

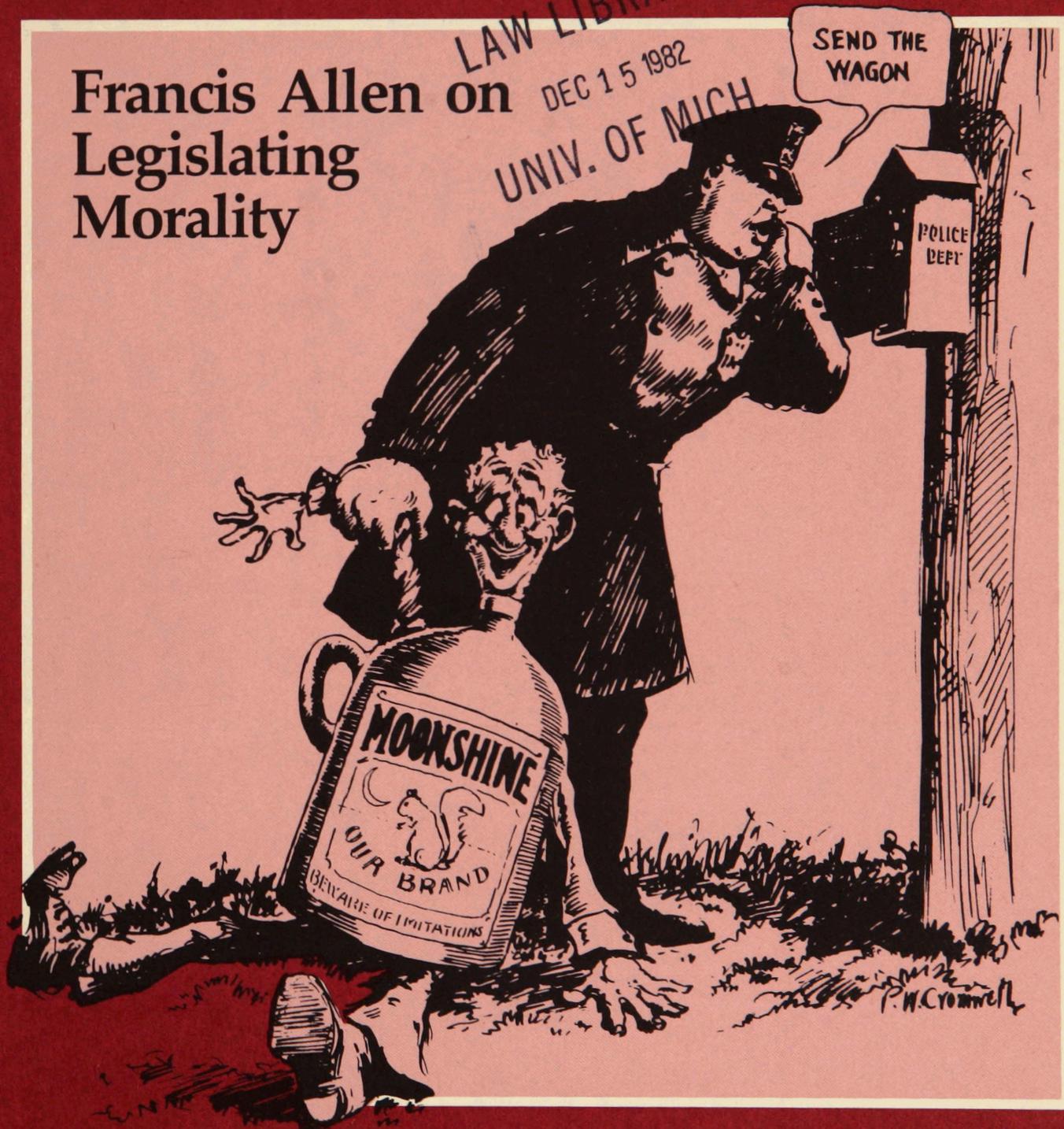
Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL

VOLUME 27, NUMBER 1, FALL 1982

Francis Allen on Legislating Morality

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St. Antoine: Collective Bargaining Law Is Inadequate
McCree on Excellence in a Democracy
Advice to Young Lawyers from Woodcock and Richardson

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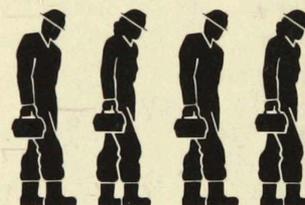
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The assassination attempt

"It can hardly have been the conduct of a madman"

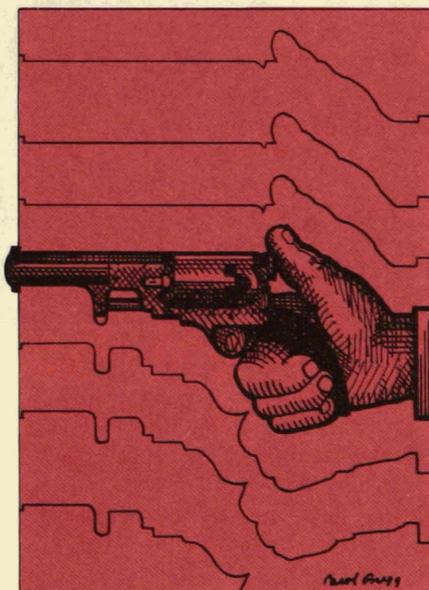
by Yale Kamisar

From the moment the would-be assassin opened fire until many days after he was found not guilty by reason of insanity, the press was fascinated by the case. The very same day that it reported the assassination attempt "in the open street, and in the broad face of day," the *Times* considered but quickly dismissed the possibility of insanity: "The defendant's purpose was carried out with the most cold-blooded determination. . . . His demeanor throughout was cool and collected, nor did there appear any evidence of insanity."

When, several days later, it became plain that the defendant was indeed going to rest his defense on the ground that he was insane at the time he committed the act, the *Times* was incredulous: "The facts, meager as they are, would seem to warrant the conclusion that whatever eccentricity there may have been in the man's behavior, there has been so much of 'method' in it—such symptoms of foresight, prudence, deliberation, and design, that it can hardly have been the conduct of a madman."

It turned out, however, that it was a good deal easier to convict the defendant in the court of public opinion than in a court of law. At the trial, the prosecutor made a valiant effort. He stressed that "the public safety requires that the insanity defense should not be too readily listened to; and, above all, the public safety requires that the atrocious nature of the act itself should not form any ingredient in that defense." There are few crimes committed,

he pointed out, "and, above all, crimes of an atrocious nature like this, that are not committed by persons laboring under some morbid affection of the mind; and it is difficult for well-regulated minds to understand the motives which lead to such offences in the absence of that morbid affection of the mind." The prosecution's argument fell on deaf ears.



The defense had a small army of medical witnesses who testified that the act of the defendant had been committed while he was under a delusion and that the shooting was "a carrying out of the pre-existing idea which had haunted him for years." The doctors also pointed out that it was not uncommon for "a person insane upon one point to exhibit great cleverness upon all others."

The defendant's lawyer, one of the ablest in the land, made

the most of this medical testimony. He pointed out that "a man may be mad and yet in carrying out the fell purposes which a diseased mind has suggested, may show all the skill, subtlety, and cunning which the most intelligent and sane would have exhibited." He emphasized that though a person's mind "may be sane upon other points," mental disease may render it "wholly incompetent to see one or more of the relations of subsisting things around him in their true light, and though possessed of moral perception and control in general," a person "may become the victim of some impulse so irresistibly strong as to annihilate all possibility of self dominion or resistance in the particular instance." If the jury should find these were the facts in the instant case, he concluded, the defendant "cannot be made subject to [criminal] punishment, because he is not under the restraint of those motives which could alone create human responsibility."

The defendant's argument prevailed, but the verdict of not guilty by reason of insanity caused such a public outcry that the matter of criminal responsibility became the subject of spirited debate among the nation's political leaders. One house of the national legislature summoned the judges to explain the law governing such cases. The Queen of England, who had read the *Times* reports of the case assiduously and who was not without fears that some day she might catch a bullet herself, was so upset by the outcome of the case that she wrote to the national leader who was the intended victim of the assassination as follows:

"The law may be perfect, but how is it that whenever a case for its application arises, it proves to be of no avail. We have seen the trials of [assassins and would-



be assassins] conducted by the ablest lawyers of the day and *they allow and advise* the jury to pronounce the verdict of Not Guilty on account of Insanity whilst *everybody* is morally convinced that [the] malefactors were perfectly conscious and aware of what they did!"

The case I have been discussing is not *United States v. John Hinckley*—which many regard as striking evidence of the grotesqueness of our modern legal system—but *The Queen v. Daniel M'Naghten*, the most famous, indeed the foundational, insanity case in Anglo-American jurisprudence. The *Times* was the *London Times*; the Queen was Queen Victoria; the year was 1843; all quotations above describe the attempted assassina-

tion of Sir Robert Peel, Prime Minister of Great Britain.

Early in August John Hinckley was ordered committed to a mental hospital for an indefinite period. This suggests there may yet be one more parallel between his case and M'Naghten's. Although "acquitted," M'Naghten never regained his liberty. He was confined in Bethlem Hospital until 1864 when he was transferred to the newly opened Broadmoor Institution for the criminally insane. There he died the following year. M'Naghten's lawyer, on the other hand, fared very well. After receiving much credit and fame for his skill and eloquence in defending M'Naghten, Alexander Cockburn was knighted in 1850, became Attorney General the following year,

and appointed Lord Chief Justice of the Queen's Bench in 1859.

M'Naghten, if he had had his wits about him, might well have wondered whether his famous "acquittal" had been a victory for himself or only for his lawyer. How long will it take for an institutionalized John Hinckley to start wondering the same thing?

Yale Kamisar is Henry K. Ransom Professor of Law, The University of Michigan. This article originally appeared in the August 30, 1982 issue of the National Law Journal and is reprinted with permission. For a rich collection of materials on the M'Naghten case, including press reports of the case, see L. Weinreb, Criminal Law: Cases, Comments & Questions 433-53 (3d ed. 1980).

Academy membership for Dr. Bolgár

Lifetime commitment to comparative law recognized

The Communists took over in Hungary in the summer of 1948, but Vera Bolgár did not flee the country then. She was too committed to completing her law degree. As a woman, Dr. Bolgár had been made to appreciate the privilege of being allowed to study law. Women were not admitted to legal studies in Hungary when she began her higher education before the second world war, and Dr. Bolgár worked instead for a doctorate in linguistics and languages. When equality of the sexes was declared in 1946, she immediately registered to study law. In December of 1948 she became the first woman to graduate in law in Hungary.

This spring Dr. Bolgár's many contributions to comparative law won her election to associate membership in the International Academy of Comparative Law in Paris. While this honor recognizes Dr. Bolgár's writings and her devoted work for the *American Journal of International Law* during the thirty years she served as a research associate at the Michigan Law School, it was her original decision to finish her legal training in Hungary which placed the most extreme demand on her courage and her powers.

While still in Hungary she was invited to conduct seminars in Comparative Law at a university in Szeged. After the Communist take-over, a disapproving party member appeared in the front row of her classroom. At the end of her lecture he challenged her disapprovingly: "Comrade, I was very disappointed in your lecture.

You mentioned Lenin's name only once." Dr. Bolgár replied, "You are wrong Comrade. I did not mention him at all."

This interchange, which led to Dr. Bolgár's being asked to discontinue her lectures, had a fortunate consequence. It brought her to the attention of John P. Black, a cultural attaché with the American embassy in Budapest who helped with her nightmarish escape from Hungary. While he was unable to take her out of the country, he did take her through heavily patrolled areas to the border in his diplomatic car and did carry money and some belongings to Vienna where she later found them.

The story of her escape is like a terrifying nightmare, still vivid and alarming even when retold, 30 years later, in Dr. Bolgár's

pleasant garden in Ann Arbor. It involved making contact with the mother-in-law of a janitor whom she knew at the law school and, through her, with a profiteer who smuggled people over the border. It involved the crushing discovery that she had arrived at the border during the full moon, when escape would be impossible, and would have to return later in the month. It involved fabricating an excuse to return, this time not in a diplomatic car, that was accepted by an armed and suspicious guard only because he could not read the dubious verification Dr. Bolgár thrust before him. It involved an endless wait at the smuggler's house on the appointed night, while he did not appear and his drunken mother grew abusive. Ultimately it involved the decision to pay an inexperienced boy to lead her to the border and a solitary crossing of the barbed wire and heavily guarded no-man's land. Exhausted and disarrayed, Dr. Bolgár arrived in an Austrian border town only to discover that the shillings sewn



Dr. Vera Bolgár

Michigan scholars in the Academy

The International Academy of Comparative Law draws members from all nations represented by the United Nations Scientific and Cultural Organization. Counted among the total of associate and regular members are three from the University of Michigan Law School in addition to Dr. Vera Bolgár. Professor Alfred F. Conard, Professor Whitmore Gray, and Professor Eric Stein are also among the approximately fifteen Americans who have been elected into the Academy.

The Academy, which was founded in the 1930s under the auspices of the French government, seeks to advance the study and understanding of comparative law through international cooperation. To that end, the Academy sponsors a comparative law congress every four years where general reporters present papers discussing research on designated topics conducted by scholars in various countries. These are later published by the Academy.

Professor Conard, who is Henry M. Butzel Professor of Law, has been an associate member of the Academy since 1972. This year he was elected to titular membership in the organization. The number of such members is limited to fifty from throughout the world. This fall he attended the Academy's eleventh International Congress of Comparative Law where he was general reporter on the topic, "What Law Governs the Determination of Who Controls a Corporation that Has a Foreign Subsidiary?" This year's congress was held in Caracas, Venezuela.

Professor Gray, who has been an associate member of the Academy since 1976, was general reporter on "Case Decisions as Sources of Law" at the 1974 congress in Tehran and on "Product Liability" in Budapest in 1978. Professor Gray has just returned to the Law School after a year spent as a visiting scholar at the University of Tokyo. Last April, as one of the first law professors invited by the

Chinese Academy of Social Sciences, he lectured on American contract law in Beijing and Shanghai.

In 1980 Professor Stein, who is a specialist in disarmament and weapons control law as well as in comparative law, was elected to associate membership in the Academy. Professor Stein returned this semester from Hamburg, West Germany, where he had been doing research at the Max Planck Institute, supported by an award from the Alexander von Humboldt Foundation of Bonn. Fittingly, Professor Stein holds the Hessel E. Yntema professorship which is named for one of the Law School's most renowned scholars of international law.

Professor Yntema initiated Michigan's involvement with the International Academy of Comparative Law. He and Professor Roscoe Pound of Harvard Law School were the American representatives to the first international law congress in 1938.



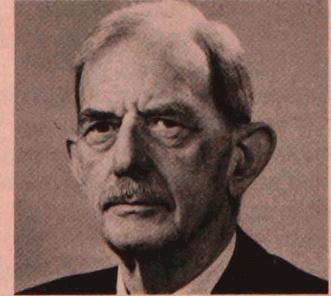
Alfred E. Conard



Whitmore Gray



Eric Stein



Hessel E. Yntema

in the hem of her coat that were to pay her bus fare to Vienna had been devalued into worthlessness. To an Austrian woman who wordlessly paid her fare, Dr. Bolgár still displays overwhelming gratitude.

Like her escape, Dr. Bolgár's arrival in America in 1949 was fortuitous. Professor Hessel E. Yntema of the Michigan Law Faculty was intent on founding an American journal of comparative law at that time. With her doctorate in languages and training in comparative law, Dr. Bolgár was the ideal person to help with setting up and organizing publication of the periodical.

The American Journal of Comparative Law, which published its first issue in 1952, has since become the nation's most respected review in the field. At that time, however, its success was unsure. There were few scholars of comparative law, and the journal depended on the collaborative efforts of the law schools of ten major universities. They contributed funds for the printing costs, as well as faculty members to serve on the journal's editorial board. The magazine quickly achieved national prominence and, with growing interest in the field, the number of contributors and of sponsoring institutions has multiplied.

Dr. Bolgár wrote, rewrote, and translated articles for the journal throughout Professor Yntema's editorship and during that of Professor Alfred F. Conrad of the Michigan Law School faculty, who succeeded Yntema. It is for her contributions to this important outlet for legal scholarship as well as for her own writings that Dr. Bolgár has been recognized with her election into membership in the International Academy of Comparative Law. This is a distinction which few scholars achieve. Although some six

hundred people attended the most recent congress organized by the Academy and about 200 papers were presented on that occasion, less than 100 scholars from throughout the world have been elected to regular or associate membership in the Academy. Those so distinguished must first be nominated by their nation's representatives to the Academy and then voted on by the Academy's international committee. Dr. Bolgár will become one of very few women among the Academy's members, and one of only about fifteen scholars who represent America in the international organization. Election to membership in the Academy constitutes recognition of the value of the nominee's activities, notably publications, in the field of comparative law.

Dr. Bolgár has written on American and German law and has served as an expert witness in trials requiring knowledge of

German and Hungarian law. Her most recent article is indicative of the scope of her thinking and research. Entitled "The Fiction of the Corporate Fiction from Pope Innocent IV to the Pinto Case," it argues that the recent, widely published trial in which Ford motor company was tried as a person in a regular common law criminal court in Elkhart, Indiana is the first occasion since the twelfth century in which the fiction that corporations cannot be sued in criminal law has been challenged.

Dr. Bolgár is clearly delighted by the Academy's recognition of her work. "Perhaps," she says, "it makes the terrors I went through all worth it." Nevertheless, it has not dissipated her memories of them and her appreciation of the calm of her flower garden; nor did the terrors undermine the independence, the intelligence, and energy of this remarkable person.

All the news that's fit to print is good

The New York Times reports on the Michigan Law School

This summer David Margolick, a Stanford law graduate who writes on legal issues for *The New York Times*, came to Ann Arbor to find out what impact Michigan's financial hardships might have had on the excellence of the Law School. His verdict is evident; his story ran under the headline, "Michigan Pride, Its Law School, Eludes Decline." Margolick says that the School's unusual history as a public institution which has attracted generous private support

is responsible for its continuing excellence.

The complete text of the article is reprinted here for those who missed *The Times* last July 20th.

ANN ARBOR, Mich.—"Smaller is better" is the motto these days at the University of Michigan. Faced with severe budgetary problems induced by the state's economic troubles, the school has already eliminated its geography department, and the departments

of art, natural resources and education could be the next to go.

But at the University of Michigan Law School, things have never been better. The lawn in the middle of the Law Quadrangle, ravaged by generations of touch football players and Frisbee throwers, has recently been resodded; the slate walkways between the Legal Research Building, the Lawyers Club and Hutchins Hall have been relaid. The most impressive feature, moreover, is barely visible: the new underground law library, designed by Gunnar Birkerts, which opened last fall.

For a state institution like the University of Michigan, the dramatic new building, a kaleidoscope of light and mirrors and sky, is a financial as well as an architectural feat. It cost \$9.5 million, and not a penny of the price was borne by the taxpayers.

The entire law complex, Terrance Sandalow, dean of Michigan, has suggested, is a metaphor for the institution he heads. With the exception of a tacky aluminum addition built in the 1950's, the law school was built with private funds. While tax money may have helped keep it functioning, private contributions have given Michigan what Dean Sandalow calls its "margin of excellence." It is this increment that has made it, by common consensus, the top state law school in the country, rivaled only by such private institutions as Harvard, Yale, the University of Chicago, and Stanford.

Because of its stature, Michigan Law School is just about the sacrest cow on this troubled campus. Concerned about maintaining its reputation for academic excellence in a time of retrenchment, the University of Michigan seems to need its law school as much as the law school needs the university and has not

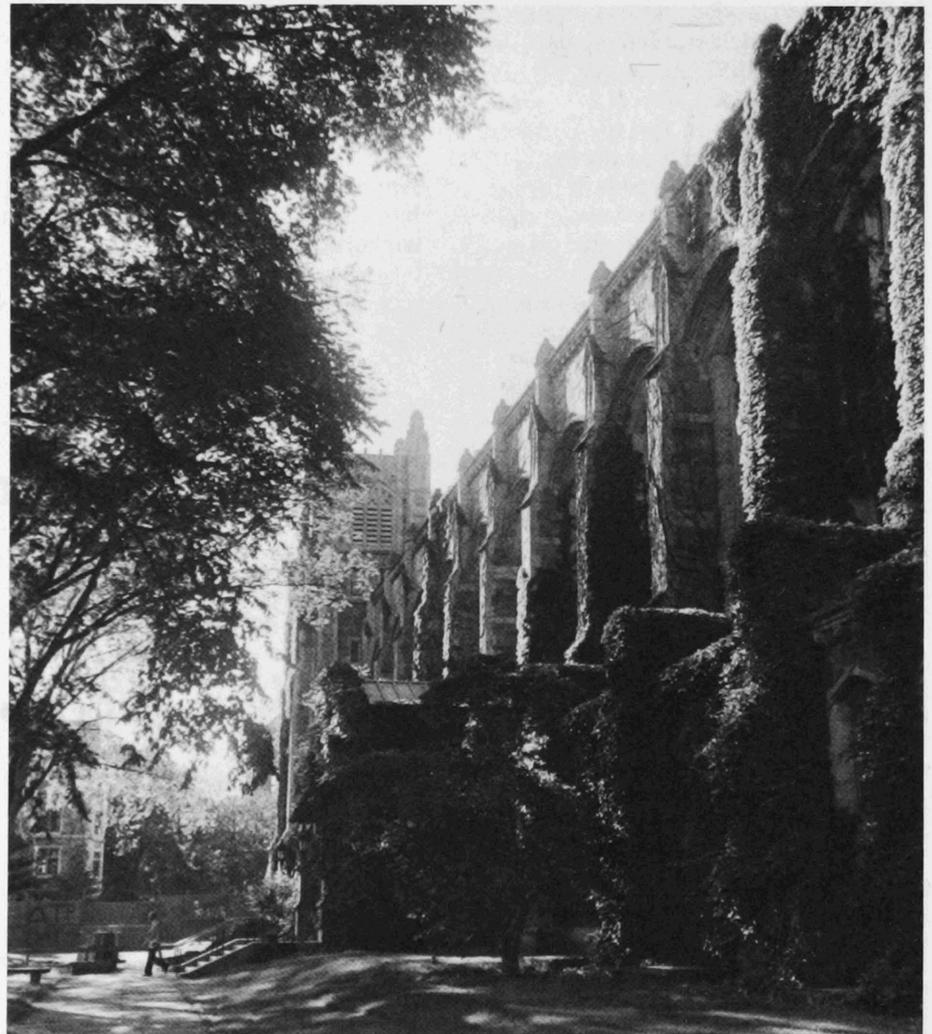
asked it to make any special sacrifices.

"We recognize the law school as something special and treat it accordingly," Harold T. Shapiro, Michigan's president, said in an interview. "It's an investment we can't afford to let deteriorate in any way."

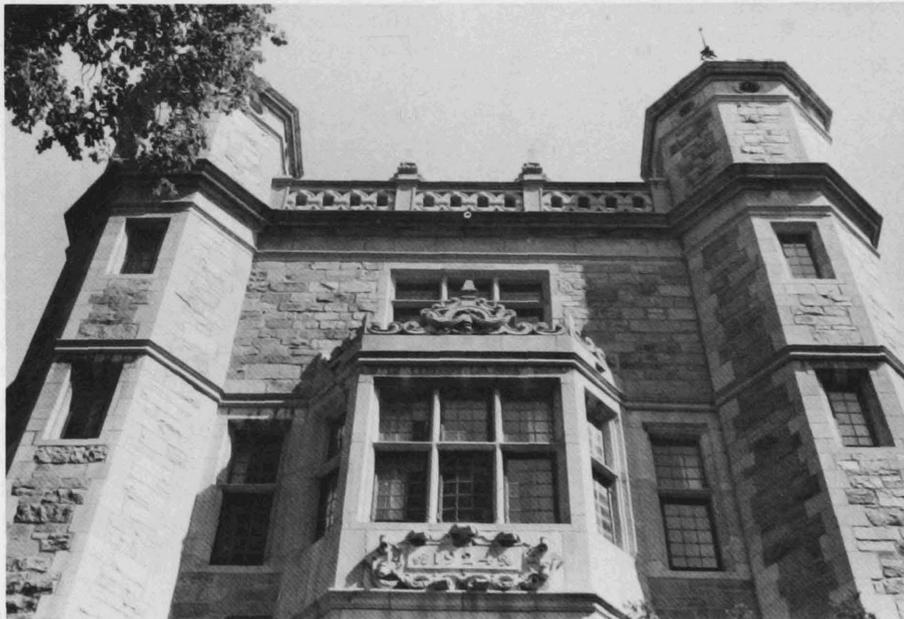
From the moment it opened in 1859, Michigan Law School has been a state institution in name only. Only 15 to 20 percent of its

financing comes from the state; more than half of its students come from outside Michigan, and upon graduation, as many of them head to New York, Washington and Chicago as Detroit. Michigan is one of the hardest law schools to get into, with more than 5,400 applications for 360 places. This fall, three of its graduates will be clerks at the United States Supreme Court, a number exceeded only by Harvard and Yale.

*M*ichigan Law School "may well represent the future of higher education" says *The New York Times*.



B R I E F S



In fact, in many ways Michigan Law School seems closer to the Ivy League than the Big 10. Partly the identification is purely architectural; on a campus filled with government-issue, Eisenhower-era buildings, the Gothic Law Quadrangle exudes Eastern elitism.

On a more spiritual level, moreover, the tumult and the shouting of the Michigan campus

doesn't always reach the law school. When student strikes closed down the rest of the campus in the late 1960's, the Legal Research Building was the only library on campus to remain open; on those rare occasions when Bo Schembechler's Wolverines lose a football game, the reaction here is more likely to be indifference or even smug satisfaction than chagrin.

