Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 27, NUMBER 2, 1983

Lempert on Spousal Immunity

In recent history, the spousal immunity has been used to bar testimony of wives against their husbands. Had such a rule been in effect in the garden of Eden, however, it might have prevented Adam from accusing Eve.

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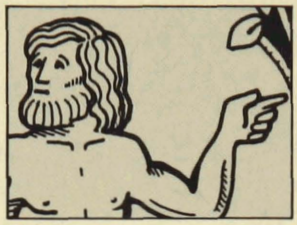
ARTICLES

DEPARTMENTS



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Shoot out on television

Bollinger on broadcasters' First Amendment rights

Professor Lee Bollinger was invited to be one of three key speakers at a national workshop on television and violent behavior which was held in Washington, D.C., this winter. The workshop was sponsored by the committee on research on law enforcement and the administration of justice of the National Research Council's commission on behavioral and social sciences and education.

Professor Bollinger discussed the constitutional issues involved in regulating televised presentations of violence. His address followed a talk by psychologist Thomas Cook of Northwestern University which surveyed research on the relationship of television viewing and violent behavior and a discussion of regulating strategies by Professor Douglas Ginsberg of the Harvard Law faculty.

The question of whether the Constitution would permit any form of legal regulation directed at severing the possible link between television viewing and violent behavior was Professor Bollinger's subject. Although proceeding on the assumption that such a link is demonstrable, he stressed that a cause-and-effect relationship between viewing televised violence and aggressive antisocial behavior has been asserted but not conclusiveiy established.

In his talk, Professor Bollinger considered how laws regulating portrayals of violence would fare under the First Amendment, concluding that they would not fall within the well-defined exceptions to protected speech outside the broadcasting context. He then discussed the rationales which have been used to legitimize special regulation of broadcast media which would be impermissible if applied to other forms of speech, drawing on the Supreme Court's decision in *F.C.C. v. Pacifica* 438 U.S. 726 (1978). Arguments turning on the scarcity, pervasiveness, or ability to penetrate into the private home of broadcast media "would not provide much help in supporting a case for the regulation of television violence," Bollinger said. He further noted that these rationales, as well as the "impact thesis" which holds that television has a unique and extraordinary control over its audience which justifies particularly stringent regulation, are currently "undergoing a rather rapid erosion, both from the force of logic and from that of technological change within the television medium."

Those advocating regulation of televised violence, then, would of necessity turn to other rationales which, Bollinger cautioned, might well legitimate government con-

trol "over virtually every aspect of television programming" and have an impact outside the broadcasting media, eroding First Amendment protections in other areas of expression. Since seeking to deal with social violence by controlling televised portrayals of violent acts would thus present "grave constitutional difficulties," Bollinger suggested that alternative government responses to the underlying social problems should also be explored.

The problem of vagueness which would necessarily attend any attempt to define improper programming violence is possibly the most insuperable of the First Amendment questions which would be raised by such regulation. Bollinger voiced his concern about the difficulty of articulating a legal standard which would reliably distinguish violence with undesirable social consequences from that which is integral to works like *King Lear*. Regulation designed to be sensitive to context and social value in a given expression is inevitably ambiguous and can lead to excessive self-censorship among broadcasters. The corresponding disadvantage with a narrow or quantitative standard, Bollinger said, is that it can be highly arbitrary. It "will encompass good as well as bad speech, and probably even fail to reach all the bad speech," he said.

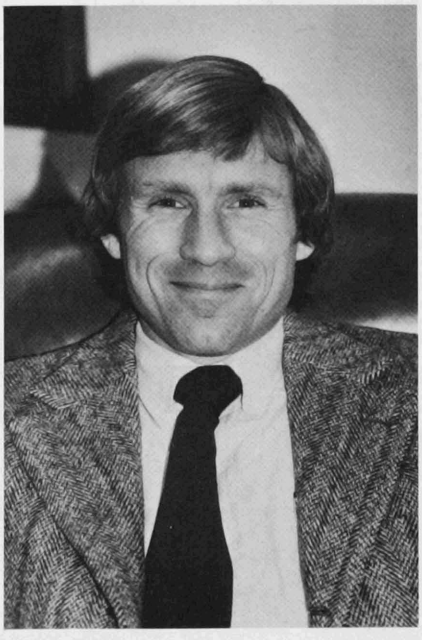
The difficulty of drafting a legal standard to control televised violence would not, of itself, be determinative in any assessment of the constitutionality of such a regulatory scheme, Bollinger said. The combination of constitutional considerations raised by proposals to restrict or prohibit the attractive portrayal of violence on television, however, does mitigate against the desirability of devising and defending such a scheme in Bollinger's view. Nevertheless, he continued, it is worthwhile to consider the central theories which could be used most effectively by advocates of such regulation with the least disruptive impact on existing First Amendment doctrine.

One need not demonstrate the uniquely persuasive nature of television to justify its regulation, he said, since the technology of all broadcast communication has traditionally been perceived as a proper place for regulation. There are also grounds for arguing that television entertainment programs are entitled to a lesser degree of First Amendment protection than political speeches without involving the regulatory agency and courts is case-by-case examinations of the merits of particular programs. Furthermore, "given the generally unpolitical character of television entertainment programs," Bollinger said, the risk that such an argument would lead to the suppression of important and valuable speech is not substantial.

A proposal that the attractive portrayal of violence be restricted to certain times of day would make regulatory sense, Bollinger said, if the object of such regulation were to control the exposure of children to such programming. Regulation with that restricted purpose would also stand a better chance of success than a broader regulation directed at controlling expression for adults, he added.

Those seeking to regulate televised violence might also decide to make a claim under the fairness doctrine rather than advocating censorship, Bollinger said. They could argue that the broadcasters should be required to represent the attractiveness of nonviolence as well. This approach "has the great merit of being designed to 'expand' rather than 'ban' speech," Bollinger said. A similar balancing effect might be achieved, he went on, through the financing of nonviolent programming for the public broadcasting system.

Whether broadcasters should be held liable for injuries sustained by individuals which were allegedly caused by violence in television programming was Professor Bollinger's final topic of consideration. Noting that such tort liability would probably result in excessive self-censorship by broadcasters and could be imposed for impermissible reasons which would be difficult to discern, Bollinger argued that tort liability for acts of violence which are imitative of television programming should not be constitutionally permissible. He concluded, however, that "liability may well be imposed in situations where there is a true attempt at incitement and a clear and present danger of serious harm is presented. Nothing insulates the television medium from the application of this normal First Amendment rule."



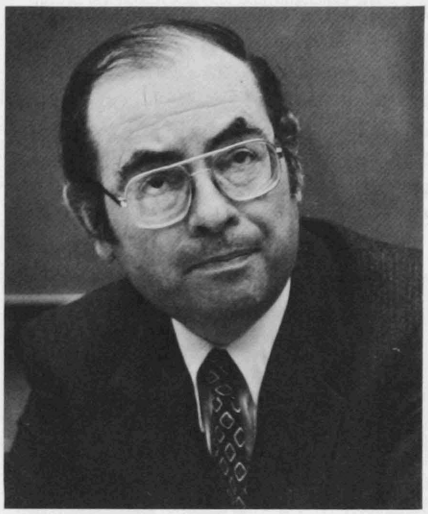
Lee Bollinger

On flatfoots and gumshoes

Kamisar's study of interrogation wins award

"Professors, it seems, are supposed to tiptoe, not crash. They are supposed to be troubled and tentative, not take very strong and very clear positions on anything, "writes Professor Yale Kamisar in an article praising the unusual prescience, outspokenness, and openmindedness of his long-time adversary on questions of police procedure and protection of suspect's rights, Fred E. Inbau. The article is one of seven provocative and influential essays on the law governing confessions collected in the volume, *Police Interrogation and Confessions: Essays in Law and Policy*. They were written by Professor Kamisar during the fifteen years of unprecedented change from pre-*Escobedo*, pre-*Miranda* days to the Supreme Court's decision in the "Christian Burial Speech" case, *Brewer v. Williams* (1977). Widespread praise of the volume suggests that Professor Kamisar, while an indefatigable scholar who imaginatively and fairly considers all views of a question, is himself no tentative tiptoer.

"Perhaps no other legal scholar's writings have ever played so great a part in formulating the relevant questions, in providing insight into the critical issues, and, ultimately on shaping the constitutional doctrine established by the Supreme Court as have Kamisar's in this area," wrote Welsh S. White in the *Pennsylvania Law Review*. "The articles survey the pros and cons but then let you know where the author stands, usually in no uncertain terms, and often in language that flows white hot with an indignation made more compelling by Kamisar's obvious



Yale Kamisar

awareness of countervailing arguments and his graciousness (usually) to the individuals who advance them," says Stephen J. Schulhofer in the *Michigan Law Review*. Even a nonprofessional, like the reviewer for the *Times Literary Supplement*, is awakened to the significance of the subject by the book's impassioned advocacy: "Kamisar's conviction maintains a compulsive, intensive fascination for the reader that makes him [or her] realize thoroughly the importance of legal theory if one is not to place the 'mouse under the protective custody of the cat.' " All of the book's many reviewers mention its thoroughness and power. As the writer in the *National Law Journal* put it, "Mulling, speculating, pondering, digging about, revising and rethinking, nobody is as comprehensive as Mr. Kamisar. . . . The charm and eagerness that characterize him as a teacher and debater are apparent in his written work."

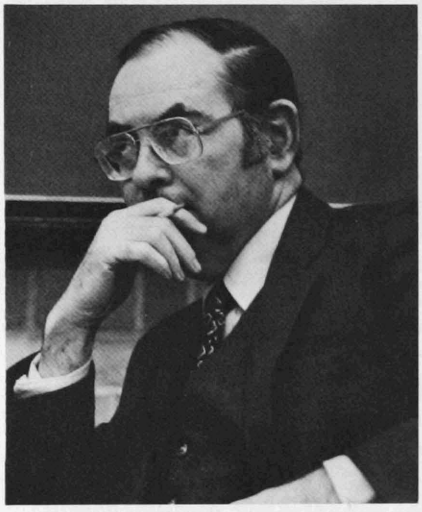
It is little wonder that *Police Interrogation and Confessions* received this year's Michigan Press Book Award. The award is conferred for the most distinguished book published by The University of Michigan Press within a two-year period. The seven essays in the volume "provide the most illuminating historical perspective of the Supreme Court's efforts to deal with the confessions problem and the most penetrative analysis of the constitutional and policy issues that have confronted the Court along the way," writes Wayne State's expert on criminal procedure, Joseph D. Grano. Yet the interest of the book is not merely historical. The appearance of the collection is also timely, as reviewers note, coming as it does when many Americans are demanding increased police powers and when the Burger Court has been accused of retreating from the Warren Court's concern for the rights of suspects. With expanded footnotes and a retrospective introduction describing how and why he came to write each of the essays, Professor Kamisar sets all the material in the collection in a contemporary context.

Significantly, Professor Kamisar credits an initial angry reaction with instigating his subsequent prodigious research into the problem of interrogation. In his introduction Professor Kamisar suggests that the "secret root" from which he "drew the juices of indignation" was a six-hour-long tape recording of the questioning in the 1962 Minnesota case, *State v. Biron*. The tape is unusual, Kamisar says, in including not only Biron's confession, but also the "repetitious and unrelenting" questioning by five interrogators endlessly "urging, beseeching, wheedling, nagging Biron to confess."

Students, to whom Kamisar plays the tape, rarely can bear to listen to more than two hours of it. Yet "the interrogators neither engaged in nor threatened any violence." Rather, what is disturbing about the tape is that it vividly illustrates "the kinds of interrogation practices that at the time satisfied the best standards of professional police work and fell within the bounds of what the courts of that day called 'fair and reasonable' questioning." Kamisar implies that it may have been dismay at actually hearing such methods of wrenching confession from the accused which prompted the Minnesota Supreme Court to strike down Biron's conviction, though the ground which it articulated was only the narrow one that false legal advice by the police had vitiated the confession.

"How can anyone listen to the insistent questioning of Biron and to the many different ways his interrogators urged, cajoled, and nagged him to confess without feeling the relentless pressure, without sensing Biron's confusion and helplessness, without getting the message—confess now or it will be so much the worse for you later—and without wondering what ever happened to the privilege against self-incrimination and the right to the assistance of counsel?" Kamisar asks. The discrepancy this question suggests existed between the meticulous protection of the right to counsel and privilege against self-incrimination required in the courtroom and practices then acceptable in secret police questioning is the subject of a landmark article included here entitled "Equal Justice in the Gatehouses and Mansions of American Criminal Procedure." Kamisar's sense that a court will be most likely to correctly ascertain coercion if it is exposed to an exact record of the interrogation underlies the argument which he makes in his discussion of the famous 1977 "Christian Burial Speech" case, *Brewer v. Williams*.

In his article on that case, Kamisar illustrates that discrepancies existed between the police captain's two accounts of the speech he made which led to a confession. Noting that none of the courts which considered the case attended to these differences, Kamisar argues for the importance of the nuance which may well be lost in even an honest and well-intentioned officer's account of a conversation. To understand the tone and implications of an interrogation, Kamisar insists, the court needs to have access to tape recordings of private meetings between police and suspects. When police could make such an objective record but fail to, Kamisar argues, courts should reject all governmental claims that a suspect has waived the right to counsel or the right to remain silent.



If Kamisar's first fascination with these issues arose out of his distaste for the *Biron* tape and sympathy for the accused, he also manifests an unwillingness to let a problem drop and an insatiable appetite for finding satisfactory explanations which might qualify him for the interrogator's role. Indeed, it is Professor Kamisar's own tireless style of questioning which makes his book fascinating. Progressing from the earliest essay, "What Is an 'Involuntary' Confession?" to the final one, "What Is 'Interrogation'? When Does It Matter?" he takes nothing for granted. Through comparisons and a string of hypotheticals, he clarifies the distinctive significance of the particular fact situation of the case under discussion. Analyzing the opinion of the court and those of the dissenters, he patiently highlights points of contention or moments of obscurity. The court, for example, fails to delineate what constitutes "interrogation" in the "Christian Burial Speech" case; Kamisar compensates for the oversight.

No problem seems static in Kamisar's characterization. He does not advance a fixed thesis, but progresses through question and exploration, developing and elaborating a viewpoint which grows as one reads. The landscape of criminal procedure is, as he presents it, a shifting and deceptive one, constantly disturbed by new articles, decisions, and ideas. Professor Kamisar seems to welcome each new complication with an energetic readiness to contemplate all aspects of a problem.

Yet this is not the balance of the cautious, tiptoeing academic. It is the overwhelming crash of the man who has been called "the dominant academic force among the reformers of police interrogation" fortifying the "nearly impenetrable wall" of scholarship he is praised, and sometimes cursed, for having constructed around the Warren Court decisions.

