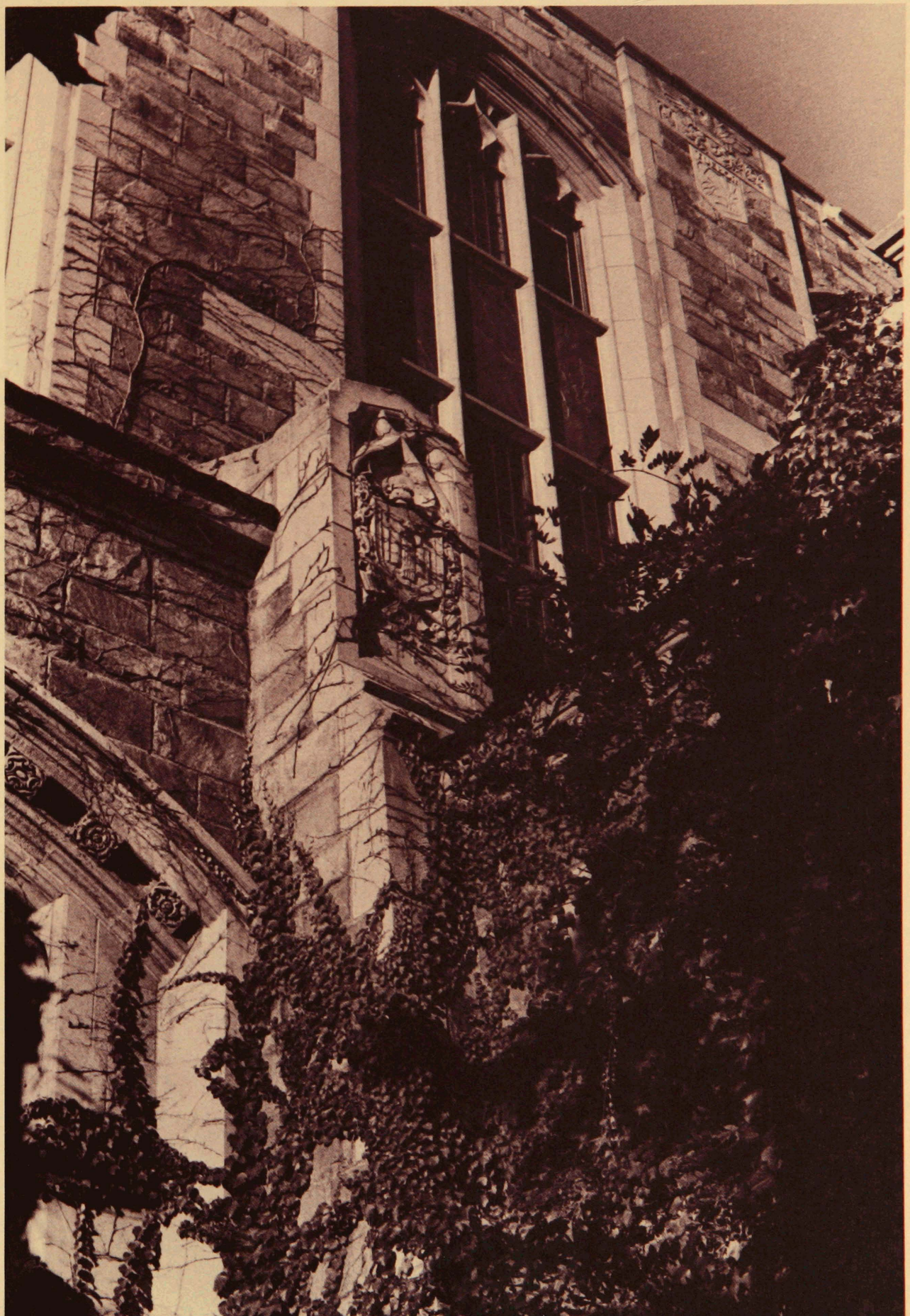
Law Quadrangle Notes

The University of Michigan Law School

Volume 26, Number 1, Fall 1981



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contents

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briefs

Sandalow Among U-M Delegation To China

A U-M delegation led by President Harold Shapiro and including law dean Terrance Sandalow visited China in May in an effort to increase research opportunities for U-M faculty and graduate students. As guests of China's Ministry of Education, the group met with officials of the Chinese government and of seven universities and research institutes in the cities of Shanghai, Xian, and Beijing (Peking).

Representing the U-M on the trip, in addition to Shapiro and Sandalow, were Vivian Shapiro, a faculty member in the School of Social Work; William R. Dawson, chairman of the Division of Biological Sciences; Richard D. Remington, dean of the School of Public Health; Wei-ying Wan, head of the Asian Library; and political science Professor Michel Oksenberg, who made arrangements for the trip.

In the course of discussions between the U-M group and Chinese officials, arrangements were made to establish a program of reciprocal research fellowships. The University will offer nine fellowships annually to Chinese scholars to support their research at the University. In return, Chinese institutions will offer an equal number of fellowships to U-M faculty and graduate students to support research activities in China. Although the general outlines of the program have been agreed upon, many details remain to be worked out.

The most important unresolved question, Dean Sandalow noted in an interview upon his return, "is the extent to which Americans will be able to gain access to matters that they wish to investigate. Although we received assurances that our faculty and students would have a broad range of research opportunities, it is important to remember that China is not an open society. Subjects that we do not regard as sensitive may require access to information and to geographic areas that are restricted in China. The extent of these restrictions will not be known until specific research proposals are put forth.

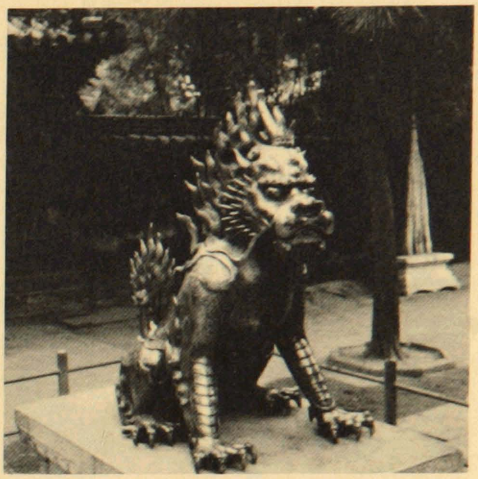
"Nevertheless, we came away from the meetings optimistic about the prospects. Both Chinese government and university officials seem eager to develop strong ties with the University, and they appreciate the importance that we attach to increasing research opportunities for our faculty and students," said Sandalow.

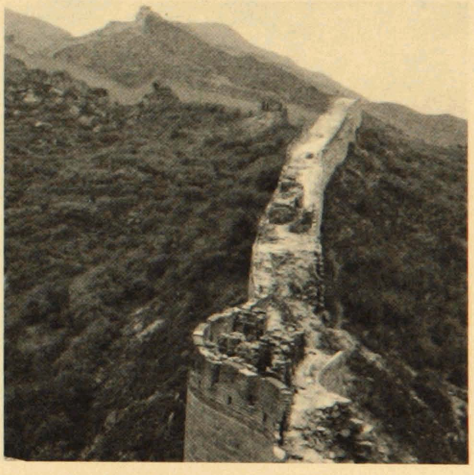
The U-M group explored research possibilities in China in a wide range of fields. In discussing opportunities for legal research, Dean Sandalow noted that little is known by the Western world about the Chinese legal system. "Improved Sino-American relations and the resumption of trade between the United States and China create an immediate need for greater knowledge," he said. "Lawyers involved in U.S.-China trade exchanges will require an understanding of Chinese commercial regulation and taxation. And since some Americans will be living in China, we shall need to know more about areas of Chinese law—for example, criminal law—that may affect them."

Study of China's legal system is also important, Dean Sandalow observed, as a way of increasing our understanding of Chinese society. "Research concerning criminal law and administration is likely to yield important insights into prevailing ideals and attitudes." Moreover, he added, "the differences between the Chinese legal traditions and our own are sufficiently great that American legal scholars doing research in China will almost inevitably be drawn to investigate questions that do not directly concern the legal system. Traditionally, and under the Communist government, law and lawyers have been much less important in China than they have been in the West. The Chinese have, for example, looked to courts much less than have Western nations to resolve controversies between individuals, relying instead upon less formal mechanisms of conciliation. Investigation of the mechanisms of conciliation will increase not only our understanding of Chinese society, but also of the potential of alternative techniques of dispute resolution."

The opportunities for legal research may be especially good now, Dean Sandalow said, because in the past few years the Chinese government has substantially altered its policies with respect to law and the role of lawyers.

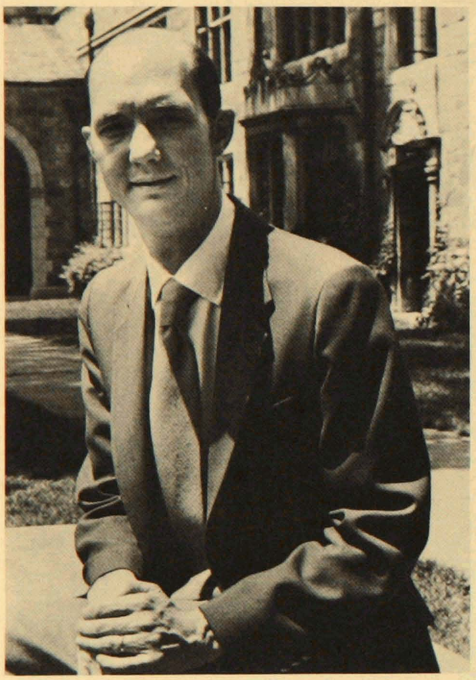
"Partly as a result of its desire for increased international trade and





From the dean's China photo album (top to bottom): the Forbidden City, Coal Hill, and the Great Wall, all taken in or near Beijing (Peking).

Dean Terrance Sandalow



Edward H. Cooper

partly because of changes in its domestic policies, the government has embarked upon an ambitious legislative program. It seems generally to be accepted that lawyers are needed to draft and to administer the new legislation. The government officials and legal scholars with whom I met were, however, candid in admitting that China confronts an acute shortage of lawyers. During the Cultural Revolution—from 1964 to 1977—all law schools were closed. As a result, China, whose population is approaching one billion, has only 3,000 lawyers—and virtually none who are under the age of 45.

"With so few lawyers, it's obvious that many jobs that we are accustomed to having performed by lawyers are, in China, being done by people who have no formal legal education. Although the government appears determined to increase the number of lawyers substantially, continued reliance upon individuals who lack formal legal training seem inevitable for the foreseeable future."

One manifestation of the Chinese government's renewed interest in legal education and research is the desire, expressed by several officials, to enable Chinese lawyers to study the legal systems of other nations, including the United States, said the dean. The Law School is eager to receive Chinese lawyers who wish to study or do research in the U.S., Sandalow said, but "language is as formidable a barrier for the Chinese as it is for Americans who might wish to study or do research in China. Just as there are very few American lawyers who know Chinese—Chris Whitman is the only member of our current faculty who does—there are very few Chinese lawyers who know English well enough to do work here."

Two students from the People's Republic of China have been studying at U-M Law School during the past year. They are Tingyun Sun, an employee of the Wuhan Heavy Machine Tool Works, and Keyu Peng, a staff member of China's Ministry of Foreign Affairs. In the fall, 1981, Miss Ai-lin Wan, who earned the equivalent of a law degree from Beijing Institute of Foreign Trade, will be the third student from China at U-M Law School. Sandalow estimates there are some 60 students from the People's Republic of China presently studying at U-M in various fields.

Among general observations about China, Sandalow said a lasting impression was that of the high population density. Also, he noted, each city visited by the U-M delegation seemed to have distinctive characteristics, especially with regard to the apparent economic status of the population and the availability of consumer goods. By contrast, American and European cities seem much more homogeneous, he said.

Almost everywhere the U-M group went, said Sandalow, "we were greeted on the street by Chinese who wanted to practice their English." The American visitors were permitted to walk throughout the cities at will, and Sandalow said the only time he was prohibited from taking photographs was when one hotel guard carrying a rifle and bayonette declined to have his picture taken.

The U-M delegation were guests at many banquets hosted by Chinese officials. "To my astonishment," said Sandalow, "I found that I liked cooked eels—and even had a second helping."

Edward H. Cooper Named Associate Dean

Edward H. Cooper, U-M law professor since 1973, has been appointed associate dean of the Law School. The appointment, for a three-year term beginning July 1, 1981, was approved by U-M Regents.

"Prof. Cooper has written extensively in the field of civil procedure and is widely regarded as one of the nation's leading authorities on that subject," said Terrance Sandalow, dean of the Law School. "In addition to his work in civil procedure, Prof. Cooper has made important contributions to scholarship in the field of antitrust law.

"During his years at the Law School, Prof. Cooper has served on and chaired a number of important committees. He has earned the respect of his colleagues for the intelligence, sound judgment, and efficiency with which he has handled these assignments."

Prof. Cooper, after receiving his undergraduate degree from Dartmouth College and his law degree from Harvard University, served as a law clerk to Judge Clifford O'Sullivan of the U.S. Court of Appeals for the Sixth Circuit.

Following private practice in Detroit, Prof. Cooper began his academic career in 1967 as a member of the University of Minnesota law faculty, and then joined Michigan's Law School in 1973.

James J. White, who has been associate law dean for the past three years, was due to step down in July, but his term was extended by U-M

Regents for six months in order for White to continue working on projects relating to the construction of the new law library addition.

Eric Stein Receives von Humboldt Award

Prof. Eric Stein of U-M Law School is one of five American professors named to receive awards from the Alexander von Humboldt Foundation of Bonn, West Germany, to pursue scholarly research in that country.

"The award is available to scholars in social sciences and humanities of any nation," noted the awards announcement. "The prize entails an invitation to conduct scientific work of the recipient's own choice at German research institutions."

Prof. Stein was nominated for the award by co-directors of the Max Planck Institute for foreign and private international law in Hamburg, where he will conduct research from January through April, 1982. His work will also be done at a second Max Planck Institute in Heidelberg.

Stein's research will contribute to an ongoing project by European and American scholars analyzing the trend toward uniform foreign affairs and policies of European nations, as a byproduct of their uniformity of economic and trade policies. The project is sponsored by the European University in Florence.

Other of Stein's research work will deal with the problem of prohibition of racist propaganda under American law, in certain European countries, and under international treaties. The work is being carried out in conjunction with research by U-M law Prof. Lee Bollinger, who is writing a book about U.S. First Amendment free speech questions.

Prof. Stein, who holds the Hessel E. Yntema Professorship at the U-M, is a specialist in international and comparative law. He is author or co-author of books on European Community law, test ban negotiations, and harmonization of international business law.

Other winners of 1981 von Humboldt Research Awards and their scholarly fields: Prof. Richard A. Musgrave, Harvard University (finance); Prof. Walter H. Sokel, University of Virginia (literature); Jacob Neusner, Brown University (Semitic studies); and Prof. Robert S. Weyer, University of Illinois (psychology).

Kamisar Argues For "Exclusionary Rule"

Abandonment of the so-called "exclusionary rule," which prohibits police from using illegally gained evidence in criminal trials, could open the floodgates to widespread abuse of constitutional guarantees by law enforcement authorities, warns a Michigan law professor.

Yale Kamisar, criminal law specialist, defended the long-standing exclusionary rule in remarks in June, 1981, before the Attorney General's Task Force on Violent Crime which met in Los Angeles.

The exclusionary rule, which has been criticized recently by Chief Justice Warren Burger of the U.S. Supreme Court and other members of the legal profession, was adopted by the federal courts in 1914. It has also been imposed on the states since 1961 as a result of the widely known Supreme Court case, *Mapp v. Ohio.*

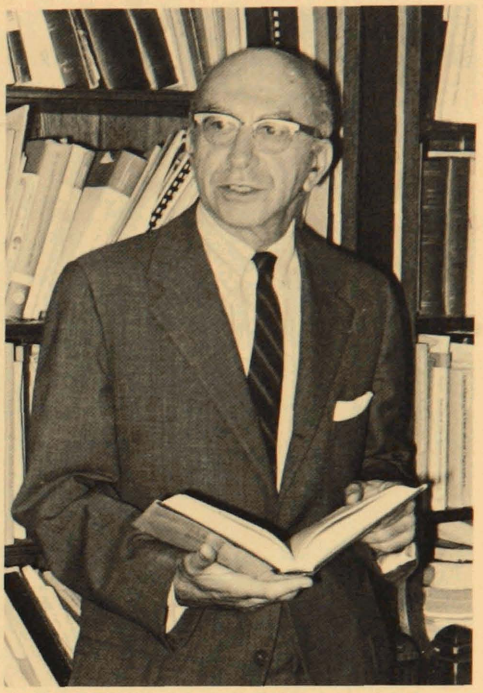
Kamisar told the federal task force that abolition of the rule by the courts would provide the tacit message to police that they could return to pre-1961 policies under which constitutional guarantees—particularly the Fourth Amendment protection against "unreasonable search and seizure"—were not seriously upheld.

He cited the disclosures of one New York City police official, who described the effect of the 1961 *Mapp* ruling this way: "The Mapp case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take our search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled (until 1961) that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?"

