and insurance company officials are still investigating the case.

The value of the missing tapestry is estimated to be more than $12,500.

An article in the *Michigan Alumnus* magazine at the time Cook donated the tapestries says it is possible that some of the animals depicted in the works were "fashioned from imagination or description of travelers, rather than actual observation."



Part of the daily activities at the Law School's Placement Office. Nancy Krieger, director of the office, is at left.

Law School Graduates Score High In Job Placements

Since 1977, the U-M Law School Placement Office has consistently reported job placements for 80 percent or more of each year's graduating senior class.

That excellent track record is still in force today. Out of a senior class of 380 students in 1979-80, 82 percent—or 313 class members—reported definite job commitments, according to placement director Nancy S. Krieger. (The remaining 36 seniors reported indefinite plans, and 31 seniors did not report career plans to the office.)

For participating students, the placement office provided 10,780 law firm interviews during the fall of 1979-80, and 723 interviews during the spring. These figures compare favorably to those of previous years.

Some 700 representatives of law firms from around the nation and the world participated in the fall interview season at the Law School and 32 firms participated during the spring, according to Krieger. In addition, 2,086 legal employers sent written notice of other job opportunities.

Among other gains, Krieger reports that the number of seniors graduating with indefinite plans has been reduced from 55 in 1977-78 to 36 seniors during the past year.

In addition to seniors, second-year law students, summer starters, and second-term first-year students, 517 former Michigan graduates participated in the placement program last year.

Headed by Krieger for the past eight years and with a total staff of three, the Placement Office serves the entire student body by providing counsel and direction to law students groping with the job interview process. Planning and implementing scheduling between law firms and students is handled with such ease, say users of the service, that law students and visiting recruiters often forget how complex the procedure could become without such an effective staff.

Krieger recalls that when she was originally appointed placement director, there were 300 interviewing firms rather than the 700 firms participating this past year. The evolution of placement activity within the Law School dates to the mid-1960's when placement was solely an ad hoc professorial assignment.

"The biggest challenge is trying to help students individually decide what might work best for them. Looking for a job and interviewing creates so much anxiety for many students that we consider a natural part of our job is to listen and help students keep the interview process in perspective," says the placement director.

Krieger also points out that for many Michigan students, a law firm rejection letter is often the first major "rejection" in the student's life. Thus, the process of building confidence and learning coping techniques is a fundamental purpose of the placement office, she says. "Students have to learn that job application rejection is not personal."

John H. Jackson

Lee C. Bollinger

Michigan's placement policy does not allow law firm interviewers to pre-screen student placement files. Each student has an equal opportunity to be interviewed by the firms of their choice, assuming the student has followed the appropriate administrative procedure.

Krieger reflects, "Because we share an individual interest with each student involved in interviewing, our office has not considered computerizing the scheduling process. During the delicate matching process, we think the most effective liaison is human concern. Interviewing is neither logical, neat, or predictable."

The Placement Office encourages feedback reporting from students regarding what type of summer and permanent employment was secured. Last year, out of 313 seniors who reported their plans, 242 went to law firms; 17 tooks jobs with the federal government; and 4 took jobs in state government. Some 23 students were appointed judicial clerkships at the federal level and 2 students received clerkship appointments at the state level. Five seniors went to CPA firms, two seniors pursued graduate study, and one student was awarded a fellowship. Six students went to work for Legal Aid, one student went with Group Legal Services, one student was hired by a public interest law firm, and one student chose teaching. Three student employment opportunities were not identified.

A total of 228 students secured their jobs through placement interviews; 13 students responded successfully to the placement bulletin board notices; 4 students attributed employment to faculty referral; 4 cited their own initiative as reason for employment success but indicated they would have used the placement office, and 64 students got their job strictly on their own initiative.

In 1978, law firms paid beginning associates between $9,000 and $29,150. In 1980, firms increased the entry level salary to a range of $14,000 to $37,000. Students accepting federal positions generally entered at the GS-11 level.

In terms of firm size, 156 of the interviewing firms number from 26 to 50 attorneys; 145 of firms interviewing range from 11 to 25 attorneys; 128 firms include from 51 to 100 attorneys; 65 large firms have 101 to 150 attorneys; and 73 "super-large" firms with 150-plus attorneys. At the other end of the scale, 56 firms ranging from 1 to 10 attorneys recruited at Michigan.

Student interest for increased opportunity to interview with public interest law firms and agencies led to the Law School's sponsorship of a successful public interest law conference last fall.

Susan Eklund, the school's dean of students, worked closely with Michigan student representative Lee Tilson and the placement office in hosting the school's first public interest law employment conference, which was attended by 25 potential employers.

Participants included 112 students from six law schools, including the U-M, University of Chicago, Northwestern, Minnesota, Wisconsin, and Wayne State University. There are plans to have the conference hosted on a yearly basis by each participating school.

Actual job placements handled by the Law School Placement Office during 1979-80 covered some 30 states. The state of Michigan was the leading place of employment for U-M law graduates with a total of 90 placements. Other states with high numbers of placements were Illinois with 45, New York 33, District of Columbia 27, California 26, and Ohio 15.

U-M law Dean Terrance Sandalow evaluates the placement office by noting: "Nancy Krieger is one of the Law School's major assets. Almost every week I receive at least one letter or phone call from a law firm representative complimenting the efficiency of the Placement Office."

Sensitive to faculty and student concern about the amount of time that job interviewing consumes, the Placement Office and the Law School administration are presently exploring ways of resolving that concern.—*Laura R. Moseley*

Jackson, Bollinger Revise Casebook

Updating and revising a contracts casebook offers scholars the opportunity to expand and delete, to re-focus emphasis, and to use student feedback in preparing a learning text. U-M law Profs. John H. Jackson and Lee C. Bollinger's recently published revised contracts casebook focuses on the major critical issues in contract law today. The previously infrequently highlighted areas of unconscionability, due process, and warranties in contracts casebooks is scrutinized in depth in the Jackson-Bollinger contracts second edition.

The new casebook offers a different organizational structure. To

implement student understanding, each chapter begins with a historical preface. Certain chapters are designed for independent reading without class discussion. Article II, Uniform Commercial Code, is discussed comprehensively. Designed to compare different styles and approaches, this new contracts casebook concentrates on public policy and its effect on contractual development. Some 80 percent of the material is maintained from the first edition. The 20 percent comprising the new cases and analysis development reshapes the contextual scope and clarity of the total work, say the authors.

Prof. Jackson, author of the original contracts casebook from which the current work is derived, is a graduate of Princeton University and U-M Law School. He teaches courses in internatioinal law, law of international trade and economic relations, and contracts.

Among other posts, Jackson has served as general counsel to the U.S. Office of the Special Trade Representative in 1973 and 1974, and helped write the U.S. Trade Act of 1974. He served as consultant to the U.S. Senate Finance Committee on legal matters relating to implementation of the Multilateral Trade Negotiation agreement, and also was consultant to the U.S. Treasury in the Office of the Special Trade Representative, and for the secretariat of the General Agreements on Tariffs and Trade (GATT) in Geneva. He is a member of the board of editors of the *Journal of World Trade Law* in Geneva, the *Journal of Law and Policy in International Business* at Georgetown University, and has served as visiting professor and lecturer at several academic institutions.

Prof. Bollinger, a graduate of the University of Oregon and Columbia Law School, teaches in the areas of corporate law, constitutional law, freedom of speech and press, and contracts. He served as law clerk for Chief Justice Warren E. Burger of the U.S. Supreme Court.

A 1980 Rockefeller Humanities Fellow, Bollinger is author of the studies *Freedom of the Press and Public Access: Towards a Theory of Partial Regulation of the Mass Media* and *Elitism, the Masses and the Idea of Self-Government: Ambivalence about the "Central Meaning of the First Amendment."* He is currently writing a book concerning the theory of free speech.

—Laura R. Moseley

Prof. Regan Authors Philosophical Treatise

"My book is not a legal treatise, but a book on moral philosophy," said U-M law Prof. Donald H. Regan of his new work, *Utilitarianism and Co-operation* (Oxford University Press, 1980).

Assuming we know which consequences are good and which are bad, how exactly do consequences determine the rightness and wrongness of acts? Act-utilitarianism, rule-utilitarianism, and utilitarian generalization are standard theories which constitute different answers to that central utilitarian question, according to Regan. In *Utilitarianism and Co-operation*, the professor identifies the properties which account for the appeal of the traditional theories and explores to what extent these properties are mutually compatible. Regan suggests that the conflict between the different theories is "irreconcilable within the traditional framework of analysis of these issues."

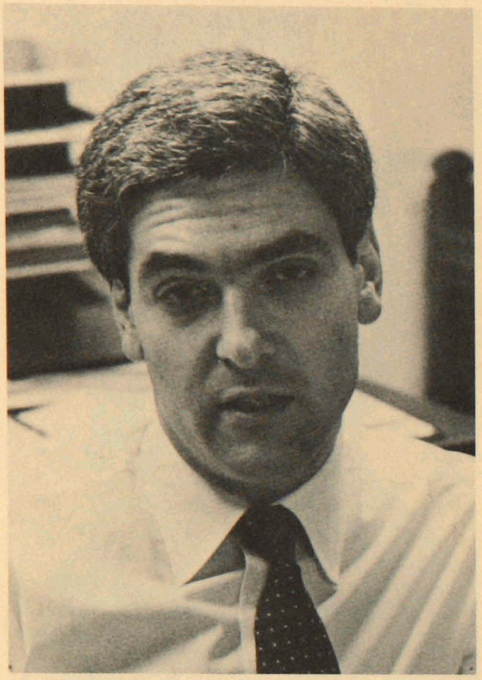
Regan develops a new theory called "co-operative utilitarianism." This radically different approach combines the appealing elements of the traditional theories while more adequately reflecting the "fundamental 'co-operative' nature of the moral enterprise."

Regan characterizes his treatise as "rather esoteric and mainly for philosophical scholars." Yet, the author's writing style is clear and concise in presenting interesting perspective and analysis for an educated lay public. Though *Utilitarianism and Co-operation* centers on the current debate among utilitarian theorists, Prof. Regan's next book, on "the nature of the good and of a good life," will be more accessible to a general readership, he says.

Utilitarianism and Co-operation developed over 10 years of research and writing intermittently pursued while Regan met legal teaching and scholarship resonsibilities. The professor is currently working on his next book while serving as a visiting fellow of All Souls College at Oxford University. Next year, as a senior research fellow of the National Endowment for the Humanities, Prof. Regan will continue research and writing on this subject.

A Harvard graduate with a major in mathematics, Prof. Regan received his law degree from the University of Virginia Law School where he was editor-in-chief of the *Virginia Law Review*. After law school, Regan was a

Donald H. Regan



Michael Rosenzweig

Theodore St. Antoine

Rhodes Scholar at Oxford University where he received his degree in economics. In 1980, Regan received his doctorate in philosophy from the U-M. He has served as a visiting professor in the Philosophy Department as well as teaching constitutional law and the philosophy of law at the Law School.

—Laura R. Moseley

Rosenzweig Is New Tax, Securities Prof.

At 28, Michael Rosenzweig is the youngest member of the U-M Law School teaching faculty as well as the school's most recent faculty appointment. A 1976 Columbia Law School graduate, Rosenzweig has already become known among students for his well-organized, clear teaching style in his courses in tax, securities and regulation, and corporation law.

Besides the refreshing element of his being close to or the same age as some of the students he teaches, Rosenzweig's previous legal experience provides a "real world" balance in the classroom. A Phi Beta Kappa graduate of U-M, Rosenzweig was a James Kent Scholar and a Harlan Fiske Stone Scholar while at Columbia University School of Law. After a legal clerkship with Judge Paul R. Hays on the U.S. Court of Appeals for the Second Circuit, Rosenzweig became an associate with the law firm of Rogers & Hardin in Atlanta, Ga.