The conscience of the University?

Sax becomes distinguished university professor

This year Professor Joseph Sax of the Law School was appointed a Distinguished University Professor. He was recommended for the honor by a University-wide committee of faculty. Only one other law professor, William W. Bishop who is now retired, has received this title. Professor Sax is the youngest faculty member ever so honored.

The name of the professorship, which is designated by the holder, is the Philip A. Hart Distinguished Professorship of Law. With his choice, Professor Sax expresses his respect for the late United States senator from Michigan who was known by many of his colleagues as "the conscience of the Senate." Senator Hart, a 1937 graduate of the University, played an important role in shaping all major civil rights, consumer protection, and antitrust legislation passed by Congress during his eighteen years in office.

Senator Hart was widely regarded as a man of great intellectual honesty, principle, compassion, and determination. His ideals and career as a senator were honored by his colleagues' decision a few months prior to his death from cancer to name the Senate Office Building then under construction the Philip A. Hart Senate Office Building. Described by one colleague as someone committed to finding out the truth on every issue and then opening it up for all to see, Senator Hart's career and reputation were summarized by the statement: "He exemplified the highest of moral and ethical standards in public service. He was a friend of the American consumer and a tireless worker against injustice."

Like Senator Hart, Professor Sax has become recognized for his principled, reasoned, and effective intellectual leadership on complex issues of pressing importance to our society. He is widely recognized as the nation's preeminent authority on environmental law and as one of the major intellectual figures in the environmental movement.

In several score books, articles, and reviews he has addressed the problems of environmental protection and the conservation of natural resources with uncommon imagination and intelligence and with a breadth of learning unconfined by disciplinary boundaries. His work on the definition of property rights, on the relationships between law and politics, and on the control of bureaucracy are justly regarded as seminal. It has enlarged our understanding of issues that are central to the formation of public policy regarding the environment and natural resources and that are, more generally, of enduring significance for democratic government.

The importance of Professor Sax's work may be measured by its profound influence upon legal scholarship and by its impact upon the legal system. Of the many examples that might be cited to illustrate his significant contributions, one is the conception of the "public action," which he developed in his book *Defending the Environment*. This concept has not only been remarkably influential in the environmental field, but legal scholars and law reformers also have brought it to bear on a broad range of contemporary issues. The pioneering Michigan Environmental Protection Act, which he authored and which embodies many of the ideas advanced in *Defending the*

Joseph Sax

Environment, has been adopted by a substantial number of states and in some respects by Congress.

Professor Sax's distinction as a scholar and the importance of his contributions to the public weal have received frequent tangible recognition. Among other awards, he has received the Environmental Quality Award of the U.S. Environmental Protection Agency, the American Motors Conservation Award, and the National Wildlife Federation Resource Defense Award. In recognition of the influence of his work on European environmental law, he has also received the Elizabeth Haub Award, the major European award in environmental affairs. His most recent book, *Mountains Without Handrails*, which was characterized by a colleague as "eloquent, learned, and compelling," received The University of Michigan Press Biennial Book Award.

Although Professor Sax's efforts, especially in recent years, have been directed primarily toward environmental protection and the conservation of natural resources, he also has addressed other important issues. In a series of articles during the Vietnam years, he imaginatively probed a number of issues of enduring importance in a democracy—civil disobedience, conscientious objection, and the obligations of jurors to respect laws they regard as immoral. This work significantly advanced the quality of public and professional discussion at a time when the nation had no greater need.

The qualities of mind that have enabled Professor Sax to make such important scholarly and public contributions have made him equally effective as a teacher. His courses are among the most popular in the Law School. Students respect him not only for the strength of his intellect but for his power as a moral force. The rigor, idealism, responsibility, and commitment he displays in his scholarship he also brings to the classroom and to his dealings with students as individuals.

The Quadrangle isn't square

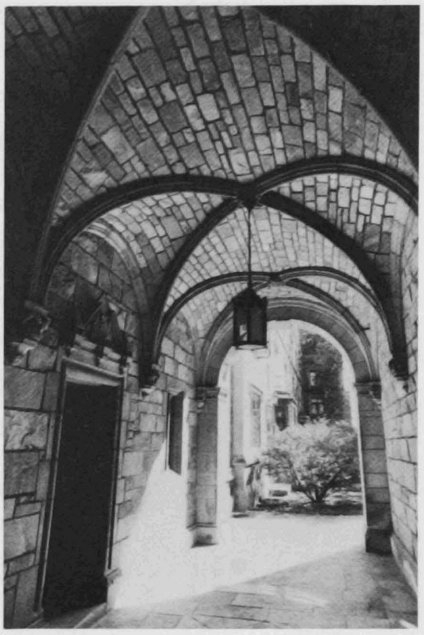
Law School is an unusual architectural mélange

Many of those who visit and admire the Law Quadrangle assume that it was modelled by architects York and Sawyer on some existing complex of buildings at Oxford or Cambridge. While the Law School's buildings are in the tradition of English Gothic used at other institutions, they are unique and very much more varied in style and use of ornamental detail than is apparent to the casual observer. A recent descriptive evaluation of the Quadrangle written for an architecture class at Michigan by student Paul Weller demonstrates that the buildings are not only original designs but also "tend to represent styles which span the fifteenth, sixteenth, and early seventeenth centuries."

While the Legal Research Library, Hutchins Hall, and the Dining Hall make use of English Gothic features which prevailed in the fourteenth and early fifteenth centuries, the Lawyers Club building and the two dormitories have a late Tudor or Jacobean character. They reflect Italian and Flemish influences which had only affected English architecture by the late sixteenth and early seventeenth centuries.

According to Weller, York and Sawyer wanted to evoke a "sentimental connection between legal education at Michigan and a rich legal and academic past." To do that, he points out, "they need not design a perfect period piece or copy of an English college. As long as the result had an apparent unity and completeness, each building, in fact each architectural element, could be from a different period. If variation in detail were controlled by a consistency in the materials used, the subtle variety of architectural ornament could be all the more delightful and amusing." In Weller's estimation, the Quadrangle as completed in Massachusetts granite and carved Indiana limestone, decorated with lead fixtures and topped with slate roofs, does achieve a harmony whose "quality derives from the complexity of detail appropriately carved and assembled in durable, pleasing material."

The prevailing effect and feeling of the Quadrangle is Gothic. The Dining Hall and Legal Research Library, with their crenellated parapets, their finials, turrets, wall buttresses, and tall windows subdivided by vertical stone tracery, resemble English buildings in the perpendicular Gothic style of the early Tudor period. Hutchins Hall, which sits between these two buildings, is "essentially a twentieth century structure," according to Weller, but is ornamented with wall buttresses, pointed doorways, and carvings which "make it blend with the other buildings in the complex."



At far left:
The Dining Hall, with its solid masonry construction and structural oak trusses supporting the roof, is modelled on the chapel at Eton College. Like the Legal Research Library, it has tall pointed windows, subdivided with stone tracery, which are characteristically Gothic.

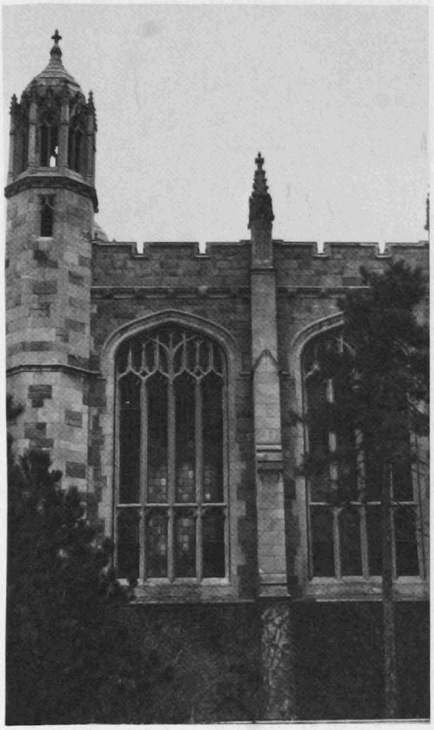
At left:
Even where pointed arches and turrets are absent, the Quadrangle retains an overall Gothic feeling derived from the consistent use of heavy, carefully cut blocks of stone.

The Club building, with its Renaissance portico, forms a link between the Perpendicular or early Tudor style of the Dining Hall (left) and the late Tudor or Jacobean style of the dormitories (right).

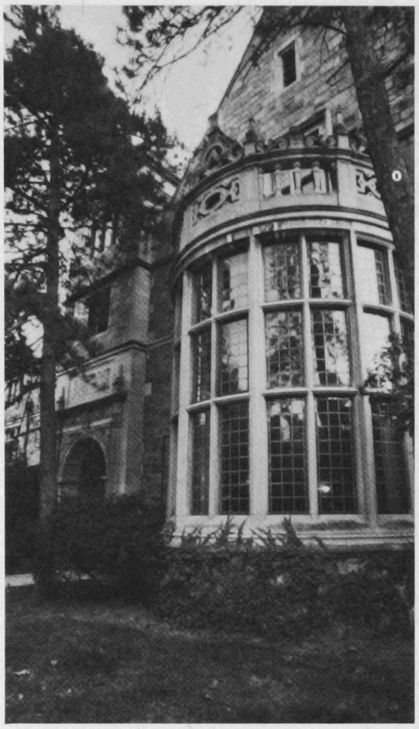
The most delightful structures of the Quadrangle, in Weller's estimation, are the Lawyer's Club, its dormitory, and the John P. Cook Dormitory. Both dormitories are decorated with ornamental stonework in the shape of scrolls, curves, and shields, forms which did not appear on English buildings until the Jacobean period.

The Club building, Weller notes, is the most unusual. "It speaks the language of the Renaissance in a direct manner, which seems right for a building meant to function in many capacities," he says. The rounded arches and Tuscan columns on its balustraded parapet lend the Club its Italianate feeling. The Italian Renaissance reached England in the Tudor period, so the Club building evokes English architecture constructed between the Gothic and the Jacobean. Thus, the Club serves as an appropriate transition linking the perpendicular buildings south of it on the Quadrangle with the stylistically later dormitories north and east of it.

The diversity in architectural style of the Quadrangle's buildings is echoed in the rich variety of its decorative detail. Some features are purely ornamental, adding pomp, solemnity, and esthetic pleasure to the experience of entering the Quadrangle. Other decoration on the buildings is symbolic, designed to instruct the observer and convey William W. Cook's intentions in donating the funds for the buildings. Still other details, like the Quadrangle's many carved heads, gnomes, and painted glass medallions, are satiric in intent. They offer a special delight to the spectator who takes the time to appreciate their humorous incongruity, Weller observes. Many of the faces and figures on the buildings good-naturedly poke fun at eminent



The Dining Hall and Legal Research Library make use of fourteenth and early fifteenth century Gothic stylistic features like crenellated parapets, finials, turrets, and wall buttresses.



The entry arch, bay window, and ornamental scrollwork evident in this picture of the Lawyers Club are curved, and thus characteristic of seventeenth century English architecture.

Doorways into the dormitories reflect the harmonious melding of diverse styles accomplished in the Quadrangle. While doorway P is Gothic, doorway M has classical elements like those used in Jacobean buildings. Doorway F combines classical and baroque features, a tendency also characteristic of the later period.

Satiric ornamental details in the Quadrangle mock the fallible humans who practice, teach, and learn the law, but never legal and political institutions.

jurists like Coke, Blackstone, and Marshall or at the University's presidents, as well as at law students. "Jolting anachronisms are part of the entertainment," Weller says, with law students carrying tennis rackets and stony gargoyles peering out from behind horn-rimmed glasses.

How do these fit with William W. Cook's stated aims in making his donation? Cook wrote that he wished to construct facilities which would attract the best students and "establish the moral tone and dignity proper to the study of law." It is significant that the satiric ornaments mock only those who practice, teach, and learn the law. "Neither the law, nor constitutional principles, nor American political institutions are part of the mockery and fun," Weller points out. The satiric ornaments encourage students to recognize human foibles and failings, as lawyers must. Their effect is counterbalanced, however, by the overall aura of the Quadrangle. Weller concludes that "the satiric gnomes and heads relieve in miniature the Quadrangle's ponderous character without disrupting its atmosphere of reverence and hushed dignity."

"The buildings, with their Perpendicular, Tudor, and Jacobean elements carved in limestone and set against granite, conjure up a feeling not only of the Anglo-American legal tradition but also

of the durability and permanence of the law," Weller says. He concludes that they have certainly contributed to legal education as Cook wished: "The ability of The University of Michigan's students and faculty may not be exclusively the product of the structures wherein their activities take place," Weller says, "but certainly the quality these buildings speak cannot be overlooked."

A good consequence

Regan receives national philosophy prize

A professor of constitutional law and philosophy of law at Michigan, Donald H. Regan, has been named a recipient of the 1982 Franklin J. Machette Prize which is awarded by the American Philosophical Association. The award, which is given every other year, honors scholarly books or articles of outstanding philosophical merit. Regan's prize-winning book, *Utilitarianism and Co-operation*, was published by Oxford University Press in 1980.

Utilitarianism is a doctrine which holds that the determining consideration of right conduct should be the usefulness of its consequences. In his book, Professor Regan analyzes a seemingly indissoluble contradiction inherent in utilitarian theory as it had been described by previous scholars. This turns on whether the requirement that moral agents should maximize good consequences applies to individual acts or to classes of acts and patterns of behavior.

Regan proposes a new theory, "co-operative utilitarianism," which differs radically from the traditional positions debated among utilitarians and makes a reconciliation of their conflicting intuitions possible. Thus, Professor Regan is able to rescue utilitarianism from internal contradiction.

One of the few non-philosophy professors to win the award, Professor Regan shares the Machette Prize with Bas van Fraasen of the philosophy department at Princeton University and Paul Guyerof, professor of philosophy at University of Illinois, Chicago Circle. A member of The University of Michigan's philosophy faculty, Lawrence Sklar, is a previous recipient of the award.