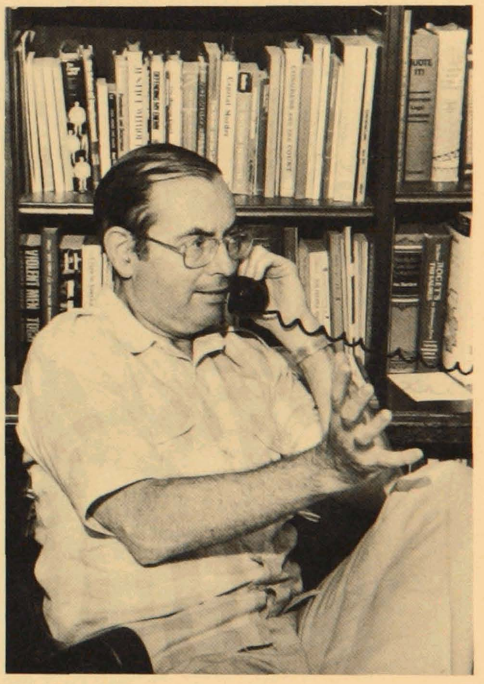
Kamisar noted that one recurrent criticism of the exclusionary rule is that it handcuffs police in their fight against crime. But, argued the professor, those restraints against illegal police activity are already set forth in the U.S. Constitution, and the exclusionary rule merely serves to remove incentives for violating those guarantees.

"The exclusionary rule says nothing about the content of the law governing police," said Kamisar. "The rule merely states the consequences of a breach of whatever principles control law enforcement"—namely, that evidence gained illegally cannot be admitted in a criminal trial.

But the professor acknowledged the difficulty in gaining strong public



Eric Stein



Yale Kamisar

Theodore J. St. Antoine

support for the exclusionary rule, both within and outside the legal profession.

A major problem for public acceptance, said Kamisar, is that the rule works after the fact—"and by then we know who the criminal is and what the evidence is against him.

"Although the police may have illegally searched five or ten homes without discovering anything, or illegally arrested five or ten people without uncovering anything, the only case that gets to court is the one where they hit paydirt.

"By then we know who the criminal is and what the evidence is against him, and the defense lawyer, in effect, asks the court to turn back the clock and reconstruct events as though the damaging evidence never exists."

While "deciding Fourth Amendment questions after the search and seizure has taken place is the worst time to do so," said Kamisar, "from a practical standpoint, it is the first time we can do so."

The basic argument underlying the need for the exclusionary rule, according to Kamisar, is this:

"If the government is supposed to honor 'the right of the people to be secure . . . against unreasonable searches and seizures' and the government violates that right, it should not be allowed to benefit from it.

"If the government could not have gained a conviction had it obeyed the Constitution, why should it be allowed to do so because it violated the Constitution?"

Kamisar noted that another criticism of the exclusionary rule has been that "the rule leaves a good deal to be desired as a deterrent." For example, some have argued that the rule has no effect in cases of police harassment that do not result in criminal prosecutions, or in cases of illegal search and seizure that turn up no incriminating evidence.

Such drawbacks, argued Kamisar "strike me as a good reason for supplementing (the exclusionary rule), not abolishing it."

He also noted that there is no conflict between implementing the exclusionary rule in cases where prosecutions are brought and suing or disciplining lawless police when their misconduct does not produce damaging evidence.

Kamisar claimed that the thinking of a leading critic of the exclusionary rule, Chief Justice Burger of the Supreme Court, has not been unyielding over the years.

The professor said that he was surprised to learn on rereading a 17-year-old article "by a then relatively obscure federal judge" (now Chief Justice Burger) that Burger "had recognized that the exclusionary rule is an essential tool, and that its inadequacies were a reason to supplement the rule, not abolish it."

Kamisar said Burger even went so far as to offer his own original theory of justification for the exclusionary rule.

He quoted Burger as saying in the article: " 'It is the proud claim of a democratic society that the people are masters and all officials of the state are servants of the people. That being so, the ancient rule of "respondeat superior" furnishes us with a simple, direct, and reasonable basis for refusing to admit evidence secured in violation of constitutional provisions. Since the policeman is society's servant, his acts in the execution of his duty are attributable to the master or employer. Society as a whole is thus responsible and society is "penalized" by refusing it the benefit of evidence secured by illegal action.' "

Kamisar noted that the Chief Justice's thinking has changed significantly in the past 17 years, and Justice Burger is now urging abolition of the exclusionary rule. Added Kamisar: "I submit that he was right the first time."

"Firing" May Be Form of Discrimination, Says St. Antoine

While great strides have been made over the past 20 years to stamp out discrimination in employment, another hurdle facing large numbers of American workers must still be crossed—the problem of unjust discharge by their employers.

So said Theodore J. St. Antoine, a specialist in labor law from the University of Michigan Law School, in an address at the 34th annual meeting of the National Academy of Arbitrators. The group met in Maui, Hawaii in the Spring, 1981.

St. Antoine, former U-M law dean, said the time is now ripe for the passage of legislation requiring employers to show "just cause" for dismissals of workers and for disciplinary actions—such as demotions or denied promotions—which constitute a "functional equivalent of discharge."

Ideally, said St. Antoine, the legislation should require such cases

to be settled through the use of labor arbitration procedures, with the options of reinstatement of the fired employee or an award of severance pay in cases where the dismissal is found unjustified.

Today, only a fraction of American workers are protected against unfair dismissals, said St. Antoine. These include federal, state, and local civil service workers, a small number of workers on fixed contract, and workers covered by collective bargaining agreements which prohibit discharge except for "cause" or "just cause."

Because union membership has now dropped to less than 20 per cent of the total U.S. labor force, St. Antoine estimated that "something like three quarters of our 100 million work force" operates without such protections.

Analysts have calculated that "about one million private industry employees with more than six months' service are fired in a typical year without recourse to grievance and arbitration procedures." And it has been estimated that "about 50,000 would (likely) be reinstated if they could appeal to impartial tribunals," said St. Antoine.

Recent court cases in New Hampshire, Michigan, California, and other states have moved in the direction of holding retaliatory discharge to be a tort or breach of contract, although such cases have stopped short of imposing any obligation on employers to demonstrate a "reasonable basis for adverse personnel action."

These cases have dealt with such questions as a female worker's firing after she had rejected her foreman's sexual advances; workers fired for refusing to give perjured testimony or for serving on a jury; and one employee who was allegedly discharged for refusing to participate in an illegal retail gasoline price fixing scheme.

"Just cause" protection of non-union workers has been proposed in bills introduced in such states as Connecticut, Michigan, and New Jersey during the past few years, noted St. Antoine. "A federal statute would seem foredoomed in this period of national retrenchment; state legislation seems more promising," he said.

Models for possible U.S. legislation exist in all European Common Market countries and in Sweden and Norway, where laws protecting workers against unfair discharge are already in force, said St. Antoine.

American labor unions, he noted, cannot be counted on to support this legal protection of workers. "A common assumption is that unions will not favor (such legislation) because it will eliminate or detract from one of the unions' prime selling points in their efforts to organize the unorganized."

But St. Antoine argued that this view is short-sighted because "the promise of fair treatment" held out to employees by the newly proposed legislation will likely remain unfulfilled unless "there is present the means to actualize it." Unions could play a significant role in helping to enforce such a law, he said.

St. Antoine recommended that high-level management employees and probationary employees probably ought not be included under the legislation, and that "small employers" having fewer than 10 or 15 workers, should be similarly excluded.

Vining Warns Of Court "Bureaucracy"

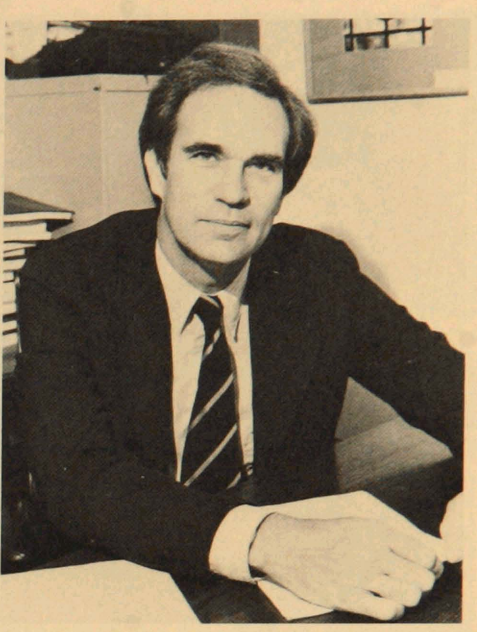
Just as computer printouts and supermarket pricing codes have tended to depersonalize our day-to-day business transactions, the federal court system is becoming more of a "depersonalized bureaucracy" for lawyers who must deal with that system, maintains a Michigan law professor.

Gone are the days, said Prof. Joseph Vining, when lawyers could count on opinions of the federal courts as authoritative reflections of the workings of a single legal mind, or the joint efforts of judges to accurately reflect the dialogue that produced a decision.

Instead, judges are increasingly relying on the growing cadre of law clerks, many of them recent law school graduates, to write a major share of their opinions, said Vining.

Continuation of this trend, warned Vining, could bring about a widely accepted "bureaucratic" style of legal writing—similar to texts produced by "opinion writing sections" of federal administrative agencies—that could seriously erode the authority of the federal courts in the eyes of lawyers.

Vining, a specialist in administrative law, discussed the problems in his Distinguished Scholars Lecture on Access to Justice, hosted by the University of Windsor in Canada in the spring, 1981.



Joseph Vining

Law Dean Terrance Sandalow talks over Alumni Reunion dinner with Eldon Butzbaugh (class of '68) and Judy Butzbaugh.

Gerald M. Rosberg

Citing the "bureaucratization" of the U.S. Supreme Court as an example of a trend which is also prevalent on lower courts, Vining said:

"The actual operations of the Supreme Court have always been veiled, and what is revealed is often dismissed as gossip. But clerks routinely now say in private that they wrote one or another important opinion and that it was published with hardly a change. Studies of lower court procedures also suggest that an institutional practice of assigning to staff the reading of briefs and the writing of opinion is well established.

"However veiled the actual operations of the Supreme Court may be, we know that a large professional staff must have something to do. All are working to produce a product. And the products they are producing are the texts of choice to which American lawyers turn when they undertake legal analysis.

"As lawyers are becoming more aware of this," said Vining, "their confidence that, through reading an opinion or set of opinions, they can reach a mind behind these opinions must begin to fail within them. Lawyers have assumed that legal writing is a means of access to the legal mind."

Vining noted that it is now common for associate justices on the Supreme Court to have four law clerks each, compared to a staff consisting only of a legal secretary or research assistant years ago.

"As the staff has grown there are indications that it is becoming layered. Clerks interview the flood of applicants for clerkships. One or another clerk may regulate access to the justice himself. As the staff grows and becomes layered, a premium upon tenure in office can be expected to emerge."

Within such a bureaucratic setting, opinions produced by the courts "now often seem things written by no one at all, or no one with responsibility," says the professor.

"They are too long to be written by men complaining of a vast increase in case load, too much things of patchwork, things which seem on their face to express more the institutional process of their making than the thinking, feeling, and reasoning of the author and those persuaded with him."

Alumni Reunion And Law Forum II Well Received

by Prof. Roy F. Proffitt

Beautiful spring weather, a robust crowd, an excellent program, good food, and a large measure of visiting between classmates and other friends proved to be a foolproof recipe, making the second annual Law Alumni Reunion and Law Forum an exciting experience for all who attended. The gathering convened in Ann Arbor, May 21, 22, and 23, 1981.

The enthusiasm with which LARLF I and II have been received assures that Law Alumni Reunions and Law Forums will be a permanent part of the activities of the Lawyers Club and the school. Several thoughtful suggestions for future programs from those in attendance will receive careful attention as plans for LARLF III are made. Details about the next reunion and forum will be announced in the next issue of *Law Quadrangle Notes* as well as in separate mailings to all alumni.

The Law Alumni Reunions and Law Forums are intended to be a pleasant social event as well as a stimulating intellectual experience. All agreed that LARLF II easily achieved both goals.

An important event for members of the Class of 1931, who held their own 50-year anniversary in conjunction with LARLF II, was their induction into the University of Michigan Emeritus Club. Appropriate certificates and pins were given to the more than 30 members of the class

who were present. One hundred forty-one graduates were in the Class of 1931. The Class of 1941 also had a well-attended reunion during LARLF. Among its exciting activities was a Saturday afternoon cocktail party at the country home of classmate Judge John Feikens. Eight members of the Class of 1926 and their spouses enjoyed dinner together at the Friday night all-class dinner.

Variety and excellence marked the Law Forum presentations. Subjects included antitrust law, an inside look at the activities of the legal adviser's office in the United States Department of State (including the problems created by the Iranian settlement), the so-called "taxpayer revolt," the place of psychology in the litigation process, and a discussion of the pros and cons of prepaid legal services. During the reunion luncheon on Friday noon everyone enjoyed a talk on "Transitions" by the former Solicitor General of the United States (and former judge of the United States Court of Appeals, judge of the United States District Court, judge of the Wayne County Circuit Court, and private practitioner), Wade McCree, Jr., who has now joined the Law School faculty.

Professor Emeritus William W. Bishop, Jr., chats with alumni at the Law Forum II.

Waggoner Is Fellow Of Probate Group

Law Prof. Lawrence W. Waggoner has been elected to membership as an Academic Fellow of the American College of Probate Counsel.

The college is an international association of lawyers working to "improve the standards of persons specializing in wills, trusts, estate planning, and probate." It also seeks the administrative modernization of our tax and judicial systems in these areas.

Waggoner's election, announced by Milton Greenfield, Jr., president of the American College of Probate Counsel, took place during the group's recent annual meeting in Tarpon Springs, Fla. More than 350 fellows attended.

A member of the U-M law faculty since 1974, Waggoner specializes in trusts and estates, federal estate taxation, and estate planning. A graduate of University of Cincinnati, he received a law degree from Michigan in 1963 and a doctorate from Oxford University in 1966.

Peter O. Steiner Named LSA Dean

Peter O. Steiner, professor of economics and law at U-M, has been appointed dean of the College of Literature, Science, and the Arts (LSA), effective July 1, 1981.

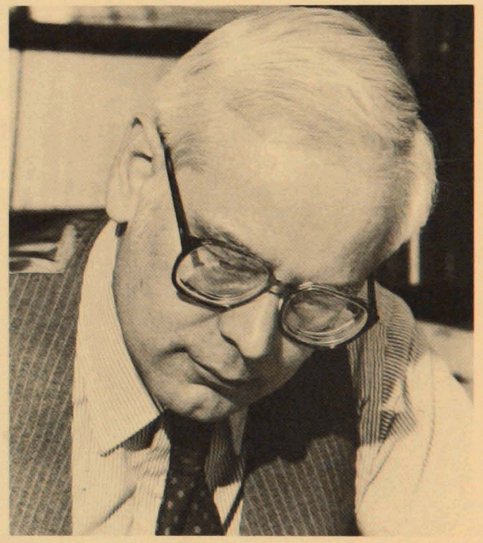
The oldest and largest U-M school, LSA had a 1980 enrollment of some 16,500 students and a faculty of about 850 people.

Steiner is an internationally known economist who served from 1976 to 1978 as president of the American Association of University Professors. He served as chairman of the U-M economics department from 1971 to 1974.

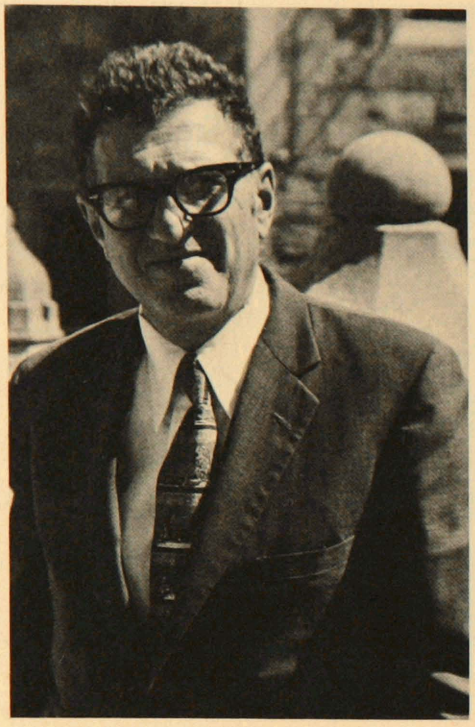
He is the author and co-author of 10 books including *Economics* (with Richard G. Lipsey, published by Harper & Row), the sixth edition of which has just been published, and *Mergers: Motives, Effects, and Policies* (University of Michigan Press, 1975). The latter work received the University of Michigan Press Book Award in 1977. He is also the author of many articles.

Steiner earned a bachelor of arts degree *magna cum laude* from Oberlin College in 1943, followed by master of arts (1949) and doctor of philosophy (1950) degrees in economics from Harvard University.

A World War II U.S. Navy veteran, he was a teaching fellow at Harvard while pursuing his graduate degrees. He was a faculty member from 1949 to 1957 at the University of California,



Lawrence W. Waggoner



Peter O. Steiner

Berkeley, before going to the University of Wisconsin economics department. He rose to professor there before coming to Michigan in 1968 as professor of economics and law.

Steiner has been a consultant to the Department of the Treasury, the Bureau of the Budget, and the American Council of Graduate Schools. He has served as a member of the Presidential Task Force on Productivity and Competition and the Higher Education Advisory Committee on Wages and Prices. He has been a Social Science Research Council faculty research fellow, a Guggenheim fellow, and a Ford faculty research fellow.

In 1975, while on a visiting professorship in Kenya, he made international headlines when he helped negotiate the release of four Stanford University students who were kidnapped and held hostage by rebels in eastern Zaire.

