Law Quadrangle Notes

The University of Michigan Law School

Volume 25, Number 3, Spring 1981

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contents

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briefs

Law Library Addition To Be Dedicated In October

Saturday, October 31, 1981, is the date of the formal dedication ceremony for the U-M Law School's new law library addition.

A series of related events is also being planned for October 30 and 31, culminating in the dedication ceremony Saturday afternoon.

All U-M law alumni are being invited to take part in these dedicatory events. In addition, the ceremony will be attended by distinguished judges, leaders of the bar, state government officials, and representatives of various law schools.

While plans are not final at this writing, major events in the dedication program will include a banquet Friday, October 30, at the Lawyers Club, and the dedication program Saturday afternoon.

A third major dedicatory event is a conference on the theme "The Legalization of American Society," to be held at the Law School Friday morning and afternoon, and Saturday morning.

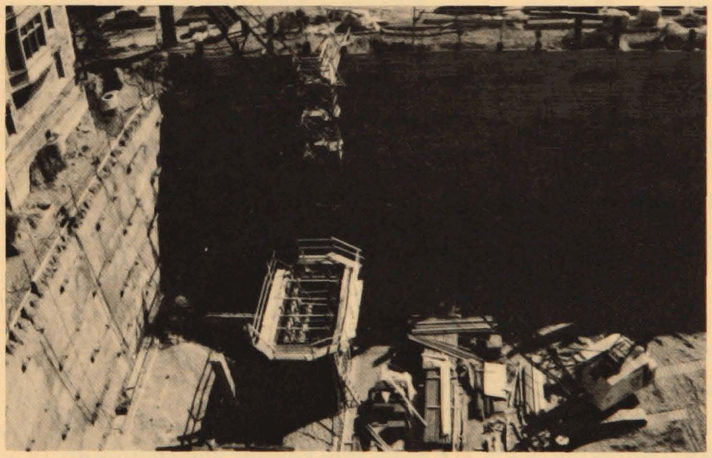
A reservation form on which alumni can reserve dedication banquet tickets and make hotel reservation has been inserted in this issue of *Law Quad Notes.*

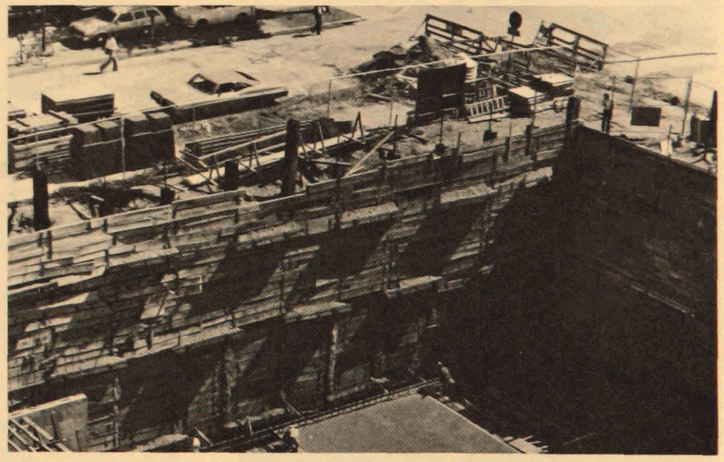
The conference will consider the "rapid expansion of law and governmental regulation in areas of American life not heretofore subjected to legal regulation" or where "legal intervention earlier occurred on a smaller scale," according to U-M law Prof. Francis A. Allen, who heads the conference committee responsible for planning this event.

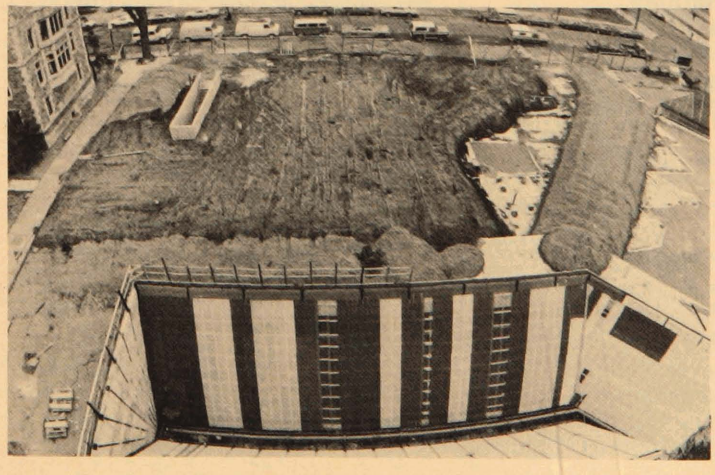
While much attention has already been devoted to the so-called "law explosion"—particularly increased amounts of litigation before the courts and administrative agencies—the conference will be primarily concerned with the causes and consequences of "the transfer of powers of decision from private persons and groups to agencies of the state," according to Prof. Allen.

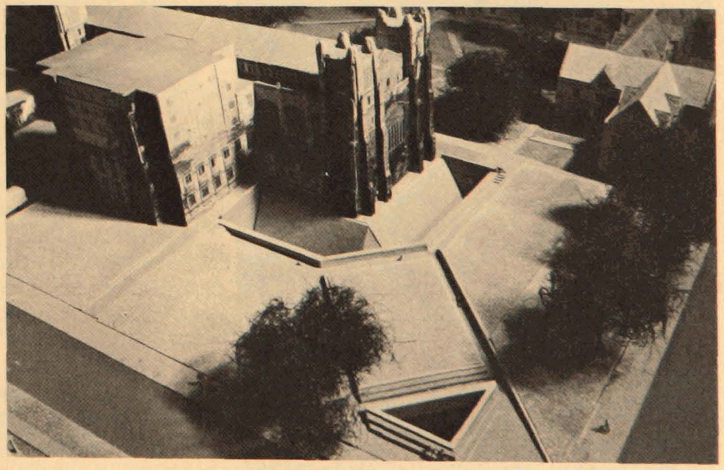
The professor notes that papers prepared for the conference are to be published in a small book that will commemorate the dedication of the library addition.

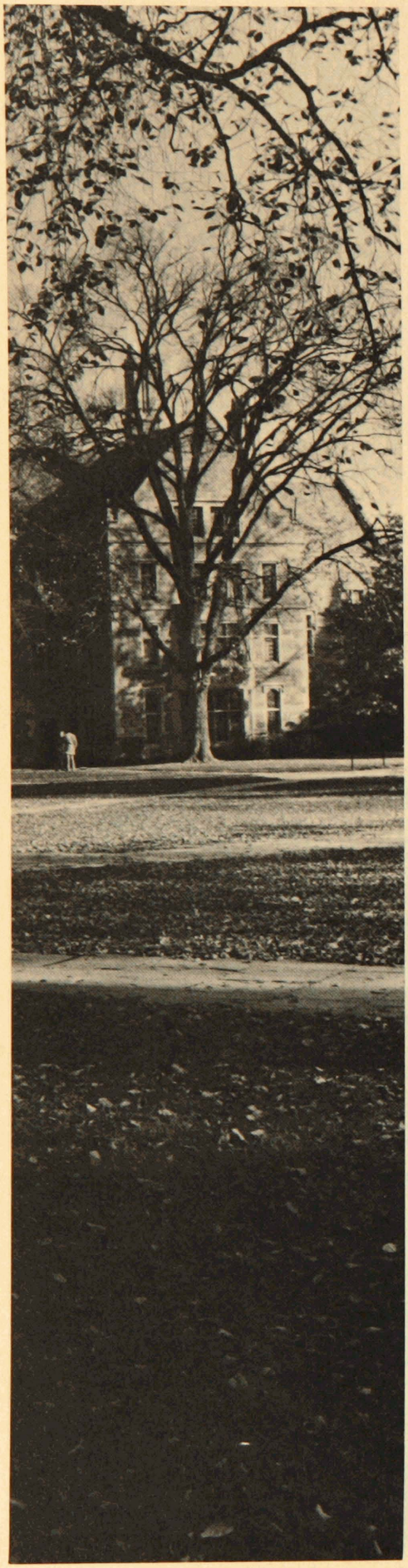
Prof. Allen will open the conference Friday morning with a paper outlining the general scope of the conference. Other conference participants and











their topics are as follows:

—U-M law Prof. David L. Chambers will speak Friday morning on the "legalization of the family." His paper will discuss the transfer of decisionmaking powers for many family issues—such as child care and rights of wives—from the family unit to courts and social agencies.

—Also speaking Friday morning will be Prof. Christina Whitman, whose paper will deal with the elevation of private rights to the constitutional level. The paper will focus on torts cases illustrating the upgrading of rules of private law to constitutional status, which has led to an increase in the "weight of governmental intervention" and a "movement from state to federal jurisdiction," according to Whitman.

—On Friday afternoon, Prof. Joseph L. Sax discusses new forms of legal regulation of economic enterprise. His paper will explore regulatory problems concerning environmental protection, industrial safety, and similar issues.

—Another Friday afternoon speaker is Prof. Peter O. Steiner, whose paper deals with costs and benefits of economic regulation. The paper will consider the de-regulation movement and will evaluate the pros and cons of state intervention in American economic life.

—The Saturday morning speaker is Theodore J. Lowi, senior professor of American institutions at Cornell University, whose paper deals with social and political causes of the legalization of American society. This paper will consider the phenomenon of legal regulation as a whole as it relates to American political and social systems.

The conference will also include commentaries by other scholars. A round-table discussion will follow the final presentation Saturday morning.

The dedication ceremony Saturday afternoon will mark completion of the Law School's $9.2 million underground library addition that is being financed privately from proceeds of the Law School's successfully completed three-year capital campaign.

Situated on the corner of Monroe and Tappan streets, the L-shaped structure extends three levels below the ground and is covered by an open landscaped area. The underground design was selected by the Law School's Alumni Development Committee and the Faculty Building Committee over several alternative designs. A major consideration was that the underground library addition would least conflict with the Gothic style of the existing Law Quadrangle (the style of which could not be duplicated today at a reasonable cost).

Designed by architect Gunnar Birkerts of Birmingham, Mich., the new library addition will accommodate some 180,000 books as well as microfilming facilities, thereby easing overcrowded conditions in the existing Law Library.

According to Beverley J. Pooley, director of the U-M Law Library, and assistant director Margaret Leary, the new 77,000-square-foot addition will contain 62,000 square feet of "finished" space and 15,000 square feet of "unfinished" space that could accommodate future library expansion.

In addition to providing book storage space, the new structure will include space for library staff, student journal offices, carrels and other study areas, a seminar room and a lounge, and computer terminals. The library addition will contain seating for some 353 students, including seats in carrels, around tables, in the lounge, and in balcony areas around lightwells.

Unusual design features include a dramatic 150-foot-long skylight within a moat facing the original Law Library. A smaller, triangular shaped skylight will be at the opposite end of the building.

Library director Pooley is enthused by the energy-saving features of the underground building. Because of the insulating characteristics of the surrounding earth, the building will use less energy for both winter heating and summer cooling.

Kenneth Beaudry, manager of utilities systems for the U-M Plant Department, estimates that the new building will use between one-fourth and one-third of the energy consumed by a comparable above-ground facility. This could mean savings of as much as $50,000 a year in utility costs for the building, says Beaudry. He also notes that heating and cooling are of particular significance for a library facility because constant temperature and humidity levels must be maintained in order to properly care for library books.

U-M Is A Leader In Law Teacher Output

A "disproportionate" number of full-time law teachers in the nation are graduates of a "select" group of law schools, according to a study released by the American Bar Foundation in Chicago.

The U-M Law School rates among the top five of those schools, which produced 33.2 percent of all full-time law teachers, according to the study.

Producers of the largest number of teachers (in order) were: Harvard University, Yale University, Columbia University, U-M, University of Chicago, and New York University.

The study, carried out by Donna Fossum, a Fellow of the Baldy Center for Law and Policy at Buffalo, N.Y., is the American Bar Foundation's first major study of law teachers.

Of full-time teachers on the faculties of almost 160 U.S. law schools, "33.2 percent received their J. D. (Juris Doctor) degrees from one of a group of only five law schools, while an additional 25.7 percent received theirs from one of another 15 law schools," said the study.

"Thus, almost 60 percent of the legal profession's teaching specialists were the products of fewer than 15 percent of the nation's accredited law schools."

The study was based on data on full-time teachers holding the rank of dean, associate dean, and assistant to full professor during the 1975-76 academic year.

"The success of the graduates of this small group of elite law schools in the field of law teaching is undoubtedly a consequence, in part, of the relatively universal manner in which more able students tend to be allocated to higher-quality institutions," the report said.

"This suggests that the graduates of these elite law schools would tend to be the best qualified to teach or practice law, and by hiring graduates of these law schools, institutions would be acquiring the best talent available.

"This success also appears to be the result of the ability of these elite law schools to successfully sponsor their graduates who want to be law teachers. That is, these law schools possess the contacts necessary to effectively place their graduates on the faculties of other law schools . . ."

Wade H. McCree, Jr., Joins U-M Law Faculty

Wade H. McCree, Jr., the U.S. solicitor general for the past three and a half years, has been named to the faculty of U-M Law School.

U-M law Dean Terrance Sandalow said McCree will formally join the faculty in the fall, 1981. The dean said McCree's teaching schedule will lean heavily on his background as judge and solicitor general.

"McCree is one of the nation's most distinguished lawyers," said Sandalow. "Because of his experience, he will serve as an important resource for students. His background makes him unique—there is simply no one else in the country who has his experience."

McCree, 60, was appointed to the solicitor general's post in 1977 by President Jimmy Carter. He stepped down from the post after Carter was succeeded in office by Ronald Reagan.

A practicing lawyer in Detroit from 1948 to 1952, McCree was appointed by Gov. G. Mennen Williams to the Wayne County Circuit Court in 1954, making him the first black man to sit on a Michigan court of record.

In 1961, after winning re-election, McCree was appointed to the U.S. District Court for the eastern district of Michigan by President John F. Kennedy; and in 1966, President Lyndon Johnson appointed him to the U.S. Court of Appeals for the Sixth Circuit.

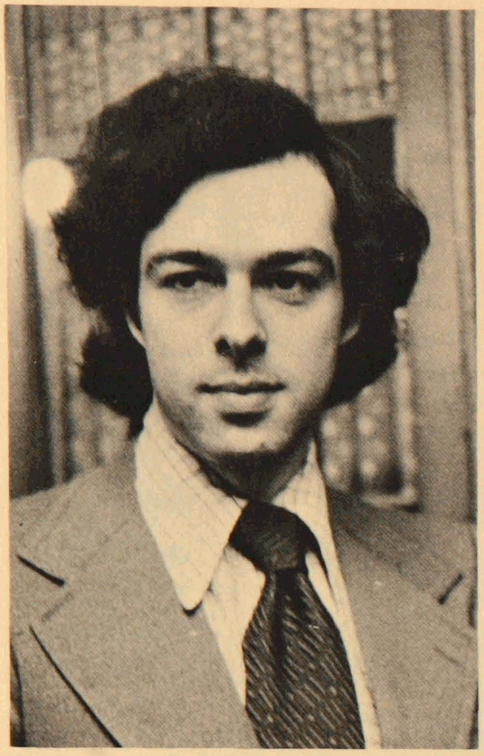
As the U.S. solicitor general, McCree was the nation's top lawyer, formulating and sometimes arguing the government's position in court cases and deciding which cases were to be appealed. Much of his work has been before the U.S. Supreme Court, where he has argued some 25 cases in three and a half years.

Born in Des Moines, Iowa, on July 3, 1920, McCree is a graduate of Fisk University and received a law degree from Harvard Law School. He has received honorary degrees from many institutions, including an honorary Doctor of Laws from the U-M in 1971.

He served four years in the U.S. Army during World War II and was awarded the Combat Infantry Badge and the Bronze Star. In 1956, he was a U.S. delegate to the Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which was held in Stockholm, Sweden.

McCree has served as an adjunct faculty member at Wayne State University Law School, the University

Wade H. McCree, Jr.



Gerald M. Rosberg

of Detroit Law School, and as a law faculty member at the Salzburg Seminar in American Studies, and Indiana University summer school.

He is a fellow of the American Bar Foundation, a member of the board of directors of the National Judicial College, a former director of the American Judicature Society, and was a member of the initial board of the Federal Judicial Center.

He is a member of the American Bar Association's Standing Committee on Judicial Selection, Tenure and Compensation, and the Lawyers' Conference Committee on the Federal Courts and Judiciary.

McCree is married to the former Dores M. McCrary and has two daughters, a son, and a grandson.

Gerald Rosberg Spends Year At State Department

The post of counselor on international law with the Office of the Legal Advisor, U.S. Department of State, generally permits lawyers from an academic setting to spend a year working on long-range, often theoretical legal problems of the State Department.

For U-M law Prof. Gerald M. Rosberg, work in that government post has been far from theoretical. For the past several months Rosberg has been working on some of the intricate legal questions raised by the agreement between the United States and Iran that led to the release of the American hostages.

In particular, Rosberg has been working on the "claims settlement agreement" between the two countries which provides for establishment of a tribunal to adjudicate monetary claims of American citizens and corporations against the government of Iran. As part of the U.S.-Iranian financial settlement, $1 billion in Iranian funds on deposit in domestic branches of U.S. banks is to be set aside in a "security account" to cover awards of the tribunal, says Rosberg. And Iran has committed itself to replenishing the account whenever it falls below the $500 million mark, he notes.

Rosberg, a member of the U-M law faculty since 1974, began in the State Department legal post last June. He is on leave from U-M Law School through June, 1981.

As a result of his State Department experience, Rosberg says he expects to return to law teaching "with greater understanding of the kinds of challenges facing practicing lawyers, and with great appreciation for the skills they develop to meet those challenges.

"Unlike academics who have time to think through problems carefully and often in an abstract manner, the government lawyers in Washington and those in private practice are required to come up with firm and reliable answers on short notice. The positions they take under great time pressures must hold up once the crisis has passed," says Rosberg.