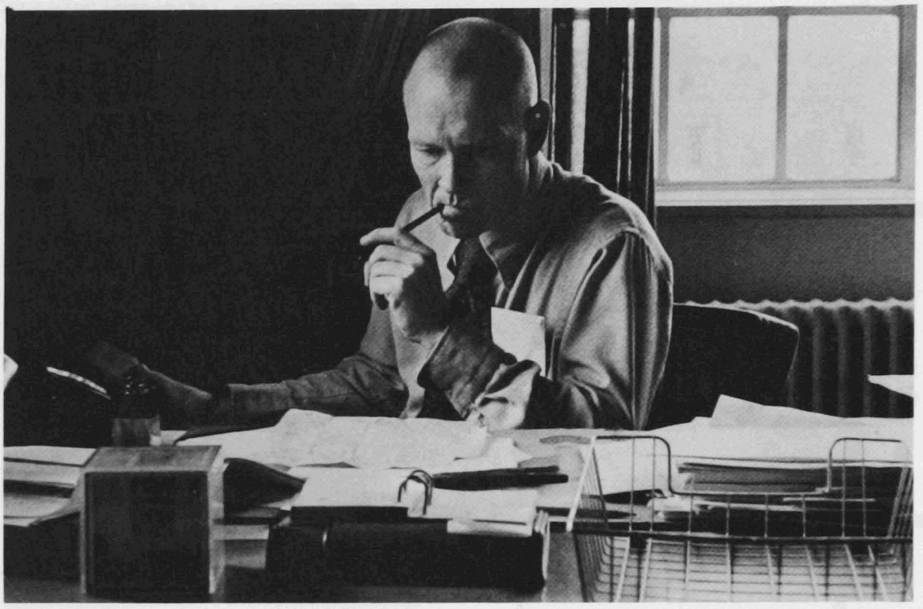
Professor Regan, who attended Harvard College, received his law degree from the University of Virginia Law School in 1966. He joined the Michigan law faculty in 1968 after having attended Oxford University as a Rhodes Scholar. While teaching at Michigan, Professor Regan did graduate work in philosophy, completing his Ph.D. in 1980.

Last year, Professor Regan received a Senior Research Fellowship from the National Endowment for the Humanities which enabled him to spend a research leave at the University of California in Berkeley where he worked on a theory of the good. His testimony on proposed amendments to the Constitution concerning abortion before the Senate Judiciary Committee's Subcommittee on the Constitution appeared in last spring's issue of *Law Quadrangle Notes*.

Donald Regan

Law professors get new names

Three distinguished members of the Law School faculty have been honored with appointments to named chairs. Professor John H. Jackson has become the Henry M. Butzel Professor of Law, a position long held by his recently retired colleague, Alfred F. Conard. Named to the new Robert A. Sullivan Professorship of Law is James J. White. Jerold H. Israel has become the first Alene and Allan F. Smith Professor of Law. The profiles given here describe the distinct contributions each has made to the intellectual and professional vitality of the Law School.



James J. White

☐ **Professor James J. White** is among the nation's leading scholars in the field of commercial law. He received a B.A. *magna cum laude* from Amherst College and a J.D. from the University of Michigan Law School. After practicing law in Los Angeles, he returned to Michigan in 1964 as an assistant professor and was promoted to associate professor in 1967 and professor in 1969. He has also been a visiting professor at Wayne State and Harvard Universities. A skilled and efficient administrator, Professor White served as Associate Dean of the Law School from 1978 to 1981.

He has written extensively on a broad range of commercial law topics and is the author of several widely used casebooks. The text on the Uniform Commercial Code that he co-authored with Professor Robert Summers has become the standard reference on that important subject. He is also a frequent contributor to professional and scholarly periodicals.

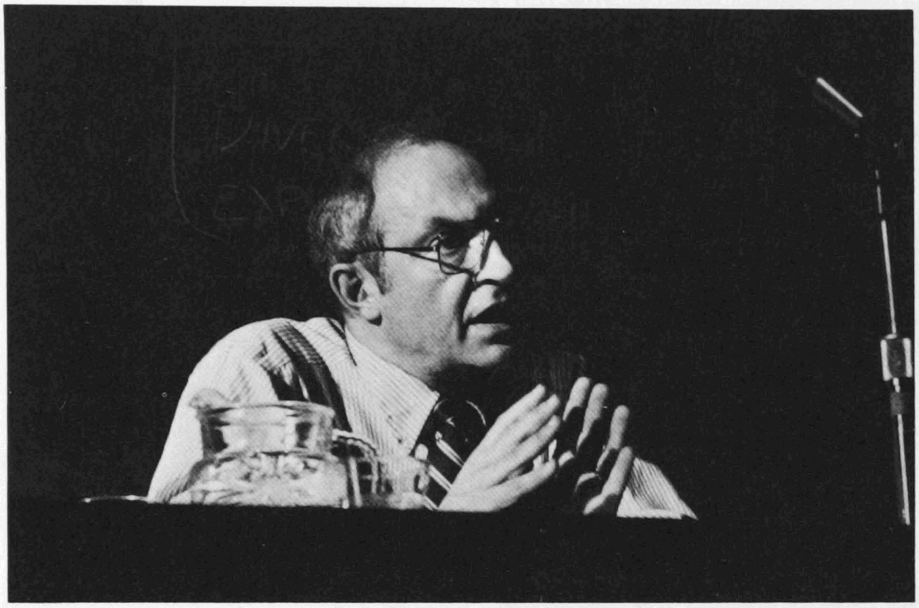
Among Professor White's many public service activities, the most noteworthy are his service as executive director of the National Institute for Consumer Justice, his service as chairman of Michigan's Advisory Commission on the Regulation of Financial Institutions, and his current service as a trustee of the Ann Arbor Board of Education.

Professor White is widely regarded as one of the most demanding and yet most popular of the School's teachers. He has been a pioneer in the development of programs for training students in professional skills. He played a leading role in the establishment of the School's clinical law program and created a course, which has become a model for similar courses at other institutions, to train students in the art of negotiation.

Professor White has made important contributions to the community, the state, and the nation as well as to the Law School. He provides law students with a consummate model of the qualities of mind, the precision, dedication, and acuity, which characterize the finest legal professionals.

☐ **Professor Jerold H. Israel** received a B.B.A. from Western Reserve University and an LL.B. from Yale University. Thereafter, he served for two years as a law clerk to Justice Potter Stewart of the Supreme Court of the United States. In 1961, he joined the law faculty at Michigan as an assistant professor. He was promoted to associate professor in 1964 and to professor in 1967. He has been a visiting faculty member at the Stanford Law School and at the University of Florida.

Professor Israel is an eminent authority in the field of criminal law, particularly distinguished by his capacity to integrate theory and practice. In recent years, he has been increasingly active in seeking to achieve reform of the criminal justice system. He served as co-reporter for the Uniform Rules of Criminal Procedure and as a member of several governmental commissions on criminal law reform. He currently serves as the Executive Secretary of the Michigan Law Revision Commission. As reporter to State Bar committees, he has proposed



Jerold Israel

revisions of the *Michigan Penal Code* and the *Michigan Code of Criminal Procedure*. He has participated in training programs for lawyers, judges, prosecutors, and police and has authored thirteen training films designed to educate police officers about legal restrictions governing their activities.

With Professor Yale Kamisar of this law faculty and others, Professor Israel is the author of two widely used casebooks on criminal procedure, both of which are currently in their fifth printing. He has co-authored two texts on criminal law, as well as numerous articles that range from subtle analyses of landmark cases to lucid overviews of areas of criminal procedure for professionals and nonprofessionals. In his writings, as in his professional service, Professor Israel manifests an unusual ability to conceive improved procedures through thoughtful examination of existing practice.

Professor Israel is consistently praised by students for his excellence as an instructor. His classes are marked by careful explication of existing practice, rigorous analysis of legal materials, and sensitivity to the uniqueness of cases, all skillfully blended with attention to principle. His own enthusiasm and interest are quickly transmitted to students who describe his classes as both stimulating and informative.

Professor Israel was among the first persons appointed to the law faculty during Allan Smith's tenure as dean. It is, therefore, especially fitting that his many contributions to the Law School, the state, and the nation have been recognized with the conferring of the first Alene and Allan F. Smith Professorship of Law.

☐ **Professor John H. Jackson** received an A.B. degree *magna cum laude* from Princeton University and was awarded a J.D. with honors by The University of Michigan. While a student at the Law School, Professor Jackson received the Coblenz Award for the best student work for the *Michigan Law Review*. Following graduation from Law School, Professor Jackson practiced law in Milwaukee until 1961, when he joined the law faculty at the University of California, Berkeley. He became a Professor of Law at Michigan in 1966; since that time he has become an indispensable figure in the School's Graduate and International Law programs.

Professor Jackson is internationally recognized as a preeminent authority on the law of international trade. His classic study on *World Trade and the Law of GATT* is widely used by governments and embassies and has become a standard reference for practitioners in the area. In numerous other scholarly publications he has demonstrated intellectual command of and a distinctive breadth of insight into the multiple, complex issues that arise in international trade. Yet his work is not restricted to his area of specialization. Professor Jackson is the author, with Professor Lee Bollinger of this Law School, of the casebook, *Contract Law in Modern Society*, which is now in its second edition.

The importance of Professor Jackson's scholarly contributions and the widespread esteem for his expertise are revealed by the many invitations that he has received to lecture and teach throughout the world and by the frequency with which he has been asked to advise government and international agencies. He has served the United States government as General Counsel of the Office of the President's Special Representative for Trade and as a consultant to the Senate Committee on Finance. At various times he has also been called in as a consultant by G.A.T.T. (General Agreement on Tariffs and Trade), by the United States Treasury, the United Nations Commission on Transnational Corporations, UNCTAD, as well as by private law firms. He currently serves as a member of the Task Force on

Trade Laws and Practices of the Advisory Council on Japan-U.S. Economic Relations. He was a Research Scholar in Geneva, Switzerland, a Rockefeller Foundation Fellow and Professor of Law in Brussels, Belgium, and a Visiting Professor of Law at the University of Delhi in India. He was invited by the U.S. government to return to India as a guest lecturer and received the U.S. State Department American Specialist Fellowship to Brazil. He was Guest Professor at the Europa Institute in Amsterdam, a Distinguished Speaker at the International Bar Association in Berlin, and a guest lecturer in Tokyo. He serves on the Board of Editors of three scholarly journals: *The American Journal of International Law*, the *Journal of World Trade Law*, and the *Journal of Law and Policy in International Business*.

John Jackson

Professor Jackson is one of the Law School's most effective and admired teachers. His advice and example are particularly valued by our many foreign graduate students and by J.D. students who aspire to work in the international field. Professor Jackson brings to the School a sense of vital connectedness and concern with the rapidly changing law of trade between nations.

At a school with a long tradition of preeminence in international and comparative law, Professor Jackson is a truly worthy successor of scholars like Edwin D. Dickinson, William W. Bishop, and his immediate predecessor in the Henry M. Butzel Professorship, Alfred F. Conard.

Visiting faculty

This year, one in which many members of the Law School faculty were engaged in supported research, University administration, and other activities which drew them from the classroom, the School was particularly fortunate in securing the services of a large group of able and distinguished visitors.

In the fall term there were three visitors.

☐ **Joseph F. Brodley** was here from Boston University School of Law where he has been a professor since 1979. A graduate of UCLA who holds law degrees from Yale and Harvard, Professor Brodley practiced law in New York City and in Los Angeles before taking up teaching. He is an authority in antitrust. While at Michigan he taught Antitrust Analysis I and a seminar entitled "Mergers and Joint Ventures: Evolving Standards."

☐ **John W. Wade** is Distinguished Professor at Vanderbilt University School of Law. Professor Wade is an authority on conflict of laws and author of a classic casebook on torts. He holds degrees from the University of Mississippi and from Harvard. At Michigan he taught the first-year course on torts and a seminar, "Advanced Topics in Torts."

☐ **James Boyd White** visited from the University of Chicago Law School. He is the author of the book, *The Legal Imagination*. Professor White's subjects are criminal law, criminal procedure, and law and literacy. He is a graduate of Amherst College and of Harvard Law School. At Michigan he offered an upper level course entitled "Criminal Justice: Administration of Police Practices" and a seminar on the legal imagination.

During the winter semester, our reliance on the expertise of our visitors was even greater.

☐ **Professor Robert H. Abrams** visited from the Wayne State University Law School. Professor Abrams holds A.B. and J.D. degrees from Michigan. He worked for the firm Kozlow, Jasmer & Well in Southfield after his graduation from law school. He then became an assistant professor at Western New England University for three years before moving to the Wayne State faculty. Professor Abrams taught Introduction to Constitutional Law and a seminar entitled "Federalism Sovereignty and Natural Resources."

☐ **Professor William R. Andersen** was with us from the University of Washington School of Law.

Professor Andersen specializes in administrative law and has written on corporate practice and on professional negligence. He graduated from the University of Denver and from the University of Denver Law School. He holds an LL.M from Yale. Professor Andersen has taught at the University of Kentucky Law School and Vanderbilt University Law School. He was a visiting scholar for a year at Columbia. He also served as Associate General Counsel at the Federal Aviation Agency from 1960-63. At Michigan, Professor Andersen taught a course in administrative law and a seminar on urban finance.

☐ **Professor Stuart R. Cohn** is on the faculty of the Spessard L. Holland Law Center at the University of Florida. He received his B.A. from the University of Illinois, an Honours Degree in Juris from Oxford University, and an LL.B. from the Yale University Law School. Professor Cohn was a partner in the firm Devoe, Shadur & Krupp in Chicago. He joined the faculty at the University of Florida in 1977. Professor Cohn's subjects are agency and partnership, corporate finance, corporations, and securities regulation. This winter he taught a course in business planning and a course in enterprise organization.

☐ **Professor Jane M. Friedman** visited from the Wayne State University Law School. She works in the field of constitutional law, in contracts and in law and medicine. Professor Friedman received her B.A. and J.D. degrees from the University of Minnesota. She served on the *Minnesota Law Review.*

From 1966-69 Professor Friedman was a trial attorney with the U.S. Department of Justice, Civil Division. She then became Assistant General Counsel at the Federal Commission on Obscenity and Pornography. She was an instructor on the Michigan Law School faculty for a year before moving to Wayne State.

☐ **Professor Alan Gunn** visited from Cornell Law School. He received a B.S. from Rensselaer Polytechnic Institute and a J.D. from Cornell where he was article editor on the *Cornell Law Review.* Professor Gunn specializes in natural resources and real property. He was in private practice in Washington, D.C., before he became a law professor. He taught first at Washington University in Saint Louis, then moved to Cornell in 1977. Professor Gunn taught Tax I at Michigan, as well as a seminar in products liability.

☐ **Professor Atsushi Kinami** of Kyoto University also taught in the Law School this winter. He taught a course on the Japanese Legal System with Professor Whitmore Gray. Professor Kinami has written two articles dealing with the Uniform Commercial Code. He received a bachelor of law degree from Kyoto University where he is now an associate professor of law.

☐ **Professor Frederic L. Kirgis, Jr.,** visited from Washington and Lee University where he is a professor and the director of the Frances Lewis Law Center. Professor Kirgis's subjects are conflict of laws, international law, and international organizations.

He received a B.A. from Yale University and a J.D. from the University of California at Berkeley where he was assistant notes and comments editor for the *California Law Review.* He has been a research student at the London School of Economics and Political Science. He was an associate with Covington and Burling in Washington, D.C., before beginning to teach. He then became an assistant professor at the University of Colorado School of Law. He moved from there to U.C.L.A., and then to Washington and Lee in 1977.