New Directory Of Law Alumni Is Published

The fifth in a series of alumni directories has recently been published by the Law School. It contains information about approximately 13,500 living alumni, whose class years span a period of 80 years from 1901 through 1981. It also includes the names of more than 4,500 new graduates who had not yet received their degrees when the last directory was published in 1970. With an average of 390 graduates in each class since that directory, the new additions to the ranks of alumni far outnumber those lost by attrition.

After an informal poll of alumni, the arrangement of the material in the new directory has been altered slightly from earlier editions to make this volume easier to use; however, the information is substantially the same. The largest subdivision of the new directory lists all living alumni in alphabetical order, and includes his or her entire academic history, legal or other employment position where applicable, and address. If a person's name has been changed since graduation, both names will be shown. Business addresses have been emphasized, but whenever appropriate a home address has been used.

A second major subdivision is a geo-alphabetical listing of the living alumni showing their states and cities and the years of their first degree from the Law School. Michigan Law School alumni are located in all 50 states, District of Columbia, Guam, Puerto Rico, the Virgin Islands, and 75 foreign countries. The third important division shows an entire list of graduates in each class—from 1860 through 1981—and indicates those who are deceased and those about whom the Law School has no current information. The volume is completed with a list of all faculty members who have served the school since 1859.

With the use of computers and modern printing technology, the time lag between the first announcement of this directory and the mailing of the questionnaire to alumni and the distribution of the finished volume was dramatically shortened from similar periods for the earlier editions, but inevitably this directory, like all directories, was "out of date" before it was printed. Because this was true, and more than 4,000 changes are made to the addresses each year, and because of the large size of each new class, the Law School now expects to publish a new edition at three year intervals. To keep the cost as reasonable as possible, and in anticipation of more frequent directories in the future, this edition has been issued with the so-called "perfect binding" or soft cover.

Great care was taken to keep factual and printing errors to a minimum, but miracles are not expected. If errors are found, the Law School will appreciate alumni sending the correct information to the school.

Those who did not take advantage of the pre-publication sale of the book may still purchase a directory, on a first-come first-served basis, for $15. Requests should be sent to the Law School Fund, The University of Michigan Law School, Ann Arbor, Michigan 48109.—*Roy F. Proffitt*

Aleinikoff And Schneider Are Newest Faculty

Alexander Aleinikoff and Carl E. Schneider are two new faculty members of the U-M Law School, effective in the fall, 1981.

Aleinikoff will teach courses in

constitutional law and local government law. Most recently he served for three years as an attorney in the U.S. Department of Justice, first in the Office of Legal Counsel, then as counselor to the Associate Attorney General, and finally as a trial attorney specializing in wildlife management cases.

Aleinikoff is a 1974 *summa cum laude* graduate of Swarthmore College and a 1977 graduate of Yale Law School. While in law school he served as note editor of the *Yale Law Journal*.

A member of Phi Beta Kappa, Aleinikoff published an article, co-authored with Robert Cover, "Dialectical Federalism: Habeas Corpus and the Court," which appeared in the *Yale Law Journal*.

Schneider, a Michigan Law School alumnus, will teach courses in property law. During 1980-81 he served as law clerk for Justice Potter Stewart of the U.S. Supreme Court, and in 1979-80 was law clerk for Justice Carl McGowan of the U.S. Court of Appeals for the District of Columbia Circuit.

A 1972 *magna cum laude* graduate of Harvard College, Schneider received his J.D., *magna cum laude*, from U-M Law School in 1979. Among other honors, he served as editor in chief of the *Michigan Law Review* and received several awards recognizing his scholastic record, his work for the *Law Review*, and his academic work in comparative law, and criminal and constitutional law.

Law Journal Surveys "Economy In Disarray"

A "tax based incomes policy," designed to decrease inflationary behavior by taxing or subsidizing certain wage and price actions, might be a useful alternative to "wage and price controls," suggests an article in *The University of Michigan Journal of Law Reform*.

The article, by Washington, D.C., lawyer Steven Hunsicker, appears in a recently released special issue of the publication devoted to the theme "The Economy in Disarray: Legal Perspectives on Inflation and Recession."

Also appearing in that issue is an article by U-M president and economist Harold T. Shapiro, who argues that the "cure" for inflation may lie beyond the grasp of economists alone, but within the broader political arena. For example, he says, "if continuing inflation is to be avoided, Congress cannot continue to satisfy constituents' demands through the vehicle of monetary expansion."

In his article on a "tax based incomes policy," Hunsicker suggests that such a policy merits serious consideration as a complement to policies of fiscal and monetary restraint.

"The fundamental rationale of TIP (tax based incomes policy) is that aggregate individual wage and price decisions contribute to generalized inflationary pressures. The theory is that by taxing or subsidizing wage and price actions, a TIP could induce less inflationary behavior," says Hunsicker.

"Tax rates could be increased for those wage and price increases exceeding specified norms, and/or decreased where wage and price decisions reflect the desired degree of restraint."

By contrast, Hunsicker argues, experience has shown that wage and price controls cannot contain the inflationary wage-price spiral over extended periods "without unacceptable costs."

Discussing the causes of inflation, President Shapiro argues that a continuing inflation can be understood only "when considering society in its broadest context and not in the narrow confines of economics.

"To understand the basic underlying causes of inflation, we must ask ourselves why our government has persisted, through Democratic and Republican administrations alike, in making the political choice of running large budget deficits and financing these, in part, by increasing the supply of money."

Explaining such monetary expansion, Shapiro writes: "When the Congress has finally expended all tax revenue and is unwilling or unable to expand the national debt, it can continue to 'satisfy' constituents' demands, at least in the short run, by printing money.

"Thus, while no group in society explicitly demands more inflation per se, pressures for the government to pursue a more inflationary policy arise from the fact that there are always groups—those who are next in line for federal support—who benefit from such a policy."

In another article Richard M. Bank, Washington, D.C., attorney, and Thomas C. Woodruff, former executive director of the President's Commission on Pension Policy, discuss "Protecting Retired Workers from Inflation."

They suggest consideration of various collective bargaining alternatives and other measures to boost the value of retiree pensions during today's rapid inflation.

"One suggestion to strengthen the bargaining position of retirees has been to allow retirees to bargain for themselves. While independent bargaining would put retirees in charge of their own fate, it would also put them in overt competition with active workers for benefits," they write.

"A less drastic alternative, which would nevertheless increase the bargaining strength of retirees, would be to require union officials to consult with retirees before making collective bargaining decisions affecting them."

Automatic cost of living adjustments in pension are among other reforms cited by the authors.

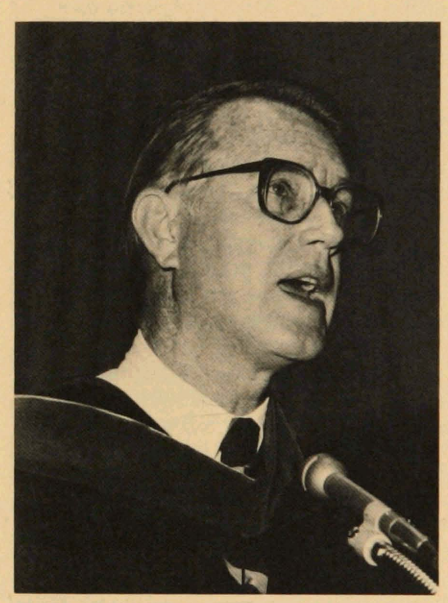
Other articles in the special issue deal with such questions as monopolistic aspects of inflated food prices, personal bankruptcy, advance notice of plant closings, and antitrust enforcement.

Good-bye

This is my last issue as managing editor of *Law Quadrangle Notes*, and editor of the briefs, events, and alumni notes sections. Over the years, I have attempted to make the magazine as interesting and readable as possible. I will continue in my capacity as information officer with the U-M Information Service, where the Law School will remain one of my areas of news coverage.

—Harley Schwadron

events



Charles B. Renfrew

Wade H. McCree, Jr.

Renfrew: "Too Many Senseless Lawsuits"

"The amount of litigation in this country is absolutely staggering," **Charles B. Renfrew,** former deputy U.S. attorney general, told graduating U-M law students at the Law School's "Senior Day" ceremonies in the spring, 1981.

Speaking at Hill Auditorium on campus, Renfrew said many lawyers are advancing cases dealing with important human rights and constitutional guarantees.

But too many others, he said, are "abusing the legal process" with senseless lawsuits.

These "petty, vindictive, malicious" cases are too often pursued "for the benefit of lawyers themselves, much to the detriment of the public," said Renfrew.

Blaming these excesses for much of the public distrust of the legal profession, Renfrew called on lawyers themselves—particularly new law graduates—to help remedy the problem.

A 1956 U-M law graduate, Renfrew served as deputy U.S. attorney general during 1980-81 in the Carter administration. He recently returned to private practice as a partner in the San Francisco law firm of Pillsbury, Madison & Sutro.

Previously Renfrew had served for eight years as U.S. district judge for the northern district of California.

Renfrew told the graduates that emphasis on education of lawyers who "are members of a learned profession," rather than mere "technicians," could help restore trust in the legal world.

Rather than simply teaching techniques of lawyers, legal education should impart the "ideals and values" and help establish and maintain high "standards of performance," Renfrew stressed.

McCree: "Abiding Respect For The Supreme Court"

Wade H. McCree, Jr., the U.S. solicitor general for the past four years and newly appointed faculty member at U-M Law School, says he has left the solicitor general's post with "an abiding respect for the U.S. Supreme Court."

The keynote speaker at the Law School's second annual "Law Alumni Reunion and Law Forum" in the spring, McCree observed that the lack of unanimity in Supreme Court decisions is a reflection of changing societal values and the "strong and divergent opinions on issues that should be debated vigorously."

He also said he was impressed by the high court's large caseload, in view of the fact that the average age of Supreme Court justices has been 70. "How many other courts can boast of no backlog of cases," said McCree.

Turning to other legal questions in an interview, McCree said he does not feel that the presidency of Ronald Reagan will necessarily mean a sudden conservative shift of the federal courts.

"It is interesting to observe that President Carter was the first full-term president not to have had a Supreme Court appointment. But he appointed more judges to lower federal courts than any other president in history, as a result of the omnibus legislation creating additional federal court positions.

"Many of these appointees are young people—such as two U-M law school alumni, Amalya Kearse and Harry Edwards (a former U-M law professor). And they are going to be serving on the courts for quite some time."

Based on his 23 years as a judge and four years as solicitor general, McCree said the quality of law school graduates who have served under him as law clerks or assistants is "better than ever."

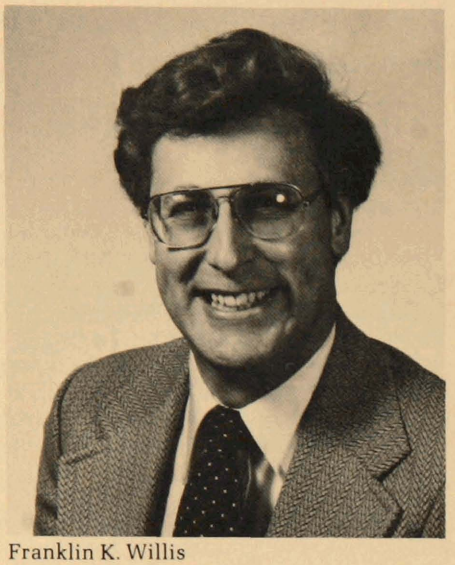
This high quality of law graduates is due, in part, to the fact that "law school curricula are more responsive to the needs of the profession, the quality of instruction is better, and the quality of students coming to law school is better," observed McCree.

A graduate of Fisk University and Harvard Law School, McCree is no stranger to the U-M. He received an honorary Doctor of Laws degree from Michigan in 1971, and both his daughter and son-in-law are U-M law graduates. (Both now Detroit attorneys, Kathleen McCree Lewis is a 1973 graduate of the Law School and her husband David Baker Lewis is a 1970 graduate.)

Before being named solicitor general by President Carter in 1977, McCree was judge of the U.S. Court of Appeals for the Sixth Circuit, the U.S. District Court for the eastern district of Michigan, and the Wayne County Circuit Court.

At U-M Law School, McCree expects his teaching will draw heavily on his experiences as judge and solicitor general. He is teaching a trial practice course during the fall term, 1981, and a Supreme Court seminar in the winter term. Another possibility is a class on "lawyers and clients."

alumni notes

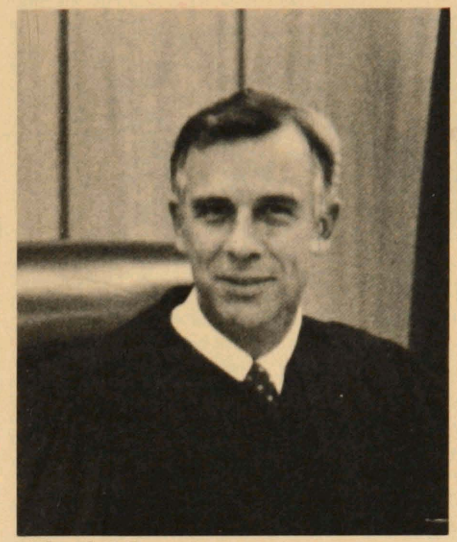


Franklin K. Willis

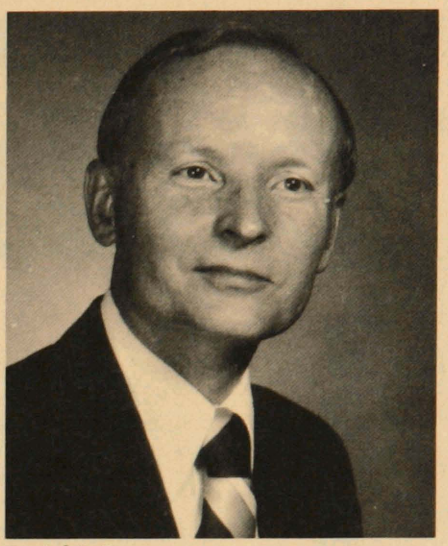
☐ **Franklin K. Willis,** 1969 U-M Law School alumnus, has been appointed by the Reagan administration as deputy assistant secretary for policy and international affairs in the Transportation Department. Previously Willis had worked in the State Department for 11 years in the Office of the Legal Advisor, and recently was involved in the Middle East peace talks. He served as assistant legal advisor in economic affairs during 1978-80, in Latin American affairs in 1977, and in African affairs in 1975-76. A 1960 graduate of Ann Arbor High School, Willis received his undergraduate education at Harvard College. He joined the State Department upon graduating from U-M Law School in 1969. In October 1980, he received a special award presented by the Secretary of State for his achievement in helping negotiate a civil aviation agreement leading to the resumption of air services between mainland China and the United States, following a 30-year lapse. In April 1977, Willis was the adviser to the U.S. delegation that traveled to Havana, Cuba, to reinstate U.S.-Cuban relations after a 16-year lapse. He was also actively involved in the anti-hijacking program of the Nixon administration in the early 1970s and designed a world-wide anti-sabotage treaty on behalf of the U.S. Willis is the son of Prof. and Mrs. Edgar W. Willis of the U-M Department of Communication.

Deanell Reece Tacha

☐ **Deanell Reece Tacha,** 1971 alumna of the Law School, became the new vice chancellor for academic affairs at the University of Kansas in the spring 1981. A law professor and former associate dean of the University of Kansas Law School, Tacha has served as associate vice chancellor for the past two years. In her new post, she is the chief academic administrator of the KU-Lawrence campus, with responsibilities for all academic programs and budgets, and for the overall supervision of KU's College of Liberal Arts and Sciences, the professional schools, and other academic programs. A 1968 KU graduate, Tacha served a year as a White House Fellow in the U.S. Department of Labor immediately following her graduation from Michigan Law School in 1971. She then practiced law for a year with a Washington, D.C., firm, and returned to Kansas in 1973 to practice with a firm in Concordia. She joined the KU law faculty in 1974, teaching and directing the KU Legal Aid Clinic. In 1977 she was named associate dean of the Law School. Tacha serves on the Kansas Committee for the Humanities, the National White House Fellows Commission, and the Kansas Board for the Admission of Attorneys. Her university activities have included membership on the Commission for Improvement of Undergraduate Education, and service on three dean search committees.