The international law counselor's post in the Office of the Legal Advisor was established some 12 years ago to bridge the gap between the academic community and the federal government.

A number of notable authorities in the field of international law have served in the post, including Stephen Schwebel, newly elected to the International Court of Justice, and the late Richard Baxter, who also served on that court.

A 1968 graduate of Harvard College, Rosberg went on to receive a law degree from Harvard in 1971, and then served as a law clerk for Chief Judge David L. Bazelon of the U.S. Court of Appeals in Washington, D.C., and for Justice William J. Brennan, Jr., of the U.S. Supreme Court.

After working for the Washington law firm of Covington & Burling, Rosberg joined the U-M law faculty in 1974. He has taught international law, civil procedure, conflict of laws, copyright law, and the law of nationality and immigration.

Some U-M Students Espouse More Than Just The Law

[Editors Note: *For this story noting the rise in the number of law students married to other law students, law school student writer Laura R. Moseley interviewed seven married couples who have been jointly pursuing their law degrees at Michigan.]*

The phenomenon of the married law student is nothing new. But a growing number of them are married to other law students, and in some cases the vows are taken during the

time of their legal education.

While statistics are not available in terms of a national trend, evidence at U-M Law School indicates that the law school marriage phenomenon is much more common today than in the past.

Allan D. Stillwagon,assistant dean for admissions, notes the rise in law school applicants who quite fearlessly insist that their unmarried "significant other" be considered for admission as well as the applicant's individual candidacy.

"Of course, we get the person, both male and female, who gives the ultimatum that either they and their friend are accepted or neither candidate, if accepted, will attend. This type of situation never occured, even 10 years ago."

Stillwagon continues, "The entering married couple is another dimension of this expanding admissions experience. Many married couples do not announce that they are married to each other when concurrently applying. It is usually in the acceptance process that we discover that we have accepted both partners or rejected one of the marital partners. If we are initially aware of the applicant's marital status as it relates to another applicant or to a student currently enrolled in the Law School, some effort and consideration is given to the married couple or individual spouse applying. However, there is no formal Law School policy in this area."

This year at the U-M Law School, there are at least seven married couples pursuing the J.D. degree. Some of these students are also completing requirements for a Ph.D. or master's degree from another academic program within the University.

What type of law student can blend the rigors of the first years of marriage with the discipline and other demands of the legal experience? What personality traits allow the sense of commitment and challenge that being married to another law student dictates?

Karen and Peter Shinevar: Karen and Peter Shinevar met while he was a summer associate at Jones, Day, Reavis & Pogue in Washington, D.C., and Karen was federal summer intern at the National Aeronautics and Space Administration. The summer dating turned to serious courtship that fall when Karen entered her first year at the U-M Law School. The two Phi Beta Kappas surprised parents and friends by marrying in law school.

"My parents think the world of Pete, but they were afraid that I would not complete my own career objectives after getting married," commented Karen.

Karen and Peter Shinevar

Peter, seeing no problem with a two-career marriage, cited his mother's and dad's independent careers as a good example of how a two-career marriage can successfully survive.

"If you can find the time for marriage, you seem able to find the time for everything else too," observed Karen.

Karen and Peter are not only married law students, but each has been extremely active in Law School activities. Peter, who received his J.D. degree in August, 1980, is anticipating a Ph.D. degree in economics in August, 1981, from the University. A former associate editor and senior editor of the *Michigan Law Review*, Peter Shinevar will begin a judicial clerkship with Judge Harry T. Edwards of the U.S. Court of Appeals for the Washington, D.C., Circuit. Karen, former associate editor and notes and comment editor of the U-M *Journal of Law Reform*, received her J.D. degree in May, 1981, and intends to practice law in the Washington, D.C., area with a small firm.

Says Karen, "Where to locate geographically and whose preference comes first is a major consideration for married law couples. We're moving to the D.C. area because that's where Pete wants to be. I know I want to work for a small firm outside of the D.C. area, maybe a Maryland law firm.

"It's because our law career goals are different that we miss the competitive friction potential of a law

Diane and Jeff Lehman

school marriage. Pete is interested in a large firm practice and I'm not," concluded Karen.

Diane and Jeffrey Lehman: Jeffrey Lehman began college hoping to become a math professor but during his junior year at Cornell, he decided to consider career alternatives spanning computer research to the law.

"I felt that pursuing scholarship in math was just too solitary and lonely. Both of my parents are lawyers so I had a realistic view of the legal practitioner." Lehman continues, "Diane and I met at Cornell while undergraduates. She's known she wanted to practice law since a jurisprudence course in high school."

"Yes, but I've also had other interests including a family-centered life," Diane interjects. In addition to her law degree, which she expects in May, 1982, she is working to receive a Master of Public Policy degree from U-M with a certificate of specialization in gerontology.

Diane and Jeff concur in appraising the law school environment for newlyweds: "The law school years allow a couple time to adjust and adopt in a fairly safe and stable environment. Your real world problems and constraints can be responded to under a controlled time frame, whereas once on the job, the marriage is subject to the uncontrollable demands of career and other outside influences."

Jeffrey, former editor-in-chief and associate editor of the *Michigan Law Review*, received his J.D. degree and a master's degree from the U-M Institute of Public Policy Studies in May, 1981. He will be a law clerk for Chief Judge Frank M. Coffin of U.S. Court of Appeals for the First Circuit (Portland, Maine) after graduation.

Yet Jeff continues, "Law school poses different stresses than encountered under regular marital conditions because the law school experience is a 24-hour ordeal. You have to be extremely flexible."

Diane adds, "Both partners face maximum stress during exams while in the real world, the individual stress times usually don't occur simultaneously."

Diane and Jeff mutually note, "We've taken classes together and really enjoyed it. But some married law couples feel uneasy in the same class. They feel the competitive pressure is just too much. Academic competition within a marriage is awfully destructive. If you've got two job-oriented, potentially high earning spouses, the law marriages seem to work out if the partners' interests are in different legal areas."

Sheryl and William Powers: "We got married while we were both working on master's degrees at The University of Michigan after having met and dated during our undergraduate days at Michigan," commented Sheryl Powers in evaluating being a first-year law student who is married to a graduating law school senior.

"It's great being married to a law student because he understands that you have to study first. I've known both worlds. Being a wife to a law student without being there myself and being a law student, too. Being the wife who is also the law student is less frustrating and much easier on the personal relationship.

"Now, instead of me dying to go out and not understanding why he has so much studying, we both study—independently and together. And when we can grab an evening off it's a rich and mutually appreciated gift."

Bill Powers reflects, "I didn't consider a legal career seriously until just before applying to law school. Sheryl's interest began as an undergrad and continued in her career as a clinical social worker. My great interest in politics prompted the law school choice.

"When friends learned that Sheryl was beginning law school and scheduled to attend the same law school with me, we received dire predictions about divorce and warnings that seven out of ten law school marriages end in divorce. But there is a distinct and profound

difference in the stress on a relationship when only one of the partners is in law school. It's been our experience that when both partners are in law school, it can actually be fun."

Bill received his J.D. degree this past December and anticipates receiving a doctorate in economics in May, 1982, from Michigan. Sheryl anticipates receiving her J.D. in May, 1983. Prior to law school, she received her Master of Social Work in clinical casework and worked professionally as a clinical social worker.

Sheryl declares, "Finances. That's the real marital problem while in law school. We've been a working couple for several years. And then, suddenly you're back in school and you have to fill out financial aid forms requesting information about the financial status of your parents even though you haven't received money from your parents in years.

"Professional graduate schools have to start accommodating the proven financial responsibility of the returning student who has already experienced career success. It's demeaning to be treated financially as a child when a student has a proven and commendable financial history."

Prior to and during law school, Bill was a policy analyst for the U.S. Environmental Protection Agency; a graduate teaching assistant at the U-M Institute of Public Policy; former director, programming services of the U-M Office of Student Programs; an assistant to an economist, Whirlpool Corporation; and assistant econometrician, Clark Equipment Corporation.

Margaret and Phillip Holman: Phil, the certified public accountant, and Margaret, the engineer, met, fell in love, and got married while at the Michigan Law School. Phil, a December Law School graduate, works for a law firm in the Renaissance Center in Detroit. Margaret received her J.D. degree this May. Margaret is postponing an active law career for several years but expects to pursue part-time legal employment so that maximum time is spent with the Holman's six-month-old baby.

Says Margaret, "The semester I was pregnant, I got my highest grade point average—a 4.0. I was so determined to have a healthy baby and a successful semester that I was more organized and prepared than before or since." Margaret continues. "The following semester when the baby was born however, I only took one course."

Phil adds, "We have a beautiful baby whose presence adds to our life. Being newlyweds and new parents in law school is challenging. But because we worked before entering law school, we had an honest sense about what marriage and the law would require. And instead of the baby creating more problems, he has created new joy.

"Finances, of course, remain a continuing concern. We've gotten by so far thanks largely to student loans."

Norma and Stewart Schwab: Norma and Stewart were high school sweethearts in Chapel Hill, N.C. They got married shortly after he graduated from Swarthmore and she graduated in nursing from the University of North Carolina at Chapel Hill.

"The first year of marriage is the only time that we haven't been students. But, I was working as a nurse when Stewart started at Michigan Law School. When I applied to law school afterwards, my father said I would forget thoughts of a law career the minute I got pregnant," Norma smiles. "Well, Justin is two years old and I'm graduating from law school this May with a job in sight. Actually, my father, the professor, and my whole family is quite pleased with my legal efforts now."

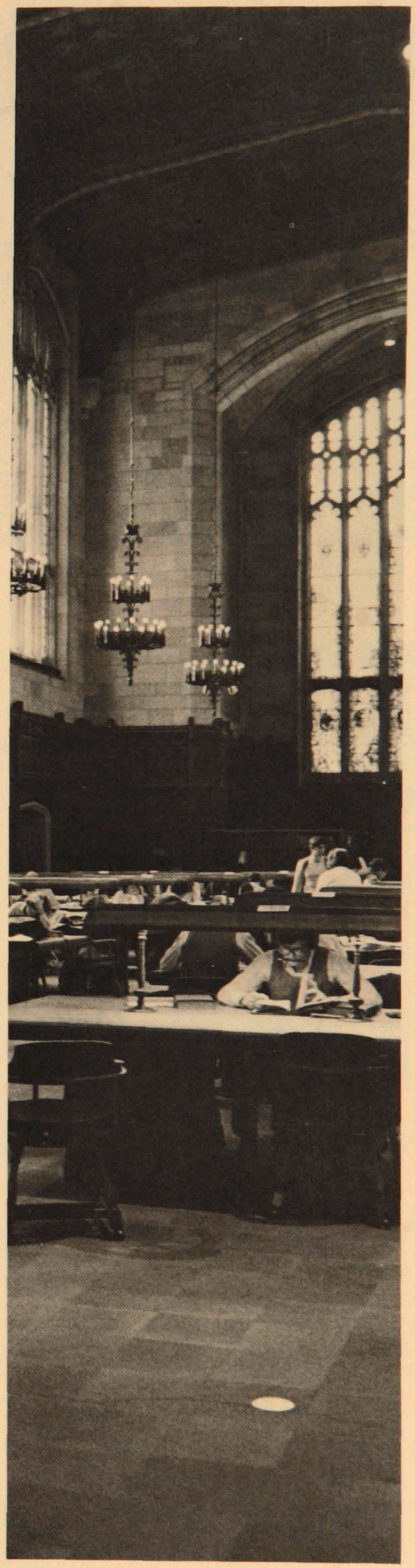
Norma began law school at Wayne State University in Detroit and then transferred to U-M Law School. She started at Michigan Law School while pregnant and gave birth to Justin on a Wednesday, returned to classes that Friday and took an exam that same day.

Stewart advocates, "Graduate school is a great time to have a child because as a father you actually get to know and play with your child and emotionally grow with your wife and child. The pressure and sweat shop hours of a beginning law career limits this type of time with a family."

As to Norma switching from nursing to law, Stewart comments, "I knew she was dissatisfied with nursing. I wanted her to try something interesting. Law seemed a natural choice."

Says Norma, "People would warn us of the competition that might arise between us; but since we're headed in totally different legal directions, it doesn't apply."

Stewart begins a judicial clerkship with the Honorable J. Dickson Phillips, U.S. Court of Appeals (Fourth Circuit) sitting in Durham, N.C., and Norma begins work with a solo legal practioner in Chapel Hill whose general practice includes food and drug regulation law. Stewart, a former note editor of the *Michigan Law Review*, expects to receive his Ph.D. in economics this year from the University.



Daniel Gibbon and his wife, Jamie Bischoff

Jamie Bischoff and Daniel Gibbon: Married for two and a half years, Jamie and Gibbon (he's affectionately called by his last name) were headed in different career directions before law school. Gibbon continues his interest in natural resources through the study of environmental law and also anticipates a master's degree in natural resource policy from the U-M School of Natural Resources this May. Jamie exhibits her skills as a former assistant editor, Charles Scribner's Sons (New York), as copy editor for the law student newspaper weekly, *Res Gestae*.

"When my parents realized that I was going to law school, my mother asked me why I couldn't just be satisfied with marrying a lawyer. She wanted to know why I wanted to be a lawyer too. My parents always wanted me to be a writer. But even when I was a kid my nickname was 'the D.A.' because I always interrogated everyone unmercifully. Today, everyone is quite supportive and happy with our career decisions," commented Jamie.

Gibbon notes, "My parents were delighted that I selected the law since my family has a tradition of several generations of lawyers and my parents thought for some time that I might not select the law for a career.

"We had originally decided it would be better for our relationship if we went to different law schools. I started at Wayne State University Law School, but the physical distance added unnecessary stress to our relationship, so I applied to transfer to Michigan. With both of us at the same school, the pressure lessens and we are able to reinforce each other in terms of study, discipline and commitments."

Jamie and Gibbon feel they have licked the competitive problem by recognizing each other's strengths and weaknesses. "One of us test better and the other is better at the actual analysis and understanding. Together, we complement the learning experience."

Jamie says, "We're taking two courses together this semester and it's really been great. The best study aid is going over the material together."

Gibbon adds, "There are some problems when interviewing for positions with law firms. Most law firm interviewers aren't prepared for the law student married couple interviewing at their firm. If it's a small city like the place Jamie and I prefer to work, the firm usually only allows one marital partner to work in that city and the other partner must find a job elsewhere. This summer Gibbon and Jamie will be living in a place equi-distant from Santa Fe and Albuquerque, N.M., the locations of their summer clerkship assignments.

Erica and Jon Lauer: When Erica and Jon met as summer starters in law school, they were engaged. But not to each other. For some time, they thought of their friendship as nothing more than being "great pals." Law brought them together and the distance of responding to interview "flybacks" helped them see their relationship clearly. Both sets of parents were "overjoyed" with the new engagement announcement.

Sometimes the Lauers take the same classes, sometimes they don't. Having gone through the first-year courses together, the daily competitive factor appears non-existent.

"Interviewing with law firms for summer clerkships is a different matter. We split the list of firms in a city we're interested in down the middle and I take one part of the list and Jon takes the other part. Once, through error, we ended up interviewing at the same firm and actually both of us got an offer from the firm. But we don't want to work at the same firm," states Erica. "That could cause unnecessary problems."

"While Jon had to cope with decisions over whether to follow his father's footsteps as a political science professor, I entered law school making the conscious decision not to attempt to practice law in Lansing right after graduation for fear of being compared to my dad. As a couple, we prefer to explore legal opportunities

in the Midwest. If I were single, I'd try Milwaukee. But as a couple, we will choose a city we both like a lot."

Jon adds, "We both work constantly so we try to arrange our class schedule so that between classes and part-time employment, we have time for each other. Dean Sue Eklund is quite helpful in this area. She also recognizes that new procedures could be developed for financial consideration and loan opportunities for married couples in law school."

In terms of competition, Erica and Jon share these observations: "How you're judged in law school does not necessarily reflect how well or poorly you will perform in the real legal arena. Last summer, students who had great grade point averages sometimes gave mediocre legal performances in the actual law firm and some Michigan law students with average grades did exceptionally well in the real world of law. Since being a good lawyer centers upon being able to deal with people and we don't really learn too much about that in law school, we feel the false sense of grade competition must not affect our personal relationship or how we view the world."

All couples cautioned students contemplating marriage to other law students to consider their financial resources carefully; legal goals; and whether the relationship as it presently exists is stable, flexible, and filled with enough humor to withstand the effects of being a "pioneer" couple. Geographic location choices for legal practice and whether "we eventually want kids or not" should be issues to be discussed before rather than after marriage, they say. Overriding all other considerations, couples placed excessive individual competition as the most detremental element in a law student marriage.

Married couples in law school felt they learned more, had a better support system, and learned earlier how to cope in any situation by being married to a law student.—*Laura R. Moseley*

Erica and Jon Lauer

Joseph Sax Receives Environmental Awards

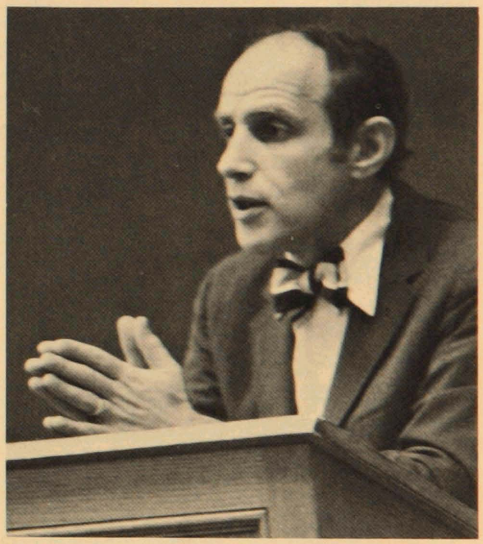
Environmentalist Joseph L. Sax, a professor at U-M Law School, recently received two environmental awards.