At the same time, Michigan Law School has absorbed some of the peculiar serenity of this college town. The word Michigan faculty members use most frequently to describe the place is "collegial." Unlike Harvard, which has been torn asunder on generational and political lines, there is little factionalism here. Tenure, the most divisive topic in some schools, is not an issue here because no one has ever been denied it.

Moreover, unlike the University of Chicago Law School, where the insufficiently quick-witted are known to "flunk lunch," Michigan offers frequent and supportive faculty contact. The school is remarkably free of the tumescent egos who fill legal academia; though it is occasionally guilty of aping Harvard Law School, the "publicity or perish" philosophy of some Harvard faculty members is nowhere in evidence here.

"Those who are really interested in living on a fast track, who are concerned about getting their name in Time magazine and having movers and shakers for their friends, don't come to Ann Arbor," Dean Sandalow said. "You come to Ann Arbor if you're curious, if you're committed to the intellectual life."

Some contend, however, that the school's civility has been purchased with excessive caution. Neither end of the spectrum in contemporary American legal education—the law and economics perspective of the University of Chicago or the Marxist analysis of the Critical Legal Studies movement—is represented on the faculty here. Michigan professors consider both schools of thought too simplistic and ideological to be scholarly, but some will admit they find them somewhat threatening as well.

Though there have been some

exceptions, such as Prof. Alfred Conard's pioneering work on no-fault compensation schemes, Michigan Law School was long considered a stuffy, conservative place. Through the end of the 1950's, it defined its mission narrowly, more as the training of client caretakers rather than social engineers.

All of this began to change in the 1960's, under Dean Allan F. Smith, when the criminal law specialists Yale Kamisar and Jerold Israel, the labor lawyer Theodore St. Antoine, Joseph Sax, an environmental law authority, and Mr. Sandalow joined the faculty. Under Dean Francis Allen, a host of younger legal scholars were added with backgrounds in sociology, philosophy and history, including Joseph Vining, Vincent Blasi, Richard Lempert, Philip Soper and Donald Regan.

Michigan has continued, however, to ignore such fads and fashions as clinical education. The school considers its calling to be higher than imparting what Dean Sandalow called "instantaneous practicality."

"Most students come to the law school aspiring to be useful, rich and/or powerful, but applicants should understand that assuring such attainments is not the primary end of the school," the Michigan catalogue states. "Its goal is to bring the whole of human insight to bear on the study of the law and its institutions."

Unlike many of its rivals, Michigan has never catered primarily to the wealthy. In 1871, it became the first school in the country to award a law degree to a woman, and it was the second to graduate a black. In 1894 it admitted its first Hispanic.

Ironically, the school's democratic traditions are precisely what turned it into an elite institution.

Who was that man in the dean's chair?

It is impressive how vividly Mr. Margolick was able to portray the Law School in his brief article. Although he visited Ann Arbor for only a few days, at a time when most students and many faculty members were not on campus, Mr. Margolick caught the atmosphere of the Quadrangle admirably. Dean Sandalow expressed his pleasure in the article, while noting, "Mr. Margolick of necessity omitted what I regard as the most impressive characteristic of the School, that a faculty of very considerable distinction might be put together solely from those whose names are not mentioned in the article."

The hiring of those who are mentioned is also not recorded with perfect accuracy. Understandably, Margolick did not discover that some of the faculty members he says were hired during Allan F. Smith's deanship were actually invited to join the Law School during the one year in which Judge Charles Joiner served as acting dean. To set the record straight, then, we offer here the dates of hire of all current tenured or tenure-track members of the Law School faculty who came to the school after Allan Smith became dean in 1960.

For an accurate record of faculty hiring before that time, one may consult Elizabeth Gaspar Brown's history

of the first one hundred years of the Law School, *Legal Education at Michigan, 1859-1959*.

Deanship of

Allan F. Smith ('60-'65)

Jerold F. Israel ('60-'61)
Frank R. Kennedy ('60-'61)
Beverley J. Pooley ('61-'62)
Douglas A. Kahn ('63-'64)
Thomas E. Kauper ('63-'64)
James J. White ('63-'64)
Yale Kamisar ('64-'65)
Theodore J. St. Antoine ('64-'65)

Acting Deanship of

Charles W. Joiner ('65-'66)

Francis A. Allen
Layman E. Allen
John H. Jackson
Joseph L. Sax
Terrance Sandalow

Deanship of

Francis A. Allen ('66-'71)

Robben Fleming ('66-'67)
Richard O. Lempert ('67-'68)
Donald H. Regan ('67-'68)
Peter O. Steiner ('67-'68)
David L. Chambers ('68-'69)
Joseph Vining ('68-'69)
Vincent A. Blasi ('69-'70)
James A. Martin ('69-'70)

Deanship of

Theodore J. St. Antoine ('71-'78)

Edward H. Cooper ('71-'72)
Thomas A. Green ('71-'72)
Lee C. Bollinger ('72-'73)
E. Philip Soper ('70-'73)
Peter K. Westen ('72-'73)
Lawrence W. Waggoner ('73-'74)
Steven D. Pepe ('74-'75)
Sallyanne Payton ('75-'76)
Christina B. Whitman ('75-'76)

Deanship of

Terrance Sandalow ('78-)

Michael Rosenzweig ('78-'79)
T. Alexander Aleinikoff ('80-'81)
Wade H. McCree, Jr. ('80-'81)
Dennis Ross ('80-'81)
Carl E. Schneider ('80-'81)

More than with any other law school of its caliber, Michigan graduates have come from poor backgrounds and gone on to great success—success they have often attributed to their alma mater. One such alumnus, the New York lawyer William W. Cook, donated \$16 million to the school, which built the Law Quadrangle and provided funds for faculty research.

Fifty years after Cook's bequest, when Michigan needed more library space, 2,000 "friends and alumni" once again responded, with enough money not only to build the library addition but also to support four new professorships and increase scholarship funds. But with the money the alumni issued a caveat: The new library had to go underground, lest it clash with the quadrangle's Gothic splendor.

Initially, the faculty viewed the plan skeptically, scouring medical and psychological literature on prolonged subterranean living. But in some ways the new building seems peculiarly well suited to this institution, which, though it has shed much of its conservatism, is still reluctant to flaunt its brilliance. It stands as well for a school that, far from going into decline, may well represent the future of higher education in an era of limits.

"The line that separates 'public' and 'private' institutions, if one looks at reality rather than legal forms, is becoming harder and harder to make out," Dean Sandalow said. "In some ways the example of Michigan Law School, drawing from both sectors, is the model for what all great institutions will be."

Annual grants for Michigan Law students

The principle of reciprocity is generously displayed

This fall The University of Michigan Law School will begin receiving grants of \$100,000 per year from the S. K. Yee Scholarship Foundation of Hong Kong. Funds have already been received by the Law School to support the grants for the first three years. A trust fund will be established during that period which will support the annual grants in the future.

The donor, General S. K. Yee, has been Chairman of the United Chinese Bank of Hong Kong for over three decades. He wishes to bolster and enhance American leadership in the world with his contribution to legal education. General Yee sees the legal profession as having been a dominant source of political leadership in America and the world.

The Foundation will make scholarships of \$5,000 annually available to twenty meritorious law students who will be selected by the dean. Expressing his gratitude both for this generous gift and for the sentiment underlying it, Dean Terrance Sandalow said, "As an American and a lawyer I am moved by the confidence you have expressed in us." He noted that General Yee's aim of fostering leadership makes his choice of Michigan Law School as a recipient of the fellowships a particular honor. One other American law school, The University of California at Berkeley, will receive similar grants.

The gift, said Sandalow, "will make a significant contribution to our ability to ensure that talented men and women, whatever their



need, will be able to obtain a legal education at Michigan." The scholarships will be open to all law students without regard to race, color, country of origin, creed, or sex.

General Yee, who served with the armed forces of the Republic of China in World War II and before, studied in the United States as a young man. He received a B.A. degree from Michigan in 1927. His studies in America at that time were made possible through another's generosity, an experience which showed General Yee the importance of financial aid to deserving and needy students. Having been a recipient of such aid himself, General Yee believed that he had a moral obligation to reciprocate. In Chinese culture it is customary

for the giver of a gift to expect that the recipient will feel morally bound to return a similar sentiment.

Accordingly, General Yee established the fellowships bearing his name to provide assistance to others. In keeping with the philosophy of reciprocity, recipients of Yee fellowships will be asked to acknowledge their moral obligation to contribute to the education of future law students. They will be asked to contribute to the Law School, once they have become established in their careers, in amounts at least equal to those they received.

This is a familiar form of aid at Michigan Law School, Sandalow said. For the past thirty years law students have been offered part of their financial assistance in the form of "moral obligation loans." Many recipients have made gifts to the school well in excess of the amounts originally received, Sandalow said. Repayments by recipients of Yee fellowships will be used to replenish and augment the funds supporting the scholarships.

This gift comes at a particularly opportune time. Current reductions in federal loan programs, coupled with the rising cost of education, threaten the ability of many exceptionally able young people to attend law school. The magnitude and nature of General Yee's gift, Sandalow said, make it "a magnificent contribution toward our efforts to assure that no meritorious person is denied a legal education at Michigan solely for financial reasons."

The financial structure of the program, including payments to scholarship recipients through the law schools, will be administered by Irving Trust Company of New York, which has a long-standing relationship with General Yee and with the United Chinese Bank.

Professor Payton in Action

How research can improve public policy

Coming to law school teaching from her service as chief counsel to the Urban Mass Transportation Administration in the U.S. Department of Transportation made Sallyanne Payton dramatically aware of the potentially close relationship between academic legal study and the practice of administrative law. She views the academy as a place in which scholars can do the long-term thinking necessary for the development of conceptually sound, farsighted public policy. Administrative law and regulatory policy are in a state of such constant flux, she believes, that legal scholars who are willing to develop usable ideas can have a large impact on public policy and the development of the law.

While much of her time is devoted to giving Michigan students insights into the intricacies of administrative law, Professor Payton also serves in three positions that illustrate how scholars can serve policymakers in administrative agencies and legislatures as well as assist in the development of court-created legal doctrine. On the Administrative Conference of the United States, Professor Payton serves as both public member and consultant. This year she began a term as member of the board of the Roosevelt Center for American Policy Studies, and she is also a member of the American Bar Association's committee on health economics.

Professor Payton has had considerable experience in working on problems of federalism and the administration of federal grant programs, subjects that have recently come into prominence as

a result of the Reagan administration's "New Federalism" proposals; it is on those subjects that she serves as consultant to the Administrative Conference of the United States. The Conference was established by Congress to exercise continual review of the federal administrative process; it is both a think tank for issues in administrative law and procedure and a deliberative body that makes recommendations for improvements. The Conference is composed of representatives of government agencies and a number of "public" members who are law professors or members of the private bar.

The Conference works through committees, which identify areas for study, hire consultants who are typically law scholars, and make recommendations to the Conference at large, which, in turn, makes recommendations to Congress and the agencies. Thus the Administrative Conference serves as a direct conduit for academic input into the policymaking process.

Agency administrators who participate in the Conference come into frequent contact with current scholarly thinking about procedure, which affords them a chance to explain and defend their existing practices while alerting them to potential objections and costs. Thus the Conference promotes discussion and reform from within.

Scholars who participate in the Conference are also influenced by the interaction. They are led to focus on practical scholarship, and come to appreciate the relationship between practice and theory in administrative law. Such

B R I E F S



Sallyanne Payton



administrative law scholarship tends to be regarded as the best thinking in the field and frequently influences judicial decisions on administrative law issues.

In her work with the Roosevelt Center for American Policy Studies, Professor Payton finds a balance for the nuts and bolts approach of the Administrative Conference. The Roosevelt Center is a non-partisan, privately supported think tank whose mission is to foster long-range contemplation of the issues which are likely to be before the American public in the decades ahead.

At the same time that the Roosevelt Center is more distanced from day-to-day decisionmaking than the Administrative Conference, it is under more pressure to prove its utility. Its aim is to offer politicians ideas based on long-range thinking that are also useful and sensible and can command a constituency. A Chicago-based group with a Washington presence, the Roosevelt Center will support research into such questions as the probable impact of the telecommunication explosion on the political process, long-term tax policy, or the implications for various policy areas of demo-

graphic change.

Since she has been at Michigan, Professor Payton has developed an interest in health care regulation, which has grown out of her teaching in the general field of regulatory law and policy. Her concern that health care regulatory problems are poorly understood and her sense of professional obligation have led Professor Payton to agree to serve on the ABA Committee on Health Care and to chair the subcommittee on Health Economics. In that setting her goal is to help those in the field to understand the structure of the health industry and to design laws and regulatory policies that will reduce the cost of health services while maintaining quality care. As a subsection of the Antitrust Section of the Bar Association, the ABA Committee on Health Care focuses primarily on antitrust issues involving the health care industry. One function of Professor Payton's subcommittee is to stimulate research and scholarship which will respond to the lawyers' pressing need for accurate descriptions of economic relations in the health care industry, now that the United States Supreme Court has decided that the anti-

trust laws will apply with full force to the health care sector.

The connections between scholarship and actual lawmaking which Professor Payton's activities demonstrate are reflected in her style of teaching. In her class on administrative law and her seminar on health care regulation this fall, Professor Payton conveys to students a vivid sense of how ideas and procedures shape both court-created legal doctrine and lawmaking by legislatures and administrative agencies.

Her goal, she says, is to encourage students to appreciate institutions and decisionmaking processes other than those centered on courts, which include legislatures and administrative agencies and private institutions exercising quasi-governmental functions.

The future belongs to lawyers who can deal with all sources of law. As a former federal official, Professor Payton admits that she would like to think that her students gain some appreciation also of the complexities and responsibilities of governance in a federal, plural, contentious and litigious political/governmental system.

Policing the police

Michigan publishes eight provocative essays

Although the application of federal constitutional law to state systems of criminal justice began relatively recently and received little attention from legal scholars before 1950, criminal cases raising issues of defendants' rights have crowded the courts in the past thirty years and articles on emerging procedural law have flooded the law reviews. "The mass of periodical literature and the volatile nature of the law it analyzes create problems even for specialists in the field and a most formidable set of difficulties for persons with more general interests," says Professor Francis A. Allen in his introduction to a volume just published by The University of Michigan Press entitled *Police Practices and the Law*.

The book identifies and focuses on four central problems in constitutional criminal law. They are: the relationship that does and should exist between the courts and the police; problems of the definition and scope of Fourth Amendment protections against unreasonable search and seizures; questions associated with police interrogation of suspected persons; and the danger that incorrect identification by prosecution witnesses may lead to mistaken convictions. In the volume, eight of the most significant articles on constitutional criminal law which have appeared in the past decade and a half are collected. All first appeared in the *Michigan Law Review*.

"The essays include some of the most seminal and widely cited discussions in the literature of the field, by writers well known for the importance of their

scholarship," says Professor Allen. They "clarify the development of leading ideas in an important area of constitutional litigation: they identify questions that have been thought to be important, the reasons for thinking them so, and the ebb and flow of doctrine. Yet," Professor Allen continues, "the essays ought not to be read simply as contributions to constitutional history. All of them, even those published in the 1960s, are important to problems being mooted and litigated today."

In his overview Professor Allen raises three fundamental questions. First he asks why questions of criminal procedure loom so large in modern American constitutional law. Next he asks why it is procedural, rather than substantive, issues which have predominated. Finally, he introduces a question which dominates the first two essays in the volume. Why, he asks, have the important political and social issues engendered by criminal justice administration been viewed in America as problems to be resolved in the courts.

This attitude is not universal, Professor Allen points out: "In no other political society have the judges assumed such large responsibilities for the decency and efficacy of criminal justice." Furthermore, he says, our continued reliance on the processes of adversary litigation to regulate police activity may not be wise.

This view is elaborated in the book's first essay, "Rule-Making and the Police," by Judge Carl McGowan of the United States Court of Appeals for the District of Columbia Circuit. Expressing

doubts about the courts' suitability to be the source for rules of police behavior and worries about the amount of the courts' time that must be devoted to that function, Judge McGowan proposes that the police be conceived of as an administrative agency responsible for promulgating and publishing rules governing its activities.

The volume includes two other essays focusing on the role of the courts in criminal procedure. In one, A. Kenneth Pye, who is former dean of the Duke University Law School and former Chancellor of Duke University, thoughtfully considers the specific achievements of the Warren court and puts them in general perspective. The second, which Professor Allen commends for its "meticulous scrutiny of the evidence," challenges the widely credited myth that the Burger court shares none of the Warren court's dedication to protecting the rights of the accused. In this article, Professor Jerold H. Israel of the Michigan law faculty examines the record of the Burger court and the tenor of its majority opinions, demonstrating that they do not reveal a move to restrict the protections which have been guaranteed to defendants.

"A Dissent from the Miranda Dissents . . .," an article in the section of the book concerned with efforts to control the abusive extraction of confessions from people suspected of a crime, is also by a member of the Michigan law faculty, Professor Yale Kamisar. In his commentary, Professor Kamisar forcefully attacks the assertions made by the dissenting justices in the Miranda Case and analyzes the constitutional bases for the majority opinion using an historical perspective.

Despite dissent and resistance to the *Miranda* decision, the current Supreme Court shows no

inclination to abandon efforts to regulate interrogation, argues another essay in this collection. Welsh S. White, who is a professor of law at the University of Pittsburgh, uses two difficult and controversial 1980 confession cases as a point of departure for his examination of the appropriate scope of modern rules governing the admissibility of confessions.

Two essays in the collection deal with the law regulating unlawful search and seizure. The first is by Professor Wayne R. LaFave of the University of Illinois Law School, who is generally regarded as the nation's foremost authority in the field. His is a landmark analysis of some of the most basic Fourth Amendment questions. Professor Allen calls

the LaFave article a "discussion of extraordinary scope," commending it as "a masterful analysis in an area in which the case law has been unusually complicated and inconsistent."

The second essay on search and seizure is a much-cited study of electronic eavesdropping by Professor Herman Schwartz of American University law school. Professor Schwartz argues that the legitimization of wide-ranging official uses of electronic eavesdropping must seriously attenuate the restraints and values of the amendment.

The volume concludes with a study of the danger inherent in the use of police lineups and of the Supreme Court's efforts to cope with these dangers. In his definitive article on the subject,

Joseph D. Grano, a member of the Wayne State University law faculty, cites a large and generally well-authenticated body of psychological knowledge suggesting that reliance on identification by prosecution witnesses may tend to result in the conviction of the innocent.

Police Practices and the Law offers assistance to those seeking to understand the problematic issues in one of the most significant areas of American public law. The problems discussed in the essays are, according to Professor Allen, "likely to be with us in the generation ahead." Those interested in gaining insight into them by ordering the book should contact The University of Michigan Press, 839 Greene St., Ann Arbor, MI, 48109.

POLICE PRACTICES AND THE LAW

Essays from the Michigan Law Review

INTRODUCTION

American Criminal Procedure: Why the Dominance of Judge-Made Law?
by Frances A. Allen

THE POLICE AND THE COURTS

Rule-Making and the Police,
by Carl McGowan
The Warren Court and Criminal Procedure,
by A. Kenneth Pye
Criminal Procedure, the Burger Court, and the Legacy of the Warren Court,
by Jerold H. Israel

SEARCH AND SEIZURE

"Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and Beyond,
by Wayne R. LaFave
The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order",
by Herman Schwartz

CONFESSIONS

A Dissent from the *Miranda* Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,
by Yale Kamisar
Interrogation Without Questions: *Rhode Island v. Innis* and *United States v. Henry*,
by Welsh S. White

LINEUPS

Kirby, *Biggers*, and *Ash*: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?
by Joseph D. Grano

Lawyers make the best clients

New library is "first class custom made"

"Should you not be selected to design this building, who would you recommend?" That was the last question which Professor William Pierce's building committee asked each architect who proposed designs for the addition to the Law School's library. For the architect whom the committee selected, Gunnar Birkerts, that tricky question epitomizes his experience "matching wits with a group of legal minds." While that process of interaction and accommodation between designer and those who would use and pay for his building may have been difficult and frustrating, it is the key to the outstanding success of the completed structure according to architect and writer Barry Kahn.

The law library addition was singled out by Kahn in an article in *Monthly Detroit* magazine as "the best example around of how contemporary architecture can function." The Law School's new building is "a real winner" says Kahn, who judged most recent buildings in the Detroit area "abysmal." His article, entitled "Why Detroit Architecture is So Awful," argues that too many contemporary buildings are architectural statements which reflect little concern for the building's users. Yet it is the clients as much as the designers who are to blame, says Kahn. Those commissioning buildings are often indecisive or unsure of their priorities. Clients who cannot describe their needs, or those who lose interest as the decision-making process forces them to ever more refined definitions, often wind up with work spaces that are inefficient and structures

which are monumental but uninviting. "It'd be easy to blame the architects," says Kahn, "but the folks who paid for these buildings seem to have gotten

exactly what they asked for."

Lawyers, on the other hand, are trained to withstand controversy and to direct adversarial proceedings in ways that produce clarification and effective resolution. In working with architect Birkerts, the law alumni, faculty, and library staff demanded several major design revisions. After they saw early models, the Law



School's representatives became increasingly convinced that any visible modern structure would impair the majesty of the Law Quadrangle.

The decision to totally bury the addition derived from their determination to preserve the integrity of the existing Gothic buildings and from Birkerts' fascination with the challenge of devising innovative ways to make a submerged structure light and inviting.



"The best example around of how contemporary architecture can function" is Michigan's addition says *Monthly Detroit*.

A really successful work of architecture, says the *Detroit Monthly* article, must be custom made. A dedicated and tenacious client with specific needs can get such a building, one which functions well and whose unique appearance is not arbitrary but grows directly from its purposes. Of the Law School addition, writer Kahn says, "it is more cheerful than most libraries," even those above ground. "Con-



trasting with one's expectations—the deeper you go, the bigger and brighter the view—the experience is exhilarating. . . . The work spaces have a wonderful glow," Kahn continues, "like daylight-filled rooms after a snowfall."

The building's functionalism and attention to the needs of users is praised by the national architecture magazine, *Architectural Record*, as it was by *Monthly Detroit*. In a cover story on the law library addition, *Architectural Record* comments: "Birkerts declares his intention of going underground without degrading the building's users, who can sit or move about in the space with no oppressive sense of burial in a remote subbasement."

Because of its extraordinary success in making the underground setting seem open and bright at a time when energy costs have awakened interest in that option, the Law School's addition is receiving wide attention. The Japanese magazine, *Architecture and Urbanism*, featured the building on its cover and in a laudatory article last July. The British publication, *Architects' Journal*, also ran an article describing the new library at Michigan.

While many contemporary buildings are inhuman in scale or impractical in layout, the Law School's addition is an outstanding success. If "awful" buildings result from the client's indecisiveness, lack of precision, and unwillingness to make objections, then putting up with the frustration and difficulty of working with exacting and deliberative lawyers may well be worth an architect's while. Gunnar Birkerts seems to believe so. He has recently agreed to design a building for the University of Iowa Law School.



On Trial: Michigan's Courtrooms

Can justice be done in a converted meat locker?

by Susan Isaacs Nisbett

In temporary district court in Munising, Michigan, no proceedings are scheduled on the second Friday of the month: the odor of liver and onions, wafting up to balcony courtrooms from the senior citizen's lunch served in the auditorium below, keeps attorneys away. In Detroit's Traffic and Ordinance Court, in the Old Wayne County Building, fewer trials make their way onto the summer docket: more frequent recesses are needed to cool down courtrooms equipped with air conditioners so noisy they prevent court recording.

Nearby, in Detroit's Lafayette Building, the judge has found a way to see around courtroom columns that provided cozy lounging spots for mischief-makers and miscreants: he installed supermarket security mirrors. No one has yet found a way, however, to disguise the flaws of the converted laundromat, across from a car wash, that serves as district court in Lincoln Park, or the Total Gas Station that processes traffic complaints in Alma.

Some Michigan courts lack adequate, secure document storage. Others lack security alarms or emergency lighting. Many courts are inaccessible to the handicapped or are marked with signs and instructions which bewilder an unfamiliar public. From Copper Harbor to Detroit, Port Huron to Ironwood, the problems confronting Michigan's halls of justice run more than case-deep, according to a landmark study conducted by the University of

Michigan's Architectural Research Laboratory (ARL) for the Judicial Coordinating Committee of the Supreme Court of the State of Michigan. The study suggests the kinds of problems which plague courts in many states and suggests minimum design standards and essential reforms.