☐ Another visitor at the Law School was **Richard Mittenthal,** a lecturer teaching a seminar in labor arbitration. Mr. Mittenthal holds an A.B. from Cornell University and an LL.B. from N.Y.U. He is with the firm Alspector, Sossin, Mittenthal, and Barson in Birmingham, Michigan. Since 1954, he has been self-employed as an arbitrator.

☐ **Professor Mark Yudof** teaches at the University of Texas School of Law where he is the Marrs McLean Professor and Associate Dean for Academic Affairs. Professor Yudof received his B.A. and LL.B. from the University of Pennsylvania where he was on the law review. He clerked for Hon. Robert A. Ainsworth, Jr. of the U.S. Court of Appeals for the 5th Circuit. He then became Associate General Counsel to the Committee of the American Bar Association to Study the Federal Trade Commission. He was Staff Attorney at the Center for Law and Education at Harvard, where he also lectured in the Graduate School of Education. Professor Yudof joined the University of Texas law faculty in 1971. His specialties are children and the law, constitutional law, and contracts. At Michigan he taught the first-year course in contracts.

Last summer's visitors were **Professor Ronald J. Allen** from Duke University School of Law, **Daniel Polsby** of the Northwestern University Law School faculty, and **Bernard Wolfman** who is Fessenden Professor at Harvard University Law School.

Students dine and debate with McGowan and Greenberg

Eminent judge and civil rights lawyer are DeRoy Fellows

Initiated in 1980 through an endowment fund established by the will of Detroit philanthropist Helen L. DeRoy, the Law School's DeRoy Fellowships bring leading lawyers and national figures to campus for sufficient periods to attend classes, meet with students, and offer their insight and expertise in a variety of settings other than the formal lecture. This year the program's aim of bringing law students in contact with people who have influenced our legal and political life was particularly well served through the visits of United States Appeals Court Judge Carl McGowan and of Jack Greenberg, the director-counsel of the NAACP Legal Defense Fund.

Mr. Greenberg, who visited in early November, participated in classes in criminal law, employment discrimination, professional ethics, and civil rights litigation in federal courts. He also held an open discussion session for students, met with members of the Black Law Students Alliance, and talked with small groups of students over meals and at a reception sponsored by the Law School Student Senate.

Mr. Greenberg has been associated with the NAACP Legal Defense Fund since its inception. After graduating from Columbia Law School in 1949, he became an associate of one of its founders, present Supreme Court Justice Thurgood Marshall.

In his more than twenty years with the Fund, Mr. Greenberg has played a part in such landmark Supreme Court cases as *Brown vs. Board of Education* and *Furman vs. Georgia*, a case in which the Court held that the uneven and arbitrary imposition of the death penalty possible under existing statutes constituted cruel and unusual punishment.

Since 1967, Mr. Greenberg has conducted a national drive to abolish the death penalty, arguing that it has had a racially discriminatory impact. In 1978, Mr. Greenberg received a Grenville Clark Award for public service.

Judge Carl McGowan, who spent ten days at the Law School in March, had been made an honorary alumnus of the University at winter commencement only a few months earlier. The statement of his merits made on that occasion clearly suggests the value of his experience and influence for law students. The substance of that statement is given here.

During a rich and varied life in the law, Carl McGowan has made invaluable contributions to the public weal. As a distinguished federal judge, he has ably advanced the ideals of justice and of liberty under law. For many, he has become the exemplar of a judge.

Early in his career, Judge McGowan served as counsel to Governor Adlai Stevenson. A biographer of Stevenson has written that McGowan was the governor's most valuable advisor on "substance, on policy and on questions of principle versus political expediency." The biographer continues, "McGowan performed the further invaluable function of saying no to Stevenson, a role not common around public men."

In his eighteen-year service on the United States Court of Appeals for the District of Columbia Circuit, Judge McGowan has consistently combined preeminent technical competence with profound ethical concern. His judicial opinions, written in the plain style with few flourishes, show painstaking thought, careful articulation, and broad erudition. They reveal his extraordinary affinity for the modes of legal analysis and his deep understanding of the social context in which law operates.

Although deeply engrossed in professional responsibilities, Judge McGowan has contributed significantly to legal scholarship and to an understanding of the aims of legal education. Law schools, he has persuasively maintained, must foster not merely competent technicians but wise and reliable counselors with an "understanding of the purposes of law" and sensitivity "to the requirements of a just and orderly society, and to currents of change." To that end, he has been a forthright defender of humanistic values in university law training.

There is a striking consistency in the quality of John McGowan's career as a teacher, in state government, as a private lawyer, and as a federal judge. In all of these roles and activities, he has been distinguished for his exceptional professional competence, his wide learning, his sense of public calling, and his unfailing decency and integrity. The University of Michigan is proud to claim him as one of our own by conferring on him the honorary degree Doctor of Laws.

During his stay at the Law School. Judge McGowan participated in classes on constitutional law, administrative law, and legal ethics. He also met informally with students and faculty.

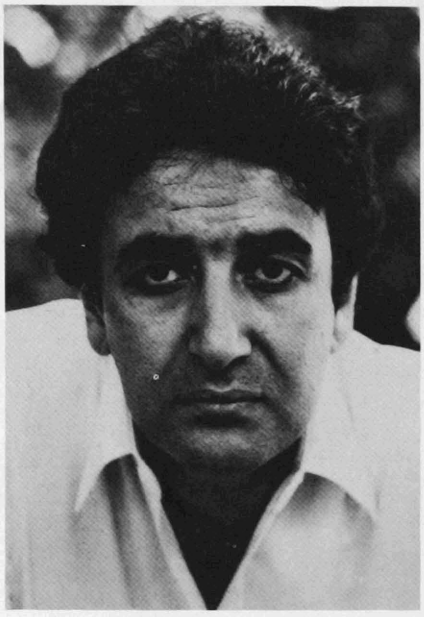
Law and literature

Alumnus wins national poetry contest

In his famous essay, "Law and Literature," Justice Cardozo wrote, "by the lever of art the subject the most lowly can be lifted to the heights." That elevation of the ugly and humble is the accomplishment of Law School alumnus Lawrence Joseph (J.D. '75) who has won the 1982 Agnes Lynch Starrett Prize for his book of poems, *Shouting at No One*. The collection makes powerful art out of the anguish, fear, and blankness in the lives of the poor who inhabit Detroit's urban wasteland.

The prize is awarded by the University of Pittsburgh Press for a first book of poetry. Joseph's manuscript was selected from the 450 works submitted to the competition this year. The prize consists of a cash award of one thousand dollars and publication of the manuscript by the press.

In his discussion of the crafting of judicial opinions, Justice Cardozo stressed the essential identity between the best legal writing and literature. The record of Mr. Joseph's concurrent successes as a poet and as a lawyer bear out Justice Cardozo's claim. Mr. Joseph is presently in private practice with the firm of Sherman and Sterling in New York City. He has been working on his book of poems since 1970 when he was an undergraduate English Honors major at The University of Michigan. He received a major Hopwood Award for poetry in his senior year, as well as a Power Foundation Fellowship to Magdalene College, Cambridge University, where he earned both a B.A. and an M.A. with Honours in English Language and Literature. After returning to Michigan



Lawrence Joseph

for law school, he served as law clerk to Justice G. Mennon Williams of the Michigan Supreme Court. In that office he had a chance to discover the artistry involved in composing judicial opinions, helping to draft Supreme Court opinions relating to no fault auto insurance, products liability, environmental law, workers' compensation, and unemployment compensation.

In 1979, Mr. Joseph served as a consultant to the Commission on Courts of the Michigan State Senate. He was also the recipient of a Michigan State Bar Foundation Grant that year. In 1980, he received a research grant from the United States Department of Labor. An assistant, then associate, professor at the University of Detroit School of Law between 1978 and 1981, Mr. Joseph has published articles on labor law in *Vanderbilt Law Review* and *Wayne Law Review*.

Throughout these years in which he has been teaching, researching, and practicing law, Mr. Joseph has also continued to write poetry and to receive increasing recognition for his work. His poems have been published in such periodicals as *Paris Review, Commonweal, Poetry East, New York Quarterly, Ontario Review* and *Michigan Quarterly Review*.

Although the poems in *Shouting at No One* were written over a ten-year period, they cohere to form a book with a powerfully unified message rather than a mere collection. Across the hellish waste of Detroit's landscape, Joseph moves his derelicts, aged immigrants, and delinquents. They mumble or shout, they curse, they mutter incantations or senile ramblings. Always, they seem to go unheard. Joseph's poems articulate a rage which many of his characters are too numb to feel or acknowledge, a rage others voice only through violent anti-social acts. With insight and discipline, Joseph transforms their incoherent screams, their threats and vacant gestures into an art which helps us to contemplate and understand the almost unspeakable anguish which overwhelms many people in our cities.

Himself of Lebanese Catholic descent, Mr. Joseph vividly calls up the Middle Eastern landscapes which are the heritage of many of the immigrants who have come to Detroit. He sets scenes in lush and holy places against blight. In poems like "He is Khatchig Gaboudabian" (given below), he vividly and compassionately chronicles the cycle of hopes, despairs, and renewals that have been the experience of many immigrants to America's cities. As one evaluator has written of

Joseph, "He is an unabashedly urban writer whose poems are driven by a powerful desire to bear witness and give testimony to the terrible truths of the contemporary city. *Shouting at No One* is a book of fierce and tender poems, and no one who cares about contemporary American poetry should miss it." Another pre-publication reader, Robert Dana, has written, "It would be easy to praise the technical skill of these poems, but it's his anger, his scorching passion, that astounds Lawrence Joseph's words into poetry. *Shouting at No One* burns with the gravity of a black hole."

The Agnes Lynch Starrett Prize is one of the very few national poetry contests for authors of first books. It is named in honor of the former director of the University of Pittsburgh Press and is offered "to support the writer of poetry at a time when the economics of commercial publishing make it more and more difficult for the serious literary artist to find publication," a representative of the press notes. The University of Pittsburgh Press has a distinguished history of support for American poetry. It has published the first books of many now recognized poets, among them one who received the Nobel Prize for literature in 1979.

The press released *Shouting at No One* this May. It will be available in major bookstores or by order from the press (The University of Pittsburgh Press, 127 North Bellefield Avenue, Pittsburgh, PA, 15260; $10.95 cloth; $4.95 paper). A sampling of poems from the volume is offered here.

"Do what you can," "He is Khatchig Gaboudabian," and "Fog" copyright 1983, Lawrence Joseph. Reprinted by permission.

Do what you can

In the Church of I AM she hears there is a time to heal,
but her son, Top Dog of the Errol Flynn gang,

doesn't lay down his sawed-off shotgun,
the corn she planted in the field where

the Marvel Motor Car factory once was
doesn't grow with pigweed and cockleburr.

When someone in the Resurrection Lounge laughs,
"Bohunk put the 2-foot dogfish in the whore's hand,"

someone's daughter whispers, "Fuck you,"
places a half-smoked cigarette in her coat pocket,

swings open the thick wooden door and walks
into air that freezes when it hears frost

coming from Sault Sainte Marie. Driving, I see
a shed of homing pigeons, get out of my car to look.

I answer, "What you care?" to a woman who shouts,
"What you want?"
Beside the Church of St. John Nepomocene

an old man, hunched and cold, prays, "Mother of God"
to a statue of the Virgin Mary

surrounded by a heart-shaped rosary
of 53 black and 6 white bowling balls.

Where the Ford and Chrysler freeways cross
a sign snaps, 5,142,250,

the number of cars produced so far this year in America.
Not far away, on Beaufait Street,

a crowd gathers to look at the steam
from blood spread on the ice. The light red,

I press the accelerator to keep the motor warm.
I wonder if they know

that after the jury is instructed
on the Burden of Persuasion and the Burden of Truth,

that after the sentence of 20 to 30 years comes down,
when the accused begs, "Lord, I can't do that kind of
time,"

the judge, looking down, will smile and say,
"Then do what you can."

He is Khatchig Gaboudabian

1

He hears screams in the alley:
a cousin cuts a cousin's thoat.
"We are all cousins," they say,
but they are not his cousins,
these black men from Yemen,
curved daggers cinched to their waists,
who kill for women.

He coughs, wakens suddenly.
Is this a dream? What time is it?
Noon? He lifts the shade:
it is past noon; the smoke
from the plant is heavy, red,
the day is gray again.
He walks across his room,
lights a cigarette, sits down on the bed,
gets up, walks, sits down again.
His legs hurt; doctor says
his blood is bad. What time is it?
He's hungry. He scratches his ribs.
He must not forget to take his pills.

2

Before he is born
because there is no work in Sivis
his father crosses the border
into Bulgaria forever.
War brings soldiers with long rifles
who take his mother, brothers
and sister away forever.
In Arabkir he is an orphan
among orphans,
in Detroit an uncle sends him money
to come tap the cupola, pour
liquid metal into the ladle.

When I heard about their bodies
floating in a river of blood
you might say my heart was broke.
I was lost, there was no one
to tell me I was lost.
I used to pray beneath the cross
before I thought of all this,
before I thought.

He doesn't know how old he is,
he doesn't know his real name.

He knows pain crosses his shoulders.
His lungs cough blood.
He is dying.

He can't eat because he doesn't have
teeth and his gums bleed.
His room in the Hotel Salina doesn't have
heat and the pipes freeze
like the water in the toilet down the hall.

He complains to whomever listens
or doesn't listen
or to himself
if there is no one to complain to.

He is a well-known
loser at *barbouda*, a socialist
who speaks with arms and elbows.
He's ashamed to say he's sacrificed
women and family
to serve two masters: Henry Ford and dice.

4

The warm white wind, the afternoon light
feel the face of the man who knows
he is dying.

His legs don't hurt as much.
He inhales without coughing.

A newspaper, sunglasses, a pack
of cigarettes,
a hat, the clothes on his back,
a chair by a table in a coffee house,
a window, are his.
He can drink eight cups of coffee,
he can figure the importance
of Albania to Afghanistan.

This is where the world is!
Those who don't understand this
don't understand!

He used to walk beside tons of sand,
storage bins, along the boat slip.
He remembers the dusk sun
golden across the black Rouge River.
He promises himself he will go there
one more time, one more time
to feel the power of earth, water and sun
together, holding him.

5

In Salina, South Dearborn,
the air is cold, damp, deep
black and red, filled
with sulphur and the earth
roaring inside machines.
Crowds of young men on the street
shake and nod their heads,
waiting for the midnight shift.
If they do not acknowledge him
he does not care:
he is Khatchig Gaboudabian.
If he must shut himself
in his room alone
he will.

I have the mind
That will save me.

Fog

All day the air was fog;
couldn't see
the barbed wire, rusting
scraps, stacks
and stacks of pallets,
the tarpaper roof
of Dreamer's shack,
the underground
caverns of salt hardening
around bones.