He received the 1980 "Resources Defense Awards" from the National Wildlife Federation at the organization's 1981 annual awards banquet in March in Norfolk, Va.

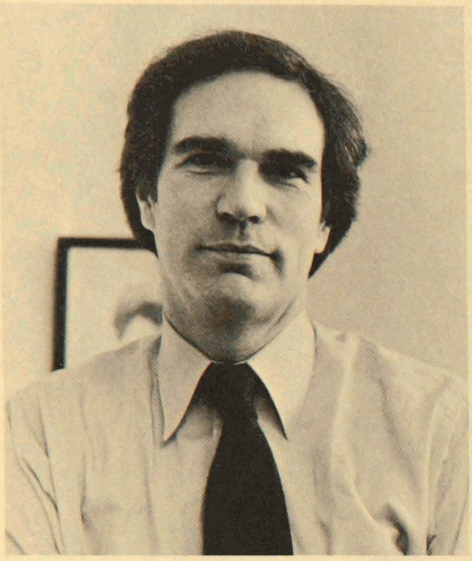
The award citation noted that Sax "was principal author of the Michigan Environmental Protection Act, considered to be one of the strongest and most forward-looking pieces of conservation legislation in the country."

Sax "also helped pioneer the creation of a joint law and natural resources degree at The University of Michigan, and has established a legal externship program that sends high quality students to work without cost for conservation organizations," said the National Wildlife Federation.

Sax joined a group of 12 other individuals and organizations named by the federation to receive "Connie" awards for achievement in the conservation field. Other winners included former Secretary of the Interior Cecil D. Andrus who was named "Conservationist of the Year" by the foundation; and television newsman Walter Cronkite who was honored for his journalistic contributions to the nation's better understanding of environmental problems.

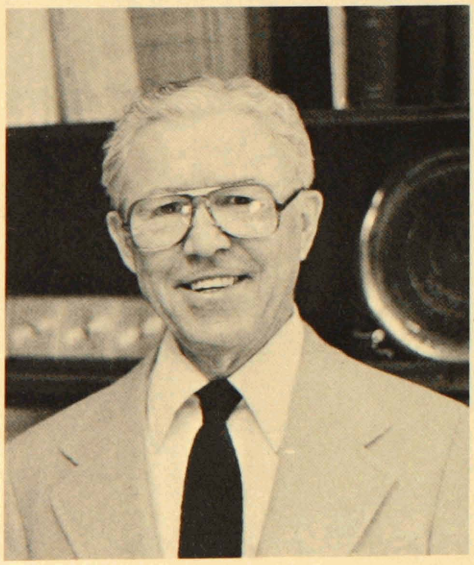


Joseph L. Sax



Joseph Vining

Thomas A. Green



Roy F. Proffitt

In March, Prof. Sax was also named "Conservationist of the Year" by the Detroit Audubon Society in recognition of his "work in environmental law and wildlife protection."

Sax's 1970 Environmental Protection Act was the first law giving citizens the undisputed right to bring polluters to court. The act has been copied by other states, and its intentions are reflected in federal environmental legislation.

In 1970 Sax also authored the book *Defending the Environment*. His most recent book is *Mountains Without Handrails—Reflections on the National Parks* (University of Michigan Press), in which he argues for continued preservation of our wilderness areas rather than adopting an "amusement park" philosophy for our national parks.

A graduate of Harvard University and the University of Chicago Law School, Sax has been a U-M faculty member since 1966.

Vining Inaugurates Windsor Lecture

Prof. Joseph Vining of the U-M Law School delivered the inaugural lecture in a new visiting lecture series at the University of Windsor in Canada.

Vining discussed "The Bureaucratization of the Appellate Courts" on March 26 in the University of Windsor's first Distinguished Scholars Lecture on Access to Justice.

In the lecture, Vining questioned the trend toward larger staffs on U.S. courts and the increased responsibilities of those staff members—principally law clerks—in the writing of judicial opinions.

Staff-written opinions of the courts, said Vining, may come to be viewed by lawyers in the same light as staff-written opinions of federal administrative agencies, many of which are not accorded much weight because "lawyers know who wrote them."

Thomas Green Gives UCLA's Clark Lecture

Prof. Thomas A. Green of the U-M Law School was a featured lecturer in the William Andrews Clark Memorial lectures Feb. 26 at the University of California at Los Angeles (UCLA).

Green delivered a lecture along with Prof. Richard H. Helmholz of Washington University, St. Louis, on the topic "Community Judgment and Freedom of Speech: the Role of Juries in 17th and 18th Century Trials for Libel and Slander."

Both Green and Helmholz hold dual professorships in the law schools and history departments at their respective universities.

The topic of Green's lecture at UCLA was "The Jury, Seditious Libel, and the Criminal Law." Helmholz's lecture was titled "Civil Trials and the Limits of Responsible Speech."

Proffitt Speaks At "New Deans Workshop"

Roy F. Proffitt, law professor and director of alumni relations at the U-M Law School, addressed law school deans at a "New Deans Workshop" at the February mid-year meeting of the American Bar Association in Houston.

Proffitt spoke on "Establishing a Successful Development Program" and referred to the success of the Law School in waging a major capital campaign for the construction of a law library addition and meeting other school needs.

Proffitt said continued contact with alumni through school magazines, an alumni directory, continuing legal education programs, and alumni gatherings were important in keeping alumni involved with the school. The professor also suggested that alumni should be directly involved in all phases of any development effort.

U-M Environmentalists Recommend Against Toxic Waste Liability

A study by the Environmental Law Society (ELS) at the University of Michigan Law School points to a new potential victim of hazardous wastes: the taxpayer.

Focusing specifically on the hazardous waste problem in Michigan, the society noted that "under state law, the government may assume ownership of closed hazardous waste dumpsites, and along with ownership will come liability. The state may be sued for victims' injuries and property damages."

Sanford Lewis, coordinator for the student law group, noted that pending suits stemming from toxic chemical

waste problems at New York's Love Canal, for example, total more than $15 billion.

"That is about one and a half times Michigan's annual state budget. A state government's loss of even a small fraction of that amount would be disastrous," said Lewis.

In the past, noted Lewis, toxic waste sites in Michigan have been abandoned and companies have gone bankrupt. As a result, no one was left responsible to answer lawsuits or to carry out long-term waste cleanup.

But Michigan's recent Hazardous Waste Management Act is intended to prevent such problems by giving the state Department of Natural Resources responsibility for long-term maintenance of toxic waste sites, and also liability in the event of legal action, noted ELS.

In a letter to DNR director Howard Tanner in April, 1981, the ELS urged a moratorium on such transfers of ownership of the closed sites in order to avert possible costly lawsuits against the state.

"While maintenance and liability are serious problems in the case of former hazardous waste sites, the transfer of liability could jeopardize the fiscal future of the state," said the student group.

In the letter, the ELS questioned why the state should assume risks "thought to be too severe for the federal government to assume."

The student law group noted that the recently enacted national "Superfund" Act allows transfers of liability for closed sites to a federal trust fund, but that the Environmental Protection Agency is authorized to veto the transfer of unacceptable sites.

"The state would probably accept liability only for sites rejected by the EPA—in other words, the environmentally unsound sites. And the state would be exposed to unlimited liability, as contrasted to the limited liability of the federal government," said Lewis.

In addition to avoiding lawsuits against the state, the ELS recommends that state laws should be amended to provide more adequate insurance protection for neighbors of toxic waste sites in the state.

Besides Lewis, members of the ELS' hazardous waste liability project included Melissa Rasman, Stephen Nolan, Gary Ekman, Roger Freeman, Joseph Van Leuven, and Alan Van Kampen.

Visiting Professors Have Varied Expertise

Soviet law, U.S. family and welfare law, labor and administrative law, and civil procedure are among the specialties of visiting professors at the U-M Law School during the winter 1981 school term.

Christopher Osakwe, Tulane University law professor and director of the Tulane Institute of Comparative Law, has been teaching a course on socialist legal systems and a seminar dealing with the law of international organizations. He is also serving as a fellow of the U-M Center for Russian and East European Studies.

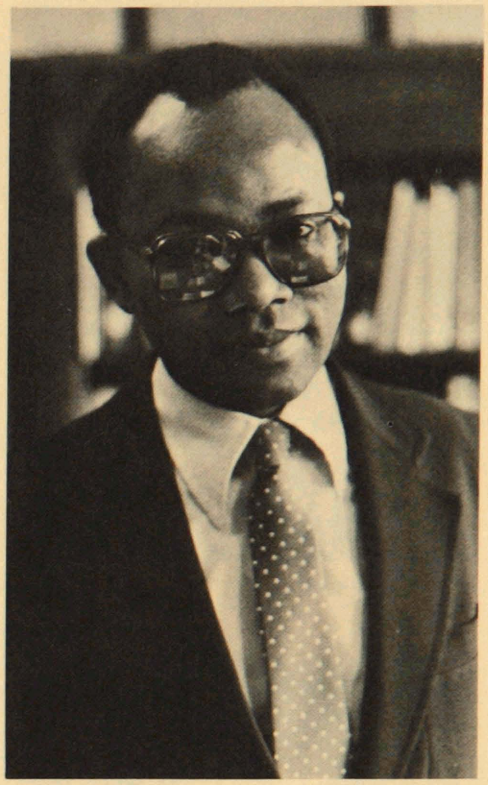
A Nigerian by birth, Osakwe was raised in England as the son of a member of the Nigerian diplomatic service. He received his college degree from Moscow State University (Lomonsov) in U.S.S.R. with honors in 1966. He also received a Master of Laws and the Doctor of Laws degrees from Moscow State University, and holds a J.S.D. degree from the University of Illinois School of Law. Prof. Osakwe became a naturalized American citizen in 1972.

Fluent in Russian, French, and German, and also schooled in Greek and Latin, Prof. Osakwe is a prolific scholar in the areas of international organizations and Soviet law. His publications include the book *The Participation of the Soviet Union in Universal International Organizations: A Legal and Political Analysis*, as well as many articles in law reviews and other scholarly journals.

"Though it has been more than 63 years since a new legal system was established in Soviet Russia, the Western world has not produced a single treatise on Soviet law. I hope my research will help fill that void," said Osakwe.

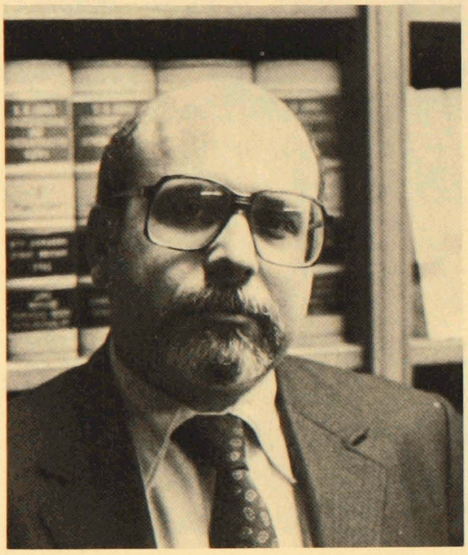
Currently, he is finishing a treatise on Soviet law for non-law experts to be published as part of the St. Anthony's College (Oxford) Special Studies Series; he is also completing an analytical text on comparative legal systems for the West Publication Nutshell Series. Osakwe's major writing challenge is a comprehensive treatise on Soviet law that he has been working on for several years. Prof. Osakwe estimates he is midway through the project.

This summer Osakwe is to be visiting professor of law at Moscow State University (Lomonsov) Law School, representing the United States through the International Research and Exchange Board Senior Scholar Exchange Program.

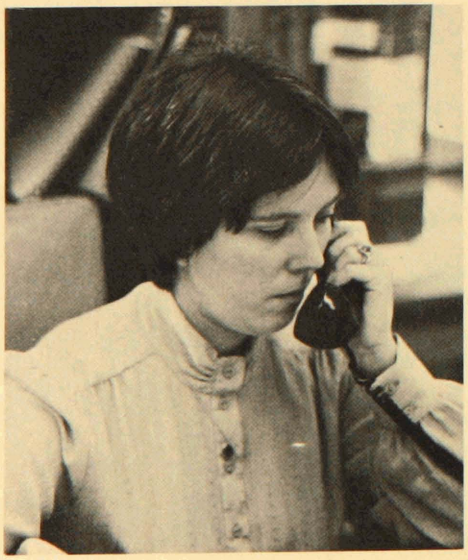


Christopher Osakwe

Harry D. Krause



Matthew W. Finkin



Mary Kay Kane

Asked to compare European law students with their American counterparts, Osakwe observed: "Most European law students enter law school without the intention of practicing law upon graduation. They view law as a humanizing discipline and as an indispensable ingredient of a good liberal education. Therefore, they freely take culturally enriching courses such as Roman law, jurisprudence, comparative law and legal history.

"By contrast, the typical American law student already has a B.A. degree and views law school as a stepping stone to a profession. The American law student traditionally takes 'bread and butter' courses and sometimes misses that wonderful advantage law school offers as a last chance for pure scholastic enlightenment. I personally feel that courses in jurisprudence, comparative law, and legal history should be a mandatory part of an enlightened lawyer's education."
—*Laura R. Moseley*

Harry D. Krause, professor of law at the University of Illinois, has been visiting U-M professor this winter in the areas of family law and welfare law.

A legal consultant, teacher, and writer in the field of family law for 15 years, Krause is author of the recent book *Child Support in America* (Michie Bobbs-Merrill). The book offers an up-to-date review of the laws and issues relating to child support, legitimacy, and paternity.

A member of the Council of the American Bar Association Section on Family Law from 1972 to 1977, Krause served as chairman of the Illegitimacy and Paternity Committee and the Committee on Social Legislation and Family Law.

He is on the board of editors of the *Family Law Quarterly* and served on the advisory board of editors of the *American Bar Association Journal*. He was vice president of the International Society of Family Law from 1973 to 1977 and now is a member of the group's executive council.

Since the early 1970's, he has served as consultant on child support issues to the Children's Bureau and the Office of Child Support Enforcement of the Department of Health, Education and Welfare (now Health and Human Services), and to the National Institute for Child Support Enforcement. He was consultant to the Congressional Research Service and the U.S. Senate Finance Committee when the federal child support legislation of 1975 was prepared.

Krause is draftsman of the Uniform Parentage Act of the Commissioners on Uniform State Laws, and is co-author of the AMA-ABA guidelines on blood typing in paternity cases.

He is the author of more than 30 articles and reports and five books in the family law field. Krause is an alumnus of the U-M Law School's class of 1958.

Matthew W. Finkin has been serving as visiting professor of labor law and administrative law at the Law School. A professor at Southern Methodist University Law School, Finkin is considered a leading expert in labor relations law regarding higher education and professional employees, particularly involving issues of faculty collective bargaining and tenure.

Prof. Finkin received his undergraduate degree from Ohio Wesleyan University, his law degree from New York University Law School, and the LL.M degree from Yale Law School. Since 1975, he has been a member of the Panel of Labor Arbitrators, American Arbitration Association. He is the former general counsel, American Association of University Professors, and former associate editor of *Human Rights*, journal of the ABA Section on Individual Rights and Responsibilities. Finkin's many publications include analyses of the legislative issues in public sector collective bargaining and the role of the National Labor Relations Board in higher education. His comments on the current state of higher education: "Higher education is in an economic depression that will remain severe for another decade. It is possible that this depressed condition won't change appreciably until after the year 2000. We may well lose a generation of scholars similar to what happened during the 1930's. There just won't be jobs for young people who want to become academicians."

Prof. Finkin has recently completed an article dealing with the issue of whether an individual employee protesting his working conditions is unprotected by the NLRA Act merely because the employee is acting alone. The co-author is Prof. Robert Gorman of the University of Pennsylvania Law School.

A graduate of U-M and Michigan Law School, Prof. Mary Kay Kane has been teaching a first-year civil procedure course as visiting professor here this winter.

Professor of law at Hastings College of Law, Kane is involved in the writing of the second edition of the Wright

and Miller multi-volume treatise *Federal Practice and Procedure*. She is updating volume 10 dealing with summary and declaratory judgments, costs, and default. In addition, she will be updating and writing the class action volumes. Working closely with Prof. Arthur R. Miller for the past 10 years, Prof. Kane co-authored the "pocket supplements" to several Wright and Miller's volumes since 1975.

In a project begun under the auspices of the U-M Law School in 1971, Kane became co-director of the National Science Foundation project on privacy, confidentiality, and social science research data with Prof. Miller, formerly a U-M law professor. The project continued under her co-direction at the Harvard Law School, where Miller now teaches. Kane also has been adviser to the United States Privacy Protection Study Commission concerning research data.

Kane worked with the U-M Law School Institute on Consumer Justice evaluating consumer class actions. Her publications include articles on civil procedure, monographs concerning privacy, *Civil Procedure in a Nutshell* (West Publication, 1979), and *Sum and Substance on Remedies* (Creative Education Services, 1981).

During the fall 1980 academic term, the following visiting professors taught at the U-M Law School:

Susan F. French, law professor at University of California, Davis, taught in the areas of property and trusts and estates.

Roland L. Hjorth, professor at University of Washington School of Law, was visiting teacher in the areas of tax and federal tax policy.

Summer, 1980, visiting law professors at U-M were as follows:

Prof. Donald G. Hagman of UCLA taught in the area of public control of land use.

Prof. Donald G. Marshall of University of Minnesota Law School taught in the area of torts.

Prof. John C. Weistart of Duke University Law School taught contracts law.

Three U-M Scholars Do Fellowship Research

Three U-M law professors—Peter Westen, Philip Soper, and Lee Bollinger—are pursuing research under separate fellowship awards.

Prof. Westen is recipient of a 1981 Guggenheim Memorial Foundation Fellowship to explore the relationship between the law of contracts and the law of criminal punishment, specifically relating to plea bargaining. A major focus of the research, says Westen, is the apparent shift in law and morals from an emphasis on litigation to an emphasis on negotiation.

