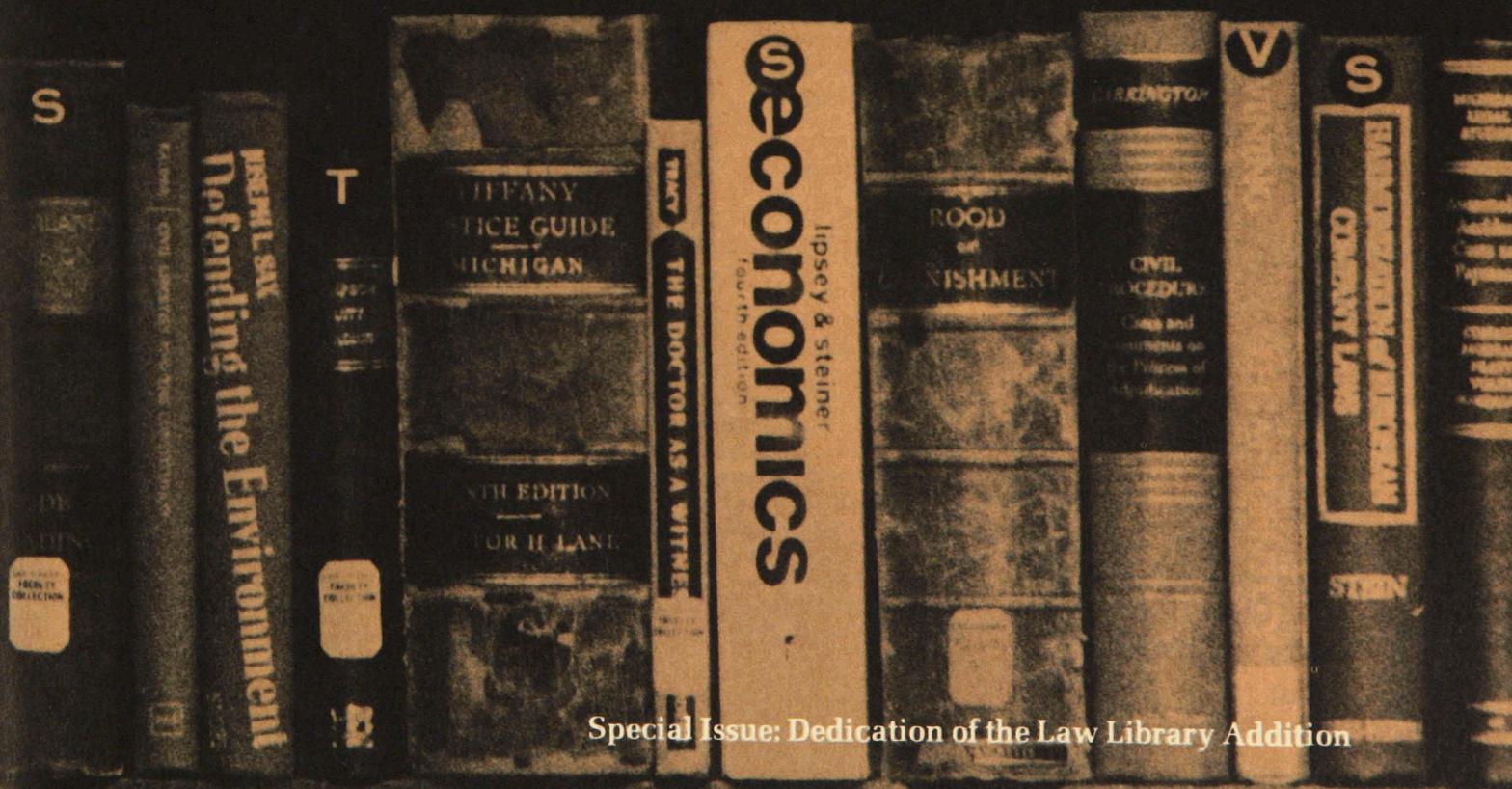


Law Quadrangle Notes

The University of Michigan Law School

Volume 26, Number 2, Winter 1982



Special Issue: Dedication of the Law Library Addition

Law Quadrangle Notes

Volume 26, Number 2,
Winter 1982

Contents

**Special Issue:
Dedication of the
Law Library Addition
October 29-31, 1981**

The Dedication Issue 1
by Pat Sharpe

**The University
of Michigan's
Law Library Addition** 2
by Margaret A. Leary

**Delight at the
Completion of the
New Library** 8

**The Dedication
Private Lawyers and
Public Responsibilities** 10
by Carl McGowan

Dedication Remarks 14
Thanks 19

**The Symposium:
The Legalization of
American Society** 21

**The Legalization of the
Family: Toward a Policy
of Supportive Neutrality** 22
by David Chambers
Summary and Excerpt

Comment 25
by Robert A. Burt

**Elevation of Private
Rights to the
Constitutional Level** 26
by Christina B. Whitman
Summary and Excerpt

Comment 29
by Lea Brilmayer

**The Legalization of
American Society:
Economic Regulation** 32
by Peter O. Steiner
Summary and Excerpt

Comment 35
by Roger C. Cramton

**Antitrust:
Economic Regulation
or Deregulator?** 36
by Thomas E. Kauper
Summary and Excerpt

Comment 39
by Sallyanne Payton

**Law, Power, and
Knowledge** 40
by Theodore Lowi
Summary and Excerpt

Panel Discussion 43
Francis A. Allen,
Theodore J. St. Antoine,
Joseph L. Sax,
E. Philip Soper

Receptions 46

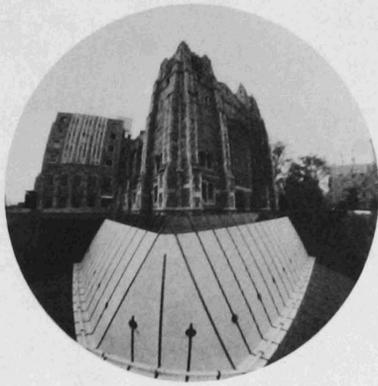
Briefs 50

Law Quadrangle Notes (USPS 893-460), issued quarterly by the University of Michigan Law School. Second-class postage paid at Ann Arbor, Michigan. Office of publication, 109 East Madison, Ann Arbor, Michigan 48109.

POSTMASTER, SEND FORM 3579
TO: Law Quadrangle Notes, Law School, The University of Michigan, Ann Arbor, Michigan 48109.

Publications Chairman: Professor Yale Kamisar, U-M Law School;
Editor: Pat Sharpe, U-M Law School;
Graphic Designer: Jennifer Spoon, U-M Publications Office; **Production Editor:** Carol Hellman, U-M Publications Office; **Typesetting & Printing:** U-M Printing Services.

Photographs by: Bob Kalmbach, U-M Information Services; Eric von Geldon and David Peterson, Law School Student Photographers; and Marianne Cardunier.



The Dedication Issue

Pat Sharpe
Editor
Law Quadrangle Notes

On the Cover

The cover of this dedication issue of *Law Quadrangle Notes* shows part of a display of books written by University of Michigan law faculty that was amassed in celebration of the magnificent new Law Library addition.

Composed of almost 800 volumes, the display gives tangible evidence of the diverse and continuous intellectual activity of the faculty. The earliest title, *On the Study of Law*, by the school's first dean, James Valentine Campbell, was published in 1859 in the very month that the law department opened to students. The most recent volume, former dean Francis A. Allen's *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*, was published in 1981, only shortly before the display was prepared. In the interim, 132 faculty authors have published books on all aspects of the law and on the interaction of law with society.

Our cover reflects a sentiment characterized by Judge Carl McGowan in his dedication address, which is included in this issue. A Yale librarian, Judge McGowan tells us, was so disgruntled by all the attention accorded a newly completed library building that he wished to have the words, "This isn't the library. It is inside," inscribed on the facade.

The Building

Michigan's new Law Library addition, thrilling as it is to enter, attracts no such inappropriate wonder at exteriors. As architect Gunnar Birkerts said in his dedication remarks, it is a building without a facade. One can look across the top of the new addition at the timeless dignity of the virtually unchanged Law Quadrangle.

Margaret Leary's article on the planning and construction of the library describes the rationale for the underground plan and the process by which it was adopted. The building's appropriate and attractively unassuming exterior is the result of that decision. Instead of creating a monument demanding admiration, the architect used glass, mirrors, and angles to focus attention anew on the Gothic facade of the Legal Research Building.

From three stories below ground level we can look up with reawakened appreciation at the arched window and towers of the old library. This new perspective intensifies our awareness of its Gothic height and angularity. To achieve this perspective, we need not descend into gloom. Bars of sunlight play on the sloping limestone wall of even the lowest underground level.

A sense of height and openness remarkable in an underground structure immediately strikes anyone entering the new library addition. A physical exuberance seems to arise from walking into a space suddenly open in so many unexpected directions. In eliciting this response the new library is reminiscent of the I.M. Pei addition to the National Gallery in Washington. Yet where that building devotes only a small proportion of its vastness to the display of art, the features of Birkert's addition all serve to draw one into the legal scholarship that is its function.

The Symbolism of the Building

"One of the central roles of architecture through history," one architecture critic said recently, has been "to hold up before us a focused image of the role an institution plays in our lives." Yet, he goes on to say, surrounded as we are by "mute, sleek" modernity, "we have largely forgotten that buildings can do that."

Such amnesia does not characterize those who have been closely associated with the Law Quadrangle. Both Dean Sandalow

and former dean St. Antoine describe Michigan's Gothic buildings as symbolically representative in their dedication remarks. The Quadrangle embodies the vital importance of legal education as envisioned by donor William Wison Cook; for Professor St. Antoine, its style can also be read as an expression of the aspiration of the law itself.

In law and in scholarship, tradition is both valued and revitalized by reconception. The same can be said for the Quadrangle. The new building, accommodating new information technology and a vastly increased collection while simultaneously inviting attention to the beauty of the existing facilities, rearticulates commitment to an ideal of ever-renewing respect.

The library addition also represents a significant choice on the part of the school: to focus the capital campaign on the need to maintain one of the great research libraries in the world and to construct a lasting reminder of the significance of the word in law and legal education.

The Dedication Activities

Like the building they celebrate, the Symposium on the Legalization of American Society and the Dedication Ceremony which are described in this issue bespeak the continuity of legal education at Michigan. Judge McGowan's dedication address draws on Justice Harlan F. Stone's speech at the dedication of the Law Quadrangle in 1933. Both addresses emphasize the critical importance of excellent legal education.

Justice Stone, speaking during the depression, saw the bar's failure to maintain its "traditional position of public influence and leadership" as a primary argument for the rigorous education of lawyers. Speaking today, Judge McGowan noted that the topic of the symposium honoring the new library reflects the continuation of this questioning of the function of law in our society. It also attests to the increased scope of legal influence. That, Justice McGowan said, necessitates renewed efforts to give future lawyers not just technical competence but also a critical and theoretical understanding of the changing role law must play in the struggle for a just society.

The University of Michigan's Law Library Addition

Margaret A. Leary,
Assistant Director
University of Michigan
Law Library

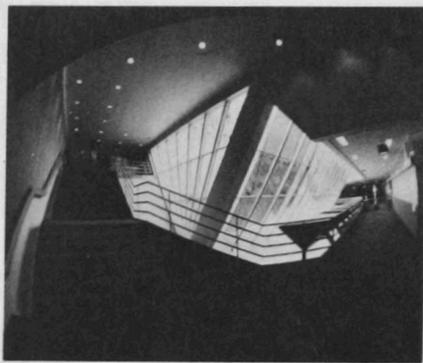
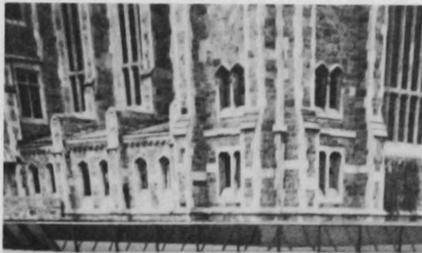
A quarter block of Ann Arbor has, for half a decade, attracted the intense attention of Law School alumni and faculty, architects, librarians, geologists, laborers, students, engineers, carpenters, photographers, and even fire marshalls, as well as the merely curious. The center of attention: a very large hole. Observers wondered whether the Law School was anticipating increased militarism in the eighties and had started an underground bomb shelter or was attempting to build an esthetically pleasing parking structure by burying one.

The fifty-five-foot deep hole has finally assumed features which reveal its function: an underground addition to the Law Library. On August 31, 1981, a strikingly airy library opened, and the finished product speaks elegantly and eloquently for itself. Visitors, who move easily from the dark basement of the Legal Research Building down a broad stair into the bright, open space which is one-, two-, and three high-ceilinged levels below the basement, are aware only of the unusual bottoms-up view of the Gothic Law Quadrangle; they appreciate the gentle reflected natural light and comment on the luck of the Law School to have the best of both the past—in the Legal Research Reading Room—and the present—in the addition—to offer users of the Law Library.

The process of building was fascinating, although completion of the building has obliterated all evidence of the complex, even dangerous task of creating it. In the late seventies a fifty-five-foot hole was dug immediately adjacent to the entire east side of the fifty-year-old, hundred-foot-tall Legal Research Building, in sandy soil; a poured concrete building was constructed in the hole; and the result was covered under several feet of artfully landscaped dirt. This article addresses

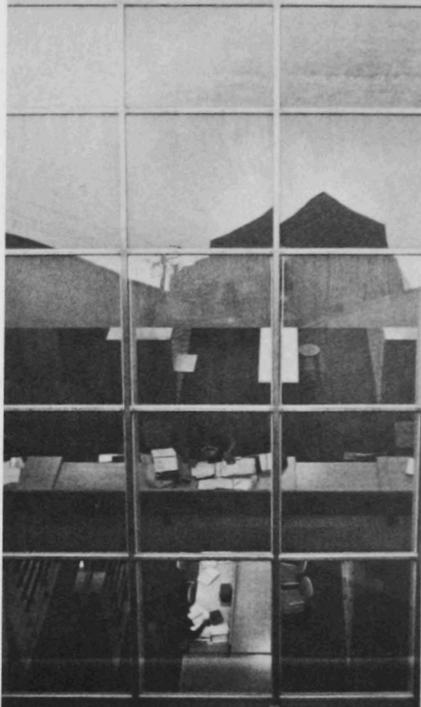


Suspended stairways and open balconies make it possible for all three underground levels of the new library addition to be open to the light well which admits sunshine and a dramatic view of the Legal Research Library.

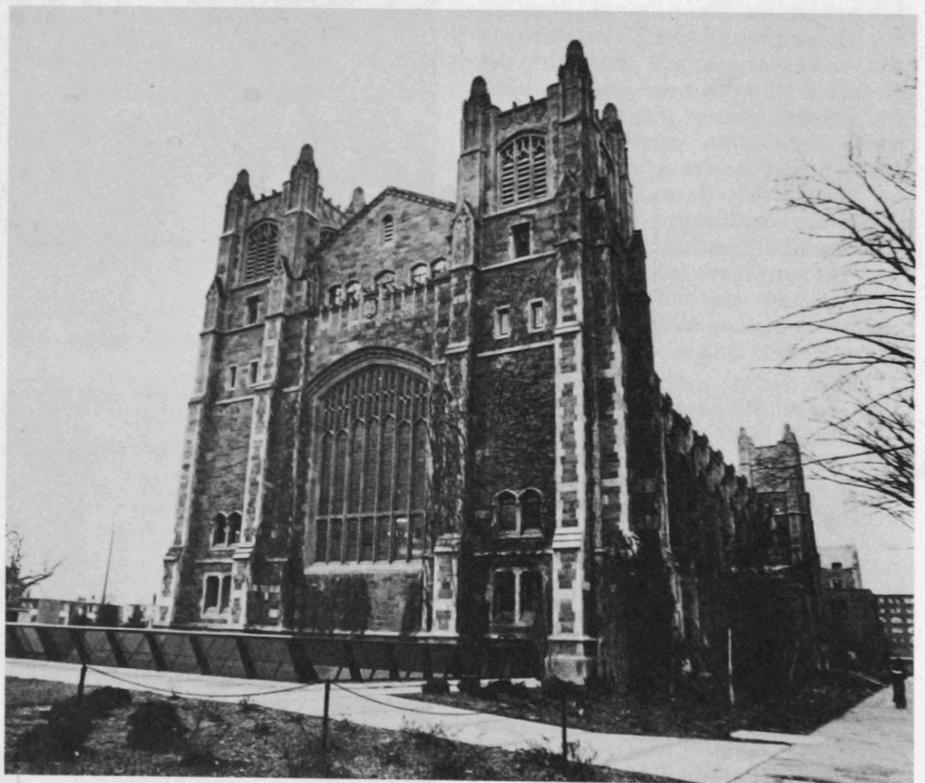


The entrance to the new building from the old library's reading room offers a spectacular view of the light well which is an important design feature of the addition.

The larger light well is L-shaped, forming the inside angle of the new building. One side of it is faced with glass supported by mirror-encased steel, the other with limestone.



Looking into and across the smaller light well in the new addition, one can see students at work inside as well as the grass and paths that cover the building.



The east end of the Legal Research Library with the new addition in the (literal) foreground.

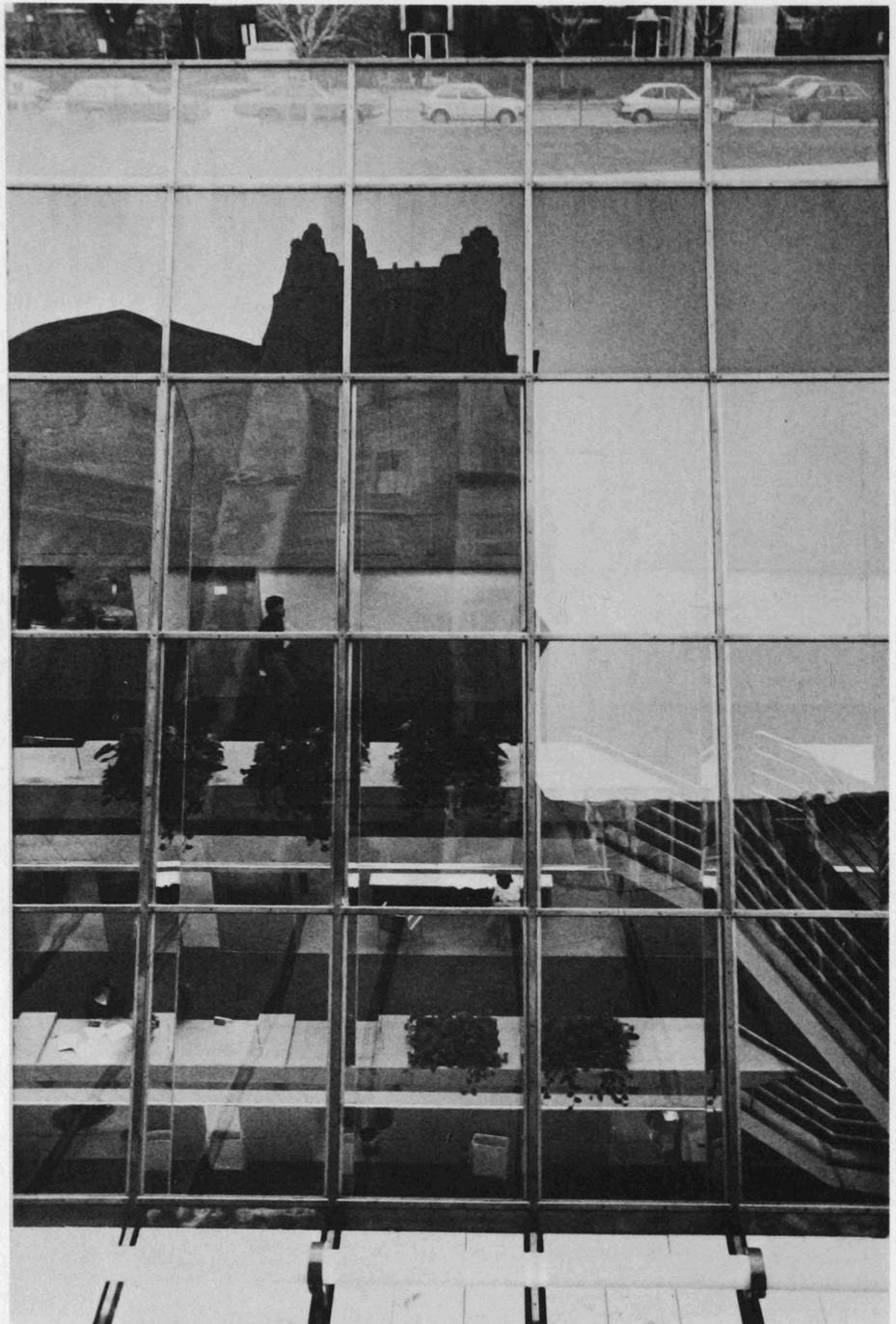
some major questions about the project: What protected the Legal Research Building from damage or even falling into the hole? Why is the addition underground? What does the new building mean to the Law School?

By the 1960s the Law School concluded it had to have more space and that the greatest need was for library space. The School possesses a large and fine library which had long outgrown its quarters. Originally built for 200,000 volumes in 1931, expanded for 120,000 more in the early 1950s, the Library held half a million volumes by 1977. While technology—microforms and computers—might hold space needs constant, the condition of the Library in the 1960s and 1970s already made more space for books and study essential.

The site, an underutilized parking lot at Tappan and Monroe, was fairly obvious since it was the only open space on the block. The issue was whether anyone could design and build a structure compatible with the treasured buildings which William W. Cook shepherded to completion in the 1920s and 1930s. What contemporary design would be acceptable to the broad community of interested parties?

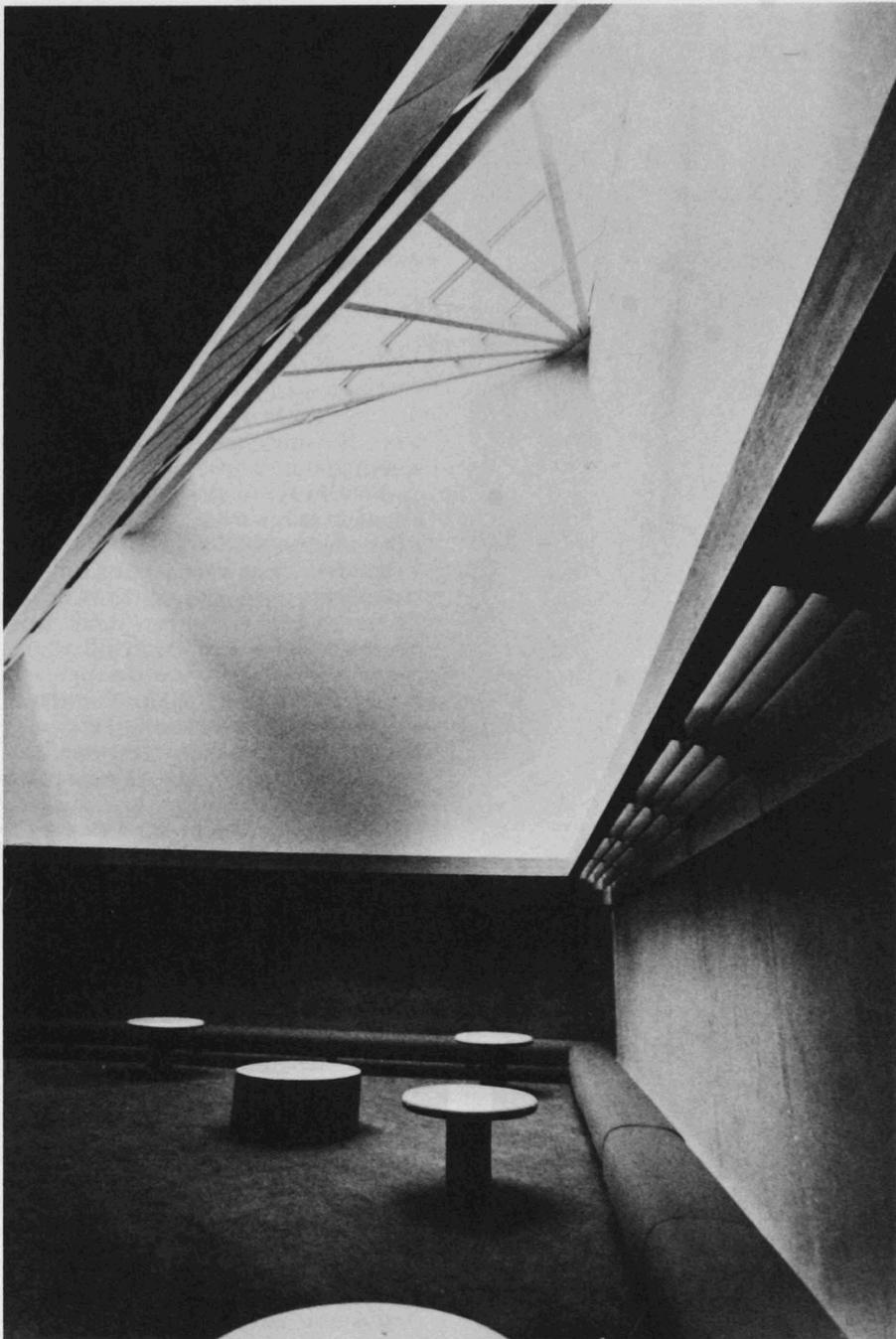
The answers emerged as the School chose an architect, Gunnar Birkerts and Associates of Birmingham, Michigan, and began to review his proposals. The original ideas, all for above-ground structures, offered the necessary space but did not generate the enthusiasm required for raising money for the project. Each successive proposal became less obtrusive—from a wraparound on the upper floors of the Legal Research Building, to a composite in several stages both above and below ground, to all underground. Only when the addition would be almost invisible was it esthetically acceptable.