Richard H. Benson

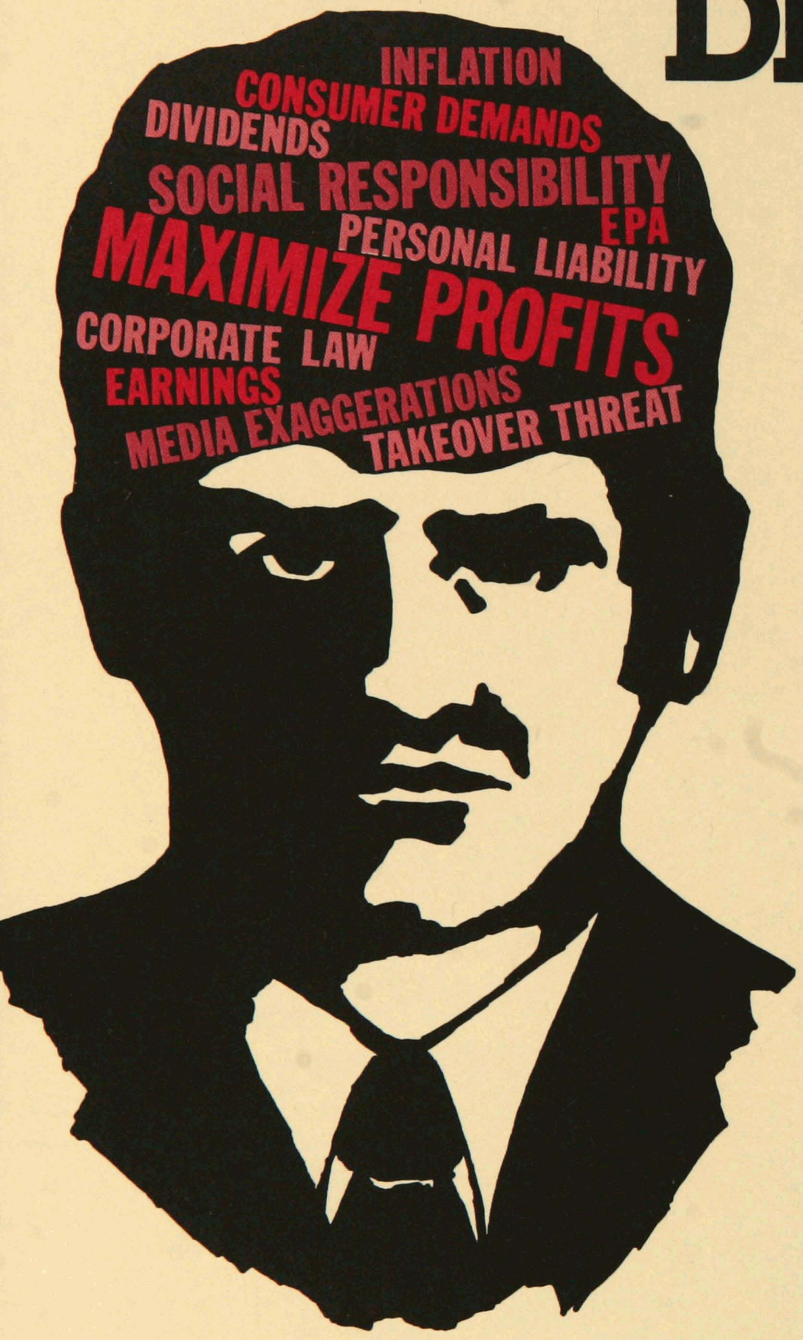


Daniel S. Guy

☐ A Michigan Law School alumnus is playing a role in the emerging nationhood of the Federated States of Micronesia, which is now organizing its own government. **Richard H. Benson,** member of the Michigan law class of 1956, has been appointed as one of the two members of Micronesia's first Supreme Court. Judge Benson began his duties as associate justice in March 1981 along with the new chief justice, Edward C. King. Judge Benson notes that "the Federated States of Micronesia embraces the states of Kosrae, Ponape, Truk, and Yap—that is, all of the Caroline Islands except Palau, which in January 1981 began its separate status as the Republic of Palau. The Caroline Islands have been a trust territory of the United Nations, administered by the United States since 1947. Two years ago, with the election of the first congress and the election of the president, its separate status under its own constitution began. The framers of the constitution, considering the limited bar within the Federated States, anticipated the need for formally trained and experienced foreign judges for a period of time." Both supreme court judges have pledged that they will encourage legal training of the citizens so that their places on the judiciary may be taken when citizens become qualified. Under the constitution, the courts must apply local customs and traditions in settling disputes—"an interesting and challenging provision because of the diversity of languages, customs, and traditions within the Federated States of Micronesia," notes Judge Benson. After graduating from U-M Law School in 1956, Judge Benson was in private law practice in Greenville, S.C., for 10 years. In 1966 he and his family moved to the Territory of Guam, Mariana Islands, where he continued in private practice for three and a half years. In 1970 he was appointed to the territorial court, which is now the court of general trial jurisdiction. A native of Ann Arbor, Judge Benson received the B.S. degree from United States Naval Academy in Annapolis in 1949, having enlisted in the U.S. Navy in 1944. He was in active naval service continuously from 1944 to 1954.

☐ **Daniel S. Guy,** who received the LL.M. degree in 1956 and the S.J.D. in 1970, both from U-M Law School, is serving as dean of Ohio Northern University's Pettit College of Law. Prior to his appointment, he had served as interim dean for two years. A 1949 graduate of Ohio Wesleyan University, Guy received his law degree from Ohio Northern University in 1952. He began his law career as law clerk in 1952 in the office of former U.S. Senator and Ambassador William Saxbe of Ohio. Later Guy practiced law in Canton, Ohio, and served as assistant attorney general for the state of Ohio. Since 1959 he has served on the Ohio Northern faculty, except for four years teaching at the University of North Dakota and one year as director of the North Dakota Criminal Justice Commission. Guy holds membership in the Order of the Coif, the Willis Society, and other professional organizations. He is the author of a book on "eminent domain" along with many professional papers and articles. Among other honors, he received a fellowship from the International Law Institute in 1959, was a Congressional Fellow in Washington, D.C., from 1961-62, and served as a W. W. Cook Fellow at Michigan Law School from 1965-70.

THE DIRECTORS' DILEMMA



by Alfred F. Conard
Henry M. Butzel Professor of Law
The University of Michigan Law School

[This article is based on a paper delivered by Prof. Conard at a recent conference of corporation executives, corporation counsel, and management consultants.]

In Kafka's novel, "The Trial," a bank clerk named Joseph K. is accosted in his room by menacing strangers in unrecognizable uniforms, who summon him to a strange sort of assembly, where someone sitting in the high seat hurls incomprehensible words at him in an accusatory tone, and every attempt of Joseph K. to ask what the proceeding is about is drowned out by the angry murmurs of a crowded audience.

This story has generally been understood as a parable of the little man in the overbearing presence of the wielders of power. But a deep sense of kinship with Joseph K. may have been felt by many corporate directors when Ralph Nader announced last spring that on May 1, American Big Business would be put on trial. Like Joseph K., they must have wondered who were these process servers, who sealed their writs, and by what authority they called Big Business to trial. If they listened on May 1, they were probably equally puzzled about what they were accused of doing, and what edicts of what puissance they had transgressed.

For those directors who wonder whether people think they are really guilty, there may be comfort in a book of essays assembled by Henry Manne, entitled "The Attack on Corporate America." I hardly need tell you that Manne's team was speaking in defense, not in attack. He posed the question "Should Corporations Assume More Social Responsibilities," and the answer is, "No, they will do more good by trying to make money." The next question is "Does the Corporation Discourage Individual Responsibility," and the answer of course is, "No, it maximizes it." And so on through 62 questions, each of which implies some corporate failing, and 62 answers, each in an emphatic negative.

The Dilemma

The raging of this word battle is not in itself a subject of great concern to corporate directors. Such battles may be expected to rage in a land of free expression. But directors do have to ask themselves whether the battle of words reflects some more fundamental problems, of which these words are tell-tale symptoms. When we look, we cannot miss some signs of trouble which are not features of the recent (or current) recession (or depression)—whatever you think it is, or was—but secular aspects of recent decades.

One of these symptoms is the financial crisis faced by some of our largest and historically successful corporations. A giant transportation company that had paid dividends for a hundred years went into bankruptcy. One of the world's largest automobile companies had to turn to the U.S. government for financing. One of the world's largest steel companies had to be protected from the competition of a country that has to import its coal, its oil, and its iron ore, and can still deliver steel at U.S. ports more cheaply than U.S. manufacturers.

A second symptom is the decline in productivity and of investment in new equipment, which go hand in hand. Recent reports of the 20-nation Organization for Economic

Cooperation and Development show a U.S. annual productivity loss for 1978-80 of 0.9 percent, while Germany and Japan are posting annual productivity gains of 2.3 percent and 4.5 percent, respectively.

About the causes of these phenomena, there are as many hypotheses as there are experts in the audience. I would like to talk about the possible cause that predominates in the minds of most corporate directors. This is the pressure on corporate revenues that is imposed by employees' demands for wages, pensions, and health insurance; by consumers' demands for product safety and reliability; by accident victims' demands for compensation for any injury or illness in which the product was involved; by communities' demands to cut down on noise, cut down on smoke, cut down on effluents; by investors' demands for interest and dividends as a condition of putting money into the company. Sometimes there is not enough revenue to go around among all these claimants, and the company fails right away; sometimes there is enough to go around, but not enough to replace obsolescent facilities with newer ones, and the company slides downhill toward eventual failure, or toward survival with government subsidies. It is like the problem of over-grazing, which environmentalists worry about. Overgrazing exists when a range would produce more animal food if less animals were consuming it. Overregulation exists when industries would produce more wages, better products, and less pollution if the immediate demands on them were diminished.

This brings us to the question whether there is any possibility that corporate managers would optimize the returns to all sectors of society if left to themselves. There are some people who still believe that this sort of optimality will result from pure profit-seeking. I will not deal with this hypothesis, because I think it has been exploded by the economists' analysis of "externalities." Another hypothesis is that corporate managers would, if freed from overregulation, voluntarily choose courses of action that favor employee welfare or consumer safety or a cleaner environment, even at some sacrifice of profits. I would like to explore the question of whether this hypothesis is realistic.

For the purpose of this discussion I am going to ask you to imagine—whether you believe it or not—that there are a lot of directors who are broad-minded, generous people, who are ready and willing to do a little less than they might for the benefit of investors in order to do a little bit more for the benefit of other constituencies.

Modifying a popular cliché, I will call these people "socially responsive directors," without meaning to imply that all others are either antisocial or irresponsive.

What I am going to talk about is the impediments that these nice people would meet in the legal sphere, in the dynamics of the market, and in accepted accounting practices if they tried to express their "social responsivity" in their directorial decisions.

The Legal Precepts

The first impediment is what the laws have to say about the duties of management. The Model Business Corporation Act, which is fairly typical of corporation codes, says that directors should discharge their duties "in the best interests of the corporation." The directors' guidebook, issued by the Committee on Corporate Laws, spells this out a little more explicitly. The directors, they say, should "maximize profit." They should give thought to other interests, but since the ultimate aim is to maximize profit, the directors must do only those things for employees, consumers, and communities that maximize profit for the corporation.

The paradigmatic application of this doctrine was rendered 60-odd years ago in the famous case of the Dodge Brothers against the Ford Motor Company. Henry Ford I announced that he intended to cut annual dividends to a mere 2,000 percent on their original investment in order to raise wages and reduce prices so as to share the profits of his business with employees and consumers. The Michigan Supreme Court told him that his motives were wrong, and ordered him to distribute $19 million in dividends. The duty of directors was to maximize returns to the shareholders, the judges said. They did not restrain Henry from raising wages or cutting prices, but only because the judges were not sure these actions would not benefit shareholders in the long run.

Since Henry Ford made his bold proclamation of corporate altruism, no other American executive has, to my knowledge, made an open admission of diverting substantial resources from shareholders to public interests. There are a great many public statements about serving our employees, our customers, and our country, especially in group statements like those of the Business Roundtable, that cannot be tied to a particular expenditure of any identified corporation. However, about 1960, a British publishing company sold its principal assets—a pair of newspapers—and proposed to use the proceeds to pay to its laid-off employees amounts far in excess of those required by law or contract. One of the shareholders brought suit to prevent it from happening. The British Court of Appeal granted the injunction, and forbade the company to divert its assets to employee welfare, even if a majority of shareholders might vote in favor. (Parke v. Daily News Ltd. [1962] Ch. 927).

This event led, after a lag of some years, to a new definition of the duty of directors in the British Companies Act of 1980. This was an act sponsored by the Conservative government of Prime Minister Margaret Thatcher, and adopted by the Conservative majority in Parliament. It says:

> The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the companies' employees in general as well as the interests of its members (§ 46(1)).

At another point, the Act authorizes directors to make provisions for the benefit of employees when they close a plant, "notwithstanding that [it] is not in the best interests of the company." (§ 74(1), (2)).

There are, of course, no similar provisions in U.S. corporation codes.

What happened to Henry Ford and to the *Daily News*—when the court stepped in to direct corporate action—is only one of the perils facing a socially responsive director. Another is personal liability for causing loss to the corporation. In theory, directors are personally liable for any loss that the corporation suffers because of decisions that violate their duties of diligence and loyalty. Furthermore, they are liable for the whole loss. If Ford directors had decided to keep its Mahwah plant open at a loss out of consideration for the long-time employees who worked there, legal theory would make the directors liable for the losses incurred, which might be tens of millions of dollars.

This is a very odd kind of liability, when you come to think about it. It has grown up as a projection of the liability of someone who negligently loses a borrowed diamond, or negligently wrecks a borrowed car. It is a very illogical projection, since the director has to make decisions not about his own use of property, but about uses by thousands of employees, affecting thousands of shareholders. Judges who make decisions about other people's affairs are not liable for the losses caused by their decisions, even when they are reversed. Congressmen who vote on other people's money have a complete immunity for their mistakes. But directors are liable. They don't have the power that judges and Congressmen enjoy to write their own rules.

There is, of course, a good deal of doubt about whether these principles of law impose any real restraints on directors in deciding for whose benefit their decisions should be made. So long as directors appear to be trying to act in the corporation's interests, judges generally give them the benefit of all doubts—even very big doubts—under the rubric of the "business judgment rule." On this principle, judges approved a corporation's charitable gift to Princeton University on the ground that it would bolster the free enterprise system, and possibly lead to the education of chemists who would be employed by the corporation. (A.P. Smith Mfg. Co. v. Barlow, 13 N.J.L. 145, 198 A 2d. 681, app. den. 346 U.S. 861.) Consequently, judges are unlikely to evaluate adversely any policies on wages, products, or effluents that the directors purport to be making in the corporation's long- or short-term interest.

But this doesn't solve the problem. In order to persuade labor leaders and Congressmen to get off the backs of business, managers have to persuade them that decisions are being made that deliberately curtail profit in favor of the welfare of employees, consumers, and communities. If they publicly announce that they are acting against the corporation's financial interest, they will run into the antagonism that judges reserve for directors who act from the wrong motives. For example, judges will pass almost any plan for prospective compensation, but will quickly invalidate a bonus for past performance, because it is a gift. The giving motive is wrong, unless it is for a public charity.

Furthermore, directors have reason to be a little skeptical of the evidence on nonliability that emanates from published judicial decisions. Under modern conditions, it is hardly possible that a case in which a director is liable would be allowed to come to judgment. This is because of a peculiarity of the law of directors' indemnification. In a shareholder's derivative suit, if judgment is entered against a director, he may have to pay it out of his own pocket. But if the suit is settled before judgment, the corporation can pay the bill. Consequently, there is a tremendous impulse to settle these cases before they come to judgment. The corporation is usually quite willing to settle and indemnify, for two reasons. First, the other directors and most shareholders sympathize with the directors who are sued. Second, the corporation generally carries insurance that will pay 95 percent of the amount required to settle.

Now you might think that since the liability is likely to be settled and insured, it is not of any real concern to directors. But they still have grounds for concern, both personal and social. One of the personal grounds is the loss of time and reputation in a derivative suit, which can never be fully indemnified. A second personal ground is the insurance thresholds, known as deductibles and retentions, and insurance limits; they may render a director liable for everything under $25,000 and everything over $25,000,000.

The director's social concerns are based on the tremendous costs of derivative suits in relation to their benefits. Unlike judgments for product liability, which shift money from producers to consumers, these suits shift money chiefly from corporations—who pay either through indemnification or through insurance—to lawyers. Consequently, directors will shun derivative suits even if they are not intimidated by the danger of individual liability.

These considerations will strongly deter directors from decisions that affront legal norms, even if they think the danger of ultimate adverse judgment is very small.

Directors' aversion to the risk of lawsuits is going to be accentuated, I suspect, by a development that has been almost universally applauded. This is the movement toward predominance of independent directors on corporate boards. According to a recent *Wall Street Journal* survey, nearly 90 percent of major corporations now have independent majorities. One of the avowed purposes of these independent directors is to see that corporations hew to the legal line, and refrain from treating the corporation's assets as their private property. If they read the Corporate Directors' Guidebook, and learn that their duty is to maximize profit, they are going to vote conscientiously against giving employees any favors that are not compelled by union pressure, and against cleaning up any effluents that the EPA is not about to penalize.

The Takeover Threat

Now I want to leave legal duties aside, and move into a second impediment to the line of directorial behavior that I have called "socially responsive." This is the ever-present threat of a takeover. If the company is making less money than it could, its shares will have a lower market value than they would under a management that is more exclusively oriented toward profit. If outsiders become aware of this gap between actual and potential profits, anyone who can raise the money for a tender offer would have every reason to buy the company, and put an end to its brief excursion into social responsivity. Some analysts, or pseudo-analysts, contend that failures to maximize profit are the principal reason why takeovers occur.

I do not share this view of the dynamics of takeovers, but I do believe that a firm that is visibly earning less than its potential is ipso facto an attractive takeover target. Moreover, if its directors confess openly that they are not maximizing profit, they will have a hard time persuading their shareholders to spurn the tender offer, and to hold on for a brighter future with the incumbent managers.

