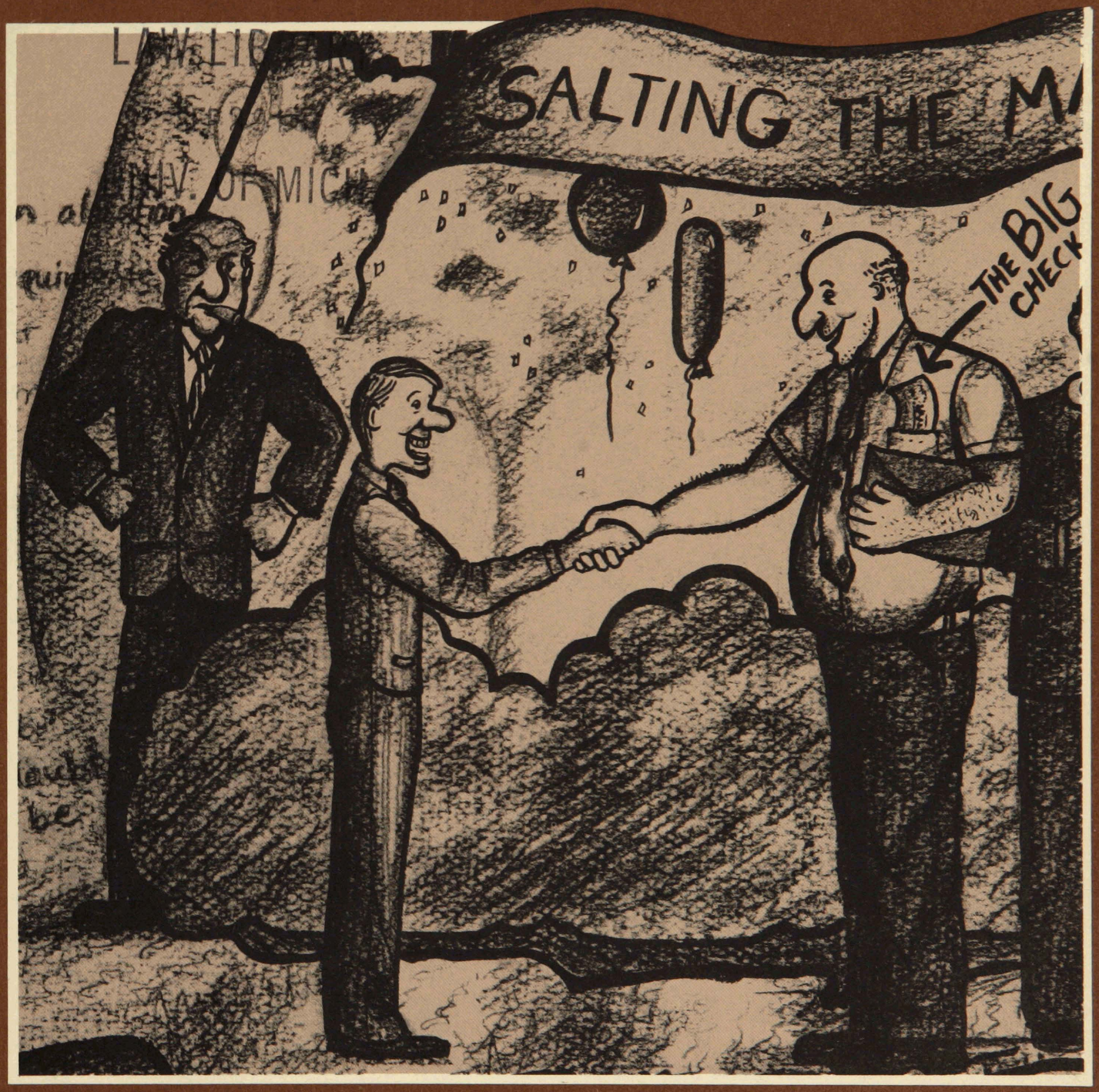
# Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 27, NUMBER 3, SPRING 1983




**White on contract law and commercial behavior**
**Memorial to L. Hart Wright**
**Edwards, Howe, Coleman, Frey are speakers**

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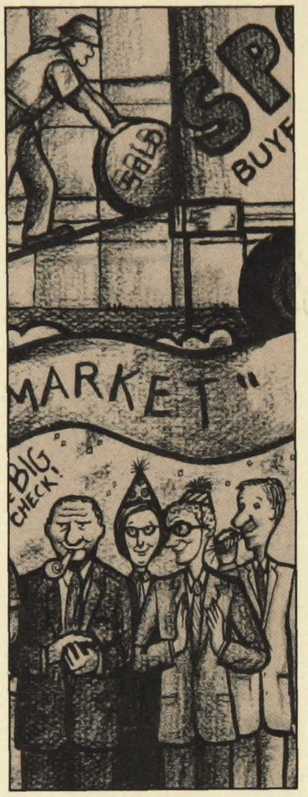
## ARTICLES



## DEPARTMENTS



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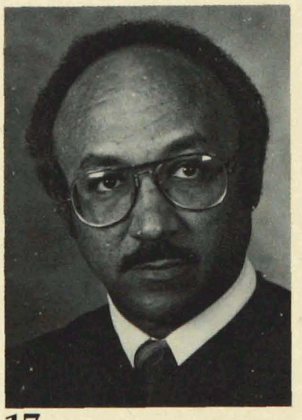

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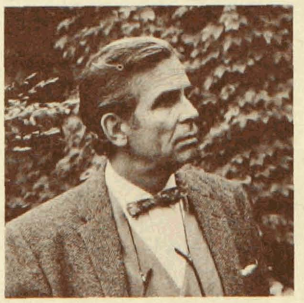

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# Informed reform

*Legislators draw on Chambers's research*

In reforming the laws and procedures governing child support payments and the visitation rights of divorced parents, the Michigan legislature turned to Professor David Chambers's research findings reported in his book, *Making Fathers Pay: The Enforcement of Child Support*, (The University of Chicago Press, 1979). His survey of the records of child support payments in 28 Michigan counties provided strong evidence for the deterrent effect of jailing within a well-organized and well-announced enforcement system, but raised doubts about the fairness of the judicial process which leads to jailing for non-support and about the effectiveness of long jail terms.

Chambers's study revealed that procedures and collection rates varied greatly among the counties studied. He found that significantly higher rates of collection occurred in counties which had both a self-starting policy, whereby enforcement efforts were automatically initiated in all cases of delinquency without a prior complaint being required, and a practice of jailing substantial numbers of delinquents. Chambers's study also revealed, however, that long jail sentences were no more effective than short ones in assuring payment either from people sent to jail or from others who knew of the possibility of being jailed.

The new Michigan Support and Visitation Enforcement Act (House Bill 4871) responds to Chambers's findings by shortening the maximum jail sentence a parent can be required to serve for non-payment from a year down to 45 days and by requiring each county to adopt a self-starting enforcement system. The system makes use of automatic wage assignments which take effect in all cases where a parent falls behind in payments by a fixed amount. It also requires that warnings be sent as soon as a non-paying parent has built up several weeks arrearage.

*David L. Chambers*

In this, the bill is responsive to Chambers's arguments that jailing, however effective it may be in securing compliance, is a debilitating and excessive punishment for non-support which should be used only where there is no effective alternative. In the conclusion to his book Chambers suggests that mandatory wage deductions are one such alternative which should be tried.

The new Support and Visitation Enforcement Act is only one part of a legislative package sponsored by Representative Debbie Stabenow which went into effect on July 1, 1983. Also included was a bill revising the structure and functioning of Michigan's offices of the Friend of the Court. These agencies, which are unique to Michigan, oversee the welfare of children whose custody and support are the subject of court orders.

During their deliberations about the new legislation, Ms. Stabenow and other members of the legislature called on Professor Chambers to discuss his findings and views with them on five or six occasions. The parts of his book which deal with the futility of long sentences were frequently mentioned in the legislative debates. Some legislators who were unimpressed by the arguments that long terms in jail were unduly harsh were more receptive to evidence that they are a waste of public funds.

Although his primary contributions were to the provisions

concerning the enforcement of child support, Professor Chambers also participated in the discussion of a new requirement that Friend of the Court offices provide domestic mediation to all divorcing couples who request it for help in reaching voluntary agreements. He welcomes this provision as a "nice modest beginning" which may help us to learn more about the effectiveness of mediation and to move away from excessive reliance on litigated resolutions of domestic disputes.

It is not unusual for members of the Law School faculty to be asked to testify before national and state legislative committees or to comment on drafts of bills. It is, however, rare for a law professor to offer empirical data on the effects of existing legislation which can help lawmakers in the process of reform.

In fact, it is unusual for legal scholars to conduct empirical research. Professor Chambers began his project with no background in the methodology of the social sciences and little anticipation of how complex the analysis of some of the data would prove to be. He credits Terry K. Adams of The University of Michigan's Institute for Social Research, who received a J.D. from the Law School in 1972 and who worked with him on the research design, and Law School colleague Professor Richard Lempert with offering sound advice about what data would be worth gathering as well as reassurance about the value of the project. "The Law School is a supportive institution," Chambers says. "I felt free to do research that was out of the ordinary and to learn as I went. I received support from Cook funds as well as from the National Science Foundation. That gave me confidence that the research was worth doing and that I was going about it in a reasonable way." Indeed, since its publication, *Making Fathers Pay* has been widely praised by social scientists as well as by legal scholars.

Professor Chambers began with the insight that the extensive records maintained by court agencies about support payment constituted a unique opportunity for studying the deterrent effect of sanctions on the rate of incidence of a crime. While many crimes go undetected or unreported, the crime of non-payment of child support is immediately reflected in the records of Michigan county agencies. Through a comparison of the records of various counties which used differing methods of enforcement, Professor Chambers sought to understand why some counties were able to collect much more than others. By closely examining payment records and personal characteristics of fathers in one county, he also tried to discover why some fathers pay so much more diligently than others in the same county.

Chambers admits that he began his research hoping to discover that jail sentences were not effective in assuring that support payments are made. He was alarmed to find that his data suggested as strong a case as has ever been made for the deterrent effects of jailing. Yet the empirical results offer only a limited measure, Chambers says. He points out in the book that his data only demonstrate that jailing is effective in bringing in more child support dollars. He argues, drawing on affecting descriptions of individual cases, that its social costs, which are harder to calculate, may well outweigh its advantages. Nevertheless, when the book appeared, Professor Chambers was invited to lecture to many groups who were enthusiastic to hear about the statistics on jailing's deterrent effect, but uninterested in Professor Chambers's cautions and qualifications.

"By contrast," he says, "the legislators' response is heartwarming." They have drawn from the book the argument that there are ways to make collection of child support payments more effective which all counties should be required to employ in the interests of uniform justice as well as of improved efficiency. Provisions are included in the new legislation which allow for release on bond of a delinquent payer who has been arrested, for release of an unemployed person who finds work, and for determining a non-custodial parent's ability to pay. The revised legislation also establishes uniform procedures for assuring that the visitation rights of non-custodial parents are protected. In these provisions, as in reducing the maximum length of sentences for non-support and in requiring wage assignments in cases of delinquency, the State has made sensitive and intelligent use of Chambers's findings.

"I don't want to overstate the impact of my research on the legislators," Chambers cautions. "It does seem highly unlikely that they would have reduced the maximum sentence for non-payment without my findings which ran counter to the intuitions and personal inclinations of many of them. The legislators were, on the other hand, already inclined to compel improved efficiency in the enforcement process and were disposed to try a 'self-starting' enforcement system. My research seems simply to have suggested the specific action they chose in that area and in provisions regarding wage assignments."

For the last several decades, Michigan has been the state which has been most effective in assuring that parents pay child

support. Systems similar to Michigan's Friend of the Court offices are currently being tried in several other states, and the Michigan model is frequently invoked. As other states imitate Michigan's recent reforms, they will, of necessity, study Professor Chambers's research, and the impact of his findings will spread well beyond the confines of the 28 Michigan counties he surveyed.

Harvard President Derek Bok, in his recent, much publicized criticism of the American legal system, called for empirical research by legal scholars which can inform legislators and the courts. We need to "make greater efforts to examine the effects of the laws we already have," Bok argued, if we are "ever to develop more sensible theories of the appropriate role of law." Bok also criticized the law schools for their emphasis on preparing students for legal combat. "Throughout the curriculum, professors spend vast amounts of time examining the decisions of appellate courts, but make little effort to explore new voluntary mechanisms that might enable parties to resolve various types of disputes without going to court in the first place."

In his interest in mediation as well as in his pioneering research, Professor Chambers exemplifies the capacity of law scholars to challenge the status quo and to have a concrete effect on the law, improving the lives of men, women, and children.

# Where did Howard Hughes live?

*McCree is special master in inheritance case*

The oak panelled courtroom on the second floor of Hutchins Hall is no longer strictly a place for arguing moot questions. The live and material question of which state was the legal domicile of the eccentric billionaire, Howard Hughes, has been raised there, since it is at the Law School that Wade H. McCree, Jr. has held initial pre-trial hearings in the case to determine Hughes's residence.