The site is nearly pure sand, layered with gravel, untouched since the glacier laid it down. The layers of gravel were critical in the excavating. The general process for digging the hole was a bit more complicated than, but similar to, digging on a beach or in a sandbox. A hole dug in wet sand can go much deeper than one in dry sand but will eventually develop a cave-in stage, in which the edges of the hole expand at about the same rate as its depth. On a beach, the event is amusing if somewhat frustrating. On a site bounded by sidewalks, utility poles, parking meters, and the University of Michigan Law School, the

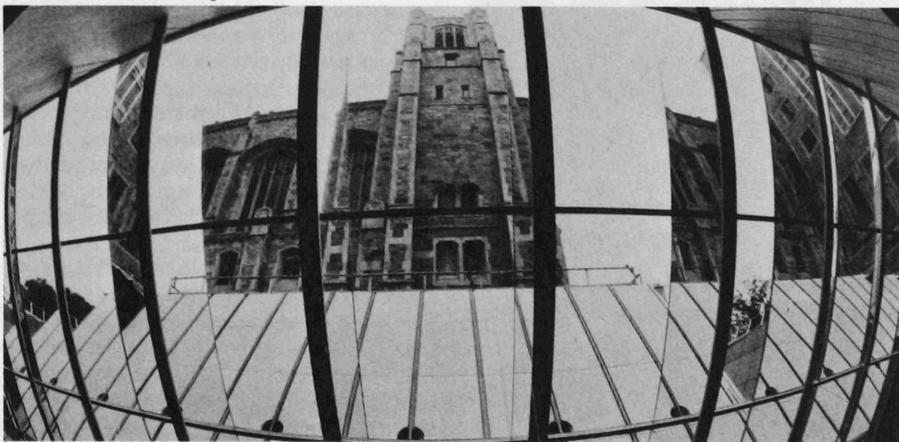


Looking into the light well that wraps around the outside of the Legal Research Library, one can see both the reflection of the old building and people using the new facility.

Individual carrels, each wired to accommodate its own computer terminal in the future, are available to all Law School students in the new facility.



The Lounge on the third underground level is open to a triangular light well situated at the outside corner of the new L-shaped addition.



View of the Legal Research Library from inside the new addition.

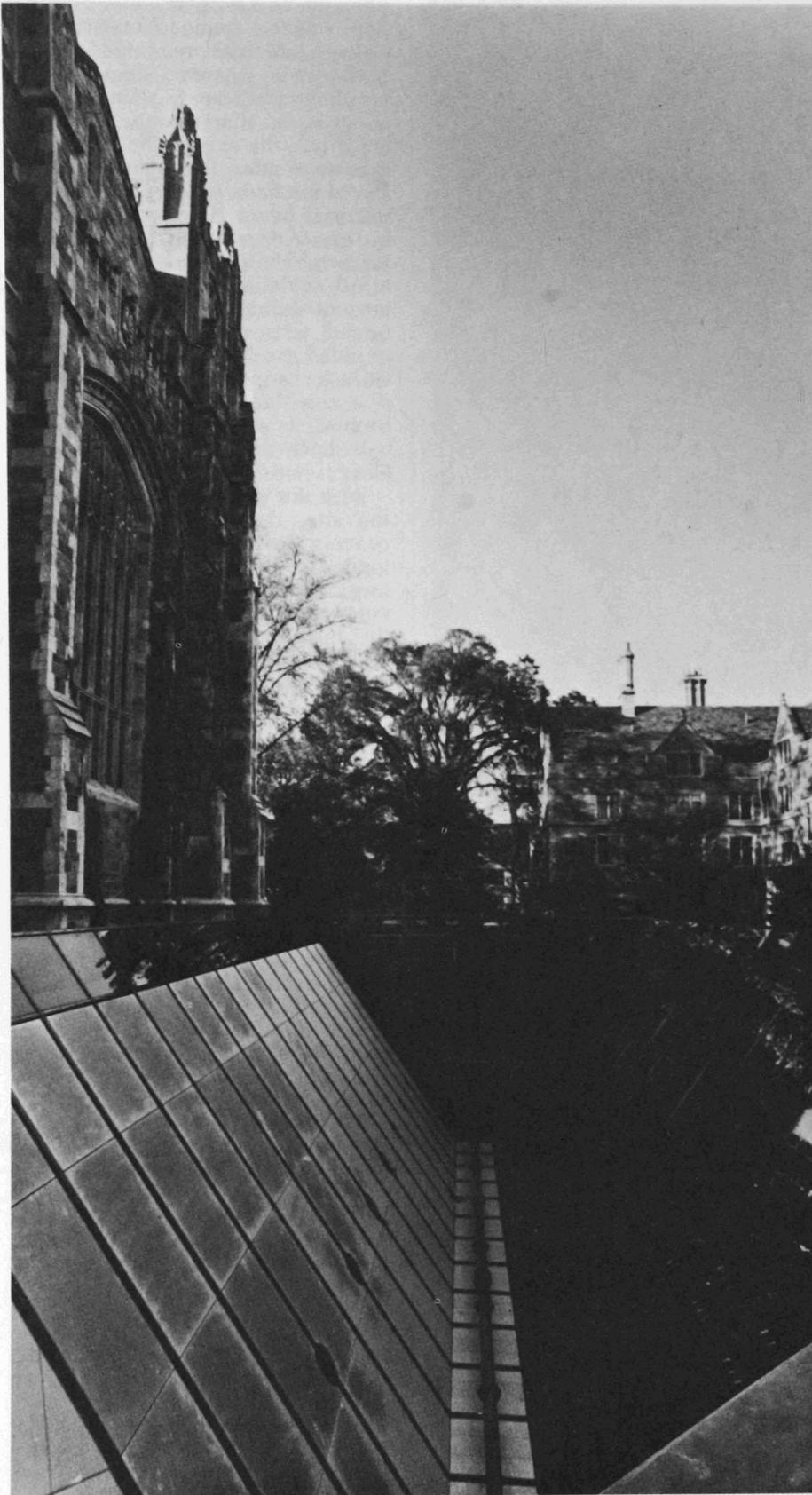
phenomenon was serious. Frustration was an inadequate response. Cave-in had to be prevented.

The hole was the shape of the building-to-be: an L with sides of about equal dimensions. Inside the angle was the existing building; outside were sidewalks and streets. Different methods to stabilize adjacent material were used on those two sides. Adjacent to the Legal Research Building, where no shifting at all could be permitted to occur, tangent columns of concrete reinforced with steel completely surrounded the building. On the street sides, a cheaper and less labor-intensive combination of driven pilings connected with heavy oak boards held back the sides of the excavation.

With the walls established around the site, the digging started. The process was slow, for dirt had to be hauled to a landfill several miles away. The crane which lifted sand out was, of course, at the bottom of the hole. Long before the digging ended, bets were on about how that equipment would be removed. A crane stayed in the hole even after all the sand was out, to bucket concrete into place and move equipment and material. Eventually, that crane was removed by a much larger crane, brought in just for that task. The crane-removal was a major event with standing-room-only crowds and went without a hitch.

Early in the excavation, the glacier's role became critical on the Monroe and Tappan Street sides. There, where the sides of the hole were held firm by oak boards attached to pilings, real trouble came as the hole got deeper. About twenty or thirty feet down in the digging, the first layer of gravel was exposed. The sand had behaved as expected until then, and the oak boards had held it in place. The gravel, however, didn't hold. It collapsed, running out from under the boards and bringing the sand above with it. Sidewalks, parking meters, and even utility lines were threatened. Work slowed drastically for the erosion was dangerous not only to those at grade level but especially to those in the hole. Sand and gravel fell with such force that the integrity of the entire support system was jeopardized. The solution—pumping thin concrete into the sand at the digging site—took months to develop.

The north end of the site was completely excavated first. Concrete walls were formed and poured at that end as excavation to the south and west continued. When enough walls and columns existed, a floor would be poured; then the sequence of walls, columns, and floors was repeated.



The relationship of the new addition to the Law Quadrangle is clear in this photograph.

Meanwhile, the demolition that had to precede renovation went on in the Legal Research Building. Students and staff learned to carry on even though the noise level was warlike and the dust thick. Floors and stairs, even outer walls, were removed and new ones built. A complex connection between existing space—the third floor Reading Room and the basement corridor of the Legal Research Building—and new space emerged. Demolition and renovation went on for over two years.

The final construction phases were finishing off the interior with wood, glass, carpet, and furnishings and putting V-shaped lightwells between the two buildings and at the right angle of the addition at the Tappan-Monroe corner. The side of the lightwell toward the Legal Research Building is faced with limestone. The side toward the new space is glass. The glass is supported by mirror-encased steel—the effect is to bring the Gothic building visually into the new space and to make the new space feel like an extension of the older.

The result, in mere statistics, is to add 52,000 square feet, 35,000 linear feet of shelving, 237 carrels, 226 study spaces, and offices for the *Michigan Law Review*, *Journal of Law Reform*, and library staff. The critical value of the space is that the Law School now has the means to rationally allocate, arrange, and use space. For years, the sole objective had been simply to “cram-it-in,” whether “it” was a book, an office, or a person. The new building means that students have access to adequate study space, open book stacks, and library staff and records to help them get what they need. Faculty have an improved library and lounge. Students and staff have new lounges.

The move of Library staff, equipment, and 300,000 books took place in August. The objective was to move with the least possible disruption for Library users, which meant books had to be shifted quickly and the Library ready to operate immediately after the shifting was done.

Library staff, rather than professional movers, planned and carried out the move. Staff spent the spring and early summer in intensive preparation. The Library closed for only one week: a weekend in which to do preliminary work, four and a half days of moving, and a weekend for recovery. In the four and a half days, staff members plus over 100 temporary workers moved 150,000 volumes into the new space and rearranged another 150,000 within the old stacks. Every shelf-full as it

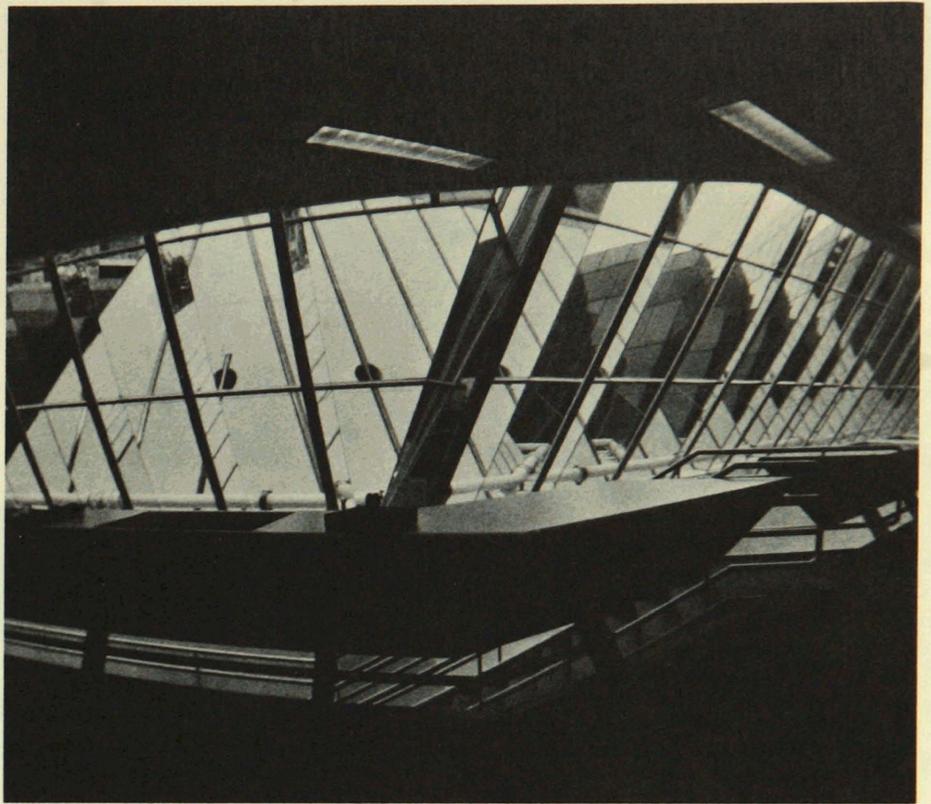
would be after the move was identified ahead of time. Books were moved in cartons on flat bed hand trucks. To speed up vertical movement and decrease reliance on slow elevators, wooden chutes were built down the new connecting stair and at four locations in Legal Research and Hutchins Hall.

The first official event in the new building was the Dean's fall gathering on Sunday, August 30. And right on schedule, at 8:00 on the morning of the first day of classes the following Monday, the Library reopened with its greatly expanded and re-arranged quarters.

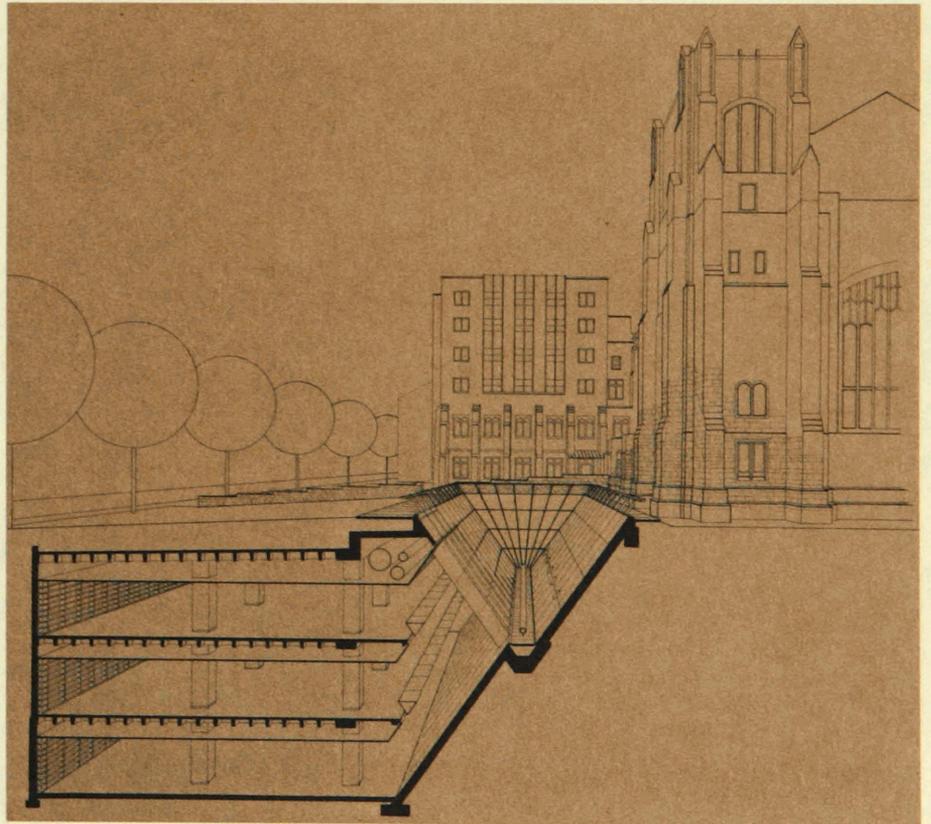
The shift of the collection puts the fundamental material for 1150 J.D. students in the new addition, in multiple copies; the international collection, basic statutes and court reports, and Michigan material are now in the Reading Room. The lower two stack levels of the original building house older court reports and statutes, easily accessible from both the addition and the Reading Room; the fourth through the seventh levels hold the foreign law collection; the faculty library is on level eight; nine is a retrospective and historical collection; and the British Commonwealth collection remains on level ten.

An important quality of the new space is its provision for the ultimate in mistake-correction: 15,000 square feet of open, empty, as-yet-unplanned-for space. The Law School can correct misallocation of space, or respond to new developments, by finishing off the space in almost limitless ways: carrels, tables, or lounge chairs for study space; open stacks, closed stacks, or intensive storage for books; microform storage and use space, computer terminals, or sight and sound facilities. The building increases the printed-book storage capacity of the Law Library to nearly 900,000 volumes. At that size, or less, the Library in book form will stabilize, and other means of storing information will be used. For the immediate future, converting extra copies of older, deteriorating material to microform will be important. Machine-readable storage will also be important.

In spite of a longer-than-projected construction time, inflation, the noise, dust, dirt, and exacerbated crowding of renovation, and the frequent strains on everyone's sense of humor as the time to move drew near, the Michigan Law Library addition is worth every bit of the support, planning, work, and attention it has received from alumni, faculty, librarians, architects, engineers, and construction workers.



The mirror-encased steel beams which support the glass of the light well break up and reflect the view in exciting ways.



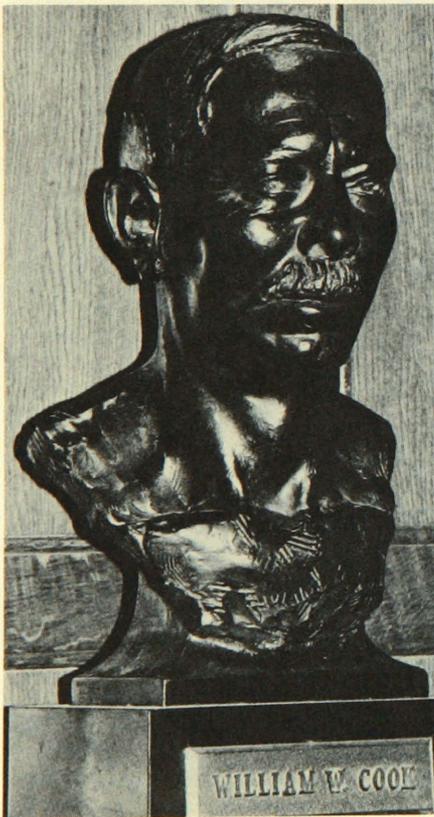
Architect's drawing

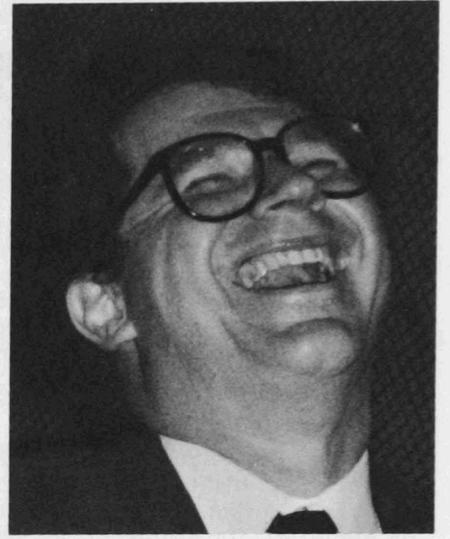
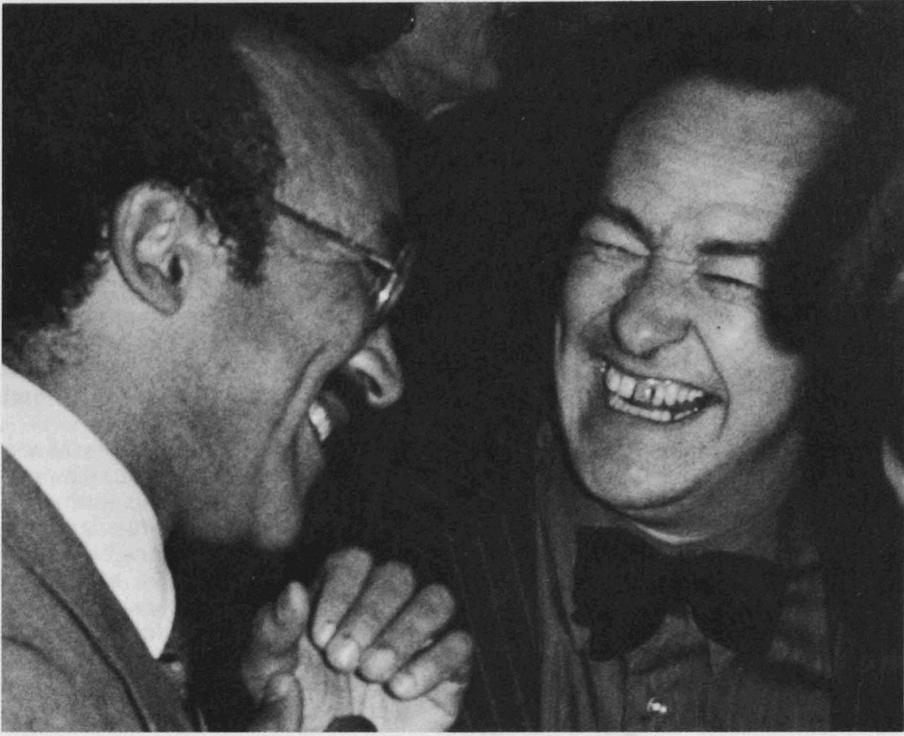
Delight at the Completion of the New Library

Among the gargoyles decorating the outside of the old Law Library are two which Library Director Beverley Pooley insists were sculpted to resemble William W. Cook, the donor of the Law Quadrangle.

"Looking up at those gargoyles from the underground addition, one can see clearly that Mr. Cook is smiling," Pooley told Harley Schwadron in a recent interview. "He appears to be pleased with the new addition to his library."

Others observed during the dedication ceremonies also seemed delighted with the newly completed building.





Private Lawyers and Public Responsibilities

Dedication Address by Carl McGowan, Judge of the United States Court of Appeals for the District of Columbia Circuit

From the Introduction of Judge McGowan by
Dean Terrance Sandalow:

Judge McGowan's career exemplifies the diverse challenges and opportunities for service that a life in the law permits. In the course of his rich and varied career, he has been a notably successful private practitioner, a professor of law at Northwestern University, a lawyer in the service of both state and nation, and most recently a member of the United States Court of Appeals for the District of Columbia Circuit.

The mere recitation of those positions, however, fails to convey the distinction with which he has discharged his various responsibilities or the extraordinary esteem for him within the profession, matters about which much might be said but that I can now touch upon only very briefly. In the late 1940s, Judge McGowan accepted a position as counsel to Adlai Stevenson, then governor of Illinois. Stevenson's biographer, John Bartlow Martin, writes that Judge McGowan quickly became Stevenson's closest advisor. As such, he was a key figure in Stevenson's campaign. In describing McGowan's role during that campaign, Martin writes: "Every campaign has its McGowan; few have anyone so good." That is a fair approximation of what knowledgeable observers have said about him in relation to each of the roles he has played.

I know from personal experience that it is true of his performance as a lawyer, and it is plainly the consensus of those most familiar with the distinguished contributions he has made during the past two decades to the Court on which he sits. We have heard a good deal recently about the differing perceptions of judges and their law clerks; but on one point the judges and clerks of the D.C. Circuit—and the lawyers who appear there—seem agreed, and that is the crucial role that Judge McGowan has played within that Court. For many, he became the exemplar of what a judge ought to be.

A half-century ago when this Law Quadrangle was conceived and constructed, it was surely an act of faith on the part of its wise and generous donor. So it was also of this University which undertook the challenge to make of his vision a reality—to provide, in the most magnificent plant for legal education this country has ever seen, instruction in the law and constant refinement of its ideals worthy of the most rigorous traditions of the higher learning.

It was a time when our national confidence was sorely shaken by a shattering economic collapse which opened up dismaying fissures of doubt as to what shape the social and legal organization of our society might take in the future. For those in positions of responsibility on this campus, there must have been serious uncertainties about the nature and purposes of the legal education to be purveyed in the new facility and, indeed, whether law itself as it had previously existed would play as significant a role in any new system of governance that might emerge from the widespread frustrations of popular expectations then visible on all sides.

For quite different reasons, the addition to the Law Quadrangle at this point in time of an impressive new library is itself a similar act of faith. When, some 50 years ago, the Sterling Memorial Library at Yale was being built, the Yale librarian of that era was discomfited by the attention seemingly being paid the new building to the exclusion of all else. It is said that he wished to put a sign over the front door reading: "This isn't the library. It is inside."

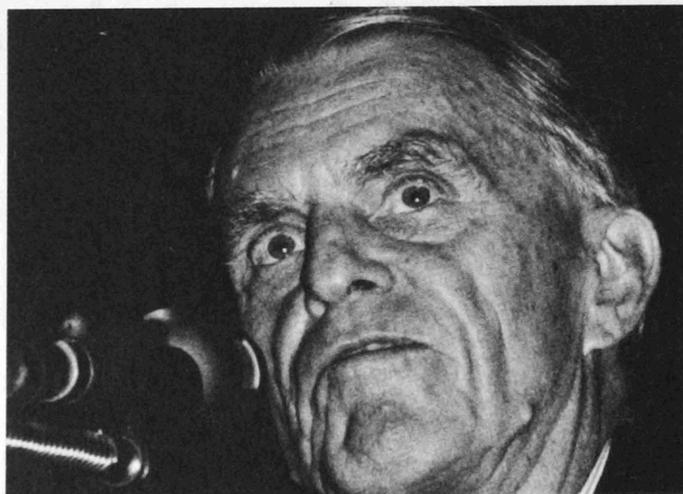
His primary concern at that time was obviously about the breadth and variety and completeness of the collections of books to be housed within the new walls. Today, bombarded as we are on all sides by the breath-taking claims being made for the unfolding information revolution, the concern must be with whether there will be any books inside or only computer terminals, television screens, and electronic print-outs.

For one who, like myself, has always associated the acquisition of knowledge with the solitary student, reading and rereading the book he has taken from a library shelf, there is always the recollection of what Erasmus, visiting the sixteenth-century centers of learning, said of his stay in Oxford:

"It is wonderful what a harvest of old volumes is flourishing here on every side; there is so much of erudition, not common and trivial, but recondite, accurate and ancient, both Greek and Latin, that I should not wish to visit Italy, except for the gratification of travelling."

It is thus somewhat disconcerting to me to read in the current annual report of a large American communications company that for the future "Ours is the business of information handling, the knowledge business," or a recent news story in the *London Economist* that a Dutch electronics company, thanks to the phenomenally expanding capacity of the silicon chip, within two years expects to sell, at a comparatively modest price, a computer that can store and instantly retrieve all of the information contained in the Library of Congress.

Putting to one side the question of whether the spread of information can always and invariably be equated with a growth in knowledge, it may well be, of course, that scientific developments of this nature will prove to



be a useful enlargement of the resources of university libraries as we have known them, and not a substitute. For reassurance on this score, I have recently taken counsel with a distinguished scientist, and a great humanist as well, who has been working at the heart of the new technological developments in information handling, and also with a scholarly library expert whose job it is to provide advice and assistance to libraries faced with what he characterizes as both the opportunities and the dangers presented by the new technologies.

The general message from both encourages me to believe that for the foreseeable future the book on the shelf will continue to be an essential feature of the university library, although certain kinds of information may perhaps more effectively be stored in other forms. As is usual in times of change, it appears that what is helpful in the new world will be merged with what has been found to be essential in the old. Certainly I am told that "the new and costly systems, despite strongly made assertions to the contrary, will probably supplement rather than supplant printed books, scholarly journals, and research libraries." I have no doubt that the building we dedicate today will house a library which will, to paraphrase one of my informants, "anchor the present" of this Law School to its "past," and provide the services that will "help fuel [its] thrusts into the future."

It is, of course, for the Law School itself to determine what it believes should be the nature and objectives of those "thrusts." A major event in its history, such as the one being recognized today, inevitably initiates a period of self-searching and reflection on this score. When the Law Quadrangle itself was first dedicated in June of 1934, the speaker on that occasion had no doubt as to what he thought was the most urgent item of business to which the university law schools should turn their attention. It was the restoration and strengthening of what he termed "the public influence of the bar."