The socially responsive directors may, of course, resist the takeover bid in various ways. They may buy "gray knights" that compete with the bidder, or buy in the blocks of shares that look vulnerable to a tender offer. If they succeed in beating off the tender offer, and are then sued for wasting corporate assets in defense, they may defend on the ground that the corporation's interests include those of employees, customers, and communities. When a takeover bidder appears, an enormous well of subliminal social responsibility bubbles into view. In this context, judges become unusually tolerant of "social responsivity" as in the case of the *Denver Post*. In that case, the court excused expensive anti-takeover tactics, professing to recognize a duty of the corporation to its readership, its community, and its staff. (Herald Co. v. Seawell, 472 F.2d 1081, 10th Cir., 1972.) Actually, there was little evidence of any loss to the readership, the community, or the staff, excepting the top executives.

This judicial indulgence will be helpful to corporate directors if they fight off the tender offer, and are then sued derivatively for wasting corporate assets. But it will not help much in fighting off the tender offer itself. Consequently, experiments in social responsivity must be carried out with a weather eye to takeover vulnerability.

The Profit Picture

I have now mentioned two impediments to "socially responsive directorship," one imposed by legal theory, and one imposed by market dynamics. I would now like to mention a third, which is imposed by accounting practice.

Let us imagine now a group of socially responsive directors who are unimpressed by the warnings of the previous paragraphs and who decide to brave the dangers. Abandoning all hope of capital gains, they decide to earn just the minimum of profit that a public service commission would allow a utility to earn, and then say to their

employees, their consumers, their injury claimants, and their environmental complainants, "Look, we are doing all we can for you. If we do more, we will end by doing less. Please believe us when we tell you where our limits lie." Will the external constituencies believe them? You know the answer.

Profits are regularly reported in the news media in a way that greatly exaggerates the apparent amount of discretionary expenditure. There are two sources of misunderstanding, one of which is very superficial, and the other more fundamental.

The superficial problem is this. If a company makes 2 cents on the dollar in one year, and 5 cents in the next year, the newspapers and telecasters will come out with a lead line, "Widget profits jump 150 percent." No one in this room would attribute any significance to this line. But there are a lot of voters at Congressional elections and at union elections who think that it means profits at the rate of 150 percent of invested capital. Last spring, some of you may have seen a television clip of a well-known senator who was seeking higher office, declaiming to a crowd with a clenched jaw, "Why should workers go hungry, while corporations make 100 percent profits?"

After the meager results of 1980, some firms in 1981 are likely to have gains of 1,000 percent, and you can imagine what the senator will say then. One of the ironies of this kind of arithmetic is that if profits rise 1,000 percent, and then fall back by the same amount, it is only a 91 percent decline. So the sympathy that corporations get in bad times never equals the envy they incur in good times.

What we need is a standardized way of conveying to the public the percentage relationship of earnings to sales, or earnings to invested capital, rather than of current earnings to last year's earnings. When earnings on sales of 5 billion rise from 100 million to 300 million, the report should not be of a 200 percent increase, but of a 4 percent increase in earnings as a percent of sales.

A more fundamental problem is involved in the gulf between the meaning of "profit" as it is understood by the man in the street and the "earnings" that accountants report. The popular meaning of profit—which is also its etymological and its historic meaning—is the net product of an operation, the amount that can be taken out without diminishing productive capacity. Earnings, on the other hand, measure the change in the firm's asset position, as measured by monetary inputs.

Earnings and profits would be about the same thing if the economy were stable and stagnant—the kind that economists and accountants are referring to when they say "other things being equal."

But in an inflationary economy, there is a big gap. To replace present inventory and equipment with identical products will require more money. To pay higher wages and then wait for the related revenues will require more money. Technological advances, which require replacing old materials with more advanced new material, widen the gap further. There may be handsome earnings, as the accountants figure them, but no profits at all, as the public understands them. Yet we can be sure that if the accountants report "earnings" of 100 million, the press will report "profits" of 100 million. The socially conscious director would like to explain to the public that some part of the 100 million—perhaps all of it—will be required just to keep the business running on its present volume. But nobody will hear him, so long as the bottom line says "net earnings $100,000,000."

We have made a little progress on this front with the FASB rules on supplementary statements to show current cost and constant dollar adjustments. We have been patting ourselves on the back about these details, which are very helpful to sophisticated investors. We would have more reason to pat ourselves on the back if investors were the only people concerned with corporate profits.

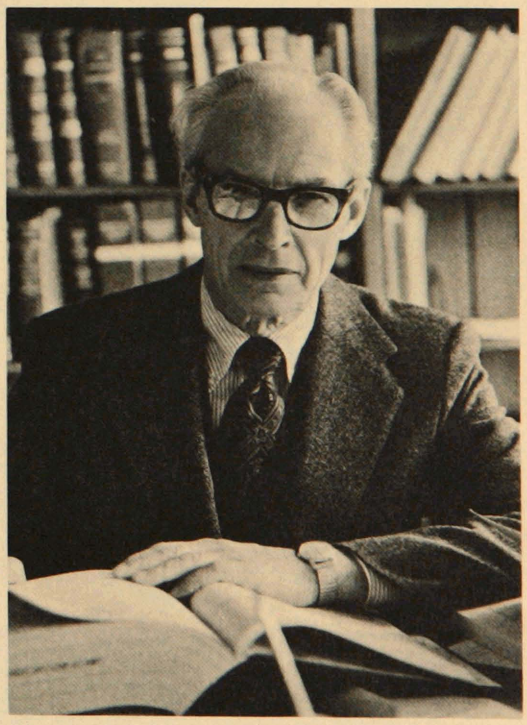
Investors may be the only constituency that votes for directors, but they are the least of the constituencies that create the squeeze on corporations today. The heavies are the unions that represent employees, the legislators who represent consumers and communities, and the judges who devise liability rules. The socially conscious director will never convince these constituencies that the corporation isn't rolling in money, so long as the bottom line that hits the press is the earnings figure reported by the accountants.

Conclusion

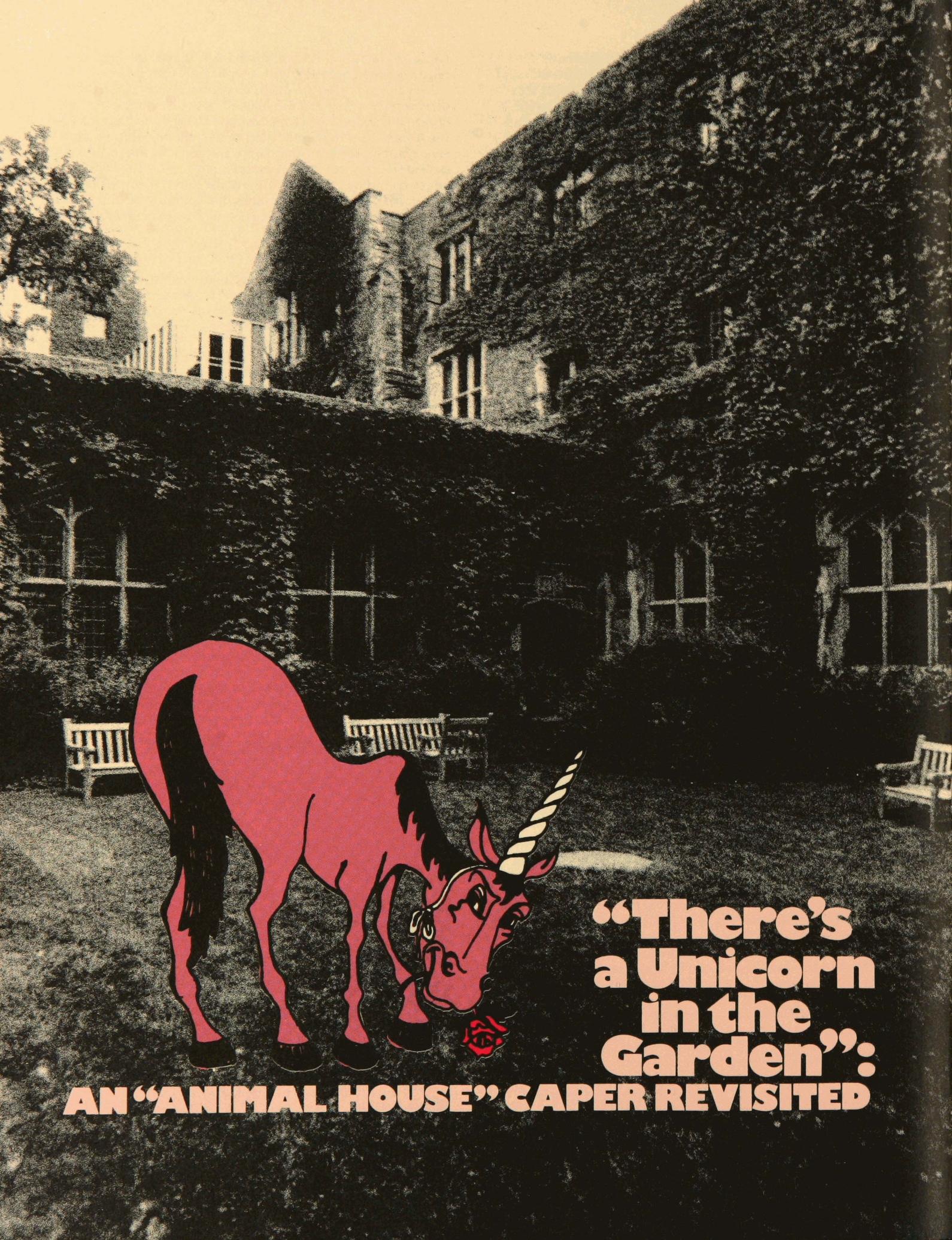
These are the components of the directors' dilemma today. So long as directors purport to maximize profits, they are politically vulnerable to an increasing burden of demands. If they were able to make a conspicuous demonstration of non-maximization, they would expose themselves to derivative suits and to takeover bids. Moreover, the prevailing system of reporting earnings makes corporations appear to have much larger dispensable resources than they really have, and encourages the exertion of external pressure upon them. Finally, the disposition of directors to be intimidated by these deterrents to social responsivity is probably accentuated by the current emphasis on "independent" directors.

These considerations suggest that reformers, in their zeal to make directors more socially responsive by compulsion, have overlooked the possibility of allowing directors to be more socially responsive by free choice. The path of voluntarism has never been explored.

If I had just been elected president, I would now tell you what my program is, and how it will resolve all these difficulties and move the nation into a brighter future. Luckily for me, and even more luckily for you, I have not been elected to anything. I have not even been elected to propose solutions to this conference. But I seize this opportunity to tell you that I believe in the capacity of American business enterprise to respond to the challenges of the 1980's, and to win back much of the public confidence that it lost so catastrophically during the 1960's and 1970's.



Alfred F. Conard



"There's a Unicorn in the Garden":

AN "ANIMAL HOUSE" CAPER REVISITED

by Theodore W. Swift

[Theodore W. Swift, 1955 graduate of the Law School, is a member of the law firm of Foster, Swift, Collins & Coey of Lansing, Mich. But he says his "real claim to fame" is the incident described in this article, which occurred in 1952 during his student days at the Law School.]

An early grade of "A" in Criminal Law (practical experience) lulled me into the belief that I could continue the extracurricular practices learned in the Marine Corps while still managing to achieve scholastic fame as a 1952 freshman law student. When I succeeded in convincing the elder statesmen of the Ann Arbor chapter of the Veterans of Foreign Wars that my three month tour of duty on Vieques (near Puerto Rico) entitled me to membership, my social success was assured and my academic fate was further sealed. I was entitled to bring "guests" to the "club" which was located on Liberty Street, the closest real bar to the Law School. Evenings and weekends were spent enjoying the pleasures of the "VOOF" with droves of my Law School "friends." My personal popularity has never since reached such a zenith.

The zealous pursuit of happiness and rowdy behavior brought the year-end news that I was no longer welcome as a tenant of the Law Club; my academic standing was also labeled "precarious."

The combined rudeness of the Law School Dean, the formidable proprietress of the Law Club (affectionately dubbed "Little Orphan Annie" because she, like Annie, always wore the same colored dress; her choice was black), and the Law School faculty kindled a sense of bitterness which was not tempered by the blandishments of the good wife that I acquired in the summer of 1953. In those days, before protest marches could be staged for any reason, or no reason, my anger at the system was intense and unfulfilled. There seemed to be no way to cry out against the callousness and injustice perpetrated on the law students, in general, and me, in particular.

A protest vehicle was provided when I was invited to join the Barristers Society, a Law School "honorary," in the spring of 1954. The history of the Barristers Society is murky, at best, but the organization has been on campus, except for various periods of suspension, since 1904. The society has no constitution, no by-laws, no organized alumni, no official status, and no purpose. It persists to this day as a self-styled "honorary" for those who are doomed to be denied any other form of recognition. Each year the 25 senior members of the society tap 10 junior members who, in turn, select 15 more of their classmates for membership during their senior year of Law School. Dedication to the good things in life remains the prime requisite for membership.

I was honored by my invitation. I applied myself to the official functions of the group, to wit, the sponsorship of two dances during the school year and the yearly publication of an insulting and semi-pornographic document known as the *Michigan Raw Review*. The caption and the style of the *Raw Review* was designed to simulate the respected *Michigan Law Review*; the content of the publication was totally dissimilar.

The president of the Barristers Society named me as publicity chairman for the 1954 spring dance—The Crease Ball. The term originated from a law professor's comment that spring brought "thoughts of love" to law students. The students emerged from winter hibernation with a crease in their pants—the only time of the year this phenomenon was observed. Hence, Crease Ball. I was told to find a gimmick which would attract the attention of the law students, a notoriously lethargic and blasé group. My power was total and absolute; my budget was minimal.

Since I had been given a mandate to attract attention, I also sensed a personal opportunity to vent my frustrations at the forced rigidity of a law student's life.

The Law School was physically designed to allow a student to spend an entire three-year "sentence" within the confines of a singular city block. You were expected to eat, sleep, study, and go to class within that one isolated square of Ann Arbor. All classes were held in Hutchins Hall, the major cocoon within the mother womb of the Law School.

Hutchins Hall is a marvelous architectural achievement complete with terrazzo floors, marble walls, stained glass windows, and classrooms which ascend from a speaker's pit in a steeply rising and ever-widening fan-shaped series of benches. To an outsider, the building signified a reverence for the Law; to the inmates, the minute-jumping clocks, the lock-step sound of changing classes, the "screws" who doled out daily tongue lashings, and the thick walls combined to create the ideal environment for a maximum security prison. Another unique feature served to further the prison analogy; like every good reformatory, Hutchins had a courtyard. Unlike a prison, however, the 1954 inmates of the Michigan Law School were forbidden to set foot in the "yard."

I am told that present enrollees of the University of Michigan Law School are now allowed access to the interior courtyard. This open door policy undoubtedly resulted from the frustrations experienced by the recent dean of the Law School, Theodore St. Antoine, when he was a member of the Barristers Society at the time of the events related above. St. Antoine will undoubtedly deny such a damaging accusation, but he was, in fact, a pivotal member.

The word "courtyard" does not give justice to the pristine setting which was hidden deep within Hutchins Hall. A more accurate term would be "garden." Lush grass was unblurred by weed or dandelion. Roses of varied hues and fragrance bordered the emerald floor and climbed the magnificent walls which completely surrounded the garden. The symphony of color was available to all, and was magnified by the view through the stained glass windows; but the perfumes of the rich loam, the manicured grass, and the dew-flecked petals were forbidden to the students. Those olfactory delights were reserved for only two mortals who shared the secrets with the hummingbirds or bees who might have been swept into the 50-foot square garden by a passing storm.

The dean of the Law School was ensconced in an office on the third floor of Hutchins Hall overlooking the garden. It was rumored, and later confirmed, that each morning the dean would open his windows wide to gaze down upon the lovely vista. He would then drink deep of the visual and nasal delights. The lone janitor, assigned the task of clipping the errant strands of grass and pruning the sheltered roses, was the only other individual with access to the yard. Perhaps that custodian shared the students' resentment of the garden since it was a compound of labor to which he had been assigned. Whatever his feelings may have been, his work arena was a pleasant one. The area was commonly referred to by the inmates as "The Dean's Garden."

At this time, a James Thurber vignette was experiencing a rebirth of popularity. The ditty, "The Unicorn in the Garden," became the subject of a short cartoon film which was then being shown to enthusiastic audiences in Ann Arbor. This Thurber story was to become the final catalyst for a plot which occupied the time and ingenuity of numerous Barristers—precious few of whom could afford a moment away from their studies.

If great oaks do grow from little acorns, this scenario was spawned by the casual suggestion of a fledgling barrister during an evening of frivolity at the Flame Bar. "Let's put a unicorn in the dean's garden," observed the sodden student. At that instant, an avenue was opened for the venting of myriad Law School frustrations; a device was hatched to protest the exclusion of students from the garden; and a method provided for a "boffo" publicity vechicle to promote the upcoming dance.

The idea was tested the following day in a more sober atmosphere. The appeal remained. Volunteers were enlisted to search for a proper unicorn. The genuine nature of these offers of aid confirmed by the aborning belief that law students were not worldly wise and were not suited to animal husbandry. After convincing our disappointed cohorts that the last live unicorn had been seen centuries ago, we decided to create one. Our research confirmed that a unicorn was simply a horse with a single spiraled horn projecting from its forehead. A beautiful cone, colored in the fashion of a barber pole, was soon created. Barristers were then dispatched to neighboring farms near Dexter and Saline with orders to fit the spike to the head of a willing horse. The initial reports of progress were glum.