Westen comments: "The hypothesis underlying my inquiry is that while the law of contracts and the law of criminal punishment may merge in practice such as in the law governing the treatment of 'mistaken' plea bargains, the merger may be unstable, because the normative premises underlying negotiations may be fundamentally incompatible with the normative premises of punishment.

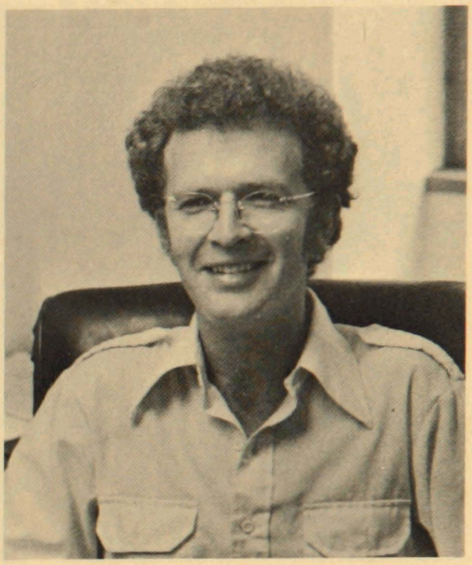
"The real problem, I believe, is that people sense that the morality of contractual negotiation is simply inconsistent with the morality of punishment. Successful negotiation is based on the assumption that the contracting parties are both free and equal—free in a sense of being able to accept or reject the offered terms of settlement; equal in the sense of having an identical voice in accepting or rejecting the agreement."

Westen continues: "Punishment, on the other hand, is premised on the assumption that the guilty defendant is neither free nor equal. Instead, the guilty defendant is an outcast, a person worthy of blame and deserving to be deprived of liberty. Put bluntly, punishment that is inflicted pursuant to a written and mutually negotiated agreement ceases to be 'punishment' as we understand it."

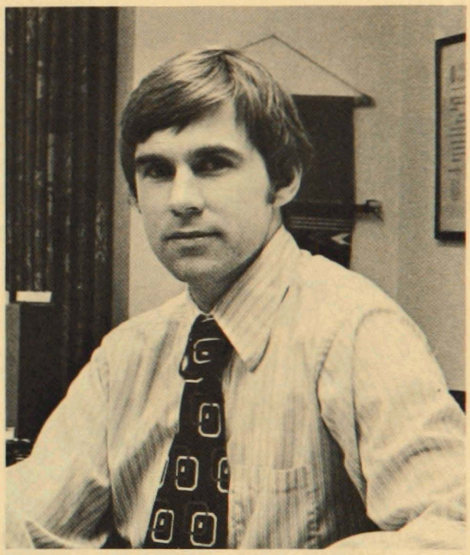
Prof. Philip Soper, under the auspices of the American Learned Society fellowship, is pursuing research concerning the relationship between legal and political theory; he is writing a book which probes "the obligation of theory and moral duty."

"I want to develop a systematic account of the idea of law that will help clarify the major philosophical issues that arise when one attempts to distinguish moral, coercive, and legal forms of social control," says Soper. He cites the problem in legal theory as "the increasing difficulty to explain how legal philosophy is relevant for those within the legal system such as the litigant and the prosecutor."

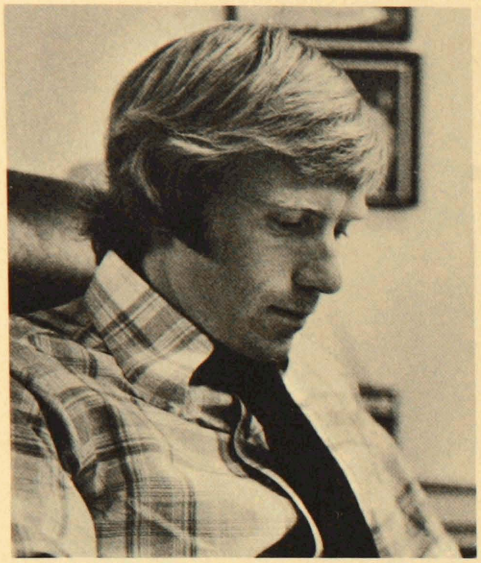
Soper observes that scholars usually write about either legal theory or political theory and rarely does a scholar attempt to treat political and legal theory within the same text, as Soper's work mandates. Analyzing the legal theory concern with "what is law" with the political theory concern



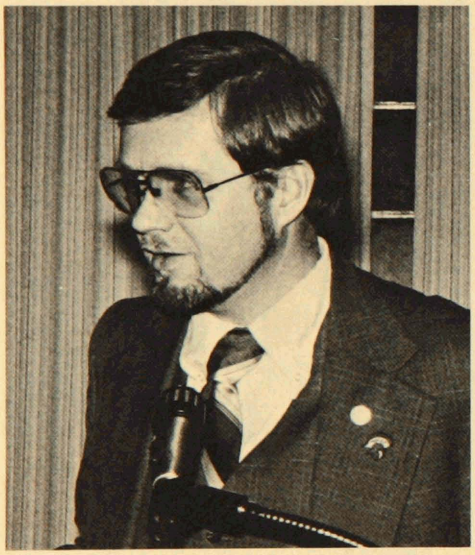
Peter Westen



Philip Soper



Lee Bollinger



State Rep. David C. Hollister, at the awards ceremony (State Sen. Robert Vanderlaan was unable to attend the Feb. 21 ceremony due to a Washington commitment)

requiring legitimacy of the state obligation to obey the law, Soper states," The view that I plan to develop straddles the gap that divides traditional positivist and natural law theories. I hope to demonstrate that the existence of a legal system is conceptually dependent on the good faith claim by officials that the system is just."

Prof. Lee Bollinger is a Rockefeller Foundation recipient for research on First Amendment freedom of speech and press issues. Bollinger's central thesis is that the inclination to approach issues through a constricted vision of a single model or paradigm must be avoided.

"The simple fact is that most First Amendment scholarship tends to be almost entirely derivative of the traditional model of analysis. With the extraordinary changes that are apparently soon to occur in our methods of communication, it seems especially important to rethink some of the critical assumptions which have been handed down to us."

Bollinger continues: "We tend to view our paradigmatic answers as permanent solutions. The better approach is to recognize that ambivalence has a positive role to play within the legal system; that it can lead to more creative solutions to our problems, and since it reflects our true feelings about many issues, ambivalence provides us with more persuasive, and therefore, more enduring resolutions of issues."

Prof. Bollinger sees a major research challenge in attempting a re-focus on the debate over whether people should be tolerant of extremely radical speech. Postulating that extreme, radical speech may be different from the speech protected by the First Amendment, Bollinger uses a theory of "ambivalence" to illustrate how certain recurring and unresolved speech and press issues could be effectively settled.—*Laura R. Moseley*

Journal Award Honors Two Legislators For Law Reform

Two Michigan legislators have been named the first recipients of the University of Michigan *Journal of Law Reform* Award for their contributions to law reform. The journal is a student scholarly publication at U-M Law School.

State Sen. Robert Vanderlaan (R-Kentwood), who helped amend Michigan's worker and unemployment compensation acts, and state Rep. David C. Hollister (D-Lansing), who authored the Blue Cross/Blue Shield Reform Act of 1980, were chosen for the award by the editorial board of the journal.

The award was presented at a February banquet at the Lawyers Club. The journal, devoted to analyzing and reforming current legal thought, says it will present the award annually to "the person or persons who have contributed the most during that year to changes in the law."

Vanderlaan, "the current Senate Republican minority leader and a 16-year Senate veteran, was a driving force behind passage of amendments to the state's worker disability compensation act this year. Reform of the worker and unemployment compensation laws has been a controversial political issue in Michigan for the past 10 years," according to the *Journal of Law Reform*.

"The amendments passed this year provide for several changes in the current law, including: a substantial weekly benefit increase and a significant retroactive benefit adjustment for disabled workers; higher eligibility standards for heart and mental disability; limited retiree eligibility; the exclusion of injuries resulting from social or recreational activities; and broader exemptions for family members and corporate officers or stockholders. The amendments also contain several provisions designed to streamline the appeals procedure to reduce existing backlog and minimize delay.

"The legislation is viewed by many as a major compromise between workers and employers, a compromise for which Vanderlaan is largely responsible."

Hollister, a third-term representative from the 57th district, "wrote and was the key mover behind legislation that reorganized Blue Cross/Blue Shield for the first time since the giant health care corporation was created in 1939. A complex and controversial piece of consumer legislation, the Blue Cross/Blue Shield Reform Act will directly affect 5.3 million Michigan Blue Cross/Blue Shield subscribers," says the Journal.

The legislation reduces the size of the governing board, makes consumer representatives a majority on the new board, and makes the new directors more accountable by requiring roll call votes and open meetings. The act also contains significant cost containment provisions and a mechanism for developing health planning and reimbursement, all of which have received national acclaim."

events

One of the panels in the U-M Law School colloquium "Transnational Legal Problems of Refugees." The speakers, from left, Paul Weiss, former UN refugee protection official; James L. Carlin, director of the Intergovernmental Committee for European Migration; J. J. Lador-Lederer, former legal official with the Israeli Ministry for Foreign Affairs; Prof. Eric Stein, U-M Law School; Yoram Dinstein, rector of Tel Aviv University; Zvi Gitelman, director of the U-M Center for Russian and East European Studies; and Joseph W. Samuels, law professor at the University of Western Ontario.

Refugee Legal Problems Cited At Conference

"There are many people desperate enough to risk dying of starvation at sea, or having their wives and daughters raped and their boats plundered, in order to land in a country where they would receive better treatment."

Joseph W. Samuels, law professor at University of Western Ontario and one of the speakers at a U-M Law School conference on legal problems of refugees, painted this bleak picture of "boat people" from Indochina and other areas escaping from the economic and political perils in their homelands.

The prospect of drought and other natural disasters, said Samuels, raises the specter of many future migrations of "boat people" from India, Southeast Asia, and other disaster-prone and economically vulnerable areas.

Samuels, a scholar working in the area of humanitarian relief efforts, urged relief agencies and nations to offer the same rights to refugees who are victims of natural disasters as to those who are victims of oppressive political regimes.

"Too often," he said, "refugees of natural disasters receive very little publicity and are forgotten under international law. But the possibility of mass migrations of this sort looms large."

Samuels was a speaker in a conference on "Transnational Legal Problems of Refugees," sponsored in January by the *Michigan Yearbook of International Studies*, a student journal at the Law School. Texts of the speakers will be featured in a future issue of the yearbook.

Another speaker, Paul Weiss, former United Nations' refugee legal protection official, noted that the cornerstone of international refugee law involves 1951 U.N. guarantees that no refugee may be returned to the country of origin where his life or liberty is threatened.

"The most interesting recent development in refugee law is that nations today are more willing to grant asylum to refugees even in cases where such rights do not exist under international law," said Weiss.

Despite liberal immigration policies of such nations as the United States and Israel, the legal status of Soviet Jewish emigres remains somewhat obscure, according to James L. Carlin, director of the Intergovernmental Committee for European Migration.

"Although the Soviet Union requires that emigres renounce their Soviet citizenship, these emigres are not considered refugees under international law because they left Russia legally," said Carlin.

Thus, in some instances, "they may not qualify for help of international relief organizations. Yet a strong case can be made that they are *de jure* refugees because they are escaping from oppression," he said.

Despite the rise in Soviet emigration since 1971, the Soviet government still creates tremendous stumbling blocks for emigres, including cumbersome administrative procedures, high fees,

Subjects ranging from corporate professional responsibility to the negotiations leading to the release of the American hostages in Iran were discussed by Lloyd N. Cutler (right), former general counsel to President Jimmy Carter, during his U-M Law School visit in March. Cutler was the Law School's first Helen L. DeRoy Fellow in a program designed to bring leading government officials and other public figures to the school to spend time with students and faculty. Cutler, who was involved in the hostage release as President Carter's prime legal adviser, told students that he regarded the last four days of the hostage negotations as his "most memorable experience" during his government service. Cutler has recently returned to private practice as senior partner in the Washington, D.C., law firm of Wilmer, Cutler & Pickering. The Law School's Helen L. DeRoy Fellowship program was established under an endowment fund created with a gift from the Len DeRoy Testamentary Foundation of Detroit, which is chaired by Leonard H. Weiner, a member of the U-M Law School class of 1935.

and various kinds of harassment, according to Zvi Gitelman, director of the U-M Center for Russian and East European Studies.

Although 300,000 Soviet citizens—mostly Jews—have been allowed to leave during the past decade, there is still a relatively high rate of denials for emigration, according to the professor. The Soviet's policy is largely intended to "expel undesirables under the guise of emigration," he said.

But the plight of refugees was even worse during World War II, before refugee relief became a major international concern, according to Yoram Dinstein, rector of Tel Aviv University.

"During World War II boatloads of Jews left Nazi Europe but could find no hospitable nation. In Britain, they were regarded as aliens, just as Japanese were considered in the U.S.

"In wartime, all peacetime rights of refugees are suspended. The plight of the refugee often has been to travel from country to country seeking temporary or permanent asylum. There is simply no way for a person to gain asylum if a country does not grant it."

Attorney Michael E. Tigar, an international law expert, gave the keynote speech, titled "The New Nationalism," at a dinner connected with the symposium.

Citing the early 1960's as the time of genesis of a healthy criticism of American foreign policy and a growing desire of legal scholars to re-evaluate the American interventionist foreign policy, Tigar cautioned: "There are disturbing signs of a new U.S. nationalism, a new intolerance of critical assessment of American policy, appearing in the pronouncements and policies of the new administration, and in the utterances of the new Senate leadership."

Stressing that the new nationalism might inhibit open evaluation of U.S. foreign policy, Tigar warned: "The most critical question of international legal order will be the political, economic, and increasingly military challenges to the domineering influence of the great powers and multinational corporations upon the social systems of third world countries.

"This unrest has been a long time building. The debt service burden on the third world is large and increasing. Economies distorted by inherited dependence on production of commodities whose prices are volatile are in many cases further restrained from social investment by the terms imposed on international loans and grants. Power structures perceivably long-supported by American arms and aid are challenged, as indigenous rebel movements dare to emerge from the countryside into the towns—Irans, Nicaraguas, El Salvadors.

"This constellation of events threatens the property of American-based multinationals and the world view of Pax Americana. This constellation of events triggers the cry for forcible intervention. The same events pose for internationalists the most significant question of international order," said Tigar.

"We must re-examine the rules of international law to ask whether they serve the broader goals of progress or the narrow ones of self-interest. International law is no longer something great nations make to impose upon smaller ones, no longer the superstructure of world dominance.

"Responding to third world challenges with force and the threat of force is tempting to the new makers of American policy. Propping up reaction and subvening terror does more than risk foreign war and, as a corollary, domestic repression. Responding with force and the threat of force tears the fabric of international order. It comes perilously close to the international crime of aggressive war."

To the Alumni and Friends of
The University of Michigan

The Dean, Faculty, and Students
of
The University of Michigan Law School
Request the Pleasure of Your Company
at the Dedication of the
New Law Library Addition
on the Thirtieth and Thirty-first of October,
Nineteen Hundred Eighty-one

Activities will Commence at
9:00 a.m. October 30
and Conclude after
4:00 p.m. October 31

Dedication of the New Law Library Addition

Schedule of Events

Friday, October 30

Symposium on **The Legalization of American Society,** Hutchins Hall

morning

"The Legalization of American Society"
Francis A. Allen, Professor, The University of Michigan Law School

"The Legalization of the American Family"
David L. Chambers, Professor, The University of Michigan Law School

"The Elevation of Private Rights to the Constitutional Level"
Christina Whitman, Associate Professor, The University of Michigan Law School

afternoon

"New Forms of Legal Regulation of Economic Enterprise"
Joseph L. Sax, Professor, The University of Michigan Law School

"Economic Regulation: The Costs and Benefits"
Peter O. Steiner, Professor, The University of Michigan Law School,
and Dean, College of Literature, Science, and the Arts, The University of Michigan

Banquet, Lawyers Club, 8:00 p.m.

Saturday, October 31

Symposium on **The Legalization of American Society,** Hutchins Hall

morning

"The Social and Political Causes of the
Legalization of American Society"
Theodore J. Lowi, Professor of American Institutions, Cornell University

Roundtable

Dedication Exercises, Rackham Auditorium, Saturday Afternoon

Dedication Address
The Honorable Carl McGowan, Circuit Judge, United States Court of
Appeals, District of Columbia Circuit

Reception in the New Library afterwards

Please complete the reservation form below and mail, with your check to:
Director of Special Programs, Office of the Associate Dean, The University of Michigan Law School, 320 Hutchins Hall, Ann Arbor, Michigan 48109.

The University of Michigan Law School
Law Library Addition Dedication

Please send_____ tickets at $20 each for the Dedication Banquet at the Lawyers Club on the evening of October 30 at 8:00 p.m. I've enclosed my check for $_____.

Name _____

Address _____

City _____ State_____ Zip _____

☐ Please reserve a room for me as follows:

Number of persons _____ One bed_____ Two beds _____

Arrival date/time _____ Departure date/time _____

☐ I prefer to make my own housing arrangements.

NOTE: Deadline for reservations is September 28, 1981. Please make checks payable to "The University of Michigan."

Tigar cautioned that whether one agreed with his international analysis is not the major issue but whether there will be the continued flow of differing views and analysis. "I am not asking acquiescence, but vigilance. If, as I fear, this new nationalism will be danced to the moral majority's familiar refrain, 'give me that old time repression,' then the voice sought to be silenced will not only be mine. That is, after all, the lesson so recently taught."

Great Lakes Oil Discussed At U-M

Will the Great Lakes become the focus of the next conflict between environmentalists and industry over oil drilling rights?

Dr. Howard Tanner, director of the Michigan Department of Natural Resources, says pressures for oil drilling and exploration are possible in the long run, although not imminent.