Asked to compare private practice with legal academe, Rosenzweig responded: "In many ways, the pressure of academic life is greater than in private practice. In private practice, goals are well-defined, concrete, and short term. In teaching, one's work is never finished. I am also impressed by the concentration of bright and inquisitive students at Michigan which makes teaching here quite stimulating as well as challenging."

Prof. Rosenzweig's current research interests involve questions of shareholder democracy and corporate governance, with particular emphasis on the impact of the federal securities laws in these areas. He is also interested in emerging principles of professional responsibility relating to practice in the securities area.

A cyclist who bikes to class daily, Prof. Rosenzweig also enjoys reading and such sports as racquetball, squash, and softball.

—Laura R. Moseley

Japanese Firms Fear U.S. Labor, Says St. Antoine

Japanese firms have not set up more plants in the United States because of three misconceptions about American employment relations, according to a team of labor experts headed by U-M law Prof. Theodore J. St. Antoine.

Speaking before 200 Japanese industrialists and union leaders at a recent conference in Tokyo, St. Antoine discounted Japanese fears about American workers' productivity, the aggressiveness of organized labor, and the complexity of U.S. legal regulation.

"It is true the rate of increase in our national productivity has been declining in recent years," St. Antoine said. "But in absolute terms the real outpout of the American worker is still the highest in the world. On a scale of 100, with American productivity at that figure, Western European output is about 90 and Japanese output is about 70.

"The reasons for the drop in our improvement rate has little to do with the individual employee," St. Antoine said. "They relate to aging plants, reduced research budgets, the energy crisis, and planning mistakes by business and government. When given the opportunity, the American worker has proved capable of efficient and high-quality performance."

St. Antoine served as chairman of a team of U.S. labor experts who participated in a three-day "Seminar on U.S. Labor-Management Relations" in Tokyo in December. The seminar was arranged by the U.S. Department of Labor and the Japanese Ministry of Labor.

American unions are easier to deal with than those of many other countries, St. Antoine asserted, because they are "pragmatic and non-ideological. . . . They want to work within the established political and economic systems, not to seek fundamental changes in them."

He pointed out that the United Auto Workers once took a pay cut to help an ailing domestic car manufacturer, and that they recently lobbied for governmental regulatory concessions to assist a foreign manufacturer to begin operations in this country.

Japanese labor laws, St. Antoine observed, are much less favorable to employers than American labor laws. In Japan, for example, employers are prohibited from trying to persuade their employees not to join a union.

He conceded that the legal regulation of employment in the U.S.

is extensive and complex. "But the law has made the workplace safer, guaranteed the soundness of pension programs, and opened the doors to jobs for qualified females and minorities."

St. Antoine noted that many firms from abroad have demonstrated they can cope with our regulatory system. "At least in the U.S. it's all written down in black and white," St. Antoine said. "In some countries it's often almost impossible to find out what the rules are. And American labor law plays no favorites," he added. "It applies equally to domestic and foreign businesses."

Other American conference participants included Martin Gerber, UAW vice president; William P. Hobgood, assistant secretary of labor; and James D. Hodgson, former secretary of labor and ambassador to Japan.

Also: Bernard Kleiman, general counsel of the United Steelworkers; George A. Moore, Jr., industrial relations vice president of Bethlehem Steel; and Eva Robins, president of the National Academy of Arbitrators.

Sax Warns Against Park "Urbanization"

Government and U.S. Park Service officials should resist the temptation to turn our national parklands into "urban"-style amusement parks, recommends U-M environmentalist Joseph L. Sax in a new book examining national parks policies.

Although there are considerable pressures to provide elegant hotels, restaurants, amusements, and more automobile touring roads within national parks, such facilities would violate the unique environmental heritage of our wilderness areas, argues Prof. Sax in the book *Mountains Without Handrails—Reflections on the National Parks* (U-M Press, Ann Arbor).

A professor at U-M Law School, Sax has been involved in the U.S. environmental movement for more than a decade. In 1970 he authored Michigan's landmark Environmental Protection Act, the first law giving citizens the right to bring polluters to court. That law has now been duplicated in 12 states and in many federal laws. Sax is also author of the widely known book *Defending the Environment*.

Sax's main argument in his new book is that U.S. park officials, rather than acquiescing to popular demand for "passive" types of recreation, ought to take the lead in showing park visitors some of the rewards of more "active" and "challenging" interactions with natural surroundings.

The result of such a "preservationist" orientation would be to retain the uniqueness of our wilderness areas, says Sax, rather than cluttering them with plastic alligators, swimming pools, manicured lawns and other fixtures of conventional private tourist parks.

"The purpose of reserving natural areas," Sax writes, "is not to keep people in their cars, but to lure them out; to encourage a close look at the infinite detail and variety that the natural scene provides."

The aim, he says, "is to expose, rather than to insulate, so that the peculiar character of the desert, or the alpine forest, can be distinctively felt; to rid the visitor of his car, as the fisherman rids himself of tools."

In particular, Sax suggests that "the inexperienced, urbanized visitor is precisely the one who needs the most attention and on whom most imagination needs to be expended."

For example, rather than creating a motorized nature loop through the Great Smoky Mountains National Park, Sax recommends creation of short access roads leading to a variety of trails of indefinite lengths, with opportunities for the visitor to cut back at various points according to personal inclinations.

In providing such temptations to explore natural settings, says Sax, this message of the preservationist would become clear:

"Put aside for a while the plastic alligators of the amusement park, and I will show you that nature taken on its own terms has something to say that you will be glad to hear."

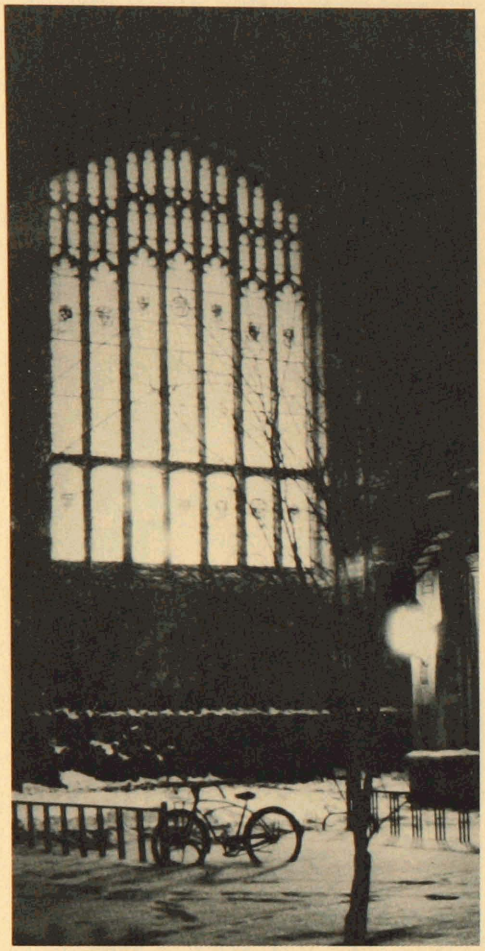
The preservationist, says Sax, is "concerned about what other people do in parks not because he is unaware of the diversity of taste in the society, but because he views certain kinds of activity as calculated to undermine the attitudes he believes the parks can, and should encourage.

"He sees mountain climbing as promoting self-reliance, for example, whereas 'climbing' in an electrified tramway is perceived as a passive and dependent attitude.

"He finds a park full of planned entertainments and standardized activities as deterrent to independence, whereas an undeveloped park leaves the visitor to set his own agenda and learn how to amuse himself.

"The preservationist does not condemn the activities he would like

Joseph L. Sax



to exclude from the park. He considers them perfectly legitimate and appropriate, and believes that opportunities for conventional tourism are amply provided elsewhere—at resorts and amusement parks, on private lands, and on a very considerable portion of the public domain, too."

Thus, says Sax, a preservationist-oriented parks policy would recognize that "the parks have a distinctive function to perform that is separate from the service of conventional tourism, and that they should be managed explicitly to present that function to the public as their principal goal."

In addition to wilderness areas such as the Smokies and the Grand Tetons, enlightened park management strategies can also help preserve natural environments in heavily populated areas, notes Sax.

"The urban-region park provides an ideal opportunity to show city dwellers . . . that we can draw satisfaction by accommodating to natural forces as well as by harnessing them.

"By refraining from driving roads into every corner of every park, as Congress recently did at Assateague Island National Seashore, even small acreage can be made capacious. Places become much bigger when we are on foot, and a slower pace enlarges the material on which to expend our leisure."

Sax offers the following points in a suggested policy statement underlining "the meaning of national parks today":

Sax offers the following points in a suggested policy statement underlining "the meaning of national parks today":

—The parks are places where recreation reflects the aspirations of a free and independent people. They are places where no one else prepares entertainment for the visitor, predetermines his responses, or tells him what to do. In a national park the visitor is on his own, setting an agenda for himself.

—The parks are an object lesson for a world of limited resources. In the national parks the visitor learns that satisfaction is not correlated to the rate at which he expends resources, but that just the opposite is true. The parks promote intensive experience, rather than intensive use.

—The parks are great laboratories of successful natural communities. We look at nature with awe and wonderment: Trees that have survived for millenia; a profusion of flowers in the seeming sterility of the desert; predator and prey living in equilibrium. Nature is also a model of many things we seek in human communities. We value continuity, stability, and sustenance.

—The parks are living memorials of human history on the American continent, demonstrating the continuity of natural history measured over millenia.

In writing the book, Sax was aided by grants from the Ford Foundation and the William W. Cook Fund at U-M Law School. He began the book during his stay as a fellow at the Center for Advanced Study in the Behavioral Sciences at Stanford University.

Three From U-M Serve On Section

Three people affiliated with the U-M Law School are serving on the American Bar Association's Section of Litigation, an influential group with the second largest membership of ABA sections.

Chairman-elect of the section is Ronald L. Olson, 1966 Michigan law graduate who now resides in Los Angeles. Prof. John W. Reed of the Law School is a member of the section's governing body; and the representative to the section's law student division is John W. Elam, a third-year U-M law student from Columbus, Ohio.

Alumni Gather In May

The second annual U-M Law Alumni Reunion and Law Forum will be held May 21-23 at the Law School.

Principal speaker at a May 22 luncheon will be Wade H. McCree, Jr., former U.S. solicitor general under President Carter. McCree will officially join the U-M law faculty next fall (details in the next *Law Quadrangle Notes*).

The law forums will include a panel, "Is There Mandatory *Pro Bono* in Your Future?" and seminars featuring U-M faculty members Thomas E. Kauper, Richard O. Lempert, Gerald M. Rosberg, and economist Daniel L. Rubinfeld.

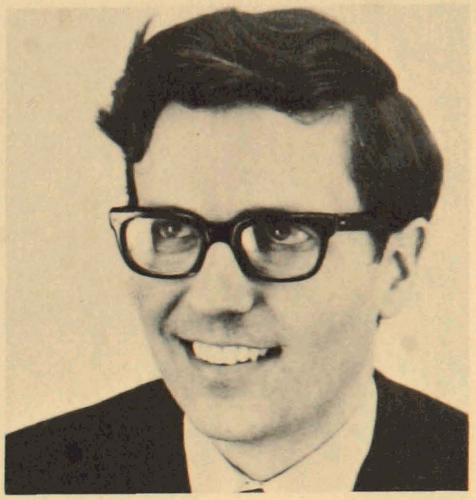
Details of the gathering are available from Prof. Roy Proffitt at the Law School.

alumni notes

☐ Oakland County, Mich., Probate Judge **Eugene Arthur Moore,** a 1960 graduate of U-M Law School, has been named president of the National Council of Juvenile and Family Court Judges. Upon being installed as president of the 3,500-member organization this past summer, Judge Moore stated: "We have many outstanding juvenile courts in this country whose primary goal is to ensure rehabilitative services for adjudicated youngsters. Even this is not enough. We must also have courts which feel they have an additional responsibility of encouraging programs within their local community that prevent neglect and delinquency." Among programs suggested by the judge were voluntary delinquency prevention efforts, runaway shelters, in-home detention programs, community service activities, job placement, parent effectiveness training, and diagnostic clinics. Elected to the Oakland probate bench in 1966 and re-elected in 1974, Judge Moore also teaches juvenile law and probate procedures at Detroit College of Law and is a faculty member of the National College of Juvenile Court Judges. He is the author of articles and texts dealing with marriage and divorce, probate practice, and juvenile justice.