McCree has been named special master in the case by the U.S. Supreme Court. It is the duty of the special master to set and direct all proceedings, to gather evidence, summon witnesses, take testimony, weigh all the evidence and render a determination to the Supreme Court in an advisory report.

McCree, who is now the Lewis W. Simes Distinguished Professor of Law, gained a rich understanding of the functioning of the Supreme Court during his four years as United States Solicitor General. In that office, he argued the government's position in hearings before the court.

The Hughes case is unusual, McCree notes, because it is one of the rare cases which fall within the original jurisdiction of the Supreme Court. The Supreme Court functions almost exclusively as an appellate body; the cases in which it has original jurisdiction are limited by Article III of the Constitution to those "affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." This limitation of the Court's original jurisdiction was endorsed in the Court's landmark decision in *Marbury v. Madison*. It was in renouncing an attempted enlargement of its original jurisdiction that the Court asserted its authority to interpret the Constitution. The Court held that the provision of the Judiciary Act of 1789 in which the Congress sought to grant to the Supreme Court jurisdiction beyond the cases stipulated in Article III was unconstitutional.

Since *Marbury v. Madison*, cases falling within the original jurisdiction of the Court have been rare. Almost all of them have involved boundary disputes between states, frequently arising out of a change in the course of a river which formed a common boundary.

Because such cases constitute such a small proportion of its caseload, the Supreme Court finds it inefficient to maintain a trial section. Instead, whenever original cases arise, it finds it useful to appoint a special master who serves as a trial judge in each specific instance.

In the Hughes case, the contesting parties are the states of California and Texas. Attorneys representing each state claim Hughes as a legal resident, arguing that his multi-million dollar

estate owes inheritance taxes to their state. While no law prevents both states from claiming to be Hughes' legal residence and both from collecting taxes from the estate, the plaintiff asserts that the claims of California and Texas cannot both be satisfied from what will remain after federal estate taxes are collected.

Because the eccentric pilot, moviemaker, and inventor owned numerous homes in various states and countries, determining his legal domicile is complex. Hughes was born in Houston in 1905 but left Texas after twenty years. He spent forty years living in California but always claimed he was still a Texan to escape from California's tax system, a biographer has reported. The Hughes estate has claimed that the reclusive magnate was a resident of the state of Nevada, which has no inheritance tax. Although Hughes lived in Nevada from 1966 to 1970, at one time renting the entire floor of a luxury hotel in Las Vegas, Nevada appears to have been eliminated as a possible legal residence.

Discovery of where Hughes regularly cast ballots in elections, if he voted, and where he paid property taxes will be important in the ultimate determination of his legal domicile, McCree says. This case does not deal with the authenticity of the many purported Hughes wills or the validity of the claims of potential heirs, but only with the competing claims of the two states.

To Michigan Law Professor William Pierce, who serves as executive director of the National Conference of Commissioners on State Laws, the case serves as an example of the expensive and time-consuming litigation which often occurs when states do not have uniform laws in an area, in this instance, inheritance law. Presently, notes Pierce, about half

*Wade H. McCree, Jr.*

the states have ratified what is known as the Uniform Arbitration of Domicile on Death Act, which calls for arbitration of cases in which there is disagreement about the state in which the deceased resided. Had all the states involved in the Hughes litigation adopted the law, the costly legal proceedings leading to review by the U.S. Supreme Court could have been avoided, but Texas is one of the states which has not adopted the act.

The size of the Hughes estate is another factor which accounts for its becoming the subject of extensive legal action. The states are prepared to pay a great deal, according to some sources almost five million dollars, to prepare their cases since the ultimate tax payments received will far surpass that amount. Texas, if it wins, will claim 18 percent of Hughes's estate in inheritance taxes. California stands to collect even more if it wins. California inheritance tax is 24 percent, which could mean receipt of an estimated $200 million from the Hughes estate. Ironically, it will cost the State of California an estimated $900,000 just to compute the value of the Hughes estate.

Two pre-trial status calls, at which the status of evidence being compiled by the attorneys for both states were reviewed, have already been held at the Law School. Students in Professor McCree's constitutional litigation class observed the proceedings and have studied aspects of the case. The next pre-trial review of the status of the evidence will be held at the Law School next fall. If the parties do not reach an out of court settlement, the trial will be held in 1984, either in Ann Arbor or in some neutral tribunal which would be convenient to prospective witnesses.

McCree was a natural choice for special master in this case which will doubtless attract a great deal of national media attention because of his unusually rich and varied background in the law. After receiving his law degree from Harvard University, he practiced in Detroit until he was named commissioner of the Michigan Workmen's Compensation Commission in 1952.

In 1954 he became a Circuit Court Judge in Wayne County and served in that office until his appointment in 1961 to a federal judgeship in Michigan by the late President John F. Kennedy. McCree remained in that post until 1966 at which time the late President Lyndon Baines Johnson named him the U.S. Court of Appeals for the Sixth Circuit. In 1977 former President Jimmy Carter appointed McCree to the solicitor general's position which McCree held for four years before resigning to accept a professorship at the Law School in 1981.

# Decoration for Res Gestae

*Student newspaper wins ABA award*

**Peter Jackson**
**for the *Res Gestae***

Ten years ago the *Res Gestae*, the Law School's student newspaper, first came out in crude typewriting on ditto sheets. The law student editors enjoyed the diversion of a school newspaper, but the *Res Gestae* wasn't catching anyone's eye.

Last year it did. In fact, the American Bar Association thought the 1982 newsprint version worthy of an award. At its annual meeting, held in San Francisco last August, the ABA's Law Student Division gave the *Res Gestae* its top honor for student newspapers from law schools with 700 or more students. The award was presented *in absentia*.

The ABA offered no explanation for its action, but editor Jeff Blake, a third-year student from Detroit, believes the presence on the awards committee of both lawyers and journalists with an appreciation for activities involving both disciplines gave the *Res Gestae* an edge. "Unlike other established papers such as Harvard's and Louisville's, which are monthly and bi-monthly publications", he explained, "the *Res Gestae* comes out every week for better or for worse. Searching for readable stories on that basis is a constant challenge and the committee must have recognized it."

The paper's visual impact may also have been a factor. Timely photography, a consistent layout scheme, and paid advertisements from local merchants and law firm recruiters created an image of legitimacy.

It was not always so. In the late sixties and early seventies, the *Res Gestae* was known for its irregular mimeographed appearance, robust language and occasionally slippery editorial standards. Professors subjected to its scrutiny sometimes by-passed normal channels of response and distributed rebuttal handbills.

The new version reflects Blake's two years of experience as a reporter for the *Petoskey News-Review* before coming to law school in the summer of 1980. Blake, however, could not have performed the transformation alone. "The paper began to take shape under (his predecessors) Matthew Kiefer and Cub Schwartz. They changed to a newsprint format and recruited managing editor Jeff Eisenberg, who put in as much time as I did the following year." Blake and Eisenberg then installed individual students as "page editors," responsible for finding and often writing stories for the opinion, features, sports, and arts pages.

Stories that may have caught the ABA's attention ranged from coverage of events in Washington and Lansing to interviews with the Law School's custodial staff. Law School issues receiving treatment included closed faculty meetings, an alleged cheating scandal, Law Review affirmative action proposals, the exclusive membership policies of the Barrister's Society, and the anti-homosexual bias of military recruiters at the Law School. "Page editors" Jim Loots and Colleen Hanlon won individual ABA awards for articles on the Justice Department's new antitrust guidelines and the erosion of constitutional rights, respectively.


siting Profs Bring Expertise, Enthusias

Dig That Hog

The Res Gestae

gal Midwife to
uples Without Kids

Clinic Crisis (Part

A new staff took the *Res Gestae* helm in January and intends to improve on the system they inherited. The old staff, which has no intention of interfering with their efforts, hopes they continue to observe the once seemingly infallible *Res Gestae* principle articulated by former editor Blake: "You can't take yourself or the paper too seriously. The *R.G.* legacy is that nothing is sacred and everything could be worse."

Future Law School reporters may not know, or care to remember, the 1982 *Res Gestae*. The ABA, however, has seen fit to document its existence with a commemorative certificate secured between slabs of walnut and plexiglas. An unsuccessful search for appropriate display space relegated the certificate to a wall of the newspaper's modest office on the fourth floor of Hutchins Hall, where it can be viewed during business hours.

# Beloved tax professor dies

*University community mourns L. Hart Wright*

L. Hart Wright, the Paul G. Kauper Professor of Law at The University of Michigan and leading expert on U.S. federal and European tax procedures, died Tuesday, April 12, at the age of 65. He succumbed to radiation pneumonitis while undergoing treatment for lung cancer at Johns Hopkins University Hospital.

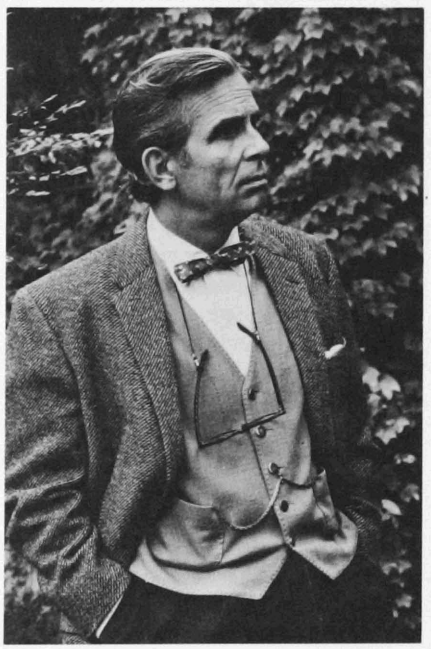
Law students, colleagues on the Law School faculty, and the many people throughout the University and Ann Arbor community who worked with Professor Wright and delighted in his tenacious enthusiasm for analysis and debate were deeply saddened by his loss. The Lawyers Club was filled with members of the Law School Community who gathered to mourn and reminisce about Professor Wright, about his unique style of wit, his upright and generous spirit, his superb skill and dedication as a teacher of legal analysis. In addition to the memorial by Robben Flemming which is given on the facing page, moving testimonials to Professor Wright's impact on individuals and the community were offered by his long time colleague Allan F. Smith and by former student Warren Elliott of the class of 1952.

In a written memorial statement, Dean Terrance Sandalow said: "In an era in which many members of university faculties have given primary allegiance to their scholarly specialties, Hart Wright consistently adhered to an older trandition. For more than 35 years, the University received his undivided allegiance. To it he gave unstintingly of his time, his energy, his many talents, and—he would have been unembarrassed to say—his love. He received in return the only reward that was important to him, the respect and affection of his colleagues and of countless students.

"For all of us who were his colleagues, Hart's death represents the loss not only of an esteemed colleague, but of a cherished friend. We shall miss his counsel, but even more, his comradeship."

Born in Chickasha, Oklahoma, Professor Wright earned a bachelor of arts degree in 1939 and a bachelor of laws degree in 1941, both from the University of Oklahoma. After service in World War II, he earned a master of laws degree from the University of Michigan Law School in 1946.

At that time, Professor Wright joined the Law School faculty and began a long career of devotion to the welfare of the School and the larger University. During his more than 35 years on the faculty, he served on many University-wide committees, notably the faculty Senate Advisory Committee on University Affairs. He chaired the Board in Control of Student Publications and the SACUA Committee on Staff Excellence in addition to numerous committees within the Law School.



*L. Hart Wright*

Professor Wright earned an international reputation as a student of taxation, and his contributions as a public servant were of sufficient importance that the Treasury Department conferred upon him the Civilian Meritorious Service Award, the highest civilian award given by the government. But it was as a teacher that he made his most significant contribution and from which he derived his deepest professional satisfactions. He brought to the classroom consummate professional skill, intense moral commitment, and a profound concern for his students. Among generations of graduates of the Law School, Professor Wright's scorn for the mere transmission of information without critical analysis and his skill at cultivating the powers of legal reasoning are legendary.

Many alumni will join with present students and faculty at the Law School in mourning the loss of so vital, provocative, and generous a member of this intellectual community. A committee, chaired by Jerome Libin of the class of 1959, has just begun raising funds to establish a memorial endowment for Professor Wright. Those wishing to make contributions to this endowment may send them to the Law School Fund Office, indicating they are to be included in the L. Hart Wright memorial endowment.

# *Memorial for L. Hart Wright*

**by Robben W. Fleming**

Hart Wright would not have wanted us to meet in sorrow today, and indeed if I allowed myself to speak in sorrow, I could not speak at all.

Hart was such an enthusiastic, exuberant, humorous, dedicated man that I hope you will find it possible to smile with me as I think back over two occasions which were typical of him.

The first involved one of those small bets he loved to make. They usually varied in amount from one cent to five dollars, with the average being five cents. Interestingly, for one so politically conscious, he never corrected these amounts for inflation!

In any event, you will find in the archives a complete record of one such bet. Hart and Bill Haber had bet five dollars on whether and when Richard Nixon would leave office. Thereafter, as one would expect from two such funsters with so large a wager at stake, an argument arose over the proper interpretation of the bet. Hart then persuaded me to represent him in the matter. Accordingly, I wrote Bill a stern letter advising him to pay or we would sue. Upon receipt of that letter, Bill engaged Allan Smith as counsel. Allan promptly wrote to me, saying among other picky, picky things, that he doubted that I was admitted to the practice of law in Michigan.