Speaking at an environmental symposium at U-M Law School in March, Tanner explained that oil exploration and drilling in Michigan's Great Lakes waters are presently prohibited under policies of the state's Natural Resources Commission and the governor's office.

Yet, he said, "one cannot exclude the possibility that the search for energy may eventually drive us toward the Great Lakes."

The Law School's symposium on Michigan public lands management, moderated by law Prof. Joseph L. Sax, was sponsored by the Law School's Environmental Law Society, the Law School Speakers Committee, and the Michigan Student Assembly.

Appearing on a panel with representatives of conservation groups and industry, DNR director Tanner noted that "there have been no requests from industry for oil exploration (in Great Lakes waters) during the past three years."

Tanner said he does not advocate legislation governing possible oil drilling in the Great Lakes "because we don't know if oil is out there" and it would be inappropriate "to make decisions for future generations" on the question.

But another speaker, Ken Sikkema, executive director of the West Michigan Environmental Action Council, urged passage of legislation specifically prohibiting oil drilling in Michigan's Great Lakes waters.

Participants in the Law School's symposium on Michigan public lands management were, from left, environmentalist Ken Sikkema, West Michigan Environmental Action Council; Howard Tanner, director, Michigan Department of Natural Resources; Joseph L. Sax, U-M law professor; Thomas Washington, Michigan United Conservation Clubs; and Richard Burgess, Northern Michigan Exploration Company.

"The present administration in Michigan does not favor drilling, but who knows what some future administration might propose?" said Sikkema.

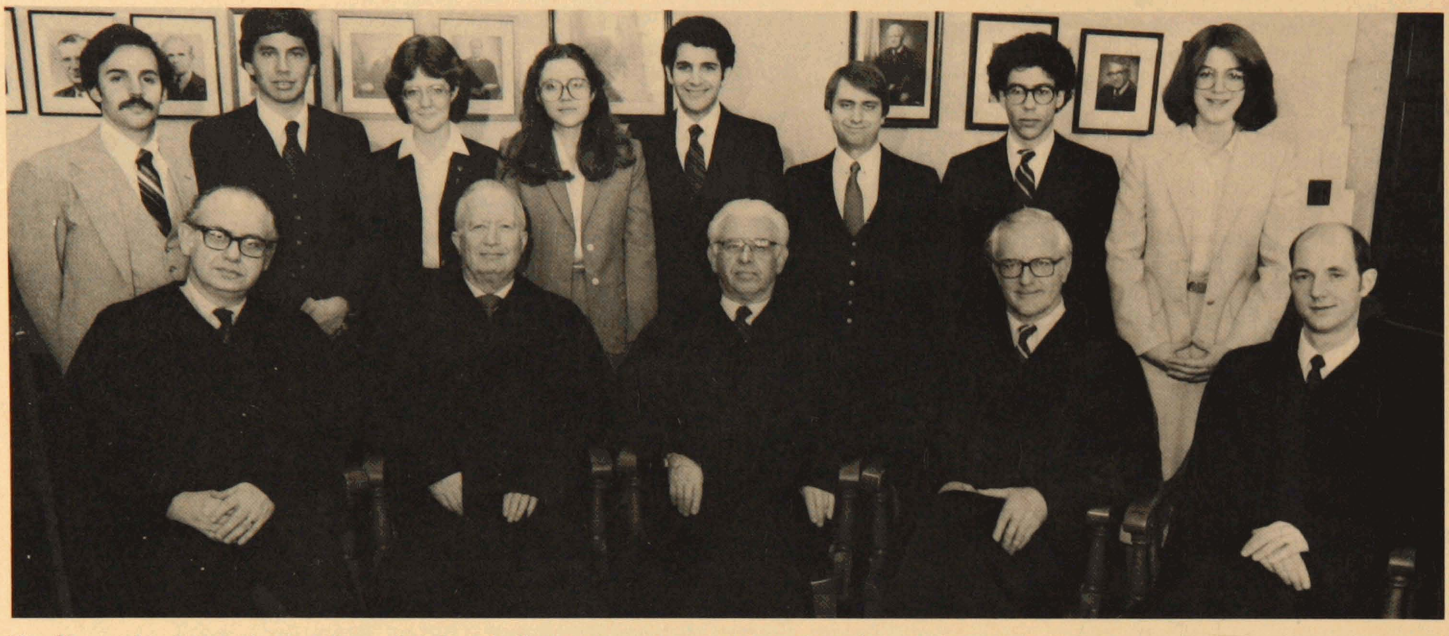
"Presently the state DNR does lease the bottomlands of the Great Lakes. Although these leased lands fall under the category of 'non-development,' such a designation could be subject to change," said Sikkema.

Richard Burgess of the Northern Michigan Exploration Company said industry presently has no intention of drilling for oil in the Great Lakes, although some 1,500 gas wells have been in operation on the Canadian side of Lake Erie since World War I.

It is probable, said Burgess, that Ohio, New York and Pennsylvania will eventually allow gas drilling on their portions of Lake Erie. Panelists noted that gas drilling poses fewer environmental risks than oil drilling which presents a threat of spillage.

DNR director Tanner said management of Michigan's water resources would likely become a leading area of conflict in the future, because of problems of drought in eastern and western states.

Noting that Michigan has a large share of the nation's fresh water, Tanner predicted there will be great demand for this water from other parts of the country.



Finalists and judges in the 1981 Henry M. Campbell Moot Court Competition. The judges, seated from left: U-M law Dean Terrance Sandalow; Judge Malcolm Wilkey, U.S. Court of Appeals for the District of Columbia Circuit; Arthur J. Goldberg, former U.S. Supreme Court Justice; Judge James L. Oakes, U.S. Court of Appeals for the Second Circuit; and Prof. Edward H. Cooper, U-M Law School. The student finalists, standing from left: Richard S. Hoffman, John C. Grabow, Anne E. Brakebill, Janet E. Lanyon, Bob D. Scharin, Mark E. Haynes, Joseph Blum, and Sheree R. Kanner.

Campbell Competition

Four U-M law students were declared winners of the 1981 Henry M. Campbell Moot Court Competition held March 31 at the Law School.

A total of eight student finalists argued two legal issues before a distinguished panel of judges which included Arthur J. Goldberg, former U.S. Supreme Court Justice.

The first place winners: Mark E. Haynes, Olathe, Kan.; Bob D. Scharin, Brooklyn, N.Y.; John C. Grabow, Sun Valley, Idaho; and Richard S. Hoffman, Chicago, Ill.

The runners-up in the competition: Joseph Blum, Philadelphia, Pa.; Sheree R. Kanner, Flushing, N.Y.; Anne E. Brakebill, Knoxville, Tenn.; and Janet E. Lanyon, Sterling Heights, Mich.

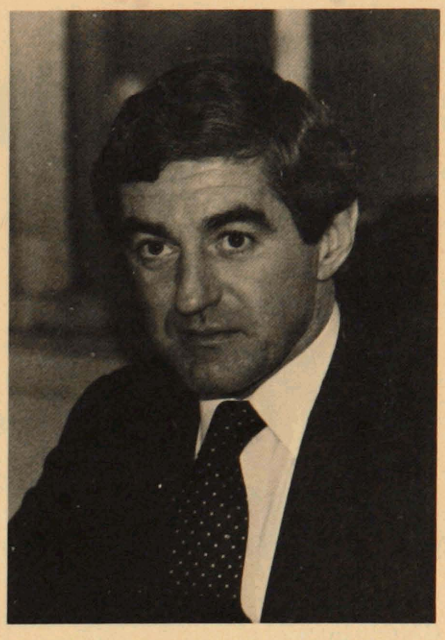
The finalists were divided into four teams that argued two legal issues in a hypothetical case dealing with a professional football team's hiring a college athlete before his graduation from college.

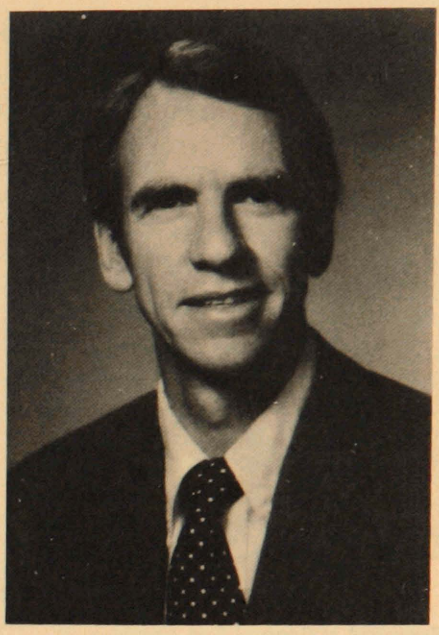
Also serving as judges in the competition were Judge Malcolm R. Wilkey of the U.S. Court of Appeals for the District of Columbia Circuit; Judge James L. Oakes of the U.S. Court of Appeals for the Second Circuit (New York, Vermont, and Connecticut); and Dean Terrance Sandalow and Prof. Edward H. Cooper of the U-M Law School.

Winners were also announced for preparation of the best written legal "briefs" in the competition.

They were: William Fallon, Grand Rapids, Mich.; John Low, Niles, Mich.; Brian Boyle, Grosse Pointe Park, Mich.; and William Carroll, Ft. Wayne, Ind.

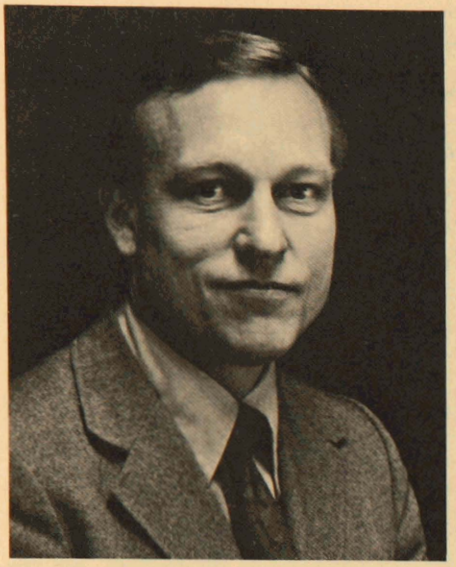
alumni notes



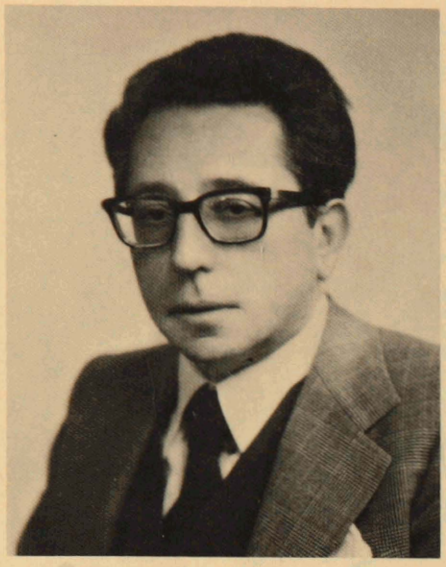


☐ **R. T. McNamar,** member of the U-M Law School class of 1963, is the new deputy secretary of the treasury under the Reagan administration. McNamar had been executive vice president of the Beneficial Standard Corporation, a diversified financial services holding company in Los Angeles, from 1977 until his nomination to the treasury post by President Reagan in January, 1981. From 1973 to 1977 McNamar served as executive director of the Federal Trade Commission. He also served during 1973 as internal management consultant to the Cost of Living Council and the Federal Energy Office. During phase II of the Economic Stabilization Program, he was director of the Office of Case Management and Analysis for the Pay Board in 1972 and 1973. From 1966 to 1972 McNamar worked as a management consultant with McKinsey & Company, Inc., in San Francisco, New York, and Amsterdam; and in 1965-66 he was legal and financial counselor for Standard Oil Company of California. He is a member of the California and American Bar Associations and the Financial Executive Institute, among other groups. Born in 1939 in Olney, Ill., and raised in Tulsa, Okla., McNamar received the A.B. degree from Villanova University in 1961, a J.D. degree from Michigan in 1963, and an M.B.A. degree from the Amos Tuck School of Business Administration at Dartmouth College in 1965. He is married to the former Mary Ann Lyons, and they have two children. At 41, McNamar is the youngest deputy secretary in the history of the Treasury Department.

☐ **Richard H. May,** who received his law degree from U-M in 1960, is the new chairman of the National Committee of the Law School Fund, serving a two-year term covering the 1981 and 1982 campaigns. May assumed the post in the spring 1981, succeeding William A. Groening who served as chairman for the 1979 and 1980 campaigns. A member of the law firm of Goodenough, Smith & May of Bloomfield Hills, Mich., May played an active role in Law School Fund campaigns for a number of years. He served as national class vice-chairman in 1977 and 1978, and as national vice-chairman in 1979 and 1980. Among other positions, May is general counsel and a member of the board of directors of Ziebart International Corporation, and since 1975 served as chairman of the Franchise Advisory Committee of the state of Michigan. Among other associations, he is a member of the International Franchise Association Legal-Legislative Committee, a trustee and former chairman of the TimRo Center for Emotionally Disturbed Children, and director of the Birmingham Hockey Association. A 1955 graduate of Princeton University, May was a U.S. Marine Corps officer from 1955 to 1957.



☐ **Ronald L. Olson** of Los Angeles, a member of the Law School class of 1966, is chairman-elect of the Litigation Section of the American Bar Association, and is slated to become chairman for 1981-82. Among other involvements, Olson has been chairman of the ABA's Special Committee on Resolution of Minor Disputes, which is involved in national discussions on alternative means of dispute resolution. This summer Olson has been named to the faculty of the Law Session of the prestigious Salzburg Seminar in American Studies in Austria. A partner in the Los Angeles law firm of Munger, Tolles & Rickenshauser, Olson specializes in antitrust, securities, and commercial contracts. Before joining the Los Angeles firm in 1968, he served as an attorney with the U.S. Justice Department in 1967 and as law clerk for Chief Judge David L. Bazelon of the U.S. Court of Appeals for the District of Columbia Circuit in 1967-68. A 1963 graduate of Drake University, where he was a three-year football letterman, Olson also attended Oxford University under a Ford Foundation fellowship after his graduation from U-M Law School. He has served on the ABA Special Committee for the Study of Discovery Abuse, and the ABA's Civil Practice and Procedure Committee. He has been director of the Legal Aid Foundation of Los Angeles since 1975 and also serves as director of the Los Angeles County Bar Association. He was elected a fellow of the American Bar Foundation in 1977. Olson has written widely on commercial litigation in various bar journals.

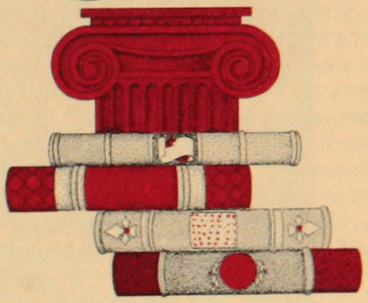


☐ **Giorgio Bernini** of Bologna, Italy, who received the LL.M. and S.J.D. degrees from U-M Law School in 1953 and 1959 respectively, is the first president of the newly organized U-M Law School Association of Europe. Composed of U-M law alumni from throughout Europe, the association was organized at a September, 1980, meeting of European alumni in Knokke, Belgium. A practicing lawyer in Italy and Brussels, Bernini has taught on several European and American law faculties and has served as consultant to the Italian government and the European Economic Community (EEC) on trade law problems. Appointed chairman of commercial law at University of Bologna in 1970, Bernini had served since 1954 as professor of comparative law, EEC law, and Anglo-American law at University of Ferrara, University of Padua, and as lecturer at the Faculté Internationale de Droit Comparé in Luxembourg and Strasbourg, the Johns Hopkins University Bologna Center, and the Ohio Legal Center Institute in Columbus. He was visiting lecturer at U-M Law School in 1958. Bernini was responsible for organizing the New York Law School-Bologna University Summer Program held in Bologna for the past two years, and is adjunct professor at the New York Law School. The author of several books in Italian and English, he is a contributor to many Italian and Anglo-American periodicals.

Other officers of the U-M Law School Association of Europe are **Jean Michel Detry** (M.C.L., 1976) of Brussels, secretary; and **Walter Konig** (M.C.L., 1969) of Zurich, treasurer. (See the fall 1980 issue of *Law Quad Notes* for a full listing of the association's board of governors.)

Humanistic Legal Education:

the Quiet Crisis



by Francis A. Allen
Edson R. Sunderland Professor of Law
The University of Michigan

These remarks were delivered at the special convocation commemorating the opening of the Begbie Building, University of Victoria, November 1980.

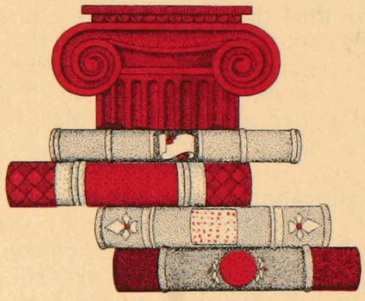
As a schoolboy I was taught that a public speaker ought not to confess uncertainties about his talk to the audience; the reason given was that doubts are contagious and ventilating them may forfeit the confidence of his listeners. Especially, I was warned, he ought not to begin his remarks in this way. Not for the first time I propose to disregard good advice. In thinking about these comments in the weeks just past, two concerns recurred; I should like to confess them at the outset, not for the good of my soul but in aid of understanding. First, I am acutely aware that the experience from which I speak differs in many important particulars from your own. Most of my mature life has been involved in legal education as a student and as a teacher; but the experience is one almost wholly confined to the United States. It is a propensity of my fellow-countrymen, I am afraid, to assume that the American experience should be accepted as normative for all of mankind (a tendency which may be weakening, however, under the pressure of modern realities). I do not suppose that my observations, which are in part the product of a particular experience, will speak directly to your problems. I hope that some of what I have to say will spark recognition, or at least that it may possess for you a quaint anthropological interest. This is my hope but I cannot be sure.