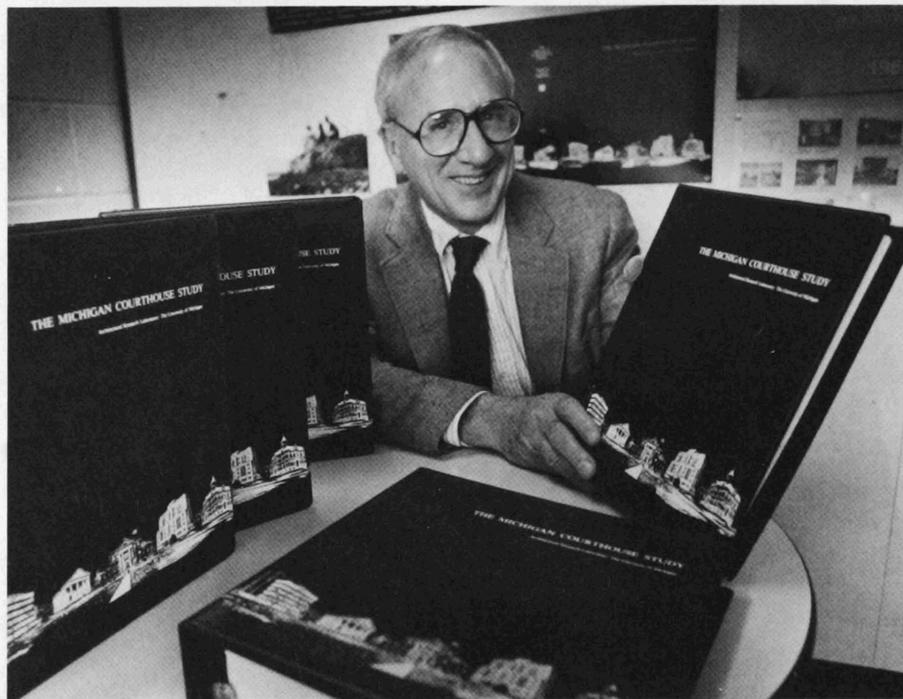
In dispassionate prose, statistics, tables, photos and drawings, the seven-volume *Michigan Courthouse Study* celebrates a limited number of court facilities—like Marquette's Circuit Courthouse, setting for the Hollywood film "Anatomy of a Murder"—and

indicts those whose architecture compromises the symbolic and functional integrity of the state's judicial system.

Leading this \$360,000 trial-by-architectural-jury, funded through the federal Office of Criminal Justice, was Jonathan King, the dapper, grey-haired U-M Professor of Architecture who directs the ARL. King describes the mammoth project's history in the language of a judge's sentence: "It took two years, five months, and 16 days—then they let me out on parole."

The state's courthouses did not get off so easily. Courts in Detroit and Wayne County—victims of dense use and under-maintenance—fared worst overall, but they held no state monopoly on poor design or design eroded by years of *ad hoc* changes.

That award must probably go to the state's district courts, last in order of creation and certainly



Jonathan King, who led the Michigan Courthouse Study, is a Professor of Architecture and the director of the Architectural Research Laboratory at the University.

last in facilities. Established by the Legislature in 1968 to handle a case load that includes civil litigation up to \$10,000, criminal misdemeanors where punishment does not exceed one year, preliminary examinations in felonies, small claims court, landlord-tenant matters, and traffic violations, district courts were often pushed into the likes of funeral homes (St. Johns), trailers (Taylor), and meat lockers (Wayne). These recycled structures announce their former use far more clearly than any sense of judicial dignity.

Not untypical of the situation King's field teams of graduate students found on their rounds of interviews was that of the district court in Utica, housed in a converted machine shop. King reels off a litany of deficiencies: a jury deliberation room that allowed easy eavesdropping by attorneys; a missing concrete block that allowed the cold winter air to penetrate the building; inadequate toilet facilities (a problem throughout the state) that created theater-length lines at recess.

What most impressed him was the prisoner holding room. "It had the thinnest hollow-core door I'd ever seen," says King, "fastened by a three-quarter-inch steel-hardened bolt. You could kick the door through and open it, but no one would bother because the room had a casement window that opened onto an alley."

The cinderblock and brick 29th District Court on West Michigan Avenue in Wayne is attached to a Poly-Gard Rustproofing garage. The facility is a former meat locker. Ersatz colonial brackets above the low-slung building's front door and multi-paned windows, half-boarded up, give its Michigan Avenue facade the air of a seedy funeral home. Inside, floor space is totally inadequate. There is no jury deliberation



The local traffic court in Alma, Michigan is housed, appropriately enough, in a Total gas station. Like many of the facilities surveyed, it is inadequate as a courthouse because it was designed for other uses and only hastily and incompletely converted.

room, prisoner holding room or court recorder's office. Juries deliberate in the court, tying it up for hours. Prisoners are detained in the court, in three green-vinyl-padded steel office chairs placed against a row of files. The court recorder has her office furniture in the court, transcribes her tapes under the watchful eye of people using the courtroom as the public waiting room that does not exist.

What space is left is divided between the judge's dais, files for which no other space can be found, folding grey-metal chairs for the public, jury seating which blocks the doorway when swung into last-minute position, and a central, single attorney's table with a partially obstructed view of the witness stand.

Things are hardly better in the clerk's office, a 13 by 28 foot space shared by eight people—two of whom rotate at one desk—and those files which have not been exiled to the already narrow access corridors beyond its counters, corridors which are also used for client-attorney conferences and jury exclusion. "The noise is just incredible," says Vivian Maton, the court administrator.

King says it was a tough task to refrain from "writing purple prose" about courts like Wayne's, or to remain cool about the dete-

rioration of facilities in Detroit's handsome, 1897-vintage Old Wayne County Building, with its graffiti-scrawled prisoner holding rooms and doorless public toilets "so bad you would have to have dysentery to go in."

What concerned King and his colleagues most, however, was the manner in which many buildings' problems impinged on the efficient and, even, unbiased delivery of justice. Most critical, in King's opinion, are a plethora of acoustical maladies. A whopping 42% of the 240 court facilities surveyed reported excessive noise penetration into the courtroom; 47% reported inadequate speech privacy in the litigation area. Curving walls played acoustical havoc in the more informal, circular courts of the late 1960s and early 1970s. Noisy air conditioners created a conflict between hearing and sweating resolved either by frequent recesses to cool the court or postponement of summer jury trials.

Hardly less serious are the overlapping threats to security and to the presumption of innocence posed by the 76% of Michigan courthouses in which prisoners share common corridors with the public and other players in courtroom dramas. "People that are being tried are frequently

The Old Wayne County Building

The deterioration of nineteenth century courthouse buildings, which are some of the state's most imposing historic structures, was another critical problem identified in the study. The Old Wayne County Building "is in dire need of maintenance and repair," it notes. "A thorough cleaning of the exterior and a remodeling of the interior should be undertaken." Records are stored on three floors and some are not protected from the public, fire, and rodents. Waiting areas are inadequate, and an excessive caseload places undue wear and tear on the facilities.



criminals," King says wryly, noting the easy potential for violence. Even they, however, deserve better than likely prejudice by jurors influenced by overheard conversation or the prisoners' manacled entry through public spaces.

Jurors, in turn, deserve better than what they get as deliberation spaces. "These people are major users of courts," says King. "They're drafted to serve their country, not on the battlefield, but sometimes under conditions almost as bad."

Over half the jury deliberation rooms in the state serve other, often incompatible, purposes. They double, for example, as storerooms or judge's chambers containing telephones, legal files and law books to which jurors should not have access, but lacking toilet facilities, so that a bailiff must escort jurors to the bathroom. If the bailiff is alone,

all jurors must go along for the ride. "It's terribly inefficient, not to say demeaning," protests King.

The jurors' plight is, in a sense, a symptom of their lack of franchise in the court system: if the judge can usurp their deliberation room for quarters, it is because he's represented in the power structure, according to King. Yet, because court facilities are the responsibility of local governments, because government officials are the ones who hire and confer with architects of the courts, even judges and payed court personnel often have little say in the design process. As substantial increases in litigation have created a demand for expanded facilities, says King, structures have often evolved which are insensitive to the users' needs, structures that wastefully substitute manpower for architecture and reflect only a desire to conserve the taxpayers' money.

Were the guidelines proposed in the ARL study to become accreditation standards in the near future, most of the state's courthouses would have to be closed. "The problems would just be tremendous," King admits. "There may be rural communities where apparently inadequate court facilities serve perfectly well."

Rather, the study's guidelines and statistics provide a blueprint for change and growth, according to executive director of the State's Judicial Coordinating Committee, Marilyn Hall. No one can say whether decisions in our courts are the worse for the architectural settings in which they occur. "Yet," she notes, "the physical setting can influence the timeliness of justice. And we still believe that swift justice is certain justice."

Susan Isaacs Nisbett is a writer who concentrates on design and the arts.

Brandeis/Frankfurter scandal

Critic of media ballyhoo praises Michigan Law Review

After the publication this year of Bruce Murphy's book, *The Brandeis/Frankfurter Connection*, widespread criticism and questioning arose in the national press about the probity of Justice Louis Brandeis's conduct while he sat on the Supreme Court. In an article entitled "The Framing of Justice Brandeis" which appeared in *The New Republic*, Professor Robert Cover of the Yale Law School convincingly argues that "the lack of critical inquiry" exhibited in the book "and in the press's coverage of its claims raises more serious questions about current ethics in scholarship, publishing, and journalism than about Brandeis's judicial conduct." Cover reveals the inaccuracies and questionable interpretations which pervade Murphy's book. Ironically, it is an article from the *Michigan Law Review* which Murphy himself co-authored with David Levy that Cover uses as a model of a more balanced and scholarly interpretation.

In his article, Cover is as critical of what he sees as irresponsible reporting of Murphy's thesis in the national press as he is of the slant and emphasis of the book. "The [New York] Times, in treating history as news, has reported these matters as if they did not entail a problematic effort of the imagination," Cover said.

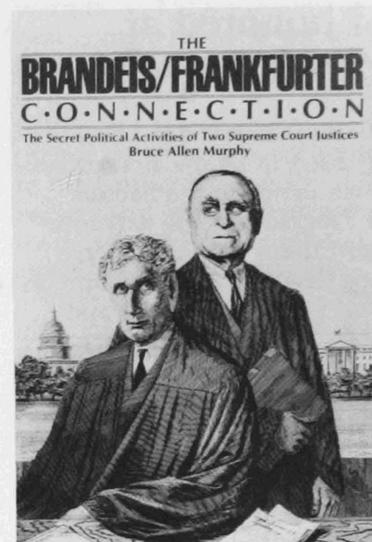
In his discussion of the letters and other primary sources which Murphy used, Cover shows just how much imagination, how much interpretation and selection of evidence, goes into even Murphy's decisions about the probable order in which events

took place. Obviously, Cover says, conclusions about the meaning of statements, gestures, and events are even more likely to be shaped by the interpreter.

Cover argues that responsible scholarship should present and explore all possible implications of the evidence. That is what Murphy failed to do in his book when "revealing" payments made by Brandeis to Frankfurter, according to Cover. Evidence that such payments were made was not new. Murphy's contribution was novel, according to Cover, simply in narrowing interpretation of the fact that payments were made to the theory that they were intended to make Frankfurter promote political causes which judicial ethics made it impossible for Brandeis to espouse openly.

Cover quotes from Murphy and Levy's article which appeared in the *Michigan Law Review* in 1980 to demonstrate that this reading of events was not an inevitable response to the evidence. Murphy himself suggested there that the evidence does not support the theory that Brandeis simply bought political influence through Frankfurter. "Brandeis never asked the professor to undertake projects or to act on suggestions that did not command Frankfurter's independent approval and allegiance," Cover quotes the Murphy/Levy article as saying. "In no sense, therefore, could Brandeis think of Frankfurter as being on a salary, taking money in exchange for the unquestioning performance of assigned duties."

Nevertheless, neither the Murphy/Levy article nor Professor



Cover sees Brandeis's payment to Frankfurter as totally above scrutiny. The justice's behavior should be questioned, Cover says, but only condemned if the evidence fully warrants. The question posed by the *Michigan Law Review* article, "whether the entanglement of such a complex relation—which touched upon many issues potentially related to the Supreme Court's work—might not impair the judgment of the justice," Cover judges to be "exactly the right one, while the accusation of the book, like all easy pieties, misleads us."

Cover concludes his critique with speculation about the reasons for "the differences in tone and emphasis between Murphy and Levy's article and the book," and for the readiness of the *New York Times* to accept and publicize the spectacular claims of the book without subjecting them to critical assessment. Accurate, thoughtful, and judicious scholarship, Cover implies, is incompatible with an undue emphasis on selling books or on being the first to broadcast an accusation. Yet, ironically, the *Michigan Law Review* which told the story first also told it with the greatest balance and perspective.

Blasi honored at Columbia Law School

Professor Vincent Blasi has been chosen to be the first professor in residence in the Samuel Rubin Program for the Advancement of Liberty and Equality through Law at Columbia University Law School. Lecturers and occasional visiting professors, chosen from among noted legal professionals, teachers, and public figures whose careers demonstrate commitment to social justice and human rights, will be invited to Columbia under the auspices of the new program.

Professor Blasi, a specialist on the First Amendment and civil liberties, has been at the Michigan Law School since 1970. He has recently finished editing a book, *The Burger Court: A Critical Assessment*, which will be published by Yale University Press. Professor Blasi has written several scholarly articles on the First Amendment, most notably a study of the checking value in First Amendment theory for which he was chosen by the American Bar Foundation to write the Samuel Pool Weaver Essay in Constitutional Law, an honor which has been accorded to only three other scholars in the last five years.

At a symposium sponsored by the University of Minnesota to mark the fiftieth anniversary of the landmark case of *Near V. Minnesota*, Professor Blasi was one of the five specialists on the First Amendment invited to deliver a paper. In addition to his scholarly articles on such topics as journalistic privilege, on the Bakke case, on prior restraint, and on the "rootless activism" of the Burger Court, Blasi has written on journalism and the law for national publications like *The Nation*. He is probably most pop-



Vincent Blasi

ularly known for his witty and insightful weekly commentary on current legal issues, "Law in the News," which was broadcast on National Public Radio from 1972 to 1981.

While Professor Blasi will hold the only Rubin Professorship this year, civil rights leader Vernon Jordan and Anthony Lewis, an editorial columnist for the *New York Times* and author of *Gideon's Trumpet*, have been invited to visit and lecture as Rubin Fellows. The first such Rubin Fellow, who spent a week at Columbia last fall, was Judge J. Skelly Wright of the United States Court of Appeals, D.C. Circuit.

The program of visiting professorships and lectures was established by the Samuel Rubin Foundation to advance the ideals of its late founder. Mr. Rubin, who established Fabergé, Inc., was, according to the Foundation, "sensitive throughout his life to the needs and rights of the poor and defenseless and dedicated to concern for universal human rights and the peaceful resolution of economic and social conflict." To that end, Mr. Rubin supported a wide variety of causes and

institutions from Harlem's Sydenham Hospital to the *Journal of Transnational Law*. The Foundation sees the new program as an expression of Mr. Rubin's cognizance of "the importance of free expression and the right to dissent in a functioning democracy" and of his skepticism "about governmental justifications for encroachments on the Bill of Rights."

For Professor Blasi, a side benefit of his year as Samuel Rubin Visiting Professor of Law will be easy access to the New York music scene. He and his wife Nancy Gilmartin, who is a musician, frequently attend concerts in New York. "This visit," he says, "will save us a lot of train fares." A patron of the arts as well as of social causes, Mr. Rubin would surely be pleased at the combination of enthusiasm for music and insight into civil rights issues which Blasi will bring to Columbia this year. Mr. Rubin once provided the late Leopold Stokowski with a grant to establish the American Symphony Orchestra, with the proviso that he make a special effort to recruit black and female musicians.

Smiths' contributions are commemorated

A new distinguished professorship honoring Alene and Allan F. Smith has been established at the Law School. No faculty member yet holds the title, but an eminent legal scholar from the Law School will soon be designated the Alene and Allan F. Smith Professor of Law.

During their thirty-five years in Ann Arbor the Smiths have made countless contributions to the life of the Law School and of the University. Professor Smith was dean of the Law School during a crucial period of development from 1960-65. He so distinguished himself in that office that he then was asked to serve as vice-president for academic affairs and later as interim president of the University.

In the Law School Professor Smith is known not only as a skillful administrator but also as a supremely effective, popular,



Alene and Allan Smith

and caring educator. In recommending establishment of the new professorship, Law School Dean Terrance Sandalow described the Smiths thus: "As a revered teacher and noted scholar, as dean of the Law School, as vice-president for academic affairs, and as interim president, Smith has enriched the lives of thousands of students and has left a mark upon the University that will benefit countless others in future generations.

"Alene Smith, while she has held no formal position, has with

warmth and grace made significant contributions to the life of the University. The establishment of a professorship bearing their names is a fitting means of recognizing their exceptional service to the University and the deep respect and great affection for them among alumni, students, and their faculty colleagues."

With gifts received from faculty, alumni, and friends of the School, an endowment has been established to support the new professorship. Funds were raised by a committee composed of past chairmen of the Law School Fund: Thomas Koykka, Emmett Eagan, Benjamin Quigg, Jr., John Tennant, Thomas Sunderland, Malcolm Denise, Samuel Krugliak, David Macdonald, and William Groening, Jr. The University has offered to fund a grant which will match all private gifts to this endowment up to \$200,000. Any readers who wish to contribute to the endowment may do so through the Law School Fund office.

Tax specialist joins law faculty

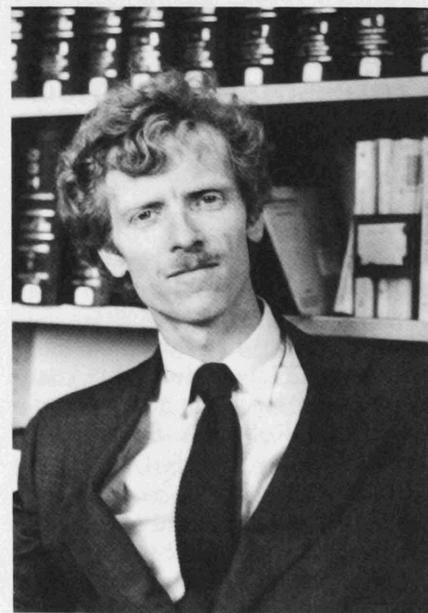
Dennis Ross has accepted an appointment as an Assistant Professor of Law at the University of Michigan Law School commencing with the fall semester, 1982. Mr. Ross will teach courses in taxation, trusts and estates, and business planning.

Mr. Ross received a B.A. degree with a major in English from The University of Michigan in 1974. He graduated from the University of Michigan Law School in 1978. Upon graduation he served as a law clerk to The Honorable J. Edward Lumbard of the Federal Court of Appeals in New York City. From 1979 to the present he

has been an associate specializing in tax law with the New York City law firm of Davis, Polk, and Wardwell. In this capacity, he has concentrated on the structuring of domestic and foreign corporate transactions, counseling foreign corporations regarding operations in the United States, and counseling foreign individual and syndicate investors regarding U.S. tax treatment of investments in this country.

When in law school, Mr. Ross served as Articles Editor of the *Law Review*.

Before graduation from law school, he worked for one summer with the Chicago law firm of Mayer, Brown and Platt, and the Los Angeles law firm of Gibson, Dunn and Crutcher.



Dennis Ross

Professors Bishop and Stein are honored

The new honorary president of the American Society of International Law is Professor Emeritus William W. Bishop, Jr. of the Michigan Law School. The Society, which was founded in 1906, recently celebrated its seventy-fifth anniversary. On that occasion, Professor Bishop delivered the retrospective on developments in international law during the history of the society which appeared in last spring's issue of *Law Quadrangle Notes*.

Professor Bishop, who has been a member of the Society for almost fifty years, has served as one of its honorary vice-presidents since 1971. He was also editor-in-chief of the Society's publication, *The American Journal of International Law*, for ten years. He continues to serve as a member of the board of editors of the publication.



William W. Bishop

Another member of the Law School faculty, Professor Eric Stein, has also recently been honored by the American Society of International Law, of which he has long been a member. Professor Stein has been elected an honorary vice-president of the



Eric Stein

Society. He also serves on the board of editors of the Society's journal, as does another of the Law School's international law scholars, Professor John H. Jackson.

Professorship named for noted labor lawyer

A second new endowed professorship, in addition to that honoring Professor and Mrs. Allan F. Smith, has been established at the Law School this year. It is named for a late alumnus of the School, Robert A. Sullivan.

Mr. Sullivan attended Michigan as an undergraduate, receiving his degree in 1938, and as a law student. He received his J.D. degree in 1940. Considered one of the state's leading transportation and labor lawyers, Mr. Sullivan

was counsel to the Motor Carrier Labor Advisory Council, to the Aggregate Carriers of Michigan, to the National Association of Engineering Companies, and to other trade and industry groups. At the time of his death in 1979, Mr. Sullivan was a senior partner in the law firm Sullivan and Leavett of Detroit. The new endowed chair was created through his bequest to the Law School.

Dean Terrance Sandalow said "a distinguished member of the faculty will be appointed by the Regents," to hold the Robert A. Sullivan Professorship of Law for a term of ten years. The dean of the Law School will recommend a

faculty member for the honor.

A portion of the endowment supporting the Robert A. Sullivan Professorship of Law may be applied to support and facilitate the research of the faculty member chosen to hold the distinguished professorship; the endowment may also be used to purchase volumes for the library at the Law School or to foster other faculty research.

The dust has not settled

Planning for the Law School's new library included careful consideration of the changes it would, and should, bring about in the use of existing buildings. Since eating and socializing are not permitted in the new facility, a convenient student lounge was clearly necessary.

The faculty coffee room, 100 Legal Research, which is pictured here was ideally located between classrooms and the library, and will be converted into a student Rathskeller. Book racks, vacated on the third floor of Hutchins, will become a new faculty common room. An elaborate pulley system was required to remove shelving and debris from the area, while blocks to construct a wall around the proposed lounge were painstakingly brought in by wheelbarrow.

Faculty expect to begin using the new room by the end of the fall semester.



Bequest honors Professor Proffitt

William H. Hawley, who attended the Law School from 1963-65 has left \$5,000 to be designated as the Roy F. Proffitt Fund. The bequest may be used by the School either as a source of income for purposes identified by the dean and Professor Proffitt, or for capital expenditures "whose material form shall bear the name of Roy F. Proffitt in tribute to his long service and devotion to the interests and wel-



Roy F. Proffitt

fare of the students of the School."

Professor Proffitt came to the Michigan Law School in 1956. After many years of devoted service as assistant dean, Professor Proffitt turned his attention to maintaining ties with former students he had helped through Law School. Since then he has worked tirelessly, coordinating alumni activities and directing the Law School Fund.

Who gets the manganese nodules?

Elliot Richardson on international problem solving

Had President Reagan joined the crowds at the Law School's Cooley Lectures this year, he might have been less ready to declare that the United States will neither sign nor adhere to the Law of the Sea Treaty. In refusing to approve a 1980 draft of the treaty which 130 nations did accept, the Reagan administration has risked leaving American interests unprotected if, as expected, the treaty is ratified and becomes international law this December.

Elliot Richardson, who was President Carter's chief negotiator at the Law of the Sea Conference and who favored the draft, made a powerful case in his lectures at Michigan for the need to cope with problems that have a global impact through multilateral institutions which rest upon an agreed foundation of law. Such institutions can only function effectively, Mr. Richardson stressed, if countries are prepared to relinquish the more traditional approach, the resolution of multilateral problems through the exercise of power, whether military or economic.

In his three lecture series entitled "Global Interdependence and the Design of Multilateral Institutions," Mr. Richardson said that crucial problems confront the world which traditional rules of international law are unable to solve. Those which arose at the Law of the Sea Conference are exemplary. The increasing danger of pollution of the oceans or the threats that overfishing by one nation might destroy an international fishing site were the sorts

of issues which customary rules of international law could not adequately handle. Technological advances like those enabling oil companies to drill in the deep seabed raised new questions about jurisdiction.

Computer technology has made it feasible that commercial firms could profitably retrieve from the ocean floor the curious "manganese nodules" which form as layers of metal oxides accumulate around a small object like a shark's tooth over millions of years. The Law of the Sea Confer-

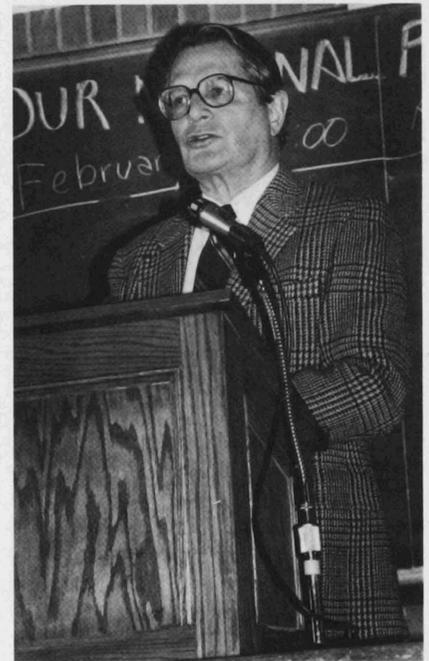
ence addressed not just the question of who should be allowed to exploit such resources of the deep seabed but also that of how and by whom such determinations should be made.

Such questions, Mr. Richardson argued, do not yield to ad hoc solutions, nor can they be adequately handled by single nations or small groups of nations. Global interdependence is a fact, said Richardson, which increasingly requires the establishment of permanent mechanisms, like the proposed International Seabed Authority, to deal with the many instances in which actions by one agent or nation will affect the interests of many others.

While the first of Mr. Richardson's three lectures at the Law School focused on this need to construct organizations with a



Most recently the Special Representative of the President to the Law of the Sea Conference, Mr. Richardson has served in a bewildering variety of national offices. He has been Secretary of Commerce, of Defense, and of Health, Education and Welfare, as well as Under Secretary of State, Attorney General of the United States, and Ambassador to the Court of St. James's.



Mr. Richardson's three lectures were entitled, "The Role of Law in the Management of Interdependence," "The Adaptations of Structure to Function in International Organizations," and "Toward the Constitutional Design of New Multilateral Institutions."

E V E N T S



Despite a blizzard on the second day of Mr. Richardson's visit to Ann Arbor, many law students and others got out to attend his lectures.



Mr. Richardson talked with student members of the International Law Society at a Luncheon in the Lawyers Club.

legal foundation to deal with those broad international concerns which are not now adequately addressed by international law, his second and third lectures extrapolated from the record of various international organizations principles deserving consideration from the designers of the constitutional structures

of future international organizations. Experience provides many useful models, Richardson said, but its final lesson is that new, ingenious, and inventive constitutional provisions will have to be devised to balance, and effect compromise between, competing interests.