Those few farmers who still kept horses seemed generally unwilling to let red-eyed law students attempt to fit conical spikes to the heads of their animals. In the few cases where this owner reluctance was overcome, the horses were found to be even more reticent to participate in such damned foolishness. One shocked city-bred volunteer commented, as he surveyed the newly broken skin on his arm, "I thought horses only ate grass." As defeat piled on defeat, a decision was reluctantly made that the unicorn concept must be abandoned. At the same time, it was determined that the idea of a plain horse in the Dean's Garden, albeit difficult, remained viable. Better yet, a jackass would be obtained, placed in the garden, and a sign would be draped on the beast of burden reading "You Bet My Ass I'm Going to Crease Ball."

This capital idea rekindled sagging spirits and once more loyal Barristers fanned out through Washtenaw County. We found the environs devoid of donkeys, mules, or asses (I don't think we ever bothered to determine the distinctions). This setback was taken with more alacrity than our original unicorn failure. Deductive reasoning, the hallmark of the lawyer craft, surfaced at last. If we, as exalted members of an honorary, could not grasp the distinction between a horse, mule, donkey, or jackass, why should we fear that our law school colleagues, to whom the message was aimed, would be any more perceptive? Having bridged this logical gap, we turned our efforts to a search for a mere horse. If we could procure a horse, we would simply label it an ass, and an ass it would be.

As the date of the impending dance drew near, our horse search intensified. The reluctance of the farm folk of Washtenaw County to participate in our great endeavor was appalling. We never resorted to subterfuge or trick, however, and we told the horse owners the exact nature of our plan. We advised them that we could not accurately predict the reaction of those persons in power, and we cautioned as to the element of risk involved—if not to ourselves—then to the horse. We promised that: 1) the name of the owner would never be divulged, 2) no liability would result, and 3) no violence would be precipitated. We even pledged the sacrosanct beer fund of the society as indemnification to the owner in the event the horse was not returned in the same condition as delivered. I don't recall that we ever discussed how we would have utilized the animal if we had been forced to a purchase, but surely our ingenuity would have persevered. We were always big on barbecues.

Then came the news that one of our members had located a farmer with either an advanced sense of humor or an inclination to rid himself of a horse. We did not question his motive; we quickly closed the deal. We agreed to a day lease of his horse for the sum of $50.00. The farmer, in turn, agreed to deliver the beast to the Monroe Street entrance of Hutchins Hall at 5:30 a.m. on the appointed day, and he also stood ready to transport the jewel back to the farm—assuming survival. In case of illness or accident, we agreed to purchase the animal for the sum of $100.00. Although I did not participate in the bartering for the equine mammal, and was not to see the thoroughbred until the day in question, we had obviously dealt with a shrewd bargainer. When I later viewed the beauty, it was clear that the owner had struck a sharp bargain. Even our paltry lease payment must have far exceeded the best possible offer obtainable from the nearest mucilage works.

Having secured the horse, we now turned to the problem of gaining access to the garden and to the ancillary issue of providing "cover" for the culprits involved. The operation smacked of a covert CIA caper. We may even have had several former CIA agents in our membership; in those days, a tour with the CIA after graduation from undergraduate school was a fairly common and popular sport.

Access to the garden was limited to a single door on the east side of the courtyard. This opening was located approximately 50 feet from the outside entrance to Hutchins Hall facing south on Monroe Street. Although Hutchins Hall remained locked, in its entirety, from early evening until approximately 7:00 a.m., access to the building posed no problem. Certain gifted students, such as *Law Review* editors and Case Club judges, held keys to the building. Sympathetic personages from among those ranks were solicited and a key to the building was readily obtained. But no one, we concluded, had a key to the interior garden door except the janitor-gardener and, possibly, the dean. Our attention, naturally enough, was brought to bear on the janitor-gardener.

We placed a fulltime stake-out on the garden in order to determine who was assigned the task of garden upkeep. One of our agents was on duty when the custodian approached the door, opened the same, and proceeded to perform his duties in the courtyard. The key-carrier was thus identified. Further surveillance followed. The other custodial duties of the keeper-of-the-key were duly noted, and his day-to-day routine was carefully catalogued. By the end of a week, we knew where this gentleman could be found at almost any given moment on any given day. We had not yet devised a method for obtaining the key but standard CIA tactics were rejected. Although we were certainly the outcasts of the law school, violence and direct larceny were not in our bag of tricks.

The employee was found to be, from a check on his personal life, a hard working and conscientious servant of the University. He had no discernible drinking habits so the prospect of befriending him at some convivial watering spot was discarded. He did not appear to be particularly fond of law students and it seemed unlikely that we could simply persuade him to part with his key. Because of his advanced years, however, it was deemed possible that he might be separated from his possession if caught in a stressful moment.

Since the windows of the second floor offices of the Case Club also opened upon the garden, it was decided that our plan to divest the custodian of his key must emanate from that point. During a period of changing classes, we threw open the windows of the Case Club office and heaved a sheaf of papers down into the garden. I then rushed to the aged custodian, told him that my very important term paper

had just blown out the window, and begged his immediate assistance in gaining entry to the garden for retrieval purposes. Instead of handing me the key, he volunteered to lead me into the garden and even offered assistance in helping me gather up the papers. I was dismayed. "You have more important duties," said I, "so why not simply loan me the key?" "I would get the papers," I explained, "hurry to my next session, and return the key to him immediately after class." I described for him the first floor classroom where I would be during the next hour. With great hesitancy, he pulled forth his master ring, separated a single key from the collection, and handed me my ticket to the garden. I rushed down the stairs and into the yard, gathered up the useless papers, noted the janitor watching me from the upper window, and sprinted to my class.

> "Because the poor beast found it impossible to gain secure footing on the highly polished surface [of the Hutchins Hall foyer], the sound resembled the Charge of the Light Brigade across a shopping center parking lot."

My seat selection placed me next to an outside window of the first floor room, and after a proper passage of time, I pushed open the window for a bit of ventilation. When the professor turned to his chalkboard to diagram a "springing use" or some such nonsense, I tossed the key through the open window to a waiting confederate. Within the hour he had procured a duplicate, announced his return by a gentle rapping on the window, and in perfect prearranged harmony, lofted the key back through the window directly into my trembling hands. I exited after class and found the worried keeper-of-the-keys stationed directly outside the door. I thanked him profusely and returned his key. Later that day we fitted the duplicate key to the oaken garden entry and found, to our delight, that we had obtained a workable passport to the sanctuary.

The appropriate sign was made ready for the draping of the horse, and all plans were "go."

In a search of our membership, we found one Barrister who professed expertise in the handling of horses. He was delegated to meet me on Monroe Street at the hour of 5:30 a.m. on D-Day, for the purpose of lending assistance in the negotiation of the horse out of the truck, up a series of steps, into the building, down a hallway, and through the door into the garden.

After a restless night in my apartment, I answered the alarm at approximately 5:00 a.m. My wife, gainfully employed at that time as an Ann Arbor teacher, inquired as to my unusually early rising. Apparently fatigued from supporting me, she did not question my ludicrous statement that I was going to log in an early effort at the Law Library. Such a fiction would not normally have passed muster, but in the fog of the early dawn, she merely grumbled, rolled over, and I was on my way to a starting gate rendezvous with "Whirlaway."

I was not a total stranger to the deserted streets of Ann Arbor at 5:00 a.m. since, more often than not, that was the hour when I was winding my way home. In the soberness of this dawn, however, I was amazed by the apparent proliferation of police. As I traversed the distance to the Law Club from our lowly digs at the north end of State Street, I fancied that every passing person was taking notes as to my suspect appearance. I reached the Monroe Street entrance at approximately 5:20 a.m. and duly observed the dawning of what promised to be a glorious spring day.

When, at 5:30, neither horse nor confederate had appeared, I recall a moment of introspection when I asked why I had become involved in such folly. The prospect of expulsion, and what it would mean to my wife and parents, teased my mind. Perhaps, I mused, neither horse nor companion would show so that I could cut and run.

As the familiar bile of cowardice backed up my throat, I heard the faraway chug of a vehicle. It was clattering its way from the south and soon came into view as it careened off State onto Monroe. In the gray of dawn, the shape of the vehicle quickly became evident. In earlier days, it must have been a fancy truck, but the vicissitudes of time had made serious inroads. It now appeared as a fender-flapping contraption with high-boarded sides surrounding the flatbed. As the truck lurched to a halt, the baggage in the back was rudely jolted and the quiet dawn was wrenched by a high-pitched and seemingly endless neigh. Except for Tom Mix movies, I had never before been so close to a frightened horse. The sound was ear-splitting, and I was certain that the entire town of Ann Arbor had been signaled to arms by the unexpected reappearance of Paul Revere's steed.

A weather-beaten and bewhiskered man-of-the-sod jumped from the cab of the vehicle (he didn't bother to open the door—there was none) with the frenzied look of a man pursued by the entire FBI. Without greeting, he dashed to the rear of the truck, noisily removed and dropped a back barrier, and backed Whirlaway to the street. Still without a word, he handed me the short rope which tethered the beast, hopped into his antique, and roared away into what was left of the night. As the backfires and clattering faded in the distance, the silence of the Ann Arbor dawn again enveloped me. I took stock of the situation and found myself standing in the middle of Monroe Street holding a piece of rope to which a horse was attached. The poor beast had obviously seen better days. His advanced years belied the label of "frisky," but the unusual hour, the unique surroundings, and the obvious nervousness of his appointed handler had awakened what little adrenalin still pumped through his spavined system. As difficult as it must have been for him, he began to prance and balk. For a brief period, while his spirits surged, he threw his hoofs into reverse and began to back towards State Street. I could not halt this progress, of course, but I knew better than to release him. During all of this time, my mind was racing for a plausible alibi in the event the local police stumbled upon the scene. My favorites, as I recall, were in the nature of "I had a hell of a time running him to the ground, Officer!"; or, "Do you have a report of a missing horse?"; or, "Look what I found—is there a reward?"

Whirlaway soon tired of his strenuous efforts, and returned to a docile state more typical of his octogenarian status. With a few soothing words, I was able to lead him, in a tentative fashion, to the foot of the steps of Hutchins Hall. There we stood for an interminable period. My problem was now purely logistical. I had the key to the outside door in my pocket but the rope was not sufficiently long to allow me access to the door while still holding the end of the rope. This was due to the fact that Whirlaway would not progress beyond the bottom step. In retrospect, I realized that I could have hitched him to a railing, Clint Eastwood style, while opening the door, but this thought never occurred to me that day. Instead, I continued to tug on the rope, and Whirlie continued to balk. During all of this time, my horse expert failed to materialize. I believe that one Ken McConnell, now of Bloomfield Hills, was to be my assistant. McConnell had a demonstrated law school record of being untrustworthy, and he continued his pattern on that day. He never did appear.

The beast and I were still stalemated in our private tug-of-war when help suddenly appeared in the form of a law

school acquaintance whistling down Monroe Street on his way to opening the Law Club dining room for breakfast. This cavalier gentleman, Bill Van't Hoft of Grand Rapids, seemed not the least bit startled to find me there at that hour—tied to a horse. The coolness and quickness he displayed on that occasion foreshadowed the great success he has realized in later life. His opening greeting was casual enough: "Hi, Ted, where'd you find the good looking date."

In my frantic state, I had no time to be coy or to advise him that I was now married and no longer dating. Instead, I quickly divulged to him the grand plan and my obvious problems. He was immediately sympathetic to the scheme, and he also claimed experience in matters and manners of horse. He took control of the chaotic scene, issued brisk orders, and the program was back on track.

He first advised me that horses don't willingly climb stairs (a fact that I didn't know, but one which I have never forgotten). He excused himself for a moment, scouted a couple of nearby alleys, and promptly returned brandishing a huge board. When I asked the purpose of the weapon, he politely told me that he was going to give that horse "a swat in the ass." I cringed at such cruelty and remonstrated on behalf of Whirlaway. His reply was terse and to the point. "Do you want to get the damn horse up the damn steps, or don't you." His cruel rhetoric and limited vocabulary appalled me, but I nodded in the affirmative.

We propped open the double doors allowing entry to Hutchins Hall, and I then took a strain on the rope. My confederate slowly circled the unsuspecting beast, and I closed my eyes as I saw Van't Hoft go into his backswing. The noise of the impact was sharp, and the reaction of the recipient was sudden. Whirlaway bolted up the stairs, passed me in a blaze of speed, and clattered headlong into the foyer of Hutchins Hall. I was still tenaciously clinging to the rope as he spurted by, and I followed him without hesitancy—or the need of walking. The noise of those hoofs on the polished mosaic of the gilded hallway remains riveted in my mind to this day. Because the poor beast found it impossible to gain secure footing on the highly polished surface, the sound resembled the *Charge of the Light Brigade* across a shopping center parking lot. I was certain that the two janitors we knew to be on duty would come instantly to determine the source of such a clatter, but again my newfound colleague came to my aid. He rushed to the basement area to engage them in normal 5:30 a.m. idle conversation. Whatever he did, or said, it was sufficient. No one appeared on the scene in response to the sound which flooded the normal funereal surroundings of Hutchins Hall.

Whirlaway did not like the hallway and finally took a firm four-legged stance. I shoved and slid him to the garden entrance and opened the door with my purloined key. When the heavy oak portal swung open, the frightened animal spied the elegance of the dew-covered garden. The rest was easy. With a quick flurry of energy, and a shuffle step of sliding hooves, he projected himself into the center of the garden. I quickly tethered him to a stake set in the middle of the arena, and gleefully noted that the rope was sufficiently long to allow him access to all of the grass and most of the new budding roses. I wished him Godspeed, patted his bruised rump, and beat a hasty retreat.

All of this was done after I had hung on him the appropriate sign announcing the upcoming social event. It was not the blanket of black-eyed susans normally hung on a Preakness winner, but Whirlaway did not seem insulted. He was not accustomed, I am certain, to the usual amenities of the winner's circle.

After a quick breakfast at a local beanery, I returned to Hutchins Hall to survey my work. At 7:45 a.m., with a trace of a smile on his face, Whirlaway was busily engaged in reducing the lawn to a stubble. I posted myself by the Law Club entrance to Hutchins Hall to await the somnambulant students destined to arrive for 8:00 a.m. classes. They came in their usual aimless gait—ladened with books and heavy of eye—retracing, by rote, their steps to the classroom. Most looked straight ahead and, for a moment, I was afraid that no one would glance into the forbidden garden. At last, a more alert specimen appeared. For some reason, he glanced into the garden and his doubletake was worthy of the late Lou Costello, the master of said gesture. He actually rubbed his eyes first to make certain that he had seen what he had thought he had seen. Once he had determined that his eyes had not failed him, he pressed his face to the window and explained, "I'll be a son-of-a-bitch, there's a unicorn in the Dean's Garden—eating rosebuds!" I could not have written a better line, and but for the profanity, it was an exact quote from Thurber's opening passage. A whisper could normally be heard within the confines of Hutchins Hall at 8:00 a.m., but his exclamation ricocheted through the building. Everyone dashed to the windows to verify the presence of Whirlaway, and the 8:00 classes, as well as all subsequent morning classes, were undercut by the exclamations of delight and surprise. The news of his presence blazed through the Law School and spilled over into the undergraduate ranks. Soon huge crowds were gathered at the courtyard windows to observe Whirlaway at his morning pastoral pleasure.

"In accordance with his usual format, [Dean Stason] walked to the window, swung it open to enjoy the beauties of the day, glanced into the garden, and became hysterical."

The Barristers now reached the third and final stage of the operation—The Cover. We had carefully gauged the principals involved, and we had programmed their expected reactions to our heinous deed. The anticipated response set in shortly after 9:00 a.m. when the dean arrived at his office. In accordance with his usual format, he walked to the window, swung it open to enjoy the beauties of the day, glanced into the garden, and became hysterical. Upon regaining temporary control, he issued two orders. The keeper-of-the-key was to be immediately produced in the dean's office as was the president of the nefarious Barristers Society.

Our leader was one James (Buck) Buchanan, and he immediately responded to the edict. The dean was furious and demanded to know why the Barristers Society had committed such a travesty. Buchanan denied any involvement on the part of the society, and joined the dean in condemning the reprehensible misdeed. On behalf of the Barristers, he went the extra mile and volunteered to enlist the membership in removing the offensive animal at an appropriate time. The dean replied that the appropriate time was now. Buchanan countered by saying that immediate removal was impossible since the members were in class and could not possibly be assembled until the noon hour. Noon was not sufficient for the dean and he demanded that the animal be removed by 11:00 a.m., "or else." As Buchanan was about to leave, the dean added this comment: "Not only must the beast be removed, but all of his leavings as well." His reference, of course, was to the numerous road apples that Whirlaway had deposited in apparent violent reaction to his rich and unaccustomed diet of bluegrass and roses.

In his second angry response to the insult of the garden invasion, the dean ordered the immediate firing of the errant key keeper.

By 10:00 the ever aggressive *Michigan Daily* had reporters on the scene. A photograph was taken of Whirlaway in all his splendor. The local correspondent of *The Detroit Free Press* even called to interview the dean. When the amused reaction of the outside world became apparent, the dean's normal unflappable serenity returned. Buchanan was summoned from a second class to again appear before the dean. He was asked how the "removal and disposal plan" was coming, and Buchanan again noted that the time restrictions were too difficult to meet.

"We are trying to locate the owner of this stray, sir, and we're attempting to find volunteers to deal with this animal and his belongings. We need time, sir." The dean relented and in a soft voice, accompanied by forced smile, he said, "I love a joke, but that animal must be out of there by noon and all of those other things must be gone, too."