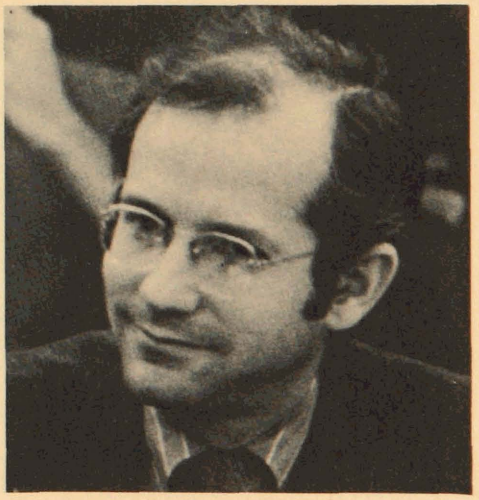
☐ **Richard B. Madden,** a member of the Law School's class of 1956, is the new chairman of the board of trustees of the American Enterprise Institute for Public Policy Research. He assumed the post last May. The Washington, D.C., public policy institute views its role as "fostering innovative research, identifying and presenting varying points of view on issues, formulating practical options, and analyzing objectively public policy proposals." Madden, who holds a B.S. degree in engineering from Princeton University and also a M.B.A. from New York University, is currently chairman and chief executive officer of the Potlach Corporation of San Francisco. Before assuming his present position with Potlach in 1977, he was president and chief executive officer, and a director of the company since 1971. Previously Madden served in several executive capacities with the Mobil Oil Corporation, New York City, since 1956. Among other positions, Madden is a director of Amfac, Inc., Del Monte Corporation, Pacific Gas & Electric Company, and the American Paper Institute. He had served as a trustee of the American Enterprise Institute for Public Policy Research since 1972 and a member of its executive committee since 1975. As chairman of the institute's board of trustees, he succeeds Herman J. Schmidt, retired vice chairman of Mobil Oil Corporation.

☐ U-M Regent **Robert E. Nederlander,** a 1958 graduate of the Law School, has received a Presidential appointment to serve on the National Council on Educational Research (NCER). The three-year appointment was made by President Carter in the fall. NCER was established by law in 1972 to make general policies and to review the conduct of the National Institute of Education. Elected to the U-M Board of Regents in 1968 and re-elected in 1976, Nederlander is partner of the Detroit law firm of Nederlander, Dodge & McCauley, and vice president and director of the Nederlander Theatrical Corporation. A 1955 U-M graduate, Nederlander was captain of the 1955 Michigan Big Ten championship tennis team. Among other affiliations, he is a member of the American Bar Association, State Bar of Michigan, Presidents Club and Michigan Benefactor of the U-M, "M" Club, the NAACP, and the Economic Club of Detroit. He is national vice president of the Muscular Dystrophy Association of America, and director and vice president of the Muscular Dystrophy Association of America, and director and vice president of the Muscular Dystrophy Association of southeastern Michigan.



Eugene Arthur Moore

Richard B. Madden



Robert E. Nederlander

events

Franklin Zimring

Cooley Lectures

Despite the call in some legal circles for adolescents to be treated as if they were adults, a University of Chicago scholar argues for legal flexibility that would reflect the "transitional" status of adolescents as they move toward adulthood.

Delivering the Thomas M. Cooley lectures at U-M Law School in the fall, Franklin E. Zimring argued that a single "age of majority" is an inappropriate legal concept in reflecting the "path to adulthood."

"Growing up is a process, not an event. For this reason, the adolescent years are best conceived as a learner's permit period when privileges are extended in the hope that a period of learning by doing can produce authentic maturity," said Zimring.

The professor, who is director of Chicago's Center for Studies in Criminal Justice, delivered a series of three lectures here on the subject "The Changing Legal World of Adolescence."

"To ask how old is old enough to date or drive is, in my view, to ask the wrong questions," Zimring observed. "Instead we must ask how old is old enough to learn to drive, to start a process such as dating that ends at competence if we're lucky—to invest, taking transitional risks, hoping that the result will be the right kind of adult."

By contrast, some legal reformers have argued for abolition of "youth" as a legally relevant concept and for treatment of youthful offenders with the full force of adult laws.

Warning against such a trend, Zimring said adolescents, in learning adult roles, should be "protected from the full force of adult responsibilities but pushed along by degrees toward moral and legal accountability."

He went on to suggest a graduated system of rights and responsibilities conferred on young people at different ages.

"With respect to liberties, why not the 18th birthday as a presumptive age of majority, one where we confer liberties not already obtained unless there is a very good reason not to. Freedom of choice in medical care, for example, might not extend to the right to request and obtain vasectomy at age 19 in the name of zero population growth.

"With respect to entitlements, a good argument can be made that educational and job skills entitlements should not be age-specific. But if they are, why not presume 21 as an age of majority unless there is a good reason for adjusting it upward or downward.

"With respect to responsibility, such as the right to attend college without a non-custodial parent's support, why not presume age 21 unless there are good reasons to depart from that threshold."

Winter "Senior Day"

Lawyers and judges must continue to serve the cause of justice despite the "climate of insecurity and fear" gripping America today, said Judge Damon J. Keith of Detroit at U-M Law School's winter "Senior Day" ceremonies.

Judge Keith, who sits on the U.S. Court of Appeals for the Sixth Circuit, told the graduating law students and their families:

"I pray that you never know the fear of being on a Klu Klux Klan 'hit list' because you rendered a decision in favor of equal educational opportunity.

"I pray that you never have to look over your shoulder to be sure that your federal bodyguard is with you before you leave your office at night.

"I have had these experiences as a federal district judge, as chief judge of the eastern district of Michigan, and as a servant of justice."

During his 10 years as a federal district judge in Detroit, Keith was responsible for several landmark decisions, including the 1971 White Panther wiretap decision in which the U.S. Supreme Court affirmed Judge Keith's position that neither "domestic security" nor the inherent powers of the President justified electronic surveillance without a court order.

Another of his major decisions involved the 1970 Pontiac, Mich., school desegregation case in which the school board was found to have deliberately located schools to coincide with existing segregated housing patterns.

Quoting from the late Dr. Martin Luther King, Jr., Judge Keith said: "We often find that on some positions, cowardice asks the question, 'Is it safe?' Expediency asks the question, 'Is it politic?' Vanity asks the question, 'Is it popular?' But conscience must ask the question, 'Is it right?'

"And there comes a time when one must take a stand that is neither safe, nor politic, nor popular. But one must take it because it is right.

"This, then, is where we find ourselves today," Judge Keith continued. "Not only judges, but all of you must seize the opportunity, whenever and wherever presented, to be just, to act according to conscience, to bite the bullet. In doing so, we shall be honoring the heritage and tradition of what is best in America."

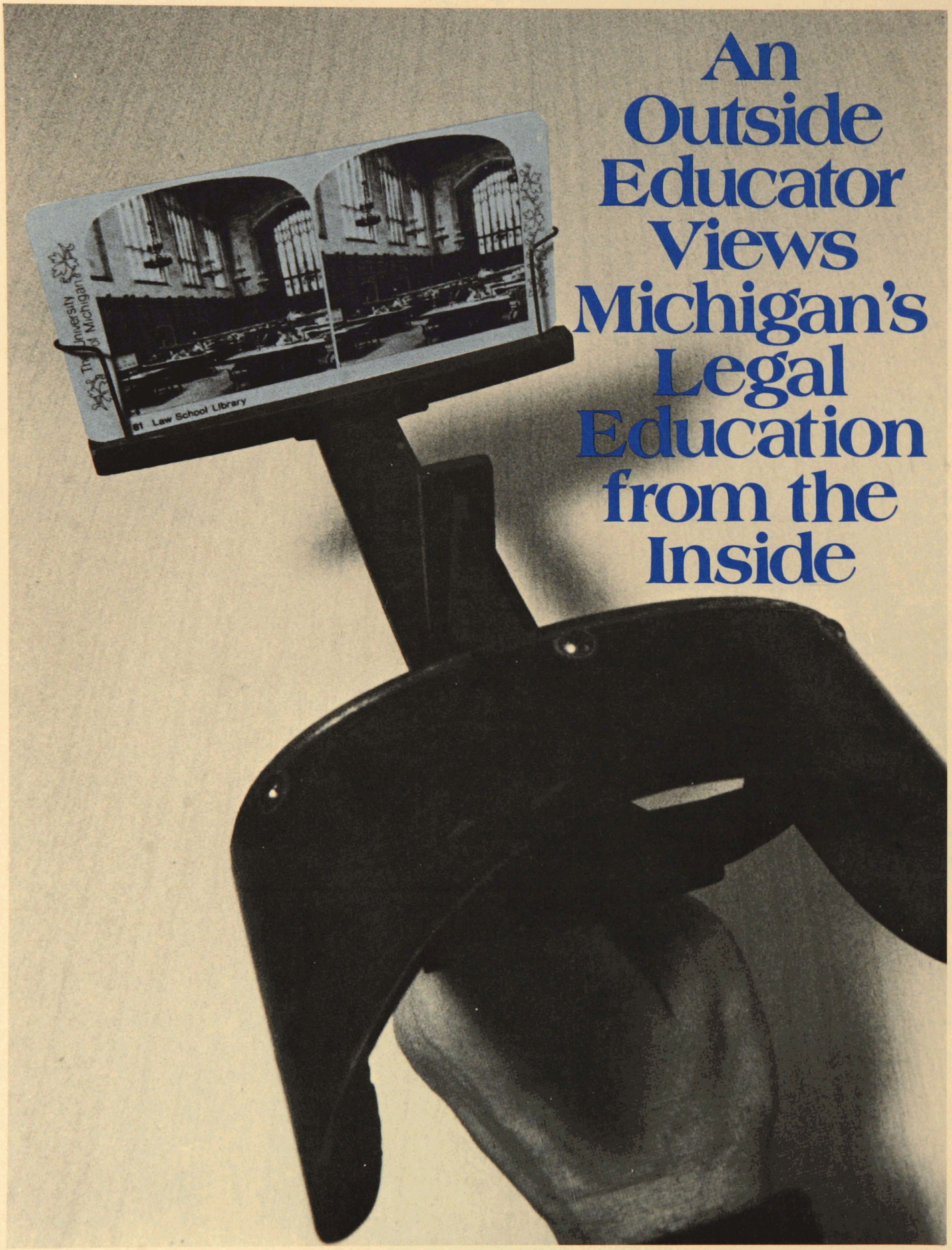
Judge Keith also observed that the future of civil rights does not look particularly promising today.

"The failure of presidential and congressional leadership left the issue of civil rights to the courts. Now, a failure of national and congressional leadership seeks to undo the few gains made by black Americans through the court system. Are some white Americans afraid to grant black Americans full complete and total equality before the law?"

Judge Damon J. Keith

Among current movements sparked by fear, hatred, and violence, Judge Keith cited the rebirth of the Ku Klux Klan, the rise of the National Socialist-Nazi Party, and the rapid increase in random killing of black men and women in urban areas.

There were 55 candidates for the Juris Doctor degree and two candidates for the Master of Laws degree at the U-M's winter "Senior Day" ceremony held at Hale Auditorium in the U-M Graduate School of Business Administration.