It was Justice Harlan Fiske Stone's submission to that audience that there had been a serious decline in the leadership role of the private bar in public affairs and that the consequences of that deterioration were peculiarly severe in the crisis condition of the economy then obtaining. A Wall Street lawyer himself, both early in life and for a period following upon his academic career prior to his being summoned to public office in Washington by his Amherst collegemate, Calvin Coolidge, he was especially perturbed by the preoccupation of too many lawyers with the frenzied finance of the late 1920s and their callousness to shocking violations by their clients of the fiduciary principle. He believed that the disclosures of these activities in the congressional investigations following upon the stock market collapse of 1929 had undermined the confidence of the lay public generally in the members of the bar and thereby diminished their ability to provide the leadership to a struggling nation for which their abilities and training had qualified them.

Justice Stone ended on a more affirmative note. He thought that, with the university law school teachers taking the lead, both by precept and example, in "discharging the public duties which rest on the profession as a whole," the bar would respond in a manner and to a degree certain to reinvigorate the traditions of an earlier time.

This concept of the academics as the key to the acceptance by the private bar of its public responsibilities was not a new departure for Stone in his dedication address in 1934. As long before as 1928 he had spelled it out in more informal terms in a letter, recently come to light, to Dean Young B. Smith of the Columbia Law School, who had invited Stone's comments on his annual report.

Wrote Stone:

... I am assuming that where you speak of the public service in law that this includes the private practice of law. . . . That always requires emphasis, especially in a school like Columbia, where attention is being concentrated on research and more scientific work. Of course, the fact is, all the law in Christendom and all the research in it isn't worth a d —, except in so far as it serves its utilitarian purpose of securing social order and justice. It does that only as you train members of the bench and bar. It is because I believe that more scientific study and research make law more useful that I have always been for dealing with law in more scholarly fashion, but the men who are working with you who are not very closely in touch with the bar must be constantly reminded that their whole program comes to nothing if they do not sell it to the bar and get lawyers to take particular advantage of it.

In the longer view, it is very possible that Stone was voicing these concerns about the private bar at the point in our national history when they were most justified. The decade of Al Capone, prohibition, and a runaway stock market was not our finest hour, and law was not the only profession that strayed from its moorings. I like to think that because Stone spoke out as he did on this campus and because the university law schools picked up the gage he flung down before them, the bar has gone far towards regaining its sensitivity to the public role it cannot escape and to the responsibilities that accompany its privileges.

That did not happen overnight. I can remember in my early years as a lawyer and law teacher what a futile organization the American Bar Association appeared to be. The newcomers to the bar stayed away from it in droves, although neither did they rush to embrace the National Lawyers Guild which was set up as a counter-attraction. The ABA, in the years both before and after World War II, seemed to spend most of its time discussing amendments to the Constitution for such purposes as prohibiting the President from entering into executive agreements with foreign nations, and limiting the federal income tax to a maximum rate of 25 percent.

This was all dramatically changed some years ago when a veritable handful of ABA members of unimpeachable professional abilities decided to make a conscious effort, working from within and through the machinery in place, to upgrade the leadership and thereby to change the whole tone of the organization. They succeeded beyond their wildest dreams, and for many years now the ABA has been a useful and effective organization of dramatically increased strength. There is room for disagreement as to whether it always reaches the right answers, but it is generally regarded as addressing the right questions in terms of the public obligations of the legal profession.

When John F. Kennedy became President, he found himself facing a host of difficult problems growing out of the advances in constitutional doctrine with respect to racial and other forms of discrimination. He concluded that he was entitled to have the active assistance of the private bar in seeing that the new law of the land was enforced. He invited a group of leaders of the organized bar to the White House and bluntly told them that he thought they should respond to his call for help. The answer he got was the formation of the Lawyers' Committee for Civil Rights Under Law, which still functions and which, through volunteered time, money, and effort, has secured for many individuals the rights to which the Supreme Court had held they were entitled. This would not have happened in the organized bar of an earlier

day, and how Justice Stone would have hailed this assumption by private lawyers of burdensome but vital public responsibilities.

When I first began my judicial service in the District of Columbia, I was amazed at the extent to which the private lawyers of Washington were carrying the load of representing indigents in the many criminal appeals we had at that time prior to D.C. court reorganization. With two and frequently three criminal appeals on the calendar each sitting day, many, indeed if not most, of which involved indigents, the amount of the wholly uncompensated legal representation then required was enormous. We would have patent lawyers and tax lawyers briefing and arguing criminal cases and doing it very well indeed, although they had to work very hard to handle the unfamiliar subject matter.

We began to have some apprehensions as to whether there might be a problem of reverse discrimination in that appellants with no money might be getting better representation than those who had just enough not to qualify for *in forma pauperis* treatment. The subsequent provision of publicly financed defender agencies has eased this load on the private bar, but it was cheerfully and ably carried for a long time, and still is to a considerable degree.

One of the most pressing needs for legal services has been in the civil area. When Congress first appropriated money for neighborhood legal offices, many of the private law offices at their own expense detailed legal associates and secretaries to serve successively for six months or longer in such offices. A large amount of *pro bono* work in civil matters has been done by these law firms in the last several years.

Congress, of course, finally decided to regularize and stabilize these services by creating and funding a National Legal Services Corporation to which appropriations are made for supporting legal services at the local level. Most people would believe that this has proved to be a desirable and efficient way to resolve this pressing problem of access by the poor and untutored to the legal counseling and assistance they need in common with all the rest of us. The organized bar supported this approach strongly, and the ABA in particular has forcefully resisted the suggestions made to Congress that it be either eliminated entirely or subjected to large decreases in funding. Here again it is hard to envisage the ABA of 1934 as casting itself in this role.

Pending at the present time in the Congress are a number of bills which seek to deprive the Supreme Court, or the lower federal courts, of jurisdiction to consider certain specific issues, such as school prayers and busing, abortion, and the all-male draft. As it did when similar steps were sought to be taken 20 years ago by groups hostile to decisions of the Warren Court, the organized bar, led by the ABA, has acted promptly and vigorously to assert their unqualified opposition to the displacement of the Supreme Court as the final interpreter of the Constitution or the prevention of its decisions from being followed and enforced by the lower courts.

Justice Stone, whose court in 1937 successfully weathered the court-packing proposal of Franklin D. Roosevelt with the overwhelming support of the private bar and a little effectively timed self-help by Chief Justice Hughes, would surely regard these responses by the bar as in the great tradition of lawyer leadership on public issues, particularly in areas where their professional knowledge qualifies them to speak with special authority.

Judge Harold Medina, of the Second Circuit, who studied law under Dean Stone in the second decade of this century, has spoken of how interested his teacher invariably was in the ethical problems of counsel which he

was quick to identify in the cases being considered in his classes. Certainly it is true that these problems were still heavily on his mind when he said here in 1934 that, "problems to which the machine and the corporation give rise have outstripped the ideology and values of an earlier day. The future demands that we undergo a corresponding moral adjustment."

Sensitive as he invariably was to issues of moral conduct arising in the private practice of law, Stone is reputed to have been very skeptical of the utility of broad general formulations of ethical principles in the form of canons or codes. Thus, he would presumably have welcomed the present effort of the ABA to scrap its existing Code of Professional Responsibility and its accompanying—and confusing—canons, statement of ethical considerations, and disciplinary rules. The jargon of ethical principles is abandoned, and the proposed rules aspire to the precision of statutes declaring and defining rules to be observed in the practice of the law, with disciplinary sanctions to be imposed for non-compliance.

The final draft of the proposed rules is awaiting final consideration by the House of Delegates next year, but it has set off a prolonged period of intense reexamination by the bar at large of what is right and what is wrong for lawyers to do in advising clients and trying cases. Some of those long-established assumptions have already been demolished by recent Supreme Court decisions, employing both the First Amendment and the antitrust laws to strike down minimum fee schedules and restrictions upon lawyer advertising and group legal services. Much more needs to be done, however, and the proposed rules represent great strides in that direction.

Professor Geoffrey Hazard, Jr., the reporter for the ABA Committee having this matter in its charge, has pointed out the extent to which the bar has, in its ethical reflections over the years, been almost exclusively preoccupied with the criminal law and the defense of criminal defendants. In this area it was assumed that the lawyer's first and only duty was to his client, and the same principle somehow managed to project itself as the starting point for ethical guidance in other, and wholly dissimilar, areas of private law practice. However, as Professor Hazard correctly concludes, "[T]he ethical foundation sustaining the narrow function of the criminal defense lawyer simply cannot carry the system of ethics for the whole range of functions that American lawyers now perform." It is upon this premise that the proposed rules have been founded, and their ultimate adoption will, if achieved, be an important milestone in the coming of age by the private bar in the recognition of its public responsibilities.

This is not to say that there have not been notable acceptances of such responsibilities in the past. When I first came to the bar in New York City as the decade of the 1930s was ending, Wall Street was astounded by the splitting up of one of its major law firms because its head could not countenance the action of one of his partners in incorporating the private yachts of some of his wealthy clients and thereby securing for them income tax deductions then arguably possible under a loophole in the tax laws. Within the last few years, a prominent lawyer in this state undertook, at the request of the Detroit Bar Association, the *pro bono* representation, in the United States Supreme Court, of the District Court for the Eastern District of Michigan against which the Attorney General had brought a writ of mandamus. Against government challenge the Association lawyer successfully asserted the correctness of his client's decision to invalidate the wiretapping without the authority of a judicially issued warrant that was being widely practiced in internal security investigations, with consequent

threat to the invasion of the constitutionally protected privacy rights of the guilty and the innocent alike.

In interviewing applicants for law clerkships, I frequently ask the perhaps not very meaningful question as to what use the applicant anticipates that he or she will make of the legal training when the time comes to settle down for the longer pull. During the days of the student unrest a few years back, the answer almost invariably came back: "Well, Judge, I can tell you one thing I'm not going to do and that is to work for a big law firm and spend my time serving the interests of the big corporations."

My response was to say that perhaps this was too quick a writing off of a career alternative, pointing out that there are broad-gauged lawyers as well as narrow-gauged lawyers, and it is for the individual to make of himself the one or the other. I went on to say that in my time in practice I had seen broad-gauged lawyers who, because of the respect their legal abilities and good judgment had earned for them from their corporate clients, had enormous influence on the business decisions and policies of those clients. Their views on such matters were actively solicited, given great weight, and often prevailed.

This influence extended to areas affecting large numbers of people, both within and without the corporation, in respect of labor relations, non-discriminatory personnel practices, environmental impacts, social problems of their communities, charitable contributions, full disclosure to their stockholders and their customers, avoidance of restrictive practices, and ungrudging compliance with applicable laws. Indeed, I concluded, I could think of some private lawyers who were, in their quiet and unpublicized way, doing more to bring about advances in areas in which the applicant was presumably interested than some of his professed heroes in public office, the academy, or general militancy.

Of course, in the Viet Nam era, this was all greeted by my hearers with a polite reserve eloquently indicating disbelief. The times have changed, and my latter-day interviewees do not give the automatic answer to my question that was formerly forthcoming. They now exhibit a willingness to be convinced. That willingness, in my judgment, offers both a challenge and an opportunity to a private bar that demonstrates a disposition to be ever mindful of the public responsibilities that are the hallmark of all truly learned professions and which are peculiarly characteristic of the law. If that challenge is met and that opportunity fully realized, it will be because the practice of the legal profession is being carried on in the spirit of the same university tradition that embraces the teaching of law at university law schools like this one.

The purposes of a true university have been variously defined. Daniel C. Gilman, when inaugurated as the first president of Johns Hopkins University in 1876, included among his hopes that it would be a place of great usefulness in promoting sound ideas of good government. President Eliot of Harvard, greeting the newcomer on that occasion, observed that "Universities, wisely directed, store up the intellectual capital of the race, and become fountains of spiritual and moral power."

There has been uniform acceptance of the mission of a university as extending to the identification and espousal of those values that strengthen the social order by endowing it with the quintessential quality of justice. It is the direct relationship of the law to this particular purpose that has brought this and other distinguished law schools within "a university framework, with all that that implies in terms of the purity and elevation of educational objectives, and their enrichment by ready access to other intellectual disciplines."

There have been of late many expressions of concern about the technical competence of the practicing bar, escalating into the claim that the university law schools in particular have neglected practical instruction in favor of that of a more theoretical nature. I have paid my respects on earlier occasions both to the accuracy of the diagnosis as well as to the efficacy of the remedies proposed, and I do not now pursue that question further than to note that legal competence customarily tends to be defined too narrowly. It is possible for great technical competence to coexist with abysmal ignorance of, or lack of interest in, the larger ends which law seeks to attain.

Of two lawyers of equally high technical competence, one may have that extra dimension of understanding of the purposes of law which makes him sensitive to the requirements of a just and orderly society and to currents of change. He it is that makes a wise and reliable counselor for harried corporation heads who have learned the hard way how to distinguish the broad- from the narrow-gauged lawyer. The point has been effectively made by Professor Francis Allen of this faculty, who has recently written:

Concern with values is . . . far from being merely of academic interest. On the contrary, it goes to the very essence of technical professional competence. These facts have long been understood by the best legal practitioners. It is important that we do not forget what our best lawyers discovered long ago.

It is not without significance in this context that the Symposium held as part of these dedicatory activities has been addressed to the subject of "The Legalization of American Society." The consensus would appear to be that such a process has been going on apace and shows few signs of abating.

There has been a weakening of the influence of institutions like the family, the school, and the church; and the law has tended to flow into the resulting vacuums. This is also true of employer-employee relations where disputes and tensions once worked out within the office or the plant now speedily become the subject of lawsuits. Even the present-day counterparts of the medieval guilds of tradesmen speak with lessening authority, both to their members and to the community at large. Organizational values which once were operative and exerted a stabilizing and solvent effect seem to have lost their former force.

In the field of public affairs, special—and, indeed single—interest groups have proliferated, and political power has simultaneously tended towards fragmentation. Building the coalitions of agreement which enable governments to function gets harder and harder as the discordant voices become larger in number and shriller in tone.

All of these circumstances bid fair in the years ahead to make of law and lawyers a major component of the glue holding our society together. If they are to have any chance of fulfilling this initial function, it will be because the law is receptive to values deriving from other intellectual disciplines and because lawyers, bringing to bear their special training in relevance and rationality, take all knowledge for their province in making and applying rules for human conduct.

Viewed in this way, it is plain to see why the private bar has public responsibilities far transcending its individual concerns and why the education of lawyers in the university tradition is of critical importance. The advent of a great new library in a university setting is dramatically symbolic of this fact and provides an appropriate occasion for both bench and bar to say to this Law School and this University, in the words of the Psalmist: "In your light we see light."

Dedication Remarks



Terrance Sandalow
Dean, University of
Michigan Law School

The addition to the Law Library is indeed a cause for celebration, fully worthy of a place on the Law Quadrangle among the nation's most distinguished law school buildings.

Mr. Cook's magnificent gift to the University is known and admired by lawyers, judges, and legal scholars throughout the world. Its beauty and majesty have played an important part in instilling the pride that generations of students and faculty have taken in their association with the Law School and in nurturing the affection they have felt for it. In these circumstances, the decision to add a building to the Quadrangle imposed a special responsibility—a responsibility to recognize the significant role that the Quadrangle has come to play in the life of the School. Since I had no part in the design or approval of the addition, I may say without embarrassment that I believe that responsibility has been admirably fulfilled. Not only is the addition itself an architectural triumph, but in the use that he has made of the Legal Research Building, the architect has succeeded in enhancing our appreciation of that grand edifice.

Although the addition has been occupied for only two months and the finishing touches put upon it even more recently, it has already produced a memorable moment in the history of the School. The plans for the addition were, as you may know, the source of some controversy, not only among alumni but also within the faculty. With the opening of the addition, controversy among the faculty has ended. One of the original faculty critics has even been heard to say "I was wrong," as far as I know the first time that a member of the law faculty has been known to utter these words.

The opening of the library addition is the immediate occasion for our celebration but not the sole reason for it. The addition is but the largest and most visible product of the School's recently concluded capital campaign. There are many others. As a result of the campaign, endowments were established for the support of four new professorships; the endowment of a fifth was substantially augmented; and two additional endowed professorships will be established in the future. Our endowments for student financial assistance were significantly increased. Funds were provided that permitted us to undertake needed rehabilitation of the Lawyers Club. An endowment was created that enables the School to draw upon the intellectual resources of the bench and bar by bringing distinguished judges and lawyers to the Law Quadrangle for extended visits. Funds were received that enabled the School to establish a pioneering Program for the Prevention of Child Abuse and Neglect and to continue its important Program in Law and Economics. In brief, the life of the School has been pervasively and permanently enriched by the campaign.

The School has, to put the point somewhat differently, been immeasurably strengthened by the generosity of its alumni and friends and by their commitment to the ideal of excellence in legal education. Here, I believe, is the most important reason for our celebration. We celebrate not only the opening of the library addition—magnificent as it is—and the other gifts received during the capital campaign—important as they are—but even more significantly, the tradition of which they are a part. Michigan is unique among public law schools—and, so far as I am aware, among public institutions of higher education in any field—in the level of private support that it has enjoyed. We are, of

course, a public law school, and public support is important in enabling us to discharge our responsibilities. However, it is the support that we have received from our alumni and from others who value excellence that accounts for the School's place among the world's leading centers of legal education and scholarship.

In this respect, the Law Quadrangle may be taken as a metaphor for the life of the School. The original Gothic buildings and now the different but equally notable addition were all built with private funds. Only one part of the Quad, the upper five stories of the stacks in the Legal Research Building, was built with public funds. Those floors are serviceable; we could not easily do without them; but I do not risk contradiction by saying that they are undistinguished. The distinction of our physical surroundings is entirely the product of our private support. The distinction of the School's research and educational programs is no less dependent upon the generous private support that it has received.

My point is emphasized by but does not at all depend upon the current economic difficulties of the State. More than a half century ago, Mr. Cook expressed the hope that the trust created by his will to support legal research at Michigan would "cause others to realize that the University cannot" depend on "state taxation alone . . . if its standards of scholarship . . . and its service to the state and nation are to be maintained and advanced. . . ." Mr. Cook's wish has been grandly realized, not only in the major gifts that the School has received since his death but in the indispensable support that is provided through the Law School Fund.

One is led to ask why Michigan, uniquely among public law schools and to an extent equalled by only a few private schools, should have received such generous support. The initial reason, no doubt, is gratitude, together with the belief that the debt each alumnus owes to the School can best be repaid by helping to provide an outstanding legal education for succeeding generations. Equally important, I think, is appreciation of the importance of the task that the School has set for itself: to advance understanding of that part of life touched by law and legal institutions, in the hope that by doing so we will enrich the lives of our students, equip them for the positions of service and leadership they will hold, and contribute to the common welfare.

Those who have so generously supported the School share with the faculty a belief in the importance of disciplined intelligence. They know, as we do, that there is no equivalent in the law to the hope that a cure will be found for some dread disease. Injustice and threats to freedom will persist despite our efforts. Nevertheless, the School exists in the faith that reason and understanding are indispensable in the conduct of human affairs and that in them lies our best hope that the problems we confront can be made to yield, if just a bit. The commitment of our alumni to that belief is at once the School's greatest asset and its proudest achievement.



Theodore St. Antoine
Former Dean of the Law School; newly appointed James and Sarah Degan Professor of Law

It has been a long journey. As I arrive here today, my feelings are not so much ones of accomplishment, because the library project has long been out of my hands, but of gratitude and appreciation to all of you who have made the journey possible and the destination worth the journey. I should have liked to name fifty persons who have helped immeasurably in our success. Instead, I am only going to mention a couple who symbolize for me the contribution of the alumni and I am not even going to name them. I shall simply describe them.

One was a splendid gentleman who had graduated from Michigan the year I was born, and that was some time ago. He was introduced to me by another alumnus from Washington, D.C., although he was in Portland, Oregon. That somehow epitomized for me the continuing

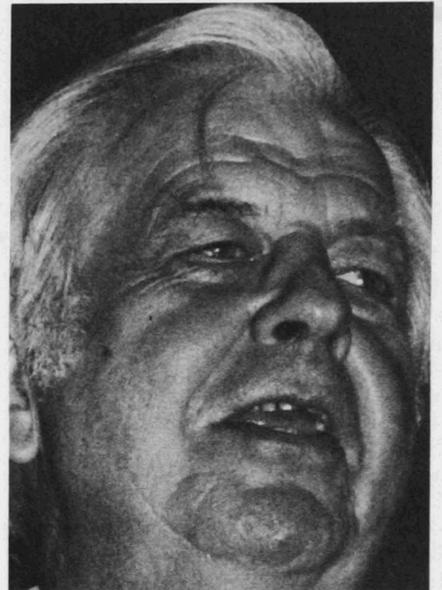
bond that exists among the far-flung Michigan alumni family. The gentleman in Portland was dying of cancer by the time I first met him. He was ebullient. He was full of heart, and he was going to fight this thing and be with us at the dedication of the building. Just to visit him was a lift to the spirits. It made one realize that difficulties could be surmounted. He lived very close to the time of seeing the building completed. He asked nothing from the University but once he did make the modest suggestion that, since he had put together his fortune in the lumbering business, perhaps we might consider constructing the addition out of wood.

The other whom I shall leave nameless was a classmate. During our years together at the Law School I had enormous admiration for this gentleman's impeccable style in speech and dress. Later on, I admired his good taste and style in marrying into one of the first families of Michigan. He, too, came through by suggesting to me the strategic moment at which to approach one of the most generous donors in our campaign. And so it went, all through the drive. Whenever the need arose, an alumnus stepped forth, to unlock a door or dig into his or her own pocketbook. . . .

There was a memorable dinner celebrating the 50th anniversary of the opening of the Law Quadrangle some time ago. At this dinner we unveiled the initial model for the new law library addition. It would have been a glass and steel structure. It would have gone along South Monroe Street behind the existing library. Gunnar Birkerts, the architect, and I were rather enthusiastic about this model. To the best of my knowledge, there were precious few others. We did not wind up with that building, and I am prepared to say that I too may have been wrong.

In any event, in the course of that evening I tried to give some sense of my belief that this was truly a continuation of the Gothic spirit, this great arching glass and steel building. I quoted a passage from Henry Adams' *Mont St. Michel and Chartres* in my effort to draw upon the past to prepare the way for the future. I suspect no one remembers my words, and so I'm going to repeat them now. I think as you stand there at the reception you will agree that, despite the fact that it does not go in the direction from ground level usual for Gothic buildings, the addition still embraces many of the same

arching virtues of those great cathedrals. For me the new building does indeed symbolize the aspirations both of our own institution and of the law itself. Henry Adams said of the Gothic that, "the delight of its aspirations is flung up to the sky. The pathos of its self-distrust and anguish of doubt is buried in the earth as its last secret. You can read out of it whatever else pleases your youth and confidence; to me this is all."



John Pickering,
Chairman of the National Committee for the Capital Campaign

The greatness of this university and its law school is reflected in many ways, most notably in the loyal support of its alumni. Over a half century ago we celebrated the generosity of one alumnus, William Wilson Cook, whose magnificent gift built the Law Quadrangle and endowed legal research at Michigan. Today, we celebrate the generosity of over 2,000 alumni and friends of the Law School whose generosity has exceeded that of Mr. Cook. They managed to put more money into a hole in the ground than the entire Quadrangle cost.

Now this is a remarkable achievement and a true tribute to these inflationary times. It is an even more remarkable achievement when you realize that during the three years that the capital campaign was actually collecting money, the rate of annual giving to the Law School Fund increased, for the first time exceeding the half million dollar mark. This is a tremendous record, one of which the school can be proud.

We thank all of those alumni and friends who contributed to make this day possible, but there are groups that also deserve special thanks. First, the members of the National Committee for the capital campaign. This campaign was three years in the planning stage during which we met frequently in Ann Arbor. There were many difficult problems: how much money to seek, what the timing of the campaign should be, what kind of a building we should choose, where it should be, and what were the priorities and the other needs of the Law School in addition to the building. Looming over everything, and vastly complicating matters, was the Quadrangle itself. How could we possibly integrate a facility with it without marring the beauty that has inspired so many?

These were all matters on which reasonable minds could differ. Being lawyers, naturally, we all had reasonable minds. Being lawyers we also could differ, and we differed. Differed quite strongly on occasion, but out of those differences came a remarkable consensus: instead of erecting a building, we would bury one. Having achieved this consensus, we were able to launch the campaign. We exceeded our original goal of 10 million dollars by almost half again as much, and the result was the beautiful building and the wonderful functional facility that we dedicate today.

In addition to the members of the committee itself, there were a number of regional and local chairmen and volunteer solicitors who really did the foot soldier work of soliciting the general alumni body. The campaign could not possibly have succeeded without their dedicated efforts.

In any joint endeavor several people perform significant service above and beyond what can be expected. There were two people in particular on the committee I would like to recognize. One was Margaret Emery. She graduated from this Law School in 1931 when women in the profession were few and far between. She challenged and exhorted us. She challenged us to think boldly, to plan grandly. The other was Roy Callaghan of the class of 1929. He shared with our committee and the Law School leadership his lifetime of experience in dealing with architects and large construction projects. He taught us the valuable lesson that buildings are intended to serve people and not to be their masters.

I would like to end by saying that we alumni have been very proud to have played a part in making this day possible and in helping raise the funds for the programs and facilities that provide the margin of excellence that makes the University of Michigan Law School a leader among the nation's law schools. The building we dedicate today is a marvelous link between the past of the Gothic Quadrangle and the future. It is a bridge in my mind into the twenty-first century which will see this Law School continue as a leader in serving the profession and the society.



Robert Nederlander,
*University of Michigan
Board of Regents*

The Board of Regents, my colleagues, and I are absolutely thrilled with this magnificent structure and thrilled that the funds to build it have come from foundations, from corporations, from individuals, from alumni, and not from federal or state money. If we are going to maintain our academic excellence and continue to be a great university, we have got to cultivate these areas.

When I first was elected to the Board of Regents in 1969, I sat in the library of President Fleming and we discussed the new projects which he thought ought to be built. One of the things mentioned was the Law School. He said, "We've got to get some help over there. We won't get any federal money and it's unlikely we'll get any state money."

From that date, a great many people—Dean St. Antoine, Dean Sandalow, all the Law School faculty, the alumni, corporate sponsors, administrators, and others—have worked long and diligent hours in order to turn out the kind of law library addition which you see today. It was not easy. It took an enormous amount of time and they are all to be congratulated. It was a team effort. There was some concern by all

of us that we would not make it, but I knew with their leadership we could not fail.