The fog says,
Who will save
Detroit now?
A toothless face
in a window shakes No,
sore fingers
that want to be still
say, Not me.
Not far away from where
Youmna lies
freezing in bed,
rolling her eyes, declaring
This is a place!
the remains of mountains
wait to be moved
through smokestacks
into air.

A horse of a different color

Unusual judge named to international commission

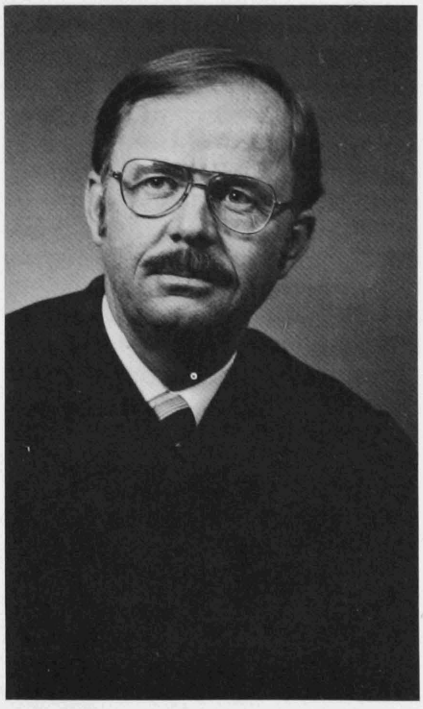
Professional success sometimes seems attainable only at the cost of one's other interests and larger humanity. At a time when many undergraduates and law students are fearful of the sacrifices their ambitions may require them to make, the career of Judge Richard Nygaard (J.D., December '71) offers welcome reassurance.

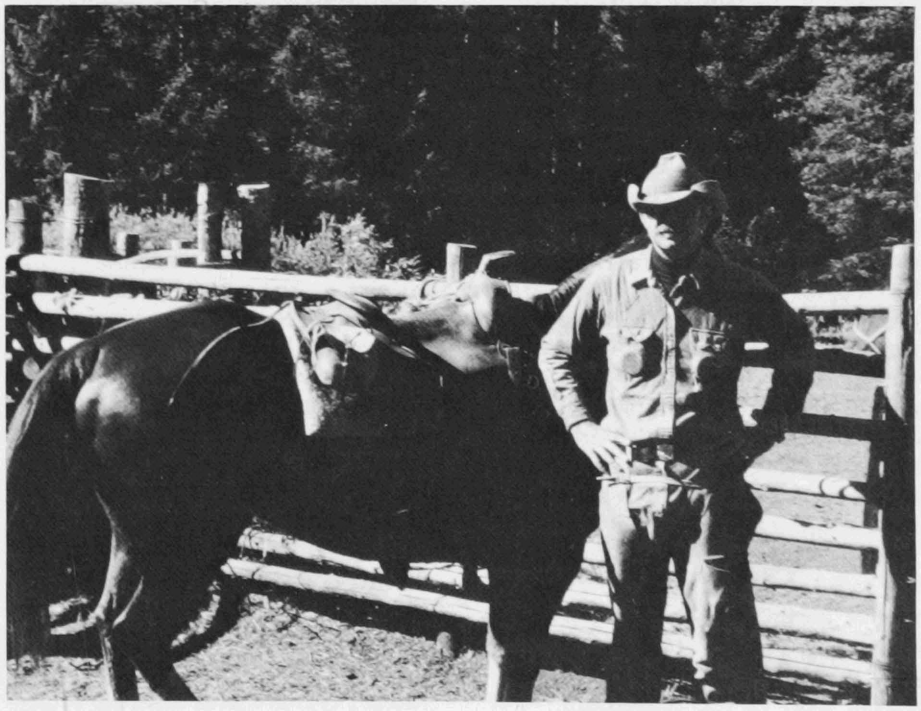
Judge Nygaard, who is junior Judge on the Court of Common Pleas for Erie County in Pennsylvania, has been named by President Reagan to be an American representative to an international commission concerned with problems of democracy and constitutionalism in emerging nations. The commission, chaired by Chief Justice Warren Burger, is composed of judges, legislators, and government leaders from countries all over the world. Its mission is to develop plans by which constitutional governments can be established or re-established following periods of non-democratic intervention.

The commission's first meetings were held in Washington in November. At this conference on free elections, Judge Nygaard gave a speech on "the absolute necessity of a free and independent judiciary to guarantee free elections." He also met and talked with the chairman of the National Constitutional Commission of Liberia, Amos Sawyer.

Two weeks later, Judge Nygaard received a request from Liberia that he gather information on court systems in America. Judge Nygaard has agreed to study and report on how U.S. federal judges get appointed by the president and confirmed by the Senate, as well as on how some state judges are elected while others are appointed by the governor. His research findings will be put at the disposal of Liberia's constitutional convention, which is to be held later this year, where the African nation's judicial system will be planned. Liberia is in the process of re-establishing a democratic government after three years of military rule.

Judge Nygaard is excited about his work with the commission. "The idea of being able to sit down with these emerging countries and establish a blueprint for writing a constitution in 1982 instead of 1782, realizing the impact it may have on the world





Judge Nygaard balances the intellectual work of the courtroom with strenuous physical labor on his cattle and horse farm.

for years to come is a real challenge," he has commented. He was recommended for service on the commission by United States Senator from Pennsylvania, Arlen Specter, who had been impressed with Judge Nygaard's handling of several complicated, controversial, and highly publicized cases.

When Judge Nygaard took his seat in 1981, some members of the legal community expressed concern that his practice and service as a county councilman had not given him adequate trial experience for his position. Other commentators registered suspicion of this "boondocks lawyer" whose cowboy boots were visible below his new judicial robes.

In his first year on the Erie County bench, Judge Nygaard allayed their fears, earning respect from the community and his colleagues with his handling of several noteworthy cases from the first death penalty murder case to come before his court in decades to the bitter court fight between the Erie County School District and the teachers' union over a work stoppage. In that instance, a newspaper editorial commended Judge Nygaard's courageous fair-mindedness: "We have never seen a neophyte Erie County Court judge so quickly establish himself as a fearless interpreter of American law." Judge Nygaard has also earned praise for the balance he strikes between tough sentencing of career criminals, serious sex offenders, and drunk drivers and humane concern for the problems in the penal system such as overcrowding in the prisons.

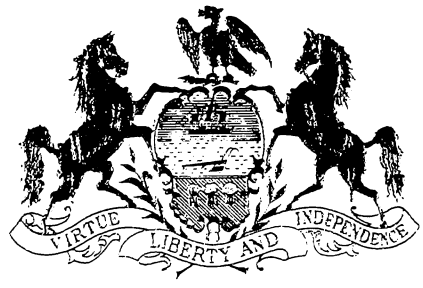
Judge Nygaard is distinguished not only by his superior performance on the bench, but also by his forthrightness and lack of pretention. He balances the intellectual work of the courtroom and of crafting judicial opinions with strenuous physical labor on his cattle and horse farm. "Getting too far from the land, for me is not a healthy situation," he has said. "There are practical lessons there, from working on the land and with animals, that can be applied to my work in the legal field."

Judge Nygaard's career challenges other myths besides that which holds that success must absorb all one's energies and concern. He confesses that, despite being an effective legal professional, he was never able to fully accept the attorney's role in the judicial system. "Professionally, an attorney is supposed to be able to set his feelings aside and take up his client's cause, like the gladiator," Judge Nygaard says. His wish to become a judge sprang in part from his discomfort with that characterization. "In the role of adversary," he admits, "I found it difficult in many cases to take up one position or another, when I philosophically did not agree with it."

Another anxiety of today's student and their parents is also dispelled by Judge Nygaard's example: the fear that high school grades may well determine all chances for future success. Admirably, Judge Nygaard includes in his resume, along with the record of his later academic successes, the period he spent taking correspondence courses "to correct high school grade deficiencies" before he could be admitted to college. Graduating 496th in a high school class of 500 clearly was no measure of this man who went on to complete his B.S. in Public Administration *cum laude* at the University of Southern California and to complete the three-year law school program at The University of Michigan in two and a half years. Judge Nygaard was also the recipient of the American Jurisprudence Award for Excellence in the field of torts while at the Law School.

Judge Nygaard grew up in a family where religion and the work ethic were vital. These traditions sustain him in judicial decision making. He is conscientious, inquiring, and thorough, driven both by his love of intellectual stimulation and his commitment to hard work. From his faith he draws an ideal, an unattainable standard of excellence toward which to aspire. His religion also gives him a particular connection to the country for which he is conducting research. Judge Nygaard's aunt was a missionary teacher in Liberia for forty years and he remembers her accounts of her experiences there warmly.

The insignia which adorns his judicial stationery has a particular appropriateness, appearing as it does above the name of this farmer who campaigned for county council on horseback, yet is making his forthright and considered opinions felt across the world. At the center of the crest is a plow, turning up the fields, with a ship moving into the distance behind it. Added to these elements, which are part of the seal of Pennsylvania, are two proud horses and the words "virtue, liberty and independence." Judge Nygaard has demonstrated that he merits both the words and the animals.



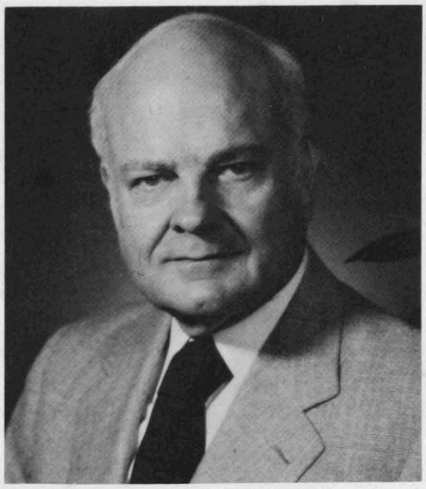
Alumni Notes

☐ **Charles B. Blackmar** of the class of 1948 was appointed to the Supreme Court of Missouri last December. Also serving on that court is his classmate, Albert Rendlen, who has recently been elected Chief Justice of that court for a term which will continue until July 1, 1985.

Judge Blackmar, who was born in Kansas City, Missouri, graduated from Princeton University *summa cum laude* before coming to the Law School. After graduation he practiced with the firm of Swanson, Midgley, Jones, Blackmar and Eager and predecessor firms in Kansas City until 1966 at which time he joined the law faculty of Saint Louis University. Judge Blackmar is co-author with Edward J. Devitt of the book *Federal Jury Practice and Instructions*, third edition, and has written many articles on legal topics.

The main focus of Judge Blackmar's teaching was on corporations and civil procedure, but he also offered a wide variety of other courses. He served as chairman of the Fair Public Accommodations Commission of Kansas City from 1964 to 1966. The Commission was responsible for enforcing civil rights ordinances. Judge Blackmar was also appeals mediator for the United States Court of Appeals for the Eighth Circuit in 1981-82. In that position he worked on a special program of preargument conferences.

Judge Blackmar notes that he and Justice Rendlen are the third and fourth Michigan law graduates to sit on the Missouri Supreme Court in his memory. The others were Henry Eager, Sr., of the class of 1920 and the late Clem Franklin Storckan of the class of 1922. Judge Blackmar also notes that the reason those sitting on the Missouri Supreme Court are called "judges" rather than "justices," with the exception of the "Chief Justice," is "lost in antiquity."



Charles B. Blackmar

Harold M. Fong

☐ Last July, **Harold M. Fong** (J.D. '64) began his tenure as United Stated District Judge for the District of Hawaii. At the seminar for newly appointed district court judges which he attended in Washington prior to his induction, Judge Fong reminisced about the Law School with two other alumni, Judge Glenn E. Mencer (J.D. '52) of the Western District of Pennsylvania, and Judge John A. Nordberg (J.D. '50) of the Northern District of Illinois. After his induction, Judge Fong found himself extremely busy since he was the only federal judge presiding in the district during his first two months in office.

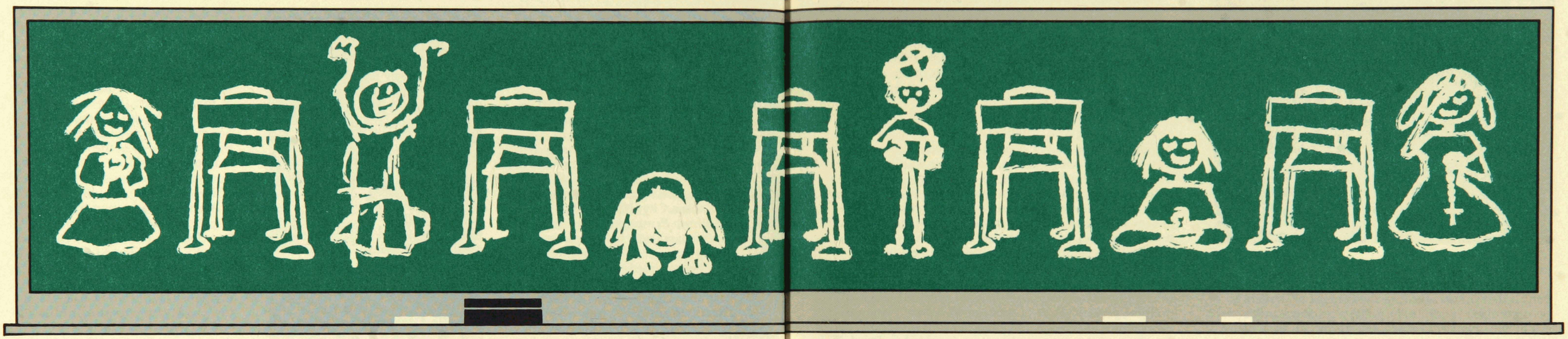
After his graduation from Michigan, Judge Fong became a law clerk for Justice Jack H. Mizuha of the Hawaii Supreme Court who is also a Law School graduate (J.D. '47). From 1965 until 1968, Judge Fong was deputy prosecuting attorney for the city and county of Honolulu. He then went into private practice with Justice Mizuha, who had retired from the Supreme Court. In 1969, Judge Fong accepted appointment as an assistant United States attorney for the District of Hawaii, a position in which he served until 1973.

At that time, Judge Fong was appointed United States Attorney for the District of Hawaii, first by the District Court and then by President Nixon. Judge Fong remarks that in a relatively small district like Hawaii, the U.S. Attorney is not merely an administrator but remains active as a trial attorney. One of his most significant trials while serving as U.S. attorney was that of the acknowledged leader of the Hawaii crime syndicate for income tax violation which resulted in the longest sentence ever meted out by a federal judge for income tax violation in the history of tax prosecution.

In 1978 he resigned from his position to return to the private practice of law. He was a partner in the firm of Fong, Miho & Robinson from that time until his induction as U.S. District Judge.