After allowing due time for the dust to settle, Allan and I then conspired to advise both Hart and Bill that our fees now far exceeded the wager, but that we had agreed to split the five dollars being held in escrow as a down payment. Naturally, though totally without justification, this turned both Hart and Bill against their lawyers. I am glad to report that the matter ended peacefully at a wonderful dinner.

And then there was the golf course. The Wrights and the Flemings frequently played together. The harsh truth, on which there is no reason to dwell, is that none of us were very good golfers. But if you could survive Hart's meticulous system, which apparently involved going through an extensive check-list of do's and don'ts before making any shot, it could be great fun.

Phyllis, his wife, had a unique way of coping with Hart's study periods before each shot. She simply proceeded on down the course, advising others to do likewise. This may have been unorthodox, but it did not seem to bother Hart or to encourage him to speed up.

Hart did everything with intensity and vigor, whether it was mowing the lawn, painting and remodeling a room, talking with pride about his daughters, arguing American foreign policy, expounding on a needed revision of the Internal Revenue Code, or insisting on the deficiencies in the pass-fail grading system. As a matter of fact, it was frequently difficult to get into the conversation at all unless you were quick about anticipating the slightest pause.

On the more serious side, perhaps one reason Hart was so close to many of us of his generation was because we shared so many memories and experiences. He was a product of small-town America, fiercely loyal to his home state of Oklahoma, dedicated to his family, and infinitely proud of his country and its democratic institutions. His was the generation which was called into service in World War II, perhaps the last time that young Americans were confident they fought a just and righteous war. Words like "honor," "pride," "dedication," and "discipline" meant a great deal to him, and they were the key to the values he brought to his career at The University of Michigan.

Few faculty members served on as many University-wide committees as did Hart, or contributed their talents to so many constructive causes. But for all that, it was the Law School which was the center-piece of Hart's love for the academic world. He could never accept mediocrity, therefore his goal was always excellence. If his standards for judging prospective faculty members were high, if he was demanding of his students and critical of their efforts, if he sometimes pressed his arguments beyond his ability to convince his colleagues, it was always because his pride in the Law School was so great.

Great universities are characterized by faculty members who are unwilling to settle for less than excellence. Hart was such a faculty member. The Law School and the University will be forever indebted to him.

*Robben W. Fleming is a professor in the Law School. He has served as president of The University of Michigan and of the Corporation for Public Broadcasting. He is currently the chairman of the National Institute for Dispute Resolution. He delivered these affecting reminiscences of his colleague and friend at a memorial service for Professor Wright which was held in Lawyers Club on April 14, 1983.*

# A great lake state

*Michigan's new law clinic will focus on water pollution*

Six law students, four graduate students in natural resources, and six graduate students in public health comprise the first group enrolled in the Law School's newly established clinical program in environmental law and policy. The program will be affiliated with the Great Lakes Natural Resources Center which is one of five regional centers established by the National Wildlife Federation to protect natural resources through legal means. While the National Wildlife Federation provides all funding for the Great Lakes Center, the Center's Director, Mark Van Putten, holds an Assistant Professorship of Clinical Law. Law students who enroll in the Environmental Law Clinic receive Law School credit for their work at the Center.

According to Van Putten, the Center's mandate from the National Wildlife Federation is to concern itself with all matters "affecting water quality in the Great Lakes Watershed." Van Putten considered a variety of approaches to this mandate, including intensive use of litigation to protect water quality, but fears of earning a reputation as "an environmental ambulance chaser" made him decide on a less confrontational alternative. The Great Lakes Center will monitor and study the natural resources it seeks to protect. Then, it will attempt to influence private and governmental decision making regarding those resources through timely intervention in the regulatory process.

With this methodology in mind, Van Putten divided the sixteen clinic students into two teams and gave each team responsibility for one Michigan river system. The first team will concentrate on the Saginaw River System and the second on the Kalamazoo River System. Both of these river systems have been identified by a joint Canadian-American Government Commission as sources of toxic pollutants contaminating the Great Lakes. Both teams have as their ultimate goal the amelioration of Great Lakes toxic pollution.

Each river system, however, has its own individual problems. Each team is responsible for assessing the problems of its river and then taking appropriate legal action in response to those problems. For instance, the toxins in the Kalamazoo River System result more from the churning of contaminated sediment on the river bottom than they do from current industrial discharge. Thus, the team covering that river must concern itself with matters such as the regulation of dredging. The Saginaw River System, on the other hand, still contains major point sources of pollution like industrial sewers which discharge toxins into the river. So the Saginaw River team must involve itself in the regulatory process that governs the issuance of permits for industrial waste discharge.

Of course, the assessment and monitoring of toxic water pollution requires technical expertise. In recognition of this, the Environmental Law Clinic adopted an interdisciplinary structure. Each student team consists of three law students, three graduate students from the School of Public Health and two graduate students from the School of Natural Resources. The clinic's faculty is drawn from the same three schools. In addition to Van Putten, clinic instructors include Arthur Oleinick, a medical doctor who is also a lawyer, and School of Natural Resources Professor Patricia Bidol. Van Putten points out that the clinic provides law students an excellent opportunity to learn to deal effectively with experts in other fields, a skill invaluable to any lawyer's professional development.

In order to maximize the interdisciplinary nature of the clinic, all students attend a weekly seminar whose theme is Science and Environmental Policy Making. Van Putten hopes that law students will come away from the seminar with a greater appreciation of "how science is used to set legal standards, especially by administrative agencies." Similarly, he hopes that the technically oriented students will gain an understanding of the ways in which legal, political, and economic developments affect science.

Law students enrolled in the clinic will also have the opportunity to develop litigation skills with an emphasis on administrative law and procedure. Workshops involving case simulations and role playing will be conducted in such things as negotiating tactics and expert witness preparation. Robert Vollen, General Counsel (on leave) of Business and Professional People in the Public Interest, has been engaged as an outside litigation consultant to the clinic. He will work with students both in their seminars and on their cases.

Though it is still in its infancy, the clinic has received approbation from the Law School community. Michigan law stu-

dents have a tradition of environmental advocacy. The Environmental Law Society (ELS) has long been one of the largest and most active law student organizations. According to Tom Blessing, a third-year law student and ELS member, ELS anticipates having a close relationship with the clinic. The clinic, Blessing said, is an important addition to the Law School curriculum, fulfilling "a very important function. It will give people more formal and supervised training in environmental advocacy and issues," than was previously available at the Law School. Thus, it will help students to learn to "apply knowledge from a class to real issues."

Law School Professor Joseph Sax, the nation's preeminent authority on environmental law, expressed similar sentiments. "The Law School," Sax asserted, "couldn't do anything more helpful for them [the students] in developing their professional careers" than endorse participation in the clinic. By locating the Great Lakes Natural Resources Center in Ann Arbor, the National Wildlife Federation, provided Michigan law students with a "wonderful opportunity," Sax said, to gain "experience in environmental law without going on an externship in a distant city."

## Trout fisherman and environmental lawyer

When Mark Van Putten graduated from the Michigan Law School in May of 1982 he knew that he wanted to make a career of natural resources law. Not expecting to immediately attain this goal, he accepted a position in the private sector with the Grand Rapids firm of Warner, Norcross & Judd. Van Putten's quest for his vocational *desideratum*, though, ended almost before it began. By the end of the summer, he, his wife, and their two children had returned to Ann Arbor where Van Putten assumed his new position as the first director of the Great Lakes Natural Resources Center.

The job seems tailor-made for him. Although he partially credits serendipity, his success in so quickly finding it has its roots in his past commitment to and experience with natural resources law and management. At Calvin College, where he earned his undergraduate degree in political science in 1976, Van Putten used his prerogative as editor of an arts and opinion magazine to devote several issues to environmental topics. Immediately upon arriving at the Law School, Van Putten joined the Environmental Law Society. With other Society members, he co-authored a recently published handbook, *Environmental Law in Michigan for Practitioners.* Taking advantage of the Law School's large variety of elective course offerings in his area of special interest, Van Putten studied everything from Water Law to Public Control of Land Use. Even the topic of his *Law Review* note—recreational conflicts on public land—reflects his environmental interest.

*Mark Van Putten*

Van Putten's interest in the environment extends beyond the academic. A Grand Rapids native, he grew up fishing the Michigan rivers that he now works to protect. He is a member of the Michigan Council of Trout Unlimited and remains avid in the pursuit of that elusive fish. While his present job does not allow him to spend as much time at it as he would like, he still enjoys tying his own flies.

# Michigan alumni serve as Supreme Court clerks

For the third consecutive year, three recent Michigan Law alumni are serving as clerks to justices on the United States Supreme Court.

☐ **Douglas B. Levene,** who is clerking for Chief Justice Burger, received his J.D. *summa cum laude* in 1981. Mr. Levene was the recipient of the Daniel H. Grady Prize Award which is given to the senior law student who has attained the highest standing in the class throughout a full course of study in the Law School. He was also elected to the order of the Coif. After graduation he served as clerk to the Hon. J. Edward Lumbard of the United States Court of Appeals for the Second Circuit.

Mr. Levene attended Massachusetts Institute of Technolgy as an undergraduate, earning a B.S. in Humanities and Science. He went on to complete an M.A. in East Asian Studies at Yale University. Before coming to the Law School, Mr. Levene engaged in political activities to protect the environment in Aspen, Colorado, where he worked for the *Aspen Journal*. He went on to become news editor of the *Boonton Times—Bulletin* in New Jersey for a year. In 1977, he worked as an intern in the office of Senator Edward Kennedy. At the same time he audited courses in advanced Japanese and in Japanese Law at Harvard while working on a translation of a Japanese Supreme Court tax case for use in a Harvard Law School course.

☐ **Stewart Schwab,** who is clerk to Justice Sandra O'Connor, received his J.D. *magna cum laude* in 1980. While at the Law School he was in the highly selective joint program in law and economics, completing an M.A. in economics while working for his law degree.

Mr. Schwab is a graduate of Swarthmore College where his undergraduate major was economics. In 1981-82, Mr. Schwab was clerk to the Honorable J. Dickson Phillips of the United States Court of Appeals for the Fourth Circuit in Durham, North Carolina.

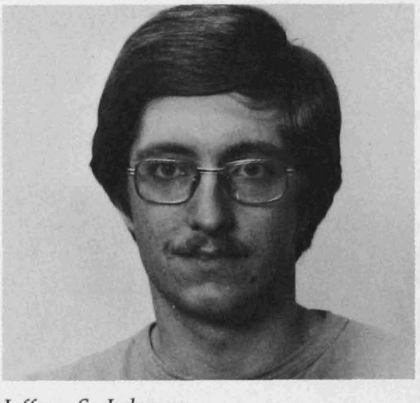
☐ Clerking for Justice John Paul Stevens this year is **Jeffrey S. Lehman** who graduated from the Law School in 1981. In his senior year, Mr. Lehman was a recipient of a Henry M. Bates Memorial Scholarship, a cash award made each year to one or more seniors in the Law School in recognition of outstanding scholarship in both undergraduate and legal studies, as well as of personality, character, extracurricular interests, and promise of a distinguished career. These awards are paid from the income derived from a fund established by alumni and friends of the Law School in memory of the late Dean Henry M. Bates.

Mr. Lehman was also recognized for his outstanding work for the *Michigan Law Review*, superior scholastic record, and effective leadership with the Abram W. Sempliner Memorial Award. This award goes each year to the student elected to be editor-in-chief of the *Michigan Law Review* for the following year. The award was made possible by a gift from Jason L. Honignan (J.D. '26) in memory of Mr. Sempliner, (LL.B, 1902) who was an outstanding member of the Detroit Bar.

Mr. Lehman received an A.B. with distinction in all subjects from Cornell University. His major was mathematics. While an undergraduate, Mr. Lehman directed the Eastern Regional Monopoly Championships and co-authored the book, *1000 Ways to Win Monopoly Games.*

*Douglas B. Levene*

*Stewart Schwab*



*Jeffrey S. Lehman*

## Law school graduates hold judicial clerkships

Thirty-one other alumni who graduated in August and December 1982 and May 1983 hold judicial clerkships this year. The following is a list of those clerking in state courts and federal courts other than the Supreme Court.