An Outside Educator Views Michigan's Legal Education from the Inside

by Harold J. Spaeth
Professor of Political Science
Michigan State University

Editor's Note: *Harold J. Spaeth is a Michigan State University political science professor who has attracted considerable attention for his computer predictions of the outcomes of U.S. Supreme Court cases. Over the past seven years, his predictions are said to have had an accuracy rate of more than 93 percent. Spaeth's approach is to analyze the "voting records" of justices to determine personal attitudes and other factors influencing their decisions. He says these voting records are usually more revealing than legal "theories" which may mask the underlaying motivations in the particular judgment. A U-M law student since the summer of 1979, the 50-year-old professor says "a law degree will assist my future writing and research, and better equip me to do consulting work for attorneys who try cases before the Supreme Court."*

In the summer of 1979, after 25 years behind a podium, I became a student at the Law School. Call it role reversal with a vengeance. Now, 14 months and 45 credits later, some observations on the producers, products, and processes of legal education at the University of Michigan.

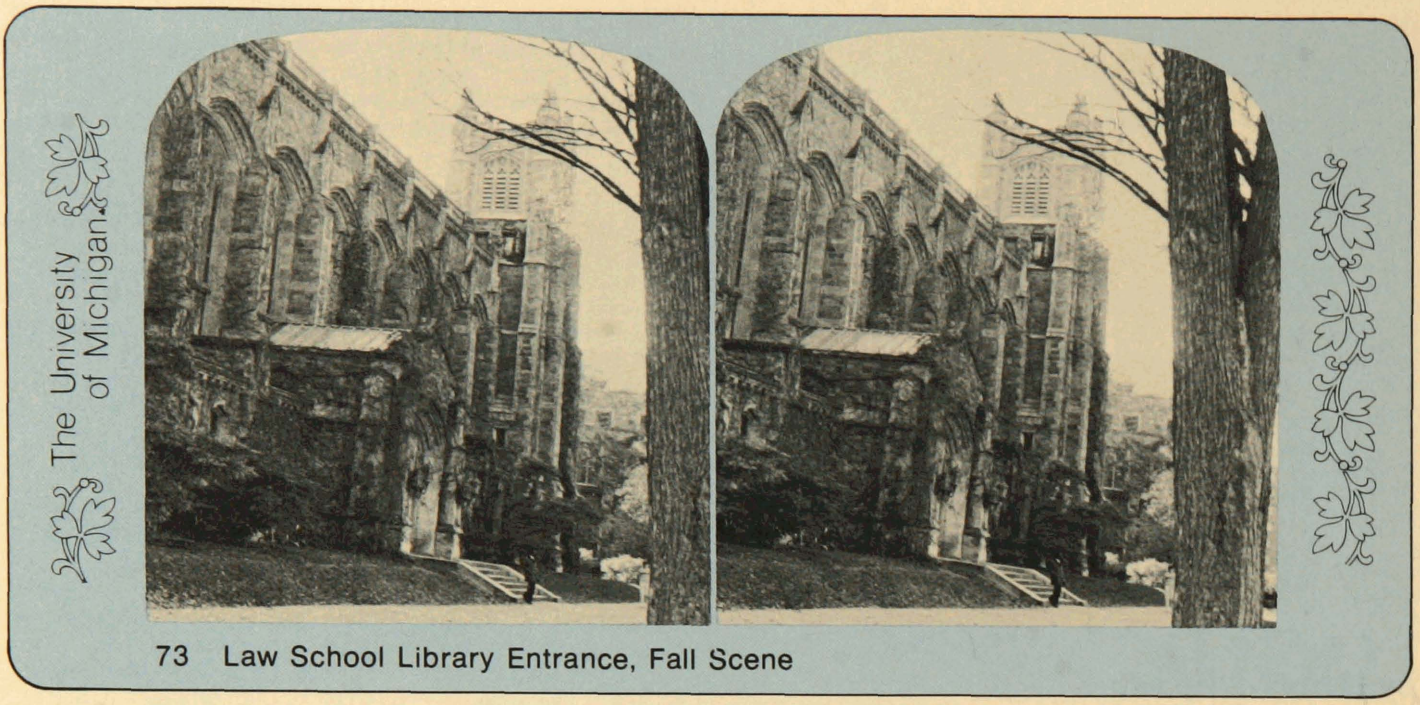
The Faculty

Mastery of a subject does not necessarily correlate with an ability to teach. It does among those members of the faculty I have encountered. Not only is their command of the subject complete, so also is their commitment to scholarship and, equally pronounced, to the practitioner's art. The pedagogical approach taken dovetails most impressively with the nature of the subject matter: from black letter doctrine at one extreme to policy at the other. But even where the subject lends itself to a policy orientation, a steady undercurrent of attention to detail prevails. It is this unwavering attention to detail—to specific facts—that, in my judgment, best characterizes legal education and sets it apart from its sister disciplines.

As a political scientist, my concern has been the macroscopic—to describe and synthesize the forest, never mind the trees. Given my previous training and proclivities, re-education directed toward the recognition of the importance of detail has been especially difficult. But the difficulty I have had has been more than offset by a degree of intellectual stimulation and a joy of discovery that I did not know I was capable of. The primary source of this stimulation has been the classroom lecture. For five weeks this summer, Monday through Thursday, I sat in the same seat in the same classroom for four hours and ten minutes, broken only by two five-minute intervals, thoroughly engrossed by the lectures of Donald Hagman (visiting from UCLA), Marcus Plant, and James Martin. At the other extreme, more than once have I driven two and one-half hours to attend a single fifty-minute lecture by Jerold Israel, Yale Kamisar, or Allan Smith. Such teaching has been the frosting on the cake of the assigned reading. Arguably, much of the instruction appears on its face to be nit picking, but in the real, as opposed to the academic, world, the nit picked (or the one unscratched) may well determine who wins and who loses. This, then, is the value that the faculty brings to legal education. Whether the instructional mode be purely or marginally Socratic, the focus on specifics, on refined distinctions, suffuses their courses from start to finish, and makes the faculty's labor worth its salt.

Teaching style mixes well with subject matter. From the black letter doctrine presented by Israel, Martin, and Smith (imagine learning real property or the UCC from a policy focus), to the blenders of doctrine and policy (Whitmore Gray in contracts, Plant in workers' comp, and Victor Rosenblum [visiting from Northwestern] in torts), to the policy orientation of Hagman in land use, and the apodictic fulminations of Kamisar in criminal law and police practices.

No curriculum can be better than the faculty who teaches it. Michigan's curriculum matches its faculty—unbelievably full and variegated. If areas of the law are uncovered, they presumably are exceedingly esoteric. My count of the *Bulletin* totals 119 course offerings. By any reasonable measure, a plentiful sufficiency. A sound balance exists between required and elective courses. Students quickly find their interests and choose their courses accordingly. Although the discussion paper issued by the Law School's Curriculum Study Group in September, 1979, proposed a "reshaping," I would caution doing anything more than a bit of fine tuning. Too much tinkering may transform a silk purse into a sow's ear.



73 Law School Library Entrance, Fall Scene

Contrast, if you will, what it would be like to learn the law solely by resort to casebooks. While some may curse the invention of the printing press because it produced pornography, I suggest that a few curses might more appropriately be directed at the casebook. They are written as though Demosthenes were speaking with a mouth full of pebbles—cumbrously, infelicitously, and as syntactically as hiccupping. I occasionally sympathize with the practitioner deficient in writing skills. Consider the model on which he cut his legal teeth—those good old casebooks, in which the elements of good writing—clarity, unity, and emphasis—are as visible as sunlight in a fog.

Now, not all casebooks fall into the preceding category. I know of one that an intelligent person can profitably read on his own: Marcus Plant's *Workers' Compensation and Employment Rights* (with Malone and Little), 2d ed. (West, 1980). If there are others, they are not among those I have used. This notwithstanding the fact that the authors of many of the assigned casebooks are the self-same individuals for whom, as teachers, scholars, and practitioners, I have the highest respect and unqualified admiration. Not that I do not respect them as writers. Articles and books that they have otherwise written are well done indeed; the most current example is Yale Kamisar's *Police Interrogations and Confessions: Essays in Law and Policy* (U. of Michigan Press, 1980). It's just that when it comes to writing casebooks, their otherwise exceptional talents fall on evil ways.

But perhaps I harp too much. Casebooks do provide a sort of perverse pleasure to the reader. The pleasure of a challenge, of efforted accomplishment, akin to the exertion of those last ten sit-ups, or the jogging of that extra mile. If the authors instead wrote as they spoke—taped their lectures or used their class notes around which they built their casebooks—how much better they would be. But if they did so, the bottom would undoubtedly fall out of the Nutshell, Sum and Substance, and commercial outline markets. And that just might be the straw that broke the economic camel's back.

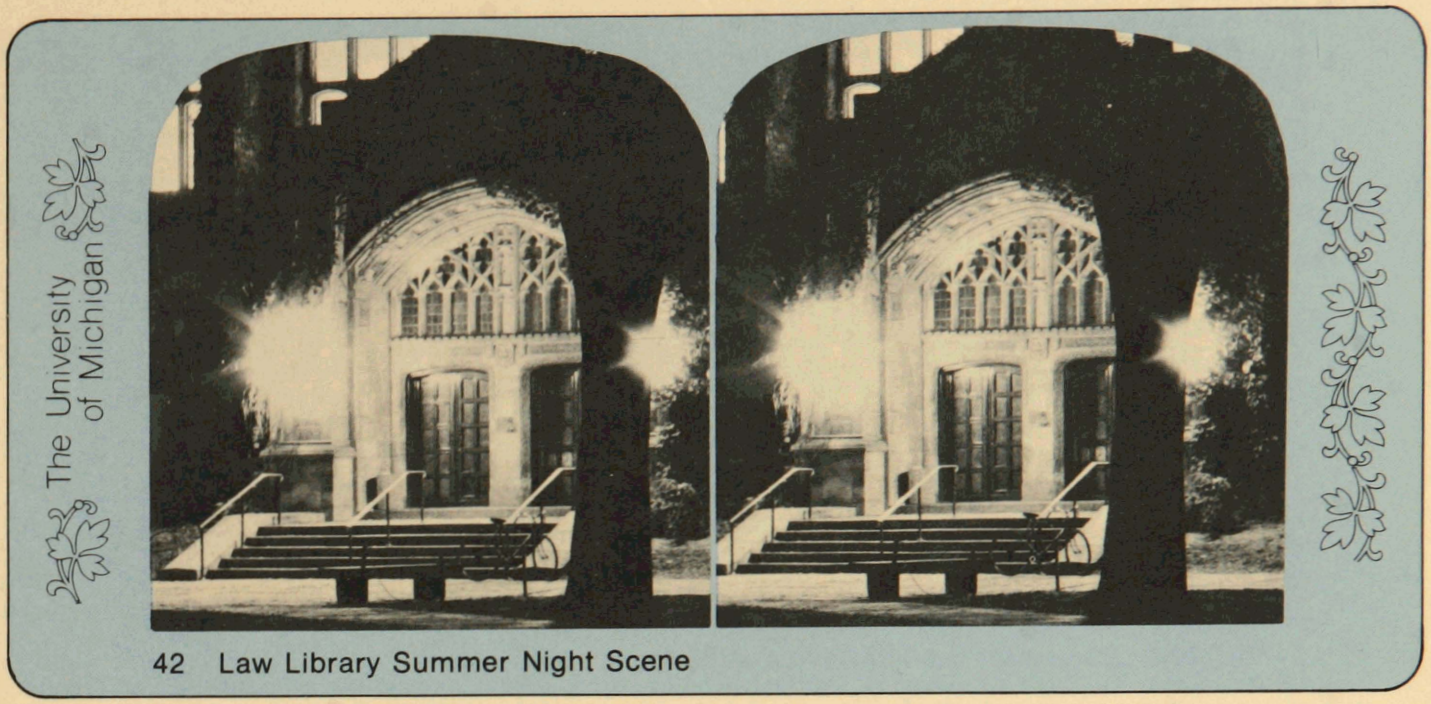
The Administration

Here my admiration is unequivocally unqualified. Actually, my reaction is less admiration than awe. The reason? An apparently total absence of bureaucratization. Yet the School contains several dozen faculty members, an equivalent number of secretaries, librarians, and support staff, plus a thousand students. All of the bureaucratic ingredients are here: specialization of function, fixed rules, and a hierarchy of authority. Nonetheless, the net result approximates the proverbial Mark Hopkins on one end of the bench, the individual student on the other. The only plausible explanation for this wondrous phenomenon is the absence of administrators. But such a situation, the experts tell us, produces chaos. That may be true of some organizations; it is not true of Hutchins Hall. Not only does anarchy not reign supreme, it doesn't even reign constitutionally.