The School Prayer Amendment

Testimony of Dean Terrance Sandalow before the Committee on the Judiciary, United States Senate, September 16, 1982



I want to thank the members of the Committee for inviting me to testify regarding Senate Joint Resolution 199, which proposes a constitutional amendment relating to prayers in public schools and other public institutions. Because of the limited time available, I shall confine my testimony to the most important and most controversial feature of the proposed amendment, the abandonment of virtually all constitutional restrictions on prayer in the public schools.

In *Engel v. Vitale*, 370 U.S. 421 (1962), the Supreme Court invalidated a local school board's policy requiring students at the beginning of each school day to recite a prayer composed by the New York Board of Regents. One year later, in *Abington School District v. Schempp*, 374 U.S. 203 (1963), the Court invalidated a requirement that public schools open each day with a selection and reading of verses from the Bible, followed by student recitation, in unison, of the Lord's Prayer. In both cases, the Court rested upon the establishment clause of the First Amendment, which under prevailing constitutional doctrine is made applicable to the states by the Fourteenth Amendment. S.J.Res. 199 seeks to overturn these and several decisions by lower courts, both state and federal, that have restricted prayers in the public schools in a number of other settings. It would do so by the simple and forthright expedient of amending the Constitution to provide that "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools. . . ." The only qualification to this sweeping renunciation of constitutional authority is contained in the proposed amendment's second sentence: "No person shall be required by the United States or by any State to participate in prayer."

Before discussing the merits of the proposed amendment, it may be useful to consider briefly the nature of the question that the Congress must decide in determining whether to adopt S.J.Res. 199. Proponents of the amendment often seem to argue, if only obliquely, that a constitutional amendment overturning *Engel, Schempp*, and related decisions is justified because those decisions rest upon (what are asserted to be) erroneous interpretations of the First and Fourteenth Amendments. An examination of the question whether the courts did err in those cases would carry us very far into constitutional theory and is, in my view, unnecessary and perhaps irrelevant to the issue that the Congress must now decide. Our constitutional tradition does not impose upon Congress responsibility for reviewing the courts' constitutional decisions and proposing an amendment whenever it concludes that the courts have strayed from the Constitution's true meaning. Neither the processes nor the resources of Congress are adequate to that task. The question that Congress must decide, to put the point somewhat differently, is not a question of law, but a question of policy: whether the welfare of the nation would be served by removing from the Constitution all restrictions upon prayer in the public schools? I turn now to that question.

President Reagan, in proposing the amendment contained in S.J.Res. 199, wrote that it would merely "restore the simple freedom of our citizens to offer prayer in the public schools. . . ." With deference, I submit that the disarming simplicity of the President's characterization cloaks the real issues that the proposed amendment raises, issues that are considerably more complex than his statement suggests.

To begin with, no constitutional amendment is required to restore the freedom of children to pray in school. As reported in a recent study by the Congressional Research Service, 21 states have adopted statutes requiring or permitting schools to observe periods of silence during which students may meditate or pray (Ackerman, *Legal Analysis of President Reagan's Proposed Constitutional Amendment on School Prayers* 9, Cong.Res.Serv. 1982). The only courts that have considered the practice have sustained its constitutionality, a conclusion that is undoubtedly consistent with the Supreme Court's decisions in *Engel* and *Schempp*. The courts have also uniformly sustained the inclusion of invocations and benedictions in public school commencement ceremonies and the holding of baccalaureate services in the public schools.

The consequence of adopting the amendment proposed by S.J.Res. 199 would, thus, not be simply to permit prayer in public schools, for prayer in public schools is not now generally forbidden by the Constitution, but to permit it in the forms and in the circumstances in which it is currently impermissible. The position of the amendment's proponents is that, so long as individuals cannot be compelled to participate, any form of prayer in the public schools should be permitted in any circumstance. In their view, the content of and circumstances for prayer in the public schools should become the subject of political decision or, failing political decision, should be left to school officials and teachers in each of the tens of thousands of classrooms in the United States.

I hold a very different view. Although I believe that several lower courts have been unduly restrictive in the limits they have imposed upon prayer in public schools, I think that the removal of all constitutional limitations invites a mixture of politics and religion threatening to the body politic and inconsistent with our traditions of religious freedom and tolerance. An analysis of the varying practices that would become constitutionally permissible if the proposed amendment were to be adopted offers a framework

It is a truism, but one that bears repeating, that Americans worship God in many ways. If the amendment is adopted, the question that must arise in each state and each school district is which of the ways should be prescribed.

for developing the reasons for these concerns.

The Prayer Amendment was deliberately drafted to permit decisions regarding the content of prayers to be prescribed by ordinary political processes. A state might thus prescribe a prayer or it might leave communities free to do so. It is a truism, but one that bears repeating, that Americans worship God in many ways. If the amendment is adopted, the question that must arise in each state and each school district is which of the ways should be prescribed. One need not suppose that that issue will be divisive in every community to recognize that it will be the subject of intense, perhaps bitter conflict in many. Prayers often begin with a recitation of a biblical verse. Is the King James version or the Douay to be used? Shall the New Testament be avoided in deference to the beliefs of Jewish children? Shall the Bible be avoided in deference to the beliefs of the increasing number of Americans who are neither Christians nor Jews?

Differences about the place of the Bible in prayer are merely illustrative of the broad range of disagreements with which the political process would be required to contend if the proposed amendment were to be adopted. The forms and content of prayer, for the many millions of Americans who regard it seriously, are matters of vital importance, for prayer is an expression of their profoundest beliefs. Yet the beliefs that are expressed in prayer are the source of deep divisions among our people, at times even among the adherents of what might generally be regarded as a common religious tradition. As the Supreme Court of Wisconsin observed many years ago, among Christians some

> ". . . believe the doctrine of predestination, while others do not; some the doctrine of eternal punishment of the wicked, while others repudiate it; some the doctrines of the apostolic succession, and the authority of the priesthood, while others reject both; some that the holy scriptures are the only sufficient rule of faith and practice, while others believe that the only safe guide to human thought, opinion, and action is the illuminating power of the divine spirit upon the humble and devout heart; some in the necessity and efficacy of the sacraments of the church, while others reject them entirely; and some in the literal truth of the scriptures, while others believe them to be allegorical, teaching spiritual truth alone or chiefly. . . ." State v. District Board of School Dist. No. 8 of Edgerton, 44 N.W. 967 (Wisc. 1890), at 972.

Adoption of the Prayer Amendment would open the way for each of these issues, and manifold others that divide religious groups, to become the subject of political dispute. It would invite the adherents of each of the many religions represented in our nation to seek official sanction for its version of religious truth, if only to ward off the efforts of others.

Testimony before the Committee, even by those who are generally supportive of the amendment, reveals that this tendency cannot be avoided. It inheres in any attempt to formulate prayer through a political process. Thus, a spokesman for the National Association of Evangelicals objected to the supposedly "non-denominational" prayer involved in *Engel v. Vitale*. "That kind of prayer, routinely repeated every school day, is far removed from the kind of meaningful religious expression that should be permitted in the public schools" (Statement of Robert P. Dugan, July 29, 1982). Yet, it is apparent that prayers acceptable to the membership of the National Association of Evangelicals, prayers they would regard as a "meaningful religious expression," would contradict the deeply held beliefs of many others.

It should be noted that the Association is sensitive to this difficulty and urged revision of S.J.Res. 199 to preclude any governmental influence on the content of prayers in the public schools. If the Prayer Amendment were to be adopted as written, however, it is not obvious what alternative evangelicals would have to seeking official adoption of prayers that would, in their view, offer their children an opportunity for "meaningful religious expression."

The success with which the United States has managed its unique religious pluralism is in substantial part attributable to its having been able to avoid pitting religious groups against one another in the political arena. No doubt, the good will that our traditions have fostered would lead many to act with restraint even if the Prayer Amendment were adopted. The risk is nonetheless great that adoption of the amendment, by inviting the establishment of official prayer, would lead to a significant increase in religious dissension.

The removal of a constitutional restraint upon the establishment of official prayers is not the only objectionable feature of the proposed amendment. In

recent years, a number of school districts have authorized teachers to lead their classes in prayer at the beginning of the school day or to select students to do so. Courts that have considered the practice have uniformly held it an impermissible establishment of religion [*Karen B. v. Treen*, 653 F.2d 897, aff'd 102 S.Ct. 1267 (1982); *Kent v. Commissioner of Education*, 402 N.E.2d 1340 (Sup.Jud.Ct. of Mass. 1980). See also, *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir. 1981), cert. denied 102 S.Ct. 322 (1981)]. Adoption of the Prayer Amendment would overturn these decisions and render the practice permissible, almost certainly leading to its institution in some school districts.

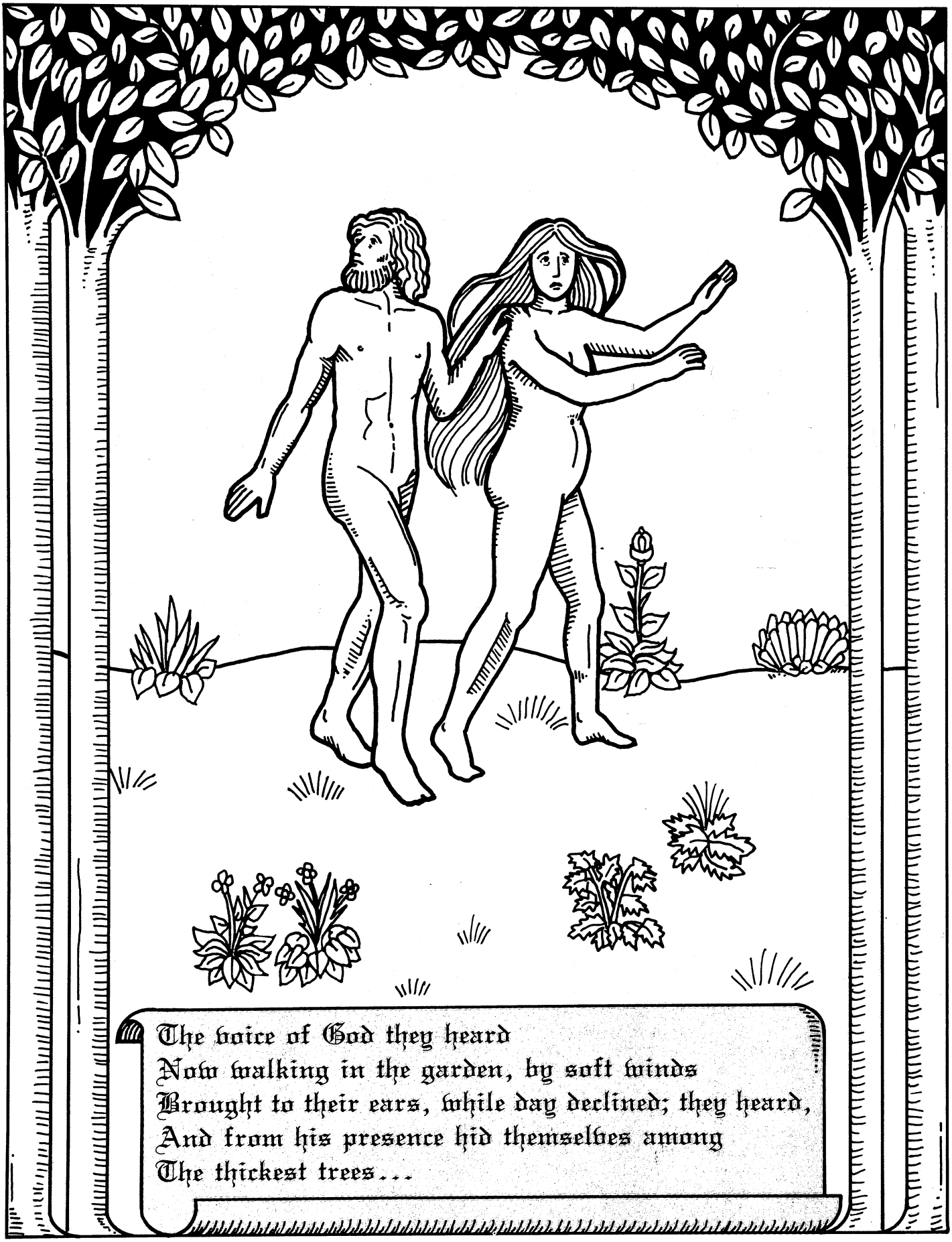
Although a policy permitting students and teachers to lead prayers would avoid the need to compose official prayers, and the political divisiveness that would attend that activity, it would increase the risk of religious activity in the nation's classroom that would be deeply offensive to many parents and children. Many, perhaps most, teachers and students might be expected to act with sensitivity toward the diversity of beliefs represented among the student body, but it seems hardly open to doubt that among the tens of thousands of teachers and millions of students in the nation's public schools there would also be many who would regard the opportunity to lead prayer as an opportunity to proselytize or who would merely act with insufficient sensitivity to the beliefs of others. The record in *Kent v. Commissioner of Education, supra*, demonstrates that such concerns are not fanciful. It disclosed that among the prayers offered by students were some that were clearly denominational, such as the Lord's Prayer and Hail Mary, and others that would undoubtedly be regarded by some as offensive because directed toward trivial secular objectives, such as victory in a volleyball game. Reliance upon the administration and governance processes of the schools to avoid such problems would place school officials in the intolerable position of censoring prayers.