**Lawrence Abel**
clerk to The Hon. John Feikens
United States District Court
Eastern District of Michigan
Detroit, MI

**Elise Bean**
United States Claims Court
Washington, DC

**Susan Block**
clerk to The Hon. Joel Lewittes
United States Bankruptcy Court
Southern District of New York
New York, NY

**Susan Blondy**
clerk to The Hon. Joyce Hens Green
United States District Court
District of Columbia
Washington, DC

**Thomas Briggs**
clerk to The Hon. Carolyn P. Randall
United States Court of Appeals
Fifth Circuit
Houston, TX

**Mary Cullen**
clerk to The Hon. Richard C. McLean
Twentieth Judicial District Court
State of Colorado
Boulder, CO

**Nancy Fredman**
clerk to The Hon. Arlin Adams
United States Court of Appeals
Third Circuit
Philadelphia, PA

**Nina Gillman**
clerk to The Honorable E. Weinfeld
United States District Court
Southern District of New York
New York, NY

**Art Harris**
clerk to The Hon. John Manos
United States District Court
Northern District of Ohio
Cleveland, OH

**David Horowitz**
clerk to The Hon. Philip Nichols, Jr.
United States Court of Appeals
Federal Circuit
Washington, DC

**Deborah Singer Howard**
clerk to The Hon. Robert DeMascio
United States District Court
Eastern District of Michigan
Detroit, MI

**Karen Jackson**
clerk to The Honorable Thomas James
United States Bankruptcy Court
Chicago, IL

**Catherine James**
clerk to The Hon. Stephen Breyer
United States Court of Appeals
First Circuit
Boston, MA

**David Lauth**
clerk to The Honorable Philip Pratt
United States District Court
Eastern District of Michigan
Detroit, MI

**Jonathan Levy**
clerk to The Hon. Edward S. Godfrey
Supreme Court of Maine
Portland, ME

**Peter Lieb**
clerk to The Hon. Amalya Kearse
United States Court of Appeals
Second Circuit
New York, NY

**Don Loeb**
clerk to The Hon. Charles Levin
Michigan Supreme Court
Southfield, MI

**Peter Manbeck**
clerk to The Hon. J. Edward Lumbard
United States Court of Appeals
Second Circuit
New York, NY

**Karon Mason**
clerk to The Hon. John Grady
United States District Court
Northern District of Illinois
Chicago, IL

**Suzanne Mitchell**
clerk to The Hon. Robert Hall
United States District Court
Northern District of Georgia
Atlanta, GA

**Ron Mock**
Michigan Court of Appeals
Detroit, MI

**Dan Motsinger**
clerk to The Hon. James Lawrence King
United States District Court
Southern District of Florida
Miami, FL

**Andrew Rosner**
clerk to The Hon. Nathaniel Jones
United States Court of Appeals
Sixth Circuit
Cincinnati, OH

**Sue Sikkema**
clerk to The Hon. Charles Joiner
United States District Court
Eastern District of Michigan
Ann Arbor, MI

**Bernard Smith**
clerk to The Hon. Leroy J. Contie
United States Court of Appeals
Sixth Circuit
Akron, OH

**David Tachau**
clerk to The Hon. James Gordon,
Senior Judge
United States District Court
Western District of Kentucky
Owensboro, KY

**Evangeline Vicent**
Michigan Court of Appeals
Lansing, MI

**Wendy Welkom**
clerk to The Hon. Ralph Guy
United States District Court
Eastern District of Michigan
Detroit, MI

**Richard Werder**
clerk to The Hon. Harry Edwards
United States Court of Appeals
District of Columbia Circuit
Washington, DC

**Mary Wolodzko**
Michigan Court of Appeals
Lansing, MI

**Deborah Young**
clerk to The Hon. Thomas Clark
United States Court of Appeals
Eleventh Circuit
Atlanta, GA

# Socialism's failure in America

*Howe skillfully blends analysis with telling detail*

*Irving Howe*

The argument of this year's Cook lectures, that factionalism and absolutist responses to international crises undermined the American socialist movement at the two moments in history when it had a chance of becoming a party of national importance, might well have pleased the donor who endowed the lecture series, William W. Cook. His aim in establishing the Cook lectures was to preserve and strengthen American institutions through scholarship. Mr. Howe gave credit to the power of American individualism, the persistance of regionalism, and the enduring appeal of complex capitalism in the American setting in analyzing why American socialism has failed. He did, however, describe that failure as regrettable.

The scholarship displayed in this year's lecture series was particularly thorough, engaging, and insightful. Mr. Howe moved easily from characterizations of colorful figures in the socialist movement to analysis of their appeal for various segments of the party or of their failure to catch and hold the loyalty of a significant proportion of American voters.

Irving Howe is an author, editor, literary critic, and professor who is most widely known for his compelling social and cultural history of the European Jewish experience in American, *World of Our Fathers.* He has written many other books on politics, literature, and on the interaction of the two. Like his books, Mr. Howe's Cook lectures displayed his remarkable ability to punctuate thoughtful syn thesis with evocation of a key detail and quotation of a telling slogan.

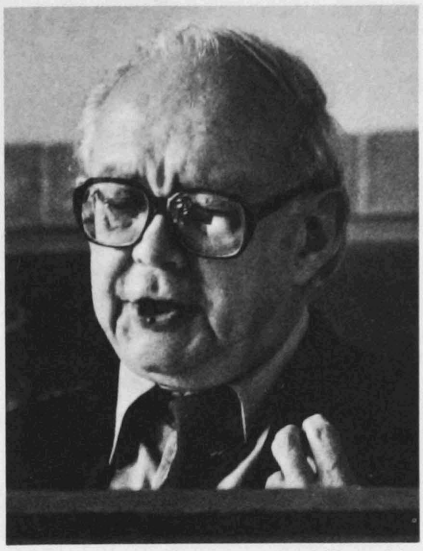
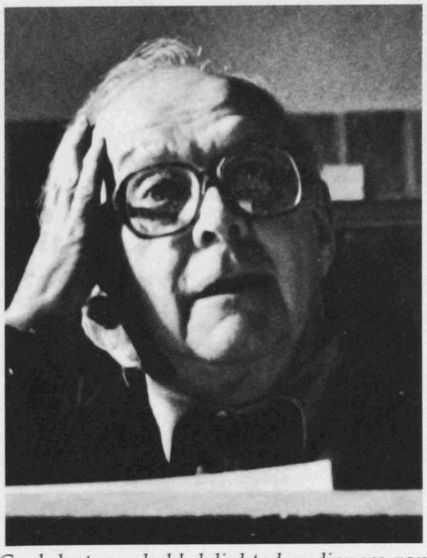
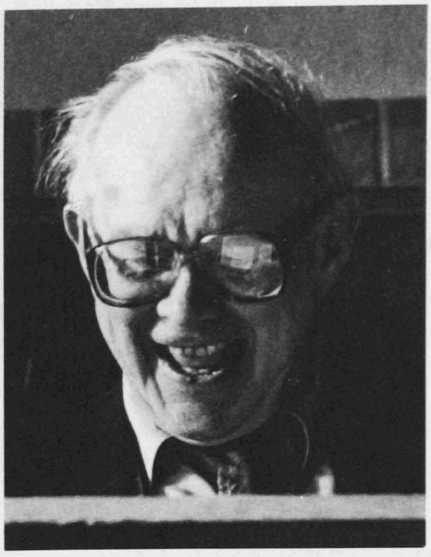
In his first lecture, entitled "Debsian Socialism and Evangelical fervor," Mr. Howe analyzed the period from 1912 to 1917 in which the socialist party moved from optimistic hope and national unity to disillusionment and disarray. In explaining the socialist party's failure to build on its impressive showing in the election of 1912, Mr. Howe described the regionalism and diversity which characterized its membership. The inspiring oratory of Eugene V. Debs was only temporarily powerful enough to hold together the groups of immigrants who made up the party's membership.

Other flaws in the socialist party of the period, Mr. Howe said, were its failure to offer any particular analysis and support to blacks, its uncompromising attitude toward capitalism and toward trade unionism, and its evangelical sectarianism. The decisive downfall of the socialists in the period came about, however, because of the absolutist anti-war position with which they greeted the American entry into World War I. Their stand on the War, like their categorical unwillingness to deal with any aspects of capitalism or with existing labor organizations, was, Howe argued, an aspect of the party's ties with evangelical sects.

The socialists displayed an absolutism about the claims of conscience which made them indisposed to political interplay and unwilling to compromise in the interests of social unity. In each instance they displayed "too large a quota of innocence," Mr. Howe said; they took revolutionary stands but were not really a revolutionary movement; they had enough influence to be considered a threat, but not enough power to resist repression.

In his second lecture, "Socialists in the Thirties: A Case Study," Mr. Howe emphasized parallels between socialism's rise to a position of influence and subsequent dissolution in that period and the trajectory it had taken in the teens. As Debs's charismatic leadership and fiery rhetoric had brought the socialist party to national attention in the early period, so the gifted leadership of Norman Thomas inspired members of the party to mount a sizeable presidential campaign in 1930. The party grew in the early thirties as many young people who had been stung by the depression joined and new locals were set up across the nation.

As in the earlier period, the party grew to a crucial size where it threatened other parties but did not have sufficient power to resist its opponents. In the thirties it was challenged both by communists to the left and by those who argued that support of Roosevelt was the best way to

*Clarifying, pondering, or chuckling, this year's Cook lecturer held delighted audiences rapt.*

realize socialist ends.

The idea that the New Deal stole socialism's thunder has been made too often and too simplistically, Mr. Howe said. While Roosevelt's programs did overlap with some of the socialists' immediate demands, and his success undermined much of their popular support, it was the socialists' insufficiently imaginative response to Roosevelt which accounts for their disintegration.

As in the earlier period, they adopted an excessively revolutionary and absolutist position. Some in the party argued that Roosevelt's programs were simply an attempt to assuage the demands of workers so as to cement the power of the owners and perpetuate the status quo. They accused Roosevelt of setting up "state capitalism" rather than true socialism and argued that his reforms would be inadequate to allay the miseries of the depression. In all of this, according the Howe, the socialists failed to recognize the importance of the social reforms which were enacted and to build on the new humanitarian stance of government which had been enacted by Roosevelt. In their insistence on running candidates against those supported by the unions, the socialists pushed members into choices which often led to withdrawal from the party.

In the thirties, as in the teens, international crises also challenged the socialists' ability to frame coherent and strategic attitudes. Stalinism and fascism represented bewildering threats which led many Americans to clamor for a united front. While the resistance Austrian socialists offered to Hitler stirred American support, the lesson which was read in the swift defeat of Austria was that of the relative impotence of socialism. To people afraid that fascism could triumph in America as it had in Europe, the defeat of the most active socialist party in the world in only four days suggested that resistence in the United States should take a different form.

At the Socialist Party Convention of 1934, debate among those militants who wished to register dismay at the fall of social democracy in Europe and those who threatened mass war resistance culminated in a statement of principles whose revolutionary rhetoric did not accurately represent the socialist ideal, Howe said. In the prevailing mood of international crisis, the socialist belief in gradual, long-term change was shaken, but the party was unable to reach a unified and distinct posture toward national and world issues.

In his third Cook lecture, Mr. Howe addressed the question, "Why has American socialism failed?" from a more theoretical perspective. He turned from analysis of the socialist party's incapacity to respond creatively to particular historical challenges to broader speculation about the American imagination's resistance to the appeal of the socialist ideal.

He questioned and qualified the argument of an earlier theorist who held that socialism in America drowned "on the reefs of roast beef and apple pie." There have always been hardships and suffering among the workers and the poor in this country, Howe argued. If Americans have not seen socialism as a cure, he con-

tinued, it probably has more to do with myths of plenty and opportunity than with economic realities.

Nineteenth century idealism, as expressed in Emerson's essays, created an ideal of limitlessness, of mobility and possibility, whose power dominated the imagination of many Americans, Howe said, even many who were dissatisfied with their economic circumstances. "Emerson raised the individual to a quasi-divine status," he continued. "Man was viewed as self-fulfilling, as existing in an unmediated relationship to nature, to a land whose paradisal wilderness represented humanity's second chance."

Americans believed their country had already had its revolution, Howe said, a revolution led by George Washington. For many immigrants, he continued, the decision to emigrate represented a personal revolution. Thus they were prepared to share in the Emersonian myth which dominated American culture. They became enflamed with the ambition to transcend their national and class origins as individuals, rather than with the conviction that social and economic conditions should be transformed.

Might socialism have been more effective here, Mr. Howe speculated, if its leaders had recognized the power of the American myth, if they had devised a program which directly countered the underpinnings of Americans' sense of uniqueness and individuality? Probably not, he admitted regretfully. But, he concluded, is not the worship of success itself characteristically American? Perhaps, one might conclude, the perpetuation of American institutions Mr. Cook cherished is premised on the failure of those like Mr. Howe's socialism, which challenge the American ideal of individuality.