Mr. Richardson, who has

served in a remarkable variety of cabinet posts and national political offices, is most widely known for his decision to resign the Attorney Generalship rather than carry out President Nixon's order to fire Special Watergate Prosecutor, Archibald Cox. Richardson's selection of Cox, who had been his professor at Harvard Law School, for the job had been called a "masterful political stroke" which restored public confidence in the non-partisan nature of the criminal investigation. Having pledged to provide Cox with full authority to contest presidential claims of executive privilege, Richardson provided a further model of integrity by refusing to betray that guarantee.

His Cooley lectures made it clear that in his work as Ambassador-at-large, as in his cabinet assignments, Mr. Richardson displayed his remarkable ability to combine skillful diplomatic maneuvering with a broad, principled conception of ultimate goals and values. Throughout his career as a state and national administrator, Mr. Richardson has demonstrated his belief that "law is the indispensable attribute of an ordered society." Now, he argues, we must recognize the need to extend that principle to the international sphere.

During his stay at the Law School, Mr. Richardson not only delivered the three formal Cooley Lectures, but also met informally with law students. He was the guest of the International Law Society at a luncheon and agreed to respond to student questions at an open forum which was held in the Lawyers Club. Throughout his visit, Mr. Richardson stressed the important role future lawyers will play in constructing the mechanisms by which the world can become a stable, orderly and safe place in which the rule of law prevails.

Let there be light

Campbell Competition airs debate on creationism

"Creation" and "evolution" evoke images of the Scopes Trial, Clarence Darrow, and Spencer Tracy pacing a steamy Tennessee courtroom in "Inherit the Wind." Although these are images from the past, the teaching of origins in public schools has become no less controversial in the present. Most recently, several states have responded to criticism of the theory of evolution and of its dominant position in the public schools by enacting statutes that call for balanced treatment of the creation and evolution explanations of origins. The 1981-82 Campbell Moot Court Competition addressed the constitutionality of such a statute.

The hypothetical Balanced Treatment for Creation-Science and Evolution-Science Act of the fictional state of Hutchins required that if a public school program included the subject of origins, the program, as a whole, must give balanced treatment to evolution and creation-science. A public high school biology teacher and student were said to have brought an action against the local board of education seeking a declaratory judgment that the statute was unconstitutional. They asserted that the statute violated the free speech and establishment of religion clauses. The Supreme Court granted their petition for certiorari on both of these issues.

The fictional statute closely resembles one which has been enacted by the Arkansas legislature and which has been judged unconstitutional by a federal district court in Arkansas. That statute has not yet reached the Supreme Court. Since the court

assembled for the Campbell Competition does not decide the merits of the case, the constitutionality of the Hutchins Act is also still open to debate. The court's task is to evaluate the merits of the advocate, judging both the brief and oral argument.

Seventy-nine participants from the Law School, working alone or in teams of two, briefed and argued one of the issues as counsel for either Petitioners or Respondent. Following quarter and semi-final rounds, four teams advanced to the final competition where they argued the merits of the Balanced Treatment Act before the five Supreme Court Justices on the Campbell Court: Hon. Potter Stewart, Former Associate Justice, Supreme Court of the United States; Hon. J. Clifford

Wallace, Circuit Judge, United States Court of Appeals (Ninth Circuit); Hon. Amalya L. Kearse, Circuit Judge, United States Court of Appeals (Second Circuit); Terrance Sandalow, Dean, Michigan Law School; and Vincent A. Blasi, Professor of Law, Michigan Law School.

Counsel for the Petitioners argued that the statute violated the free speech clause because it imposed unconstitutional limitations on the teacher's right of academic freedom and on the student's right to receive information. Counsel also asserted that the Act represented an effort by the state to suppress the theory of evolution. Suppression of unpopular ideas is an improper motive since it violates the free speech value of encouraging a marketplace of ideas.

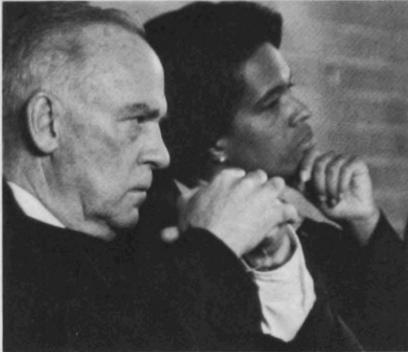
Counsel for the Respondent Board of Education argued, on the other hand, that the statute represented a legitimate state concern that school children



Finalists and judges in the 1982 Henry M. Campbell Moot Court Competition

The Court (front row seated, left to right): Law School Dean Terrance Sandalow; Hon. J. Clifford Wallace, Circuit Judge, United States Court of Appeals (Ninth Circuit); Hon. Potter Stewart, Former Associate Justice, Supreme Court of the United States; Hon. Amalya L. Kearse, Circuit Judge, United States Court of Appeals (Second Circuit); Law School Professor Vincent Blasi.

The finalists (standing, left to right): Esther S. Widowski of Rochester, New York; Keith J. Hesse of Orlando, Florida; Elizabeth H. Bottorff of Jeffersonville, Indiana; Tim Hoy of Napoleon, Ohio; Marina H. Park of San Francisco, California; David B. Tachau of Louisville, Kentucky.



Former Supreme Court Justice Potter Stewart sat on the Campbell Court during a week he spent as a Helen L. DeRoy Fellow at the Law School. An endowment, administered by the DeRoy Testamentary Foundation of which Leonard H. Weiner (J.D. '35) is chairman of the board, supports these fellowships. They enable the School to invite persons of distinction to meet with students, and participate in Law School activities. The Honorable Amalya L. Kearse (J.D. '62) also served as a Campbell Judge this spring.



Marina Park was the Campbell Competition winner on the Free Speech issue. Acting as counsel for the Respondent Board of Education, she argued that the statute in question did not violate free speech rights of the teacher or the student. For her brief in the semi-final round, Ms. Park was also awarded the S. Anthony Benton Prize. A third-year student from San Francisco, Ms. Park will be chairperson of the Campbell Competition next year.



Campbell Competition winner Keith J. Hesse of Orlando, Florida argued that the hypothetical state's statute did not constitute an unlawful establishment of religion. Mr. Hesse artfully countered battering questions from the bench; he emphasized that the statute disallows any teaching of religion, requiring only that teachers give attention to a creationist theory of origins.

receive a balanced education. Free speech rights in the classroom are not absolute, and the state and local school board must be able to control the content of the public school curriculum. Counsel argued that although the Court may not agree with the principle of balanced treatment, the Court should not involve itself in controversies as to the proper content of school curricula.

On the establishment of religion issue counsel for both the Petitioners and Respondent followed the Supreme Court's three-part establishment test. They examined the statute's purpose, effect, and whether the law would foster excessive government entanglement with religion. Counsel for the Petitioners' challenged the statute on the ground that creation-science is nothing more than the Biblical explanation of origins with the religious references deleted.

Counsel for the Board of Education acknowledged that creation-science coincides with religious beliefs but, relying on Supreme Court cases, argued that a statute does not violate the Establishment Clause merely because it happens to coincide with the tenets of some or all religions. Counsel asserted that in the context of a public schoolroom, balanced treatment of creation-science and evolution would not be a religious activity. Any benefit to religion would be indirect and incidental to the primary effect of improving the quality of public education.

On the free speech issue the Court awarded first place to Marina Park of San Francisco, California, counsel for the Respondent. Second place went to David B. Tachau of Louisville, Kentucky, and Tim Hoy of Napoleon, Ohio. On the establishment of religion issue the Court

awarded first place to Keith J. Hesse of Orlando, Florida, counsel for the respondent. Elizabeth H. Bottorff of Jeffersonville, Indiana, and Esther S. Widowski of Rochester, New York, were awarded second place.

The S. Anthony Benton award was presented for the best briefs submitted in the quarter and semi-final rounds. The team of Daniel Stephenson and Avery Williams received the award for their quarter-final brief. Marina Park was awarded for submitting the best brief in the semi-finals.

The timeliness and excitement of this year's Campbell Competition resulted from the efforts of the faculty, local practitioners, visiting judges, and Campbell Competition Co-Chairmen, Bob Scharin and Mark Haynes, as well as those of the participants. For many Michigan students "creation" and "evolution" will now evoke images not only of the Scopes Trial, Clarence Darrow, "Inherit the Wind", but also of the state of Hutchins, and of the powerful defense of "balanced treatment" made by Mr. Hesse and Ms. Park.

A negotiator's advice to lawyers

Leonard Woodcock argues for creative dispute resolution

As chief of the United States Liaison Office to the People's Republic of China, Leonard Woodcock was responsible for negotiations which led to the full normalization of relations between the Chinese and American governments. At that time, he was appointed the first United States Ambassador to the People's Republic of China.

Mr. Woodcock, who is now teaching in the political science department at The University of Michigan, was prepared for his sensitive diplomatic post by years of experience as a labor organizer in the United Auto Workers. He was both international president and international vice-president of that organization, and became active in national and international affairs. In 1977, he was appointed by President Carter to head a committee sent to Hanoi to clarify the status of Americans missing in action in the Vietnam War.

In the speech he delivered at the Law School Honors Convocation this year, Mr. Woodcock drew on his long experience as a negotiator and on his observations of oriental law and culture. His remarks, which were entitled "Tomorrow's Lawyer: Problem Solver?" are given in full here.

* * * * *

These observations relate to the resolution of civil disputes and the role of lawyers in the redress of civil claims. I am a recent enough returnee from the Orient, where there are miniscule numbers of lawsuits and few lawyers, to be struck by the contrast between the Oriental tendency not to sue and the American ten-

dency to "fight it out" in the courts.

China is seeking to establish its version of a legal system with a handful of lawyers, 2,000 at most in the whole country. There will be more, but still a limited number despite the huge population.

Japan's highly developed industrial society has few lawyers and a legal system very different from ours. The recent crash at Tokyo's Haneda Airport of a Japan Air Lines DC-8 led to events which illustrate just how different. It was clear that the crash was due to pilot error and that the pilot had been allowed to fly despite a known history of severe psychological problems. Yet the matter was ended when high officials of JAL visited the families of the dead and made appropriate ceremony at the family shrines. The damage payments were then negotiated, based on a time-honored formula, without resort to litigation.

In contrast, when Air Florida's Palm 90 crashed at Washington's National Airport, it was another story. The bereaved, we are told, became the besieged, as the "air crash bar" descended on them. For years we have had a personal injury bar, but until the Air Florida tragedy, I had not known there were lawyers who had an aircraft accident specialty. The solicitation and advertising following the crash were not aberrations. We have become a nation of litigants.

We are said to be in a "litigation explosion." Chief Justice Burger has cautioned that "we may be well on our way to a society overrun by hordes of lawyers, hungry as locusts." Indeed, for-



Leonard Woodcock

mer President Carter has said that the United States is "overlawyered and underrepresented," and he has accused us of "resorting to litigation at the drop of a hat" and "regarding the adversary system as an end in itself."

The public feels itself victimized by the excessive costs of malpractice litigation. Already squeezed by uncontrollable hospital charges and fees for service professional bills, Americans are tending more and more to blame the lawyers and the legal system for the tremendous costs of malpractice insurance which are passed, dollar for dollar, on to the patients.

New legal specialties, like the air crash bar, are constantly appearing. The corporate lawyer and the corporate strike suit lawyer are joined by a bar specializing in corporate takeovers. Domestic relations lawyers' ranks have been swelled by "palimony" experts.

The number of lawyers in the United States has doubled in the last 20 years; we now have nearly 600,000 lawyers. In the last 40 years, the growth of the average caseload per judgeship was 16

times greater than the increase in population. In the state courts alone, from 1967 to 1976, appellate filings increased eight times as fast as the population. The resultant delays reach to five years and beyond in some jurisdictions. The annual cost of legal services is said to be a shocking two percent of the Gross National Product.

These are startling figures; they explain the complaints over legal costs from many sources and account for the rising call for reform from scholars, critics, judges and the law itself.

The problem needs attention. We cannot, and I hope do not want, to ape the Chinese and Japanese. The basic truth is that the reluctance or failure "to sue at the drop of a hat" in both China and Japan is not explained simply by cultural patterns and national character. It is true that both cultures seek a "harmony of community" and that social, anthropological, and geographical factors have produced value systems and behavioral mores different from ours. In America we are familiar with the metaphor: "The squeaking wheel gets the oil." In the Orient it is said that: "The protruding nail gets hammered down." But we should make no mistake about it; the paucity of litigation in those countries is also a response to legal systems which deny redress and bar the effective settlement of civil disputes. In short, civil litigants find little justice in the courts.

Japan, under control of its active lawyers, graduates only about 500 lawyers a year, less than two percent of those who seek to be lawyers. There are not enough lawyers in Japan to run an effective justice system. Case-loads in Japanese courts are so much greater than those of American courts that their horrendous

delays make ours appear absolutely minimal. It is said that ordinary Japanese don't sue because they cannot get satisfaction through the judicial system.

The People's Republic of China gets high marks for its recent progress, but it is, after all, a totalitarian society concerned more with communal and state needs than with those of individuals. By any American standard, the Chinese legal system does not effectively redress citizen complaints and grievances.

I have come now to that point where, with full knowledge that I am a lay person, I offer advice. I begin with a caveat: We must not throw out the baby with the bath. No one wants even to consider extremes like the Oriental

In a truly successful negotiation there are no losers, only winners.

approach to dispute settlement. We can, however, without taking away any legal rights or closing off citizen access to the justice system, take steps to improve the quality of society's resolution of disputes and improve our formal legal system by lifting burdens from it.

As new lawyers, "healers of human conflict" in the words of the Chief Justice, you are, I am sure, imbued with a spirit of idealism and ready to explore options. I will suggest that there are two crucial contributions lawyers can make to improve the quality of American dispute resolution.

Lawyers must be problem-solvers. That is number one. Some situations, of necessity, will be adversarial, but lawyers should look to peaceful, constructive and inexpensive settlements where possible. The more you

become problem solvers instead of adversaries, the more useful you become—to society and even to your client. I suggest that *enlightened* self-interest militates against excessive adversarial confrontation.

In the course of my life I have had some experience with confrontation and adversarial relationships and some with diplomacy and negotiations. While there are certainly times and circumstances which mandate confrontation, it is my experience that humans make more progress when they are guided by a spirit of cooperation, where the needs of both sides are understood and the relationship promotes a result in which everyone has a vested interest. I have learned and re-learned, at labor management tables as well as in negotiations with Hanoi for M.I.A.s and with the People's Republic of China, the value of a problem-solving approach.

We lay people think many lawyers are too deeply steeped in the adversarial tradition. They want to "win" at any cost. They value the fight for its own sake. In these lawyers, the adversary process is like a laser beam so concentrated that it becomes an overwhelming antagonism which too often damages not only the settlement process but, in the end, the interests and needs of the client.

Abraham Lincoln once advised lawyers: "discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time."

A pragmatic attitude of problem solving can lead to creativity in the settlement of disputes. Common interests can be found and creative alternatives will appear when trained negotiators

honestly try to change a relationship by producing an agreement that is objectively fair and good for both sides. In a truly successful negotiation there are no losers, only winners.

The other suggestion I would make is that you should encourage experimentation with structures, in and out of court, to facilitate the settlement of disputes. The willingness to attempt alternative modes of dispute settlement is an extension of the problem-solving attitude.

You will not be alone in the search for alternative mechanisms and instruments which facilitate, augment, and supplement, but do not replace, the judicial system for settling conflict between citizens. Among those who search for alternative dispute resolution are not only the Chief Justice but also such important groups as the American Bar Association, the American Arbitration Association, The Center for Public Resources, The National Center for State Courts, The Center for Community Justice, The Institute for Mediation and Conflict Resolution and many others, including a new foundation headed by Michigan's own Robben Fleming, the National Institute for Dispute Resolution.

Mediation, arbitration, fact-finding, and pre-trial settlement procedures are instruments which are becoming more familiar all the time. These mechanisms, along with administrative procedures exemplified by compensation boards and statutory innovations such as no fault automobile liability laws and no fault divorce laws, already have accomplished faster, better and less expensive settlement of many civil disputes.

It is my hope that lawyers graduating from The University of Michigan and their colleagues all over the country will, as "heal-

ers of human conflict," come as problem solvers to bring about the satisfaction of human needs and the settlement of citizen disputes.

I want to make it clear that I am talking about supplemental, mostly voluntary mechanisms. Under no circumstances should we close the courts to those who seek redress. The American system of justice must be as responsive, open, and egalitarian as possible. Lawyers above all must pursue "equal justice under law."

In the pursuit of that goal, inside and outside the formal confines of the court system, lawyers should look to solve, really solve, the problems of human beings and of the institutions they have created. In the spirit of problem solving, the settlement of disputes should be made as just, fast, and inexpensive as possible—with the least wear and tear on the participants. The search for that ideal is bound to enhance the quality of our justice.

Federalism or Feudalism?

Panel questions novelty and coherence of government proposals

A capacity crowd turned out at the Law School to hear three specialists in federal-state relations discuss Reagan administration proposals to turn over some social programs to state control. The State of Michigan's lobbyist in Washington, David Harrison, was on the panel with Professor Thomas J. Anton of the University's political science department and Professor Sallyanne Payton of the Law School. The program was conceived and organized by Law School faculty member T. Alexander Aleinikoff.

In his role as moderator, Law School Dean Terrance Sandalow gave a history of efforts to limit the ever-increasing fiscal role of the federal government. He briefly described the current proposals and suggested four ways in which they should be judged. Their budgetary consequences must be evaluated, as must the likely shifts in power relations among various groups in society

that they may bring about. Questions of principle must clearly be raised, Sandalow said, as must questions of administrative efficiency and accountability.

All three panelists subjected the proposals to criticisms on these various grounds. All three were skeptical as to whether principled thinking about the appropriate functions of the several levels of government really underlay the proposals. According to Professor Payton, the proposed exchange by which the federal government would take over sole responsibility for Medicaid but hand over Aid to Dependent Children to the states is indicative of inconsistent thinking. These programs are alike, she said, in putting a floor under every American. That has traditionally been thought to be a function which is best performed by the federal government. If the Reagan administration were challenging that assumption, they should in theory argue that both

E V E N T S



From left: Moderator Terrance Sandalow, Panel Members Sallyanne Payton, Thomas J. Anton, and David Harrison.

programs should be administered by the states. The actual proposal indicates a confusion, she concluded.

Mr. Harrison echoed the need to reconsider what types of programs should appropriately be administered at each level of government. He pointed out, however, that in the current budget crisis Congress is reluctant to turn attention to these central matters of principle. It is clear, Harrison said, that many of the current budget cuts are being made on the backs of the states. It is an ironic truth, he continued, that the federal government does not return as much revenue to Michigan, for example, as it collects in income taxes from the state. Perhaps the best thing for Michigan, he said, would be for the federal government to give us our money back and let us administer our own programs.

Professor Anton, too, was concerned that the proposals had

been advanced with too little attention to principle, standards of equity, and consequences. The program is part of a general shift in budget priorities, he said, away from social programs and toward defense. The federal government is taking less responsibility for social welfare and for the standard of living of individual citizens. The consequences, if the proposals were enacted by Congress, would be fiscal disaster for states in the industrial heartland like Michigan, according to Anton. They do benefit from federal social programs but not from defense spending. For other reasons, states like North Carolina would also bear unjust burdens. In these concerns about equity, Professor Anton echoed Dean Sandalow's questions about who would benefit from the proposed changes.

While all the panelists welcomed some revision in the relations between the state and

federal governments, none of them was convinced that the current proposals will really result in the kind of reconsideration that must go on before a more equitable and principled balance can be reached. They were skeptical of the motivations behind the proposals, suggesting that the federal government might simply be trying to shift criticisms of cuts in social programs to the states or be relying on the traditionally greater conservatism of local authorities to effect reductions in aid.

Heated question and lively discussion from the floor concluded the session. Like the speakers, the audience seemed anxious for reform and increased controls on federal spending but concerned about the efficacy and desirability of the proposed changes.

Alumni Notes

□ The Honorable **Leroy J. Contie, Jr.** has joined the United States Court of Appeals for the Sixth Circuit. Before his appointment to the federal appellate bench, Judge Contie was 28th district judge for the Northern District of Ohio. He moved to that post in 1971 after having served for two years as judge on the Court of Common Pleas in Stark County, Ohio. Previously he had been on the Stark County Board of Elections for four years and had served as City Solicitor in his native Canton, Ohio, for four terms from 1951-60. Judge Contie was elected Chairman of the Charter Commission of the City of Canton in 1962.

In his new position on the Court of Appeals for the Sixth Circuit Judge Contie, who received his J.D. from Michigan in 1948, will join two other Michigan Law alumni already serving as judges on that court. They are Judge Albert J. Engel of the class of 1950 and Judge Cornelia Groefsema Kennedy of the class of 1947.

□ **Glenn E. Mencer, J.D. '52**, was sworn into office as judge on the United States District Court for the Western District of Pennsylvania this April. Judge Mencer came to the Law School after having earned a BBA from Michigan in 1949 and having served in the Infantry Division of the United States Army in the Second World War.

After his Law School graduation, Judge Mencer practiced law as a sole practitioner in Eldred, Pennsylvania for over ten years. During that period he also became District Attorney of McKean County. He served as presiding judge of the forty-eighth judicial district of Pennsylvania from 1964 until 1970 at

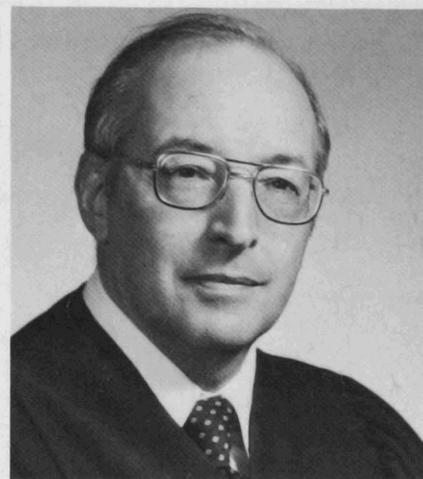
which time he joined the Commonwealth Court of Pennsylvania. He continued on that court until he was nominated by President Reagan to his new post on the federal judiciary.

□ **Judge John W. Potter**, who recently joined the bench in the United States District Court for the Northern District of Ohio, was one of the Michigan law students whose careers were interrupted by World War II. He came to the Law School in 1940, but soon, in his words, "exchanged moot court and *Law Review* for close order drill and cannoner's hop. The army, pursuant to standard operating procedure, considered my legal background and put me in the field artillery." Since then, Judge Potter has put his legal education to many more fruitful uses.

Returning to complete his JD in 1946, Potter was senior editor of the *Michigan Law Review*. He was admitted to the Ohio Bar in 1947 and entered practice. He became a partner in the firm of Boxell, Bebout, Torbet & Potter, as well as mayor of the city of Toledo. In that office he was instrumental in downtown redevelopment and renewal projects.

Judge Potter comes to his present position on the federal bench from long service as judge of the Sixth Appellate District of Ohio. He was first elected to that court in 1969 and was reelected without opposition in 1974 and 1980. He was presiding judge on that court for two four-year terms.

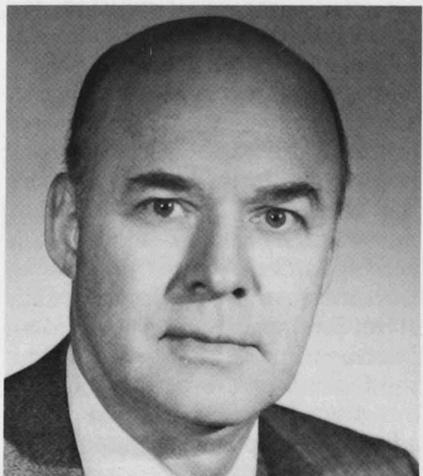
Judge Potter has also served by assignment on the Supreme Court of the State of Ohio. He was cited by the Ohio Supreme Court in 1973 for outstanding judicial service. Three of his judicial opinions have been highlighted by West Publishing Company; one of them was also noted both



Leroy J. Contie, Jr.



Glenn E. Mencer



John W. Potter



Glenn E. Kelley

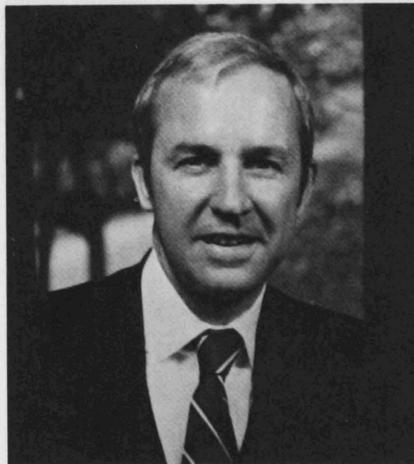
in the American Bar Association Journal and in the Insurance Counsel Journal.

□ Serving as a justice on the Supreme Court of Minnesota is **Glenn E. Kelley** of the Michigan Law School class of 1948. A native of Nebraska, Justice Kelley came to Michigan after service in the United States Army Air Force in the second World War.

After graduation, Justice Kelley practiced law for twenty-one years with the firm of Alderson, Catherwood, Kelley, & Ondov in Austin, Minnesota. He was appointed to the district court, which is a court of general trial jurisdiction in Minnesota, in 1969. In 1981, he was appointed to the Supreme Court of Minnesota.

Last spring, Justice Kelley wrote that he was enjoying the new challenges presented by his appointment to the state Supreme Court, noting "I find it considerably different from work on the trial bench." Finding work on the appellate court more "cloistered" and "collegial," Justice Kelley confessed, "I miss trial work . . . because I enjoyed the interaction between lawyers, witnesses, jurors, and other court personnel. Nevertheless, I . . . sincerely hope I can contribute to a continuance of the excellent reputation the Supreme Court of Minnesota has enjoyed over the past years."