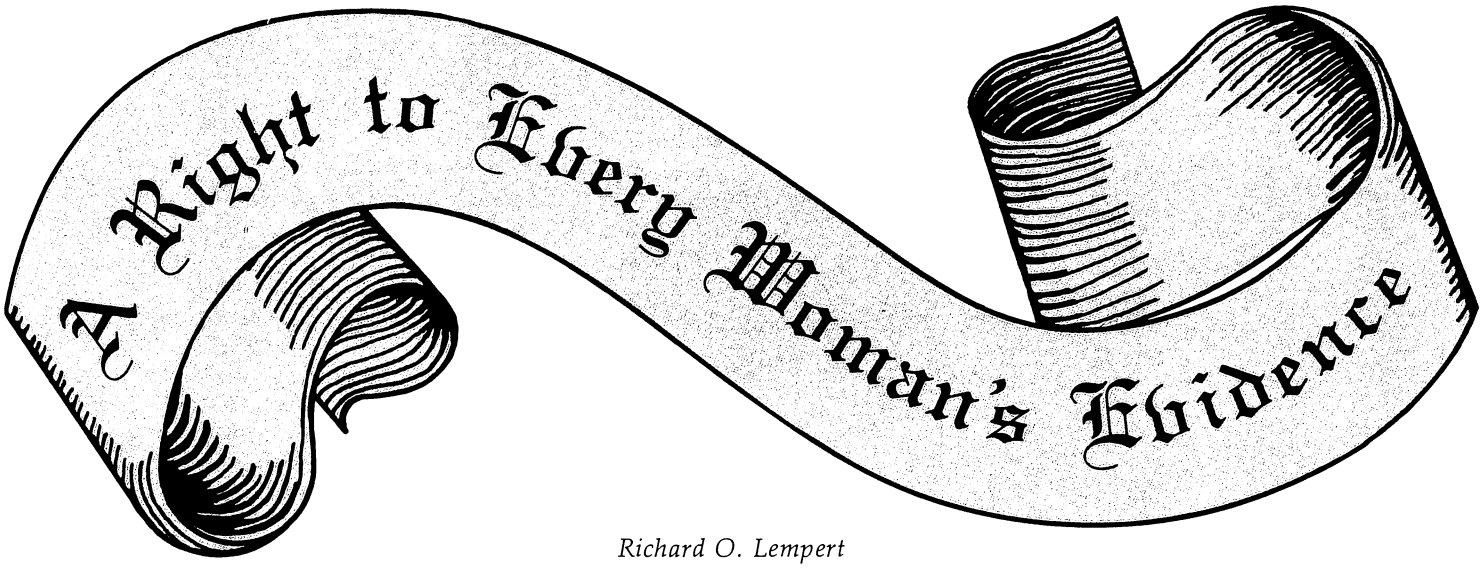
In brief, the offering of public prayers as part of the daily routine of public schools cannot be accommodated within a society as religiously varied as ours. A constitutional amendment that would remove all constitutional restriction on such prayers risks both a significant increase in religious discord and daily affront to the religious sensibilities of large segments of the population. Nevertheless, the interests of those whose beliefs require such prayer ought not to go unrecognized. Opponents to the Prayer Amendment have frequently suggested that those interests are sufficiently recognized by the opportunity for silent prayer and for prayer in settings other than the schools. Yet the beliefs of many parents and children appear to require more, an opportunity for a public profession of faith and for public prayer as part of the daily routines of life. Although the schools may not, as the courts have held, have a constitutional obligation to accommodate these beliefs,

Among the prayers offered by students were some that were clearly denominational and others that would undoubtedly be regarded by some as offensive because directed toward trivial secular objectives, such as victory in a volleyball game.

respect for the parents and children who hold them ought, in my judgment, to lead us to do so as a matter of policy if a suitable means can be found. At least, there ought not be a constitutional obstacle to a school board's power to adopt such a policy.

In a number of school districts, children have sought permission to use schoolrooms, before or after the commencement of the school day, for voluntary prayer or devotional Bible reading. Several lower courts have held that the establishment clause denies the schools authority to confer such permission [See *Brandon v. Board of Education of the Guilderland Central School Dist.*, 635 F.2d 971 (2d Cir. 1980), cert. denied 102 S.Ct. 970 (1981); *Johnson v. Huntington Beach Union High School Dist.*, 137 Cal.Reptr. 43 (Ct.App.), cert. denied 434 U.S. 877 (1977); *Trietley v. Board of Education*, 65 A.D.2d 1 (1978)]. Although the concerns that have led the courts to this conclusion, especially the risk that the imprimatur of the schools would be placed upon religious activities and the fear that children might be coerced into attendance, are matters that require serious attention, one wonders whether a solution for them might not be found that would more fully recognize and accommodate the needs of families whose beliefs do require an opportunity for their children to open the day with public prayer. This is not an appropriate occasion for a full constitutional analysis of the issue, but I may say that I believe that a carefully designed policy would pass judicial muster. A careful study of the issues by the Judiciary Committee might greatly assist local school districts that wish to consider such a policy and lead the way toward a resolution of the school prayer controversy that is more sensitive to the needs of a pluralistic society and more in harmony with our constitutional tradition than is S.J.Res. 199.


The voice of God they heard
Now walking in the garden, by soft winds
Brought to their ears, while day declined; they heard,
And from his presence hid themselves among
The thickest trees...



Richard O. Lempert

This article was delivered, in a slightly fuller form, as the first annual Mason Ladd Lecture at the University of Iowa Law School and was printed in 66 Iowa Law Review *725-739 (1981). Last year, Professor Lempert spent the fall semester as the first Mason Ladd Distinguished Visiting Professor of Law at Iowa. In the winter semester, he was a visiting fellow at the center for Socio-Legal Studies at Wolfson College, Oxford, where he worked on a book on the sociology of law.*

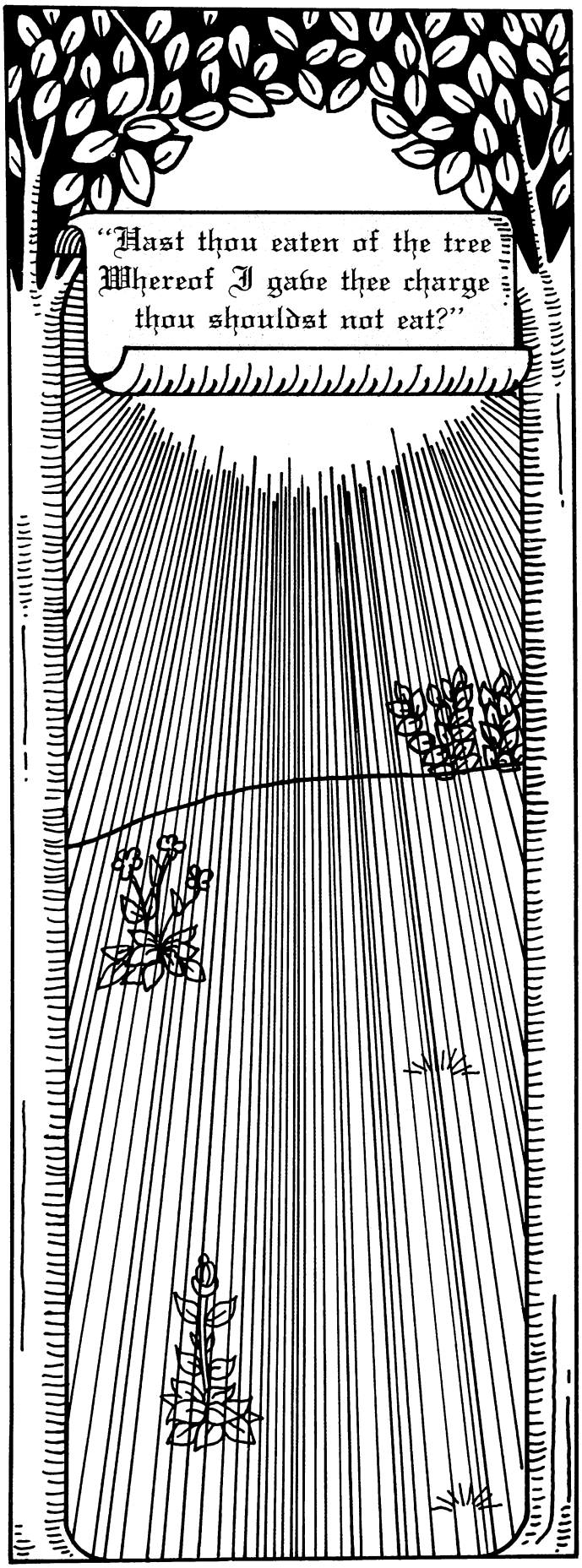
Now back at the Law School, Professor Lempert has begun a three-year term as editor of the Law & Society Review. *This journal, which is put out by the Law and Society Association, regularly publishes empirical and theoretical studies of law and the legal system.*

I would like to talk about the recent case of *Trammel v. United States*. *Trammel* is a simple case. A man, Otis Trammel, his wife, Elizabeth Ann, and several others were involved in a conspiracy to import heroin into the United States. Elizabeth, a courier for the group, was caught with four ounces of heroin during a routine customs search in Hawaii. Otis, we are told by the Tenth Circuit, was one of three men who "masterminded" the operation.

They say "it takes a thief to catch a thief." One might add, "it takes a conspirator to convict a conspirator." Often the best—and sometimes the only—evidence that a person has been active in a conspiracy is testimony from the person he has conspired with. There are two problems with securing such testimony. The first is that each conspirator has a Fifth Amendment right not to give testimony that might tend to incriminate him—and almost anything that tends to incriminate a fellow conspirator will incriminate the speaker as well—and the second is that totally apart from the danger of self-incrimination there may be a degree of honor among thieves; a person may simply not want to testify against a partner in crime. Fortunately, the state can overcome each obstacle, the first by giving use immunity thereby negating the Fifth Amendment claim and the second by offering a reward—such as an agreement not to prosecute—sufficient to overcome any natural hesitancy to turn on one's fellows.

In *Trammel*, the prosecutor, whether from delicate feelings of chivalry, a sense of relative blameworthiness, or a good idea as to who would break first under pressure, chose not to indict the two women involved provided they would testify against the three men. So far, so good; justice is on its way to being done. However, there was one hitch. Elizabeth Ann Trammel was Otis Trammel's wife and under a rule of law which I call the spousal immunity, Trammel had an apparent right to prevent his wife from testifying against him.

This rule, or privilege if you will, apparently arose in the late sixteenth century. Its existence is implied by a case in Chancery in 1579 and it is mentioned frequently enough in the early seventeenth century that one may safely presume a somewhat earlier existence. The rule provides, with certain exceptions not applicable in *Trammel*, that one spouse may not testify against the other in a criminal case. Since



spouses were not barred *by this rule* from testifying on behalf of each other the common-law rule meant, in effect, that one spouse could not testify against another over the other spouse's objection. It is this rule that has been transformed, in a way I shall soon describe, by the Supreme Court's opinion in *Trammel* and by the decisions of numerous state courts and legislatures before that. A related rule, which protects the confidentiality of private marital communications, has not been affected by these developments.

Reviewing the history of the spousal immunity, two features stand out. First, it has almost always been used to bar the testimony of wives against their husbands. In view of this, I shall abandon the sex neutral term "spouse" that I have thus far used and shall instead refer to testifying or witness spouses as "wives" and defendant spouses as "husbands."

Second, although the rule may have its origins in attitudes which we regard today as irrational, such as the notion that husband and wife are in some sense one or that for a woman to incriminate her husband is akin to petty treason, it is also the case that from the earliest times an important justification for the rule was what we would today call an argument from public policy, namely, that to allow one spouse to testify against another might cause "implacable discord and dissension" and so threaten a marriage.

"Implacable discord and dissension": the phrase has a nice ring to it. Not only is it sonorous; it is also sensible. One can easily imagine marriages that would be destroyed if a wife, forced to testify against her husband, chose not to perjure herself, but instead played a crucial part in convincing the jury that her husband was guilty of a heinous crime. This was particularly so at the time this rationale arose, for in the seventeenth century all felonies were in principle punishable by death.

Nevertheless, there are cases where one wonders how an honest court could cite this marital harmony rationale. For example, in one of the few cases where the rule sealed male lips, dangers of marital discord and dissension are the court's cited justification for refusing to receive a man's testimony that his wife had left him and bigamously married another. One can only admire a marriage that remained sufficiently harmonious despite the wife's desertion and remarriage that it was vulnerable to further discord should the first husband testify against the wife.

Or, conversely, one can only deplore a privilege which denies the law valuable information on the pretext of preserving marriages that have long since been destroyed by the behavior of the spouses. The privilege becomes even more deplorable if one believes that the policy justification is itself questionable. Jeremy Bentham, one of the earliest and most strident critics of the rule, wrote:

> It disturbs domestic confidence. Whose? Those who abuse it to disturb the public security. A miscreant, then, who could be convicted of an

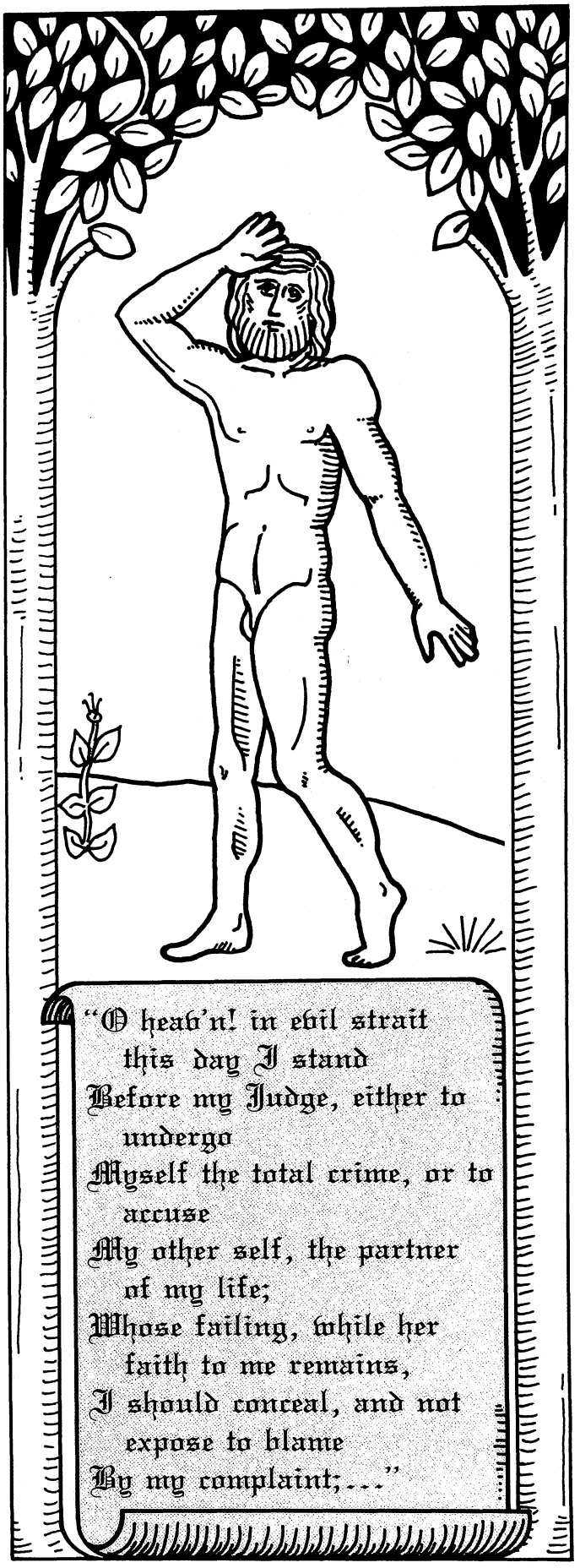
atrocious crime by the testimony of a woman, has nothing to fear; if he has only time to go through the marriage ceremony! No asylum ought to be open for criminals; every sort of confidence among them must be destroyed, if possible, even in the interior of their own houses. If they can neither find mercenary protectors among the lawyers, nor concealment at their firesides, what harm is done? Why, they are compelled to obey the laws, and live like honest people!