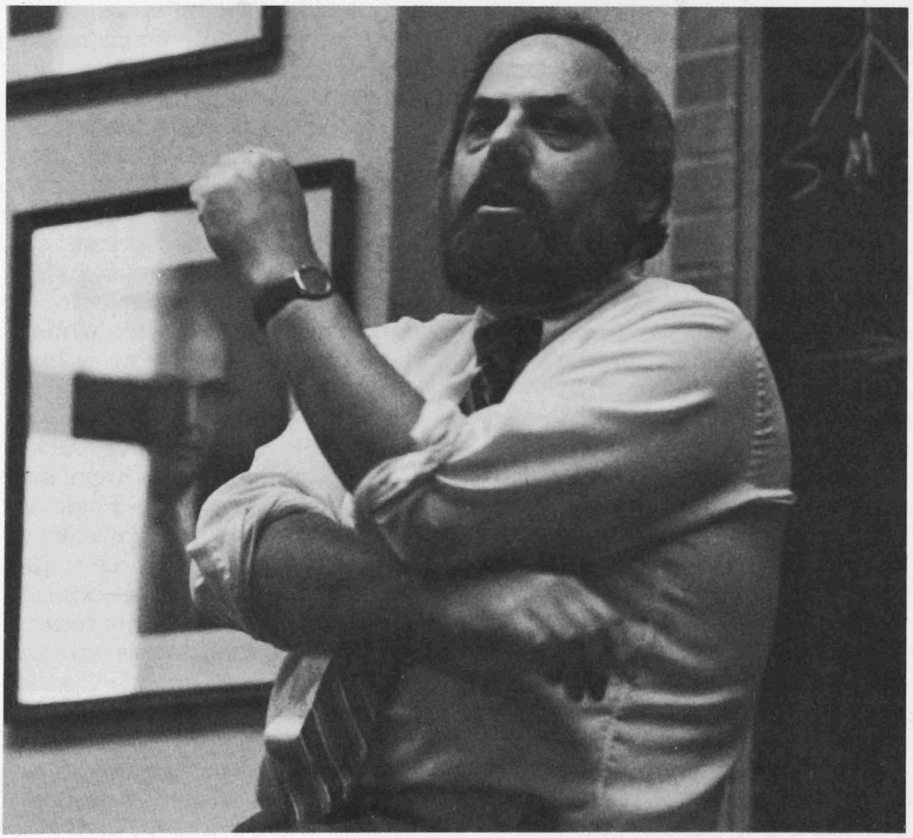
# Opposing views not excluded

*Andrew Frey advocates limits on the Exclusionary Rule*

Professor Yale Kamisar is almost as well known for his fair-mindedness as for his passionate defense of the Exclusionary Rule which forbids the use of illegally obtained evidence in criminal trials. This spring, he invited Deputy Solicitor General Andrew Frey to address his class on the Administration of Criminal Justice at the Law School. Mr. Frey, who has argued ninety-nine cases before the Supreme Court, worked on the *amicus curiae* brief for the government in the case of *Illinois v. Gates* which raised a question as to whether evidence should be admitted which a police officer obtained through behavior he believed to be legal.

In a lively interchange of questions and answers with law students, Mr. Frey said that the Exclusionary Rule promotes excessive litigation and confuses police. He urged adoption of a "good faith, reasonable exception."

In discussing how the Supreme Court approached reconsideration of the Rule, Mr. Frey offered students unusual and practical insights into the workings of the Court and into the thinking of lawyers who regularly appear there.



*Andrew Frey*

## Alumni Gatherings

That Michigan Law alumni are now practicing in all 50 states and more than 60 foreign countries is a matter of pride frequently brought to the attention of prospective students as well as that of employers who come to Ann Arbor to interview. At the same time, the geographical spread of our alumni poses a challenge.

For many years, the Law School's deans and faculty members have visited with groups of Michigan Law alumni or addressed luncheons at bar meetings in several states. This year, efforts were made to increase our contact with distant alumni by arranging gatherings in several major cities at times less hectic and more conducive to relaxed conversation than a state bar meeting. In some cities, notably Chicago and Washington, D.C., active alumni groups have invited speakers from the School. In other areas, one graduate has set up a luncheon or dinner at which a faculty member gave a brief substantive presentation. All local Law School graduates were invited to attend.

Dean Terrance Sandalow was our most indefatiguable traveller. He spoke to groups in Los Angeles, San Diego, San Francisco, Phoenix, and Denver on one swift swing through the West. He also flew to Miami for a meeting of Florida alumni, and to Washington, D.C., Chicago, Cincinnati, and Minneapolis. In New York City, he addressed a sizeable crowd at a luncheon which coincided with the state bar meeting.

Professor Roy Proffitt travelled farthest to visit with alumni. He attended a gathering in Honolulu where the Law School now has 90 graduates residing. He also went to Manila to represent The University of Michigan at the investiture of Edgardo J. Angara (LL.M. '64) as President of The University of the Philippines.

The luncheon for alumni in Seattle at which Professor Carl Schneider spoke was so successful that his host, John Matthews (J.D. '72), set up a similar gathering almost immediately. On that occasion, he welcomed Professor Theodore J. St. Antoine who happened to be in Seattle to speak at the Pacific Coast Labor Law conference.

Professor Michael Rosenzweig spoke to a group in Atlanta where he used to practice before joining the Law School faculty; Professor James Martin was the speaker at a luncheon in Houston, Professor Jerold Israel discussed the grand jury before a group in Boston, and Professor Carl Schneider attended a luncheon in St. Louis.

An active group of alumni in Chicago heard from former Solicitor General Wade McCree, Jr. as well as from the dean. A group in Minneapolis, where the luncheon was set to coincide with the State Bar Meeting in June, was entertained by remarks from Professor John Reed. We extend appreciative thanks to all alumni around the country who helped organize meetings this year.

Professor Beverley J. Pooley, director of the Legal Research Library and a speaker known for this enthusiasm and lively delivery, underwent harrowing travel conditions in a disabled airplane to arrive just as a luncheon gathering of alumni in New Haven was drawing to a close. This fall, he is risking travelling to California for a luncheon at the state bar meeting in Anaheim as well as other gatherings in Los Angeles and San Francisco.

Other fall meetings planned include a visit to Philadelphia by Dean Sandalow and one by Professor David Chambers to Indianapolis, both scheduled for October. There will be a Michigan Law Alumni luncheon at the Nebraska State Bar Meeting on October 19, and a gathering at the time of the Illinois Midyear Meeting in Chicago on November 4. Watch for invitations to a gathering in your area.

*Spirited lecturer Beverley Pooley is the featured speaker at reunions in California this fall.*

We are eager that these occasions provide us opportunities to keep up with the many accomplishments of our graduates and offer alumni a chance to meet classmates and fellow graduates in the area. We hope you will turn out to talk with visiting faculty representatives and hear about developments at the School.

For alumni readers interested in arranging a gathering, we can provide assistance with copying and mailing invitations as well as arrange for a speaker. Please let us know if such an occasion would be a good idea in your area. To do so, contact: Pat Sharpe, The University of Michigan Law School, Ann Arbor, MI 48109, (tel: 313 764-6375.)

## Alumni Notes

☐ Last fall, **Prudence Beatty Abram** (J.D. '68; A.B. '64) became the first woman judge on the United States Bankruptcy Court for the Southern District of New York. She is one of only four female bankruptcy judges on a bench of 200. While Judge Abram is convinced that being female will have little bearing on her performance or reception in office, she sees the presence of women on the bench as important in encouraging the aspiration of younger women. The appointment of women to judgeships constitutes "acknowledgement that women are able to perform in all aspects of the legal profession," she has said.

Nevertheless, she stresses, "I think of myself primarily as a bankruptcy judge, not as a woman bankruptcy judge." Recent changes in the Bankruptcy Act, increases in the use of the bankruptcy code by large corporations, and the possibility that bankruptcy judges will be granted life tenure make this an exciting time to work in the area, Judge Abram adds.

Before her appointment to the bench, Judge Abram was a partner specializing in debtors' and creditors' rights and corporate reorganizations with the New York firm, Strook & Strook & Lavan. She began to practice with Breed, Abbot and Morgan in New York. In 1972, she moved to Weil, Gotshal & Manges where she began to specialize in bankruptcy work. In 1978, she moved to the firm Krause, Hirsch & Gross which later merged into the Strook firm.

While at the Law School and for a year after her graduation, Judge Abram was employed as a research associate. She worked with Professor Arthur Miller, now

*Prudence B. Abram*

*David D. Dowd, Jr.*

of Harvard Law School, on the preparation of two casebooks. She then became involved in a project on the applications of computer-assisted instruction to legal education and research. Working with Professor Miller and Layman E. Allen of the Michigan faculty, she developed a computer-assisted teaching program in federal civil procedure for use with first-year law students.

Judge Abram's husband, Sam Abram, is also a Michigan graduate (J.D. '69). He is United States counsel for the Royal Bank of Canada in New York. It is likely they have a busy life these days. Judge Abram says of her new position, "They barely give you time to get your robe on and get started."

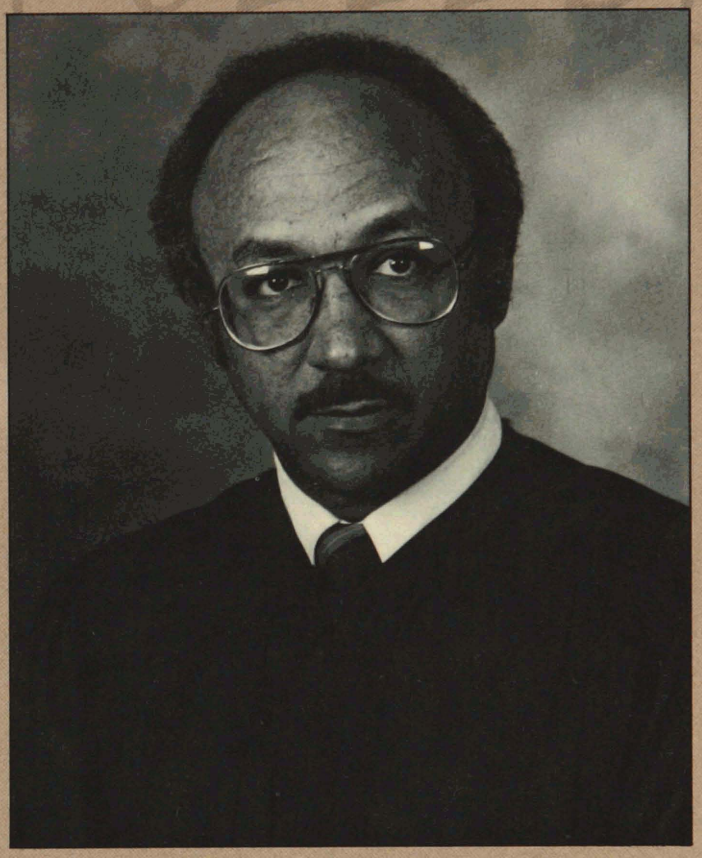
☐ **David D. Dowd, Jr.** (J.D. '54) was sworn in as judge on the United States District Court for the Northern District of Ohio last October. He joins fellow alumnus John W. Potter (J.D. '46) on that bench and brings the number of Michigan alumni presently sitting as federal judges at the district court level or above to thirty-six.

Judge Dowd moves to the federal bench with experience gained both as a justice on the Ohio Supreme Court and as a judge on the Ohio Fifth District Court of Appeals. He has also served as president of the Ohio Prosecuting Attorneys Association and as Chairman of the Ohio Organized Crime Prevention Council. In 1972 he was appointed by President Richard Nixon to serve on the Commission for the Review of the National Policy toward Gambling. He served in that capacity as one of seven public members along with four senators and four members of Congress.

Judge Dowd has also served at Councilman-at-large in the city of Massillon, Ohio. He was appointed assistant Stark County prosecuting attorney, a position in which he served from 1961-67. He then became prosecuting attorney for the county, a position to which he was re-elected in 1972. During his tenure in that office, Judge Dowd was appointed by Chief Justice William O'Neill of the Ohio Supreme Court to the Advisory Committee of the Court in the formulation of the Ohio Rules of Criminal Procedure.

While at the Law School, Judge Dowd was assistant editor of the *Michigan Law Review*. He has lectured at University of Akron Law School and is co-author of *Anderson's Ohio Criminal Practice and Procedure*.

# A CELEBRATION



by

## *Harry T. Edwards (J.D. '65)*

*Circuit Judge in*
*The United States*
*Court of Appeals*
*for the District*
*of Columbia Circuit*

*This address was delivered at the annual Butch Carpenter Scholarship dinner on April 15, 1983. At the dinner this year's recipients of scholarships from the Alden J. "Butch" Carpenter Memorial Fund were announced. They are Jon Hollinsworth and Kelvin Boddie.*

*The Butch Carpenter Memorial Fund was established in memory of a Michigan football star who died of heart failure soon after entering the Law School. During his four years as an undergraduate at Michigan, Butch Carpenter was co-captain of the football team and a starting defensive end on the Michigan Rose Bowl teams of 1969 and 1971. He majored in business administration with a concentration in accounting and, after graduation, became a member of the audit staff of a Detroit accounting firm.*

*Butch Carpenter was dedicated to the survival and growth of economically depressed communities. He came to law school because he saw there was a shortage of business attorneys committed to assisting in the development of economically depressed areas. It was his intention to return to metropolitan Detroit to practice business law after graduation.*

*It is the intent of the Butch Carpenter Fund to promote such dedication and social commitment. Accordingly, the scholarships are awarded to culturally disadvantaged Law School students who have demonstrated an inclination to practice business law, who plan to use their legal training in assisting a disadvantaged community, and whose career paths, graduate training, community involvement, or personal drive have contributed significantly to the decision to admit them to Law School.*

*The first recipient of a scholarship from the fund was Andre L. Jackson of Chicago, Illinois. He is a graduate of the University of Iowa who earned a B.B.A. in Insurance and a Masters of Business Administration with a concentration in systems management. Before coming to the Law School, he worked on the internal auditing staff of a steel company.*

*Andre Jackson was like Butch Carpenter in his athletic prowess as well as in his academic interests. As a high school and college student, Jackson was a football linebacker. He was named to the Rookie All-American team and to the All Big Ten team during his freshman year. Later he was named to the All-American team as Most Valuable Player and became Iowa team captain.*

*Near the conclusion of his speech, Judge Edwards offers the careers of several recent graduates of the Law School as inspiration to those currently enrolled. These pictures disclose the identity of each of the exemplary alumni to whom Judge Edwards refers.*

***David Lewis*** ***(J.D. '70)***

*is a "founder and senior partner of the highly successful 15-person law firm in Detroit," Lewis, White & Clay.*

Since the seventeenth century, Americans have been peculiarly prone to organize themselves into what Robert Wiebe describes as cultural "segments"—self-perpetuating, closed circles of like-minded people. It is within such circles that we have conducted most of our social life; and it is to them that we commonly look for our senses of self-worth.