"Yes sir."

"If the Barristers Society didn't do this, who do you think perpetrated such a criminal act?"

"I really don't know sir, I just can't believe that any law student would be involved in such a thing. That sign about Crease Ball is an obvious attempt to shift the blame to the Barristers Society."

"By the way, what is the Barristers Society?" asked the dean.

"It's a form of study group, dean," said Buchanan in his parting shot.

The rumor was leaked to the *Daily* that the dean, in reaction to the horse, had fired the custodian. When press inquiries began to be directed to the law school, the janitor was promptly told to "return to work with no comment." The anxious farmer was contacted, and the mop-up operation commenced. At noon, a distinguished band of law students began a pilgrimage into the sacrosanct garden. (We were not dumb enough to produce our own key.) We suspected that whoever appeared would be under close surveillance from above, via field glasses, and for this restoration phase we selected our most credible members. Only persons of high academic standing, *Law Review* credentials, or Case Club victors, were chosen to participate. All were attired in coats and ties, the normal dress for serious seekers of the truth. We led with our ace-in-the-hole, Theodore St. Antoine, *supra*. He was then editor-in-chief of the *Michigan Law Review* and winner of the prestigious Campbell Case Club competition. He carried the shovel, and was primarily responsible for removing the "leavings." We even draped St. Antoine with a sign indicating that he, too, was going to Crease Ball. Whirlaway, suffering from indigestion, was led as quietly back to his waiting van as his flatulence would allow. The owner seemed disappointed that Whirlaway was returned in such excellent condition; his dreams of forfeiting our bond had been shattered.

The picture of Whirlaway ran in the *Daily* the next morning with the following caption:

> By 7:00 a.m. yesterday, the horse above had appeared in the courtyard of Hutchins Hall at the Law School to advertise the Barristers Club's Crease Ball . . . Staked in the middle of the courtyard . . . and entirely surrounded by the Law School building, the question of how the horse got into the courtyard remained unanswered.

Although the dean had professed that he could "take a joke," we did not believe that the mere changing of the lock allowing entrance to the garden marked the end of the event. We felt that an investigation was being conducted, and that the dean was determined to resolve the question of how the horse gained entry into his garden. We decided to implement our "cover" scenario to protect the more vulnerable members of the society from disciplinary measures. This plan was designed to obfuscate the trail of the prime suspects and to thwart and confuse the inquisitors who were hot on the trail of those responsible for this deed.

Since a minimal investigation would have revealed my long personal history of anti-social behavior, I mailed a previously drafted letter to the *Michigan Daily*. The letter was printed in its entirety on the 1st day of May, 1954, the morning after the ball. It read, in part, as follows:

> In view of the really serious matters which your editorial page has featured this week. I hesitate in submitting this letter . . .
>
> I am writing to protest the printing of the picture in Wednesday's *Daily* which featured a horse. Evidently some of the editors of the *Daily* seem to feel that there is something newsworthy about the fact that a modern day unicorn made an appearance in the sanctuary of the Hutchins Hall courtyard. Perhaps there was a certain amount of humour involved in the situation. Be that as it may, I nevertheless stand opposed to any publicity being furnished for this prank.
>
> Obviously some misguided and juvenile law student taxed his limited mental capabilities to the hilt to perpetuate this hoax. Is such a feat worthy of a picture in your paper? Why do you pump this young rascal's over-inflated ego with indirect praise? Who knows what your coverage may do to spur him on to further deeds of small meaning?
>
> The University of Michigan's Law School has long shared a reputation with Harvard University as the top legal institution in the land. As such, we stand in a position which commands respect and demands a comparable duty from the students. Such acts do not, needless to say, add to this reputation . . . What serious student faced with choosing his school would consider Michigan after reading of the "Unicorn in the Garden" affair.
>
> . . . By your poor choice of what is news, you have added to the rush of poorly planned activity which seems to have swept through the Law School as of late.
>
> Viewed in a serious light, and regardless of the fact that it was placed there to promote Crease Ball (which I shall not attend), the whole incident is deplorable and should be ignored by all serious students and all self-respecting newspapers. In my eyes you have breached a duty to your University.
>
> —Ted W. Swift—

The printing of the letter brought me my only personal contact with the dean during my three years in Ann Arbor. It was not a personal audience, but a phone call in which the dean thanked me for my views and congratulated me on my good judgment. Obviously I had diverted him, at least for the time being.

But we were not done. At that time, in our University of Michigan Junior Law School class, we had two outstanding students in the form of Eugene Alkema and Robert Fiske. Alkema had already attracted considerable attention within the Law School because of his impeccable appearance, diligent study habits, and spectacular academic performance. At that point in his Law School career he had received nothing but "A's." As I was told, the dean himself had been the only previous student to graduate from the Law School with a perfect academic record.

Fiske was running academically only a bit behind Alkema, writing for the *Law Review*, and playing superb hockey for the Law School team. He also carried a certain mystique in that he had graduated from Yale and had chosen to come to Michigan for his law training. While we were curious about his Yale background, the dean revered it. The dean always liked the idea of Yale men coming to Michigan.

Alkema and Fiske, in order to make the subterfuge complete, responded with their own letters to the *Michigan Daily*. Fiske's letter was printed on May 7, 1954. His comments, printed below, were designed to thoroughly confuse our pursuers.

> Mr. Swift's letter of April 30th came as a great surprise to me, for I had not expected to find such an attitude in a fellow student. As a law student myself, I found the "Unicorn in the Garden" a highly

humorous distraction from the ordinary law school life, and think that the instigator of this ingenious act, whoever he may be, should be highly commended. I don't believe I had ever heard of Mr. Swift until I read his letter, but he obviously appears to be the type of "books for books sake" student who, in his quest for legal dignity, would perhaps have been better off to have chosen the Harvard Law School, where such "juvenile" disruptions of the academic are unheard of. However, since the die has been cast, and Mr. Swift is stuck with Michigan (and vice-versa), all I can do is suggest that he might find life around here a lot more enjoyable if he would occasionally take some time off from his conscientious pursuit of the law, and have a little fun.

—Robert B. Fiske, Jr., '55L—

P.S. As for the Crease Ball, I think I can safely speak for all who attended in saying that it was a roaring success—in spite of the absence of Mr. Swift.

"We led with our ace-in-the-hole, Theodore St. Antoine. . . . He carried the shovel, and was primarily responsible for removing the 'leavings.' We even draped [him] with a sign indicating that he, too, was going to Crease Ball."

While the Dean and faculty were attempting to sort out the confusing Swift-Fiske positions, Alkema joined the media blitz in the May 8 issue of the *Daily*. He went a bit beyond the required, in my view, since he chose to refer to an unfortunate incident of my freshman year involving skyrockets launched from the Law School roof in the general direction of President Hatcher's home. The letter nevertheless served its purpose.

Recently Mr. Ted Swift, in effect, called for the wrath of the dean's office to descend upon the "rascal" who perpetrated the affair of the "Unicorn in the Garden." All I can say is that, occupied as he must be in the Legal Research Building with his outlines and reference works, the incident has assumed exaggerated significance to him. I am sure that few of his less scholarly brethren view the episode as an affront to the dignity and decorum of the Law School. As finals approach, tension mounts, and even the most studious need some diversion. Surely Mr. Swift must agree that leaving a horse in a courtyard for a few hours is more acceptable than shooting skyrockets off the roof of the Lawyer's Club (J entry) during a certain football game often held in the Spring. Things have come to a pretty pass when one can't have a little harmless fun without being castigated for it by someone with Mr. Swift's unusual sense of propriety. Thank heaven there are few like him in the Law School. We couldn't take many more!

—Gene Alkema, '55L—

After the printing of these letters, and a few more that followed, we had the investigators thoroughly baffled. The prime suspect had assumed the role of a critic, and those least likely to participate had come forward in support of the project. We had done, then, all that we had set out to accomplish, absent our ability to produce a Unicorn, and we had thought that the matter would be given a quiet death. Instead, to our delight, unknown allies assisted our quest for confusion. As was always the case in those days, there were numerous groups and individuals seeking causes. Our exchange of correspondence lured other perennial and vocal student forces into the fray. More letters poured into the *Daily* on this crucial issue. It became, in short, a cause celebre. Was this act a symptom of capitalistic decline? Or was it good clean fun? Was the horse a victim of cruelty? Was expulsion enough for those who were involved or should capital punishment be invoked?

Whenever the sparks would begin to die, some other unsolicited author would rekindle the flame. In all, eight letters were printed on the subject. Seldom was so much written about so little. But all of this was to the good, we thought, since the dean, and the powers of the Law School, would not want to become further involved in what had become such a volatile campus-wide issue. The innovation of discipline would only mean further public scrutiny, and we began to sense that we would be spared disciplinary measures.

The Crease Ball was held with high attendance and a higher casualty rate; the investigations were dropped; and the *Michigan Daily*, in its final letter, indicated that it suspected that it had been victimized by this artificial issue. In short, even the *Daily* had been duped.

For the most part, the story had a happy ending. I personally suspect that there was only one victim of this confrontation, the not-so-innocent Gene Alkema. In his senior year he received his only "B" in Law School. I have always suspected, although he would deny it, that his letter was responsible for the only flaw in his otherwise perfect academic record.

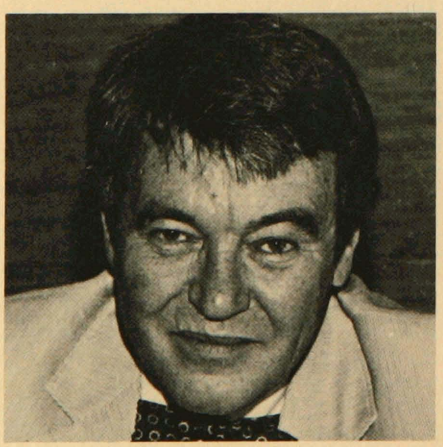
But I do not worry long about Alkema or the shortfall in his quest for perfection. He is alive and well and rich and representing management in a distinguished Grand Rapids firm. I suspect that he is proud of his role in the Unicorn affair and that this pride soothes any residual pain resulting from his lone "B."

Fiske, too, has managed to survive. After a brilliant career as the U.S. district attorney for the Southern District of New York (Manhattan), in the fall of 1979 he retired from public service and returned to the prestigious Wall Street Firm of Davis, Polk & Wardwell. Fortunately, his duplicitous conduct in the Unicorn caper never surfaced while he was in public service; presumably the barons of Davis, Polk & Wardwell are prepared to overlook his checkered past—if they are even aware of the same.

As for me, it was, with the exception of the acquisition of my wife, my only claim to fame during three years in Ann Arbor. Wherever I go in this country, I am greeted by some U-M graduate who says, "Oh you're the guy who put the Unicorn in the Garden." Fame is hard to come by, and is a vapor after all, but I had my moment in the sun, and I wallowed in the adulation which followed. As one of my classmates recently said, "Most of us graduated and went on to success and fame—in your case, Swift, you peaked early."

So be it. At last I can confess to my own form of circa 1954 "Animal House." The Statue of Limitations must surely have run after 25 years.

P.S. And best wishes to you, Whirlaway, wherever you are. I hope that you are surrounded by roses.



Theodore W. Swift

The Morality of Means: Some Problems in Criminal Sanctions

by Francis A. Allen
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[This article is based on the Louis Caplan Lecture delivered by Prof. Allen on April 10, 1981, at the University of Pittsburgh School of Law. The full text of the lecture, and accompanying footnotes, will be published in the Pittsburgh Law Review.*]*

In moments of exasperation, one may be tempted to misapply Mark Twain's comment about the weather and complain that everyone talks about criminal justice, but no one does anything about it. Sober second thought quickly reveals, however, that the statement is not literally or even substantially true. Since the eighteenth-century Enlightenment much has been done, for good or ill, about the criminal law and penal justice. Capital punishment was notably curtailed in the western world, and a regime of prisons, reformatories, and other so-called secondary punishments was instituted. Hopes for rehabilitation of offenders soared in the nineteenth century, and the rehabilitative ideal dominated thought in our own era. Such products of penal rehabilitationism as the juvenile court, systems of probation and parole, and the indeterminate sentence recommended themselves to American legislators and, indeed, to lawmakers throughout western civilization. Then in the 1970s American allegiance to the rehabilitative ideal precipitously declined, and we find ourselves today searching for a new intellectual blue print or paradigm to guide thought and policy for the remainder of the century. The substantive criminal law itself has expanded enormously, and today expresses an extraordinary range of purposes including not only that of minimizing violent behavior threatening to lives and property, but also the regulation of economic enterprise; protection of the environment; correction of relations among races and genders; alteration in habits of consumption of liquor, drugs, and sex; and even compliance with legislative dictates concerning times at which clocks are to be set. Many years ago I wrote that "the system of criminal justice may be viewed as a weary Atlas upon whose shoulders we have heaped a crushing burden of responsibilities relating to public policy in its various aspects. This we have done thoughtlessly without inquiring whether the burden can be effectively borne." The statement is a little flamboyant, as perhaps befits youth; but stripped of metaphor it seems accurate enough.

The questions about the criminal law that I propose to address in these remarks are in no sense new. They relate to the propriety of criminal sanctions as devices to achieve certain social ends. Propriety, as I am using the term, refers to the effectiveness of the criminal sanction in achieving given social purposes, but also to its capacity to gain social ends without imperiling or destroying other important values in the process. Questions about the propriety of criminal sanctions in this dual sense arise whenever serious thought is directed to legal regulation of human behavior. Moreover, the questions are never answered fully or for all time. They recur as social purposes change, as the social context alters, and as basic values relating to the relations of individuals and groups to state power are redefined.

The reasons for the persistence of questions surrounding the use of criminal sanctions become clearer when one considers some of the characteristics of the criminal law. First, the criminal law is the heavy artillery of society. If regimes of political terror of the sort that accompanied the emergence of totalitarian societies in the present century are removed from consideration, nowhere will one encounter such extreme exercises of state power within the confines of domestic policy as those occurring regularly in the ordinary administration of criminal justice. Under the authority of the criminal law a society may deprive its members of their property, liberty, and lives; and all societies, in fact, do many of these things almost routinely. The very weight of criminal sanctions requires societies valuing individual volition to erect principles of containment in order that the powers of government employed in law enforcement may be prevented from overreaching their bounds and destroying or impairing

basic political values. That the system of penal sanctions is capable of being utilized to ravage the institutions of liberal societies is another of the lessons to be learned from the history of totalitarian dictatorships in the twentieth century. The weight of criminal sanctions creates other important problems, some of them of a less apocalyptic sort. The severity of such penalties often makes them disproportionate to the purposes for which they are employed. To borrow an idiom from Sir Leslie (now Lord) Scarman, we ought not to "use . . . a nuclear weapon to control a street riot." When overly severe penalties are authorized, one of two consequences may follow. First, the sanction may be applied with the result that disproportionate injuries are inflicted on the offender. This is the problem of overkill. Second, the mismatch of penalty and offense may be so apparent to those who administer criminal justice that they may be induced to withhold penalties in situations in which sanctions of some sort are required. This is the problem of nullification.

It is true, of course, that there is a great range of severity in the penalties administered by modern systems of criminal justice, extending from little more than admonitions to the infliction of capital punishment. It is also true that alternative civil penalties, such as license revocation, may fall with greater economic effect on the offender than a fine or even a short period of imprisonment; for the withdrawal of the license may deprive the offender of a livelihood for himself and his family. Altogether too little attention has been given to the impact of such "civil" sanctions, and perhaps too great significance has been attached to the "criminal" or "non-criminal" forms of the penalties. Nevertheless, there is one feature of even apparently mild criminal sanctions that enhances their weight. The criminal law deals in the allocation of stigma; it dispenses social moral condemnation. Much of the effectiveness and also the destructiveness of criminal sanctions are related to this fact.

Another characteristic of the criminal law that inhibits rational policy is the very accessibility of penal sanctions. Like the mountaineer's mountain, the system of criminal justice is *there*. Criminal courts hold session in every county seat. It is much easier for legislators to supply criminal penalties than it is to inquire whether such sanctions are appropriate in a given regulatory situation and, if so, of what type, or whether there are alternative civil sanctions more likely to achieve the legislative purpose and at less social cost. The insouciance of lawmakers approaching these questions is illustrated by a story. When the principal draftsman of a major piece of New Deal legislation was asked about the presence of criminal penalties in the bill, he answered: "I don't know. They got into the draft late one Saturday afternoon."

There is one further characteristic of the criminal law that discourages sober consideration of the propriety of criminal sanctions in the multitude of circumstances in which they are employed. Criminal sanctions are means to the accomplishment of social goals; they are not ends in themselves. There is a morality of ends and a morality of means. The morality of ends concerns itself with what goals are to be pursued through the utilization of state power. The morality of means is concerned with the propriety—the effectiveness and decency—of devices proposed to achieve social objectives. In our society many more persons are concerned with the morality of ends than of means. Fierce conflicts surround the selection of governmental objectives, contentions all the more acute since the elections of November, 1980. Typically, persons strongly committed to particular social goals think little about the propriety of the means proposed; many lack either the capacity or inclination to do so. Indeed, many such apostles of the morality of ends interpret questions about means as evidences of covert hostility on the part of those who pose them. After all, who can doubt that food sold in the marketplace should be pure, drugs should be properly labelled, our air and water unpolluted, family members free from parental or spousal violence, our society rid of racial and sexual discrimination? With such interests at stake, who can in good faith quibble about means? The tendency to disregard or slight the morality of means, which is always strong, has been rendered even more formidible by recent developments in our political life. More and more, American public policy is being influenced by organized groups that gain potency by restricting their interests to single issues or single groups of issues, and display neither knowledge nor concern about any other part of the polity. Groups that achieve a tenuous coherence through advancing single narrow ends are little inclined to re-examine the methods proposed. The morality of means does not flourish in an era of single-issue politics.