The 1977 Gourman Study placed The University of Michigan third in the United States for academic excellence, with the Law School rated at the top. Law schools are made up of fine faculties and students, but they must have research facilities. With this library addition we cannot help but continue to excel. We are all proud of what the Law School has done for this university. It is a jewel. We will do everything we can to help keep it a jewel.



Gunnar Birkerts,
*Architect of the new library
and Professor at the
University of Michigan
School of Art and
Architecture*

I have received many remarks in recognition of the building today and they lie heavily on my shoulders and my head. I would like to spread them out onto others—to the people around me who have been part of this effort, this agony and ecstasy of building, my family around me, my co-workers, associate architects in the firm, the engineers from other firms who contributed, and also the law faculty.

Last week a student interviewer asked me a question, "Since this is the last building built of yours, is this your best one?" I had to answer him with an analogy or a metaphor saying, if this were my last child would it be my best child? For us architects, buildings are like children. They do not carry the mark of better, best. They are all our best at the given time. I can look back upon a building finished a year or two ago and the same question could have been asked. I would have said then

that it was my best building. Today I can say, this is my best building.

We have to go a little bit into the methodology of how buildings are built. It really is a fusion, a genetic kind of question. It's a fusion of the qualities and the chromosomes of the problem and the problem solver which come together in the act of creation. Therefore, every building that is built is the answer, the ultimate answer of the ones who have participated in the act of creation. I will admit that we had some premarital interaction as, for about a year, we explored the above-ground possibilities to accommodate the expansion.

After a while it was unanimously agreed that down we have to go. From there on, I had one of the greatest challenges in my career: how to build underground for law people. One day I was working in Hutchins Hall in the stone-lined hallways and saw an archway. In this archway head there is an inscription incised in limestone that says, "The life of law has not been logic; it has been experience." I remained there petrified, beginning to think, "What is the experience with underground buildings in our civilization?" Catacombs, Maginot Line, silos for missiles, basements, and other things like that. Of course I have to admit that there have been some buildings built in recent years underground which were in the educational area, but I think our problem was unique.

So, experience was no guideline for me, really, and logic didn't seem to be part of the answer. Then how do you go about it? Well, it was the old good architect's way of going about things, the synthesis of all the knowns, the amalgamation of the problem giver and the problem solver with a dash of imagination, that should really bring us to the solution.

Several major points contributed to a design solution. One was humane architecture. How do you build below ground a humane space, a space that will be inspiring, that will contribute to the process of learning and acquiring knowledge for years, hundreds maybe, and not lose its quality? The second was how to overcome the shock, the psychological shock, of going from something above ground to below-ground space with the anticipation that you will learn something there.

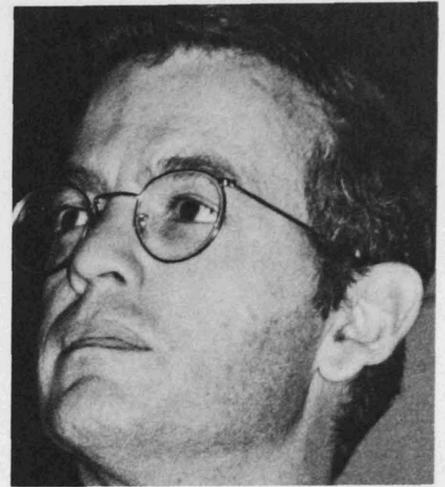
That is a known phobia. As many people are afraid of going below the earth's surface as are afraid of flying airplanes. Three, how to maintain the quality and the spirit of the mother place?

The mother in this case to me is the Legal Research Building. The solution is to keep your eye on mother all the time, to look at her, be in dialogue with her. So the walls that go down three floors below grade are open directly to the legal research library. Also in a telescopic way, over and over and over it comes in abstractly and directly. Keeping always that affinity, keeping always a finger in mother's lap was the intention. The next important consideration was a pragmatic one, energy conservation. We find that the underground building is at least 33 percent more efficient than other structures that we would build above ground.

Many have asked me, or have shouted, about the way the Legal Research Building is connected to the new underground addition. It's a very difficult task to connect a fifteenth to sixteenth century architecture to an architecture that really doesn't show above ground, an architecture that is all interiors. Here we are connecting a functional space, which I have tried to make an inspirational space, to something that is known from history books and through the memories of the alumni as a great Gothic piece of architecture.

Now these two have to be connected. I could only act in my mind as a surgeon who tells you before the surgery "It may hurt a little, but when we are done you'll be better than ever." We had to make this connection. It is my belief that if an edifice is built maybe 50 years after the neighboring one, the two can still be related and beneficial to each other.

I will end my remarks by coming back to the inscription that petrified me about logic and experience. I would like to say it was not experience which gave us a solution; it was logic and imagination.



Harold Shapiro President, University of Michigan

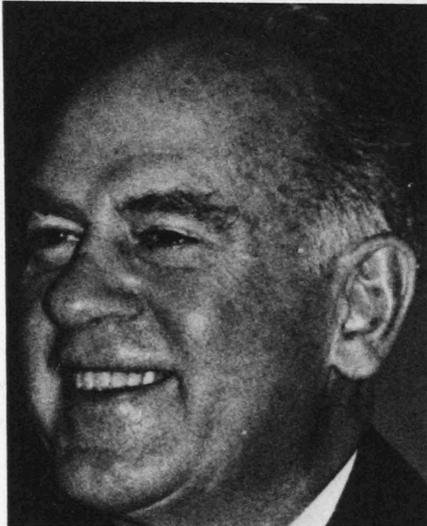
It is my pleasure to welcome you all here to the university. There probably is no more precious or more joyous occasion for a university than the dedication of a new library. Libraries are really the foundation of a university's activities. If someone were to ask me what the key activities of a university are, I think the answer would be straightforward. They are learning and critical inquiry. For learning and critical inquiry, there's nothing that replaces a library. A library is really both the sustenance and spirit of our best efforts.

What is it that expresses the importance of libraries to universities? I think of Carlyle's statement that the true university is a collection of books. You can always go back to Shakespeare to find a poetic expression of the feelings that we all have today. In *The Tempest*, a character at sea, longing to be home, says he would like to exchange a thousand leagues of the sea for one acre of barren land. As he thinks further about what it is he really wants, he says, "My library was dukedom large enough."

A university is a special place. Tyrants have exhorted us to burn all the libraries except one book; we uphold an idea quoted by Fielding: "Beware of the man with only one book." That's what all universities are about.

I have one thought for the students at the Law School, both current and future. I would recall an expression by Jean-Jacques Rousseau, who said, "I hate books, for they teach people how to talk about things they do not yet understand." A library is here, the books are there, but there's

more to it. To the faculty, I would say that libraries, great as they are, are not just built; they must grow. We have a continuing responsibility here at the university to make sure the library grows and that we at The University of Michigan are worthy of the faith that so many of the alumni and our supporters have put in our future. I think it will be a great future.

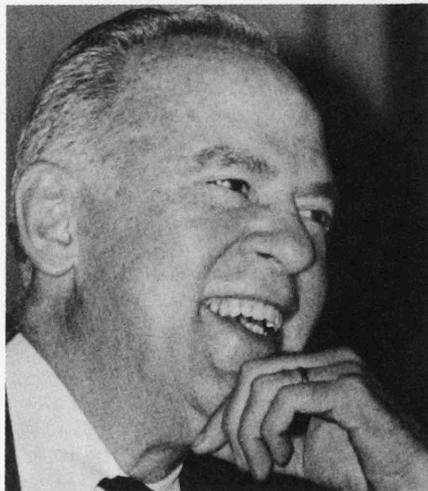
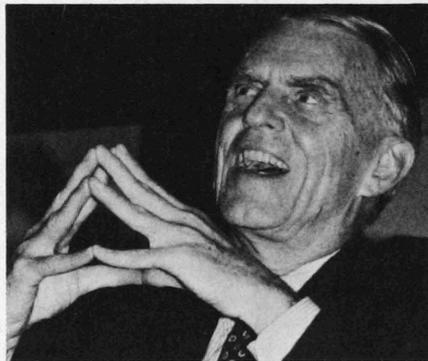


Justice Potter Stewart
*Retired Justice of the
United States Supreme
Court*

It is a particular pleasure for me to be in Ann Arbor today . . . because I have a longstanding affinity with this state and this Law School. Both my wife and I are natives of Michigan. My sister and my mother's three brothers all went to The University of Michigan and my favorite first cousin was one of the early women graduates of the Michigan Law School.

Over the years as a justice of the Supreme Court I chose more law clerks from The University of Michigan than from any other law school except for my own alma mater. Four of those former law clerks, including Dean Sandalow, are now members of the faculty here. When I was a judge of the Court of Appeals for the Sixth Circuit, it was here that we always held our annual judicial conferences. I have many happy memories of those conferences in what is now fast becoming the distant past.

For the reasons I have mentioned and for many other reasons, it is an honor for me to be here and participate with all of you today in the dedication of a magnificent new addition to the physical plant of one of our nation's truly great law schools.

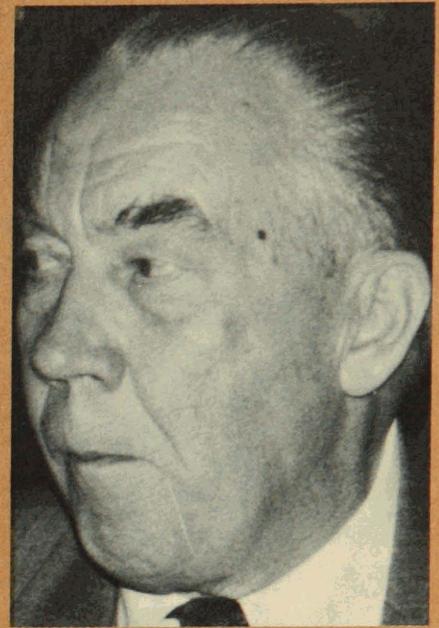


These excerpts from the dedication speeches were prepared by the editor from a tape recording of the dedication ceremony.

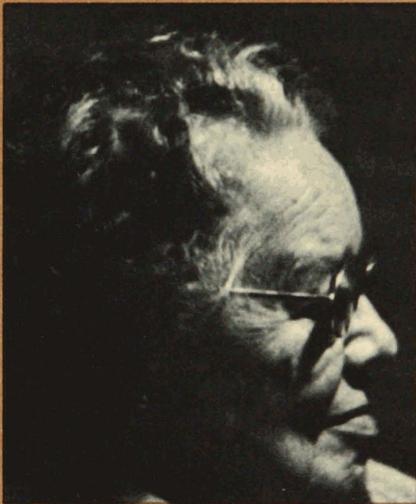
Thanks

Some people at the dedication ceremony received particular recognition for their help in the capital campaign or in planning the addition.

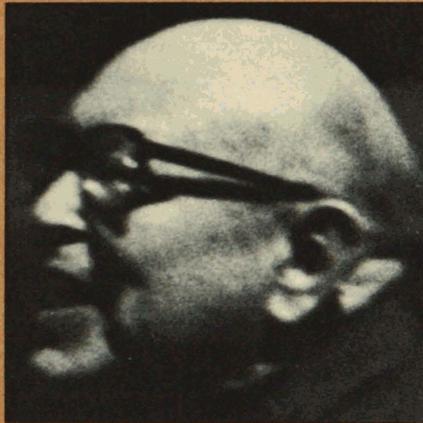
THE LAW SCHOOL GRATEFULLY ACKNOWLEDGES THE GENEROUS SUPPORT OF MORE THAN TWO THOUSAND OF ITS ALUMNI AND FRIENDS WHO CONTRIBUTED THE FUNDS FOR CONSTRUCTION OF THIS ADDITION TO THE LEGAL RESEARCH BUILDING.



Law School Alumnus Henry Bergstrom representing the Benedum Foundation of which he is President.



Mrs. Stanley Kresge, representing the Kresge Foundation

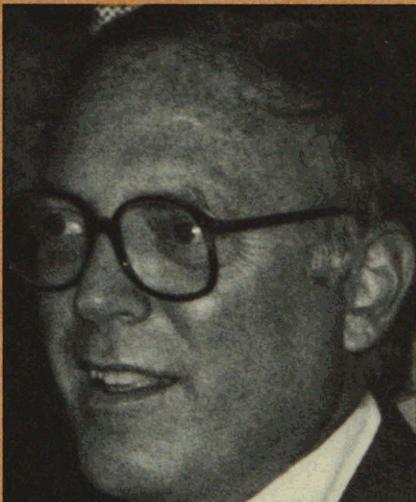


Mr. Stanley Kresge, representing the Kresge Foundation

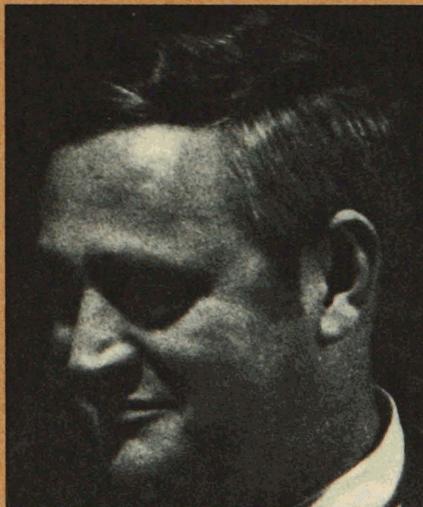


Former Associate Dean and Chairman of the Building Committee, William Pierce

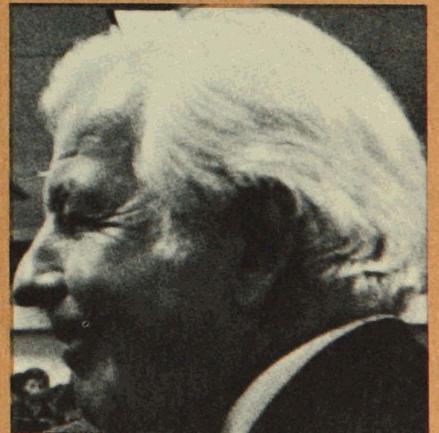
"The twenty questions he drew up for cross-examination of potential architects have been adopted as part of standard operating procedure of the University."



Law School Alumnus John Riecker, representing the Herbert and Grace Dow Foundation.

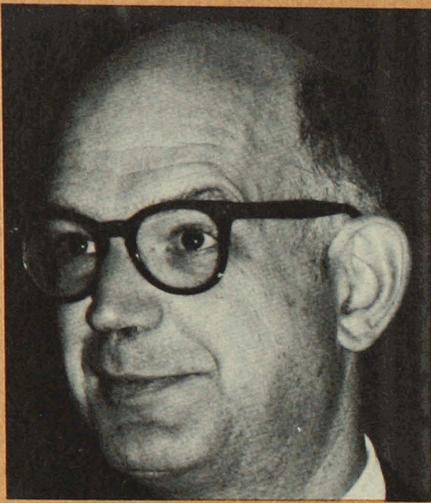


Law School Alumnus Paul Jenkins, representing the Benedum Foundation, of which he is Executive Director.



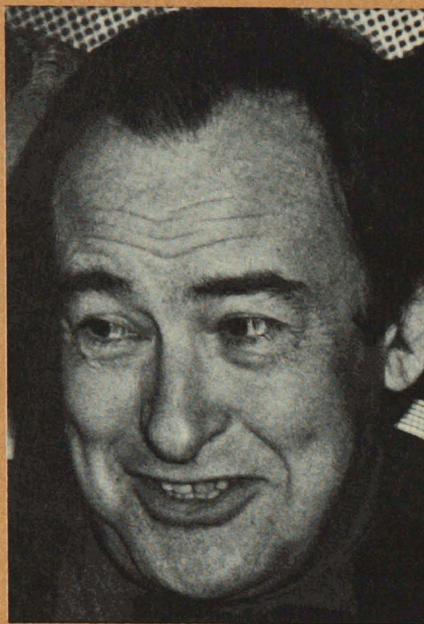
Law School Alumnus and Chairman of the Capital Campaign, John Pickering

"His sage advice, patience, unflinching enthusiasm and good humor contributed not only to the success of the campaign, but also to making a potentially burdensome responsibility a rich and rewarding experience."



Head of the Faculty Building Advisory Committee, Thomas Kauper

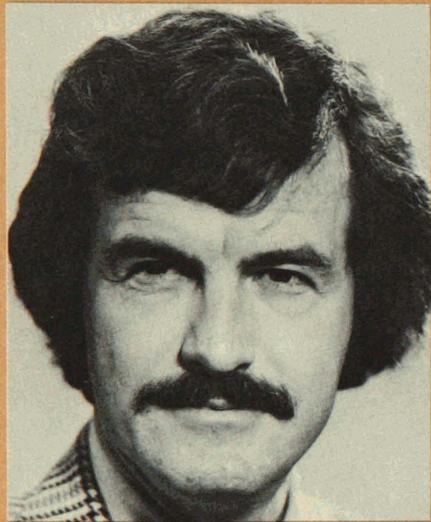
"A person of great benign influence."



Director of the Library, Professor Beverley J. Pooley

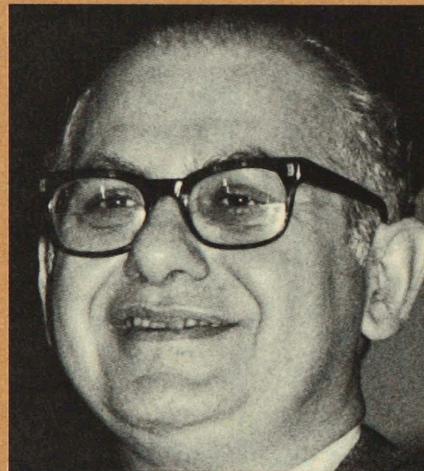
"an inexhaustible supply of bubbling energy and ready wit"

"He stuck firmly to the very sound principle that the building had to be integrated into the Law Quadrangle."



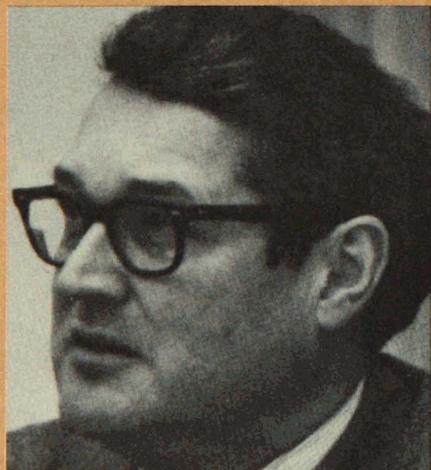
Former Assistant to the Dean, Robert Jones

"He really conducted the nuts and bolts of the campaign."



Dean Terrance Sandalow

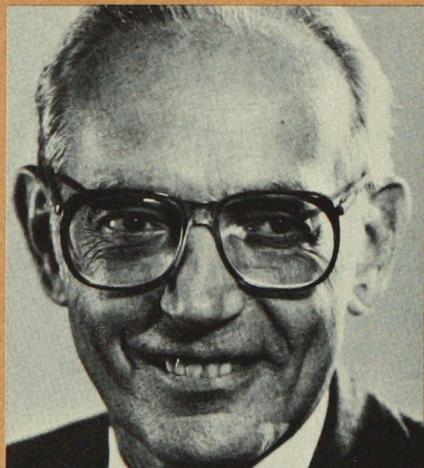
"First among equals"



Former Dean Theodore J. St. Antoine

"He made the job of being national chairman of the campaign a piece of cake."

"The Law School is permanently in his debt."



Professor Allan Smith

"The Law School's gift to the greater university."

The Legalization of American Society

A Symposium
Commemorating
the Dedication of the
Law Library Addition



Francis A. Allen (second from right) with symposium participants Thomas E. Kauper (left), Roger Cramton (right), and Peter O. Steiner (far right).

Francis A. Allen, the Edson R. Sunderland Professor of Law, delivered the introduction to the symposium. He described law libraries as symbols of the importance of the word in legal education and law practice, since it is in libraries that students learn to draw on, and to shape, the written word. "Dedication of the library addition," he said, "provides an opportunity to express our commitment to the humanistic ideal, an expression all the more significant when the place of the word in law training appears to be under concentrated attack."

The faculty committee's choice of a topic for the conference, "The Legalization of American Society," clearly serves that end. Its breadth encourages the exploration of a range of legal subject matters. The topic "reflects a popular perception that a significant expansion of law has occurred in recent years; that areas earlier free of governmental and legal intervention have become fields for legal regulation; and that in areas earlier subjected to legal controls, new and more intrusive forms of regulation are being applied." The symposium should examine the validity of these popular perceptions of the growth of legal regulation and, if they proved accurate, examine the possible causes and consequences.

"Those who devise themes for conferences," Allen said, "must be prepared for the complaints of skeptics." Historians might dispute the immediacy of this topic, pointing out that Americans have always been extremely litigious, ready to delegate to courts not only the settlement of disputes but also basic issues of social and economic policy. Political scientists, like conference participant Professor Theodore Lowi, may question whether American democracy does not suffer more from having too little law than from an excess.

While acknowledging the force of these views, and asking Professor Lowi to elaborate them, the committee initiated the conference with the continued conviction that "the displacement of private discretion by government decision making, and a number of closely related phenomena, create issues meriting identification, attention, and analysis." Increased legislation of social relations might simply codify existing practices, indicating the achievement of a social consensus. While that was the case in England in the early modern period, Allen maintained that in contemporary America the push for recognition of new rights, especially constitutional rights, reflects not consensus but the insulation of private or group interests from the ordinary functioning of democratic politics.

Professor Allen questioned the cost of such new legislation of rights, using his own situation as example.

"Soon the federal government will be telling me that if I survive, retain my health, and behave myself, I have a right not to be forced into retirement by the University because of my age until I am seventy. What does the conferring of this right on persons like me do to the ability of universities to keep open doors of opportunity for young people desiring to embark on teaching careers in these times of fiscal stringency, and what will the inconsiderate longevity of elderly faculty members do to the chances for promotion of younger people already on the faculty? What basis is there to believe that Congress is better qualified than the universities themselves to balance such considerations or more likely to resolve the issues with greater efficiency or decency?"

Professor Allen concluded his overview of the problems of regulation by distinguishing, using Isaiah Berlin's terminology, between "negative" and "affirmative" liberty. While the former implies an absence of controls, "affirmative liberty contemplates some sort of social action to create circumstances permitting enjoyment of liberties otherwise unattainable." Negative liberty alone does not encompass all we intend by freedom, Professor Allen said, yet the concept of affirmative liberty is a dangerous one which has been used to rationalize governmental coercion by totalitarian regimes. "Yet surely," he continued, "if extremes can be avoided, it is apparent that legal regulation may provide the basis for new and larger liberties. Traffic lights no doubt limit my negative liberty, but they powerfully advance my freedom of movement when I wish to get across Ann Arbor at rush hour."

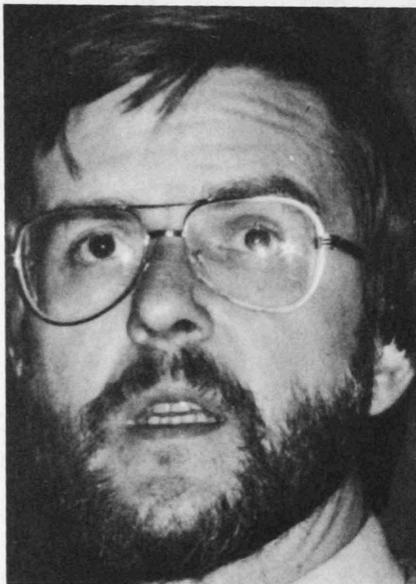
In conclusion Professor Allen mentioned some areas of increased legislation which might appropriately have been considered in the symposium: the new law relating to the rights of students in public schools or judicial recognition of prisoners' rights. Yet legal developments affecting families, he went on to say, present some of the most revealing and universally felt dilemmas through which to understand the legalization phenomenon. With this introduction, Professor Allen welcomed the first speaker, Professor David Chambers.

The following pages contain summaries of each of the five major papers delivered at the symposium. Each summary is followed by an excerpt from the speech. A commentator's prepared remarks on each speech are summarized after each excerpt, except in the case of the final paper, which was followed by a panel discussion which is also summarized.

The complete texts of the speeches are to be published in a commemorative volume.

The Legalization of the Family: Toward a Policy of Supportive Neutrality

Professor David Chambers
University of Michigan Law School



Summary:

In recent years government has withdrawn control from some family matters, while initiating intervention into others. Paradoxically, the intention behind such new regulation has often been to increase individual liberty.

Nevertheless, increased government involvement created the "sense that law had seeped into every crevice of American life and that sensible people ought to be asking whether we have gone too far," that underlies this conference. Support for Ronald Reagan's presidential candidacy represents a different kind of response to this feeling, as does such Republican legislation as the proposed *Family Protection Act of 1981*. Intended to "reemphasize the values that made this a great nation," this bill would bar the use of federal funds for educational materials undermining separate roles for men and women and would bar attorneys of any Legal Services Corporation program from helping poor people obtain divorces.

Such legislation expresses the wish not to remove government from the family, but to "replace the liberal's form of governmental intrusion" with another. "Those who most ardently supported the president are...disingenuous in asserting that they want deregulation. They want reregulation."

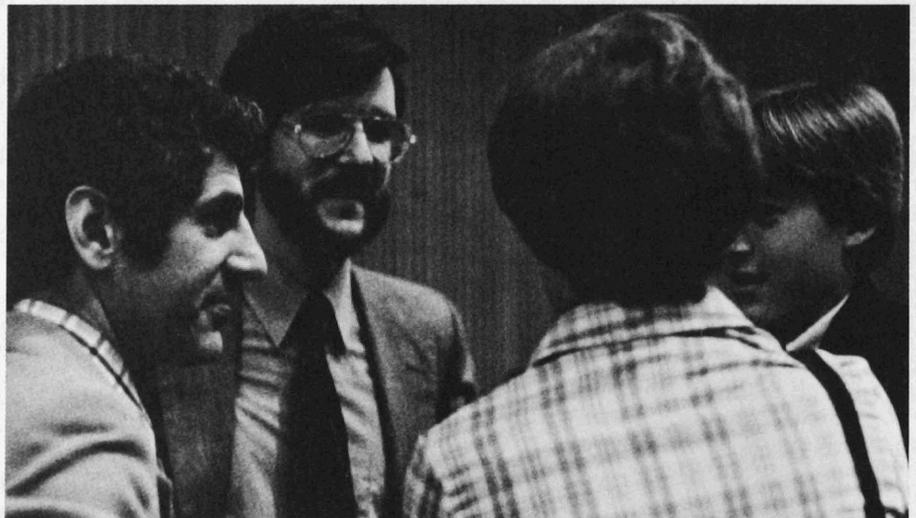
True deregulation, by contrast, could best be approached if government would adopt a policy of "supportive neutrality," entering into family life only to control "harms other than harms to our souls," and only when it has "a basis for believing that intrusion is likely to do more good than harm."