The typical forms assumed by such "segments" have changed in the course of our history. In the colonial period, they were most often defined by *traditional* affinities and allegiances; examples included the aristocracy that spanned the British colonies, the adherents of particular religious sects, and the members of often sharply defined local political parties or factions. In the nineteenth century, segments were more often defined on the basis of two overlapping variables—region, on one hand, and race, ethnicity, or class, on the other; examples included Creoles, Scotch-Irish Appalachian farmers, and Boston "Brahmins." Since approximately the 1920s, the most important cultural segments in America have consisted of *occupational* groups and associations. Twentieth-century social enclaves, in other words, tend to have functional bases; a person's goals, friendship network, sense of status, and conversation often are shaped by his or her work.

Several historical forces and factors have combined to cause these tendencies toward "segmentation" in our society. Probably the most important is the fact that America has never been encumbered by an institutional framework capable of lending a coherent shape to its culture—an established church, a rigid caste or class system, or a hierarchical political order. Also, as Tocqueville pointed out long ago, membership in such groups serves important psychological needs of a people whose natural yearnings for stability and a sense of "belonging" remain unsatisfied in our disordered, turbulent, comparatively egalitarian society.

During the past century, these factors have been reinforced by an independent economic and cultural development: the process of "professionalization." Since the 1870s, specialized occupational groups have been proliferating in American society. Stimulated partly by the need for cadres of experts to develop and apply new fields of knowledge and partly by their members' desire for increased income and social status, groups of "specialists" have coalesced, hardened, and subdivided. The result is that, today, almost every aspect of our collective and individual lives—from our health and legal rights to our recreation and tastes in clothes—is ministered to by a well-defined, self-perpetuating priesthood. Membership in one of these vocational sects typically is the crux of a person's identity, the principal defining feature of one's social and personal life. "I am a lawyer" comes more quickly to the lips than "I live in Washington," "I like Stevie Wonder," or even "I am a Catholic."

The historical subdivision of American society into social cells, and the changing criteria by which those cells have been defined, have had countless effects on our culture and politics. Several of those effects are particularly important.

One effect is the constriction of our capacity for sympathetic understanding of our fellow humans. We live most of our lives in cultural prisons. As friends and business associates, spouses and carpool-mates, we choose people essentially like ourselves. Gradually, usually unconsciously, our habits, hobbies, even our vocabularies and syntaxes come to resemble those of the people with whom we have surrounded ourselves. After years of such adaptation, we lose our capacity even to converse—on all but the most superficial level—with people who come from or live in other social worlds. Confronted with a truly novel character, we may recoil uncomprehendingly.

Most of you have, thus far, been shielded from the full force of these pressures. The invigorating variety of the student bodies in which you have moved, the broad spectrum of ideas to which you have been exposed in the last six or seven years, and your freedom, as yet, from occupational specialization have kept your horizons wide. In the coming years, you will no longer have the luxury of such a wonderfully variegated and stimulating atmosphere.

***David J. Dennis*** ***(J.D. '71)***

*was a "partner in one of the outstanding civil rights law firms in the South." He now has his own law firm in Lafayette, Louisiana.*

***The Honorable Iraline G. Barnes*** ***(J.D. '72)***

*is a "Judge in the Superior Court of the District of Columbia."*

***The Honorable Henry L. Jones*** ***(J.D. '72)***

*is a "Federal Magistrate" at the United States District Court in Little Rock, Arkansas.*

Professional training itself is often valuable and liberating; it prepares and frees you for wider participation in our society than is often possible without it. But its cultural concomitants are frequently stultifying. The next time you are at a cocktail party—or college reunion—observe the groups of lawyers discussing recent developments in securities law, the circles of doctors talking about their more interesting patients, the computer programmers talking shop; watch how awkward they become when some random social event prompts a realignment of the groups. It is a fate to which all of us are condemned, to some extent, by the occupational specialization necessitated by modern society. You can avoid its worst effects, however, if you make an effort.

* * * * *

A second effect of our cultural segmentation is related to the first. By rooting our interests and identities in narrow, relatively homogeneous groups, we have allowed our sense of social *responsibility* to wane. The more we make common cause with the members of one group, the less *duty* we feel to aid or educate others. Behind too many injustices in our society lies the attitude: "I care about *my people;* others can fend for themselves."

The weakness of most Americans' sense of obligation to serve the public has many sadly familiar manifestations: our extraordinary tolerance for the persistence of poverty in our society; our desultory commitment to the preservation of our public lands and natural resources; the relative superficiality of our popular political discourse; and our tolerance for—even insistence upon—a legislative process founded upon log-rolling and pluralistic bargaining, rather than collective efforts to promote the *common* weal.

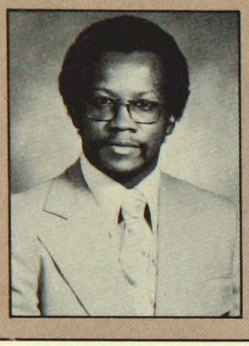
There is yet another related problem associated with occupational specialization, one that is all too familiar to minorities. Professional organizations, especially those with power and status in society, are by nature closed shops. Acting pursuant to a self-preserving instinct, professionals, like lawyers, tend to reaffirm their past glories, and perpetuate themselves as models, by conserving the tenets of the system that defined their successes. This has meant that certain less-favored groups within society historically have been excluded from the most prestigious occupational groups. As blacks, other minorities, and women now begin to enter these professions, there is a question whether they will be given equal opportunities within the group and, if so, whether they will lend a new perspective or merely embrace the traditional characteristics of the professional caste. These will be critical issues for you as you enter the legal profession.

A set of institutions once closely linked to the segmentation of American society may provide a partial solution to the aforementioned problems. American once had a very strong tradition of participation in voluntary associations. At one time, ordinary citizens were involved heavily in local government. The New England town meeting is the most famous such system of governance, but structurally similar institutions could be found throughout the country. Writing in the 1830s, Tocqueville observed that Americans combined their efforts—frequently and spontaneously—to pursue a wide variety of economic and social goals.

The practices Tocqueville described have gradually waned. In the process, we have lost something of inestimable cultural value—an ethos of active public-spiritedness, of vigorous, selfless debate and action. As Tocqueville shrewdly observed, the most important benefit secured through voluntary collective action is not improvement of the *outcomes* of political and social processes, but improvement of the *characters* of the participants:

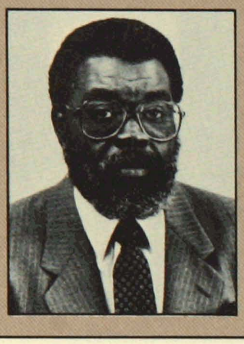
> When [people] attend to public affairs, they are necessarily drawn from the circle of their own interests and snatched at times from self-observation. . . . Men attend to the interests of the public, first by necessity, afterwards by choice; what was intentional becomes an instinct, and by dint of working for the good of one's fellow citizens, the habit and the taste for serving them are at length acquired. . . . [The

***Ralph O. Jones (J.D. '72)***



*is "Associate General Counsel of UAW."*

***Wayne A. McCoy (J.D. '72)***



*is a "partner in one of the major law firms in Chicago," Schiff, Hardin & Waite.*

***Dianne Brou Fraser (J.D. '73)***

*is "Associate General Counsel of Harvard University."*

net effect:] Feelings and opinions are recruited, the heart is enlarged, and the . . . mind is developed. . . .

Tocqueville's insights are keen, but not novel. Central to a long and important tradition in political theory—beginning with Aristotle—is the recognition that concerted political activity is enlivening and elevating. Self-fulfillment and true freedom depend upon *action*; only by *participating* in the basic societal decisions that affect the shape and quality of his life does a person realize his full potential.

I would suggest to you that the way up and out must be found through *involvement* in our social and political life. Some of your hopes will be realized; others not. Still others will undergo change as you strive for them. But you will find your successes worth the effort. And the changes wrought in yourself and your colleagues as a result of your commitment will benefit us all.

Before I conclude, I would like to pay tribute to the memory of Butch Carpenter and to those who have made this Scholarship Dinner an important annual event at The University of Michigan Law School.

Butch Carpenter's law school career was ended tragically; but he has come to symbolize the many achievements of the black students who preceded and follow him at the University of Michigan Law School. In his memory and on this occasion, we reaffirm the positive presence of minority students at Michigan.

Not long ago, I was talking with a very close friend of mine about the burdens of "affirmative action" and the problem of racial stigma. After our talk, he wrote me a letter, a portion of which I would like to read to you:

> Should we have affirmative action when presumably there's been no discrimination? What's the rationale—that blacks are dumber and need the boost? If that's the reason, then aren't we imposing a double stigma on them? Or is it that blacks aren't dumber but that young blacks in a racist society are doing a heck of a lot more with their emotional and intellectual energy than white kids are doing—to wit, trying to battle through all the racist nonsense to figure out who they are and how they fit in? It's a stress and strain that is real. . . . Although some of our students overcome it, for those who do not there is an extra burden to carry. It doesn't matter that most whites don't understand this. We know more about this subject than they. The stigma carried by black kids who benefit from affirmative action isn't much greater than the stigma they carry anyway just being black. . . .

I was struck by my friend's comments, not just by the weight of the message, but also by the harsh realization of the simple truth of much of what he said. When I graduated from Michigan, I was the only black student in my law class and, as I recall, there were no black students in the two classes below me. I sometimes felt isolated, but never stigmatized. My peers assumed that I had a rightful place at the Law School and that I possessed an intelligence on par with theirs. You, however, have faced loathsome challenges on both these scores. This is the harsh reality about which my friend wrote; he implicitly recognized that in many ways our life at law school was easier than yours even though we grew up in a more segregated society.

As I think about my experiences and yours, it occurs to me that the Butch Carpenter Scholarship Dinner is a celebration—a celebration of your resolve to succeed and a celebration of the successes of your predecessors. In recent weeks, I have heard from a number of black graduates who received their degrees from the Law School about ten years ago, at the inception of affirmative action. Among them is a partner in one of the major law firms in Chicago, who has been described to me "as a truly brilliant practioner", the Associate General Counsel of Harvard University, a Federal Magistrate, a Judge in the Superior Court of the District of Columbia, the founder and senior partner of a highly successful fifteen-person law firm in Detroit, a partner in one of the outstanding civil rights firms in the South, a first-rate litigation specialist with General Motors, a former Regional Director of the NLRB who is now a partner in a major Atlanta law firm, the Associate General Counsel of the UAW, and a partner with one of the largest and most prestigious law firms in

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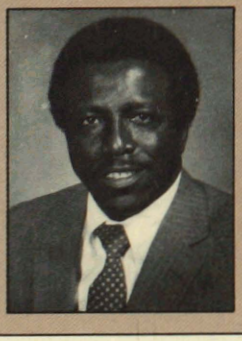
***Curtis L. Mack*** ***(L.L.M. '73)***



*is the "former Regional Director of the NLRB." He is now a partner with the Atlanta firm of Arfken, Cladwell, Steckel & Mack.*

***Jesse Womack*** ***(J.D. '73)***

*has recently left his position as "first-rate litigation specialist with Ford Motor Company" to join Arco Chemical Company in Philadelphia.*

Detroit. These are but a handful of your predecessors who have excelled in the profession since graduating from the U of M. They have overcome the burdens of which my friend spoke; they are models of excellence for you and living evidence for those who continue to doubt the capacity of our people. What they have achieved since graduation has nothing to do with "affirmative action"—it has to do with their intelligence, hard work, and dedication.

It is with these things in mind that I view tonight as a celebration. I would also suggest to you that this is an occasion for us to recall that there is still much to be done. A recent article in the *New York Times* reported that:

> A black executive of a Fortune 500 company recently said that for non-whites, corporate America is now what baseball was before Jackie Robinson. Measured by that metaphor, the status of black and Hispanic and other minority lawyers in the leading corporate law firms is akin to that of Robinson, Larry Doby, and the handful of other blacks in the major leagues shortly after the color line was broken; underrepresented, uncomfortable and, in some instances, unwanted. . . .
>
> A National Law Journal survey shows that less than 3 percent of the lawyers at the country's largest firms are black. More than two-thirds of the firms have no black partners, and one in six . . . have no blacks at all.