Yet the claims of the morality of means are insistent, and at no time more so than when criminal sanctions are contemplated. The central proposition relating to the use of criminal sanctions with which I shall be concerned here, is that the criminal law ought not to make unwise and counterproductive interventions; it ought not, that is, to undertake punitively what in fact cannot be accomplished or cannot be accomplished without doing more harm than good or without incurring unnecessary social costs. Such broad aspirations cannot be codified in the form of crisp commands to the legislature. This is true because in any given area of regulation views are likely to differ in advance of legislation about what is wise or can be achieved or where the balance of benefit lies. The matter is by its nature very much one of trial and error. Yet although it may often be impossible to prescribe wisdom in advance, there is no justification for ignoring what may be learned from past experience and past failures. Unhappily, legislative practice in the penal area is not characterized by earnest scrutiny of why past attempts failed, or even by efforts to learn which attempts failed or succeeded. What is most disheartening is not that the same mistakes are repeated, but rather the unawareness of many lawmakers, legislative and judicial, that mistakes are being made.

In the remarks that follow, I shall identify some areas of penal interest in which pressing concerns of the morality of means arise. I shall briefly inquire into how the claims of that morality have been flouted and what may be required to honor them. . . .

A decision by a society to impose criminal sanctions in any area of human activity inevitably entails consequences, some of them going much beyond the intended law-enforcement objectives. The chronic failure of lawmakers to concern themselves with such consequences and to perceive that social costs may vary significantly from one area of penal regulation to another, constitutes a serious obstacle to the attainment of rational penal policy. Without a sensitive awareness of likely consequences, legislative consideration of the appropriateness of proposed interventions by the criminal justice system into the lives of persons is likely to be meager and of limited relevance. These points can perhaps be illustrated most readily by reference to American experience with the so-called victimless crimes—offenses involving such acts as the possession and use of liquor and drugs, prostitution, and gambling. Many of the most important effects of such legislation stem from the fact that what is being criminalized is conduct typically performed privately or secretly.

In order to discover whether crimes are being committed and to identify the violators, law enforcement must impinge heavily on constitutionally protected zones of privacy. It is no accident that for practical purposes the law of the Fourth Amendment begins not in 1791 when the amendment was first included in the Bill of Rights, but rather with the Prohibition Experiment in the twentieth century. The law of search and seizure has ever since been nourished and expanded most importantly by police activity associated with the sumptuary offenses. Nor can it be doubted that the practical difficulties encountered by law enforcement in these areas have induced courts to relax constitutional restraints on police powers. The ease with which the Supreme Court validated the use of hearsay evidence to establish "probable cause" for arrest and search reflects this pressure, as does the Court's persistent sanctioning of undercover informants and police spies in American criminal justice, despite the moral incongruities and abuses that such resort admittedly entails. In short, the decision to criminalize behavior in these areas has resulted in significant redefinitions of the relations of individual right to governmental power.

The spector of the policeman in the bedroom—and a federal policeman at that—may rise to menace us once again.

The victimless crime area is familiar territory; observations of the sort just made have long been familiar to criminal lawyers and social commentators. Another area of penal regulation is emerging, however, with problems of comparable seriousness that have received much less attention in the literature of criminal justice. The area to which I refer is that in which efforts are made to order and regulate behavior in the family setting and in other intimate relationships through the use of criminal sanctions. It is not entirely fanciful to assert that the problems of achieving rational penal policy in these fields are rendered unusually difficult by a conflict between what I have called the morality of ends and the morality of means, between intensely desired objectives and circumstances tending to frustrate their achievement and to distort their effects. These are important and complex issues, and only their broad outlines can be sketched in these remarks.

Among the most typical, strongly held, and important aspirations of persons living in the late twentieth century are those seeking the security of women and children against violence in the home and the enhancement of the scope and dignity of women's roles in the larger society. Clearly related, also, are the contradictory objectives of those caught up in the abortion controversy, a controversy more threatening to the viability of American pluralism than almost any other in these times. Given objectives so fervently held and, in many instances, so obviously just, one must expect that the recruitment of all possible means to achieve these goals will be strongly advocated and that criminal sanctions will be prominent among those proposed. It would seem likely, also, that criminal condemnation of private behavior antagonistic to such goals will take on a symbolic significance that may at times interfere with rational utilitarian calculation. It is my modest proposition that the claims of the morality of means now require increased attention in these areas.

The nature of these problems makes dogmatism especially inappropriate. It cannot be asserted, for example, that criminal sanctions have no proper role to play. So long as the policy objectives include the suppression of violent physical assaults, criminal penalties must be available, however assiduously alternative methods are pursued. Moreover, in some areas criminal sanctions appeal to be the most effective devices available. Thus a recent study persuasively and somewhat disconcertingly demonstrates that the threat and application of criminal sanctions may constitute the best means to hold deserving fathers to their legal obligations of child support.

Yet one attempting to think seriously about the problems of sanctions in these fields is likely soon to become sensitive to the fact that this is an area in which unanticipated consequences abound, in which the devices employed to achieve policy objectives frequently prove ineffective and counter-productive, in which the social costs of penal interventions are sometimes very high. Suspicions that the dynamics of intimate family relations create a peculiarly difficult milieu for penal regulation may be raised in the first instance by discovery of the fact that more policemen are injured while intervening in violent disputes between husband and wife or other family members than in the performance of any other law-enforcement function. One important reason for the high police casualty rates is that often the warring family members temporarily suspend hostilities between themselves and give expression to their mutual misery and frustration by attacking the intruding representatives of law and order. Obviously, despite the perils, the police cannot ignore disputes that disturb the peace and threaten life and limb; but across the country serious efforts are being made to substitute mediative and conciliatory interventions for those of the more punitive and authoritarian sort.

Some strands of the evolving penal policy in these fields deserve to be greeted with considerable skepticism. That the dignity, not to say the physical integrity, of women requires that they not be forced violently and against their will into sexual relations with their husbands in the home as well as with strangers in the street, is a proposition deserving of unqualified acceptance in contemporary society. There is abundant evidence, however, that forced relations occur in many American homes. Yet when one moves from acceptance of the principle and the fact of its widespread violation to the problem of appropriate official response, it by no means follows that we should, as some states have done, redefine the crime of forcible rape to include forced relations between a husband and wife living together. Nor is such an alteration of the law of rape mandated simply by the fact that the reasons traditionally given in judicial opinions for excluding wives from the crime's definition are inadequate and offensive. There is need for more serious consideration than has apparently yet been given to such questions as whether any increment of deterrence is gained from prosecutions of husbands for rape rather than for assault, and whether such enhancement of stigma and penalties threatens nullification and hence reduced rather than enlarged protection of married women. No doubt, other inquiries need also to be pursued.

When one moves to the abortion controversy, the prospects become even more somber and threatening. In recent years literally scores of proposed resolutions calling for a "Right To Life" amendment to the United States Constitution have been introduced in Congress. Although the language of these proposals varies somewhat in content and legal sophistication, they typically direct that "no unborn person shall be deprived of life by any person." The fetus is defined to be a person from the moment of fertilization, and full enforcement powers are conferred on Congress and the state legislatures. The implications of

these proposals are broad and sobering; no adequate canvass of them can be given here. It will be noted that the prohibitory language apparently encompasses not only abortions as that term is ordinarily understood, but also some forms of birth control. If such an amendment is approved and ratified, the passage of implementing criminal legislation, some of it congressional, seems inevitable. The spector of the policeman in the bedroom—and a federal policeman at that—which we thought had been put to rest by such cases as *Griswold v. Connecticut*, may rise to menace us again.

Definition of the proper role of criminal sanctions in the family and in other intimate relationships encompasses some of the most difficult and neglected issues in modern criminal justice. The neglect is not entirely surprising. These are areas in which basic policy orientations have been in contention and dispute. The claims of the morality of means are often unheard when strong feelings are aroused in battles over fundamental objectives. Yet sooner or later the problems of consequences and means must be addressed. Sound policy demands more than reflexive resort to criminal sanctions because they are there, or merely because of the symbolism of criminal condemnation. Sophistication about the use and application of sanctions is required both in order to achieve policy objectives more effectively and also to avoid damaging the fabric of our basic political values upon which hopes for the next half century rest.

The concerns of the morality of means are not limited to questions about the appropriateness of penal interventions into various areas of human activity or those relating to the proper definitions of criminal offenses. There remain the difficult and important problems of what the system of criminal justice is to do with offenders once they have been convicted. These are questions of extraordinary scope and complexity. Indeed, the problems of correctional treatment have long been a principal focus of American criminological thought. Certain of these issues have gained a new urgency in the closing years of the twentieth century.

As was mentioned in the opening comments, the 1970s were marked by the precipitous decline of allegiance to the rehabilitative ideal. Although the purpose of rehabilitating convicted offenders has never been given full and consistent expression in the actual practice of American corrections, to a remarkable degree the ideal of rehabilitation served as a widely shared aspiration for the penal system during the larger part of the present century and as a standard for measuring the performance of criminal justice. The reasons for the decline in allegiance to penal rehabilitationism in the decade just past are many and complex, and cannot be examined here. For present purposes it may be sufficient to say that the decline has made the construction of a new theoretical pattern or paradigm one of the primary obligations of those concerned with American penal policy. It has also posed the issue of what role, if any, rehabilitative efforts in and out of the prisons are to play in the future.

Since the second world war, and even before, a comprehensive critique of the rehabilitative ideal has emerged. The critique not only casts doubt on our capacities to alter the criminal propensities of convicted offenders, but also warns that in some of its manifestations penal rehabilitationism imperils the central values of liberal societies. Mature consideration has led some observers to the conclusion that such deleterious social consequences flow, not from the mere presence of rehabilitative programs in penal institutions, but primarily from the role that rehabilitation has been accorded in American corrections. In short, it is suggested that a range of pernicious and unintended consequences arise when rehabilitation is made the *purpose* of penal treatment rather than a means by which the self-improvement and self-realization of convicted offenders can be facilitated. If rehabilitation is thought to be the purpose of institutional programs, then the success or failure of penal institutions will be measured by whether the reform of offenders is achieved. Because such changes in criminal proclivities are hard to come by and because a penal system must necessarily serve many purposes other than inmate reform, a strong tendency develops among correctional personnel to exaggerate grossly their rehabilitative achievements and to pretend that much of what is being done for entirely other purposes is motivated by rehabilitative ends. For their part, prisoners being held under indeterminate sentences quickly perceive that their release dates depend upon their giving evidences of reform; and not surprisingly, many set avidly to work to provide such evidences. As many commentators have remarked, the prisons are converted into great schools for thespians. Because typically the goals and methods of the rehabilitative effort are imposed upon rather than chosen by the inmates, the effectiveness of the effort is minimal.

> At a time . . . when we are being invited to redefine our social objectives, it is of importance to give particular attention to how we propose to achieve them.

With these considerations in view, commentators such as Professor Norval Morris have urged that rehabilitative programs should be regarded as facilitative rather than coercive. Persons should be sentenced to prison, not to be reformed, but rather because such punishment represents just deserts for their crimes or is required to deter the prisoners and others from committing similar crimes in the future. Educational, vocational, and therapeutic programs should be made available to prisoners desiring them, but their participation in them is not to be compelled nor should their release dates be determined by administrative findings that they have been reformed. The pragmatic advantages anticipated from this recasting of the penal rehabilitative effort are clear. Because the rehabilitative goal is one voluntarily assumed by the prisoner and the program of self-improvement freely entered into, it is hoped that institutional correctional programs will more successfully achieve their rehabilitative ends than in the past. The penal institution is relieved of the often impossible obligation of reforming the irredeemable and the parole board of the often equally impossible task of determining when the prisoner has been reformed and eligible for release.

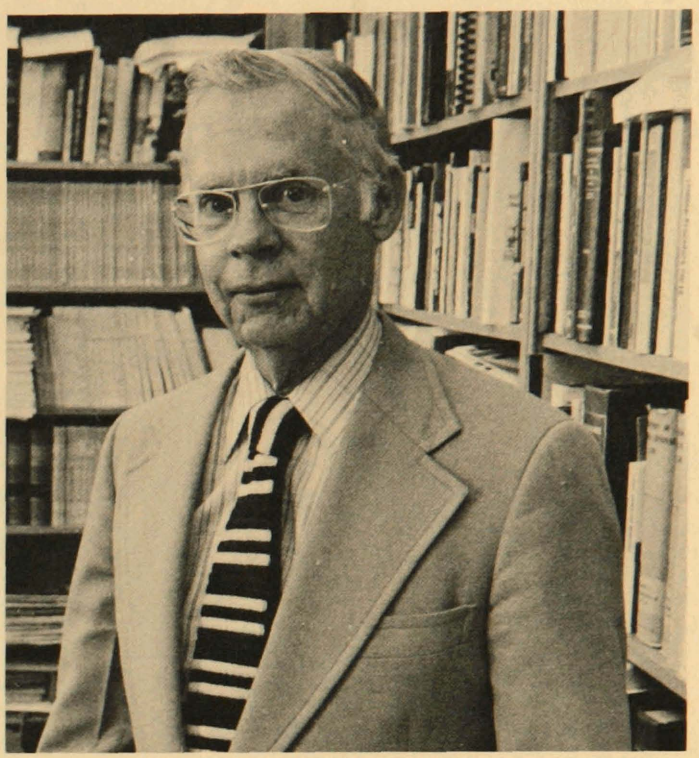
The proposal for redefinition of rehabilitative effort in the penal system is thus one based on the principle of inmate voluntarism. It has been defended primarily as a means to eliminate or reduce the factors that frequently in the past rendered rehabilitative regimes ineffective and sometimes malignant. The principle of voluntarism in prisons, however, may possess an even broader significance. It may be identified, that is, as expressing a basic assumption of public morality applicable to a wide range of public issues, as occupying a central position in the morality of means. It seems responsible to assert that the 1980 elections, portentous as they may prove to be, will not, in the long run, alter the main outlines of the welfare state. Social purposes that can be achieved only through the exercise of governmental authority will persist, and the

problems of defining areas of individual autonomy and volition in a society in which state power is a salient fact will continue to challenge and perplex us. Urging an enlarged role for voluntarism in areas in which state power is now wielded does not imply an attachment to romantic anarchistic assumptions that governmental coercion can be wholly or largely eliminated. It is rather to invite new attention to the strategies for according a substantial reality to individual volition in a society pervaded by claims of governmental authority.

Voluntaristic rehabilitative programs in the prisons may contribute to a public ethic governing the relations of the state to convicted offenders. The defining of such an ethic is doubly important at a time like the present when popular outrage about widespread crime is approaching a climax. In the best of times the conditions of penal custody tend toward waste, inhumanity, and brutality. At present a variety of economic, psychological, and cultural factors threaten the serious exacerbation of the prison environment. We need first to assert the human dignity of those we imprison and to stand against their dehumanization at our hands insofar as we are able. This implies that however deplorable the wrongs done by the prisoner, we as a society will not strip from him whatever aspirations for self-improvement he may retain, and that we will supply whatever assistance we can to advance the achievement of his educational, vocational, or other self-fulfilling goals.

Second, we need to refrain from imposing rehabilitative goals and regimes upon him, and this not only because past efforts of this sort have largely failed, but also because to do so is to infantilize adults. It is an ominous thing, one basically incompatible with the assumption of liberal societies, that the state should attempt through coercion to invade the very mind and will of those held in its custody. In the past the radical incompatibility of extreme rehabilitationism with our basic political and moral values was disguised by the fact that the rehabilitative techniques employed were fallible and such success as they achieved depended largely on the voluntary efforts of the inmate. But this will not always be true; it is not wholly true today. The coerced application of drugs, psychosurgery, and other forms of behavior modification invade human personality and assault autonomy, as do programs of "thought control" practiced in totalitarian societies and in some religious and political cults within our own community. The morality of means in these areas implicates our most fundamental concerns.

These comments have been intended to suggest that at a time like the present when we are being invited to redefine our social objectives, it is of importance to give particular attention to how we propose to achieve them. As Edna St. Vincent Millay observed many years ago, the end cannot stand pure of the means. You will note that I have not chosen to address questions of constitutional rights and limitations in these remarks. Much of the morality of means, of course, is given expression in constitutional doctrine; but too often American constitutionalism diverts thought about social policy from needed consideration of its rationality and decency. It is the concern with means that is, paradoxically, both the glory of the legal profession and the basis for its bad reputation in the community: its glory because the values that distinguish liberal societies from others often relate less to objectives than to how ends are achieved; bad reputation because a concern with means may often give rise to complaints (some of them deserved) of pettifogging, excessive technicality, and obstructionism. It is not surprising that revolutionary regimes, impatient to create their versions of the brave new world, have typically sought to destroy the legal professional or to minimize its role. Not all of the lawyer's purposes are encompassed in the morality of means; but we cannot fulfill our commitments as lawyers and neglect its claims.



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