□ Last fall **Robert L. Knauss** of the class of 1957 formally became dean of the University of Houston Law Center. At that time he was also awarded the title of Distinguished University Professor. Before coming to Houston, Dean Knauss was a visiting professor holding a joint appointment at Vermont Law School and at the Tuck School of Business Administration at Dartmouth College. Until 1979, he was dean of the Law School at Vanderbilt University.

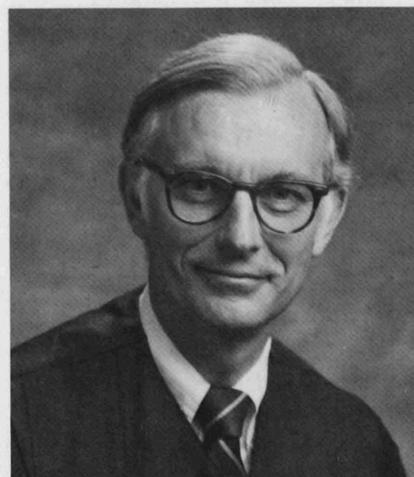


Robert L. Knauss

Dean Knauss remains in close contact with the Michigan Law School both as a scholar and as a parent. His son Robert completed his J.D. at Michigan in 1979, followed closely by another son Charles who graduated in 1981. Dean Knauss is co-author with Michigan Professor Alfred F. Conard and with Stanley Siegel of a widely used casebook on Enterprise Organization. His most recent publication, an article entitled "Corporate Governance—A Moving Target," appeared in the *Michigan Law Review* in 1981.

□ Last May, **John A. Nordberg** was sworn in as federal district judge for the Northern District of Illinois. A 1950 graduate of the Law School, Judge Nordberg was assistant editor of the *Law Review* while at Michigan. Before assuming his present position, Judge Nordberg was Judge of the Circuit Court of Cook County, and was assigned as trial judge to the Law Division for four years. Before that he served as an arbitrator for the American Arbitration Association, as a Magistrate of the Circuit Court of Cook County, and as a Justice of the Peace of Niles Township.

He coordinated some of those activities with practice as an associate and then a partner in the firm, Pope, Ballard, Shepard & Fowlie. Judge Nordberg drew on his editorial experience from *Law Review* after graduation. From 1966-74 he was a member of the board of editors of the Chicago Bar Record. During that time, he served as editor-in-chief of that publication for two years. Judge Nordberg has also been active for thirty years as chairman or member of more than twenty-six American, Chicago, and Illinois State Bar Association Committees in court and trial practice, and in corporate and local government areas. He is a lecturer on trial



John A. Nordberg

practice and on judicial, governmental, and business topics for the Illinois Institute of Continuing Legal Education and for other organizations.

Judge Nordberg has been active in court reforms for many years through the Chicago Bar Association. He served as chairman of

the Illinois Judicial Conference Committee on Comparative Negligence and as a member of the Illinois Judicial Conference Committee on Judicial Education. He is a member of the Illinois Judges Association and of the American Judicature Society.

According to Judge Nordberg, his new position is fascinating and challenging. "I sometimes use the expression 'lifetime sentence' as I look at the 400 cases that I inherited when I was sworn in," he confesses, but finds the challenge thoroughly rewarding.

Two judges on new federal appeals court are Michigan alumni

On October first a new federal court, the United States Court of Appeals for the Federal Circuit, came into being. The new court which was created by the "Federal Courts Improvement Act of 1982" resulted from a consolidation of the Court of Claims and the Court of Customs and Patent Appeals into a 13th Circuit Court.

Of the twelve judges who sit on the new court, two are Michigan alumni: **Judge Shiro Kashiwa** of the class of 1936 and **Judge Helen Wilson Nies** of the class of 1948. Judge Nies moved to the new court from the Court of Customs and Patent Appeals to which she had been appointed in 1980 after having worked in the Department of Justice and in private practice. Judge Nies was a partner in the Chicago based firm of Pattishall, McAuliffe and Hofstetter, then joined the Washington, D.C., firm of Howrey & Simon. An expert in patent, trademark, and copyright law, Judge Nies has held leadership posts in that field in the profession and in the American Bar Association.

After his graduation from the Law School, Judge Kashiwa practiced law in Honolulu with his



Judge Helen Wilson Nies

brother under the firm name Kashiwa & Kashiwa. In 1959 he took leave from the firm to become the first Attorney General of the newly created State of Hawaii. It was in this position that he became interested in the specialized field of governmental representation and litigation. That led to his appointment as Assistant Attorney General in charge of the Land and Natural Resources Division of the United States Department of Justice in 1969. At that time it was a small division, but it grew rapidly during the 1970s to accommodate the government's growing involvement in environmental litigation. The division represented in litigation



Judge Shiro Kashiwa

the Department of the Interior as well as the then newly created Environmental Protection Agency and all other agencies with environmental problems. Under the leadership of Judge Kashiwa, the division grew to be of major importance in the Department of Justice.

In 1972 Judge Kashiwa was appointed Associate Judge of the United States Court of Claims. This court, which was one of the oldest in the federal judiciary, had exclusive nationwide jurisdiction of most suits against the United States in excess of \$10,000. Judge Kashiwa was on the Appellate Division of the Court for over ten years.

The new court on which he and Judge Nies now serve inherited all of the appellate jurisdiction of the two earlier courts, and in addition will hear patent appeals from all federal district courts. Thus, one of the major areas of the new court's jurisdiction will be suits involving the United

States as party litigant. It will hear appeals in suits against the government for damages or refunds of federal taxes; it will hear appeals from the Court of International Trade, appeals from the Patent and Trademark Office and a few other agency review cases. The court will have juris-

diction over federal contract appeals in which the United States is a defendant and over all appeals from Merit Systems Protection Board. Review of the new court's decisions will be by certiorari to the Supreme Court.

Five Michigan alumni recently appointed to federal judgeships

This year the number of Michigan law alumni serving as judges in federal district and circuit courts increased to 34. A list of these federal judges and their

courts is given below. It does not include any alumni who may be serving as federal magistrates, bankruptcy judges, administrative law judges, or as judges of superior court in the District of Columbia.

In addition to the two appellate court judges, Hon. Helen W. Nies and Hon. Shiro Kashiwa, whose

reappointment to the new federal circuit court is discussed above, five other alumni received appointments to the federal bench this year. They are Glenn E. Mencer, JD '52, John A. Nordberg, JD '50, Horld M. Fong, JD '63, Leroy J. Contie, Jr., JD '48, and John W. Potter, JD '46.

Thirty-four Michigan alumni now serve as federal judges

District of Columbia Circuit

Harry T. Edwards '65

Second Circuit

Amalya Lyle Kearse '62
Glenn E. Mencer '52, Western District of Pennsylvania

Fifth Circuit

John R. Brown '32
Robert W. Porter '52, Northern District of Texas

Sixth Circuit

Albert J. Engel '50
Cornelia Groefsema Kennedy '47
Leroy J. Contie, Jr. '48
Lester L. Cecil '17, Senior Circuit Judge
John Feikens '41, Chief Judge, Eastern District of Michigan
Philip Pratt '50, Eastern District of Michigan
Charles W. Joiner, (faculty '47-68) Eastern District of Michigan

R. James Harvey '48, Eastern District of Michigan

James P. Churchill '50, Eastern District of Michigan

Ralph B. Guy, Jr. '53, Eastern District of Michigan

Stewart A. Newblatt '52, Eastern District of Michigan

Avern L. Cohn '49, Eastern District of Michigan

Horace W. Gilmore '42, Eastern District of Michigan

Wendell A. Miles '42, Chief Judge, Western District of Michigan

Douglas W. Hillman '48, Western District of Michigan

John W. Potter '46, Northern District of Ohio

Ralph M. Freeman '26, Senior District Judge

Seventh Circuit

John A. Nordberg '50, Northern District of Illinois

William G. Juergens '28, Senior District Judge

Eighth Circuit

Joseph E. Stevens, Jr. '52, Western & Eastern District of Missouri
Warran K. Urbom '53, Chief Judge, Nebraska

Ninth Circuit

Cecil F. Poole '38
Richard M. Bilby '58, Arizona
Cristobal C. Duenas '52, Chief Judge, Guam
Harold Fong '63, Hawaii

Tenth Circuit

Richard P. Matsch '53, Colorado
Clarence A. Brimmer '47, Chief Judge, Wyoming
Frank G. Theis '36, Senior District Judge

United States Court of Appeals for the Federal Circuit

Shiro Kashiwa '36
Helen Wilson Nies '48

The Law School in 1953: a minority perspective

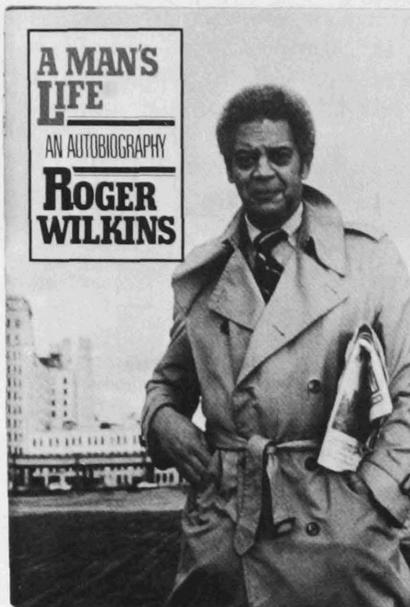
Michigan Law alumnus (JD '56) and prominent journalist Roger W. Wilkins has written a moving autobiography describing his life as a middle-class, educated black person confused by the many mixed messages he received from his surroundings. In his book *A Man's Life* (New York: Simon and Schuster, 1982) Wilkins records the progression which took him from his boyhood in Grand Rapids to prominence as assistant attorney general and as an administrator for the Ford Foundation, for AID, and in the Department of Commerce.

As the following excerpt from *A Man's Life* demonstrates, Wilkins came to the Law School confused and distracted from his studies by questions about race and racism. Here he gives a bravely frank account of an important turning point in his remarkable career.

* * * * *

Considering my indifferent academic performance in undergraduate school, I was admitted to The University of Michigan Law School with surprising ease. I took the aptitude test in August and by the first of September I was notified that I had been admitted. . . .

One day in the first semester, I was totally confused in a course that we freshman called "The Mystery Hour," where the faculty was experimenting in teaching Contracts, Equity and Damages in one huge lump. I had understood virtually nothing of what went on in class, so I made an appointment with Professor William B. Harvey in hopes of clarifying the



Roger Wilkins in his Law School days.

issues. He listened to my problem attentively. He was a small, precise man, whose Tennessee accent had been unaffected by his years of teaching in the North. He was also the law school's admissions officer.

Professor Harvey explained the essence of what he had been driving at, but although I paid close attention, his Southern accent distracted me. The South was place I hated and feared and Southern accents from white faces made me cringe.

When I had sufficiently comprehended the course material, I expressed my nervousness over the fact that many people flunked out of law school after the first year.

"I must have had the lowest undergraduate average in this class," I said to Mr. Harvey, fully expecting to be assured that that wasn't the case.

"That's right, Mr. Wilkins," the professor replied evenly.

My stomach turned.

"Well, why did you admit me?" I asked in rage.

With no change in tone the Tennessean looked at me steadily

and said, "If you had gone to some other college [Wilkins attended Michigan as an undergraduate], you surely wouldn't have gotten in here. But we could check with your professors and we had some sense of your extra-curricular activities. They all judged you to have far more academic ability than you displayed, so we took a chance.

"Now why did we take a chance?" he continued, accent unabated.

"Well, it's because we here think the Negro people in this country need leaders—well-trained leaders. And we want to do our part in helping to train them. So we took a chance on you. Now that doesn't mean you won't have to do the work. You will. If you don't, you won't stay. But that's why we took a chance."

I left his office stunned by this Tennessee man who was the instrument of the law school's social conscience—the law school's affirmative-action program for 1953. So I worked hard enough to stay and did far better than I had done in undergraduate school.

Branch Rickey: A Law School all-star

Rare is the applicant who looks on law school as a retreat from the pressures of life elsewhere, but legendary president of the Brooklyn Dodgers Branch Rickey came to Michigan Law School in 1909 to get the rest then prescribed as the only cure for tuberculosis and to find himself a calming, dignified career. Rarer still is the law student who completes three years of law school in two, earns an excellent average and serves on the *Law Review*. Branch Rickey is almost surely the only one who has ever done all of those things while simultaneously coaching the Michigan baseball team. This feat may seem impossible, but it is recorded in a new biography of Rickey by Murray Polner (New York: Atheneum, 1982).

The Michigan athletic director of the day seems to have believed it impossible. He did not rush to hire Rickey as coach despite his previous experience as a major leaguer and as a coach at Ohio Wesleyan University. Rickey got the job only by asking all the Ohio Wesleyan, Ohio State, and Michigan alumni he had ever met to flood the athletic director with letters on his behalf. They did, and Rickey was hired on condition he stop the avalanche of correspondence.

The law school dean, Harry B. Hutchins, was also skeptical of Rickey's ability to combine coaching with carrying an extraordinarily heavy load at the Law School. He only grudgingly agreed to let Rickey accept the coaching position on condition that he not let his studies slip. The faculty were to assure Rickey's unflinching attention to his casebooks by agreeing to call



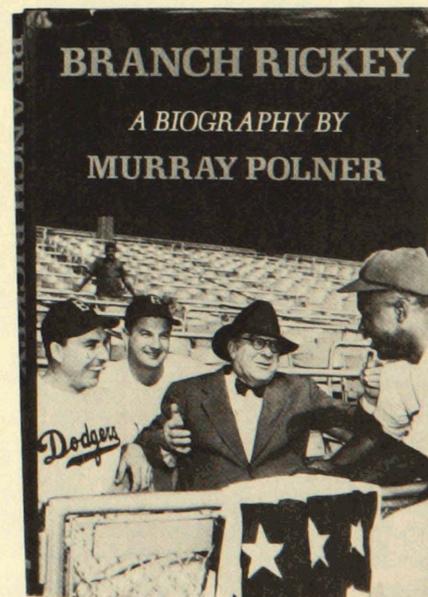
Branch Rickey, coach of the varsity baseball team and full-time law student stands in the center of the back row in this photograph from the Michiganian for 1911.

on him every day in every class. How many law students could get by, let alone excel, under such conditions?

Despite his outstanding success in law school, Rickey's attempt to set up a law firm in Boise, Idaho after graduation was a disaster. He handled only one case, soon returning to Ann Arbor and to coaching.

He went on to become one of the most vivid, loved, and important figures in the history of baseball. He virtually invented the farm system and, by signing Jackie Robinson to a contract with the Dodgers, broke baseball's color line. As this suggests, Rickey was at once a humanitarian and an effective pragmatist. He built the Cardinals into pennant winners by fostering potential stars and shrewdly trading off those who panned out. Known as the "brain" of baseball because he never forgot an average or a player, Rickey spoke a language rich with biblical quotation and stressed clean living as

much as performance in the field. In combining concern for social justice and skill in shrewd dealings, Rickey may be a typical graduate of the Michigan Law School, yet how many have gone from the *Law Review* to the dugout?



**Hathaway's
Hideaway?
Casa Dominick?
Campus Inn?
S1 S2 S3 LR?**

Our reunion quiz is not supposed to remind you of your worst moments in law school, those times when you looked at an exam question and had no idea what it was about, but to show those who did not attend the third annual Law Alumni Reunion and Law Forum that alumni see the new as well as the familiar when they return to the School. Each of these strange sounding places was the focus of festive activities at the reunion this spring.

Hathaway's Hideaway is a polling place for Ann Arbor's old second ward that was built in 1901. It was recently converted by John Hathaway (JD '57) into a cozy retreat where his twenty-fifth reunion class met during LARLF.

Casa Dominick is another recent conversion. The pizza restaurant which has long been popular with law students has expanded, adding gardens and an elegant Italian restaurant on a second floor terrace. Many "Oh's" and "Um's" were heard at the Saturday luncheon for all classes which was held there.

Campus Inn was the headquarters for the fiftieth reunion class. At a class dinner there on Friday evening, those from the class of '32 were inducted into the University's Emeritus Club.

As for S1,2, and 3, they are the depths to which one can now descend at the Law School. A key attraction of the weekend for everyone was a tour of the new library addition, led with indefatigable wit and enthusiasm by the

library's director, Professor Beverley Pooley.

At Forum sessions, alumni chose from a variety of topics currently of concern to lawyers. Professors Theodore J. St. Antoine organized an exchange between a representative of management and one of labor on current issues in collective bargaining. Professor T. Alexander Aleinikoff drew on his experience in the Department of Justice to illuminate some of the complex problems involved in regulating immigration today. Professors Sallyanne Payton and William Pierce both discussed the

particular relationship of lawyers to writing.

At the Lawyer's Symposium, alumnus Ronald Olson and former University of Michigan President Robben Fleming assured attendants that they need not fear that alternative methods of dispute resolution will supplant lawyer's role in society. Mr. Olson stressed that effective alternatives rely on the simultaneous presence of the adversarial model and the knowledge that parties can always resort to the courts. In this instance, all debate and questions were resolved most amicably over lunch.



Law School alumnus Ronald Olson (left) has recently been reappointed as Chairman of the ABA's Special Committee on Alternative Methods of Dispute Resolution. He joined former University of Michigan President Robben Fleming in running a lawyer's symposium on the topic at LARLF. Mr. Fleming is the Chairman of the National Institute for Conflict Resolution.

A L U M N I



Professor Beverley J. Pooley led alumni on a spirited and informative tour of the new library. (above)



Jazz pianist and Professor of Music at the University, James Dapogny got feet tapping and hands clapping with his renditions of W. C. Handy, Scott Joplin, and Jelly Roll Morton. As dinner entertainment, Dapogny mixed information about the great jazz pianists with irresistible evidence of their appeal. (right)

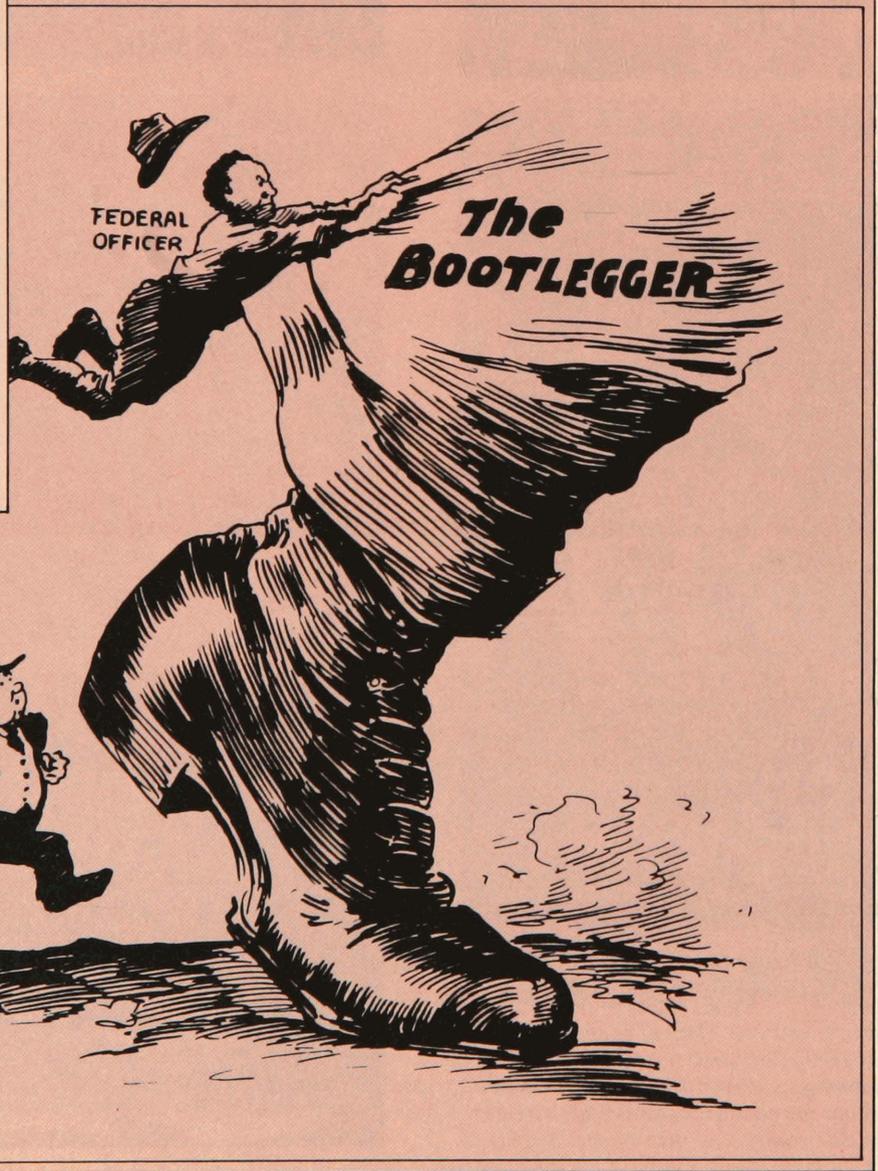


Criminal enforcement of morals...displays a critical loss of confidence in the efficacy of persuasion, education and example to preserve the traditional values.



HELP ME to keep Him PURE

PLEASE VOTE "AGAINST THE SALE OF LIQUORS"



MAJORITIES, MINORITIES, AND MORALS:

Penal Policy and Consensual Behavior



by Francis A. Allen
Edson R. Sunderland Professor of Law

This article is a somewhat abridged version of The Siebenthaler Lecture which Professor Allen delivered at the Salmon P. Chase College of Law of North Kentucky University this year. The Siebenthaler Lectures are supported by the Chase College Foundation. The complete text of Professor Allen's speech appeared in the spring issue of the Northern Kentucky Law Review.

The area of penal policy that I intend to discuss is one demanding a certain amount of fortitude or, more accurately, of foolhardiness to enter. It is a difficult and complex area, and one already much trodden by some of the most distinguished personages in law and philosophy. What I shall be discussing are penal regulations of such things as the sale and consumption of narcotic drugs and liquor, gambling, prostitution, obscenity, and other forms of sexual expression. You will notice that I am eschewing the phrase "victimless crimes," which is the shorthand term most frequently applied to these offenses. It has proved to be an unfortunate term because it often diverts discussion in the field from matters of substance to questions of label. At times, it appears to beg the very questions that these statutes engender and that are most in contention in the community. Perhaps I can best describe my purposes by saying that I intend to discuss a range of problems

arising out of sumptuary criminal regulations enacted, in significant part, to vindicate certain moral attitudes—attitudes that typically are in great contention and dispute within contemporary society.

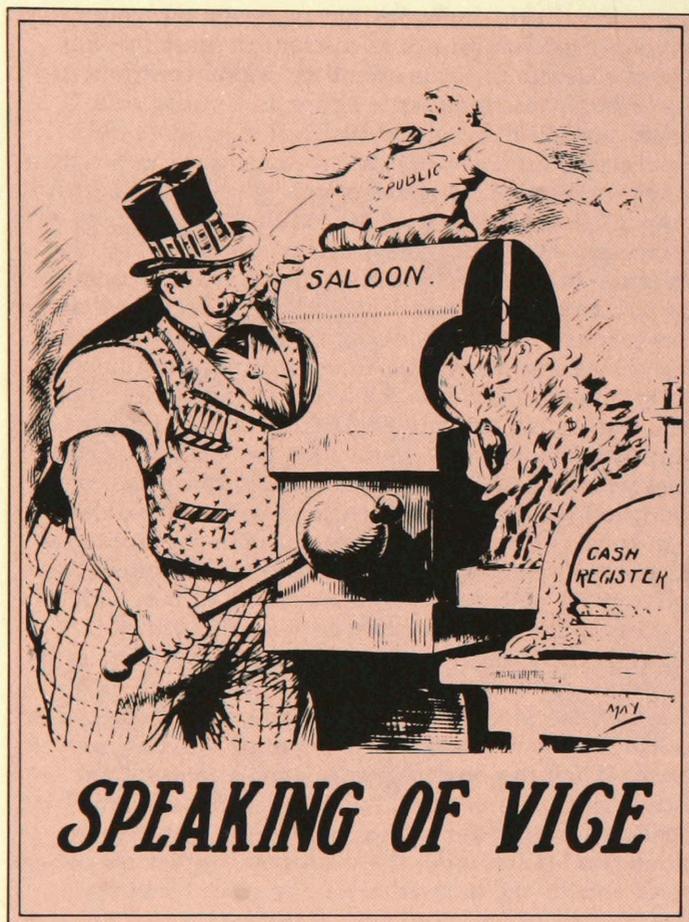
My last comment suggests that it may be desirable to say something about the relations of law and morals. I shall not say very much. Many intrepid souls who ventured into that treacherous terrain have never since been heard from. Let me suggest a dichotomy which I shall submit not as a scientific classification but as a device to focus attention. Moral concerns in the criminal law may serve either as a sword or a shield, and in many instances they may serve both functions simultaneously. It appears clearer to me than it apparently does to some positivist philosophers that among the legislative purposes underlying the condemnation of certain homicides as murder is the objective of vindicating a basic moral insight, namely the value of human life. The lawmaker declares that it is just and morally correct that persons committing homicides and displaying the requisite conditions of act and mind should be subjected to pains and penalties. This is not to deny that there may be other social purposes sought when homicides are made criminal. Reasonable security against homicidal threat is a basic condition for the achievement of any sort of satisfactory social existence and the securing of the utilitarian advantages of social life. But that the moral objective is intertwined with such purposes seems to me clear, and hence the moral concern serves as a sword: it prompts the state to exercise its power and justifies its exertion.