As for law firm recruitment of minority students, the *Times* article described a situation at NYU Law School where

> Forty-two second- and third-year black students had a total of 1,132 on-campus job interviews there last fall; only nine of these interviews led to offers. So serious is the problem that Dean Redlich held breakfast meetings recently with hiring partners at some 30 of New York's largest firms looking for answers.

There is also a growing problem with minority admissions in law school. A report just issued by a Research Associate at the Harvard Law School notes:

> The proportion of law students who are black is now 4.4%, up from 3.1% in 1969. But, this 4.4% is a decline from four years ago, when it was 4.7%. This decrease in black law students is even more significant because the number of minorities who have graduated from college increased and is now nearly comparable to the minority proportion of the population.

One would like to believe that, despite the particular problems that we encounter in the legal profession, we can see more hopeful signs in society-at-large. But optimism is easily dashed when we consider recent figures on black poverty and unemployment, and when we recall the unseemly "racial war" during the Chicago mayoralty campaign.

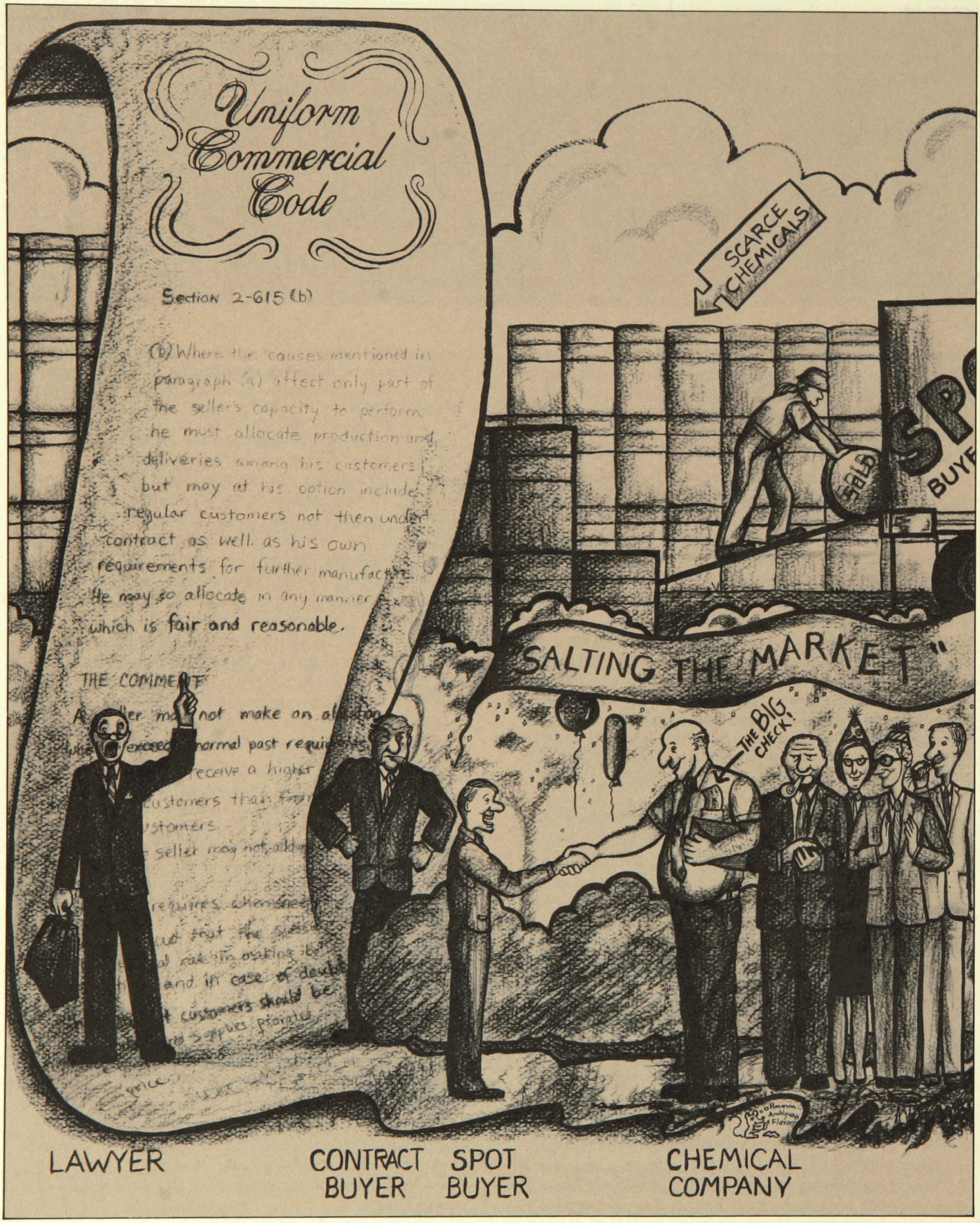
Despite the problems that persist both in and out of the law, there is no time to despair. You have proven talent to deal with today's issues. When you graduate from The University of Michigan Law School, you will carry with you some of the best legal education available in this country. Your presence in the legal profession will make a difference.

Over ten years ago I wrote something that I would like to share it with you before closing:

> [T]here must be an input of the Black vision in the societal process. To the extent that the norms generated in the societal process are the product of, or are influenced by, the legal profession, and to the extent that major law firms and corporations in partnership with important government officials and members of the judiciary occupy the lion's role in that process, there is an undeniable need for more Black lawyers to exert a full measure of power within those councils of the lions.

* * * * *

As I mentioned at the outset of this talk, you must be mindful of a danger inherent in our ever more successful penetration of the legal world. The danger is that, in becoming successful lawyers, we will become *nothing but* successful lawyers, and both we and the society will be poorer as a result. This danger is all too easy to overlook, especially after you have overcome the formidable barriers to entry into the profession. To the extent that you allow your future roles as successful lawyers to dominate your lives, you will unwittingly exacerbate the problem of social segmentation.


Uniform Commercial Code
Section 2-615 (b)
(b) Where the causes mentioned in paragraph (a) affect only part of the seller's capacity to perform he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
THE COMMENT
SCARCE CHEMICALS
SALTING THE MARKET"
THE BIG CHECK!
LAWYER
CONTRACT BUYER
SPOT BUYER
CHEMICAL COMPANY

# Contract Law in Modern Commercial Transactions: An Artifact of Twentieth Century Business Life?

by James J. White

*This article is a somewhat abridged version of the fifth annual Foulston-Siefkin Lecture which Professor White delivered at the Washburn University School of Law. The complete text of the speech was printed in the Washburn Law Journal, Volume 22, Number 1, Fall 1982.*

Diligent first-year law students study contract law with a passion previously reserved for romantic objects and religious idols. Their professors lead them in extensive and difficult intellectual explorations of the wilds of contract law. There are careful analyses of why damage recovery X will stimulate performance Y, why recovery A is appropriate to encourage the aggrieved party to return to the market, and so on and so forth. Lurking behind this year-long analysis are several inarticulate hypotheses: that contracting parties make rational evaluations of the threat of legal sanctions; that they respond in other varied and subtle ways to the law's command. Contracting parties are presented as a microcosm surrounded by an impermeable membrane, a microcosm always in equilibrium and always responding to the rules and sanctions of contract doctrine. Of course, persons in this microcosm violate their contractual obligations but those injured by the violation are appropriately recompensed by damages or are protected by specific performance or other order of the court. Neither the passions of man nor the effects of fire, flood, war, the demands of the economy, the harsh pressures of depression, inflation, or shortage cross this membrane. The microcosm is free of such influences, governed not by the law of nature or economics but by the law of contract.

It is my contention that the characterization of contractural relations in the foregoing paragraph is at best misleading, perhaps downright inaccurate. It is my thesis that contract law is a much less significant determinant of commercial behavior in complex transactions than the typical law student, contracts professor, or lawyer dares believe.

As evidence, I offer the results of an empirical study of contract administration in the chemical industry during a period of widespread shortages. In 1974 and 1975, all the large chemical companies experienced such shortages and allocated many products. In devising allocations schemes, lawyers for the chemical companies raised a host of interpretive questions concerning the applicable law. Section 2-615(b) of the Uniform Commercial Code is the basic statement of the allocation rules:

> (b) Where the causes mentioned in paragraph (a) affect only part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

This suggests that an allocation system need only be "fair and reasonable," not strictly pro rata. However, a pro rata distribution scheme does appear to be the one contemplated by the drafters to be most frequently appropriate. The Comment which expands on the rules set out in U.C.C. S 2-615(b) further implies a series of forbidden acts. It states that a

seller may not make an allocation which "exceeds normal past requirements," although a company may receive a higher price from spot customers than from contract customers. This statement implies that the seller may not add new customers, although it does not state that prohibition directly.

The Comment further states that "good faith requires, when prices have advanced, that the seller exercise real care in making his allocations, and in case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price." Thus the Comment forbids the seller from favoring one buyer over another because the favored buyer offers a higher price or other rewards. It is my contention that these rules of law are weak and relatively insignificant determinants of behavior. By an examination of contractual behavior I hope to demonstrate the variety of sirens who compete with law for the contracting parties' loyalty. I do that in a setting in which the parties' behavior was in violation of their contractual obligations and was often known to be so.

My research consisted of interviews with thirty sales representatives and corporate buyers at ten companies in the chemical industry. I also administered a questionnaire to each. I started my research with the conception that each company would have a written plan which spelled out the allocation concerning each customer and response to each consideration in intricate detail. My conception could not have been further from the truth. Of the companies interviewed, none had a written allocation plan or a fixed plan concerning its products. Although lawyers had given oral or written advice in every case, most companies had a different and informal plan with respect to each product. Typically, chemical company sales staffs are divided according to product line, and specific corporate employees are responsible for sale and distribution of specific products. The contractual and practical relations with the buyers of various products differ from product to product and from company to company. For example, one company might sell its entire output of product A to a single buyer. Another might have hundreds of thousands of individual buyers for a specific product. A company might be a sole supplier to a particular buyer. The buyer might have economically viable substitutes for the particular product or he might have no substitutes. For all these reasons the allocation plans from product to product and company to company vary according to the circumstances.

Nevertheless, it soon became clear that the predominant mode of allocation was a specific form of pro rata allocation. That mode was to allocate on a pro rata basis in accordance with actual purchases over a historic period. If buyer A had purchased one million pounds last year and buyer B had purchased 500,000 pounds last year, buyer A would receive twice as large an allocation this year as buyer B. This would be true even though the contracts of buyers A and B contain identical quantity terms. The conventional practice in the chemical industry is to write contracts that contain minima and maxima. The practice is for the seller to urge the buyer to take as much of the product as he will but not to insist that the buyer take even the minimum amount in his contract. This convention is so deeply imbedded that a contract which would appear normal to a sales lawyer, namely one with a specific quantity in which both the buyer and the seller expect to deliver that quantity, is treated as a variant in the chemical industry. That variant is called a "take or pay" contract, a name that sets it off from the usual contract in which the seller agrees to deliver up to a certain amount, but in which he does not insist that the buyer take the minimum amount. Partly because the quantities specified in the contracts bore no necessary relationship to the amount the purchaser had actually taken and paid for in the historic period, or even any necessary relationship to the buyer's current intention, most sellers allocated not according to contract amount but according to historic "take."

Allocating according to historic take has a subtle, and not incidental, consequence. It allows one to allocate to contract customers and also to "spot" customers who have no contracts. By hypothesis, in time of shortage, the spot prices will be higher than the prices in long term contracts; for that reason it will be in the short-run interest of the seller to sell as large a percentage of his product to spot buyers as he can without offending his contract buyers. The allocation according to historic take and not by contract amounts tends to maximize the sellers' short-run profits.

Allocation according to contract amount was rare; it occurred only where special circumstances made it appear that loyalty to contract buyers was in a company's long-term interest. Allocation according to geographic region was another form of pro rata allocation which was used in rare circumstances. It is important to recognize that these various allocation plans, all based on a form of pro rata distribution, could produce radically different distributions of particular products. If Section 2-615(b) permits such a variety of choices, then the seller has enormous discretion even within the pro rata rubic. In addition, companies used a multitude of variations from pro rata allocation.

Before describing these, I will comment on the clauses in various chemical companies' contracts which deal with allocation. As one might expect, the form contracts of all the companies I studied contained terms that dealt with allocation. Some were no more than an attempt to restate Section 2-615. Others were clever and intricate attempts to give the seller greater discretion in allocation, often in language that might not disclose to the buyer the full scope of the seller's intention. Some of the thirty contracts I examined appeared to have been individually negotiated by the parties.

One would assume in such cases not only the lawyer but also the contract administrators would know of such clauses and would honor them. Yet no company representative I questioned about allocation practices referred to a contract clause in answer to any of my questions about his rights or behavior. Although some skillful effort by lawyers was invested in these clauses, I saw little to suggest the contract administrators knew about or relied upon them in making their allocation decisions.

Although a pro rata distribution method was the norm for almost all products in all companies, every company deviated from its pro rata model in many ways. Consider first the deviations which are reasoned and clearly justifiable as "fair and reasonable" under section 2-615. A common case in which seller gave more than a pro rata share to buyer was that involving "defense rated" orders under which federal law would call for a preference to a particular buyer.