Second, there is the matter of tone. This convocation is above all a festive occasion. Yet efforts to discuss institutional performance and aspirations in the broader context of the late twentieth-century world seem often to strike rather somber notes. I am reminded of the story of the don in an English university who one evening at dinner visited the decanter of port rather too frequently and avidly. He reeled his way home, and as he squatted on the stoop, vainly attempting to open the front door by inserting a match box into the lock, was heard muttering, "Damn the nature of things!" There have been times in the past weeks when I feared that this imprecation might be taken as constituting the theme of my remarks. Such is not my intention, for in fact I am hopeful about the future of legal education, persuaded of its importance, and confident about the distinguished future of this school.

Coming from a clerical family background I have a tendency to seek out texts for my remarks. The statement

that I have chosen today is taken from the scriptures of Dean Christopher Columbus Langdell of Harvard, the inventor of the case method of legal instruction. In 1886 he wrote: "If law be not a science, a university will best consult its dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices." For some this may seem a curious text upon which to base a modern discussion of legal education; it is certainly in many respects a defective one. I know of no one who today accepts Langdell's version of law-as-science, and there surely must be few who concur with his apparent assumptions about the nature of science. Yet Dean Langdell's statement encompasses an assertion that retains a high relevance almost a century after it was made. It is that one cannot proclaim that law studies are appropriately included in the curricula of universities without accepting certain necessary implications about the nature and obligations of university-based legal education. In my country, at least, the failure of some members of the bench and bar and of some persons in the universities themselves

the Quiet Crisis

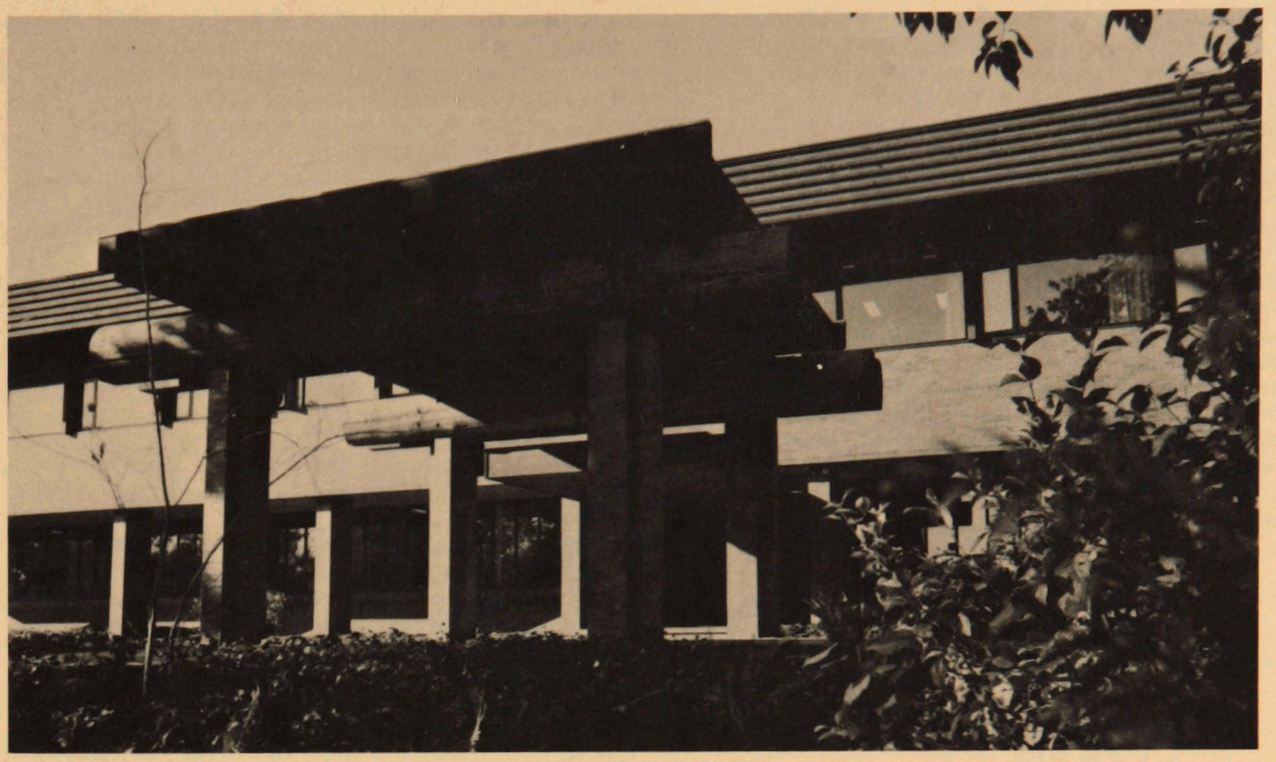


to perceive these implications threatens a crisis in legal education. The causes, however, have deeper roots. The law schools are caught up in the wider crisis that today engulfs humanistic education of all kinds.

It may be well for us to recall that despite the presence of legal studies in the universities of the western world for nearly a millenium, there are and have always been those who view university-based legal education with much skepticism and little enthusiasm. "For better or worse," writes the economist Paul A. Samuelson, "the American law school has wormed its way into a corner of the university campus." Professor Samuelson's statement demonstrates, among other things, that even a Nobel Laureate may sometimes lose control of his verbs. My experience as an officer of the Association of American Law Schools in the 1970s suggests that the problem in the recent past is not one of law schools' "worming their way" into the groves of academe, but rather the practices of some university administrations of creating new law schools or exploiting old schools as sources of financial support for university purposes wholly distinct from legal education. Later in his essay Professor Samuelson observes: "There is a conflict of interest, let us face it, between training people for a career and the creation of scholarly knowledge." Perhaps one ought not to object too strenuously that the writer is here pulling a thoroughly familiar rabbit out of his hat. The tension to which he adverts is well known to all persons thoughtful about professional education of all sorts. Yet the tension is felt more acutely today than at any time in my recollection and perhaps at any time since university law schools became the dominant mode of professional legal training. The problems it engenders can no longer be submerged and half-forgotten; they have surfaced and insistently demand attention. A new dialogue is now in progress. Much depends on how intelligently and with what restraint the dialogue is conducted.

For my first proposition let me return to the assertion that I derive from Dean Langdell: The very presence of the law schools in the universities entails certain necessary implications about the nature and obligations of legal education. What are these implications? First and foremost, that the law school being part of the university must advance the general purposes of the university. This, of course, is not to deny that the law school has its own distinctive purposes to achieve. It is to say that there is no moral or other justification for a failure of legal education to contribute significantly to the purposes and functions of the larger institution of which it is a part. And what are the general purposes of the university? I shall not rashly attempt a comprehensive statement, but at the least we might agree that they include the discovery of new knowledge; the organization and communication of existing knowledge; the identification, analysis, and criticism of values; and the cultivation of aesthetic sensibility. The law schools, if they are to perform their missions as integral parts of universities, are required to give greater attention to the means for discovery of new knowledge. Social changes affect the nature of the knowledge that is relevant to law teaching and legal scholarship; and methods of knowledge-discovery that served reasonably well in the past do not suffice today. As someone has said, it is no longer true that the fully-equipped legal scholar is one possessing a supply of 4" by 6" file cards and a desk in a library of statutes and case reports. Understanding sophisticated methods of fact-finding and analysis devised in other departments of the university has become a requisite for many important kinds of legal inquiry and, indeed, of law practice. The anarchy of values that characterizes the times requires the legal scholar to traverse bodies of knowledge outside the law—history, ethics, philosophy, social theory—as he attempts to understand the conflicts of values now being fought out in the legal arena, and as he seeks to formulate a workable body of postulates and premises upon which to erect a modern structure of law. Being part of the university dictates certain obligations for the law school, and in attempting to fulfill them, legal scholarship is drawn ever more deeply into the central intellectual currents of university life.

The new awareness and involvements of legal scholars in the intellectual life of universities is not to be explained solely, however, by reference to an obligation of law schools to do their fair share in advancing the universities' general purposes. There are other bases for these involvements that are at least as palpable and perhaps more peremptory. I shall discuss two of them: first, widespread and dominant notions about the proper functions of law; and second, certain changes that have occurred in the social roles of the traditional professions, including the legal profession. I have just suggested that law schools are moving to new forms of research, teaching, and speculation, in part because of the dominance of certain ideas about the proper functions of law. Anyone attempting



The Begbie Law Building was dedicated last November at the University of Victoria (British Columbia, Canada). Professor Francis A. Allen of the U-M Law School was the featured speaker and also received an honorary Doctor of Laws degree at the ceremony.

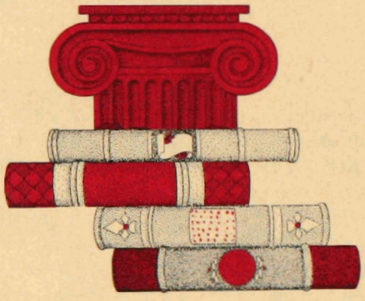
to trace the course of American legal thought in the twentieth century will almost certainly assign great significance to the emergence of realist jurisprudence, principally in the years between the two world wars. There may well be sharp disagreements among the intellectual historians about what realist jurisprudence is or was, what it achieved, or whether its consequences have been good or bad; but its importance is likely to be conceded by nearly all. One of the secure legacies of realist jurisprudence is the assumption, widely held, that law is an instrument for achieving social purposes that can be identified, analyzed, advanced, or rejected. One wonders whether there has been any time since the eighteenth-century Enlightenment when this assumption was wholly rejected. But if there was ever a period when construction of elaborate structures of judicial precedent and demonstration of the historical authenticity of legal doctrine were thought to constitute the entire domain and function of legal thought, that time is now irrevocably past. The late Karl Llewellyn's statement of the matter enunciates not only the view of realist jurisprudence, but also that of most modern men and women who have formed opinions about the functions of law. Law, according to Llewellyn, should be conceived of as "a means to social ends and not . . . an end in itself." It follows that "any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other."

How is this examination and judging to be achieved? It is at this point that many of the realist writers become most elusive and least helpful. The realists did not leave a literature rich in suggestions about achieving the realist agenda; and the law schools have moved only haltingly along the path. Yet if it be assumed, as we very largely do assume, that the serious study of law is in some significant part a study of public policy—what it is and what it ought to be—then it behooves us to cultivate the arts and sciences necessary to the study of public policy. Traditional modes of legal research are surely not irrelevant even to this sort of enterprise, but they are insufficient. It follows that the ideal of law as public policy may steer us, however slowly, to those departments of the university in which methodologies for the study and evaluation of public policy have long been developing. The notion of law as means rather than end, therefore, guides us into more intimate intellectual relations with the university.

I have also suggested that certain changes in the social roles of the traditional professions—law, medicine, and the clergy—have contributed to the same end. From the beginning of the modern era and even before, western societies have referred most questions requiring more than ordinary knowledge and judgment to one or the other of the classic professions for answers. Questions about the soul, the cause of disease, the rights of persons caught up in property disputes, or about the extent of governmental powers were submitted to the priest, the physician, or the lawyer for authoritative resolution. Before the end of the last century, however, the hegemony of the older professions was considerably weakened. This is not to say that their authority was destroyed or their prestige ended. It is to say that members of the traditional professions like the law are today required to share authority and prestige with the practitioners of other and newer disciplines. 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. So long as the physical condition of the human organism was thought to stem from the operation of fluxes and vapors within the

body, there was little point in looking beyond the medical practitioner for explanations of the causes of disease and its cure. At the point, however, that health is seen as dependent in part on the workings of microscopic organisms, the physician must share authority for responding to fundamental questions about health and disease with the bacteriologist and the virologist. So also, issues of criminal responsibility will be viewed as falling largely within the province of judges and lawyers as long as the human being is seen as morally autonomous and in possession of perfect freedom of choice. With the rise of theories of social causation of crime or of genetic or psychological conditioning of human behavior, the door must be opened, for better or worse, to the practitioners of the sociological, biological, and psychological disciplines. In many instances the newer disciplines are not only cultivating areas of general interest to the law, but those of central concern. Being aware of this cultivation, to paraphrase Mr. Justice Holmes, is for legal education not a duty; it is merely a necessity. Again, because of these events

the Quiet Crisis



the intellectual bonds attaching legal education to the universities have been strengthened.

Consequences follow from the bonding of law schools and universities, from conceiving of legal education as something more than mere handicraft. One of the consequences is that legal education falls heir to the modern crises afflicting humanistic education of all sorts. I hope that my characterizing of legal education as humanistic will not be thought strange or controversial, but perhaps the point deserves some explicit attention. In 1930 the critic Lionel Trilling wrote: "[The] function [of literary art] is ultimately the social and moral one of discovering and judging values." I am not qualified to determine how satisfactorily this observation defines the purposes of literature (and it has been challenged by other critics as insufficient); but I believe that the statement may be taken as a useful working description of much humanistic education, including humanistic legal education. Law school education and research is or ought to be preoccupied with values. We do or ought continually to ask not only "how to do it," but "why we do it" and "ought we to do it at all." There are few departments of the university in which such questions are so much a part of the daily grist as the law schools. The reason why it is important that such questions be asked is not simply that we are under obligation to be critics of the law and its institutions. We are under that obligation, and the law school's role as critic of the law, and, indeed, at times of the legal profession, is one of its most important social functions. If it is inadequately performed by the law schools, it will be performed by others; and there is no assurance that the criticism of the others will be as informed or as relevant. There is another reason for legal education's concern with values, however: such concern is essential to the understanding of law. How can law be "known" in any fundamental sense apart from its purposes? And how can the future development of the law be anticipated except by reference to how well these purposes are being achieved and how acceptable they remain to the wider society as the community's needs and perceptions change? Concern with values is thus far from being merely of academic interest. On the contrary, it goes to the very essence of technical professional competence. These facts have long been understood by the best legal practitioners. It is important that we do not forget what our best lawyers discovered long ago.

The burden of practicing and defending humanistic education in these times, however, is a heavy one. The load is perhaps especially weighty for law schools. The difficulties do not stem entirely from the modern mood of disillusion and skepticism that demands instantaneous payoffs and hence imperils humanistic values which reach their goals slowly and circuitously. The "quiet crisis" in humanistic legal education to which I refer in my title, derives more fundamentally from the circumstance that such education deals in values at a time when social values are in a disarray approaching anarchy. This disarray, this dissolving of the older categories, presents extraordinary difficulties for the legal discipline which by its nature is importantly engaged in searching out a consensus of values sufficient to support the means necessary and the stability indispensable to achieving a wide range of social requirements. Nor should the proliferation of law in our times be permitted to obscure the underlying disarray of values. In the United States—I must be especially careful here not to generalize beyond my experience and knowledge—the modern proliferation of law, the expansion of law in old areas and its penetration to fields not heretofore subject to legal regulation, often reflects not a consensus of values but its opposite. Much of the new law has been made at the instigation of special-interest groups eager to immunize their interests from the normal workings of democratic politics or from traditional forms of discretion exercised in families, the schools, and the market.

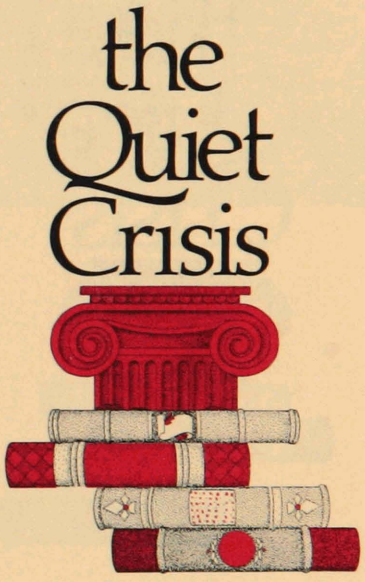
A few months ago at lunch, the dean of my law school observed that in his years in legal education he had never known a time when there was so little agreement among faculty members about what constitutes good academic work. My tenure in the law schools (I am sorry to record) is considerably longer than that of Dean Sandalow, but I believe that his observation corresponds also to my experience. The disagreements go much beyond such gross categories as "practice-oriented" versus "theoretical" training, clinical education versus traditional classroom instruction, doctrinal versus empirical research. These controversies, of course, abound; but even among persons dedicated to highly theoretical legal scholarship there is dispute about the premises upon which the work is to proceed, the values to be advanced, and the methodology to be employed. How are these acute disparities of judgment about what is good or bad, important or trivial, useful or useless, to be explained? Surely fundamental explanations require that we peer over the boundaries of legal education

and of the legal profession into the society of which law and law schools are parts. If we do this we are likely to detect the relationship between the conflicts agitating legal education and the larger contention of values that pervades all aspects of modern western culture. Among the factors most seriously limiting the usefulness of much modern criticism of legal education are the failures to perceive or even to look for this relationship and the apparent assumption that legal education can be understood and reformed as a thing apart from the intellectual and social world in which it is located.

Efforts to pursue humanistic legal education give rise to dilemmas and difficulties. Not all of them are of earth-shaking seriousness. One development entitled to passing notice is the increasing length of leading articles and student notes in American law reviews, a disease not yet manifested in quite so virulent a form, I believe, in the Canadian journals. The one-hundred twenty page article about equally divided between text and footnotes is not quite the norm in my country, but it is not uncommon. What are the causes of this new giganticism in legal writing? It must certainly be conceded that in some instances the length of the articles is justified and reflects new aspirations and methodologies in legal scholarship. It reveals the view of law as public policy, referred to earlier, and the recruitment of scholarly resources of a kind not often exploited in earlier legal writing. This, of course, is not the whole story. In some cases the extraordinary length and complexity of the writing is a direct product of the confusion of values just mentioned. If, as is often true, a set of premises must be fashioned and defended before an argument can be advanced, if one cannot assume common ground at the starting point, then length and complexity are likely to be attributes of the writing.