Such an ideal of governmental neutrality toward our choice of family structure accords with our national tradition of commitment to individual liberty, where government's role is to protect the citizens' freedom to live their lives as they please, so long as they do not cause unjustifiable harm to others. It is in families that individuals fulfill many of their needs and desires. In families we find physical protection and sustenance as well as acceptance and understanding, intimacy, and affection. "The family is also the vehicle through which each of us transmits our most fundamental values to the next generation in a culture where it is acceptable for people to hold a variety of values." The family is a sanctuary from the state; "it is with good cause that our Constitution demands that the state must have a warrant and a sound reason before entering our homes."

Although such protection of individual freedom has historically coexisted with laws which greatly limit choices of family structure, we should not continue to condone those laws whose "demands have cut far too deeply into the most basic of human needs and drives." Neither religious nor secular concerns can be effectively advanced to support retaining such restrictive legislation.

A more subtle argument, that "arbitrary rules about family matters are justifiable because they help create a sense of social cohesion," might describe the effect of a shared heritage, but not that of rules arbitrarily imposed on peoples as diverse as we who do not already accept them.

Government should intrude on family life only when its reasons go beyond moral repugnance, and only with "a subtle appreciation for the



Professor David L. Chambers, scholar on the family (center), hears from two members of his own family and from commentator Robert Burt (left).

values of family privacy and autonomy." Yet often, even when attempting to be neutral, government cannot be totally evenhanded. Legislatures must define a taxing unit and, in doing so, create incentives for people to choose one living arrangement over another. The case of *Marvin v. Marvin* illustrates perils threatening lawmakers and judges who aim to be neutral. While the justices' intention in the case seems to have been to support the relationship between unmarried people, and to make the courts available to the unmarried, their decision laid "the foundation for imposing our laws and our rules on the outlaws."

It was an oral and implied contract which the California Supreme Court held was enforceable in the case. The decision directed courts facing 'ambiguous facts' in absence of a written contract to 'presume' that 'the parties intended to deal fairly with each other.' In this, *Marvin* may have "furnished the parchment for a new governmentally imposed charter of 'fairness' for unmarried couples;" it also encourages just the sort of disclosure of the intimate details of domestic life to "bclster claims or denials of an unwritten agreement," that most states have sought to remove from the divorcing process.

It would have been preferable for California to announce that its courts would enforce only written contracts in such cases. Courts and legislatures should be as restrained in regulating families as government has traditionally been in matters of religious preference. Being supportive while being neutral requires that delicate balances be struck. Yet we must appreciate the desirability of finding this difficult balance to become a nation where people are free to choose the family life most likely to satisfy them and enrich their lives.

The following excerpt, which is drawn from the opening of Professor Chambers's speech, discusses the complex, often paradoxical relationship between governmental regulation and individual liberty in family matters.

Excerpt:

"Legalization," the word of the day, has conflicting meanings. One, intended to sound the theme of this conference, conveys the notion of government regulation permeating throughout some area of human activity. The other—as found, for example, in the phrase, "the legalization of marijuana"—is a near opposite: the process of making legal or permissible that which was previously forbidden, taking government out of that which it had previously controlled. The recent history of government's relationship to the family amply displays both sorts of legalization, both intrusion and withdrawal, and reveals a paradoxical relation between the two—that as government frees people to live their family lives as they choose, people feel no more free, in part because much government involvement is required to facilitate the new freedom.

That American governments have in many respects reduced their degree of intrusion on the family is apparent on a moment's reflection. Today, for example, in the United States nearly three million men and women of all social classes regard themselves as "couples" and live together outside of marriage—a number that has more than doubled since 1970 and tripled since 1960. During recent decades, many states have repealed their statutes barring fornication. Few people were ever prosecuted under such laws, but some in the past were threatened and others who lived in sin were fired from public employment. An even more remarkable change in recent years is that a homosexual couple who wants to live together as family is no less free to do so, at least in most large cities—free to hold their heads high, free of any fear of criminal prosecution. Over twenty states have now removed criminal sanctions for voluntary homosexual relations. Homosexual couples are not, it is true, free to marry and they are far less free of discrimination in relation to public employment than are partners in unmarried heterosexual couples, but the law is more tolerant today than it was.

Even the married couple is freer today than in the past—freer to purchase contraceptives, the distribution of which was once severely hampered by state and federal laws, freer to seek an abortion of an unwanted pregnancy. For the married couple perhaps the most important freedom of all has become the freedom to decide not to be a family any more—the freedom, that is, to divorce. A hundred and fifty years ago many American states barred divorce altogether. Of course, many couples simply broke apart without divorcing but neither partner could legally remarry nor, in some states, obtain the law's assistance in dividing property. By the late nineteenth century, divorce was permissible but obtainable only if one partner could prove some sort of serious marital misconduct committed by the other, even in cases in which both partners wanted out of a hopelessly unhappy relationship. It was the state, not the couple, who decided by what moral code the conduct of the couple should be judged. Today, by contrast, all but a handful of states have adopted a system of fault-free divorce. Any person who wants to end a marriage can do so.

In all of this, I do not claim that people are much happier than in the past, but I think it undeniable that they are more free—freer under law and social mores to live with whomever they please, to conduct the relationship in the way they please, and to leave the relationship when they want to. . . .

If so much greater freedom has been permitted by law, why then do many people have a sense that they are less free than in the past and that government today intrudes more, not less, into the lives of families? Why are we

here today? In part, the sense of greater intrusion is the paradoxical effect of the new freedom—for in our society laws are not simply a way of controlling undesired conduct, they are also ways of facilitating people's freedom of choice. . . .

The refusal of states in the past to permit divorce constituted a massive intrusion on people's freedom to live life as they chose. Yet ironically the vastly expanded freedom to divorce produces much more involvement by courts in people's lives. Each year, thousands of Americans who have never been in a court before have their first taste in the depressing process of breaking up. And government's involvement typically continues for years after divorce. Week by week for up to eighteen years in cases in which there are children, one parent, typically the father, will be ordered to make payments of child support under threat of jail. The other parent will be required to permit the noncustodial parent to visit. This court-supervised period of the parents' lives lasts in the typical case in the U.S. nearly twice as long as their marriage itself had lasted. . . .

To be sure, government's greater involvement in families . . . over the last fifty years has also grown out of its increasing role, at least until the last few months, as ensurer of all Americans' financial security and out of its involvement in responding to social ills such as racial prejudice, sex discrimination, and inequalities in educational opportunity. This increased involvement has been achieved by both a vast increase in revenue raising through taxes and a vast increase in expenditures through need-based programs, such as AFDC and Medicaid, and social insurance programs, such as Social Security. Many of these enactments require consideration of the various arrangements in which people live (who, for example, should be recognized as the dependents of whom?) and many have forced Congress to confront controversial issues of family policy. Congress would not have been paralyzed repeatedly during the 1970's by the issue of abortion if it had not adopted a broad Medicaid program for low-income citizens and had to decide whether abortions would be a covered service.

Finally, the growth of the mental health and social work professions has also led to greater government involvement in families. Psychologists, social workers, and psychiatrists have become increasingly confident that they can identify people in need of help or dangerous to themselves or others, as well as children who are at risk. They believe they can help people lead better lives. Legislators have responded. In some states, for example, the easing of the divorce laws was accompanied by laws that permitted courts to require couples to participate in counseling and conciliation efforts conducted by professionals.

More substantial in this regard has been the increasing role of the government to protect children against abuse and neglect by their parents. Since the 1950s, more and more has been learned about the widespread incidence of serious physical and sexual abuse of children within families and the more subtle but often equally serious effects of neglect—of children ignored by a self-absorbed, depressed parent, bereft of love or emotional support. This research led to the enactment of reporting laws in all states, laws which have succeeded in increasing dramatically the reporting by doctors and school personnel of suspected abuse or neglect. There has then been a proportionately vast increase in the number of families brought under government supervision. The new activism has been a mixed blessing. Some children have

been rescued from the high probability of death or disfigurement. Many others have been removed unnecessarily from their families, to their grief and the grief of their parents.

In the last few paragraphs, we have been discussing several ways in which government is heavily involved, often on a continuing basis, in the lives of families, intruding more than in the past. An additional source of the sense of intrusion may derive ironically from changes in law not directed at families at all but rather directed at businesses or at government itself. . . .

Consider, for example, the many new laws and court decisions relating to discrimination on the basis of sex. Some such laws affect families fairly directly. Laws that mandate equal opportunities for education and jobs and equal compensation for equal work may themselves directly contribute to the breakdown of traditional family relationships by encouraging women to leave the home and enter the labor force; but a more subtle effect of such laws may be in operation as well. None of these directly orders husbands to treat their wives as equals. Yet these laws, together with the language of liberation that has accompanied them, may well be perceived as imparting a judgment by government about the appropriate relationship of men and women in their private and not merely their public lives. At home the old-fashioned husband who has believed that his dominance was God's will may encounter more resistance in imposing his view and blame the government for having tampered with his natural prerogatives. Law follows and then reinforces social attitudes even toward family matters that it does not directly regulate at all.

Whatever the source of the perception that government is involved more in the lives of family, one measure of the universality of the perception is the degree to which people today accept government as responsible for the solutions to family problems. Newspapers and television newscasters deride bureaucracy and yet when a child is beaten to death by her mother, the focus of the newscast is not on the mother but on the social welfare department worker who had decided not to remove the child from home. The inadequacies of young adults are the fault, not just of parents, but of our public schools. The Civil Rights Commission blames the child-care problems of the working mother on the failure of government to provide adequate day-care services. In fact, in a society of the size and disparateness of ours, many problems perceived as serious do require government's involvement. The challenge is to define the appropriate lines between government involvement and private decision making. . . .



Commentator Robert Burt (left) and David Chambers

Comment:

Professor Robert A. Burt
Yale University Law School

Commenting on David Chambers's "The Legalization of the Family: Toward a Policy of Supportive Neutrality"

Professor Burt's "Response" centered on Professor Chambers's discussion of the *Marvin* case as manifesting conflicting principles of governmental conduct toward the family. Burt questioned whether Chambers had successfully distinguished among the principles of coercion, to which he was opposed, and of governmental facilitation of individual choice, which he celebrated, in discussing the *Marvin* case.

Summarizing Chambers's view of the case, Burt concurred with the concern that the decision leaves the definition of "fair" treatment to the discretion of the courts. Like Chambers, Burt feared "that the California Supreme Court's willingness to presume agreement almost inevitably will lead judges to impose their moral values on the unmarried couples in these cases." Burt also accepted that this imposition is similar in principle to the kinds of coercive impositions mandated by legislative measures such as the proposed Senate *Family Protection Act* and traditional state laws against fornication.

What Burt did not accept was Chambers's view that the *Marvin* decision was coercive primarily because of the interpretive latitude it allowed the courts. To Burt, this extension of judicial authority was no different in principle from the specific holding of the case, that "after the unmarried couple has separated, a court should enforce the specific terms of agreements that the parties had entered at some earlier time when they were happily living together."

While Chambers saw the *Marvin* case as essentially an expression of governmental reluctance to impose its views of right relationships on the citizens, Burt argued that it would be an instance of coercion, even had the court agreed to uphold only written contracts between couples, as Chambers suggested it should have. Even in that form, the decision would deprive people of the freedom to change their minds.

Lee Marvin might have seen such a ruling as enabling him to enter a

genuine trusting relationship when he was anxious to bind himself to Michelle Triolla. In the actual event, Marvin could not have seen the California Supreme Court's opinion as enhancing his freedom of choice. While the state may not have imposed its conception of morality on Marvin, it did require his continued adherence to a morality which he may once have embraced but came to regret.

By enforcing promises, the state lends its coercive weight to one essentially moral position over another about the nature of freedom, Burt said. Even by creating the option for married couples to enter binding promises, the state may be putting pressure on individuals to do so. If this is so, Burt asked, "then can it be truly said that the state that offers the option is simply enhancing this unmarried couple's freedom of choice? Or is the state creating subtle but powerful incentives that lead this couple toward the kind of long-term mutually trusting relationship that the state finds desirable?"

Although Burt thus characterized the *Marvin* decision as coercive in principle, he also challenged Chambers's view that the state should not thus encourage certain kinds of relationships. Burt's argument rested on the applicability of the general principle of state protection for the weaker party in many transactions. "Couples do not always enter their relationships as equals," he said. "In the past, at least, women have been too easily victimized by men in many such relationships." It may be necessary for the state to coerce the strong to prevent their abusing the weak. "This is, after all," Burt said, "the fundamental justification for state claims to combat many different kinds of discrimination or abusive conduct in our society."

Burt acknowledged that these arguments bear similarities to justifications offered by proponents of criminal fornication statutes and other distasteful impositions. Distinctions in degree are essential for Burt, since he was not persuaded that "there is a bright line of principle between the *Marvin* case, which represents 'freedom,' and these other traditional state policies, which represent 'moral coercion,'" by Chambers's argument.



Elevation of Private Rights to the Constitutional Level

Professor Christina B. Whitman,
University of Michigan Law School



Summary:

"In the last two decades it has become increasingly common for litigants to characterize as constitutional, rights that would previously have been viewed as properly heard under state tort law if they were to be protected at all." Most recently lower federal courts have been more willing to recognize such constitutional causes of action than the United States Supreme Court, but not long ago the Supreme Court did encourage such claims. In the early 1960s it turned an 1871 civil rights statute into an effective vehicle for litigation of constitutional actions brought against state and local officials. While the actions of the Chicago police in that case did represent an egregious violation of the federal Constitution, they were also the basis for a cause of action under Illinois tort law. In a similar case in 1971, the Supreme Court read the Constitution itself as implying a private right of action for damages against federal officials. Congress has also supported the rights of plaintiffs to bring constitutional claims.

The tendency to see private rights as needing constitutional protection has increased the workload of the federal courts, yet has not meant a reduction in the caseload of the state courts. "It has meant a shift in public and professional attention towards

constitutional litigation," which, by creating the expectation that all 'important' claims will be recognized and protected by the federal judiciary, may undermine state authority.

Most constitutional litigation necessarily involves only claims brought against the government or government officials. Constitutional tort actions against private defendants can be brought under some federal statutes, and the trend towards 'constitutionalization' has created pressure for expansion of the 'state action' requirement or for expansive interpretation of those federal statutes that do protect constitutional rights against infringement by private individuals. However, a private right ordinarily becomes the basis for constitutional litigation only when it is infringed by a government actor and where the litigant can point to a constitutional provision to make his case.

This has led the plaintiffs and the courts to struggle to find constitutional bases for claims. What is the source of the impetus to characterize so many rights as worthy of constitutional protection?

This desire to convert private rights into constitutional claims results in part from the increased involvement of government in the lives of American citizens. Constitutional litigation also has a special appeal for public interest litigants who are interested in es-



Christina Whitman (left) and Commentator Lea Brilmayer

establishing rules of general application and in attracting the attention of the national press.

The impetus to constitutional decision making can also be attributed to the desire to use the courts to resolve questions of morality. While other considerations are material in tort cases, constitutional litigation focuses on the issue of the propriety of the conduct of the defendant, who is typically the government or a government official. A related attraction of constitutional law to litigants is "the relative freedom that judges in constitutional cases have to draw on a range of sources for decision making." While tort judges are more constrained by precedent, judges in constitutional cases have felt freer to look beyond precedent to other historical sources and to their own perception of popular expectations and mores.

One questionable assumption which is often implicit in the arguments of litigants who press for constitutional protection is that all our values should be treated with equal respect. Since there are logical and psychological limits on the range of values that can be treated as essential by a single society, and since even very important values are frequently in conflict, the best approach may well be to reserve for only a few values the ultimate sanction of constitutional protection.

What are the costs of failing to thus limit the range of constitutional recognition? The most significant danger is that the value of constitutional protection will be diminished in those situations where federal intervention is essential and should be available. There are four ways in which expansion of the scope of constitutional protection may actually dilute the ability of our society to guarantee individual liberty: through increasing the workload of the already heavily burdened federal courts; through too hasty and abstract articulation of individual rights; by denigrating the role that the states can play in defending acknowledged rights and in articulating new ones; and by deluding citizens about the connection between individual fulfillment and limitations on government behavior.

The excerpted sections of Professor Whitman's paper give fuller consideration to these dangers inherent in increasing the scope of constitutional litigation.

Excerpt:

The sheer number of constitutional tort cases imposes a grievous administrative burden on the federal courts. This is an extremely serious practical problem, but may not seem, at first glance, to threaten the strength of constitutional protections. However, a crushing weight of cases—whatever their individual merit—ultimately diminishes all rights because the judiciary becomes less capable of responding sympathetically to any single claim. Simply as a matter of self-preservation, individual judges may begin to read complaints grudgingly or to look for narrow resolutions that avoid the most difficult issues.

In order to process the caseload, the federal courts have in the last decade grown dramatically as a bureaucracy; we have far more judges and far more law clerks assigned to each judge than at any time in the past. This too has its costs. The care with which decisions are reached and the degree to which written opinions reflect a consensus view inevitably suffer as a consequence of decreased collegiality. Under time and work pressures judges may be tempted—at least in routine cases, which appear to lack importance, or in abstruse cases, which can be intimidating and time-consuming—to defer to the recommendations of their clerks or to other judges who are perceived to have expertise in a particular area. Opinion writing may be largely delegated to law clerks and increasingly divorced from the process by which the judge reaches a decision. To save time and avoid conflict, appellate judges may hesitate to suggest changes in their colleagues' drafts, joining when they agree with the conclusion but not the rationale. It then becomes difficult to discern a coherent approach in a line of cases or to predict future decisions. Perhaps most significantly, the job of judging may dwindle into an onerous and boring administrative task—one that cannot attract and engage committed, intelligent people.

As the number of claims that receive constitutional sanction increases that in itself may contribute to loss of coherence and predictability. There will be situations in which claims come into conflict, and judges then may adopt quite consciously the role of compromiser, of policymaker. Instead of defining limits on government behavior by articulating a few inviolable principles, the Court has, in the past decade, been increasingly forced to work out solutions that give a little bit to each side. . . .

Debasement of constitutional values, then, can occur when their protection becomes a boring task, and it can occur through dispersal of judicial energy among too many interests. The very concept of "fundamental" rights seems ironic if every important right is to receive constitutional sanction. Owen Fiss has written that "[w]e have lost our confidence in the existence of the values that underlie the litigation of the 1960s, or, for that matter, in the existence of any public values." In part we have lost the certainty of the 1960s simply because the problems with which we are faced seem much more difficult. Affirmative action has not captured the attention of the public with the same fervor as the earlier claim for equal treatment of racial minorities. Abortion has proved to be a much more divisive issue than the right of married persons to use contraceptives. Another reason for our loss of certainty is our failure to remember that only a few particularly important concerns can be given ultimate dedication. As many, often conflicting, values compete for attention, it is hard to retain commitment to any one of them. . . . Constitutional decision making, rather than common-law decision making, may also impair the ability of the judiciary to protect individual rights for the very reasons that make constitutional avenues so attractive to plaintiffs—the conclusive, all-encompassing, and relatively inflexible nature of

constitutional rules. . . . Constitutional conclusions are typically articulated with reference to eternal national values. . . . Justices who sit in the seat of national government to devise rules of nationwide application and significant duration, necessarily think and speak with a degree of abstraction. . . . The Court may generalize from the dramatic situation before it . . . to devise rigid and far-reaching rules that leave inadequate room for change over time or variation in local conditions.

Tort rules, in contrast, are of narrow geographic scope, easy to modify, and typically framed to be responsive to the facts of particular cases. . . . The strength of the common law has been thought to reside in its ability to proceed through the power of judgment exercised on particular cases, accommodating novel situations. Although it works towards universal principles of broader scope through the doctrine of precedent, the common law presumes that relationships among litigants, and the circumstances that give rise to litigation will vary.

The tendency towards abstraction of constitutional litigation has a leveling effect that may actually run counter to the claims of liberty and freedom. . . . There is a tension, often unacknowledged, between a constitutional plaintiff's claim against authority in the name of individual freedom and his request for a national answer, which assumes a universality of values and needs. . . .

The tendency of constitutional litigation to abstraction is only intensified by the increased bureaucratization of the court system caused by expanding caseload. As the judiciary begins to put a high premium on the competent and efficient disposition of large numbers of cases, general rules that dictate results become much more attractive than individual decisions on the merits of each case. A single judge, unless he or she is quite exceptional, will not be able, by sheer memory, to provide the continuity through accumulated experience that has provided the safeguard of equal treatment of similar claims in the past. Instead, clerks will be relied upon to ensure continuity by research—into court files and past cases. Once this burden is transferred to the clerks, there will be an inevitable tendency to simplify and abstract, for young lawyers clerk at the time in their careers when they are most enamored of the rationalizing power of the intellect and most suspicious of decisions based on the reactions of experience to the equities of a particular case. . . .

The expansion of constitutional protection may also be unwise in that the format of constitutional litigation, in contrast to tort disputes, emphasizes the citizen's claims against society with little reference to society's claims upon the citizen. To state a constitutional case the citizen-plaintiff must assert a claim against government authority, typically that government has gone too far and must draw back. In a tort action, the relatively equivalent status of the parties encourages us to consider the reciprocal nature of the problem. Tort litigation makes us aware that the recognition of a right on behalf of the plaintiff necessarily means a constraint or a burden imposed on another citizen or on an institution—the defendant. The infinite expansion of common-law

rights is nonsense, for every recognition of a right in one person implies a limitation on the rights of others. Constitutional adjudication is less apt to remind us of our obligations to each other. The problem is not presented as one involving the coordination of the activities of several citizens. Rights are asserted as limitations on government action, not on the conduct of other people.

This is not accurate when the constitutional litigant claims that the government is obliged to protect him from other citizens—from those who discriminate on the basis of race, or from those who pollute, or from those who engage in criminal activities. Similar problems arise when the constitutional right asserted is a welfare claim, perhaps a right to a minimum level of subsistence. It is tempting to see these as simple claims of citizens against authority, but they are not. Like tort law, they ask the courts to coordinate competing activities and to dictate the allocation of resources among citizens. When the relative value of the competing activities is clear—as in cases of racial discrimination—the courts have not been reluctant to impose constitutional resolutions, but they have been understandably hesitant to recognize constitutional claims in most areas in which the claim for government protection is equivalent to a demand to be made upon the resources or activities of other citizens.

The "rights" emphasis of constitutional litigation detracts citizens from the obligations that are otherwise the corollaries of legal protection, and it may conceal the true character of claims addressed to government actors but actually made against the resources available to other citizens. Constitutional litigation encourages us to think of individuals as being most "free" when they successfully assert claims against society, represented by the government. In fact, we live in society, and our responsibilities to each other may be as important to our ultimate freedom as any limitation on government action.

Those who would constitutionalize every private right seem to have a rather exalted view of what political or governmental solutions can do in guaranteeing individual liberty. Restraints on government behavior are important, but all such restraints can do is to remove certain institutional obstacles to individual fulfillment. As important as relief from abuses by government institutions is, a sense of responsibility for one's own life and the existence of alternative institutions that can be a source of strength and fellowship are equally important. For example, the Constitution has been read to protect us from discrimination on the basis of sex and race, but it cannot give us all jobs in a depressed economy. Nor can it protect us from our own lack of confidence or from our inability to take advantage of opportunities. It does not help us to resist the temptations of flattery. It offers no relief from the casual cruelties of friends and strangers. The gift to overcome these obstacles we get not from courts, but from ourselves and from each other.

Comment:

Professor Lea Brilmayer

University of Chicago Law School

Commenting on Christina B. Whitman's "Elevation of Private Rights to the Constitutional Level"

Accepting Professor Whitman's characterization of the problems raised by plaintiffs asking for constitutional remedies where adequate state remedies also exist, Professor Brilmayer analyzed possible motives for the court's denial of such redundant federal remedies in recent procedural due process cases.

Such denials, Brilmayer suggested, may be seen as analogous to the Supreme Court's classical techniques for avoiding constitutional issues when personal rights of the litigant are not at stake. Like the doctrines of standing, ripeness, and mootness, denial of federal remedy on the grounds of redundancy allows the court to avoid "adjudication of new constitutional rights when there is an adequate alternative source of relief and the motive for seeking a constitutional ruling is only the establishment of far-reaching precedent."

While many constitutional litigants seek the articulation of such precedent, its effect is often to provoke strident opposition to their cause. The right-to-life movement, for example, only organized support for a constitutional amendment to protect fetal life after *Roe v. Wade*. Since the very attributes of constitutional decision making which attract reformers, its conclusiveness and wide applicability, also tend to fuel backlash, the court's withholding a universal federal remedy where a state remedy is available may be advantageous.

The bar on redundant federal remedies even more closely resembles three other traditional avoidance techniques than it does the doctrines of standing, ripeness, and mootness. The first of these, the exhaustion doctrine as applied to administrative proceedings and to habeas corpus, holds "the litigant may not seek relief unless he has first utilized all available procedures before the administrative agency or through the state's post-conviction procedures." Like the denial of redundant federal remedies, the exhaustion doctrine makes federal court remedies available only as a last resort.

The second of these traditional avoidance techniques, the Ashwander rules favoring statutory rather than constitutional bases for

decision, resembles the ban on redundant federal remedies in discouraging the Supreme Court's unnecessary anticipation of constitutional issues.

The principle advocating that the Supreme Court avoid the decision of a federal issue and let the case stand on state grounds where there are two independent and sufficient grounds for decision, one state and one federal, also resembles the denial of redundant federal remedies. "In all these traditional avoidance techniques, one basis for decision is preferred over another as less politically intrusive or doctrinally far reaching. Similar principles may underlie the preference for state rather than federal recognition of tort rights and may have motivated the Supreme Court to relegate litigants to state remedies," Professor Brilmayer held.

The benefits of such avoidance of constitutional questions are offset by disadvantages. Only in cases where the state court's decision is for the plaintiff is constitutional adjudication avoided rather than postponed.