Credit for this remarkable state of affairs rests—and I think this is a consensual judgment—with Assistant Dean Susan Eklund. Her organizational skills, her ability to operate a complex organization sans red tape, and her consummate talent in treating people as individuals have produced what I will wager is the best run educational institution extant. That may not be saying much these days, but I am speaking in absolute, not relative, terms.

The students, moreover, are treated respectfully, as adults, not as inmates. The rules are few and reasonable. Those that exist serve a rational purpose. I have detected no buck passing from one office to another. Registration for classes—a bane of students everywhere—is conducted painlessly and efficiently.

The consideration accorded students extends beyond Dean Eklund's office. I have found the staff and secretaries unfailingly helpful, interested, and accommodating. The faculty also. Unlike the situation at many other institutions, the faculty are accessible outside the classroom. Three examples: 1) It was not uncommon winter term to observe small groups of students clustered around Allan Smith as long as 30 to 45 minutes after his property class had adjourned. 2) Early in the fall, a classmate mentioned to me



42 Law Library Summer Night Scene

his interest in a career in criminal law and wondered about the availability of summer employment. I suggested he talk to Yale Kamisar. The student demurred, remarking that Kamisar not only was a busy person, his rough and gruff in-class demeanor also suggested inaccessibility outside of class. "Nothing ventured, nothing gained," said I. The student went off, returning an hour later. He was positively beaming. Not only had he been cordially received, he had also obtained a list of pertinent firms and Kamisar's permission to use his name as entree. 3) After presiding as senior judge for two days (including a Sunday) at my case club's oral arguments, Samuel Estep, ably assisted by his charming spouse, opened his home to the 18 of us, where we were wined and dined in a most enjoyable fashion. Note that in no sense of the word were any of us his students, but rather a bunch of strangers. Nonetheless, the Esteps' warmth and welcome were genuine, and much appreciated by all concerned.

Where the formal head of the Law School, Dean Terrance Sandalow, fits into the scheme of things, is beyond my ken: budget, personnel, alumni relations, AALS liaison, *etc.* Suffice it to say that he knows how to be unobtrusive. Administratively speaking, that is a rare talent, indeed. He presides over a well-oiled and finely calibrated machine, one which is highly responsive to the individual's wishes. The day-to-day operation of this machine is the bailiwick of Sue Eklund. If all administrators were her and Dean Sandalow's alter egos, bureaucracy's image would soon equal those of God, motherhood, and homemade apple pie in the shrine of national esteem. If you doubt the accuracy of this assessment, come see for yourself.

The Students

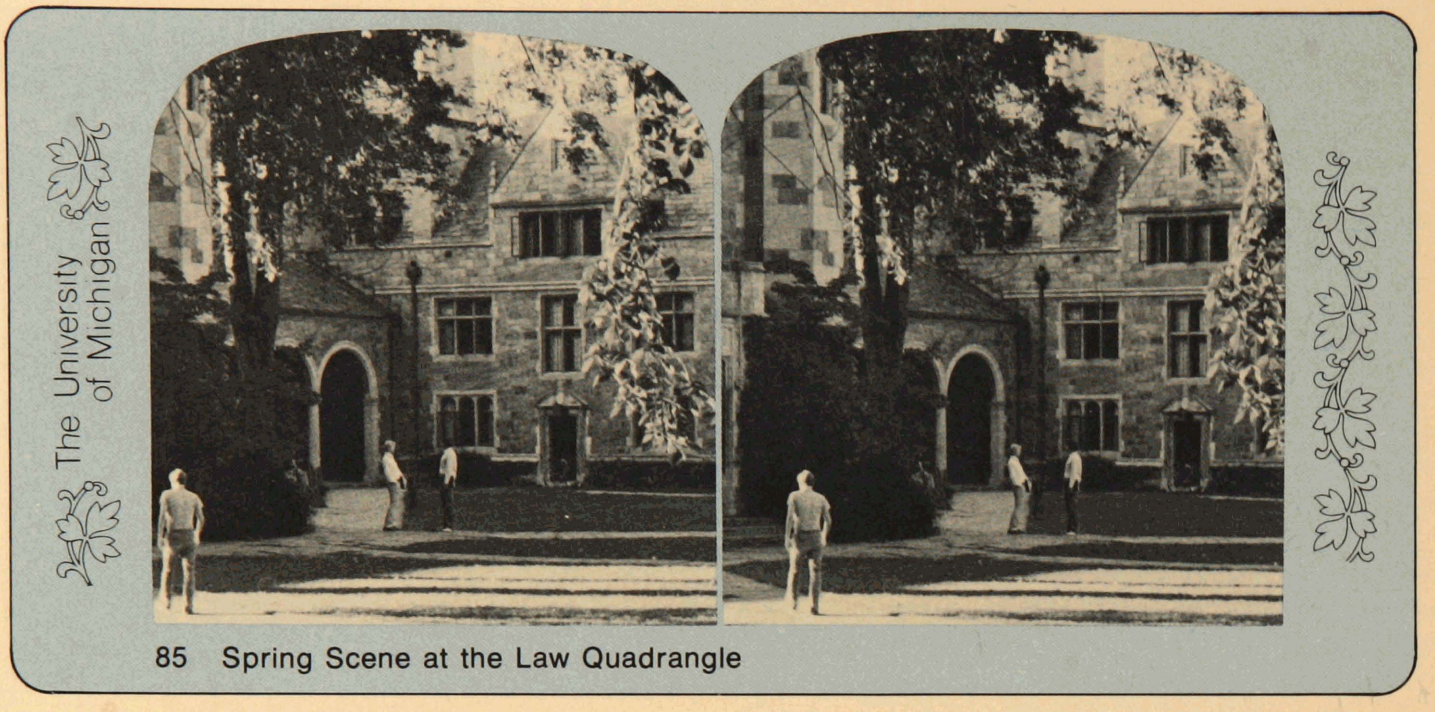
My duties at Michigan State University and the time lost in a 130-mile daily commute have precluded me from interacting with my fellow students as much as I would have liked. Nonetheless, certain observations are readily apparent.

First and foremost, the student body comprises a very thin cross-section of the best and the brightest as measured by the "objective" indicators of LSAT scores and undergraduate grade point average. So thin is this slice that it is impossible to determine, without being told, which students sit at the top of their class, and which occupy the nadir. Notwithstanding the slenderness of this sliver, the student body contains an incredible diversity of curricular and academic background, as well as an extraordinary richness of nonacademic experience. Nothing could be less true than that the students are all peas from the same pod—most of them aren't even peas. Credit for this lavish variegation accrues to Admissions Dean Allan Stillwagon.

Given this profusion of discrete talents, skills, and experience, recruiters who interview only those in the top 10 or 20 percent of a class are behaving in a less than optimal fashion. Would not a firm heavily into oil and gas profit from a geology major, regardless of class standing? Workers' compensation from a graduate with several years' experience on the line? Trade expansion from someone fluent in Russian? P.I. from a physician-attorney? Communications law from a professional journalist? Such experiences and accomplishments characterize the few students I know. Perhaps recruiters do behave rationally. Again, I know not. The chase after grades suggests that I am not wholly wide of the mark, however.

Apart from the absurdity of finely drawn grade point (or class rank) distinctions, what correlation is there between graduation *summa cum laude* and social presence, or other personality characteristics essential to the successful practice of law? I doubt that it approximates statistical significance, to say nothing of motivation, industry, persistence, creativity, or ethical sensibility. Perhaps a salutary solution might be to prohibit recruiters from inquiry about grade point averages, as is the case with regard to the maternal plans of female interviewees.

The foregoing should not be construed as denigration of those who have done well grade-wise. A good grade point average does demonstrate an ability to take tests and associated skills: to regurgitate, to psyche out the instructor, and to think quickly and accurately under great time constraints. How pertinent these skills are to the successful practice of law I leave to the next section of this essay.



85 Spring Scene at the Law Quadrangle

Before leaving the subject of my classmates, a final observation. As between male and female students, I believe that a richer diversity exists among women. Although this presumption is rebuttable in individual cases, I think it sustainable as a general rule. A legal career for a woman is not yet exactly conventional. It is, and has been, for the middle-class male college graduate. Although one can manipulate the numbers in such ways as to show that the law is approaching nursing, education, and retailing as women's fields, that day has not yet arrived. (And if Phyllis Schlafly has her way, female attorneys may again be as few and far between as traffic lights on an expressway.) Be this as it may, a woman opting for a legal career is, by definition, an unusual person. She possesses certain qualities that have set her apart. These qualities not only individualize her, they are also the sort, it seems to me, that bode well for professional success. Accordingly, the wise firm ought to seek out more than a token woman or two. They may find themselves pleasantly, and profitably, surprised.

Testing

Exams remain the bane *par excellence* of law students. And well they should. I find it utterly incomprehensible that an otherwise rational and orderly enterprise can collectively display mass irrationality in its examination processes. (My remarks here are not peculiar to Michigan; they apply to all law schools and even more forcefully to the dutiful souls serving as bar examiners in the several states—more forcefully to the latter because the stakes are higher there.)

One may accurately object that law school and bar examinations are no different, other than in content, from the types of examinations to which students have been subject since they learned how to write a simple sentence and fill in a blank. That, dear reader, is precisely the point: they aren't, but they should be. Legal education is **professional** education. It most assuredly is not liberal education. Therefore, the *ars gratia artis* principle does not apply. Society properly expects that as one passes through the educational system a person will have mastered the multiplication tables, the dates of significant historical events, some scientific facts, and a command of the language. Liberal education, in short, distinguishes itself from its professional counterpart in that the former concerns the development of the individual's mind, *qua* individual, and not as a doctor, lawyer, plumber, or accountant.

Professional education further separates itself from liberal education in that it provides training for specific roles in the real world—marketable skills, if you will. Consequently, it should not be asking too much that the measure of skill possession pertain to the real world that the professional education prepares students for. And how, pray tell, does regurgitated knowledge, off the top of one's head, of the difference between vicarious liability and imputed contributory negligence measure lawyerly competence? Or the distinction between remainders and executory interests? Or between deliberate bypass and *Francis v. Henderson*? How about an authoritative explication of Section 4-406(2)(b) of the UCC? Or the motivation behind a SCREWT? Answer, in a technical word: orthogonally. Answer, in plain English: abysmally.

Actually, Michigan is not the worst offender. Relative to other law schools and to the bar exams, sweet reason prevails. Typically, inanimate sources may be consulted—with some exceptions. Unfortunately, resort to notes and books often becomes illusory, as when 45 multiple choice questions are spread over an *equal* number of pages—each to be answered at the rate of one every four minutes. Or when a diabolically contrived essay question contains a fact situation that approximates a Byzantine maze.