Some of the difficulties of pursuing a discipline much implicated in values at a time when values are volatile and unstable take on an even more somber tone. Uncongenial and intractable social realities may tempt legal scholarship into maneuvers of escape. One evidence of this may be the rise of a legal literature directed primarily to how questions are to be thought about rather than how they are to be answered. How modern questions are to be thought about is, of course, a profoundly important matter; and I challenge neither the legitimacy nor the necessity for such concerns, particularly in these times. There is a danger, however, that our insecurity about ends as well as means may lure us into a kind of Byzantine embroidering of intellectual technique. The present disposition toward elaborate model-building may at times reveal this propensity. The technique has recently been caustically described by Professor Franklin Zimring: "Step One, make up a world. Step Two, make up a set of laws consistent with the world you have made up during Step One. The results are tidy. . . , but this process is either an amusement—a form of jurisprudential chess—or an exercise in self-deception." I also believe that in many areas of social and legal concern Professor Zimring may be right in suggesting that our better course is to pursue a policy of rigorous muddling through—"muddling through" because we cannot anticipate all the realities actually to be encountered by simply constructing in advance a body of postulates or hypotheses; "rigorous" because we are under obligation to search out conscientiously whatever alternatives of policy are actually available to us, to state as carefully as may be the reasons for preferring certain alternatives over others and the degree of our confidence in such choices. Not only is the temptation to escape reality through the exaltation of technique fatal to our capacities for adequate social response, it contains the immediate peril of alienating legal scholars and scholarship from their base in the legal profession. I do not challenge the propriety of opening the doors of law schools to scholars trained in the assumptions and techniques of other disciplines. Nor do I have anything but admiration for the self-education of many law professors in other fields of learning perceived by them to be of relevance to their teaching and scholarship. But I have sensed a danger that some of our bright young teachers may fall into a kind of limbo in which they are no longer quite lawyers but are also not quite philosophers or behavioral scientists. I see no benefit whatever in adding the law schools to the procession of those other university departments that appear to be engaged in a wistful search for a subject matter.

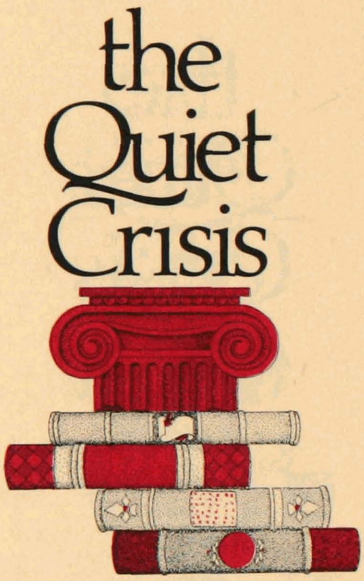
I must take care to be understood at this point. I am saying that if we are committed to treat law studies as something more than a species of handicraft, we are then called upon to confront a spectrum of problems very much like those being faced by other disciplines that are also intellectually based and humanistically motivated. That humanistic education of all sorts is hard pressed in the last quarter of the twentieth century, that it is beset by fiscal constraints,



skepticism, and temptations, is surely no justification for abandoning the goals and methods of such education. On the contrary, that teaching and research significantly occupied with the identification and analysis of values is under siege in these times is perhaps one measure of the great contemporary need for education based on humanistic assumptions. 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."

My last comment suggests a query that a number of you may have been chafing to put to me for some time. I shall state the point as fairly as I can. Even conceding, you may wish to say, that law schools have obligations deriving from their nature as parts of universities, that they have public responsibilities as critics of the law and legal institutions, that legal teaching and scholarship are of necessity concerned with public policy and its effectuation in many areas, these obligations do not and cannot exhaust the

agenda of legal education. For the law school, although part of the university, is a professional school. As such it must be concerned with the competency of its students to deal with the needs of their future clients, some of whose needs may be of wide social significance but many of which are of importance largely to the clients themselves. Law schools also owe obligations to the courts and to the other agencies of justice. Graduates lacking in basic competence are not only a menace to their clients but also constitute a burden on the institutions of justice and an impediment to the performance of their proper social functions. Before ending the list, which might be much longer, one may wish to add that the law schools owe obligations to their students. These students are not going to sit atop pillars in a desert for the next 50 years engaged in philosophical contemplation. They are, on the contrary, soon to be plunged into the practice of law, and will be swept up in what is often a bruising, competitive, and demanding regimen. It would be nice (students tell me) if the law schools could do something more to sustain them in the hard pull ahead and even contribute to their making a living!



It is vital, it seems to me, that those who defend the humanistic ideal in legal education should give the closest and most sympathetic attention to these considerations. In the United States and, I gather, also in Canada, voices both within and outside the profession are being raised to urge that more effective means be devised to enhance the competency of young lawyers and that new attention be given to what is sometimes called skills training. It would be folly for the law schools to ignore these demands for they express felt needs. Perceptions of this sort can be disregarded by legal education only at its peril.

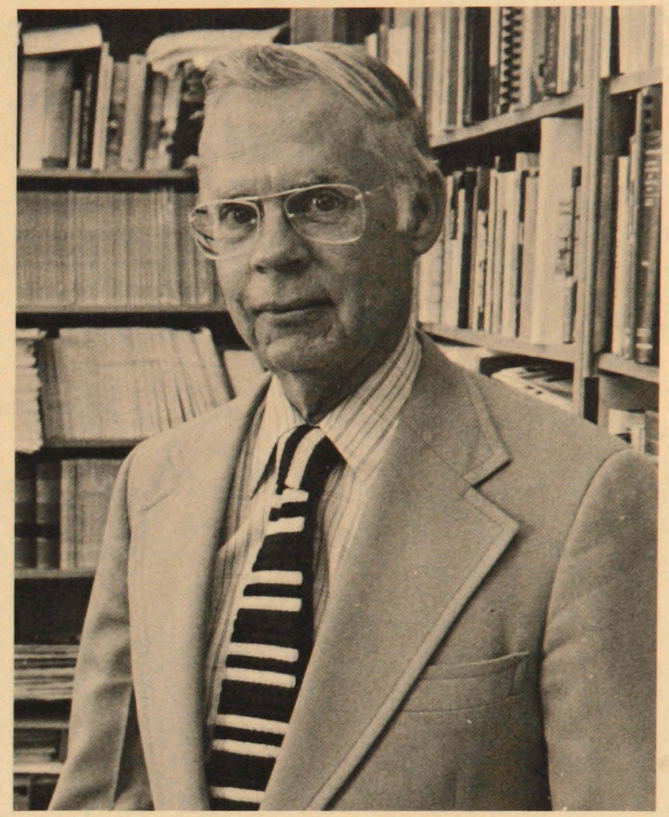
Despite the evident skepticism of such observers as Professor Samuelson, whom I quoted earlier, I have no doubt that the essential needs for improved instruction in practical lawyer skills can be accommodated to an educational regime founded on the humanistic ideal. I am not making a forecast. I do not say that this accommodation will of necessity occur, only that it can occur. Questions of specific content and modes of instruction are, of course, not irrelevant to the advancement of humanistic legal education, but more important than these are matters of motivation, spirit, and breadth. There is nothing particularly elevating about traditional classroom instruction that aspires only to assist students in obtaining licensure. And there may be much that is humane and liberating about clinical instruction that aims at something more than elaborating the niceties of professional practice. It is possible, too, that certain kinds of skills training will enhance the intellectual content of the law school experience rather than detracting from it. Such training can contribute a basis for understanding and evaluating the other parts of the curriculum, of strengthening the command of reality which is a leading attribute of sound professional training.

Our dedication to the reality principle should warn us, however, that the reconciliation of humanistic legal education with demands advanced under the rubric of competency may be no simple or certain thing. Indeed, it seems to me, a diminishment of the humanistic impulse is very nearly inevitable unless our will is strong and our judgment clear. The difficulties begin in the inability of some sincere judicial and practitioner reformers of legal education even to perceive that perils exist. "Competency" is surely an end to be desired; who would enter the lists flying the banner of incompetency? But perils unforeseen often threaten greatest harm. Some lurk in the efforts to define the concept of competency. There is no single lawyers' skill; there are many. Skills vital in some types of practice play no role in others. There is danger that our definitions may be insufficiently inclusive. Thus a group of judges and practitioners urging greater attention to litigation skills issued a report a few years ago making a slighting reference to a seminar in economic theory being offered in one of our national law schools. Yet for many professionals a working command of certain kinds of economic theory is today one of the most important of the lawyer skills both in their in-court and out-of-court practice. There may be a tendency for some persons to acknowledge and then promptly forget that central to any meaningful concept of competency are the basic humanistic skills of reading, writing, and reasoning, as well as the vital capacity to perceive the purposes and values that the law expresses or ought to express. I do not wish to convert this recital into a litany, but permit me one further observation. Most of us who are members of the legal profession are disposed to do nothing by halves. We are self-selected to reveal this trait. Most of us, whether we know it or not, are better at advocating a cause or promoting an enthusiasm than at balancing competing values to achieve a harmonious whole. By the nature of things, those who would reform legal education from outside the law schools may experience particular difficulties in achieving this balance. 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 or ability to estimate the impact of such requirements on the schools' ability to achieve their other numerous and vital goals. Some years ago when I was so unfortunate as to be a law school dean, I divided our organization of visiting alumni into smaller groups corresponding to the various divisions of our curriculum. There were groups devoted to our corporate courses, trusts and real property, public law, procedure, and the like. Members of each group were invited to study the offerings in the segment of the curriculum to which they were assigned and to make recommendations for improvement. On the morning when all of the groups reported their findings, the alumni were interested to discover that if all their recommendations were to be implemented, our three-year course of professional instruction would have to be extended to

something over nine years. Perhaps the story contains a moral.

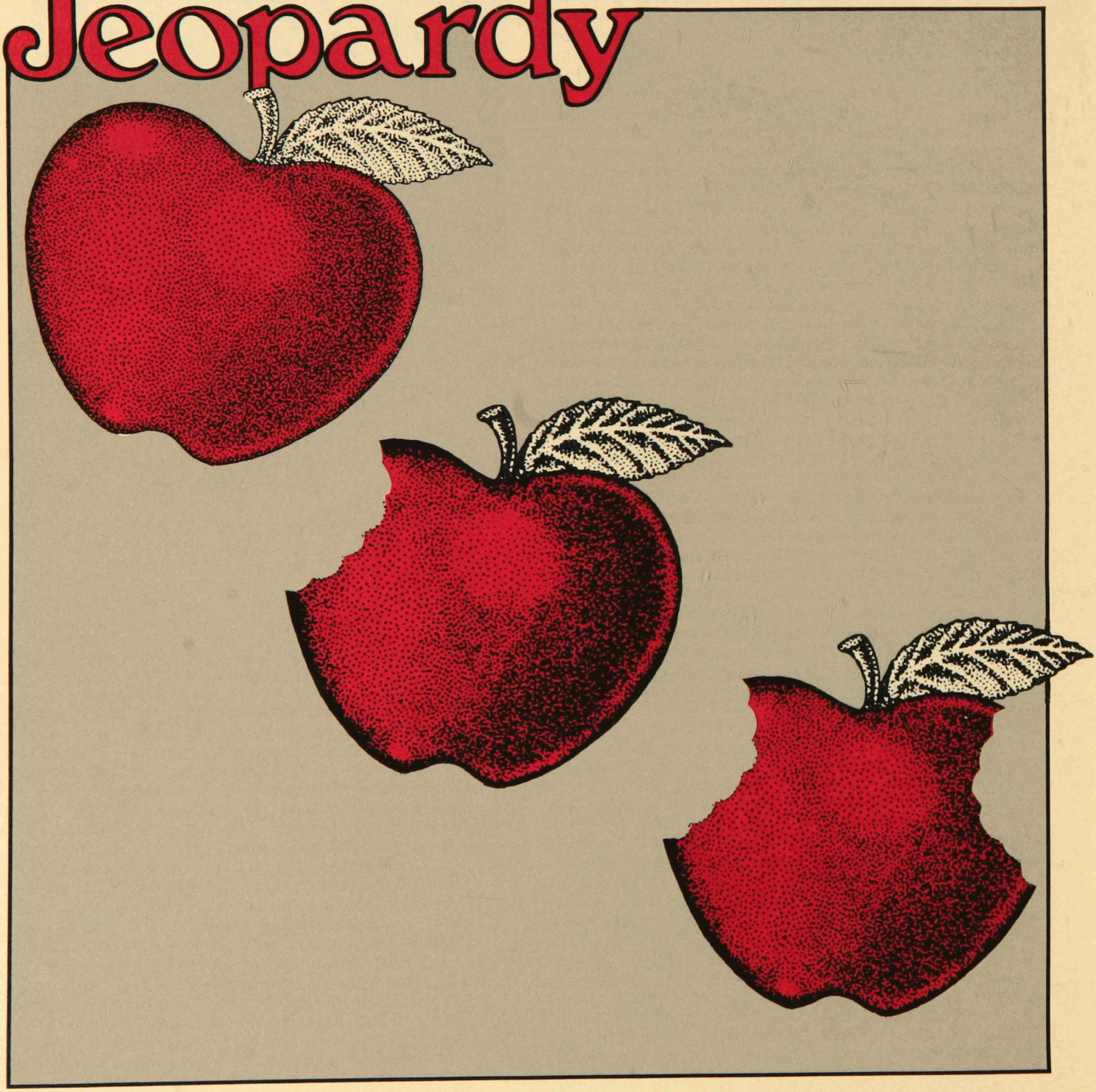
I have rather the feeling at this point that I have our heroine, legal education, strapped firmly to the rails with the locomotive, symbolizing a collection of disasters, bearing down upon her. It would be pleasant to leap upon the scene and in one dramatic gesture sever the cords and overcome the peril. Dramatic gestures seem in short supply in this era; in any event, I have none to offer. What, then, is the course for legal education in an age when the ground seems to shift under our feet, and what are its prospects? Specifically, what path should be blazed by this young law school possessed of an able and dedicated faculty, splendid physical facilities, and promising students? My advice must be meager and unsatisfactory. Of one thing I am confident, however; no true achievement or security will be gained by simply playing it safe. When the landscape is rocking there is no refuge to be found behind stone walls. 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. This is true because the needs we serve are altering and we do not yet know very clearly what form they will take and, in any event, the demands on legal education will become increasingly numerous and diverse. It seems likely, therefore, that if the law school is to flourish as part of the university, or even survive, the law school must become an even more pluralistic community than it has yet become. This is not an entirely comfortable prospect because it is likely to disturb the sense of organic unity that is experienced when persons are joined in a common undertaking with similar views about their purposes and employing similar techniques. Members of the law school community will be called upon, therefore, to express a new spirit of tolerance, a tolerance not founded on indifference or gained by suppressing critical judgment, but one which survives contentions and debate because based on mutual respect and on a poignant awareness of the fallibility, in times like ours, of the individual's capacity for understanding.

Let me not depress you unduly with my forebodings. Surely the prospects for service and satisfactions are great as the twentieth century turns. True, there are probably few of us able to look about our world and attain the level of exaltation expressed by Julian of Norwich: "But all shall be well and all shall be well and all manner of thing shall be well." Perhaps we should aspire to a mood and morale located someplace between that extreme and the drunken don's castigation of the nature of things. In the meantime, let me wish this school good fortune as it continues the intricate search to discover who we are and what we ought to be.



Francis A. Allen

Death & Double Jeopardy



by Peter Westen
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The University of Michigan

[Editor's Note: *Prof. Westen wrote "Death and Double Jeopardy" for a January, 1981, issue of* **Res Gestae,** *the Michigan Law School student newspaper. The subject of the article,* **Bullington v. Missouri,** *was argued to the U.S. Supreme Court on Jan. 14, 1981. The Supreme Court has since decided* **Bullington,** *holding on May 4, 1981, that the defendant could not be sentenced to death following his earlier sentence of life imprisonment.]*

The U.S. Supreme Court on January 14 heard oral argument in a case that has both specific and general significance for law students: specific, because it teaches us something about the particular meaning of double jeopardy in death penalty cases; general, because in doing so it tells us something about the nature of legal rules and, hence, about the ends of legal education.

The case, *Bullington* v. *Missouri*, asks whether a defendant who was convicted and originally sentenced to life imprisonment for a capital offense may be resentenced to death if he is now reconvicted following the reversal of his original conviction. The facts in *Bullington* are starkly simple. Robert Bullington, a white male, was charged with breaking into Pamela Sue Wright's home with a shotgun, binding three members of her family, abducting the 18-year old girl by force and later murdering her. Bullington was found guilty by a jury and, following a subsequent and separate sentencing hearing, sentenced by the jury to life imprisonment. The trial judge granted his motion for a new trial based on the ground that the Missouri procedure for excusing women from jury service violated Bullington's right to be tried by a jury drawn from a cross section of the community. Prior to retrial, the prosecutor filed notice of intent once again to seek the death penalty. The trial judge struck the prosecutor's notice, ruling that resentencing Bullington to death would violate the double jeopardy clause. The prosecutor took an immediate appeal, the Missouri supreme court ruled in his favor, and the U.S. Supreme Court granted certiorari.

The key to the case is *North Carolina* v. *Pearce*,[1] holding that a defendant who was originally sentenced to 12 years in prison could be resentenced to 15 years in prison upon retrial following a reversal of his original conviction. To decide whether *Bullington* is like *Pearce* or different from it for double jeopardy purposes, one must first possess a standard for measuring likeness and difference. That is to say, in order to decide whether one double jeopardy case is like another, or different from it, one must identify the standards or values that inform the double jeopardy guarantee.

As I have suggested elsewhere,[2] the double jeopardy clause safeguards three separate constitutional values, each possessing its own particular weight: (1) the integrity of jury verdicts of not guilty, (2) the faithful administration of prescribed sentences, and (3) the defendant's interest in repose. To resolve *Bullington*—indeed, to resolve any double jeopardy problem—one must, first, determine which of the three respective values is implicated and, second, assess the strength of the state's interests in light of the particular weight the respective value enjoys.