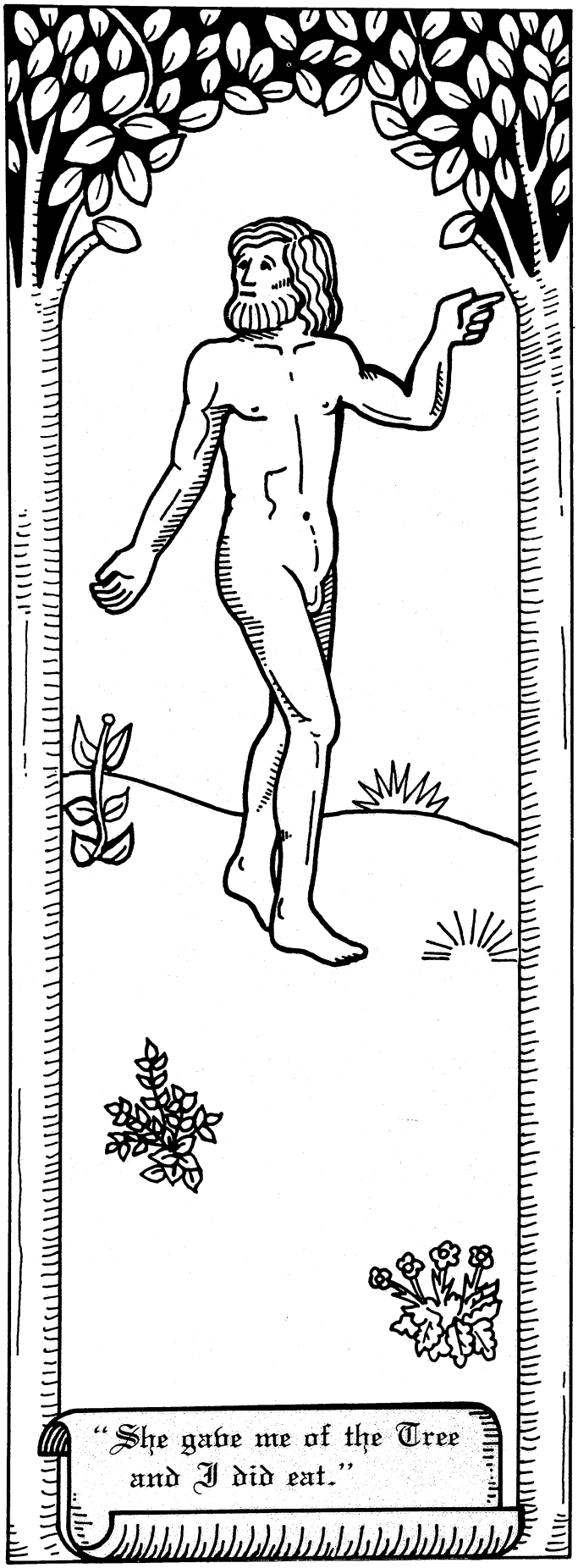
Wigmore, in his classic treatise on evidence, found an answer to Bentham when he suggested that the real reason for the spousal immunity was that "there is a *natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation. . . ." However, Wigmore was not satisfied with his own answer:

> This reason, if we reflect upon it, is at least founded on a fact, and it seems after all to constitute the real and sole strength of the opposition to abolishing the privilege. Let it be confessed, then, that this feeling exists, and that it is a natural one. But does it suffice as a reason for the rule? In the first place, it is not more than a sentiment. . . . In the next place, it exemplifies that general spirit of sportsmanship which, as elsewhere seen, so permeates the rules of procedure inherited from our Anglo-Norman ancestors. . . . The expedient of convicting a man out of the mouth of his wife is (let us say) poor sport, and we shall not stoop to it. Such is the theory and the sentiment of sportsmanship

You can be sure that when a law professor attributes a rule to sport and sentiment his next step will be to urge its abolition for litigation is, quoting again from Wigmore, "not a game, and . . . the law can never afford to recognize it as such; . . . the law, moreover, does not proceed by sentiment, but aims at justice." Yet is the wife's stake in the matter only sentiment? Is there not injustice in forcing the wife—presumably an innocent party—to play the crucial role in the condemnation of her husband? If she balks at this and refuses to testify or lies from the stand is it just that we send her to prison for her contempt or her crime? Indeed, is our preference for justice ultimately anything more than a sentiment? When opposed by other sentiments, such as those we have toward family units, love, and the suffering of innocent people, should justice always prevail?

Let us pause and take stock. We have a rule that has been with us for almost four centuries and subjected to scathing criticism for much of the last two. One of its rationales, the unity of husbands and wives, has been completely discredited and another, our repugnance at seeing wives testify against husbands, has been dismissed as mere sentiment, although we may want to dispute this dismissal. The third, the implications of forced testimony for marital peace, still stands. The concern is not with the ordi-





nary marriage where the liability to give testimony remains inchoate but with the rare marriage where but for the privilege the testimony would be forced. In these cases the liability to give testimony might well be a cause of substantial dissension, and only in these cases can the abrogation of the immunity lead to more just results.

In cases where the privilege is invoked we are trading off the probable destruction of marriages and the probable anguish of innocent spouses against an increased likelihood that justice will be done. For the moment, we can consider the question of whether to allow this tradeoff as the basic policy choice. In balancing the competing interests we should realize that requiring the wife's testimony will not necessarily destroy the marriage. But, by the same token, abrogation of the immunity will not necessarily change an unjust result to a just one. If the wife refuses to testify nothing is gained at trial although we have whatever dubious satisfaction comes from seeing a contumacious witness punished. If the husband is guilty and the wife lies or if the husband is innocent but the wife testifies truthfully to incriminatory facts, it is the probability of injustice that has been enhanced by abrogating the rule. Even if the husband is guilty and the wife testifies truthfully justice is not necessarily furthered, for the wife's testimony may have been unnecessary to the conviction or her credibility might have been destroyed on cross-examination by the revelation of information that would only be known to an intimate.

Bentham's argument, picked up by Wigmore when he says it is a curious policy that allows a wrongdoer's interest (in his marriage) to be weighed in deciding whether he should be allowed to bar testimony against him, neglects the interests of innocent spouses as well as the interests which children and others have in keeping families together. We may have no sympathy for the wrongdoer and no respect for his interests, but we still might not want to force the innocent spouse to experience the anguish of testifying against her husband, nor, for the family's sake, do we want a marriage that might be intact upon acquittal, probation, or parole to be destroyed by the trial process.

But if Wigmore's arguments are wrong on these counts, he appears right on another. In applying the immunity the law never asks whether a particular marriage is indeed viable. Not only does the law not ask whether the marriage is worth preserving (a judgment we would probably not want courts to make); it also does not ask whether there is any marriage left to preserve. If there isn't, it makes no sense to deprive a court of evidence.

Surely once a marriage reaches the point where the wife is willing to testify against her husband there cannot be much of a marriage left to save. Futhermore, a wife willing to testify against her spouse is unlikely to suffer anguish at playing a role in his conviction. Thus, the strongest arguments for this

marital privilege, the arguments from marital harmony and wifely anguish, have the same Achilles' Heel. At most they justify a privilege for the witness spouse. They do not justify allowing a defendant spouse to keep a witness spouse off the stand. Lawyers and law professors have been making these arguments for years. In *Trammel* the nation's highest court finally listened. Chief Justice Burger, on behalf of the Court, wrote:

> When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.

Here it appears we have a happy ending or at least a rational one, which is the same thing to most legal scholars. The rule is preserved, reaffirming our judgment about a special quality of marriages and our reluctance to force a woman to condemn someone she loves. But where the reason for the rule disappears, the rule does also, and courts are not deprived of valuable evidence.

I would stop here, except that I don't believe what I have just said. I don't believe *Trammel* is correctly decided, because I don't believe it is wise to vest the right to claim the privilege solely in the witness spouse. Let me tell you why.

Years ago I happened to have a conversation about Earl Warren with a friend who was a clerk at the Supreme Court when the case of *Hawkins v. United States* was decided. In *Hawkins* as in *Trammel* the Court was invited to transfer the right to claim immunity from the defendant to the witness spouse, but in *Hawkins* the invitation was declined. My friend told me that when he was at the Court, Chief Justice Warren was in the habit of lunching on Saturdays with clerks from other chambers. One Saturday discussion turned to *Hawkins*. For the clerks the case was simple; the force of the rational argument that I have outlined for you could not be denied. The Chief Justice did not find the case so easy. Speaking as a former prosecutor, he described to the clerks various ways in which the state can secure apparently voluntary testimony from an unwilling witness. The clerks, impressed by Warren's knowledge of the real world and the implicit lesson for those who master only logic, were even more impressed when it turned out that *Hawkins* provided an example of what the Chief Justice had described. The Court learned, sometime after this luncheon, that Hawkins' wife had been imprisoned as a material witness and released only after giving a three thousand dollar bond conditioned upon her appearance in court as a witness for the United States. As Justice Stewart noted in his concurring opinion, "These circumstances are hardly

consistent with the theory that her testimony was voluntary." Indeed, one is reminded of the English courts that warned of the danger of implacable discord and dissension should a person testify against a bigamous spouse. To call the wife's testimony in *Hawkins* voluntary, as the government tried to do, is just as disingenuous.

As it turns out the testimony in *Trammel* is also not voluntary in any pure sense of the word. It is the product of a plea bargain. To obtain Ms. Trammel's testimony against her husband the government gave her immunity for her testimony and advised her that if she cooperated with the government she might be charged only with a misdemeanor and receive probation. Ms. Trammel may have testified willingly in a certain sense, for the facts give us every reason to believe that she preferred seeing her husband in prison to being there herself. But by this standard Hawkins' wife testified willingly, for she obviously found an agreement to testify against her husband more congenial than rotting in jail. In neither instance would I call the testimony voluntary.

It is also likely that by the time of Trammel's trial his marriage was destroyed. Chief Justice Burger certainly thought so, for as I've told you he wrote: "When one spouse is willing to testify against the other in a criminal proceeding—*whatever the motivation*—their relationship is almost certainly in disrepair." Yet what follows from this if the disrepair was caused, as we may assume for sake of argument, solely because of the government's efforts. Surely a court that acknowledges the privilege's importance to marital harmony by continuing to vest it in the witness spouse should not tolerate a rule that gives the government strong incentives to break up those marriages it can.

The government is quite open about what's going on. Indeed, one of the state's primary arguments for vesting the immunity in the witness spouse is the "injustice to the witness-spouse of vesting in the defendant the power to destroy the witness-spouse's ability to reach a favorable arrangement with prosecutors in his or her own case." "[F]uture Elizabeth Trammels," we are told, "would be prevented by their husbands' power to invoke the marital privilege from protecting their interests in avoiding severe punishment." In other words it is unfair if the fact that a couple are married means that the government cannot destroy their relationship, the way it would the relationship of ordinary co-conspirators, by emphasizing conflicting interests and allowing one guilty party to promote her well-being by turning in the other. Put another way, it is unfair to the wife if the state cannot threaten her with severe penalties if she does not condemn her husband and reward her with no penalty when she sells him out.

The Supreme Court in *Trammel* accepted this argument. I do not. First of all, I don't think the state has any business turning one spouse against the other, even if it might advantage the spouse who has turned. Second, consider the quality of the unfairness that presumably results. A woman, unable to strike a bargain because she cannot testify against her husband, is convicted of a crime she has committed. What's wrong with that? Are we to pity all criminals foolish enough to commit their crimes without accomplices because there is no one they can betray in exchange for a lighter sentence? Do criminals with accomplices have, at least if they are the less culpable, an equal protection claim to an attractive plea bargain contingent upon their turning state's evidence?

To state these questions is, I think, to answer them. If there is anything wrong with not allowing a wife to waive the immunity, it is that a guilty husband will go free because a sufficient case cannot be made against him. But this is the cost of the privilege whether or not the wife was herself involved in the crime and thus vulnerable to the pressures of "Let's Make A Deal." We are back to basic value judgments involving the sanctity of marriages, whatever interest we have in their preservation, and the anguish of the spouse who testifies.

The fact that a woman is coerced into agreeing to testify does not mean that the decision to appear "willingly" did not cause her considerable grief. Indeed, it may lead to grief and guilt which will linger long after a prison sentence would have been served. It is true that the guilty wife's anguish may be assuaged by the thought that she will be spared the trauma that goes with criminal punishment, but, by the same token, an innocent wife's anguish might be assuaged by the material joys she might purchase if the state paid her a million dollars for her testimony. I believe we would not allow the state to buy, with a sum of money, the testimony of a wife who was involved in her husband's crime. If not, I don't see a principled basis for letting the state buy that testimony with a promise of leniency when the wife is vulnerable to criminal prosecution.

I recognize the spousal immunity has serious costs, but abrogating the privilege is costly also. I support the privilege because I believe it is an important symbolic statement of our attitude toward marriage, because I believe it may play a role in keeping some marriages together at an extremely stressful moment, and because I believe it spares spouses, who may be innocent of wrongdoing, the anguish of being forced to testify against their loved ones. The Court's decision in *Trammel* is completely consistent with these values. I believe that decision is wrong because it mistakenly assumes that testimony is voluntary whenever a wife agrees to take the stand.

I fear that *Trammel* will do more than provide occasions on which the emptiness of moribund marriages will be confirmed. Instead, it will give the government an incentive to turn spouses against each other—to break up marriages in the cause of justice. For me this is too high a price to pay. If justice, in the marginal sense of convicting a few more guilty

men, means we must allow the state to coerce the testimony of spouses, I am willing to trade a bit of justice for a bit of humanity. Wigmore would, no doubt, call these sentiments. I suppose they are. But I hope you share them, and I believe they should continue to inform the law.

In conclusion I would like to tell you what this talk is about, or at least what I have been about. My talk is of course about the spousal immunity and the *Trammel* case, but although I feel strongly about these matters (perhaps more strongly than the issues warrant), I have not chosen this topic because I think it important to persuade you of my position. I entertain no illusions on the issue that matters. No court, having abrogated a privilege, has, to my knowledge, subsequently reinstated it.

Instead of considering what I have said, consider what I have been required to draw on: English legal history of the seventeenth and eighteenth centuries; Bentham and Wigmore, each a leading scholar of his generation; logical analysis as we are taught it in law schools; attorneys' briefs and Supreme Court opinions; the sociology of prosecutorial behavior (fraught, to be sure, with empirical inadequacy); and your responses and mine to questions we cannot escape when values clash. These are but some of the paths down which the study of evidence takes you. I hope that I have given you some sense of what makes evidence a fascinating field of scholarship (dare I say "the joys of evidence") and some understanding of why Mason Ladd, one of the great figures in the history of Iowa Law School, chose to devote his scholarly life to it.

Quotations from *Paradise Lost* by John Milton.

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