"But," says the mossback, "this is the way I had to do it and, for all I know, this is the way it has always been." Mossback is probably correct, but the sense of this system departed, and senselessness set in, soon after the invention of the printing press. Prior to that time, the lawyer's stock in trade was in his head. No other source existed, except other attorneys' heads. A few things, however, have changed since 1440—not the least significant of which is the preservation and retrieval of information.

Consider rationally (if you can) what transpires at the bar exam. A student is presented with a batch of problems, answerable by way of an essay. No sources, animate or

inanimate, may be consulted. If that same student, after licensure, received a similar problem (one not heretofore confronted) and responded to his or her client in precisely the same fashion as he or she replied to the bar exam problem, should that not be grounds for disbarment? If such conduct is not unconscionable, then villainy has become virtue. Neither is the multistate portion an improvement. Only the name of the game changes; its relationship to the real world remains as distant as Alpha Centauri. This time it's called "say the Magic Words" (by filling in the proper blank) and win yourself a license. Not only has Bleak House not been dismantled, it has been institutionalized and enshrined. Cultural anthropologists should take note: Fetishism lives!

To deny an otherwise entitled law school graduate licensure on the basis of such an exam qualifies as a blatant denial of due process. Granted that, technically, said student hasn't been denied anything; nonetheless, conduct more arbitrary, in the sense of being ill suited to its ostensible purpose, or more unreasonable, defies the imagination. An argument analogous to the white primary won't wash. Bar examiners are governmental agents exercising powers reserved to the states. More credible perhaps is an argument that the Fourteenth Amendment only prohibits unreasonable action, not that which is irrational. After all, we don't hold those who are *non compos mentis* accountable for their actions. Maybe the best solution would be to resurrect the discarded doctrine of *Memoirs v. Massachusetts* and apply it to bar exams: "*utterly* without redeeming social value." It is a standard immeasurably better suited to bar exams than pornography.

As matters stand, I refuse to consider examinations a measure of self-worth. Needless to say, I study for them, but only because I firmly believe in the minimax principle. In an ideal world, they would be viewed as next of kin to party games and boob tube quiz shows. Fortunately, Michigan, for all practical purposes, has a no-attrition policy, thanks to Allan Stillwagon's careful prescreening of applications. But I fear that my classmates, who understandably view grades as the ticket to success, pay a much higher price: the avoidance of courses and instructors, though admittedly of value, that might jeopardize their grade point averages; exclusion of material pertinent to the course that is not a likely subject of examination; and an emphasis on memorization rather than comprehension, understanding, or reflection. I cannot document this, but I suspect that much of the distaste many attorneys have for legal research and their reluctance to utilize legal scholarship results from their examination experiences.

Now, I labor in what is reverently known as an ivory tower. I am not expected to consort with the real world; what I teach is purely academic by conventional, i.e. commercial, standards. Any marketable use that my undergraduate students derive from my musings is purely fortuitous. At the Ph.D. level, however, where we hope our students get jobs, albethem academic, we at least have enough good sense to correlate the examination process with what we expect our students to become: productive scholars. (Admittedly, many Ph.D.'s choose to perish rather than publish, but that's another matter.) How do we measure this potential for productive scholarship? Quite simply and directly: by requiring a series of term papers, topped off by a dissertation, that evidences ability (admittedly not motivation or devotion) to do original research.

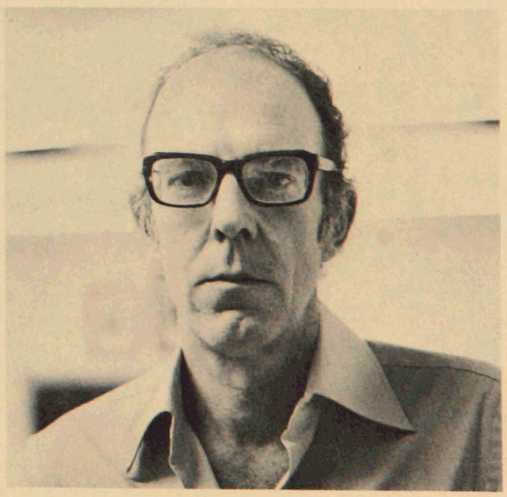
Why doesn't the legal profession do likewise? One devil theory suggests itself: *sine qua non* to employment as a law professor is medically corroborated evidence of latent sadism. Or better still: evidence of the Hyde-Jekyll syndrome. When I have broached the question (of the insanity of law school and bar exams, not latent sadism) to friends who are themselves law professors, they have looked at me as though I were crazy. Therefore, I don't know the answer. But inasmuch as my criticism has been mildly caustic, I deem a reformatory proposal in order.

Actually, my proposal exists within the monastic walls of Hutchins Hall in the required course, Writing and Advocacy. All testing is take home; time constraints are effectively abolished; and sources external to the student's head are expected to be consulted. Even so, an element of madness persists: it is the sole required course that is *ungraded*. Why could not all courses be similarly examined? Distribute the questions and allow the students a reasonable length of time to turn their answers in. Analogize to the intern or junior associate who is assigned a memo to write, or a letter to a client. Judge what is a reasonable time for completion. Typed answers could be required, and a maximum page length prescribed. The costs? Less than at present. If nothing else, professorial eye strain would markedly diminish. The benefit? Twofold. First, an effective correlation with the real world would ensue. Secondly, given the profession's rightful concern with clear and effective writing, examinations could be scored on this basis as well as on content. The 25 or 30 final examinations (to say nothing of midterms and similar assignments) that a student typically takes during his or her program of study would salubriously emphasize the importance of clarity of expression. And inasmuch as the students writing today's exams are the authors of tomorrow's casebooks, the quality of the latter may also be enhanced.

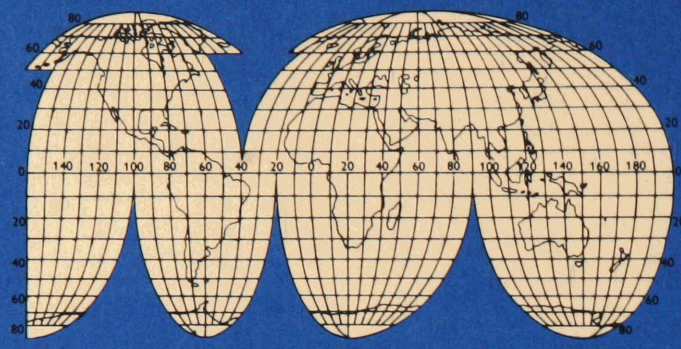
What I have said concerning in-school examinations applies more forcefully to bar exams. The logistics may differ, but administrative convenience does not justify senselessness. The examination could be staggered over the calendar year and questions randomized so that applicants taking the exam one week would not overtax library resources by seeking out identical materials. Typed answers could again be required, and effective expression and congruence with the model answer heightened. The multistate exam could then be consigned to its rightful place: a depository for hazardous waste.

* * * * * * *

If the irreverence detectable *in passim* has offended some readers, I apologize. Note, however, that though I plead guilty to irreverence, do not construe this plea as encompassing disrespect. Reverence is alien to me; respect is not. I hold legal education and the profession in high regard. If I did not, I would not have driven daily to Ann Arbor these past 14 months; neither would I have written this.



Harold J. Spaeth



Transnational Enterprises & International Codes of Conduct:

Introductory Remarks for Experts

by John H. Jackson
Professor of Law
The University of Michigan

Delivered to the International Bar Association meeting in Berlin, August 27, 1980.

I have entitled my talk "Transnational Enterprises and International Codes of Conduct: Introductory Remarks For Experts" and I particularly emphasize "Introductory Remarks For Experts," because I recognize that assembled here are persons of the highest competence who have studied the subject of TNE Codes of Conduct, and indeed have been giving thought and reflection to the meaning and impact of those codes on the real affairs and transactions with which you are personally involved. I do not intend to insult your intelligence and your experience with an elementary introduction of the subject we will be discussing today and tomorrow. Rather, what I will say now assumes a relatively high level of expertise, and thus my title: "Introductory Remarks For Experts."

This is one of the few times when there has been assembled to discuss an important subject of government policy such a distinguished group of private practitioners who can bring to bear the experience of day-to-day confrontation of the practicalities of that subject. Your preparatory committee has given you a brilliant analytical framework consisting of an outline and a series of questions. You have also structured yourself into a series of functional committees. These efforts, it seems to me, ensure the success of your endeavor to shed light on a troublesome subject.

While not repeating or duplicating the efforts of your preparatory committee, I want to do four things in my introductory remarks this afternoon, in hopes that my comments can assist you in your endeavors and your reflections, both now and in the future.

First, I want to speak briefly about the setting of world economic and geopolitical environment in which we all operate. In doing this I will be mostly stating some reminders about this environment, of which most of you are aware. Basically I am asking, what is it about the present world environment that has given rise to the recent surge of international activity designed to control or regulate the TNE, and why is the activity focused on the TNE? In short, I ask: "What is the fuss all about?"

Secondly, I want to focus briefly on the efforts to formulate codes, and why certain world institutions or groups seem to think that this approach can be productive to help in solving problems they perceive to exist. In short, I ask: "What are the objectives of the code-makers?"

Third, I will turn attention to some major common or general issues of the code efforts themselves. I do not intend, nor do I have the time, to examine individual codes in these introductory remarks. But I want to briefly mention some of the basic pro and con arguments pertaining to several overriding or pervasive issues that come up in the context of most of the codes, including the extraordinarily controversial issue of the techniques of implementing the codes.

Fourth, and finally, I want to narrow my focus even a little more, and in connection with the particular analytical outline which you have been given to structure your discussions, I want to make several comments and suggest some questions.

I. The Setting or Environment

Let me first, then, turn to the world environment. In many ways I see the attention being currently focused on the TNE as a tribute to the success of the TNE's in that environment.

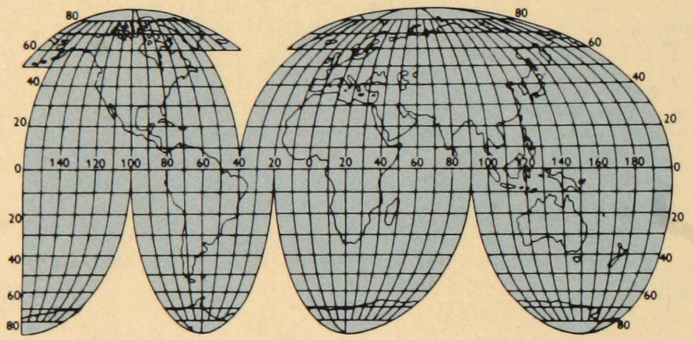
A. Interdependence and the Declining Sovereignty of the Nation State

It is almost a cliché today to talk of the growing interdependence of the world, yet there is almost no other

way to express as well what is happening. This trend was brought forcefully home to me several years ago when I was in India. While visiting Calcutta I had occasion to converse with businessmen there and to ask about the general economic conditions. I was told at that time that the single most important factor then influencing the economy of Calcutta was the state of the U.S. market for starts of new housing. My surprise must have been evident, so my hosts explained that the major product of that area was "jute," that jute was then used extensively for carpet backing, particularly in the installation of new carpeting, and that this business in turn depended on the building of new homes, principally in the United States. Since housing starts in the U.S. depend heavily on the prevailing interest rate for borrowed funds, one can see that U.S. government monetary policy can have a profound influence on the well being of people half-way around the globe.

For many years, Canada, the U.S. neighbor to the north, has said that when the U.S. economy sneezes, Canada catches cold. Another analogy used is that Canada's relations with the U.S. are like a mouse trying to sleep in the same bed as an elephant—it cannot, obviously, indulge itself in a deep sleep knowing the consequences when its bed-mate rolls over!

Today the United States also finds that its actions are circumscribed by the interdependent world environment.