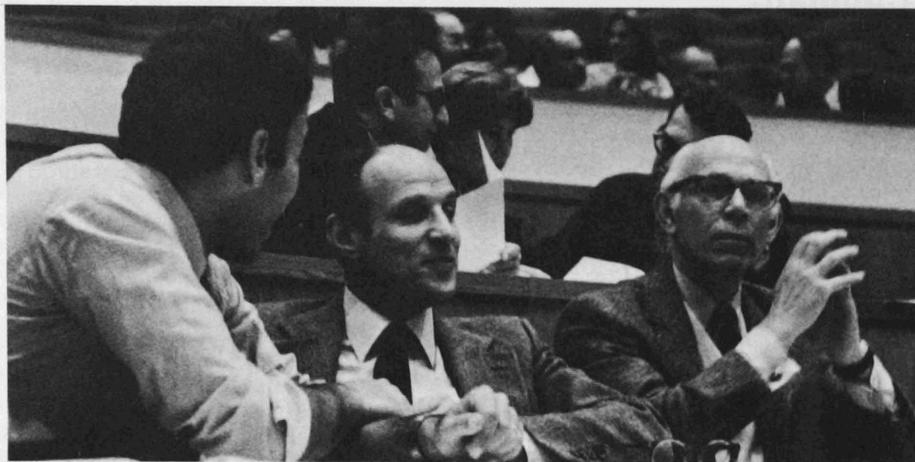
Other disadvantages also accompany the denial of concurrent federal claims. The court has not always managed to avoid addressing constitutional issues clearly and completely in such decisions. Furthermore, "the state remedy which is by hypothesis adequate may not in fact have been presented to the lower court." In that event, to expect either the court to raise and argue the state remedy, or the defendant to put forth an argument which requires him to characterize his activities as actionable under state law, is problematic.

This suggests that a requirement for "exhaustion" of substantive claims may not be as workable as the requirement for the "exhaustion of preferred fora." Only time and future Supreme Court decisions will clarify whether avoidance of constitutional issues is the best explanation for recent denials of supplementary tort remedies.

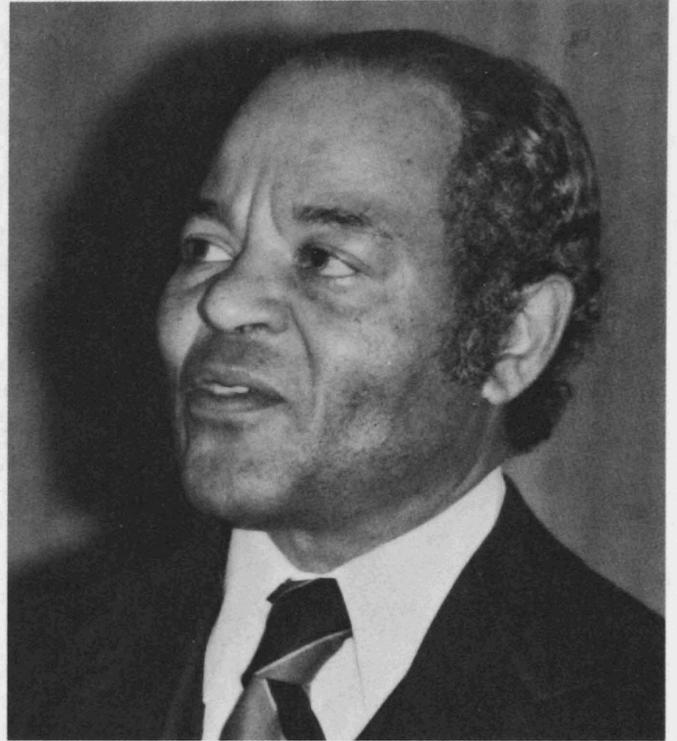


Audience Reaction

The symposium provoked deliberation and debate among audience members.



Friday Afternoon Session



The Honorable Wade McCree presided over the afternoon session of the conference on Friday. Recently appointed the Lewis W. Simes Professor of Law at Michigan, Professor McCree is the former Solicitor General of the United States and was a judge on the United States Court of Appeals for the Sixth Circuit.



The Legalization of American Society: Economic Regulation

Professor Peter O. Steiner:
University of Michigan Law School;
Dean, College of Literature, Science,
and the Arts



Summary:

Regulation includes the many ways in which governments interfere with the activities of economic actors via rule making and legal enforcement. This regulation may be insightfully classified into three broad types of response to perceived market failure: protection of competitive results, protection from competitive results, and regulation of externalities.

These types of regulation, and the legislation that accompanies them, result in both costs and benefits which are substantially inseparable, since some costs inhere in each type. The current perception of the aggregate costs of regulation as intolerably high provides an opportunity for reform that will improve the cost benefit balance, if zealous but simplistic deregulation is avoided.

Dissatisfaction with the current regulatory climate focuses on the increase in red tape, on ever-widening litigation, on the stultification that results from diverting new capital funds from innovation into compliance, on the tendency rules have to outlive their purposes, and on the diversion of efforts of the regulated from productive ventures to avoidance and evasion. Why is regulation now thus newly perceived as excessive, although many of the needs to which it was a response remain cogent?

Although inflation has little to do with regulation, our inability to understand and cope with it has prompted much of the current force for deregulation. The recognition that governments as well as markets

can fail, an impact of Vietnam and Watergate, is another cause of dissatisfaction with regulation. A more subtle cause is our growing recognition that "many of the most visible and annoying costs of regulation are inevitable byproducts of the regulation," as a survey of the history of regulation makes clear.

Regulation grew up in three separate epochs. In the late nineteenth century it was designed to prevent or control monopoly, both natural and unnatural. "Prescriptive regulation of railroad, gas, electric and water rates by independent commissioners was designed to yield the results that would be produced by competitive markets," while "proscriptive regulation of monopoly, conspiracy, and predatory behavior" protected the competitive market itself.

The second wave of regulation, a response to the Great Depression, "was concerned with the failure of competition, not with its absence." During the 1960s and 1970s, the third and most extensive period of regulatory expansion, the concern of regulators was predominantly with market or societal failure due to "adverse externalities," or impingement on social goals by actors who need not pay the cost. Although present malaise results in part from the cumulative effect of the three phases of regulation, it is "the third that has proven most decisive politically."

Study of even nineteenth century regulation, which was "rule making about limited aspects of activities that affected a limited number of well-identified firms and industries" reveals the tendency of regulation to generate adverse side effects and



Symposium participants (from left) Sallyanne Payton, Peter Steiner, and Thomas Kauper

to expand into ever-increasing complexity. There are five sources of the gradual growth of the regulatory ambit in the natural monopoly area: adaptive behavior by the regulated which requires further rules to prevent avoidance of the underlying purpose of the first rule; iterative rule making with imperfect reversibility; changes in economic conditions which have not been anticipated by the regulators; the inevitable arbitrariness of requirements that companies allocate all costs to either regulated or unregulated activities; and the need to permit a regulated utility to respond to emerging unregulated competition. All these are examples of imperfect anticipation, an inevitable fact of an ever-changing world.

The most lasting legacy of the protectionist regulation of the 1930s is the expectation that government will provide insulation from the rigors of the world. The idea of regulation to provide redress has been extended from firms and industries to apply to "individuals claiming redress from economic handicaps that had previously been accepted as facts of life." Physical disabilities, the competing demands of child bearing and employment, or the lower level of education and skill acquisition of some members of minority groups may be wholly worthy objects of regulatory interference with market determination; the point is that they were a new form of regulatory involvement.

The elevation of such protectionism to a prominent role in regulation has had major additional consequences for the present regulatory environment, three of which are continuous increase in the scope of regulation, loss of resistance by the regulated as a check on expanding regulation, the bureaucratization of regulation resulting from the increased importance of equitable treatment and procedural due process in a situation where valuable entitlements are allocated to some but not all.

The final two sections of Professor Steiner's paper are excerpted here. After discussing the particular character and effects of the third period of expanding economic regulation, Steiner concludes by describing the types of analysis and diagnosis that should accompany the current zeal for reform.

Excerpt:

The third and most recent epoch of regulatory expansion rests both on the recognition of adverse externalities such as discrimination, pollution, and threats to personal safety and on the sense of affluence that makes avoiding of these social evils affordable. The double condition is vitally important. It is not true that externalities are more common now than they were fifty or one hundred years ago. . . . The threshold of egregious harm was formerly quite high, and acceptance of "normal" hazards, a part of the ethic. A retired Pittsburgh steelworker recently put the point elegantly: "I remember that when I was young, we never thought about pollution. Everybody was working, and everybody had money, and the smokestacks were smoking, and the air was dirty, and we were all happy. I think the best air we ever had in Pittsburgh was during the Depression. That's when nobody was working."

The amenities of life and a greater degree of protection of individuals from avoidable injury are "goods" that have (in the economists' phrase) high income elasticity. As the society gets richer, we want to consume such goods in disproportionately rising quantities. By the 1960s we felt we could afford not only guns and butter, but cleaner air and more safety, too. Not merely egregious hazards but any threats to safety and all pollution became subject to scrutiny. Since externality control is *inherently* a function that must be provided by non-market action, it has led to expanded regulation. New regulatory agencies were spawned and additional requirements emanated from existing agencies.

The effect of this on the actual scope of regulation and its perceived success has proven enormous. Some activities of *all* actors came under scrutiny, and the newly scrutinized dimensions are largely additional to previous ones. The first significant difference between externality generated market failure and the earlier forms of regulation is that such externalities are truly pervasive, both in time and in scope. As a result, efforts to prevent, mitigate, or control them became potentially limitless. . . . The implication of moving from preventing specific harms (e.g., collapsing mine tunnels) to achieving absolute goals (e.g., eliminating industrial accidents) is formidable. There is no such thing as perfect safety or nonpolluting activities. Thus, regulation is sure to "fail" to achieve them. These are, of course, matters of degree, and one of the problems of the new regulation is to define the threshold level that triggers regulation. The rhetoric of the externality-reformers neglects the threshold question. Freedom from pollution and safety become attributes, not variables. Once the notion of a threshold is abandoned, the regulatory apparatus required becomes potentially vast, and the probability of perceived failure very high.

Moreover, this very vastness leads to an expansion of regulatory impact. Because public regulatory budgets are constrained, a substitute must be found for the potentially unlimited public enforcement expenditures that would be required. The solution is to shift the requirements for achieving the objectives to the regulated. This substitutes policing for direct public control. In order to make policing a manageable public activity, the natural sequel is to impose extensive compliance-reporting requirements on all. This conserves public budgets, but greatly expands private expenditures. . . . [T]he shift of many of the costs of policy and compliance onto the private sector and indeed on to individuals as well as firms has had the important effect of making regulation a fairly direct annoyance to a very large number of individuals who had previously regarded public regulation as something remote. . . .

I have here stressed the effect of the new wave of externality regulation on the costs of intervention and, more particularly, on the perception by a large part of the population of these as costs. It would be a mistake to neglect the benefits—the needs that led to a demand for regulation. Thalidomide, Love Canal, Three-Mile Island, and Los Angeles smog are genuine horrors not public relations constructs. Yet the needs for regulation have been long perceived; it is the costs and failures that are newly felt, because the beneficiaries are paying the costs directly rather than indirectly.

* * *

The historical growth of regulation was a response to the perception of new and more pervasive forms of market failure. The more recent mood favoring deregulation is a widening response to the perception of regulatory failure. This statement is less portentous than it may sound, for "failure" is a term of art. It need mean no more than that anticipated benefits have been achieved at higher than anticipated costs or that some of the anticipated benefits have not been realized. In good part what we today regard as failure in the regulatory sphere is the product of early overoptimism, even naiveté, about the ability of government to solve problems without burdening individuals, and underestimation of the innovative (but not necessarily socially optimal) responses of economic actors to attempts to constrain their private profit-maximizing behavior.

If then, in 1980, we were less naive than in 1908 or 1935 and there is a political climate receptive to rethinking regulation, what is the proper consequence for our behavior? Is it, as some now urge, that we go back to what I will call the status of "unregulation"? The answer is no, for the complex world in which we live is one in which markets often work imperfectly (i.e., fail) and so does remedial intervention. In such a world we seek not maximum regulation or no regulation, but instead the appropriate mix of regulation and *laissez faire*. For the mix selected there is the possibility of having erred in either direction.

Let me state the problem formally, in economic terms. I will consider some activity, say the construction of a power plant to service Pittsburgh. One can imagine, at one extreme, a regime of *laissez faire*—of letting the private sector do what it pleases. Next, one can imagine a variety of rules restricting the form of the plant (nuclear, coal, oil, gas), or its location, or its size. At the other extreme, one can imagine a rule prohibiting construction at all. Which of these many "rule sets" is best? The formal answer is: the set that *maximizes the difference* between "benefits," appropriately defined, and "costs" likewise defined. This apparently trivial (and empty) statement has some virtues: (1) It emphasizes that we are not seeking to find a costless rule, even if there is one, nor to minimize the costs, nor to maximize the benefits. Instead, we seek the best balance between benefits and costs. (2) It invites the distinction between a suboptimal rule and a perverse rule. A suboptimal rule may be defined as one where benefits exceed costs, but not by as much as possible; a perverse rule is one where costs exceed benefits. A suboptimal rule is better than nothing, a perverse rule is not. (3) It emphasizes that suboptimality is itself a variable concept, not an attribute: there may be better or worse imperfect rules. (4) It suggests that benefits and costs are concepts that must be defined and measured before we can have any consensus about whether a rule is perverse, suboptimal, or optimal. . . .

Analysts are today comparing, at long last, imperfect regulation (which we now know to be imperfect) with imperfect markets. Regulation, and the market failure it is designed to correct, is not a unitary phenomenon.

Neither is the adequacy or inadequacy of particular regulatory regimes or of the legislation that creates them. The choice among solutions—more regulation, less regulation, different regulation, and unregulation—may each be appropriate some of the time. There is need for serious analysis and diagnosis. We need to reconsider the alternatives, regulatory regime by regulatory regime, market failure by market failure, regulatory failure by regulatory failure, and see if we cannot come closer to a better mix of the free market and regulation.

Here lies the promise in the present zeal for reconsidering each regulation. The disenchantment with governmental infallibility, albeit belated, can be a major constructive force in the economy and in the society. It may help to increase the growth potential, to decrease inflationary forces, and even to decrease the unnecessary legalization of American society.

However, there is also reason for concern. For much of the zeal is that of a simplistic ideology, rather than of analysis of trade-offs. . . . The modern regulatory reformers see government failure and neglect the market failure that originally caused government to get involved. They regard most regulation as perverse rather than merely suboptimal. Some reformers are willing—even eager—to sacrifice the benefits along with the costs. The public goes along because it sees the costs, but neglects the link of those costs to the unmistakable benefits of the regulations we have installed over a century. The most zealous of the reformers are not naive—their actions reflect placing a much lower value than most of the public on the underlying needs which motivated regulation in the first place, and typically remain. They are, in truth, the radical right. They have capitalized on the popular disenchantment and on a confusion between the need for changes in the extent and form of regulation and the desirability of some regulation. The political day of reckoning in deregulation, as well as in budget cutting, will come when the uncommitted public see what they have given up.

I have neglected "legalization" since the opening paragraphs of this paper; it is time to relate the level and nature of regulation to the question of legalization. The latter term includes first the increased use of legal and administrative processes and second the increased bureaucratization of society. The higher the level of regulatory activity, other things being equal, the greater the legalization in both senses. However, for a given level of regulatory activity, different forms of legalization may be more or less bureaucratizing. . . .

Is legalization a "good" or a "bad"? There is no doubt that so far as it represents unnecessary interference with freedom of individual action or unproductive bureaucratization it is undesirable. But much of the legalization (in both senses) of modern economic regulation arises from the need to observe substantive and/or procedural due process in areas where regulation meets real needs. Optimal regulation would lead to an optimal degree of legalization; suboptimal regulation may well lead to excessive legalization.

A most dangerous symptom of the deregulatory fervor of the moment is the "anti-legalistic" bias it reveals. It is not too much legalization but any legalization that is scorned. There seems almost no appreciation that while due process may be costly—sometimes unnecessarily costly—it is ultimately a necessary condition of outcomes that can command public confidence. Legalization is sadly not sufficient, but it is surely necessary.

Comment:

Professor Roger C. Cramton
Cornell University Law School

*Commenting on Peter O. Steiner's
"The Legalization of American
Society: Economic Regulation"*

Professor Cramton opened with praise for Professor Steiner's integration of various theories into a new and effective statement of those characteristics endemic to economic regulation which tend to make its results suboptimal. While Cramton saw Steiner's typology of the three types of regulation as helpful in focusing attention on the purposes of regulation, he cautioned that "the typology should be viewed as involving dominant characteristics or ideal types rather than a description of historical purity." The three types of regulation are often intermixed, Cramton reminded his audience, in the constant historical growth of regulation.

Cramton followed this cautionary corrective with a more direct challenge to Steiner's hypotheses about what causes change in regulation. Steiner's remarks "underemphasize the responsiveness of our political institutions to self-interest, crisis, and catastrophe," said Cramton, who proposed to discuss the dynamics of political change that can disrupt stable regulatory regimes.

Such regulatory axes are made up of the "iron triangle" of a special interest, its supporters on a controlling congressional committee, and bureaucrats who find it in their interest to cooperate with them. One factor which accounts for the permanence of such regimes is the invisibility of the advantages they accord. "The most effective and durable arrangements of this kind will probably involve a complicated mix of benefits and exemptions, each of which is submerged in the detail of a larger statutory or regulatory scheme and almost invisible to the untutored eye."

Yet this arrangement is vulnerable to attacks by the sort of single issue pressure groups whose eyes are tutored by crises and who can wield enormous political power in our system. These groups tend to arise and coalesce in response to specific, notorious catastrophes and disasters which are perceived as symbolic of a problem that should and can be corrected by government.

While Cramton thus supported Steiner's argument that specific

harms have led to much of the demand for protectionist regulation, he challenged Steiner's claim that current deregulatory fervor reflects a change, a new disenchantment with government and a lack of faith in its power to correct wrongs. Recalling that "during the past few years of so-called deregulation in a few areas, hundreds of new regulatory initiatives were enacted by Congress or were imposed by agency fiat," Cramton argued that sentiment for deregulation, when crises arise in a field where regulation is already one of the features of the landscape, is little different in underlying philosophy from pressure for regulation generated by disaster. Both reflect the conviction that government action should bring about the solution to a problem.

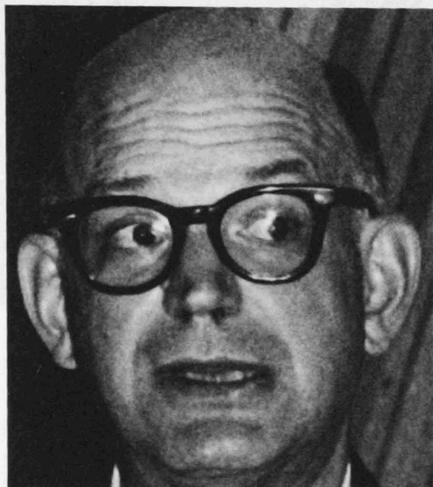
Government's responsiveness to the powerful interest groups who are often motivated by adversity accounts for much regulatory change, while government's reliance on the support of powerful industries, combined with "the squid-like absorptive capacity of regulation and its tendencies toward irreversibility," does much to fix regulatory regimes in place. While Cramton seconded Steiner's call for "closer scrutiny of the costs and benefits of regulation," he doubted whether it would be the likely outcome of the current outcry for deregulation.

Finally Cramton argued that the probable and undesirable alternative to such scrutiny is not the "global and uninformed deregulation" which Steiner seemed to fear. Rather, according to Cramton, we should worry that the growth of regulation will prove irreversible. Steiner's own discussion of the "expansive character of regulation, its endemic faults, and the one-way ratchet that the inertia of our institutions provides," can be read as suggesting that deregulation is only "a small blip on the upward curve of regulation." Cramton saw the current danger to lie in the difficulty of efficiently and effectively "cutting back much of the perverse regulation that besets us," rather than in "a simple-minded preference for unregulated free markets." Yet like Steiner, Cramton concluded with the wish that deregulation might restore "a much needed skepticism that examines the costs as well as the benefits of regulatory programs."



Antitrust: Economic Regulation or Deregulator?

Professor Thomas E. Kauper
University of Michigan
Law School



Summary:

Current controversy over antitrust centers on goals and methods. "Chicago School" economic analysts seek an antitrust policy predicated solely upon concerns of economic efficiency. Others seek to maintain a policy intended also to protect political and social values. Disagreements over methodology focus on the Chicago School's primary reliance on economic price theory to determine economic efficiency.

Supreme Court decisions reflect these changing philosophies about the goal of antitrust. Recent decisions relying on economic analysis curtail or overrule earlier decisions, particularly those of the Warren Court. While those "rested in part on concepts of property and contracts, ideas derived from other parts of the legal system, today's decisions speak in terms better understood by economists." The philosophical incompatibility of the various opinions from which specific rules are derived has created confusion. Furthermore, not all recent decisions are based on economic premises. "The Court has reshaped doctrine based on economic analysis only where there is broad consensus among economists."

Complexity and inconsistency can also result from the tension between current antitrust doctrine and the political response it has evoked. These legislative efforts are "predicated in large part on a concern over non-economic values and directed primarily at antitrust doctrine which is moving in the opposite direction."

Common themes underlie all this current controversy: antitrust has penalized efficiency; compliance has become unduly complex and costly. These criticisms resemble those directed at other forms of economic regulation. This becomes understandable when the paradoxical relationship between antitrust and other economic regulation is recognized.

Although "direct economic regulation and antitrust may be viewed as alternatives," they have developed in an interrelated fashion, and antitrust has taken on many of the characteristics of economic regulation. "Particularly in the period following 1930, it has been shaped in an increasingly regulatory fashion and has contributed significantly to the legalization of American society."

Although antitrust is substantively, procedurally and institutionally different from direct economic regulation, it "rests on the same broad premise, namely, that government must intervene when markets fail to work properly." While early antitrust rules were proscriptive, the proliferation of antitrust statutes and widening span of their bans has so narrowed the range of permissible activities that "antitrust has become increasingly prescriptive in practical effect," as has economic regulation. Insulation from the political process has characterized both antitrust doctrine, which was largely shaped in the courts, and economic regulation controlled by particular agencies.

A variety of factors have dictated these similarities between economic regulation and antitrust. One is the expansion of the scope of each in the attempt to serve more ends.

The belief that government process could and should do better than competitive markets at protecting noneconomic values developed during the depression and is reflected in the Supreme Court decisions of the Warren era. "Such decisions can be perceived as a form of economic regulation," consciously imposing costs on business entities to provide a cost protection to others.

Antitrust may be thought to share the complexity characterizing economic regulation too. "But at least in comparative terms, antitrust rules are not complex." Uncertainty, rather than complexity, has been the traditional problem with antitrust. Yet the effects of this uncertainty have all been, ironically, to increase the regulatory effect of antitrust.

The availability of private, statutory remedy for those injured by antitrust violations distinguishes antitrust from other forms of economic regulation. The mandatory trebling of damages in these private cases can operate as an over-deterrent, keeping firms from aggressively but lawfully competing. "Firms hesitate to walk even close to the line of antitrust illegality."

The constant drive by business for more precise standards has moved antitrust doctrine and institutions into a more and more regulatory posture. Judicial opinions have also expressed concern about the lack of precision in antitrust standards, supporting the development of the sort of *per se* rules currently under attack as unduly regulatory. Uncertainty has also led firms to seek guidance from government enforcement agencies. Although these agencies lack the authority to render a binding opinion, firms tend to respond to their guidelines as though they were authoritative rulings.

While antitrust doctrine may be comparatively simple, its institutions and procedures are complex. An extraordinarily diverse group of actors are involved, and defendants may be subject to an array of remedies. Because antitrust doctrine is not a set of rules administered by a single agency but the result of thousands of court cases, it has been difficult to reevaluate and reform comprehensively.

Furthermore, removing or modifying the severity of particular rules cannot be effected through the litigation process. "Cases are brought to enforce rules, not to 'un-enforce' them."

The expansion of the reach of antitrust can be accounted for, in part, by factors common to all forms of economic regulation, factors like the growth of protectionist ideology and increased concern with income distribution. Yet antitrust has also grown because of its utility as a weapon to restrict economic regulation. The indirect challenge posed to state government regulatory actions by antitrust cases against those subject to such actions can be seen as one of antitrust's major accomplishments. Yet expansion of the scope of antitrust has been a consequence.

The final section of Professor Kauper's paper is excerpted here. In it he discusses the probable and desirable outcomes of the current demand for reevaluation of antitrust doctrine by the standard of economic efficiency.

Excerpt:

Antitrust is but one of a number of forms of regulation, economic and otherwise, which have contributed to the trend toward the legalization of business decision making. It has reflected the same shifts in values, and many of the procedural and institutional tendencies, characteristic of a variety of economic regulatory efforts. Taken for decades as an article of faith, a faith nurtured by a coterie of its own apostles, antitrust now finds itself under attack in the name of reason. As our economy has faltered, as we have lost ground to the forays of foreign competitors both abroad and at home, faith is being replaced by skepticism. Lawyers, the traditional guardians of antitrust, are being displaced by economists. The traditional modes of common law development are, in turn, giving way to cost-benefit analysis. . . .

The most fundamental issue for antitrust is, of course, the determination of ends. Current controversies in the courts, particularly with respect to vertical restraints and reflected in legislative debates over such issues as the proposed prohibition of large conglomerate mergers, are in reality debates over ends. These controversies over ends are directed toward the substance of antitrust rules.

. . . [T]he present orientation is toward an antitrust policy focused solely on concerns of economic efficiency. This will, of itself, cause some additional substantive change. At the same time, legislative responses to efficiency-oriented court decisions may go in precisely the opposite direction, placing emphasis on more populist-oriented concerns. It may well be that antitrust will be confined to the promotion of economic efficiency and that other rules, directed toward other ends and bearing some name other than antitrust, will also be enacted.

A more precise definition of goals will result, and indeed has resulted, in some doctrinal reformulation. Yet difficult substantive issues will remain, even if it is agreed that antitrust should concern itself only with economic efficiency. The efficiency effects of particular conduct must somehow be determined. In general terms, this seems to require employment of a cost-benefit analysis of the type so strenuously urged today for the assessment of all types of regulation. Such an analysis could, of course, be useful even if antitrust pursues non-economic goals as a means of telling us what we are paying to achieve them. However, while antitrust, like other forms of regulation, ought not be comprised of rules which are in cost-benefit terms perverse, there are significant dangers in the insistence that all antitrust rules and cases be measured against a precise cost-benefit standard.

The costs at issue are elusive. Litigation and enforcement costs may perhaps be measured with some accuracy; but these are not the major elements of the cost side of the equation. The major concern is whether a given rule impairs efficiency and should therefore be abandoned. Efficiencies, however, are peculiarly difficult to identify and quantify. The same may be said on the benefit side, where the gain, if any, is in the promotion of allocative efficiency, the better employment of resources.