Yet, in the murder case the moral concern serves also as a shield, and this function is not of lesser importance. When the prosecution is unable to establish those conditions of mind and act that have been legally stipulated and which supply the grounds for moral condemnation of the murderer, the failure of proof shields the accused from a murder conviction. The concept of just punishment thus serves an important political function in that it not only releases state power in the criminal system but also contains it. Given the centripetal tendency in our times for authority to collect and burgeon at the centers of power, not only in the socialist autocracies but in western societies as well, the containment of powers exercised by systems of criminal justice becomes a matter of critical concern.

Also to be mentioned is another characteristic of what we often refer to as the common-law crimes—those that involve serious threats to life or limb or unauthorized deprivations of property. The moral concerns that unleash the sword of state power in these areas express something approaching a consensus in the community. For the most part the essential rightness of condemning murder, rape, larceny, and robbery is conceded.

The characteristics of such common-law crimes are in rather sharp contrast to those of the sumptuary offenses I am discussing today. The laws defining

The toll of vice...on family life, political virtue, and (equally emphatically) on the economy was portrayed in excruciating detail.



sumptuary offenses, or many of them, disclose a strong tendency on the part of their proponents to employ morality as a sword and a corresponding lack of concern or even hostility toward the uses of morality as a shield. Nor is this surprising. One who proclaims the virtue and necessity of intruding state power into the private relations of persons may not be well attuned to perceiving a morality that places restraints on the wielding of state power.

It is quite true that public advocacy of sumptuary regulation tends to rely heavily on utilitarian concerns and assertions of social advantage, as well as on moral principle. The public utterances of Anthony Comstock, that nineteenth-century defender of American society from the ravages of sin and art, illustrate the point. The toll of vice, whether in the form of liquor, gam-

bling, or sexual irregularity, on family life, political virtue, and (equally emphatically) on the economy, was portrayed in excruciating detail and was, of course, deplored. Perhaps it is not possible to disentangle utilitarian from moral considerations in Comstock's statements and in the voluminous popular literature of which they were a part. Nevertheless, it may be meaningful to say that Comstock's moral concerns appeared to be greater than the sum of their utilitarian parts.

There is a second point. The moral mandates expressed in much of the criminal legislation being discussed, in contrast to those articulated in the common-law crimes, bespeak a morality that in greater or lesser degrees is rejected and sometimes actively opposed by large groups within the community. We are dealing here with much less than a moral consensus, a fact of prime significance in a pluralistic society.

Opposition to sumptuary criminal regulation and the attitudes that engender such opposition have played a prominent role in American culture at least since the 1920s. It is a position subscribed to by what is probably a majority of college-educated persons in the modern era, including those dedicated to liberal politics and others whose orientations are primarily literary or aesthetic. The case in opposition takes a variety of forms, but most frequently it advances the values of individual privacy and volition.

Very likely the most important statement of modern liberal opposition to extensive use of the criminal law for the purposes of sumptuary regulation was that of the Wolfenden Report, presented to Parliament by the Scottish Home Office in 1957. The Report recommends, you will recall, that criminal penalties be withheld from homosexual acts committed in private by consenting adults and that sanctions for prostitution be confined to acts of public solicitation. These specific recommendations have proved influential throughout the English-speaking world, but of even larger importance was the argument or theory that underlay the proposals. The influence of the argument does not lie in its originality, for, in fact, it derives in principal part from John Stuart Mill's essay *On Liberty*. Rather, the Report expresses ideas congenial to the times and responsive, in the United States at least, to widespread concerns relating to the position of the individual confronted by increasingly intrusive and encompassing state power. Thus, the Report asserts: "We do not think that it is proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as guardian of that public good. . . . As a general proposition it will be universally accepted that the law is not concerned with private morals or with ethical standards." And again, ". . . there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."

So unquestioning are modern liberal attitudes toward the concept of personal privacy that they are

often expressed in extreme and even bizarre forms. Thus it seems sometimes to be assumed, on what evidence it would be hard to say, that the private lives of political figures are simply irrelevant to their roles as public servants, that a person may be a cad or worse in his intimate relationships without any doubt being cast on his eligibility or capacity for public service. Yet, the centrality of the value of personal privacy, not only to thought about penal policy but also, more importantly, to the strategy of freedom in these times, can hardly be doubted. It is difficult to conceive of a political philosophy that places great value on individual autonomy that does not at the same time posit a distinction between the private world and the public world, the former substantially immunized from the intrusions of state power. The particular horror evoked by the society imagined in George Orwell's *1984* (about which we are certain to hear a great deal during the next two years) stems in large part from its brutal and systematic destruction of the private worlds of its members. The cogency of Orwell's vision is revealed when attention is given to portraits of the ideal citizen drawn in the official propaganda of the Soviet Union and the People's Republic of China. The "Soviet Man," for example, appears to be one never in need of intervals of solitude, whose motives are wholly and enthusiastically social, whose unrelieved group existence proceeds under the benign and penetrating gaze of his fellows and the Party.

Thus, whatever reservations one may have about the ways in which the Wolfenden Report and others have argued the case for the immunity of the private world from state intrusions, the value of personal privacy must continue to figure prominently in modern thought about sumptuary criminal regulation. Yet appeals to that value are not sufficient. Statements of support for the immunity of the private world by opponents of such regulation in the past did not prevent the enactment of some of the most oppressive criminal prohibitions, and there seems little reason to believe that they will prove sufficient against the groups and forces organized today to advance the enactment and to resist the repeal of legislation with similar purposes. There are several reasons for this. One is that the members of some of the groups simply do not share the liberal's sense of the priority of personal privacy and volition, at least in the areas under consideration. At best, these persons reveal attitudes similar to those of former Congressman F. E. Hebert who, in another context, is said to have remarked: "It's not that I love the First Amendment less; it's that I love my country more."

To characterize in this fashion all of those who have supported certain criminal regulations of private behavior, however, is to be seriously inaccurate and unfair. Privacy is not the only value that must be pursued in modern society. It is not an absolute, and competing values will claim their due. Much of the controversy in this area arises from the incontrovertible fact that private behavior often has public

consequences. There seem to be no limits to the disagreements over whether such public consequences are in fact produced by the private behavior, over the seriousness of such consequences, and the importance of avoiding them. Thus, if it could actually be demonstrated that the private perusal of pornography transforms its readers into ravaging sexual beasts who roam the community committing violent rape and child molestation, it is likely that many persons, including some who concede high importance to privacy, would favor the abridgement of such private perusal in the interest of community security. So also, the perceived social consequences of private sales and consumption of narcotic drugs induce many persons, rightly or wrongly, to favor prohibition of the sale and use of heroin despite the serious and damaging invasion of personal privacy such prohibitions inevitably entail.

The question appears to resolve itself into an issue of how much presumptive weight is to be given to the value of personal privacy in the numerous and highly differing contexts in which the issue may arise. It may well be, as I believe, that many modern proponents of sumptuary legislation concede all too little weight to the values of privacy and volition in the various contexts in which the issue emerges; but to make that demonstration requires more than assertions about the importance of privacy.

There is a related point. In the areas under consideration the value of privacy manifests itself in the form of a political ideal, the ideal of the neutral state. The state, in this view, must scrupulously abstain from incursions into the private world. It may also be required to act affirmatively to protect the privacy of the private world from those who would disturb it. The neutral state is thus the political paradigm for the pluralistic society. Experience suggests, however, that the state encounters formidable difficulties when it attempts to assume a persuasive posture of neutrality. In some areas, like those involving the establishment of religion clause of the First Amendment, neutrality of the state is constitutionally mandated: government may not favor one religion over another, religion over no religion, or no religion over religion. Nevertheless, thousands and more likely millions of Americans see judicial decisions banning Bible reading and prayers in the public schools not as evidence of neutrality but rather as active secular hostility to the essentials of religion. These perceptions are likely to be especially strong when the government abandons a previous posture of support for religious practices or repeals a criminal sanction against behavior still widely regarded as immoral. Such moves are seen as active governmental partisanship with the enemies of religion and morality. The sense of grievance engendered by this perception is one of the most palpable social facts facing one concerned with penal policy in these fields.

It therefore appears that to describe the complexities confronting penal policy in these areas requires resort

The temperance cause was in its origins an effort at persuasion and conversion.



to a wider range of materials than has ordinarily been consulted, and that constructive thought about the problems displayed entails more than exercises in value analysis. One resource that ought not to be neglected is the history of American experience with sumptuary criminal legislation. Late in the nineteenth century a prosecutor arose in a federal courtroom to voice a remarkable proposition: "The United States," he said, "is one great society for the suppression of vice." Most of us prefer to think of a great society as an instrumentality for the advancement of human welfare, not as an engine for the forcible repression of sexual derelictions and other sins of the flesh. Yet the prosecutor's assertion contained a truth. Efforts to extirpate immorality through social and legal coercion constitute a persistent strand in American history—from the colonial period when the adulterer stood

before his neighbors in church dressed in a robe and holding a lighted taper; to the activities of Anthony Comstock's Society for the Suppression of Vice in nineteenth-century New York, the Watch and War Society in Boston, the nationwide Anti-Saloon League; to the modern groups who have declared their custodianship of American morality.

In reflecting on the relations of law and morals, a reasonable *a priori* assumption may be that in comparatively simple, homogeneous communities, sharp lines will not be drawn between legal prescriptions, on the one hand, and moral and religious mandates, on the other. The puritan communities in seventeenth-century New England with their legal codes derived in substantial part from the Old Testament's Pentateuch may illustrate this condition. Nor in such societies is the imposition of criminal sanctions in the few cases that arise likely to cause destructive tensions and disturbance, so long as the religious and moral consensus is maintained at high levels. On the contrary, punishment of the occasional dissentient may strengthen and reinvigorate the majority. It may remind them of who they are and encourage rededication to their goals.

Such, however, is not the social context in which most American experience with sumptuary criminal regulation has occurred. For the most part criminal sanctions have been resorted to during periods when the older consensus has broken down and when the proponents of repression are experiencing grave anxieties about the survival of the traditional moral codes. Criminal enforcement of morals at such times displays a critical loss of confidence in the efficacy of persuasion, education, and example to preserve the traditional values. Often the ultimate resort to official coercion follows a period of optimistic efforts to rehabilitate the erring elements of the community through education and exhortation in an atmosphere of humanitarian uplift. The history may constitute a corroboration of Lionel Trilling's well-known observation: "Some paradox of our nature leads us, when once we have made our fellow men the object of our enlightened interest, to go on to make them the objects of our pity, our wisdom, ultimately our coercion."

The movement from exhortation to official force can be observed most clearly in the emerging nineteenth-century temperance movement, the aspect of American experience with sumptuary regulation most fully treated in the historical literature. The temperance cause was in its origins an effort at persuasion and conversion. In 1830 the American Temperance Society pledged itself "never to make any appeal to legislators or officers of the law, for the aid of authority in changing the habits of any class of their fellow citizens." This self-denying ordinance was soon abandoned by many temperance leaders, however, and antebellum debates on prohibition legislation reveal familiar disagreements over where the line separating the private from the public worlds is to be drawn. There is a contemporary ring to Horace Greeley's prohibition advocacy, written in 1845: "The fallacy here . . . lies in

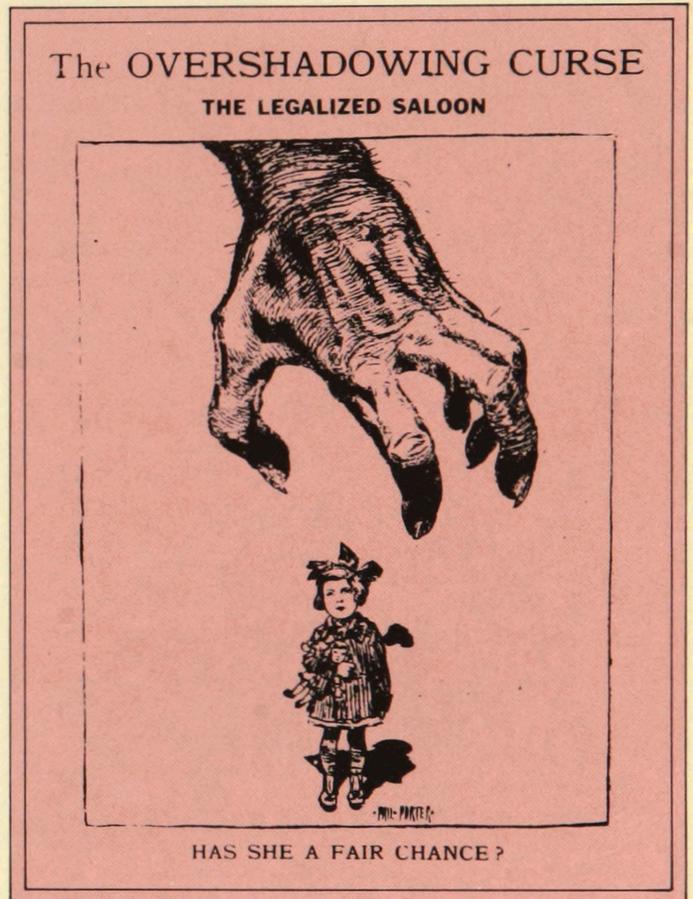
the assumption that the perpetrators 'injure nobody but themselves.' They do injure others; they bring scandal and reproach to their relatives; they are morally certain to prove unfaithful to their duties as parents, children, etc., and they corrupt and demoralize those around them."

Most of the successes the movement enjoyed in securing prohibitory legislation in the states and cities before the Civil War proved temporary. Obviously, there were elements in the antebellum world strongly resistant to the notion of coercive reform in these areas. One source of resistance was a tradition of personal privacy and volition that prevented or obstructed resort to state power. There was also a hard-headed skepticism, lost in later years, about the feasibility of such prohibitions. The crusty old Federalist, Fisher Ames, observed early in the history of the Republic: "If any man supposes that a mere law can turn the taste of a people from ardent spirits to malt liquors, he has a most romantic notion of legislative power." Finally, many temperance reformers, convinced that theirs were the dominant values of American society, were able to maintain a faith that with energy and patience countervailing values might be overcome without resort to the public force.

By the 1860s the prohibition movement was in disarray. The successes of the pre-war years had largely evaporated, and the prospects of future success were dim. Yet in the course of the next two generations the movement came to its extraordinary consummation in the ratification of the Eighteenth Amendment and the passage by Congress of the Volstead Act. The reasons for this remarkable transformation of the temperance movement from conversion to coercion cannot be adequately considered here. Such an analysis would of necessity concern itself, in part, with the burgeoning activities of that formidable engine, the Anti-Saloon League. More fundamentally, attention would need to be given to the sense of fragmentation in American culture that pitted the "Protestant[s], native-born, typically rural or small-town in their origins" against the "liquor interests," the immigrants, and the very wealthy.

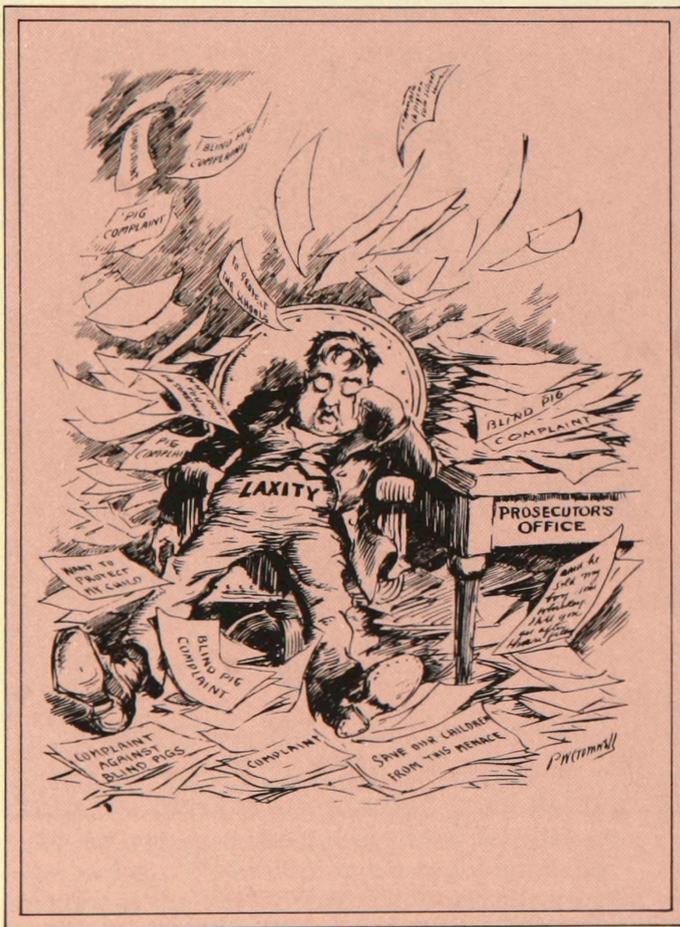
Whatever broad theories of social causation are employed to explain the metamorphosis of the American temperance movement, there were certain secondary causes and effects about which there can be little doubt. The movement toward coercion was accompanied by a new conception of those who were to be the objects of reform, a progression from persons requiring compassion and assistance to those seen as adversaries and enemies. A process of dehumanization occurred. In the Progressive Era reformers spoke much about "the saloon" and "the brothel," and these abstractions deflected attention from the concrete human realities pervading the problems of alcoholism and prostitution. An element of harshness entered the reform movements and sometimes reached levels of high intensity. "The new Puritanism," wrote H. L. Mencken, "is not ascetic but militant. Its aim is not

In the Progressive Era reformers spoke much about "the saloon" and "the brothel," and these abstractions deflected attention from the concrete human realities pervading the problems of alcoholism and prostitution.



to lift up saints, but to knock down sinners." As the nineteenth century wore on something very like a war psychology pervaded the temperance movement and the anti-vice crusades. Nowhere is the tendency more clearly revealed than in the career of Anthony Comstock. Two years before his death he could say with literal accuracy: "In the forty-one years I have been here I have convicted persons enough to fill a passenger train with sixty-one coaches, sixty coaches containing sixty passengers and the sixty-first almost full. I have destroyed 160 tons of obscene literature." That it was a matter of regret to Comstock that the

Many of the prohibitionists acceded to a program of half hearted measures and thereby created a situation in which law enforcement was demoralized, sanctions were applied capriciously and hence unjustly, and in which public life was corrupted and hypocrisy reigned.



sixty-first coach was not entirely filled cannot be doubted. Reformers unable to question the virtue of their causes become dangerous, for their convictions strip them of capacity to perceive the moral characteristics of their own behavior.

Resort to the public force in these areas has produced other consequences that are clear and demonstrable. One of these is a significant modifica-

tion in the relations of individual right to governmental authority in the United States. For the purposes at hand, the most important thing that can be said about the Fourth Amendment is that until the coming of national prohibition nothing existed in this country that could be described as a corpus of constitutional law relating to search and seizure. State prosecutors in the 1920s faced with enforcing local legislation enacted to implement the Eighteenth Amendment and suddenly confronted by the host of privacy issues it spawned, sometimes discovered to their dismay that there was not a single judicial precedent in the state supreme court relating to such matters. The extraordinary proliferation of search and seizure law in the past sixty years provides the best demonstration that sumptuary criminal regulation of liquor use, drug use, and gambling, impinges heavily on the privacy of individuals. Nor can there be any doubt that the courts, seeking to accommodate such legislative regulations to the constitutional immunities of persons, have, particularly in the search, wiretap, and undercover-agent cases, significantly constricted the dimensions of the private world deemed immune from state intervention.

Among the factors that frustrate the achievement of coherent penal policy in the areas under consideration is the symbolic significance that sumptuary criminal regulation often possesses for the groups that sponsor and defend it. At times the symbolic significance of inserting or retaining such precepts in the criminal law appears to be of greater importance to these groups than the efficacy of regulation in eliminating the prohibited behavior. The nostalgia expressed by the fundamentalist religious groups deeply involved today in political activity looks back not only to an earlier period when a higher morality prevailed but also to an age in which groups like theirs were the dominant norm-givers to American society. Such groups, scorned and lampooned in the last generation by H. L. Mencken and Sinclair Lewis, today express the grievances associated with loss of status and power. To understand the motivations behind the Arkansas law, recently much in the news, that demands equal time be given "creationism" whenever evolution is taught in the public schools, one must take account of more than the devastating impact of evolutionism on fundamentalist theology. The very existence of the Arkansas law is a reassertion of political power by these groups and symbolizes what to them may be the glittering prospects of their regaining social dominance and political hegemony.

The symbolic significance attached to sumptuary criminal legislation by its supporters also goes part of the way to explain another phenomenon that characterizes this history: namely, the willingness of the proponents to sponsor or urge the retention of criminal provisions that are patently unenforceable or unenforceable without exorbitant costs that even the proponents are unwilling to incur. The history of the prohibition experiment, again, provides a useful illustration.

One salient fact about the American experience with national prohibition was that at no time during its fourteen-year life did Congress or the state legislatures provide resources of money or personnel that even approached the levels necessary for adequate law enforcement. Shortly before the ratification of the Eighteenth Amendment, the Anti-Saloon League, insisting that an overwhelming public demand existed for the total elimination of alcohol from American society, blithely predicted that enforcement expenses in any year would not exceed five million dollars. What is more surprising, when events demonstrated that the estimate was disastrously low, the prohibitionists were remarkably moderate in their demands for greater appropriations. The reason may very well be that the proponents recognized not only that there would be strong opposition to the increased taxation more adequate enforcement would entail but also that anything approaching full enforcement would so impinge on the lives of so many persons that the public might rise up and demand an end to the entire effort. Accordingly, many of the prohibitionists acceded to a program of half-hearted measures and thereby created a situation in which law enforcement was demoralized, sanctions were applied capriciously and hence unjustly, and in which public life was corrupted and hypocrisy reigned. Ironically, it was these conditions, along with the impact of the great depression, that brought the experiment to an end. It is surely worth a moment's time to consider whether a somewhat similar history might be anticipated should current proposals for the recriminalization of abortion prevail.

There is probably no reason to doubt that the recriminalization of abortion would reduce the total number of abortions now being performed in the United States. It is also probably to be expected that the total number of abortions illegally performed would reach levels substantially in excess of those performed in the mid-1950s. This is true not only because of increased population but also because there would be a significantly large segment of the society unwilling to concede the legitimacy of the new criminal laws and who would, indeed, conceive of them as basically repugnant to a fundamental human right. That society would possess the will and resources sufficient to overcome this resistance in any complete way is surely problematic, and the consequences to the community of such massive uses of the public force for such a purpose could hardly be happy.

If, as seems more likely, a regime of partial enforcement permitting a significantly large number of illegal abortions to be performed would ensue, the consequences, again, are not attractive. The effective prohibitions of the laws would, in fact, be primarily directed, not to the affluent and influential segments of the community but to the poor and ignorant. Demoralization of law enforcement and losses in public support for the institutions of criminal justice could be anticipated. For those whose sole concern is a reduction in the total number of abortions, such factors will

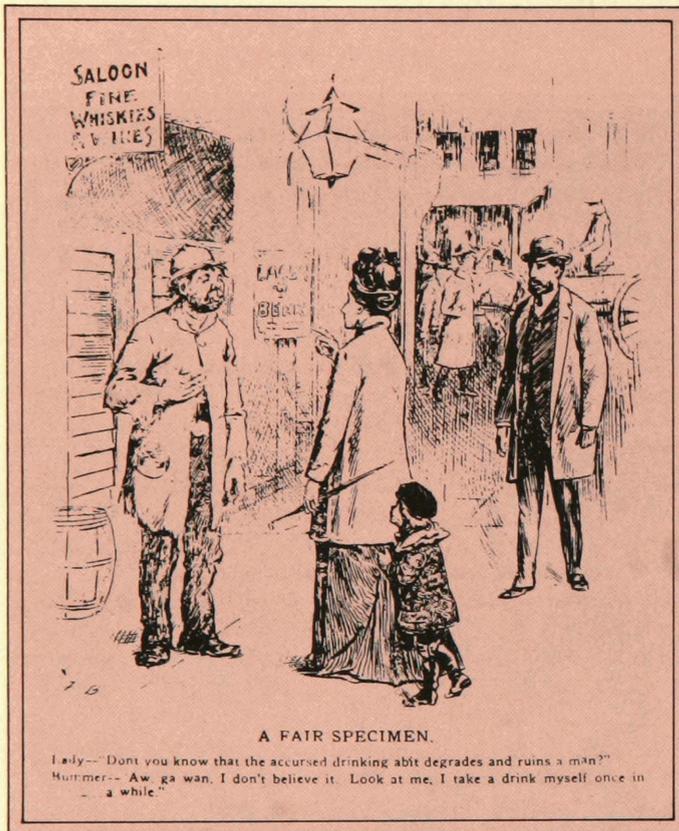
Perhaps the most remarkably successful campaign of single-issue politics in American history was conducted by that agency of evangelical protestantism, the Anti-Saloon League.



not be seen as relevant. For the rest of the community, however, they are entitled to careful consideration.

One final characteristic of sumptuary criminal regulation and the social dynamics that produce and sustain it needs to be considered. The history we have been reviewing makes clear that such penal legislation is often the product of groups practicing what in the modern vernacular is called single-issue or limited-interest politics. The problems created for representative government by such politics are not new, nor are they exclusively the product of groups concerned with the enforcement of morals. In the tenth of the *Federalist* papers, James Madison warned of the dangers threatened by such groups, which he described by the term "factions." Today observers of

Characteristically, the avid prohibitionist neglects education in temperance designed to moderate drinking habits...



the national political scene describe the proliferation of limited-interest associations, pursuing ever-smaller loyalties, and producing what one writer has called “the Balkanization of America.”