Its own dependence on exports is rising, and its security is intimately affected by decisions elsewhere on the globe. The European Common Market—as the largest trading entity in the world—has an influence on the world economy that has not yet been matched by its capacity for leadership, and this, too, is posing perplexing problems. Japan's growing economic strength is also evident and its actions also greatly impinge on others. Other parts of the world, most especially the oil-producing areas, are profoundly affecting others.

How did this increasing interdependence come about? Perhaps the technological innovations of the post-World War II era would have, at least in the absence of major military fighting, created these conditions. The time and cost of transport has fallen rapidly, so that this barrier to greater trade flows and service exchanges has also dropped. Communications have become spectacularly instantaneous—we watch local wars in our living rooms on the T.V. news by satellite, and it is possible now to order goods or shift huge sums of money across oceans, literally in seconds. Information systems are changing the character of markets, and also affecting business techniques such as the control of inventories, the use of borrowed money, the response to changing interest rates, and the adoption of new developments of technology. But these scientific developments could not have had the influence they have had if governments resisted them, as indeed can be witnessed in the case of those governments that do resist them.

We must recognize that the international institutions erected or reinstated by governments after World War II have made their contribution also (and indeed it is in the context of many of those institutions that the codes of conduct for TNE's are being developed). If some world organizations (perhaps all) have failed to peform in the manner contemplated, nevertheless, they have contributed symbiotically to the general trend of the world environment made possible by the scientific innovations. This is particularly the case with the economic institutions.

The 1944 Bretton-Woods Conference launched the World Bank and the International Monetary Fund. In the next few years the attempt to add a complementary organization for trade, the ill-fated ITO of the Havana Charter, failed, but into the vacuum grew the GATT—the General Agreement on Tariffs and Trade. These institutions were later joined by others, including the OECD, UNCTAD, and some important regional systems. By the late 1960's, therefore, the liberalization of trade and financial flows promoted by this post war system—sometimes broadly called the Bretton-Woods System—had progressed far enough to experience an unprecedented surge of trade and to demonstrate the economic benefits that flow from such liberalization. But at the same time, new problems were emerging. The receding of the waters of tariff and other overt protection inevitably uncovers the rocks and shoals of a variety of non-tariff barriers and other problems. As the European Economic Community has in recent decades experienced, creating free trade requires attention to a group of interrelated activities such as the flow of capital, the flow of labor, the flow of technology and services, and these in turn revolutionize the methods of how governments have traditionally controlled such matters as fiscal and monetary policy, taxation structure, environment regulation, product standards, and liability for product defects. The propensity for government summit meetings, both within the European region and on a broader world-wide basis, is obviously not **un**related to these world economic trends of interdependence. Likewise, the attempts by governments to join efforts through international organizations is a similar result. The question is not whether a government will play on the international scene, the questions are: Where will it play and with whom, i.e. what forum will it work in, and which other governments is it willing to let into its "club"?

The basic problem is that despite all the talk about sovereignty, independence, and equality of nations, these concepts are fictions if used to describe today's real world. What is the sovereignty of the government of a country whose trade is so dependent on a neighbor that the government cannot freely set its own interest rate or tax structure? What is the so-called independence of a government whose national economy depends almost entirely on one export commodity? What is the equality of nations when one has hundreds of millions of inhabitants while another has less than a million, when one has an economy measured in trillions of dollars while another has a total economic product less than that of a major (or even minor) corporation operating from a base in the other country?

Some would say it is best that sovereignty is no longer so complete, that governments have not shown themselves particularly fit to exercise the powers and responsibilities which sovereignty implies, and that therefore the cold reality of the international economic environment is a welcome restraint on misconceived and misapplied governmental policies. Yet regardless of one's sympathy for such a viewpoint, it is impossible to ignore the frustration which governments face today, be they good governments or bad governments; be they despotic governments, or democratic; be they rational, or irrational. Even the rational benevolent democratic government (both large and small)

finds it difficult to carry out its mandate on behalf of its citizens. Cleaning up the environment is hard when smoke drifts from your neighbor and the ocean becomes oil covered. Providing citizen desired full employment is difficult when economic down-turns starting in other countries spread to your own. Establishing even your democratically voted tax system becomes difficult if that system is perceived as less advantageous to investors who can take their money to other nations who are willing to bid for their favors.

Two centuries ago, sovereignty might have enabled a government to carry out a national goal even democratically arrived at, for example, to exalt a particular religion, or to give extraordinary rewards to persons of artistic or musical talent. In today's world of mobile resources and mobile people, what government can keep the doctors at home when another nation pays much more? What government can tax to promote equality or greater government services, when other locations bid for talent? Without judging the validity or correctness of the policies themselves, it is easy to see how a government can be frustrated.

Indeed, interdependence has some potential large prices to pay, even though it has brought and should continue to bring great benefits. Two such prices can be mentioned: The price of uniformity, and the price of the growing remoteness of government decision-making. As to the first, interdependence based on a set of international rules under the Bretton-Woods System, imposes serious pressures on a government to "harmonize" many of its policies with other governments. Governments realize, for example, the self-defeating nature of competitive interest rates, competitive export finance programs, or competitive currency devaluation. Thus a rational approach is to coordinate, to harmonize. The price is less diversity, and less freedom to go in your own direction.

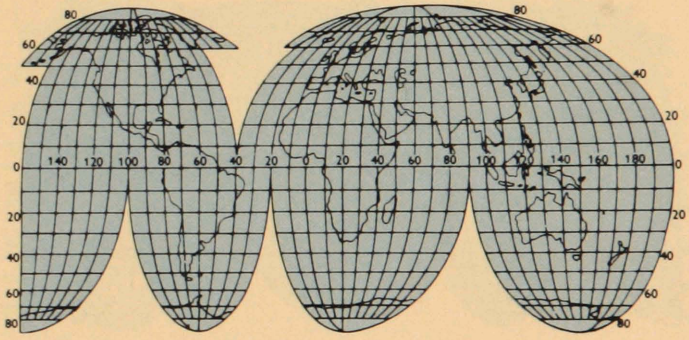
The same pressures are leading to greater internationalization of government decisions whether we like it or not. Governments, not without reason, have been very slow to entrust international institutions with much concrete decision making power. Yet we have just seen completed the elaborate Tokyo Round of Trade Negotiation in the context of GATT that has brought to the international scene new legal obligations on certain governments, concerning even their own governmental purchasing procedures, concerning their methods of establishing safety and other standards of products, and concerning their use of tax or regulatory measures which may affect the competitive nature of their exports. A key question for the future is one which I sometimes call essentially the "federalism" question; i.e. how can the necessary advantages of centralized coordination and decision making be obtained in the world, while at the same time reserving for the smallest possible unit of government, the decision making authority which it needs to be responsive to its constituents to whom it is closest.

B. The Transnational Enterprise and Its Role

In this world interdependent environment has developed the genius of the transnational enterprise. Existing in an infinite variety of structures and forms, attracting extraordinary talent by using extraordinary rewards, and imposing a discipline that many governments seem only able to dream about, the TNE has, not surprisingly, been enormously successful in capitalizing on and contributing to the advantages which the international environment and the Bretton-Woods System have fostered. A TNE has developed the "all-European" car, assembled from parts produced all over Europe. Perhaps next will come the "world car." A large TNE with manufacturing facilities in several major world locations is often in a position to quickly shift production from one facility to the next, to take advantage of fast changing economic conditions including shifting exchange rates. Such an enterprise has opportunities for minimizing its total world-wide tax liability through creative structures of its business, and the TNE often has market information through its own direct involvement in a number of different markets, or from its expertise in taking advantage of available information.

(Indeed I am reminded of a conversation I had in Brazil several years ago with a newsman who was incensed at the alleged fact that a U.S. government satellite was assembling information which was useful in predicting Brazilian crop potential, and that this information was allegedly used by some large U.S. corporations to speculate on world commodity markets to the disadvantage of Brazil. When it was pointed out to him that the U.S. government normally takes great care in being sure that crop information is available to all members of the public at the same time, and that if such satellite information existed it was probably available to Brazilians, including Brazilian Embassy personnel in Washington, his answer was: "Yes, but we don't have the personnel capable of processing and interpreting this satelite data!")

Indeed, the access and control over information, as well as the capability to transmit information (such as new technology), is considered by some to be one of the major



advantages of the well managed TNE.

As is often the case, however, success brings prominence and power, and with that come reactions from groups that are jealous; groups that feel rightly or wrongly that they are suffering because of the TNE success, and groups who are in competition for power. In short, the success of the TNE makes it a target.

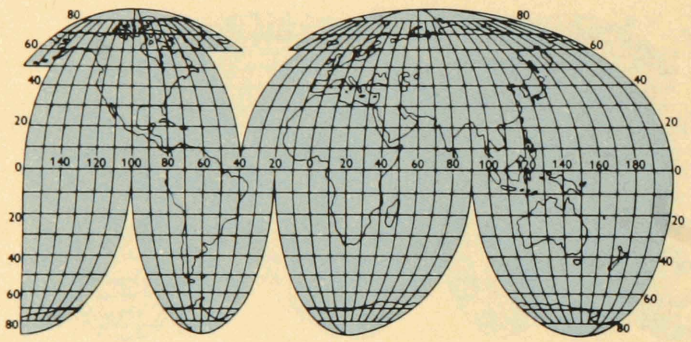
But there are also some legitimate worries about the success and power of the TNE. One doesn't need to search far for some dramatic horror stories: the TNE which produced the defective imported product which maims or kills, yet is not reachable for any remedy for the victim; the TNE subsidiary that evades its local responsibilities by pulling out, perhaps in a bankruptcy situation; the TNE that avoids commitments to its labor force by "going off shore"; and worse, the TNE that actively engages in corrupt practices to co-opt local governments and power elites. Even apart from these more dramatic cases, there are a number of troubling situations where the borderlines of sound policy or good citizenship are very unclear.

Behind all this lurks a troubling fact for the TNE's: governments differ widely in their views about the role of enterprises in society. Some governments view the corporation or other enterprise form as essentially a facilitative structure to promote the private, usually profit making, goals of the individuals who have formed the structure. In their view the public good is advanced by allowing such business structures to enhance and release the individual motivations for gain in the free market place,

so that Adam Smith's "invisible hand" plays its role for greater productivity and efficiency in creating goods and services for society. Other governments, however, view the enterprise form as merely an extension of the state, a sort of quasi-government bureau, to advance governmental goals, be they what they may. Many governments fall inbetween. Even in relatively free market oriented societies, however, observers have noted that governments view the corporation as one technique of control and facilitation for broader government goals, even when such goals are not consistent with the private profit motive. For example, books have been written suggesting that the French government often takes this view of its corporations. Probably no government is immune from these temptations. The United States government, in recently freezing Iranian assets, explicitly relied upon American Bank Corporations to carry its freeze policy into foreign territory. Likewise, U.S. government attempts to ensure that its corporations' subsidiaries abroad assist in carrying out its export control policy, are well known.

These considerations lead one to notice at least three fundamental questions or issues about the rule and function of the TNE in today's interdependent world:

First, given the wide diversity of viewpoints among governments as to the role of the TNE in society, there constantly exists the danger that a particular TNE will be



subject to conflicting governmental policies, if not downright inconsistent regulations.

Second, given the re-occurring history of governmental enlistment or attempts to enlist TNE's in the service of one or another of their policy goals, other governments and their citizens, hosts of the foreign TNE, would seem to have the legitimate right to ask such enterprises which goals are they pursuing and are such foreign government goals compatible with their own policies?

Third, and perhaps more fundamental, governments may appropriately ask with respect to many specific situations, whether the classical profit motivation of the centralized TNE leadership itself, viewing the TNE as a whole, is compatible in all cases with the particular goals of a host society.