Given the foregoing standards, *Pearce* was a relatively easy case from the prosecution's standpoint, because values (1) and (2) were not implicated at all, while the third value of repose was weighted in favor of the state. The contrary is true of *Bullington:* the defendant in *Bullington* invokes two of the double jeopardy values— *i.e.*, the conclusiveness of jury verdicts of not guilty, and an interest in repose—and both are weighted in his favor.

Jury Verdicts of Not Guilty

The Court has said that the most "fundamental" of double jeopardy values is that jury acquittals (including implicitly acquitting a defendant of a greater offense by solely convicting him of a lesser offense) are "absolutely final" and may not subsequently be set aside, even if the acquittals are "egregiously erroneous."[3] Yet the Court also ruled in Pearce that a sentencing judge's decision to give a defendant a 12-year sentence is not an "implicit acquittal" of any greater sentence and, thus, doest preclude a judge

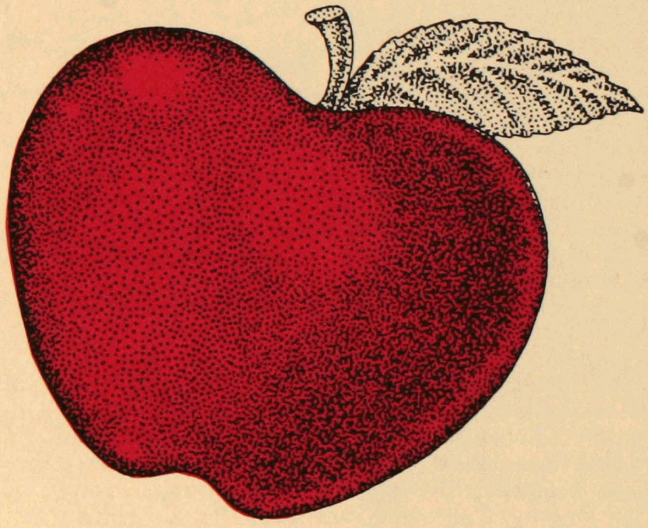
from subsequently increasing the sentence to 15 years following retrial and reconviction. More importantly, the Court has reaffirmed the rule first announced in the 1919 case of Robert Stroud, the famous "Bird Man of Alcatraz," that a defendant who is convicted and sentenced to life imprisonment by a jury in a unitary proceeding may be resentenced by a jury to death following a reversal of his original conviction.[4]

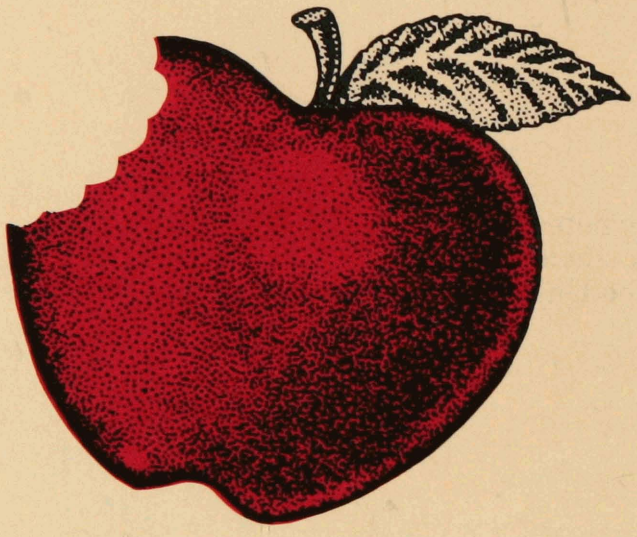
Once again, in order to decide whether *Bullington* is governed by the rule against retrial following an implicit acquittal on the one hand, or by the rule of *Pearce* and *Stroud* on the other hand, one must first identify the constitutional value that underlies the acquittal rule. Fortunately, the Court last year cast light on the issue by suggesting that the prohibition on retrial following an acquittal "is based on a jury's prerogative to acquit against the evidence."[5] That is, the absolute finality of jury acquittals is based on the unreviewable authority of sixth amendment juries to dispense mercy in the face of clear evidence of guilt.

Now that we have identified the constitutional value underlying the acquittal rule, we can see that *Bullington* is significantly different for double jeopardy purposes from both *Pearce* and *Stroud*. It is different from *Pearce*, because the principle of jury nullification that informs the acquittal rule is an aspect of a defendant's sixth amendment right to trial by jury and does not extend to favorable rulings by a trial judge. Thus, while the acquittal rule presumptively applies to the jury's favorable choice of life sentence in *Bullington*, the rule has no relevance at all to the trial judge's original 12-year sentence in *Pearce*.

Moreover, even if Pearce had been sentenced by a jury to 12 years, the implicit-acquittal rule would not have operated to render his sentence final, because the jury's prerogative of nullification does not extend to ordinary sentencing decisions.[6] The difference between determinations of guilt or innocence (to which the jury's prerogative of nullification applies) and ordinary sentencing (to which nullification does not apply) is that decisions regarding guilt or innocence are either/or decisions, while decisions regarding length of sentence are line-drawing decisions on a continuous spectrum of nearly infinite possibilities. By that standard, *Bullington* is distinguishable from *Pearce*, because while sentencing in *Pearce* involved a decision as to where to draw a somewhat arbitrary line between one and 15 years in prison, the sentencing in *Bullington* involved the starkest of either/or decisions: the decision between life imprisonment or death.

Finally, *Bullington* is also distinguishable from *Stroud* for purposes of jury nullification and, hence, for purposes of the acquittal rule. Although *Bullington* and *Stroud* both involved jury choices between death and life imprisonment, the structure of their decisionmaking was very different. The *Stroud* jury, acting without standards or guidelines and proceeding without instructions regarding burden of proof, was allowed to exercise unbridled discretion at the close of a unitary proceeding in making its choice between death and life imprisonment. The *Bullington* jury, in contrast, was directed to act in the fashion of a jury making a traditional determination of guilt or innocence: it was required to make its decision at a separate adversary hearing on the basis of detailed death-penalty standards and instructions regarding the prosecution's burden of proof. These differences are significant because just as the jury's nullification prerogative is confined to either/or decisions regarding culpability, it also appears to be confined to determinations of culpability on which the jury's discretion is guided and focused by separate submissions of evidence, specific standards of culpability, and instructions on burdens of proof.



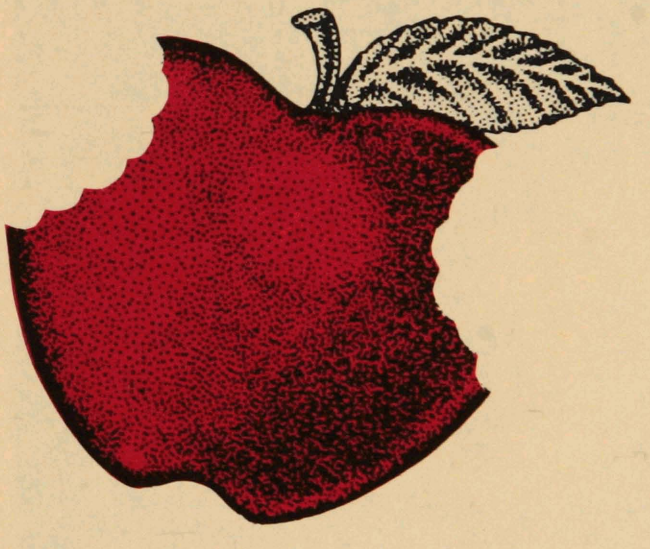


To conclude, while *Bullington* and *Stroud* both involved capital sentencing by juries, they are significantly different from one another for double jeopardy purposes, because the determination by the *Bullington* jury was identical to the traditional judgments of culpability made by juries possessing nullification authority, while the procedures followed in *Stroud* more closely approximated the kinds of sentencing judgments to which a jury's nullification prerogative does not apply. The consequence is that the jury's original verdict of life imprisonment in *Bullington* may be regarded as an implicit acquittal of the more onerous verdict of death and, thus, is "absolutely final,"[7] even if later determined to be erroneous.

The Defendant's Interest in Repose

Bullington also differs from *Pearce* (as well as *Stroud*) with respect to the defendant's interest in repose. The argument for repose is to be distinguished from the argument regarding "implicit acquittals." The acquittal rule is a reflection of the jury's unreviewable authority to dispense mercy and is apparently absolute, operating even if the jury's verdict is otherwise erroneous. The rule of repose, in contrast, is not tied to the jury: it is a principle of res judicata, applicable to proceedings terminating in mistrials, dismissals and convictions (as well as acquittals).

Moreover, as a principle of res judicata, the rule of repose is not an absolute: it seeks instead to strike a balance between the state's interest in having a fair opportunity to make its case and the defendant's interest in not having to relitigate something that has or should have been fully litigated before. Thus, the prosecution may appeal erroneous pretrial and post-verdict rulings in a defendant's favor, may appeal erroneous sentences in his favor, and may retry a defendant following a reversed conviction; yet it may not try a defendant on an issue that was fully adjudicated against it in an earlier proceeding, or retry a defendant following a mistrial declared in bad faith over his objection or following a conviction reversed for simple insufficiency of evidence. Essentially, the prosecution is entitled to "one fair opportunity to offer whatever proof it [can] assemble" in a "trial free from error," but it is not otherwise entitled to a "second bite at the apple."[8]



To see how *Bullington* differs from *Pearce* for purposes of the rule of repose, one must first understand why the state in *Pearce* was allowed to relitigate the defendant's sentence after it had already had one fair, error-free opportunity to secure an appropriate sentence at the original trial. The reason was not that the prevailing law had changed in the meantime in the form of new sentencing standards, because the defendant in *Pearce* was resentenced by the same trial judge applying the same sentencing standards as were applied originally.

Nor was it that the prevailing law prescribed "continuing sentencing" based on changing circumstances. True, some jurisdictions do employ rehabilitative sentencing standards tied to continuing assessments of a defendant's changing circumstances; in that event, ordinary rules of res judicata do not apply—no more than they do to the rehearing of continuing civil injunctions. The state in *Pearce*, however, was not such a jurisdiction. It did not use indeterminate sentences or generally subject sentences to continual reassessment. All sentences were fixed at the close of trial once and for all, except for a few defendants (like Pearce) who were unfortunate enough to be reconvicted following successful appeals.

The real reason the rule of repose did not apply in *Pearce* is that the resentencing there was not *relitigation* as ordinarily understood. The prosecution in *Pearce* was not asking for a "second bite at the apple" in the form of a separate hearing with adversary proof, instructions, and burden of proof under specific sentencing standards. Rather, the prosecution was asking that the trial judge be allowed at the conclusion of trial to impose a sentence that was in accord with the evidence already before him by virtue of its having been introduced on the issue of guilt or innocence. To have ruled otherwise in *Pearce* would have required the sentencing judge to blind himself to probative evidence already before him by adhering to a previous sentence that might have nothing to do with the facts as he then understood them to be.

> The prosecution in *Pearce* was not asking for a "second bite of the apple". . .

Bullington, on the other hand, is a paradigm of res judicata. The prosecution there is not asking that the trial jury be allowed to impose a sentence in accord with probative evidence that will independently be before it on the matter of guilt or innocence. Rather, the prosecution is asking to be allowed to present adversary proofs in a *de novo* proceeding before a jury to be instructed under independent standards of law—all for the purpose of relitigating historical facts that the prosecution had already fully and fairly litigated once before.

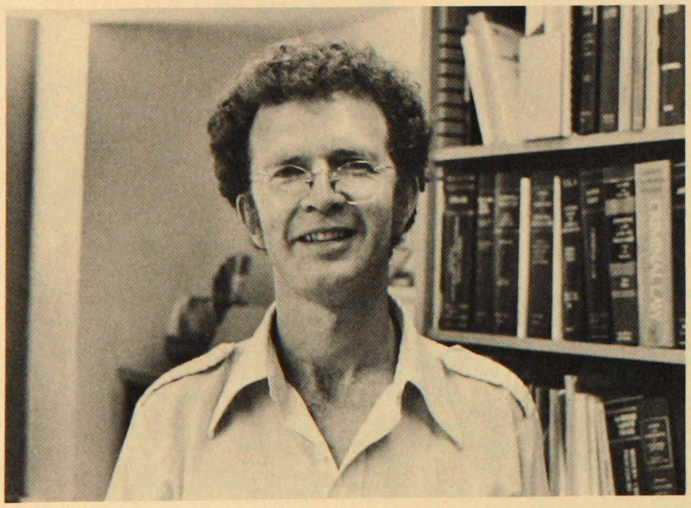
Consequently, unless the prosecution in *Bullington* has preserved a sufficient objection to the exclusion of women from the original jury, it should be precluded by constitutional rules of repose from seeking a "second bite of the apple."

* * * * * * * * * *

I suggested at the start that we might learn from *Bullington* something about legal rules and, hence, about legal education. If ever there has been a rule of criminal procedure that we all assumed we understood, it is the double jeopardy rule of *Pearce*, that a defendant who is reconvicted following a successful appeal may be given a greater sentence than he originally received. Now *Bullington* comes along and reveals that those of us whose knowledge of law consists of hornbook rules know less than we thought we did. For however *Bullington* is eventually decided, the very granting of certiorari shows that the *Pearce* rule—like all legal "rules"—is elusive; that the real meaning of *Pearce* inheres in the balance of constitutional values it reflects; that if a school can teach its students how to identify and analyze such values, it can largely dispense with hornbook rules; and that if a school does not equip its students with skills of analysis, no amount of learned rules will do them much good.

Footnotes

1. 395 U.S. 711 (1969).
2. Westen, *The Three Faces of Double Jeopardy*, 78 Mich. L. Rev. 1001 (1980).
3. *U.S.* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("fundamental"); *Burks* v. *U.S.*, 437 U.S. 1, 16 (1978) ("absolute finality"); Green v. U.S. 355 U.S. 183, 190 (1957) ("implicit acquittal"); *Fong Foo* v. *U.S.*, 369 U.S. 141, 143 (1962) ("egregiously erroneous").
4. *Stroud* v. *U.S.*, 251 U.S. 15 (1919).
5. *U.S.* v. *DiFrancesco*, 49 U.S.L.W. 4022, 4026 n. 11 (U.S., Dec. 9, 1980).
6. *See Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973).
7. *Burks, supra* at 16. To be sure, if death penalty decisions are not required to be allocated to sixth amendment juries in the first place, the acquittal rule might be deemed not to apply to such decisions as are left to juries by legislative choice. The Supreme Court, however, has never explicitly passed on whether a defendant today is constitutionally entitled to a sixth amendment jury verdict on issues of life or death. *But cf. Proffitt* v. *Florida*, 428 U.S. 242 (1976). Indeed, now that death penalty practice so closely approximates traditional sixth amendment determinations of guilt or innocence, it can be persuasively argued that the death penalty has become a mandatory sixth amendment issue for final resolution by juries.
8. *Burks* v. *United States, supra* at 16 ("fair"); *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937) ("free from error"); *Burks, supra* at 17 ("second bite").



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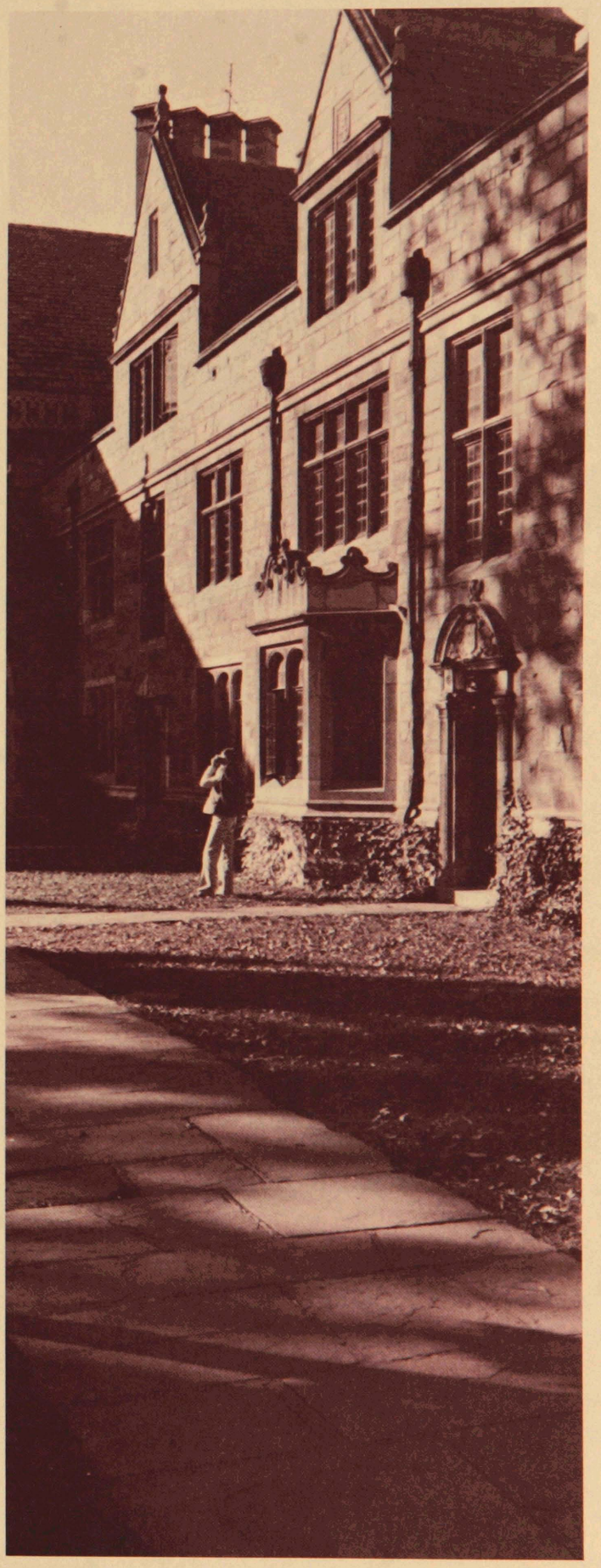

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