Perhaps the most remarkably successful campaign of single-issue politics in American history was conducted by that agency of evangelical protestantism, the Anti-Saloon League. Its record of achievement might induce even members of the National Rifle Association to doff their hats (or perhaps fire a salute) in its honor. Founded in 1896, the Anti-Saloon League, within a quarter of a century, was largely responsible for the ratification of the Eighteenth Amendment and the enactment of implementing legislation by Congress and the states. Its interests were rigorously confined to the prohibitionist cause; it sought no ancillary reform objectives. It opposed or supported candidates for public office solely on the criterion of the individual's record of adherence to the dry cause. It displayed

unremitting energy in furthering its program and implacable hostility to its opponents.

What is most arresting about such groups, both those that flourished in the nineteenth century and those today, is their simplistic view of the social, and sometimes the physical, world, and their inability to concede any value whatever to countervailing views. “An extremist group,” writes Edward A. Shills, “is an alienated group. This means that it is fundamentally hostile to the political order. It cannot share that sense of affinity to persons or the attachment to the institutions which confine political conflicts to peaceful solutions. Its hostility is incompatible with that freedom from intense emotion which pluralistic politics needs for its prosperity.” Typically, and perhaps necessarily for their morale, members of these groups often attribute wholly unrealistic importance to the problems they attack and the solutions they demand. Thus, the most famous evangelist of his day, Billy Sunday, greeted the ratification of the Eighteenth Amendment as follows: “The reign of tears is over. The slums will soon be only a memory. We will turn our prisons into factories and our jails into storehouses and corncribs. Men will walk upright now, women will smile, and children will laugh. Hell will be forever rent.”

The precise dangers to the areas of public policy threatened by the groups practicing limited-interest politics need to be carefully defined. The danger, it seems to me, is not that the fundamentalist groups will regain social hegemony in American society. The essential pluralism of our culture is deeply dyed, and recent studies of the basic attitudes of the American people in the last quarter of the twentieth century reveal no disposition to embrace any single, authoritatively prescribed version of morals and mores. It has been asserted that public-opinion polls sometimes show a support going much beyond the membership of the sponsoring groups for legislation mandating equal time for “creation science” in biology classrooms. Such public response, if it exists, may be indicative, however, of the very public attitudes that in the long run will defeat the ultimate objectives of the fundamentalist groups. The response of the larger public may be an expression of the political instinct of a pluralist society, however misapplied (as I believe it to be) in the particular instance. It signifies a willingness to compromise an issue that might prove unduly disturbing or divisive. The solution of “equal time” for contending views is seen as an expression of tolerance, of live-and-let-live. What is being revealed is an unconcern for the truth of the fundamentalist propositions, an agnosticism toward both religion and science, a willingness to “split the difference”—in short, a rejection of the very dogmatism that the fundamentalists seek to advance and impose.

This is not to suggest that the fundamentalist groups are powerless to affect public policy and in some localities to dominate many aspects of life, including many properly relegated to the private world. The situation is the familiar one in which highly organized groups

whose members, afflicted by no doubts, confidently advance panaceas for problems bewildering the larger community, and thereby gain an influence wholly disproportionate to their numbers or the merits of their proposals. This is a time in which many members of the larger community are immobilized by the magnitude and intricacy of modern problems; many have become disillusioned about their capacities to define or achieve social purposes, and are apparently incapable of organizing effective opposition to the practitioners of limited-interest politics.

Accordingly, the limited-interest groups, even when they are incapable of forcing affirmative changes in public policy, may on occasion exercise a veto power. A striking example occurred in the autumn of 1981 when the House of Representatives, for only the second time since home rule was established in the District of Columbia, rejected a bill adopted by the District City Council, and the disapproval carried by a vote of more than two to one. The rejected bill would have reduced or eliminated criminal penalties for sexual acts between consenting adults, and in its essentials resembled provisions long since adopted by many state legislatures across the country. It is hardly credible that the action of the House signals any sudden and massive shift in the views of legislative majorities on the merits of the issues posed. Quite obviously many members joined the majority because they feared to do otherwise. The values of local self-determination and of clarifying the boundaries of the private world proved not as compelling as avoiding the hostility of the private group sponsoring the resolution.

Many of the most troubling activities of such groups occur outside the legislative arena, such as causing books to be removed from the shelves of school and public libraries, complaints of which, according to one measure, increased by a factor of ten in the last decade. In the area of legislative policy, and most particularly of penal policy, the groups sometimes act to eliminate options that good sense and sound policy require be considered. In most of the areas in which sumptuary criminal legislation has been enacted there are genuine social pathologies requiring attention, but the coercive reformers often obstruct the proper identification of the problems and their amelioration. Characteristically, the avid prohibitionist neglects education in temperance designed to moderate drinking habits; those who most strongly champion enhanced penalties for drug offenses ordinarily show least interest in the treatment of addiction or the stabilization of narcotic intake at lower levels; the extreme law and order advocate stands athwart efforts to formulate a genuine correctional policy and expresses attitudes little different from those manifested in the practices of outlawry that prevailed in Anglo-Saxon England.

This, then, is the social and political world from which the problems of sumptuary criminal regulation arise. Are there any contributions to more decent and efficacious law in these areas that can be made by

N*o law should be passed imposing stigmatic penal sanctions on persons that does not clearly define the behavior that is made criminal.*

those concerned with penal policy as an area for disciplined thought and research? I doubt that at this point we shall be tempted to exaggerate the magnitude of the possible contribution. Here, as on so many other occasions in the modern world, one recalls Cardinal Newman's warnings about the fragility of human knowledge and reason as instruments to contain the passions and pride of men.

Yet, one ought not to despair too easily of the contribution that lawyers as lawyers can make. In the welter of contentions concerning the relations of law and morals in this field, voices should be raised in support of the proposition that the law, too, has its morality and that the claims of that morality should be heard. No law should be passed imposing stigmatic penal sanctions on persons that does not clearly define the behavior that is made criminal. No such law should be enacted before realistic appraisal is made of the chances of its achieving its stated objectives; without estimating the social costs incurred and the personal values sacrificed in efforts to enforce it; without thinking about what is lost, not only if the enforcement effort fails, but also if it succeeds. One need not be a lawyer to raise such questions, but in many situations if lawyers fail to speak, no one will. Moreover, the lawyer's grasp of the institutional realities may often enhance the value of his statement. In many situations, of course, the statements will not be heard, or if heard, will not be attended to. But this is often the fate of reason in the modern world. Perhaps it has always been so.

COLLECTIVE BARGAINING, INDIVIDUAL VOICE, and Inadequate Law

by Theodore J. St. Antoine

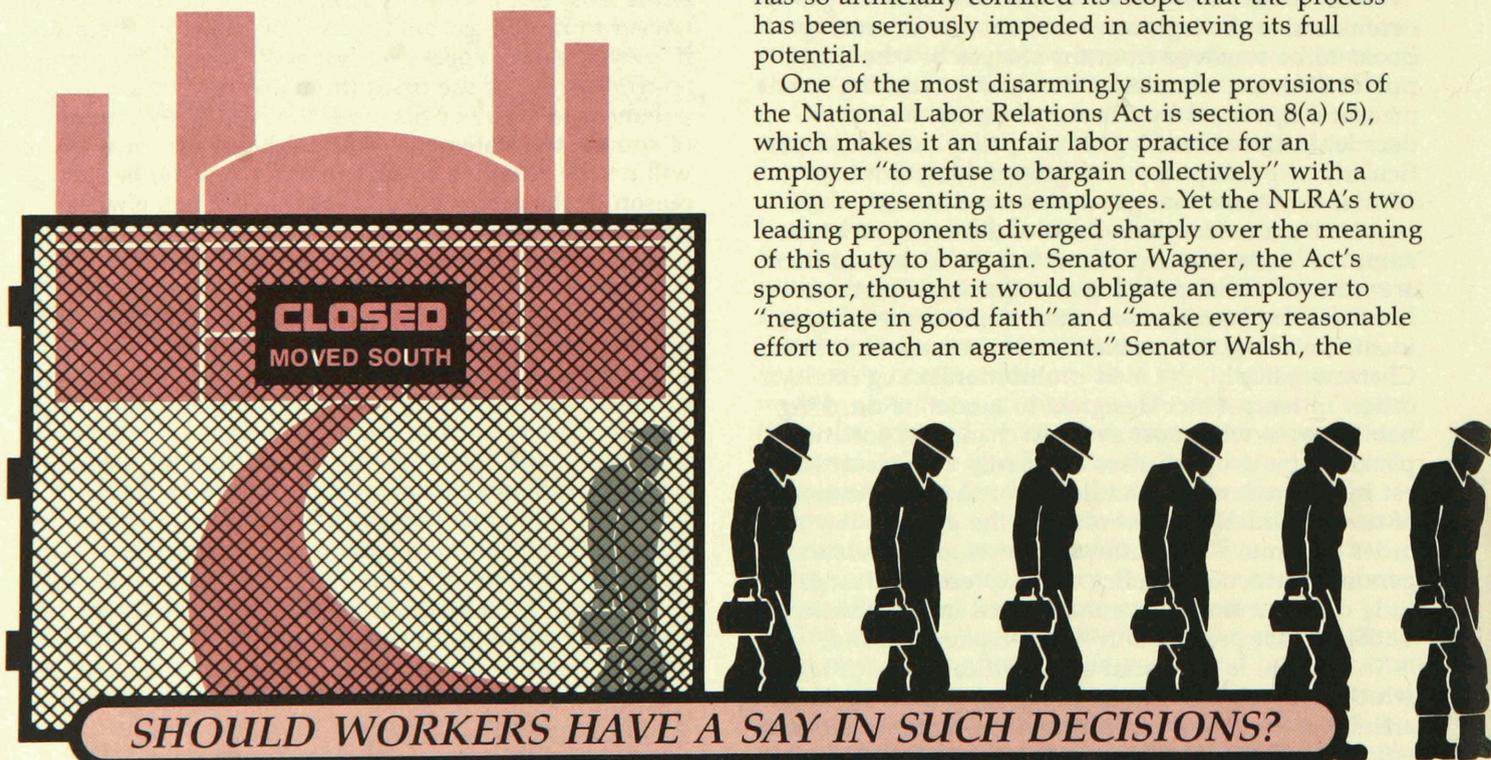
Inaugural Lecture
James E. & Sarah A. Degan Professorship of Law
The University of Michigan Law School

Nothing in my professional career has quite so touched my wife and me as the bestowal of the Degan Professorship. There have been other preferences, but they came with certain dubious strings attached. The chair was a pure, unalloyed delight. We are deeply grateful to Dean Sandalow and the Regents for the selection and to the Degans and their legal counsel for the other necessary arrangements.

With a slight twinge of guilt, I should like to dedicate these remarks to the memory of James E. and Sarah A. Degan. I say with a twinge of guilt, because I suspect that an energetic, successful businessman like Mr. Degan might not have approved of everything I shall have to offer this afternoon about an employer's duty to bargain. At the same time I find some comfort in the knowledge that Mrs. Degan, who actually decided on the gift, was a widely read and broadly cultivated woman. Surely she, at least, must have realized that when you provide a platform for an academic, especially one who no longer has to meet a payroll, there's just no telling what the fellow is going to say.

Collective bargaining lies at the heart of the union-management relationship. It is the end and purpose of the whole effort to protect employees against reprisals when they form an organization to represent them in dealing with their employer. It is grounded in the belief that industrial strife will be checked and the workers' lot bettered, if they are given an effective voice in determining the conditions of their employment. My thesis is that federal law, even while placing the force of government behind collective bargaining, has so artificially confined its scope that the process has been seriously impeded in achieving its full potential.

One of the most disarmingly simple provisions of the National Labor Relations Act is section 8(a) (5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively" with a union representing its employees. Yet the NLRA's two leading proponents diverged sharply over the meaning of this duty to bargain. Senator Wagner, the Act's sponsor, thought it would obligate an employer to "negotiate in good faith" and "make every reasonable effort to reach an agreement." Senator Walsh, the



chairman of the Senate Labor Committee, felt instead that the parties would merely be required to get together, to meet and confer. "The bill," said he, "does not go beyond the office door." These contrasting positions presaged a long and continuing debate.

Eventually, Senator Wagner's concept of a duty to bargain in good faith prevailed. Even so, as late as 1961 a distinguished Labor Study Group branded the bargaining requirement "unrealistic," adding that "the provisions designed to bring 'good faith' have become a tactical weapon used in many situations as a means of harassment."

Over the years, however, there has been increasing evidence that the statute has had a positive practical effect, including voluntary compliance by management. Thus, one survey revealed that successful bargaining relationships were eventually established in 75 percent of the cases sampled that went through to a final Board order, and in 90 percent of the cases that were voluntarily adjusted after the issuance of a complaint. However hard it may be to identify "good faith" and to classify legally such particular tactics as "take-it-or-leave-it" bargaining, it would seem almost perverse at this late date to deny that overall the statutory duty to negotiate has had a salutary impact.

Nonetheless, important problems remain. Today I wish to focus on one of the most crucial—the subject matter about which the NLRA mandates bargaining.

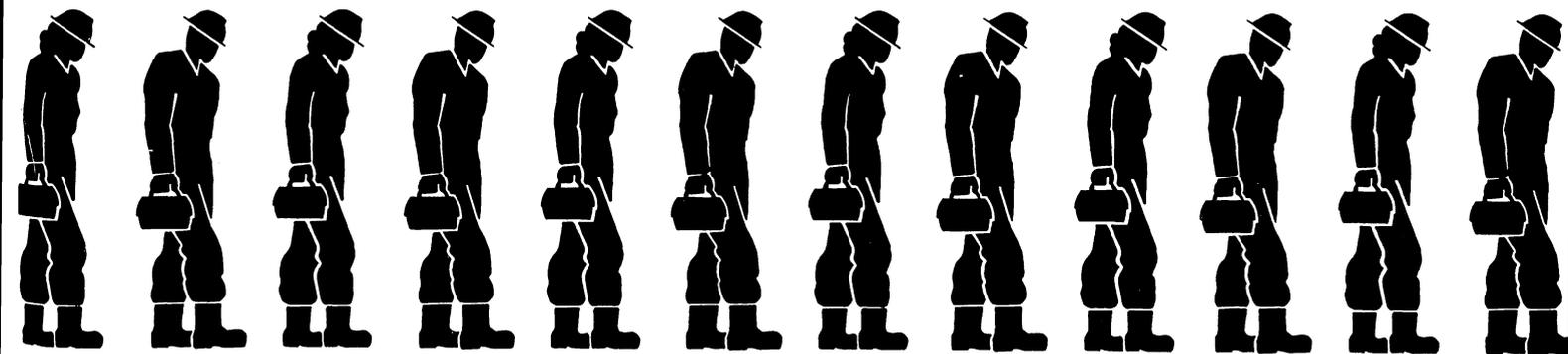
The prounion Congress that passed the Wagner Act in 1935 and imposed the duty to bargain did not see fit to define the term. This lack was remedied, in a manner of speaking, by the promanagement Congress that enacted the Taft-Hartley amendments in 1947. A code of union unfair labor practices was adopted, and unions, like employers, were made subject to a duty to bargain. A new section, 8(d), was added to the NLRA declaring that to "bargain collectively" meant the "mutual obligation" of employer and union to confer "in good faith" with respect to "wages, hours, and other terms and conditions of employment." Section 8(d) also took pains to state that no party would be under a compulsion to "agree to a proposal" or make any concessions. If the House of Representatives had had its way, the statute would have been much more specific, even definitive, in enumerating

the subjects of bargaining. In so doing the Act would have made clear, as the House Labor Committee put it, that a union had "no right to bargain with the employer about . . . how he shall manage his business. . . ."

The more general language that was finally adopted was seen as confirmation of the course the Labor Board had been following; that is, that the Board itself was to tell employer and unions what were the "mandatory" subjects of bargaining, those about which either party could be required to negotiate at the behest of the other. Moreover, if something was a mandatory topic, a party could require an agreement on it as the price of any contract. Stated differently, negotiations could be carried to the point of impasse or stalemate on such an issue. Matters outside this charmed circle of mandatory subjects were merely "permissive." The parties could negotiate concerning such topics if both sides were willing, but neither party could insist on bargaining over them if the other party objected. They could not be the basis for an impasse or deadlock in negotiations.

The Supreme Court was eventually called upon to appraise this scheme in the *Borg-Warner* case. The facts were curiously atypical. To oversimplify, an employer demanded that its collective bargaining agreement contain a clause requiring a secret ballot vote of the employees before the union could go on strike. A majority of the Supreme Court held first that the "ballot" clause related to a matter of purely internal union concern and was thus not a mandatory subject of bargaining. Then, in a step not logically necessitated by section 8(d) and highly dubious as a matter of healthy industrial relations, the Court agreed with the NLRB that the employer's insistence on a "permissive" clause as a condition of agreement amounted in effect to an unlawful refusal to bargain on mandatory subjects.

At least two other approaches might have made more sense. I am told the lead attorney for the company in *Borg-Warner* seriously considered arguing for the most straight-forward solution, which would have been to obliterate the whole mandatory-permissive distinction. Whatever either party wanted to put on the table would have triggered the duty of good faith negotiating. The other party, it should be emphasized, would never be obligated to agree, only to bargain.



Why, after all, should a federal agency, rather than the parties themselves, determine whether a particular item is so important that it is worth a strike or lock-out? The subject matter of collective bargaining ought to be flexible, not frozen into rigid molds by governmental fiat. The Board's authority to distinguish between mandatory and permissive subjects also encourages hypocrisy in negotiations. If a party deeply desires a concession on a nonmandatory subject that may not legally be carried to impasse, it will be tempted to hang the bargaining up on a false issue that happens to enjoy official approbation as a mandatory topic. Candor would have been enhanced by a different rule, and unresolved disputes would have been recognized for what they ordinarily become anyway, matters to be decided by economic muscle.

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Making all topics subject to the duty (and the right) of good faith bargaining, as the company lawyer proposed, would of course have won the case for the employer in *Borg-Warner*; but it is readily understandable why the client there shrank from such strong medicine. Ordinarily it would be the union, not the employer, that would profit the most from an expanded range of negotiations. It would enable the union to demand bargaining over those most sensitive of issues, basic business decisions now classified as managerial prerogatives.

The response of the sophisticated management attorney in *Borg-Warner* was that being required to bargain about a business decision to the point of impasse is not the worst thing that can happen to an employer. Much worse is to be told, after the fact, that a business decision unilaterally implemented without prior negotiation with the union involved a mandatory subject of bargaining, that the unilateral change thus constituted an unfair labor practice, and that it must now be undone at some substantial expense to the company. Such indeed was the ill fortune of many employers during the 1960s, when the NLRB significantly enlarged the scope of required bargaining. The safer course might well have been to end the confusion and uncertainty by treating all lawful subjects as mandatory; but that was the road not taken.

A second, more modest approach would also have allowed the employer in *Borg-Warner* to prevail. That

was the position adopted by Justice Harlan, who was joined by three other justices. He would have retained the mandatory-permissive distinction but with a difference. Either party would still be required to bargain to impasse about mandatory subjects and not about permissive subjects. That is the existing law. At the same time, however, either party under the Harlan formulation could persist in pursuing any lawful demand, regardless of how the Board might categorize it, and refuse to contract unless there was agreement on that item. In short, Justice Harlan read section 8(d) of the Labor Act to mean what it says, and only that. A party is obligated to bargain about wages, hours, and working conditions, he said. An insistence on bargaining about more is not, contrary to the majority opinion in the case, the equivalent of a refusal to bargain about a mandatory subject. A union, for example, could dismiss out of hand an employer's demand for a secret-ballot strike vote procedure, but the employer would not commit an unfair labor practice if it remained adamant.

Either of these two strategies would probably have comported better with the realities of collective bargaining than the law as now propounded. If it is too late in the day to press for fundamental revisions, at least a recognition of past missteps may help guide our future course aright.

It is now well established that mandatory subjects of bargaining include compensation in almost every conceivable form, all the way from straight hourly wages through the most complex pension plan, not to mention the traditional Christmas turkey. "Hours" cover not only the total number in a day or a week but also the times of particular shifts, the scheduling of overtime, and the like. Working "conditions" plainly encompass such physical aspects of the job as heat and cold, dirt and noise, lighting, safety hazards, and other assorted stresses and strains. The most controversial issue which has emerged over the last two decades has been the extent to which employers must negotiate about managerial decisions that result in a shrinkage of employee job opportunities. Under the *Borg-Warner* rubric, the crucial question is whether a subject is classified as a condition of employment or as a management right.

For a long time the NLRB held that in the absence of antiunion animus, employers did not have to bargain over decisions to subcontract, relocate operations, or introduce technological improvements. They merely had to negotiate about the effects of such decisions on the employees displaced. Lay-off schedules, severance pay, and transfer rights were thus bargainable, but the basic decision to discontinue or change an operation was not.

Under the so-called Kennedy-Johnson Board, however, a whole range of managerial decisions were reclassified as mandatory subjects of bargaining. These included decisions to terminate a department and subcontract its work, to consolidate operations through

automation, and to close one plant of a multiplant enterprise. The key seems to have been whether the employer's action would result in a "significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit."

In *Fibreboard Paper Products Corp. v. NLRB*, the Supreme Court gave limited approval to this shift of direction, offering some criteria by which decisions that would not become mandatory subjects of bargaining could be identified. It sustained a bargaining order when a manufacturer wished to subcontract its maintenance work within a plant. The Court emphasized that this did not alter the company's "basic operation" or require any "capital investment." There was simply a replacement of one group of employees with another group to do the same work in the same place under the same general supervision. Bargaining would not "significantly abridge" the employer's "freedom to manage the business." One court of appeals elaborated on this rationale and held there was no duty to bargain about a "change in the capital structure." Other courts of appeals, in cases of partial shutdowns and relocations, attempted to balance such factors as the severity of any adverse impact on unit jobs, the extent and urgency of the employer's economic need, and the likelihood that bargaining would be productive. Such rulings have the attraction of maximizing fairness in individual situations but often lead to uncertainty and unpredictability.

In 1981 the Supreme Court revisited the problem, with puzzling results. In *First National Maintenance Corp. v. NLRB* it held that a maintenance firm did not have to bargain when it decided to terminate an unprofitable contract to provide janitorial services to a nursing home. The Court first stated broadly that an employer has no duty to bargain about a decision "to shut down part of its business purely for economic reasons." It then pointed out that in this particular case the operation was not being moved elsewhere and the laid-off employees were not going to be replaced, that the employer's dispute with the nursing home concerned the size of a management fee over which the union had no control, and that the union had just recently been certified and as a consequence there was no disruption of an ongoing relationship. Thus the court left unanswered many questions regarding the more typical instance of a partial closing or the removal of a plant to a new location.

Before I set forth my own views on reconciling management's interest in running its own business as it sees fit and the workers' claim to a voice in shaping their industrial lives, one further important technical distinction must be understood. The question of whether a particular item is a mandatory subject of bargaining may arise in two quite different contexts.

First, the union may be seeking a certain provision, either as part of a whole new labor contract that is open for negotiation or as an addition to an existing agreement in mid-term. Second, an employer may

wish to make a unilateral change in its operations, either in the absence of or in the face of a current collective agreement, without first having to bargain with the union about the matter. In all these circumstances the Supreme Court has apparently assumed, with little or no analysis, that the scope or ambit of mandatory subjects is the same. That is to say, if the item in question is one about which the union could demand bargaining, then generically it is the sort of matter that an employer may not unilaterally change at any time without prior notice to the union and good faith efforts to negotiate an agreement concerning it. Thus, in determining the range of mandatory subjects of bargaining, we are not merely deciding what the parties

The mere existence of a grievance and arbitration system helps to eradicate such former abuses as favoritism, arbitrary or ill-informed decision making, and outright discrimination in the workplace.

are obligated to deal with at the time a contract is initially negotiated. To a significant degree we are also deciding what limits shall be imposed on the employer's freedom and business flexibility during the two or three years of the contract's life. Let us now turn to the principles and practicalities that should be considered in making that determination.

Imposing a duty to bargain about managerial decisions like subcontracting, or "outsourcing" to use the current jargon, plant removals, and technological innovation, would obviously delay transactions, reduce business adaptability, and perhaps interfere with the confidentiality of negotiations with third parties. In some instances bargaining would be doomed in advance as a futile exercise. Nonetheless, the closer we move toward recognizing that employees may have something akin to a property interest in their jobs, the more apparent it may become that not even the employer's legitimate regard for profit making or the public's justified concern for a productive economy should totally override the workers' claim to a voice in the decisions of ongoing enterprises that will vitally affect their future employment opportunities. A moral value is arguably at stake in determining whether employees may be treated as pawns in management decisions.

On a crasser tactical level, a leading management

attorney of my acquaintance once said that for years he has "Fibreboarded" the unions he deals with, long before the Supreme Court's decision on in-plant subcontracting, simply as a matter of sound personnel relations. From the workers' perspective, the opportunity to bargain before a decision is made is crucial. Unions will lose considerable leverage in bargaining even about the effects of a business change if the employer can present them with a *fait accompli* in the change itself. Oftentimes negotiations may benefit both parties by producing a less drastic solution than a shutdown or a relocation. At the very least, bargaining may serve a therapeutic purpose. As the Supreme Court put it in *Fibreboard*, in words that might sound platitudinous but for the grim historical reality behind them, the Labor Act "was framed with an awareness

Lay-off schedules, severance pay, and transfer rights were thus bargainable, but the basic decision to discontinue or change an operation was not.

that refusals to confer and negotiate had been one of the most prolific causes of industrial strife."