The attempt to measure costs and benefits in the setting of particular transactions is likely to be either impossible or, at a minimum, unreliable. The focus, then, is not on specific transactions but in the formulation of particular rules. For example, can we identify the costs and

benefits of price fixing generally and thus arrive at a rule dealing with price fixing? This is the approach of the Chicago School and a number of others as well. Through the use of price theory, it is possible to conclude at least that some conduct will in most cases impair allocative efficiency and confer no significant productive efficiency gains and should be prohibited. The reverse is true for some other types of conduct. With this methodology, relatively simple rules can be formulated and perverse results can be avoided.

The difficulty, of course, is that there are types of conduct for which no such simple rules can be formulated, where elaborate market, cost, price, and efficiency data must be evaluated. Moreover, even in generalized terms, economists may not agree on the consequences of particular conduct. If, as some have argued, antitrust rules should prohibit only conduct on the basis of economic consensus and cases should be brought only when a clear efficiency gain can be predicted, inaction is the prescribed course for a wide range of conduct.

There are justifications for such a course. If one is prepared to accept the contention that conduct which does not impair allocative efficiency through creation of monopoly power must necessarily be motivated by a predicted increase in productive efficiency, cost-benefit decisions are not difficult and seldom need be made on a case-by-case basis. Moreover, there is a plausible argument for a firm bias against judicial intervention except in clear cases, giving a preference to the decision of the firm actually in the market place unless *clearly* in the wrong. Judges, after all, suffer not only the infirmities of government decision makers generally but are confined to a litigation process which may make judgments about costs and benefits particularly difficult.

Yet inaction for a want of knowledge is troublesome indeed. Room must be left for intuitive judgments, or we are likely to see studies twenty years from now condemning failures to act on grounds that with hindsight seem clear. Errors which permit changes in industry structure are singularly difficult to correct. Moreover, in the current climate there is far more emphasis on costs in efficiency terms than on the benefits flowing from the elimination of monopoly power. The balance tends to be skewed.

The emphasis on the reformulation of substantive antitrust rules has tended to eclipse recognition of institutional and procedural changes which have occurred and consideration of such changes in the future. Yet these may be of at least equal import.

If antitrust is truly a matter of economic policy, there are significant consequences which may be expected to follow. The role of lawyers, and the use common law methodology, in the formulation of doctrine, has already been diminished, a tendency which is certain to continue. Economists may ultimately play the dominant role, a development which in turn may bring other institutional changes.

Traditionally, the Antitrust Division of the Department of Justice has characterized itself as a "law enforcement" agency. In bureaucratic terms, this has given the Division a degree of insulation from not only the most obvious forms of political interference but from the influence of other agencies, and the Congress, in policy terms. If all the Division does is "enforce the law," there is little basis for policy judgments and, thus, little basis for coordination of such judgments with others. But as the Division and the courts cast antitrust in economic policy terms, and as the Division utilizes a broad-based competition policy derived from the antitrust laws to

enhance its deregulation efforts, its protective insulation may break down. Antitrust policies may ultimately need to be coordinated with monetary policy, and so on. It will, in short, be more difficult to assert that antitrust must reflect only competitive concerns, even though that is what Congress intended. The Division, then, must develop and rely on its own economic expertise if it is not to be subordinated to the views of others. Antitrust policy will remain its domain only if it possesses the greatest expertise in the development of such policy.

A similar impact may be felt by the courts. Economic policy decisions as such have seldom been left to the judiciary, which is outside the mainstream of political influence and accountability and utilizes a litigation process which may not be the most efficient or reliable means of determining economic "facts." At a minimum, the litigation process itself may need significant alteration if it is to adapt to the new emphasis on economic analysis in antitrust cases. . . .

Finally, a complete reassessment of antitrust sanctions is needed. The criminal, civil, and treble damage provisions of the antitrust statutes have been amended periodically, but not at the same time. The sanction structure needs to be considered as a whole, with particular emphasis on the treble damage remedy, which is virtually unique to antitrust. . . .

Central to these questions is the more basic question of whether we want to encourage private antitrust actions at all. . . . There are alternatives. A single civil penalty action brought by the government could replace both criminal and private damage remedies. Victims could be compensated from the fund, if such compensation is thought necessary. . . .

I began by declining to address the role of antitrust as a deregulator, a role which is perhaps its most important. It is relatively a limited role. Courts applying antitrust rules on a case-by-case basis cannot be expected to ignore clear antitrust exemptions, or dismantle existing, pervasive regulatory schemes. Within these confines, however, antitrust litigation can define the outer limits of economic regulation and confine antitrust exemptions to a relatively narrow scope. The effect of such litigation, moreover, may be to force legislative reconsideration of existing regulatory patterns and, in the process, to consider anew the possibility of relying more heavily on market forces as the ultimate regulator.

Antitrust, then, can be utilized to force legislative bodies to think anew about the utility of economic regulation. . . . Antitrust litigation is a crude way of provoking legislative action, but it has worked. It has also been successful as an educational device, providing a forum in which competition can be presented as a realistic alternative to regulation. In the long run, significant deregulation can come only through legislative action. Antitrust has a major role to play in forcing and informing such action—a role it can perform more effectively once its own house is in order.

Comment:

Professor Sallyanne Payton
University of Michigan
Law School

Commenting on Thomas E. Kauper's "Antitrust: Economic Regulation or Deregulator?"

Professor Payton proposed to comment on both Professor Steiner's and Professor Kauper's papers since both addressed the "current crisis of regulatory legitimacy and competence." Steiner's theory that this current controversy arose from irritation generated by "social," as distinct from economic, regulation first received Payton's attention.

Like Steiner, Payton questioned why economic regulation has taken the forms it has and why we have recently become dissatisfied with them. Law incorporates a society's fundamental understanding of what constitutes right conduct, giving some values priority through protection and enforcement. It does this negatively, legislating against evil rather than in favor of good.

"Passing regulatory statutes in legislatures generally requires, therefore, the identification of a bad," Payton said. "We love to regulate the devil," said Payton, but it is the devil without. Outcry against regulation arises when the general rules we create to restrict 'them' turn out to apply to ourselves as well.

Antiregulatory sentiment also arises from the realization that 'we' pay the price even of regulation directed at corporations. That the economic consequences of regulation would provoke reaction, particularly in a stagnant economy, could have been predicted.

Yet if antiregulatory sentiment was easy to anticipate, how can we explain the proliferation of regulation from the late 1960s to the mid 1970s? The shortcomings of a legal education which implies that law can solve most problems was in part at fault.

The institutional autonomy of law was also a factor. "Lawyers create their own precedents. . . . What is most striking about regulation is how imitative it is." Legislators draw on a model, thoughtlessly treating as analogous conditions which differ greatly in significance and cost.

Political forces conjoining the previously unorganized interests of environmentalists or consumers also account for the spread of social regulation. To say that is to demonstrate that what is at issue when we discuss legalization is really control.

"In this society," Payton emphasized, "we control through law." Because we cherish private freedom, we use government only sparingly and in accordance with standards of due process. Land, capital, and industrial facilities are in private, not government, hands. Regulation, designed to control the power of these private agents to injure others, is also subject to procedural and substantive restrictions protecting the regulated. Reform in the name of streamlining which reduces these protections "will produce regulation without law, which has always been thought to be a dangerous thing."

"'Legalization' is an undesirable byproduct," Payton said, "of social control by rules." Our faith in law prompts us to seek to control through legislation and to seek redress through the courts. Citizens become increasingly dependent on lawyers to define rights and responsibilities, and minimum legal acceptability becomes the standard for action.

Yet we would not want to control these undesirable consequences by "asking individuals to forego their right to petition their government to act," or to sue, Payton noted. Like any other externality, legalization must be controlled by government.

The first step, Payton said, is for government to restrain itself. Cost-benefit analyses and regulatory budgets can make government anticipate the consequences of its decisions.

Deregulatory pressure has shifted the burden of proof onto those who desire more regulation. Until recently, the costs and burdens of regulations were irrelevant to the evaluation of a regulatory agency's performance. Even those who believe that the past century's regulation has indeed given us a healthier, cleaner, and more nearly just society should welcome attitudes which will impede the enactment of ill-conceived and frivolous restrictions.

Payton's view that good regulation is that which represents public consensus led her to explore a central conceptual question raised by Kauper's discussion of antitrust: "Should we be using the common law courts to develop any economic regulatory policy?"

An advantage lies in these courts' reliance on a standard of reasonableness and broad principles applied by generalist judges. Antitrust litigation has allowed us to scrutinize and deregulate industries which have enjoyed close and cordial relations with their regulators.

Problems arise, however, because antitrust is unlike other common law litigation in that its standards are not



grounded in internalized community values. Economic reality and real business behavior are not the subjects of such populist standards, Payton argued. In absence of this traditional basis of common law decision making, even judges are at sea in deciding antitrust cases.

Business's demand for clear articulation of obligations is then readily understandable, particularly in the light of the treble damages remedy. The degree of risk involved in antitrust, combined with the unusual pervasiveness of potential enforcement by private litigation, makes every business fearful and attentive to the risk-averse advice of counsel.

Because antitrust law has largely eliminated the ultimate reality check of a jury trial, it has lost some of the advantages of common law litigation. Like economic regulation, then, antitrust becomes intellectually insulated. Lawyers become more oracular and inscrutable as antitrust is taken over by the arid, static models of economists.

Although Payton thus demonstrated that antitrust may resemble economic regulation, she also concurred with Kauper's characterization of it as paradoxical, noting that antitrust can also be a tremendous deregulator. The value of antitrust is that it offers a fall-back position, Payton argued. It enables us to break the closed circle of regulator and regulatee and to remove the mantle of uniqueness from an industry without turning it loose from all regulation.

Nevertheless, in its own functioning, antitrust turns out to be regulation. "I tend to agree with Professor Kauper," Payton closed, "that it is regulation of a sort that is in some intellectual trouble at the moment."

Law, Power, and Knowledge

Professor Theodore Lowi:

John L. Senior Professor of American Institutions, Cornell University



Professor Joseph Sax presided over the final session of the symposium on Saturday morning, October 31. On that occasion a political scientist, Theodore Lowi gave his view of the changing role of law in American political life.

A panel of professors from the Michigan Law School responded to Professor Lowi. The panel was composed of Theodore J. St. Antoine, Joseph L. Sax, E. Philip Soper, and Francis A. Allen.



Summary:

In America the law has been a great source of civic education. Law as litigation, law as case and controversy, law as dynamic local process between contending parties where obligations are made clear and conflicts are defined by lawyers and judges, law advancing by successive approximations has made our society aware of its problems. Individual citizens learned their political responsibilities from laws and, in obeying statutes, came to believe in their provisions.

This was the case in the "golden age of democracy" that prevailed in nineteenth-century America. In that "First Republic" the states did all the real governing. Issues arose out of local controversies and resulted in legislation by amateurs that was clear in its purpose and clear in the obligation it sought to impose on the citizen. A profound change in the political framework within which legal institutions function was institutionalized during the New Deal and celebrated with the coming to power of the Democrats in 1961. Since then, we have been in the "Second Republic," where the national government has taken on the functions of regulation and redistribution, moving into a coercive relationship to the citizenry. At the same time, although Congress is nominally the source of authority of all policy, it increasingly has delegated policy making to the executive.

This concentration of power in the national government makes consensus considerably harder to achieve than it was before the New Deal. While bargaining and compromise were always components of democratic government, the nature of compromise has changed in the

Second Republic. To understand the new relationships which prevail between compromise and the rule of law, legal scholars and political scientists must examine real laws and the political agreements out of which they arose.

Three cases of legislation by Congress in the Second Republic provide a range of possible types of compromise and resultant legislation. The first is *The Water Resources Development Act of 1974* which authorized a diverse plethora of projects delegated to the Army Corps of Engineers. This act required no compromise, since it "did not involve mutual surrendering of positions." Instead it created a vast but temporary coalition of participants who had nothing in common except for their support of the omnibus bill.

Such logrolling is characterized by a politics of low visibility. The public is uninformed. In Congress there is little debate on the general moral, political, or fiscal implications of the act's provisions and great resistance to application of a general policy governing public works. Standing committees or subcommittees with close relationships to administrative agencies dominate congressional action on such bills.

The Civil Rights Act of 1964, although also an omnibus bill, provides a direct contrast. One principle underlay the entire act: anti-discrimination. This broad and abstract principle was concretely defined by the bill's several titles, each of which covered a separate cause of action. This controversial bill passed only after its supporters had agreed to reduction in jurisdiction and weakening of sanctions.

These compromises were the result of direct confrontation

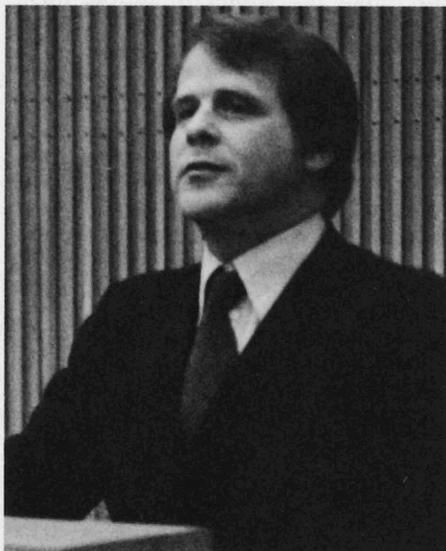


Discussion panel (from left) Theodore St. Antoine, Philip Soper, Francis Allen, Joseph Sax,

between interests which shared an understanding of the types of conduct prohibited by the major titles of the act but disagreed "as to how much of each of these principles should become law." The bill was weakened by compromise, but its principles remained clear. "Citizens could clearly grasp, without aid of legal counsel, what new obligations the 1964 Act sought to impose."

The *Economic Stabilization Act of 1970*, which provided for the first nonemergency wage and price controls in American history, contains no such principle or specificity. "It provides no standard by which the intention of the state could be fathomed." It authorizes the President to decide when to, and when not to, apply controls; he may also delegate this power to any governmental office he pleases. "This is a case of compromise by obfuscation" or "policy without law." Such vaguely worded bills undermine the educational function of law. The politics surrounding them declines quickly into logrolling. Congress gives such bills little floor debate; agencies administering them look to interested clientele for help in developing operating patterns.

In the following excerpt, Professor Lowi concludes with a description of the role of lawyers in the Second Republic and with his proposals for reform of the procedures and ideologies that result in vapid or dangerous legislation.



and Theodore Lowi

Excerpt:

I would posit a general entropic tendency in politics: The more obfuscated and empty the rules or standards in a law, the more likely the politics will run down toward low intensity, low visibility, decentralized and autonomous elites, and resistance to the introduction of broader considerations that might produce debates and rules. Conversely, the clearer and stronger the rules and standards in the law or bill, the more likely the politics will be visible, volatile, and contentious; the more creative will be the role of debate on the floor of Congress; the more likely that groups will be in confrontation rather than cooperation; and the more frequently agencies will confront adversaries, even with arguments over rules and standards. . . .

It should now be all too clear how laws and their politics can so quickly affect knowledge. It should also be clear how the Second Republic has contributed to the decline of the education function of both politics and law. Under the First Republic national government was not particularly relevant. Its output, though dominated by the pork barrel and other distributive outputs, was relatively small. It might also be argued that the political stability a young and socially vibrant nation got from a national pork barrel was worth the price paid in moral or educative irrelevance. However, once the national government became a modern state and assumed so many responsibilities to intervene coercively in the economy and society, it could no longer ignore the moral and educative implications of its actions. Yet, by and large, it did ignore them. The two types of policies most frequently produced by Congress—distributive and vaguely worded regulatory and redistributive laws—share one very important attribute: the absence of a rule or standard of conduct. This explains the similarity of their politics as well as their low potential for civic education. . . .

It is in this sort of context where the function of the lawyer has been transformed by the change from laws made by state legislatures and state courts to national policies without law. Lawyers operating by the thousands as legislative and executive staff members are not officers of the court. They are not involved in adversary proceedings. They are hardly advocates. They are functionaries, and their legal training is often only of marginal relevance, except to prove to their employer they are of sound mind and dependable character. . . .

Lawyers who are functionaries have an important role to play, but if they are not officers of a court or legislators or administrative rule makers, they are irrelevant to the historic lawyer's role as lawmaker and educator. It is in this sense that the Second Republic has revolutionized the place of the lawyer by changing the character of law and the place of legislature and courts within the national scheme. This does not address itself to local legal institutions performing traditional functions, though, most likely, statistics would confirm the proposition that increasingly smaller proportions of holders of law degrees ever set foot in court or in any other way play the traditional role of adversary at law.

Certainly it is the nonadvocacy careers in law that enjoy the highest income and social status. Moreover, those who want most to use their legal training to make laws and shape principles into laws tend to have to resort to marginal careers in public interest law firms or special

cause groups in such fields as consumer law, environmental law, civil rights or civil liberties litigation, or welfare law. For those who've made their peace with it, the Second Republic is built on a relatively efficient administrative process liberalized by procedural restraints. For those of us not at peace with it, the Second Republic is a hell of administrative boredom.

The question of what to do about it quickly boils down to the question of how to reduce at the margins the frequency of distributive and vague regulatory laws while at the same time increasing, again at the margins, the proportion of regulatory or redistributive laws that embody some legal integrity. Since it is clear what society gains from the latter, one important solution is to take the message to lawmakers and federal judges. We will have gone a long way toward improving the public realm if we can just get legislators to feel more uncomfortable about the stupidities of draftsmanship they call laws. This solution requires everyone else to teach the lawmakers so they can improve the educative value of their product.

Another approach to reform is through direct public exposure of bad deeds before they have happened. Because we can know something about the relationship between type of compromise, type of law, and type of politics, we can with good, critical writing head off some of the worst products. By the time a bill becomes a law and is handed over to a large agency, it is too late to raise questions about its lack of educative quality or its tendency to produce tight little self-defensive coalitions. Even if these bills cannot be improved, they can be delayed or prevented from passage if people can be shown the potential for logrolling and downright corruption. Analysis of this sort might even embolden a President to veto bills that don't give him enough instructions about how to be faithful in his execution of the laws. I know from my own limited experience that members of Congress tend to be more sensitive to charges of idiocy in draftsmanship (as a dereliction of duty) than to charges of making unsavory deals. Now that we see the two are related, our ammunition may be stronger and more accurate.

Another approach, important mainly in strengthening the previous two, is playing on the emerging fear of government but using it as leverage to focus on better rather than less. A great deal of nonsense has come out of "conservative," "deregulation," and "free market" parties and publications during the past decade. To oppose regulation or intervention on principle requires opposition to all the state property laws, banking laws, exchange laws, contract laws, incorporation laws, etc., etc., that have made American capitalism what it is. It would also require opposition to all the zoning laws, construction codes, and municipal laws that have made life so comfortable for all the suburban middle classes. Cutting through their silliness is that great element of truth that it is probably better to leave things unregulated wherever you can. The beauty of this is that it gives us an argument for delaying legislation until we can make it clear what we are legislating for. As long as people were arguing that the political system will lose legitimacy and society will fall apart if the legislature doesn't respond to each demand with a law, a counsel of delay was a counsel of defeat or a front for selfishness. Now that even the liberals have seen virtue in the private sphere, delay in the name of better law will not be suspected as too selfish or too risky. It was never really plausible in the

U.S. to favor the free market for its own sake. Now it has become plausible to accept a freer market as a consequence of the momentary inability to formulate the rule for properly regulating it. I call this "neo-laissez-faire."

Let me close on a still more drastic idea—deregulation of the legal profession. Legal historians recognize the adaptability of the profession as one of the secrets of its continued importance in the U.S. However, if the work of the lawyer has increasingly become that of the functionary in the private as well as the public sphere, why go on pretending it needs to be a licensed profession? A political scientist is not needed to recognize this as a myth and to unmask its defense as a cover for state-sponsored control of an occupation by a small elite. Before this begins to sound arrogant as well as inconsistent with my entire argument, I want to add quickly that my intention is not to denigrate law or legal training but to permit the introduction of distinctions within the profession, not identical to but inspired perhaps by the more stratified legal professions of Britain and the continental countries. If we freed the legal profession, it could continue to develop as probably the best graduate training for public affairs. That is at least where I will continue to send the students of mine who want careers in public affairs. However, the degree itself is sufficient certification. On the average, lawyers have less need of licensed certification than practicing public economists. With that distinction established—call it public service or administrative law—we could welcome then an even more severe and state-controlled licensing process for those lawyers who would seek a career in litigation and law making, especially leading to judicial positions.

As our Chief Justice has so often pled, we need more judges, but we don't need lawyers who merely fill judicial posts or who may know a bit about judicial procedure. We need more guarantees, which we might get through licensing, that we have a trained and democratically recruited elite who have a better sense of what law is and who have the stature and self-esteem to confront legislatures and groups with *juridical* and not merely judicial opinions. Robert Jackson, one of the most thoughtful of men ever to serve on the Supreme Court, once observed that "the Supreme Court is not final because it is infallible; the Court is infallible because it is final." I am arguing that we could move a bit closer toward infallibility if we stratified the law profession and developed within it a class of persons truly dedicated to the development of law for itself. One thing that has not changed in the Second Republic is the expectation that the federal appellate judiciary will be final. Statutes with or without legal integrity require agencies to implement their decisions through court orders and/or to submit questions of jurisdiction, legality, and constitutionality to normal judicial appeal and review. The world would quake but not crumble if the courts took that job seriously, even to the extreme of reviving the *Schechter* rule. This would become realistic if judging were truly a profession.

This last so-called solution evokes a second iron law of politics: There is an inverse relation between feasibility and effectiveness. Infeasible as they may be, my modest proposals at least help to round out the analysis. Like good law, they may be educative, to this extent—in politics as in psychiatry the solution to a problem may lie in the awareness of the problem.

Panel Discussion:

Commenting on Theodore Lowi's "Law, Power, and Knowledge"

Participants:

Professors Francis A. Allen, Theodore J. St. Antoine, Joseph L. Sax, and E. Philip Soper of the University of Michigan Law School

Professor Sax: I think by suggesting the destruction of the legal profession, Professor Lowi is certainly going to generate some comments.

Professor Allen: Where in the Second Republic described by Professor Lowi are the concerns which we were talking about yesterday?

Professor Sax: It seems to me that the Lowi paper is of a piece with much of what was said yesterday; it points to an enormous proliferation of intervention on the part of the federal government and proliferation of administrative law. Whereas some of the criticism brought to that development yesterday was put on the level of inefficacy of one kind or another, Lowi is trying to respond critically to those developments at what one might call the most elevated theoretical level. He says that democratic government now perceives itself as obliged to respond positively to all the demands that are made on it. He said today that at some point in the development of the Second Republic, government intervention changed from being merely a necessary evil to a positive good. This phenomenon of proliferating involvement which he is pointing to is what everybody was discussing yesterday.

What to me is provocative and appealing is his notion that law is no good unless it plays a legitimating, educative role. He even uses a term like "civic virtue," a very old-fashioned one, but very revealing of his views. In the obfuscating model, which he views as now being dominant, the fundamental goal of law, this educative role, is lost.

In the area that I know best, that is in the environmental area, air pollution, water pollution, toxic substances, and so forth, it seems to me that laws, for all their complexity, really are not models of obfuscation. They look much more like his model civil rights law. There is a principle; there is a widespread agreement in Congress on the principle. So, I'm not sure, at least in the area that I know, that the obfuscating model really is dominant.



Professor Lowi: My hypothesis is that the level and intensity, and the public character, of the politics in the environmental field account for the clarity of the statutes. One has a clearer sense of what the stakes are, what the costs and gains would be.

I want to emphasize that the legal integrity as I call it, the clarity of the rule, is only one criterion by which to judge laws. The state laws in the nineteenth century were clear; but a lot of the state laws were so bad in their purpose that I would definitely have voted against them had I been there. At least I would have known what I was voting against.

Professor Allen: It occurs to me that Professor Soper might have some comments here. Do you have a sense that the problems that we are talking about are basically founded upon a failure of legislators to do the job of articulation and statement of principle that they should be doing?

Professor Soper: The only way that I know to assess Professor Lowi's claim about legal imprecision is ask what other plausible explanations there may be for such imprecision. The most obvious candidate, it seems to me, alluded to by Professor Lowi himself, is inherent complexity in the subject matter, though Professor Lowi denies that is the explanation. If the subject matter is inherently complex, I think, none of the theses that Professor Lowi has advanced can be demonstrated. Imprecision will exist, regardless of whether it is a case of delegation or statutory compromise through weakness or through obfuscation. Nothing better is to be expected, in fact much worse is likely to occur, if we revert to the situation of the First Republic.

I think the way to demonstrate these claims is to draw on examples from more or less the same era that Professor Lowi draws on. Joe Sax has already mentioned the primary example, the case of pollution control legislation. In the early 1970s Congress passed legislation that in

many respects fits exactly the aspects of the Second Republic that Professor Lowi decries. Congress virtually usurped the role previously exercised by states and localities, and the legislation took both forms as far as precision.

In some cases, Congress could not have been more precise. In other cases, Congress gave virtually unrestricted delegation to EPA to come up with standards. In both cases the process was the same. There was high visibility—I think Professor Lowi himself suggested that was the case—with effective interest groups moving from the administrative agency to court, to Congress, and back again, extending deadlines, changing standards, fine tuning the process as they gained information about what was technologically feasible.

The result may be a fourth kind of compromise: compromise by experiment that recognizes the inherent complexity in two senses. First, it recognizes that the problem of environmental regulation transcends jurisdictional boundaries of states and localities, so it requires broader attention. Second, it admits that even when approached from the right geographical perspective, regulating pollution is complicated by uncertainty about the scientific effects of pollutants and the costs and feasibility of control. When that is the case, there may be some sense in starting to get the information we need, either administratively or legislatively, and then responding. If that is true, if complexity makes a difference, then one has to fine tune the analysis and ask questions like, "What matters are inherently complex and might be appropriate for Second Republic treatment?"

Consider Professor Lowi's two examples: the Civil Rights Act and the Economic Stabilization Act. The first is a better kind of legislation, Professor Lowi suggests, than the second. Is that because the first, the Civil Rights Act, involves moral issues

which, however divisive, are not factually complex in the way that questions about pollutant effects might be? Regarding the other example, I'm not nearly as confident as Professor Lowi that the effects of wage and price controls are sufficiently certain, scientifically and factually, not to justify some experiment before we make a definite decision. If that's the case, then one needs to fine tune the question of when it is and is not appropriate to use new devices like delegation and vague legislation.

Professor Lowi: As far as environmental control is concerned, I don't have full details of the politics of the various efforts in that area, but I am aware that the broad EPA structure was set up by presidential order more than by Congress. I don't call that nearly as visible as the first strikes at air pollution which were rather specific. So my theory would be that as the legislation became more vague, the politics also became less visible and less centered in Congress.