II. Controlling the TNE's and the Development of Codes

A. *Actions by National Governments*

The circumstances and concerns mentioned above lead governments naturally to seek ways to overcome the difficulties posed to them. In some cases governments, particularly those like the United States which feels in a relatively (albeit waning) powerful position, have tried to act unilaterally in ways to reach transnational behavior. The United States governmental and court extension of anti-trust liability to actions outside its own borders, is widely known and indeed, widely disliked, invoking major counteractions by other governments. Likewise, other forms of government regulation may have an "extra-territorial reach." Tax authorities have been particularly pressed to preserve their tax base, and this has led to special laws reshuffling accounting figures, or introducing so-called "unitary" systems of taxation.

In some cases governments find that their efforts will cancel each other out, and so an international solution is sought, either bilateral or multilateral. Most international action, however, has been designed to place mutually agreed limitations on *government* activity, while only indirectly affecting private enterprises. Thus the GATT restricts governmental activity designed to impose restrictions on trade across borders. The International Monetary Fund aims to limit certain types of governmental activity regarding exchange rates and exchange markets, which could be damaging to the world economy.

Although not unique or totally original, the growth in recent years of efforts to develop internationally agreed limitations which bear more directly on the TNE is certainly a new turn of events. What is remarkable is the large number and diversity of these efforts, a virtual "code proliferation." It is these efforts which we examine in detail today and tomorrow. My comments so far in this paper have been designed primarily to set these efforts in the broader perspective of the current geopolitical-economic system.

B. *The Multinational Codes of Conduct for TNE's*

Although the code effort proliferation is an understandable and perhaps predictable result of the various forces and trends which I have outlined above, there is plenty of cause for concern about the way these efforts are being conducted. Let me focus for a moment, on just one fairly fundamental aspect of these efforts.

It is possible to detect in the various code efforts a variety of goals or objectives. It is certain that some of these goals or objectives conflict with others, and this fact poses some important implications. Let me just list some of the goals which I think I can detect in these various efforts, although some of these are by no means made explicit. I will leave it to you to determine the consistency or inconsistency of these diverse objectives:

1) First, one can see a goal of equalizing the competitive environment for TNE's based in diverse societies. For example, U.S. corporations which face extra-ordinarily complex and far reaching U.S. government statutory and regulatory rules regarding bribery, or corporate disclosure, would like to see their principal competitors abroad subject to similar rules.

2) A number of governmental representatives seem very interested in designing international rules which will preserve or restore a measure of national government independence of action in choosing domestic policies. Thus, there is an interest in establishing rules that might diminish the degree of TNE involvement in the host political and governmental processes.

3) Some governments see the code efforts as offering the possibility to enlist the TNE as a tool of national governmental policy, such as a policy of fostering economic development in developing countries, or in under-developed regions of industrial countries.

4) Similarly, some developing country representatives seem to view the code drafting efforts as part of a broader initiative to shift the terms of international economic bargaining power to be more favorable to the developing nations of the world.

5) Some code draftsmen seem to see the code as a useful device to further social reforms within their own (or other) societies, such as reforms that promote income or welfare redistribution, or union bargaining power.

6) Similarly, another goal of some code proponents is a general moral or policy goal of preventing certain TNE actions generally deemed to be abusive and immoral, such as bribery, tax evasion, or practices which defraud the public.

7) Likewise, the perceived need for better transnational regulation of anti-competitive behavior is a motivating goal for some.

8) Some code proponents simply feel that the certainty or predictability of code rules can be valuable, reducing the risk to enterprise management of post hoc moral or regulatory judgments, and reducing the risk premium of, for example, international investment flows.

9) Finally (but this list is certainly not exhaustive), the codes are seen by some as opportunities to piggy-back certain rules or definitions long sought by other means. Thus rules sought for fair compensation for expropriation become part of the bargaining context of code formulation.

C. The Perils of Code Formulation

Since no single agency has a monopoly on code formulation, and since there exists such a wide range of goals and objectives, clearly one danger is the emergence of codes which conflict with each other, either explicitly or implicitly. The different forums for code discussions have different balance of interests, different voting procedures, and respond to different priorities among the goals.

Furthermore, as I have mentioned before, there is often no agreement in the world on certain fundamental issues, such as the desirable structure for a national economy, the degree of distribution of income and wealth which is fair, or the importance of the protection of private property rights. Thus code formulation often runs aground on the shoals of these fundamental disagreements.

The challenge, at least for the near future, is to develop an understanding of the policies involved and to design code rules for those portions of those policies which do seem to command agreement or compromise consensus, so that some of the advantages which a code can bring can be soon realized. On the other hand, the challenge is also to avoid irreversible commitment to code rule words which could be soon outdated, or which reflect such studied ambiguity in the face of fundamental disagreement that such code words will engender conflict rather than help to resolve it.

III. Some Major Common Issues of the Codes

Although the issues encountered in the various code drafting exercises are not always the same, there do seem to arise in a number of these efforts certain major general problems. I want to discuss, briefly, four such problems, which I am sure will engage your attention during the next several days. In some cases I will mention some of the policy arguments which are relevant to each of these issues, although I feel certain that you will be able in your discussions to suggest more.

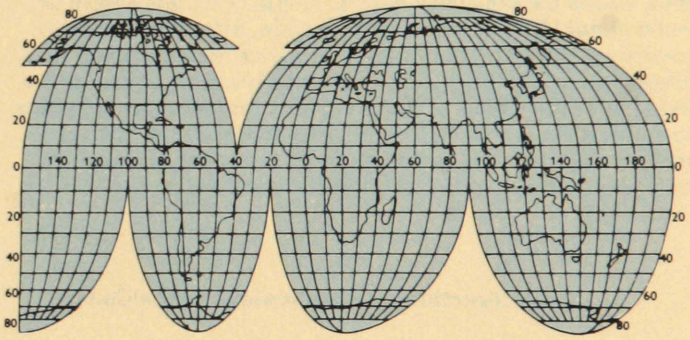
1) Implementation and Adoption

The question of how to adopt or implement the code arises in a number of the yet uncompleted code drafting efforts, and has had to be faced in connection with those codes already approved. It seems clear in these debates over implementation that participants' views of the substance of the proposed rules greatly affect their views about implementation. Potential alternatives range from the promulgation of a code as merely a "morally persuasive" set of principles, to a set of legally binding rules established in domestic or international law. Yet, as has been so ably pointed out, no one should be fooled by the seeming informality of a "voluntary" code or set of guidelines. Even these can have considerable impact, attract the sanction at least of public opinion, and influence national or international courts or other government officials.

Formal legal adoption of a code, such as through a binding treaty, may in fact prove politically impossible to accomplish; thus the attraction of less formal means. But carefully crafted informal institutions of "surveillance" can often make the voluntary code as effective as that which is legally binding. The risk is that the informality of proposed implementation may induce some to-be-affected parties to relax their attention to the code formulating process. The reception by the arbitrator in the 1977 Texaco (TOPCO)-Libyan oil case of certain language of a U.N. General Assembly Resolution demonstrates the impact that non-legally binding international consensus documents can have in some circumstances.

2) Scope of a Code's Reach

What type of enterprises should be covered by a proposed code of conduct? Considerable attention has been devoted to this issue, particularly regarding enterprises owned by a government. Those who urge that coverage



include all types of enterprises, government owned or not, domestic host country corporations as well as foreign corporations, have on their side the arguments of equal treatment and reciprocity. On the other hand, some of the goals sought to be achieved by a code (as outlined in II above) could lead one to a contrary conclusion.

3) International Law Principles, National Treatment, and Expropriation Compensation

This issue could be called "linking." The basic goal of some code formulators is that if a code contains rules obligating foreign TNE's operating in a host country, that the host country should reciprocate by undertaking obligations also. The two prime candidates for such reciprocal obligations seem to be national treatment, and the rule of prompt, adequate and effective compensation for expropriation of private property. Reciprocity encourages the idea that code proponents not be allowed to obtain something for nothing, that is, that reciprocal obligations encourage a sense of responsibility. Likewise, the proponents of reciprocity may in fact be uninterested in a code which one-sidedly obligates only the TNE, and see in the code effort an opportunity to promote other rules long-desired by them. On the other hand, it isn't logically necessary that linkage occur. A code might enhance certain goals, such as predictability, or evening out the competitive environment for TNE's even if no "linkage" occurs. Some who make linkage a sine quo non may simply recognize that

the proposed reciprocal rules are so unacceptable that imposing them as a condition is a way to defeat the code proposal generally.

4) New Rules, Amendments, and Code Evolution

One troublesome aspect of many code endeavors is the lack of adequate and effective means to change the code rules when they become outmoded or are shown to be defective. The GATT experience is testimony to what happens when an amendment or new rule procedures turns out to be basically unworkable—some GATT rules have become painfully out of date, but the amending procedure has basically been unworkable. One possible advantage of a voluntary code or guideline approach, of course, is to avoid the rigidities which a legal rule might have. But even voluntary rules can become outdated. Indeed because they were drafted as voluntary, the draftsmen often overlook the need for including in them a system for keeping the rules fresh and up to date.

To launch a set of rules for TNE behavior at a time of great controversy over many fundamental issues about the purpose and proper function of TNE's is particularly risky unless effective review and revision is built in. Some codes purport to have procedures, but if change requires "unanimity" or "consensus" those procedures could become as unusable as those of the GATT. Once fixed, the code words become very hard to revise. Perhaps a term of years should be specified in each code, after which any governmental party could, on due notice, declare itself no longer bound by the code (as a way to bring pressure for the revision of the rules). When a set of rules loses its consensus support, it also tends to lose effectiveness or compliance. In such a case the rules can become traps for the unwary or inexperienced, engendering conflict, and promoting instability.

IV. Some Directions for Discussions on the Codes

A. Comments on the Codes and Rules

Your committee's outline and questions should provide an excellent framework for your various committee discussions on the codes today and tomorrow. Let me simply add a few points that could help focus your work.

Think about just what you would like to see in the overall report of this conference, as to the codes for TNE's. For example, are any of the following questions to be answered in the report:

1) A definitive statement for or against the promulgation of each of the particular codes. Do you want to say explicitly "yes" to Code A; "no" to Code B, etc.

2) Or do you prefer not to pass judgment so explicitly, and if not, would you like to say as to each particular code, that it is acceptable if (and perhaps only if) a list of changes from the current draft be accepted and incorporated into the code.

3) Do you prefer an even less explicit approach, and instead want merely to state as to each code its strengths and its weaknesses, with an indication of changes proposed to eliminate its weaknesses.

4) In any case, particularly valuable to governments and the world community would be carefully formulated constructive statement of reasons for your conclusions, when possible giving precise case histories of situations to illustrate your points from your own experience. It is this type of evidence that could be the major contribution of this conference.

5) Finally, you could give your views on the techniques or modes for implementing each code, indicating the reasons for choosing certain techniques and for rejecting others, in connection with each code.

B. The Role of the Lawyer

Underlying your activity, of course, is a series of issues fundamental to the rule of the lawyer or legal professional. So that we do not overlook these issues, or assume unexamined choices as to these issues, let me try to articulate some of them:

1) What is the appropriate role of the attorney regarding the issues involved in the codes of conduct?

2) Can he separate his own views from those of his client or employer?

3) If his views differ from those of his client or employer, in what situations, if any, is he entitled or obligated to make these differences known?

4) What role should the attorney play in presenting arguments of his view to his client or employer? How much freedom does he have in practice in this regard?

5) How do the roles of attorneys in different cultures, for example in the U.S. as contrasted with Europe, differ in regard to the questions above?

And now let me conclude with a question which may be simply worded and deceptively ordinary sounding, but which has layers upon layers of implications for us in the international legal profession and for our clients and employers, that is:

Should the Multinational Enterprises we know, develop and pursue their own philosophy of foreign affairs, and if so, what is the appropriate role of the attorney in helping develop that philosophy?

John H. Jackson