Organized labor and collective bargaining have never enjoyed full acceptance in this country. Unions are feared by many employers and distrusted by much of the public. Their support today even among workers is lower than at any time during the past half century. For several years they have lost over fifty percent of all the representation elections conducted by the NLRB, and their membership has sunk to less than one-fifth of the total labor force, not even half the proportionate strength of unions in most of Western Europe.

There is keen irony here. Ours is the most conservative, least ideological of all labor movements, traditionally committed to the capitalistic system and to the principle that management should have the primary responsibility for managing. Yet employers will pay millions to experts in "union avoidance" in order to maintain their nonunion status. This is not the place to probe all the reasons for this resistance. In part it is attributable to the highly decentralized character of American industrial relations, which means that typically an employer must confront a union on a one-to-one basis and not have the protective shield of an association negotiating on behalf of all or substantially all the firms in a particular industry, as is true in West-

ern Europe. In part the resistance to union organization here may result, among both employers and workers, from ingrained American attitudes of rugged individualism and the ideal of the classless society.

In any event, what seems plain is that aversion to unionism can hardly be supported by a dispassionate analysis of the actual impact of collective bargaining in this country. Indeed, for many years labor economists wrangled over whether *any* significant economic effect could be demonstrated. Now I detect an emerging consensus. This was reflected in a volume produced last year by the Industrial Relations Research Association assessing U.S. industrial relations over the last three decades, during which collective bargaining could be said to have come of age.

To no one's surprise, unionism was not found to have brought about any substantial redistribution of the wealth as between labor and capital. It has achieved a wage rate that is roughly 10-20 percent higher for union workers. That differential is largely offset, however, by increased efficiency and higher productivity in unionized firms. Unions have not been an initiating cause of inflation in the post-World War II period, although they may have hampered efforts to combat it. Lastly, to mention a point I must concede is at least superficially damaging to my thesis today, union workers generally find less satisfaction in their jobs than similar nonunion workers. On the other hand, union members are more likely to say they would never consider changing jobs. Perhaps the solution to this paradox, as suggested by Richard Freeman and James Medoff, is that "the collective voice of unionism provides workers with a channel for expressing their preferences to management and that this increases their willingness to complain about undesirable conditions."

For many observers of the labor scene, the major achievement of collective bargaining has not been economic at all. It was the creation of the grievance and arbitration system, a formalized procedure whereby labor and management may resolve disputes arising during the term of a collective agreement, either by voluntary settlements between the parties themselves or by reference to an impartial outsider, without resort to economic force or court litigation. The mere existence of a grievance and arbitration system helps to eradicate such former abuses as favoritism, arbitrary or ill-informed decision making, and outright discrimination in the workplace.

My conclusion from all this is that collective bargaining has promoted both industrial peace and increased worker participation in the governance of the shop, while simultaneously stimulating higher productivity and causing only modest dislocations in the economy generally. At the same time I believe the true potential of collective bargaining has not been tapped. Because law serves such an important legitimating function in our society, collective bargaining may have been seriously undermined when the courts began cutting

back the scope of mandatory bargaining to exclude managerial decisions even though they might have a substantial effect on employees' job security.

Peter Pestillo, Ford's able, dynamic vice-president for labor relations, has mused: "U.S. labor relations are too little people-driven and too much law-driven." That may be regrettable but it seems the reality. Ironically, the legal duty to bargain is now more hindrance than help to a well-entrenched union. Without it, the union could demand bargaining on anything it wished; with it, bargaining is by leave of the employer on everything outside the prescribed list of "wages, hours, and other terms and conditions of employment." Far better, it seems to me, would be an open-ended mandate that lets the parties themselves decide what are their vital interests. The only exclusions I would readily admit are matters going to the very existence or identity of the negotiating parties, such as the membership of a corporation's board of directors, and perhaps the integrity of their internal structure and procedure. Those limitations would preserve the holding in *Borg-Warner*, which adopted the mandatory-permissive dichotomy in the first place.

My argument for a more sweeping and wide-open duty to bargain is grounded in two considerations, one a matter of economics and industrial relations policy, and the other a matter of social policy, if not of ethics. I shall deal with them in turn.

During the late sixties American management became alarmed by signs of growing alienation, even militancy, on the part of workers. Although this unrest was much exaggerated, it fueled an effort by many companies to enhance the Quality of Work Life (QWL) by increasing employee participation in job-centered decision making. The interest in such programs was intensified during the seventies by glowing accounts of the capacity of Japanese industry to improve both the quantity and quality of production through fostering an almost filial relationship between employee and employer. Altogether, it is estimated that one-third of the companies in the *Fortune 500* have established programs in participative management. In certain countries, such as Sweden and West Germany, worker participation is guaranteed by statute. More and more studies attest that it is simply smart business to heed the voice of the individual employee and to give him or her a stake in the successful operation of the enterprise. Like the student using the library designed by the great architect, the worker on the production line will spot flaws that have escaped the eye of the keenest industrial engineer.

Participative management, or QWL programs, have undoubtedly been used by some companies to counter the appeal of labor unions. Nevertheless, several major international unions have become involved in such projects. As of 1980, General Motors and the United Auto Workers had programs under way in 50 separate plants. Some locations registered remarkable gains in employee morale and performance. In addition, the

new contract signed recently by Ford and the UAW provides for "Mutual Growth Forums," at both national and local levels, consisting of joint union-management committees for the "advance discussion of certain business developments of material interest and significance to the union, the employees, and the company."

The anomaly is that many of these developments, evidently so beneficial to management, might well be classified as "permissive" subjects of bargaining by the NLRB or the courts. A union could not bring them to the bargaining table without the acquiescence of the employer. Of course, as long as the parties are cooperative, that is a moot point. The law, however, should be structured to deal with the case where it is necessary, not where it is superfluous. Even on so-called

More and more studies attest that it is simply smart business to heed the voice of the individual employee and to give him or her a stake in the successful operation of the enterprise.

managerial decisions, like revising the layout of a trim department in an auto assembly plant, the workers' input has often proved valuable. The law ought not insulate an employer from bargaining merely because management may reject that lesson.

One worrisome objection to my prescription, that it may unduly restrict a company's autonomy after a contract has been agreed upon, should be considered. If an item is a mandatory subject of bargaining, the employer is not only obligated to negotiate when a contract is executed, it may also be precluded from instituting a unilateral change during the life of the agreement. Once an employer has fulfilled its duty to bargain and has signed a contract, arguably it should be entitled to treat all contract terms as settled. Unless restricted by some particular provision, a company should be entirely free under this view to act unilaterally without further bargaining.

Two answers can be given to this objection. First, an employer can preserve its autonomy by securing a suitably broad "management rights" clause as part of the initial settlement. Second, even if the employer must bargain, there is no obligation to agree. After a good faith effort has been put forth, and the negotiations carried to impasse, the employer may proceed to

make the change. The period of bargaining may be short if the circumstances warrant. The union and the employees would have had their say, and the law requires no more.

Twenty years ago a classic study on industrial relations concluded: "An important result of the American system of collective bargaining is the sense of participation that it imparts to workers." More recently, a group of younger scholars, describing themselves as "critical labor law theorists," have expressed the view that "collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace." Some perspective on these polar positions can be gleaned from surveys indicating that the workers themselves would rather deal with safety and health than with the design of their job. Yet perhaps the most richly textured sense of how workers feel about their jobs comes from hearing them speak for themselves. Listen to an auto worker as transcribed by Studs Terkel: "What it drains out of a human being, the car ain't worth it. But I think of a certain area of proudness. You see them on that highway, you [think we] don't look and see what model it is or whose car it is? I put my labor in it."

For me, in the end, it comes down to the social values, to the human values. It is good to know that giving the individual a voice in the shaping and operation of his job may be sound industrial relations, may enhance efficiency and productivity. I think there is considerably more to it than that. My emphasis on noneconomic factors is neither novel nor quixotic. A generation ago a hard-headed labor expert, Neil Chamberlain, declared that "the workers' struggle for increasing participation in business decisions . . . is highly charged with an ethical content. . . . [L]egal and economic arguments, technological and political considerations must give way before widely held moral convictions."

I am little troubled that some workers, in answering the pollsters' canned questions, assigned a "low priority" to involvement in decisions about job content or that their initial reaction was that a car "ain't worth" the pain. Allowed to elaborate, they still find a "certain area of proudness"; they have put their "labor in it." Really, they have no choice. It is primarily work that defines a man or woman. No amount of leisure time before the television set or on a Florida beach can compensate for that. Ultimately, it may not matter much what any of us says or does about our work. What will be important is that we shall have had a voice. The worker deserves no less.

Finally, I cannot accept the romantic notion that individual employees should somehow renounce the social compact and revert to a state of nature, shaking off the shackles of collective bargaining and disowning our orderly, hierarchical grievance-solving mechanisms. The challenge, as I see it, is to provide the individual a voice without producing cacophony, to ensure a civilized confrontation and resolution of

issues, by peaceful strikes if necessary, but without the guerrilla warfare of wildcat work stoppages. The modern union may exhibit bureaucratic tendencies that some will find distasteful, but the contemporary world is hardly a place for the swashbuckling adventurer or undisciplined marauding band. Whether called a guild, a society of journeymen and apprentices, or a labor union, a settled institutional means has usually offered working people the fullest expression of their common goals, their most effective voice. The law would do the worker no favor to ignore that history.

With this lecture, which he delivered at the Law School last spring, Professor St. Antoine inaugurated the new James E. and Sarah A. Degan Professorship of Law to which he has been named. The honor recognizes both St. Antoine's eminence as a labor law scholar and his many contributions to the Law School.

As dean, St. Antoine significantly strengthened the faculty and student body of the School. He also launched the highly successful capital campaign which made it possible for the School to renovate and expand its beautiful physical facilities.

As a frequent contributor to professional and scholarly periodicals in the field of labor law and as co-author of a widely used casebook in the field, Professor St. Antoine has become one of the best-known and most highly regarded of the nation's labor law experts. The intellectual qualities and sound judgment that characterize St. Antoine's professional writing have inevitably led to frequent requests that he perform public service. He has responded by giving unstintingly of his time and of his talents, notably as Chairman of the Michigan Governor's Workmen's Compensation Advisory Commission, as a member of the Public Review Board of the United Automobile Workers, and as a member of the Judicial Qualifications Committee of the Michigan State Bar.

He has also served as chairperson of the Labor Relations Law Section of the Michigan State Bar, as Secretary of the Labor Relations Law Section of the American Bar Association, as President of the Resource Center for Consumers of Legal Services, and as a committee chairman of the NLRB Chairman's Task Force on the National Labor Relations Board.

Professor St. Antoine is a particularly appropriate person to hold the newly created professorship which is supported by an endowment created by the bequest of the late Sarah A. Degan. Mindful of "the great influence that good teachers have on their students," Mrs. Degan sought to support the University's efforts to attract and retain a distinguished faculty. Professor St. Antoine is one of the Law School's most effective and popular teachers, known for his warmth and humor as well as his intellectual rigor.

In his opening remarks, Professor St. Antoine questions the suitability of his topic for a lecture inaugurating a professorship named for a successful businessman. Yet the lecture, viewed in its entirety, suggests that full and effective communication between workers and their employers may have practical benefits for the employer, even as it promotes justice for working people.

The Quest for Excellence

by Wade H. McCree, Jr.
Lewis W. Simes Professor of Law

These remarks were addressed to the Honors Convocation at The University of Michigan last spring. In speaking to those students who have excelled academically, Judge McCree stressed the vital importance of such accomplishments to our nation. Public institutions which foster superior achievements play a crucial role, he said, in America's realization of democratic ideals.

Judge McCree, who served as solicitor general of the United States after having sat on the federal appellate bench, joined the law faculty at Michigan last fall.

John Maynard Keynes once defined education as the "inculcation of the incomprehensible into the ignorant by the incompetent." If we were equally cynical, my wife and I, might have regarded an earlier Honors Convocation, which we attended in order to exult in the achievement of one of our children, as the triumph of experience over expectations.

We are not cynics, however, and this convocation is too important to be dismissed by a few casual or flip-pant remarks. The University conducts this convocation because it recognizes the true significance of the high achievement of the students here assembled and because it wants to call to the attention of the other students here and to the attention of all the people of our state and nation just how important the pursuit of excellence is to our existence as a free and democratic nation.

Five years ago, John Silber, the sometimes controversial and always outspoken president of Boston University, wrote, "The only standard of performance that can sustain a free society is excellence." He continued, "It is increasingly claimed, however, that excellence is at odds with democracy; increasingly we are urged to offer a dangerous embrace to mere adequacy."

This is a familiar refrain, this fear of excellence, and its expositors sometimes brand the quest for excellence as the worship of "elitism," to which they give a pejorative connotation. Curiously, perhaps, many denouncers of academic excellence nevertheless insist on superior performances by our athletes, both amateur and professional. Nor will they tolerate anything less than excellent performance from our automobiles, electronic appliances, or any other goods and services that they might acquire.

Excellence is the only standard that can sustain our free and democratic state because it is our guarantee against the autocracy of birth or wealth. Neither of these purely fortuitous circumstances is a guarantee of excellent performance, and the list of significant contributors to our nation's development in science, the arts, industry, and government who came from humble origins is as long as it is distinguished.

A psychologist can doubtless give a reason for the chronic and sometimes hidden distrust of persons who

excel academically or otherwise in intellectual matters. There is no equivalent and widespread suspicion of outstanding athletes or of entertainers in other areas. Perhaps it is because people know in a profound and secret way that those who can develop and harness their intellects are the true Prometheans who have conceived the great developments that have brought humankind from the cave to our present state of grace.

The fear of excellence is coupled, nevertheless, with a sometimes grudging admiration. In times of crisis our nation turns for succor to the scholar it ignored or neglected in halcyon times. After October 1958, when the Soviet Union flung Sputnik into space and its repetitious beeping as it orbited the earth proclaimed Soviet superiority in space technology, we sought out and recognized our scholars to an extent that I had never witnessed before. American legislators at both state and federal levels vied with one another for primacy in channelling resources to our colleges and universities in an all-out effort to close the gap in space satellite technology.

Research, both pure and applied, was generously funded and we encouraged university attendance by appropriations for scholarships and other forms of academic assistance. These efforts were productive and resulted in our placing the first men on the moon, achieving a soft landing on Mars, launching the Voyager exploration of the outer planets, and deploying communication and weather satellite networks.

Unfortunately, our nation has not sustained that heightened interest in learning, and now, a quarter century later, we are witnessing the revival of the old assaults upon education and excellence. Legislators, state and federal, hard pressed to balance budgets in a time of economic distress, have identified the education components of proposed budgets as the likeliest candidates for reduction or outright elimination. Particularly vulnerable are funding requests for pure research, the humanities, and the fine arts. These academic areas suffer from the absence of an organized and vocal constituency, and budget cutters unfortunately find an appreciative response when they refer to a liberal education as an expensive and expendable frill.

Last spring, the now-defunct *Washington Star* reported an account about a recent Wellesley liberal arts graduate who, after months of looking for work in the Capital City, finally obtained a job "just a notch above a secretarial position—offering little prospect of advancement." She complained, "Why didn't someone tell me it would be like this?"

The *Star* went on to observe, "A liberal arts degree is, after all, a luxury, when both men and women are competing for a limited number of careers in a changing world economy. It often costs, after all, more than \$10,000 a year for the pleasure of learning the inner workings of Jean Paul Sartre or the dark, political genius of a Machiavelli," the *Star* continued. Small wonder that legislators believe that they are trimming fat from a budget when they cut back on education's requests for funding.

One of the greatest tragedies of the apparent current Congressional program to curtail aid to education is that its impact will fall disproportionately on able children of families at or near the poverty level—children whose only hope of breaking loose from the poverty cycle is to avail themselves of financial assistance to attend great universities like this one. Instead of promoting democracy, the legislative levelers who denounce the quest of excellence as elitism are frustrating the operation of the one system that has enabled our nation to more closely approximate the goal of a classless society than any other on earth.

What a cruel hoax it will be to tell young men and women, many of whom were identified by affirmative action programs and brought to the very threshold of

<p><i>Excellence is the only standard that can sustain our free and democratic state because it is our guarantee against the autocracy of birth or wealth.</i></p>

a university experience, that we have decided not to fund their loans or scholarships because money is in short supply and it is more important for us to build up our military establishment despite its existing capacity to destroy our planet and kill its occupants many times over.

In Michigan, as well as in the federal government, such a posture is a betrayal of our heritage. Every expression of our fundamental law from The Northwest Ordinance of 1787, which governed the territory out of which our state was created, to the current Constitution, ratified in 1963, has held that

"Religion, morality and knowledge being necessary to good Government and the happiness of mankind, schools and the means of education shall forever be encouraged."
(Const. of the State of Mich. of 1963. Art. VIII, sec. 1)

Surely, our leaders will not turn their backs now on that part of our past that has made our state a leader in so many significant areas of industry, science, the arts, and education.

We need no more technology that is designed to destroy; we can use new skills to conquer disease and to improve the quality of life. The mention of life

reminds me that Harvard's great biologist, Dr. George Wald, said, in a memorable address in March, 1969, . . . The carbon, nitrogen, and oxygen that make up 99 percent of our living substance were cooked in the deep interiors of earlier generations of dying stars. Gathered up from the ends of the universe, over billions of years, eventually they came to form in part the substance of our sun, its planets and ourselves. Three billion years ago life arose upon the Earth. It is the only life in the solar system. . . .

About two million years ago, man appeared. He has become the dominant species on the earth. All other living things, animal and plant, live by his sufferance. He is the custodian of life on earth and in the solar system. It's a big responsibility. . . . Our

W*e have no choice but to pursue excellence because nothing less can enable us to harness for good the forces that, uncontrolled, can destroy us all.*



Wade H. McCree, Jr.

responsibility is with life, not death. Our challenge is to give what account we can of what becomes of life in the solar system, this corner of the universe that is our home and, most of all, what becomes of men—all men of all nations, colors and creeds. It has become one world, a world for all men. It is only such a world that now can offer us life and the chance to go on.

No truer words have ever been spoken. A French scientist said almost forty years ago that science had taught us to become gods before we have learned to be men.

We have no choice but to pursue excellence because nothing less can enable us to harness for good the forces that, uncontrolled, can destroy us all. We need to learn more about human nature. We need to learn why we behave the way we do as individuals and collectively. We need to be able accurately to forecast our economic behavior and the onsets of our aggressions and our conciliations. We must learn how to make our streets safe, as well as our seas and skies. We must do more than just collect data—we must understand them.

This is the pursuit of knowledge that we must undertake and the talisman that will guide us is excellence. We welcome you to its quest.

Abortion controversy

To the Editor:

The statement of Professor Donald Regan on the advisability of amending the Constitution to restrict or prohibit abortion contained in the spring issue of *Law Quadrangle Notes* requires a response. That the subject has invoked, and will continue to invoke, serious consideration on legal, moral, and philosophical levels is evident. I submit that the legal aspect demands deeper consideration than the Senate Committee received in this instance.

Professor Regan's statement avoids the fundamental issue—the reason for considering the amendment at all.

Regan says, "The first issue that arises, on my approach as on a standard approach, is whether the fetus is to be regarded as a person. In my view, a general consideration of our laws does not compel an answer to this question either way. I shall therefore concede for purposes of the following argument that it is permissible to regard the fetus as a person." (Page 30)

The law cannot ignore the existence of the viable fetus nor can it be neutral toward it. The fetus must be afforded full, partial, or no protection whatsoever under the law. The controversy exists precisely because this is so. At issue is the future of our law as it will be applied to the fetus, to the woman and the man involved, and to society in general. Whichever position is finally adopted, it would seem essential that the nature of the fetus be determined and that such determination govern the law to be applied. If the nature of the fetus is determined to be such that the law regard it as a person, by Constitutional Amendment or

otherwise, then the fetus is entitled to the protection afforded a person under our law, including the Fourteenth Amendment right to life. For the purpose of his argument, Professor Regan regards the fetus as a person. His conclusions following from what he regards as "basic tenets of our legal culture" are, however, legally unsupportable.

Regan, maintaining that "the issue is whether the woman should be free to reject the fetus's claim," would dispose of Fourteenth Amendment rights with the simple and puzzling assertion that we have other values besides the preservation of life and the other values sometimes prevail over the value of life (Page 31). So much for the life of the person. One shall not be deprived of life without due process—unless, per Professor Regan, other values prevail. Hopefully for all of us, the courts will not discover and apply the Regan doctrine generally.

We are offered the proposition that the act of abortion by physical or chemical means constitutes no invasion of the fetus's life from outside but, rather, a rejection of the fetus's claim on the woman, a mere "refusal to aid." Surely, it can hardly be seriously contended that the fetus has not been invaded from outside when physical or chemical means are inserted into the woman to destroy the fetus. Except in the case of certain medical emergencies, the outside force acts by or through the consent of the woman. If one wishes to engage in the sophistry of referring to the destruction of the fetus as a rejection of its claim on the woman, one may do so, but one does not thereby resolve the legal and Constitutional issues.

Regan argues that to legally protect and preserve the existence

of the fetus is to invoke class discrimination against, to impose an improper burden upon, and to unduly require the giving of aid by the woman whose condition she neither invited nor desired. The Committee was offered purported analogies—the continuation of the relationship between prospective mother and child is compared to compelled organ donation, to death risking rescue efforts and to a duty to call a doctor for an injured person. To attempt to establish the direction the law should take upon the subject of abortion by the use of these grossly dissimilar illustrations is a misleading approach. It might well be asked, given Professor Regan's approach that the basic tenets of our legal culture should not prohibit or restrict abortion of the person regarded fetus, why such basic tenets should prohibit damage to or destruction of an infant. The infant's very presence may have been unwanted. It may place a serious and unique kind of burden on the mother, a member of a class of individuals who have suffered discrimination, who desires to reject the infant's claim and who has made no contract to give it aid. The infant is afforded the law's full protection because it has been determined to possess the nature and properties of a human person and is, accordingly, legally so regarded. As a person, it is protected by the right to life, to due process of law, even against the burdened mother.

If the fetus does not possess the nature and properties of a human person, our Constitution and law need not afford it rights which we so proudly and magnificently assert and diligently maintain for the human person. If, however, the fetus does possess such nature and properties, it would be a tragic error for our

legal system to fail to protect its very existence.

Hon. John H. Norton, J.D. '48

Professor Regan responds:

Many of Judge Norton's criticisms would be answered by an attentive rereading of my testimony. (A fuller statement of my view is available in the article on which the testimony was based, "Rewriting *Roe v. Wade*", 77 *Michigan Law Review* 1569-1646 (1979). Two points deserve comment here.

(1) I suggest in the testimony that abortion does not involve "an invasion of the [fetus's] life from outside". Judge Norton asks how I can deny that abortion invades the fetus from outside. He has altered my claim, substituting "the fetus" for "the fetus's life." The clear point of the paragraph from which Judge Norton selects one phrase is this: The woman is not related to the fetus in the way the ordinary active wrongdoer (a murderer, say) is related to his victim. We can solve the murder-victim's problem by removing the murderer from the scene. We cannot solve the fetus's problem by removing the woman. That is why it is appropriate to think of the fetus, unlike the murder-victim, as making *positive* demands.

(2) Judge Norton suggests that my argument would justify infanticide. There are many differences between the situation of a live-born infant and that of a fetus *in utero*. One important difference is that a woman can extricate herself from the claims of an infant without bringing about its death. She can give it up for adoption. The conflict between the woman's interests and the fetus's permits no analogous resolution. Further, the

woman who has a child and does *not* give it up for adoption has voluntarily assumed duties to the child (or has done something on which it is reasonable to predicate a voluntary assumption of duties) much more clearly than the woman who has unintentionally become pregnant.

A defense of Leidy

To the Editor:

A grave injustice has been done Prof. Leidy. I don't know that he needs anyone to pick up the cudgels for him, or that he would appreciate me, of all people, picking them up.

I refer to his supposed remark about working and attending our law school in the Letters section of the spring edition.

Much of my life I lived in Ann Arbor and worked from the 9th grade on. I knew many of the professors and they knew me, so there was no place to hide. By the time I hit Law School, I was in highly visible jobs, such as waiting table for a caterer. I saw all the faculty members regularly.

Of my six closest friends in Law School, five were working their way through. We all made it, although not without travail in my case. So I regularly saw Prof. Leidy. Only once did he mention my jobs, and that was to remind me that it was a tough haul doing it that way, but we all knew that.

If I were asked his attitude towards we working stiffs, I would say he was compassionate. That would tend to be confirmed by his remark after I received my diploma—to the effect that there were times when the faculty thought I wouldn't make it. That feeling I had shared with them.

I sort of suspected that his performance was a shell covering a

considerate heart—in a tough job of trying to make attorneys out of a bunch of boys. The record would seem to indicate how successful he and the other members of the faculty were.

D. H. Hoard, J.D. '32

Law School burlesque

To The Editor:

I cannot overlook the caustic remarks about Professor Bates, Leidy, Aigler, and Grismore in W.J. Harleton's letter...I think I knew these fine men well enough to argue that Harleton's claim that they did not have a sense of humor is crazy. They had to have it to put up with the students of those days. Before my time, the Phi Delta Phi's imported the entire chorus of a burlesque show, together with a name band, for a wild three day party, and I understand that Bates single-handedly saved the entire fraternity from expulsion from the University.

Another proof of Dean Bates's sense of humor was his storytelling. He had been Secretary of the Western Golf Association, and his story about the English golfer who was caught in a folding bed in Chicago was a classic. He frequently came to the Phi Delta Phi house for dinner and nobody wanted to miss his visits. Dean Bates was important in bringing to the Law School the national prominence it enjoys today.

If some of the students thought these men were too formal, I submit they should now have the hindsight to appreciate what these devoted men did for many of us in those trying times when we were in law school.

George E. Diethelm, J.D. '32

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