There's a point on which I would like to agree with Professor Soper. It may be that legislation is a way of getting the information that we need. I don't call it compromise by experiment; but whatever you call it, learning from experience is extremely desirable. One of the great problems with broad delegations is that they make it more difficult to learn by experiment. One of the advantages of federalism was that you could experiment with one state trying something one way, one state trying it another, and a few states not trying it at all, and see which ones work out. The more vague is our principle of action, the less basis we have for a kind of controlled experiment from which we can learn. The more vague the first assertion is, the less likely it is that Congress and the agencies will learn by the experience.

Professor Allen: The question of the use of law for purposes of the education of the republic looms very large in this paper. Of the lawyer members of this panel, Ted St. Antoine has probably been in a better position than any of us to react to the assertion that one of the losses in the Second Republic is this educational function of law. Ted has been a Washington lawyer; he has had as a client one of the principal interest groups, the labor unions. What is your reaction, Ted?

Professor St. Antoine: I would like to start off with a personal word of thanks for Professor Lowi's contributing a rare intellectual gift, namely, some new ideas. The Second Republic is a very provocative concept. Provocative is sometimes an academic euphemism for wrong, but in any event he has stirred us up. As we have discovered, however, any bold, new, imaginatively designed structure has a certain tendency to leak. I would like to draw attention to what I believe are some of the leaks in the Lowi thesis.

I find pervading Professor Lowi's presentation a kind of wistful yearning for an earlier and simpler America. He and I probably both come from small towns. I certainly do, up in Vermont. The town meeting is a wonderful way to run a society. It is personal, it is intimate, and also extraordinarily exclusive. Lowi referred to the nineteenth century as the "golden age of democracy." During that golden age of democracy, women could not vote. During two-thirds of that golden age of democracy, blacks weren't citizens. I realize that Lowi is not in favor of denying either women the right to vote or blacks the right to be citizens. He would say that it's the process, the bubbling up from below, that he likes about the golden age of democracy, but it seems to me that the number of people that you let into the process has an enormous bearing on how that process is going to work.

I think Professor Lowi is unhappy about the mess of letting the masses into the process. It's going to be a devil of a lot harder to govern New York City than to govern the Union League. Where you have many conflicting interests, the process does have to take account of compromise that may not be all that pretty.

I will try to say something about Professor Allen's question, concentrating upon the three specific examples that Professor Lowi gave us. The Water Resources Development Act of 1974, a part of the new republic, is, as far as I see, nothing but a modern extension of the land giveaway, or subsidy programs, that Lowi said typified congressional legislation in the nineteenth century when Congress was doing what it was supposed to do, not dealing with the great social issues of the times.

The Economic Stabilization Act of 1970 I regard as an aberrational piece of legislation. Historically, I

think you'll find it was an effort by a Democratic Congress to embarrass an unpopular President of the United States by giving him enormous powers, and daring him to do something to solve our wage and price problems. I do not think it was a serious piece of legislation. It didn't last. It's gone.

To pick that out as an example is to concentrate upon the aberrational instead of the typical. Much more typical in my field is the Civil Rights Act, which he dealt with, and it isn't alone. The amendments to the National Labor Relations Act have become increasingly clear and precise, even if misguided. I would also cite the Landrum-Griffin Act, dealing with internal union affairs, the Fair Labor Standards Act amendments, the Pension Reform Act, the Occupational Safety and Health Act, the Social Security Act, and that monument of specificity, if perhaps nonsense, the Internal Revenue Code. Congress has had full debate and direct confrontation again and again during the modern era. I really don't understand the concern about the lack of standards where standards are feasible.

In the National Labor Relations Act, one will find both kinds of approaches. You'll find it stated in very general terms that employers should not coerce employees, that unions should not coerce employees. That is a delegation to an administrative agency to fill in many blanks. I would agree with Phil Soper that this is really of the nature of the problem and that there must be generalization. A sense of direction is provided, but Congress had no sense of the infinite variety of ways in which employers and unions with imaginative lawyers can coerce employees. Other sections state that employers can't bribe union officials and give a long list of specifically stated exceptions.

When you are dealing with a society as diverse as ours, when you are opening the doors to all kinds of different individuals, highly diverse individuals, individuals who will not meet over cocktails at the Union League to resolve their problems quietly, interest groups are the way the system has got to work. If there's any educative lesson in all of this, it is the lesson that the law is responding to the way the real world is and to a far more open society than the golden age of the nineteenth century.

Professor Lowi: How can I respond to a set of comments that are so popular with the audience? I'm not against women or blacks being in the system. The golden age to me was the golden age of legislative democracy, and I have a feeling that if blacks, women, and others had been admitted to membership, the legislature could have worked just as well. I don't like the idea of blaming whatever ills we have today on the inclusion of new people.

I agree here and in print that there are elements of labor legislation that would stand up better than others as clear principles; but is it easy to confuse specificity with a clear rule. The Internal Revenue Code is an example. While it is highly specific, it lacks unifying principles. We've got to make a lot more distinctions in types of law, so we can set up experiments and do research on whether different kinds of politics, the more public or more private kinds of politics, flow from different kinds of legislation. Then we would have a good discourse going between the political scientist and the lawyer.

Professor Sax: It seems to me Professor Lowi is arguing that a law that is infinitely detailed can have exactly the same problems as a law that is utterly empty: no identifiable center or principle.

I think what Phil Soper said is more troublesome in terms of the Lowi paper. If, as he says, these laws are really experiments, that suggests the whole enterprise is a kind of bureaucratic technological function. It suggests that legislation is designed to find out the answers to some very detailed questions and that these answers will tell you automatically what to do. That is a really technological view of law. It seems to me the centerpiece of what Lowi says is that the law has got to have some clarity about what basic resolution has been made of important kinds of value conflict.

Professor Lowi: To project or defend or rationalize an act of authority as an experiment is a way of seriously reducing its legitimacy, almost a way of undercutting the very experiment itself. If everybody knows a law is an experiment, they may very well say, "No one will seriously punish us for disobeying this." If you state that a law is an experiment, you may very well undercut the purpose and wind up with a false experiment.

Professor Soper: Federalism was a way of experimentation, and nobody thought that was bad. If complexity includes an explanation for why we can no longer treat the subjects locally rather than nationally, then we simply. . . .

Professor Lowi: Theorists of federalism said different experiences would be a form of experiment, but you cannot find in the literature a state defending an important state statute as experimental. Theorists of federalism said that federalism was a great laboratory, not the legislators themselves.

Professor St. Antoine: Professor Lowi, I'm having some trouble finding out exactly what are the distinctions between your First and Second Republic, and whether you think that there are advantages in the approach of the First Republic. You said that really suffrage was not your thesis here, and I am certainly prepared to say that you are not opposed to women's voting or blacks being citizens. Nonetheless, you did state that when we had a model democracy, the party leaders controlled the state legislatures of the East, and big corporations controlled the state legislatures of the West. I find that very troubling as a characterization of a golden age of democracy.

You have also made the point that recently Congress, in working out law, has produced policy without law. Now the Internal Revenue Code may be blamed for being law without policy, but that's not the same thing. I suppose you would say the ideal is to have both law and policy reflected in clear edicts. I guess we can all agree on that ideal. My concern is that when we do have as widespread a system of participation in government as we now have, with many different interest groups genuinely reflecting the interests of many different groups of people, a clear univocal articulation of principle is, by the very nature of our present form of democracy, often impossible.

Finally, answering Professor Allen's question, I think we have chosen against any kind of authoritarian educative function of law by the kind of system we have installed. Ideally, I might prefer a simpler and clearer, more authoritative and more univocal policy, but it seems to me that we have sacrificed that in order to let more persons of widely varying views participate meaningfully in the political process.

Professor Lowi: Those ideas are all very interesting. I just want to touch on a couple of them. One, I'm an expatriate southerner, and I don't yearn for anything of the nineteenth century past. Second, you're absolutely right that pork barrelling is all they did in the nineteenth century. I say the same thing. It's just that the national government didn't quit doing that when it became a Second Republic. A very large portion of the budget is pork barrelling—public works, internal improvements.

The secret of the stability of the national government in the nineteenth century was that pork barrel legislation was all it did. Only when it took on all these new functions did it become unstable, unsteady, and ridden by interest groups.

Interest groups have always been part of American politics, but in the nineteenth century there were mediating institutions, parties and legislatures that routinely forced special interests to amalgamate to form a coalition as the only basis for getting enough votes to pass a law. The Second Republic lacks those institutions that would intervene in a mediating way. You cannot talk about interest groups as though they are something new. You cannot even talk about single-issue interest groups as new. You can simply talk about a changed institutional and constitutional environment in which they operate.

One doesn't have to be anti-democracy to say that interest groups under certain circumstances can become harmful. That is not to argue that we should go back to the nineteenth century. I want to go forward to something that we don't yet have, while learning something from the nineteenth century. The one thing I would look to in the "Third Republic" is the revival of the mediating institutions of party and legislature.

This transcription of the Panel Discussion was prepared by the editor from a tape recording of the proceedings.

Receptions

The intellectual events marking the dedication of the library addition were interspersed with informal gatherings and opportunities for visitors to admire the new facility. A dinner for the members of the committee of visitors was the first event of the weekend which began Thursday evening.

After the symposium sessions on Friday a cocktail hour for alumni, faculty and visitors was held in Hutchins Hall. Everyone then strolled through the Quadrangle in the autumn night to a banquet served in the splendid dining rooms in the Lawyers Club.

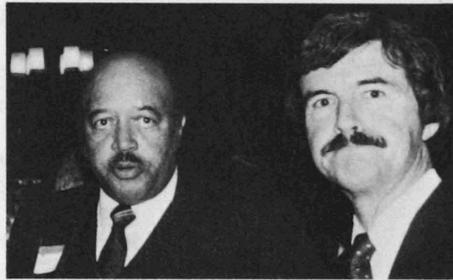
Dedication ceremonies were held in the Rackham auditorium Saturday afternoon. They were followed by a reception in the new library addition.



Judge Cornelia Kennedy, JD '47



Judge William Mc Lean with former Law School Dean Allan Smith



Horace J. Rodgers, JD '51 (left) and former Assistant to the Dean, Robert Jones



David Lewis, JD '70 (left) with Ernest Mika, JD '50 (center) and Oscar W. Baker, JD '35



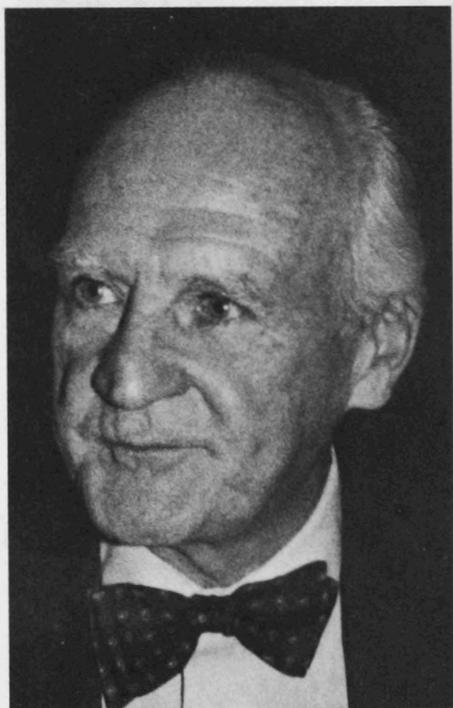
Alumni await the dedication ceremonies outside Rackham Building



Admiring crowds enter the new library for the Saturday reception



Regent Robert Nederlander with Professor L. Hart Wright



Judge John Feikens, JD '41



Professor Yale Kamisar with Susan Bloch, JD '75 and former Law School professor Judge Harry Edwards, JD '65



Bradley Giles, LLM '74 (left) of Auckland, New Zealand came the greatest distance to attend the dedication.



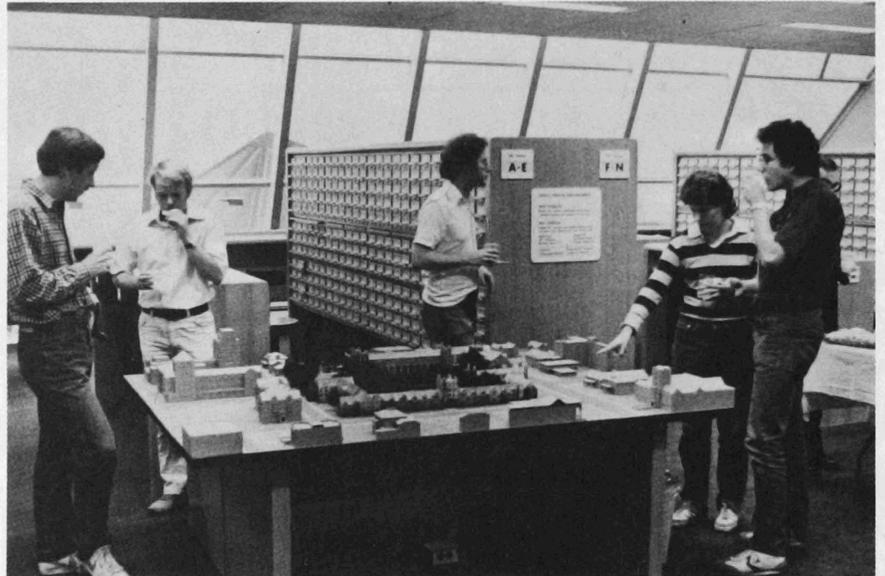
Theodore Sachs, JD '51 (left) with Dean Terrance Sandalow, Samuel Krugliak, JD '41 (right) and Willis Snell, JD '51 (far right)



Theodore Sachs, Judge Horace W. Gilmore, JD '42 and Mrs. Gilmore, University of Michigan President Harold Shapiro, Lloyd St. Antoine, and Mrs. Sachs (left to right)



Professor Samuel Estep and his wife, Doris



Students examine architect's model of the addition



Mrs. Theodore Souris, Mrs. Lewiston and Michael B. Lewiston, JD '60 with Mrs. John Reed and Professor Reed (left to right)



Former Michigan professor Richard Wellman with Judge and Mrs. Carl McGowan



Law School researcher Elizabeth G. Brown with Thomas Koykka, JD '30



John S. Tennant, JD '31 with Professor Samuel Estep



Crowds at the library reception



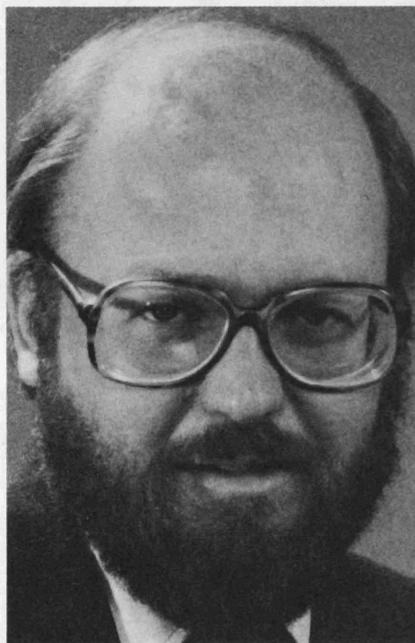
John Riecker and others move on from dedication ceremony to library reception

Briefs

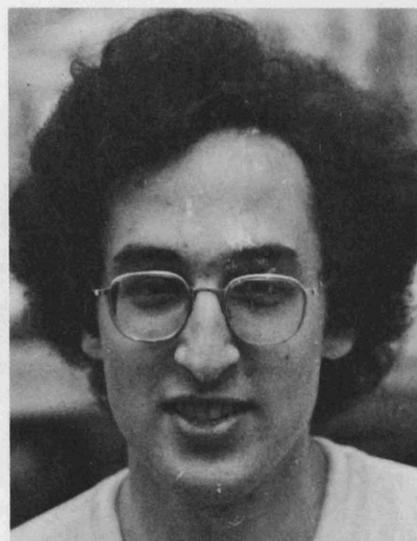
Three United States Supreme Court Clerks Are Michigan Alumni

Three recent graduates of the Michigan Law School are law clerks for justices on the United States Supreme Court this 1981-82 term. Currently clerking for Chief Justice Warren Burger is **James D. Holzhauser**. The clerk for Justice Thurgood Marshall is **Kenneth W. Simons**. **David W. DeBruin** is clerk for Justice John Paul Stevens.

With these three alumni Michigan continues a long tradition of placing its graduates as clerks with Supreme Court Justices. This also marks the beginning of a new tradition, being the second year in a row that three Michigan alumni have served concurrently. Carl Schneider was clerk to Justice Potter Stewart in 1980-81. This year he returned to Michigan as an Assistant Professor, specializing in Legal History. Robert B. Knauss, who was one of Justice Rehnquist's clerks in 1980-81, has joined the firm Munger, Tolles, and Rickershauser in Los Angeles this year, as has Richard G. Morgan who was clerk for Justice Lewis F. Powell, Jr.



Holzhauser received his J.D. *Magna Cum Laude* in 1980 and was elected to the Order of the Coif. Since graduation he has served as clerk for Judge Robert A. Ainsworth, Jr. of the U.S. Court of Appeals, 5th Circuit, in New Orleans. Before coming to Law School, Holzhauser served as Town Manager of Fallsburg, New York for three years and before that as Village Administrator of Woodridge, New York. Mr. Holzhauser received an A.B. in Economics from New York University Washington Square in 1970.



Before his clerkship with Justice Marshall, **Kenneth Simons** was clerk for Judge James L. Oakes of the United States Court of Appeals, 2nd Circuit, in Brattleboro, Vermont. Mr. Simons graduated from the Law School *Magna Cum Laude* in 1978 and, like Holzhauser, was elected to the Order of the Coif. Simons came to the Michigan Law School from Yale where he received Distinction in his major, Philosophy, and worked for the Legal Aid Bureau of the New Haven Legal Assistance Association, Inc.



David W. DeBruin was clerk for Judge Harry T. Edwards of the United States Court of Appeals, Washington, D.C., Circuit in 1980-81. He received his J.D. *Summa Cum Laude* in 1979 and was elected to the Order of the Coif. DeBruin came to the Law School after receiving his A.B. with Highest Distinction from Indiana University in a combined major of Mathematics and Economics.

Thirty-five other Michigan Law School graduates have also begun appointments as judicial clerks for the 1981-82 term. The following is a list of clerks in lower federal and in state courts:

1981 University of Michigan graduates with judicial clerkships

Joel Bennett

clerk to
The Honorable Joe Eaton
United States District Court
Southern District of Florida
Miami, Florida

Greg Bonfiglio

clerk to
The Honorable Howard F. Corcoran
United States District Court
District of Columbia
Washington, D.C.

Benjamin Calkins

clerk to
The Honorable Julian Abele Cook
United States District Court
Eastern District of Michigan
Detroit, Michigan

JoAnn Carlson

Michigan Court of Appeals
Lansing, Michigan

Denise Chrysler

Michigan Court of Appeals
Detroit, Michigan

Thomas C. Clinton

clerk to
The Honorable David Nims
United States Bankruptcy Court
Western District of Michigan
Grand Rapids, Michigan

Anthony Damiano

Michigan Court of Appeals
Lansing, Michigan

David L. DeBruin

clerk to
The Honorable John Reynolds
United States District Court
Eastern District of Wisconsin
Milwaukee, Wisconsin

Stuart Gasner

clerk to
The Honorable Roger Robb
United States Court of Appeals
District of Columbia Circuit
Washington, D.C.

Deborah Greenspan

clerk to
The Honorable Horace W. Gilmore
United States District Court
Eastern District of Michigan
Detroit, Michigan

David Gregg

clerk to
The Honorable Anthony Celebrezze
United States Court of Appeals
Sixth Circuit
Cleveland, Ohio

David Hazelton

clerk to
The Honorable Herbert Y. C. Choy
United States Court of Appeals
Ninth Circuit
Honolulu, Hawaii

Harold Hickok

Oregon Supreme Court
Salem, Oregon

Richard Hoffman

clerk to
The Honorable Prentice Marshall
United States District Court
Northern District of Illinois
Chicago, Illinois

Douglas Johnson

United States District Court
Eastern District of Tennessee
Chattanooga, Tennessee

Gwen Johnson

clerk to
The Honorable Patricia Wald
United States Court of Appeals
District of Columbia Circuit
Washington, D.C.

Randall Kaplan

clerk to
The Honorable Phyllis Kravitch
United States Court of Appeals
Fifth Circuit
Atlanta, Georgia

Kerry Kircher

clerk to
The Honorable Charles Joiner
United States District Court
Eastern District of Michigan
Detroit, Michigan

Jeffrey Lehman

clerk to
The Honorable Frank Coffin
United States Court of Appeals
First Circuit
Portland, Maine

Douglas Levine

clerk to
The Honorable J. Edward Lumbard
United States Court of Appeals
Second Circuit
New York, New York

Hal Levinson

clerk to
The Honorable James McMillon
United States District Court
Western District of North Carolina
Charlotte, North Carolina

Eric Linden

clerk to
The Honorable Cornelia Kennedy
United States Court of Appeals
Sixth Circuit
Detroit, Michigan

Alexander F. MacKinnon

clerk to
The Honorable Albert J. Engel
United States Court of Appeals
Sixth Circuit
Grand Rapids, Michigan

Alan Madry

clerk to
The Honorable John Feikens
United States District Court
Eastern District of Michigan
Detroit, Michigan

Richard Maki

Alaska Court of Appeals
Anchorage Alaska

Ken Mennemeier

clerk to
The Honorable Robert Boochever
United States Court of Appeals
Ninth Circuit
Juneau, Alaska

Marcia Murray

clerk to
The Honorable James Cobey
California Court of Appeals
Los Angeles, California

Darlene Nowak

clerk to
The Honorable George Brody
United States Bankruptcy Court
Detroit, Michigan

Alan Pemberton

United States Court of Appeals
District of Columbia Circuit
Washington, D.C.

Wayne Pratt

clerk to
The Honorable James L. Ryan
Michigan Supreme Court
Detroit, Michigan

Ron Sarachan

clerk to
The Honorable Edward Weinfeld
United States District Court
Southern District of New York
New York, New York

Peter Shinevar

clerk to
The Honorable Harry Edwards
United States Court of Appeals
District of Columbia Circuit
Washington, D.C.

Anne VanderMale

clerk to
The Honorable Douglas Hillman
United States District Court
Western District of Michigan
Grand Rapids, Michigan

Noah Yanich

clerk to
The Honorable Richard Maher
Michigan Court of Appeals
Detroit, Michigan

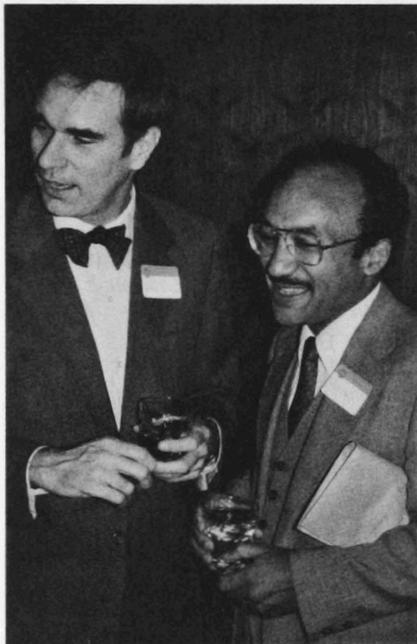
Elizabeth Zatina

Michigan Court of Appeals
Detroit, Michigan

Michigan Law Review Publishes Joseph Vining's Article on Federal Courts

Professor Joseph Vining's discussion of the transformation of the federal court system into an increasingly depersonalized bureaucracy which was reported in the last issue of *Law Quadrangle Notes* will be published in full by the *Michigan Law Review*. It will appear in the December, 1981 issue (Volume 80, No. 2) along with an opposing view by Michigan Law School alumnus and former faculty member, Judge Harry T. Edwards of the United States Court of Appeals for the Washington, D.C. Circuit.

Questions about the publication of other material first appearing in *Law Quadrangle Notes* should be directed to: Pat Sharpe, Hutchins Hall, University of Michigan Law School, Ann Arbor, Michigan 48109. Telephone: (313) 764-6375.



Friendly rivals Professor Joseph Vining (left) and Justice Harry T. Edwards put their intellectual debate temporarily to rest at the Committee of Visitors Dinner.

Announcing LARLF III

The Third Annual Law Alumni Reunion and Law Forum will be held this Spring on May 20, 21, and 22, 1982. Please reserve these dates now. Invitations with full information on activities planned have been mailed.

Members of 5-year classes (those ending with 2 or 7) interested in holding reunions at LARLF III may still contact Scott Fleming in the Alumni Office for help with planning class functions or in arranging for a separate class table at the All Class Dinner Friday night.

Contact: Scott Fleming, Michigan Alumni Association, Michigan Union, Ann Arbor, Michigan 48109 (313) 764-0384.

Law Alumni Directory

Copies of the 1981 *Directory of Michigan Law Alumni* are still available. To get a copy of this first updating since 1970, send a check for \$15.00 payable to U-M Law School Directory to the

Law School Fund Office
118 Legal Research Building
Ann Arbor, Michigan 48109.

The new directory lists the names of members of all Law School classes from 1901 through 1981, a total of almost 14,000 alumni. Listings are arranged alphabetically as well as geographically and by class. The position, business address, and academic history of each person is also given.

Alumni Memberships

Interested in membership in the University of Michigan Alumni Association?

For information drop a note to:
Richard Emmons
U-M Alumni Association
Michigan Union
Ann Arbor, MI 48109



Law School Faculty at the Dedication Left to Right Front Row: Wade McCree, L. Hart Wright, Thomas Green, Susan Eklund, Christina Whitman, Douglas Kahn, Dean Terrance Sandalow, Michael Rosenzweig, Marcus Plant, Roy Proffitt, Ellen Ticknor Row 2: Dennis Ross, Allan Stillwagon, Francis Allen, John Reed, Marvin Niehuss, Theodore St. Antoine, Sallyanne Payton, Roger Cunningham, Olin Browder, Alex Aleinikoff Row 3: Gerald Rosberg, Vincent Blasi, William Bishop, David Chambers, James White, Yale Kamisar, Whitmore Gray, Jerold Israel, James Adams, Peter Westen, Joseph Sax Row 4: Donald Regan, Lee Bollinger, Samuel Estep, Alfred Conard, Daniel Rubinfeld, William Pierce Row 5: Joseph Vining, Carl Schneider, Andrew Watson, Lawrence Waggoner, Peter Steiner, Edward Cooper, Richard Lempert, Eric Stein Row 6: Beverley Pooley, Philip Soper, Allan Smith, Steven Pepe, Layman Allen, John Jackson, Thomas Kauper, Luke Cooperrider, Roy Daniel