A second rationale that would certainly be regarded as justifying a permissible deviation from pro rata under a fair and reasonable distribution system is the argument that the alternative allocation plan will help a buyer who would otherwise suffer extraordinary economic injury or that the social cost would be great if the seller insisted upon a pro rata distribution method. Several companies reported they granted more than a pro rata share to certain buyers who would suffer severe economic consequences if they did not get that share. For example, one company granted more than the pro rata share of vitamins to an animal food manufacturer who was halfway through a six-year cycle to qualify the animal food under some federal agency standards. Had they cut off their distribution, the company would have had to start over and would have lost the several years that had already passed in the six-year cycle. If one assumes the seller in such cases did not make an added increment of profit by favoring the municipality or the animal food company, such a distribution would be regarded as fair and reasonable.

In some cases, the buyers' purchases during the historic period under consideration had been abnormally low. In such cases the seller allocated more than a pro rata share to such buyers in recognition of the fact those buyers had an equal claim with those who had been in operation in the historic period.

A final justifiable deviation from pro rata occurred in the case of a seller whose total output was historically committed to one neighboring buyer. In such circumstances neither the buyer, the seller, nor any other buyer of that particular product could have a legitimate expectation that any of that product at any time, whether in short or long supply, would go to third parties. During a shortage no reasonable expectations would be injured if the entire output of such a plant were devoted to the traditional buyer.

Because there is a better opportunity for deviousness, a similar allocation where the seller is also the buyer is more questionable. Since there is no external restraint and presumably in many cases no external evidence such as a long-term contract to show the practice and commitment, the courts should be more hesitant to accept the argument as a reasoned deviation from pro rata distribution in the latter case than in the former where there is an external buyer.

**I started my research with the conception that each company would have a written allocation plan. My conception could not have been further from the truth.**

The inarticulate premise of section 2-615 is that a seller should not be free in time of shortage to disregard his long-term commitments and favor short-term buyers who will pay higher prices. Although it is clear the seller may treat himself as a customer, he is forbidden by section 2-615 from giving himself an additional, unjustified share. Rarely could one justify the addition of new customers under section 2-615 in time of shortage. Discussions with chemical company lawyers disclosed that they were well aware of those problems. Some lawyers indicated they were careful to point out those difficulties to their sellers. Nevertheless, I received a surprising number of admissions that sellers had engaged in non-pro rata distributions which almost certainly were in violation of section 2-615. In two cases, these admissions were made in the presence of company lawyers who were surprised and obviously discomfited by the admissions.

In the remainder of this article I propose to focus on those deviations from pro rata allocation not because I regard them as particularly evil or interesting in their own right, but because they will disclose something about the limits on the power of the law to control behavior in a corporate organization. When one conforms to contractual and statutory obligations, an observer can never tell whether one did so because of those obligations or for some other motive. When one deviates from those obligations, at minimum we know those obligations were not powerful enough to outweigh the reasons for deviation. Thus it is only in those cases that we can hope to learn something about the power of the law to control behavior in this context.

One deviation from pro rata allocation which was widely practiced, probably in violation of section 2-615, was the diversion of an upstream product. Assume, for example, a seller uses natural gas to produce products A and B, and that in normal times he uses 50% of his natural gas to produce A and 50% to produce B. Assume also that in time of shortage the seller will make larger profits by producing B

than A. May he then allocate a larger share of his natural gas to produce B, thus maximizing his profits? By doing so he expands the pie to be shared by the buyers of B and shrinks the pie to be shared by the buyers of A. Several respondents reported they routinely engaged in such allocations. Some of them believed these allocations to be justified and not controlled by section 2-615. They concluded their only obligation was to make a fair and reasonable allocation of the amount of A or B manufactured.

Surely this is too narrow a view of section 2-615. Unless the buyers of A knew of and explicitly or implicitly agreed to the upstream diversion, I think a court would not find such a diversion to be justified under section 2-615.

Second, most of the respondents conceded that they granted more than a pro rata share to internal uses. In some cases such deviations would be justified, but it seems likely that most were not. One respondent stated he allocated only after he had satisfied his own needs. He concluded that his obligation was to allocate only that part left over after his company had been satisfied. Purchasing managers interviewed were unanimous in their belief that sellers satisfied their internal demands before they commenced allocation. A sales representative of one company was remarkably candid: "We sure as hell are not going to short our own plant." Moreover, he indicated that next year he might be working for the president of the division he had shorted this year. The implication of his remark was that one's corporate career might well be inhibited by having granted less than the full amount to a corporate superior.

A third deviation from pro rata distribution which was obviously in violation of section 2-615 was the sale of products to new customers. Two of the respondents explicitly and one implicitly stated they took on new customers in the time of shortage. Except in extraordinary circumstances, it would be impossible to justify the addition of new customers during a shortage under section 2-615. The rationale for such action was purely economic. As one respondent put it, one should have a right to "salt the market" because times of shortage were when one "added to his market share." He indicated they might serve a new customer where in prior times they "never got beyond the lobby." Such motivation is understandable, but it is not the kind of motivation the cases or the statute would recognize as reasonable and justified.

Finally, all the respondents admitted granting more than a pro rata share to certain buyers for reasons which probably could not be defended under section 2-615. For example, two companies acknowledged they granted greater than pro rata shares to particularly good customers.

Most companies reported that they "swapped," *i.e.*, engaged in barter transactions. Although no company stated it got an additional share by swapping, it is hard to conceive a reason for swapping except to gain an additional share. Barter transactions are cumbersome and are the rare exception in a modern economy. The only justification for engaging in such transactions is the thought that by granting another person a product in short supply, one gives him a higher price and thus encourages him to return the favor in the form of a disproportionate share of his shortage product. It is my hypothesis the swaps were stimulated by an interest in gaining more than a pro rata share of a particular seller's distribution and that in fact they were executed principally for that purpose.

By comparing the various buyers' and sellers' allocation behavior with the law and by examining sellers' motives one can attempt to measure the influence of section 2-615 and contract obligations on these particular sellers. Let us turn to that task.

What can one learn from the foregoing? It seems certain many of the sellers failed to conform to their contractual and statutory obligations. Had all the facts been known and brought to the attention of a court, many sellers would have had to pay at least nominal damages. Why was the law insufficient to the task? By analyzing the foregoing rules of law and the behavior of the sellers, one can demonstrate that the rules of law cast only a pale light upon the landscape of commercial contract administration and that that light is insufficient to hold at bay a variety of wolves and harpies who threaten the typical contract administrator.

First, one must understand why the law's power is so slight. To begin with, the law passes through the filter of vague language. Section 2-615 says only that one must allocate in a fair and reasonable manner. When one applies that exhortation to the complex and varied fact patterns seen even in a single industry, the difficulty of stating certain rules becomes apparent. Who can say with confidence, for example, that the allocation of an upstream product such as natural gas to diminish the downstream product is an unreasonable or irrational allocation method and in violation of section 2-615? One will search in vain for cases on that point. Even assuming it was done to maximize the seller's profits in apparent violation of the policy of section 2-615, one might justify such an allocation on the basis that everyone in the chemical trade expects such a thing to be done and thus it is not a violation of any buyer's legitimate expectations. At the outset, vagueness of the law, combined with the complexity of the fact patterns, means even some who are intelligent, diligent, and well meaning will be mistaken about the law's command in a variety of circumstances.

Because the law's command must be executed not by lawyers but ultimately by lay corporate agents, the problem is compounded. I doubt that any of the lay respondents had read even a single case concerning allocation. Few of them knew of the existence of section 2-615 and hardly more than a few had any

familiarity with the Code. Thus, each layman had to depend upon his lawyer to apply the law to the particular facts and give direction.

A comparison of the ways in which companies went about that task is informative. One company conducted a slide show in which a lawyer presented a text together with a variety of slides entitled "Can We Tilt?" In other companies the lawyers gave written memoranda to particular persons in answer to specific questions. Nearly all the lawyers had given oral advice to various sales representatives. It should be clear if lawyers are simply responding to questions of the lay seller, the seller has only a small chance of discovering how the law would apply in his particular case. By hypothesis the layman is ignorant of the law. That ignorance alone may foreclose him from asking for the necessary legal assistance. Thus, the light of the law, already faint, must pass through a second filter. The lay actor, a corporate seller, must appreciate his ignorance, seek advice, and apply that advice to his own complex facts.

A third filter is a function of the way in which information about legal responsibilities is transmitted within a corporate organization. Without exception, the lawyers are staff personnel rather than supervisors of those who make the selling decisions. Lawyers are not in the operational chain of command. They are likely to come from "headquarters," render advice, and return to headquarters. Only in the remotest sense do their careers depend upon the profitability of the various divisions of the company. The laymen in charge of contract administration may listen respectfully to the lawyer's description of the law, but they will listen even more carefully to their supervisor's instruction about profitability, sales, and performance. One suspects even when the law shines brightly from the lawyer, that brilliance is over-powered by a greater light from the superior. Superiors may conclude that the lawyer's advice conflicts with their divisions' interest. They may find it inviting to seize upon any equivocation in the lawyer's directive or convenient to distort that advice to conform to their conception of their economic interest.

For these three reasons, as well as others, the law's power is significantly diminished by the time it reaches the line contract administrator. Its meaning is uncertain as it is applied to complex facts. Its meaning may be diluted and distorted by its inefficient transmission from the lawyer to the layman. Its power is further diminished because the one transmitting does not supervise the decision maker.

In discussing the foregoing factors we have assumed a person who, if informed, was generally willing to comply with the law. What of those who are not willing to comply with it and see the law to be so thoroughly in conflict with their economic interests that they do not wish to follow it? It is for those that we have sanctions, injunctions, orders for specific performance, consequential, and other damages. Doubtless in some circumstances the prospect

**I found considerable evidence that lawyers were diligent in advising their clients but found little evidence that any company changed its behavior in response to the law.**

of such sanctions has an important impact upon parties to a contract. Consider three reasons which demonstrate why that is almost certainly not true in the chemical industry.

First, the complexity associated with the performance of the typical chemical contract renders it unlikely any party will find out or be able to prove that another has not complied with the allocation rules. Based on the respondent's reports, I discovered various sellers favored themselves, particular customers, or added new customers. Only by happenstance or through very expensive investigation could one ferret out such information from an uncooperative seller. Consider a large chemical company that sells hundreds of products to thousands of buyers. Remember that section 2-615 does not demand that all sales be on a pro rata basis, only that they be fair and reasonable. How then does a company prove that as a recipient of product X, it has received less than its share because there has been an unfair and unreasonable allocation of product X to another firm? Absent a gross deviation from a pro rata allocation, one would have difficulty proving such distribution. Only the prospect of a large pay-off would justify the expense necessary to prove such a fact.

Second, the relationship between the buyers and sellers in the chemical industry mitigates against lawsuits. None of the respondents reported any significant lawsuits. Several had received threats of suits; one or two had been sued in minor matters, but none had been involved in major litigation related to contract claims on shortage products. Part of the reason is the cost one incurs in undertaking such litigation. If a seller allocates some part of the product and one is able to continue production with that allocation, albeit less efficiently and less profitably than with a larger amount, one runs the risk of forfeiting that share by commencing a lawsuit. Not only does one run the risk of forfeiting that amount, one also risks interfering with tens or perhaps dozens of sales and purchases of other products from and to the other potential litigant. Because chemical companies buy from and sell to other chemical companies on a large-scale basis, the disruption of all those transactions may well be more expensive than the expected pay-off arising from a lawsuit.

The final and related factor which inhibits litigation

is the kind of injury suffered by one who is receiving a modest but unjustifiably reduced allocation. By hypothesis that party is not suffering the kind of catastrophic injuries which occur when one cancels a long-term supply contract as Westinghouse did with its uranium contracts or when a large and expensive product fails and causes millions of dollars of economic loss. Rather, the plaintiff is likely to suffer some significant but less than catastrophic loss in profits. Thus, when making the calculation described in the foregoing paragraph and weighing the expected return of a lawsuit against the likely disruption of the business relationship, a buyer will probably decide against the lawsuit.

Yet this is only part of the puzzle. The law is weak not only because it is poorly transmitted through various filters to reach our hypothetical contract administrator but also because its sanctions are distant and unlikely to be suffered. Its weakness is magnified because it must compete with a series of conflicting motivations. Corporate employees must serve the company's selfish interests; they must also serve their own selfish interests. That the legal obligation will conflict with the selfish interest in commonplace; presumably that is why we have contract sanctions. My study shows the motivation of the contract administrator is more complex than one might think.

Contract administrators have to protect their own interests. Even if it might be in the long-range interest of the company to follow the law, even if the company's profits might be maximized by doing so, a contract administrator may choose to violate the rules of Section 2-615 and decide, for example, to allocate to an internal use because such a diversion appears personally advantageous. Ideally, of course, a company should construct its incentives so that personal goals of the employees do not conflict with the corporate goals. I doubt such an ideal corporation exists, and certainly in this case it is easy to hypothesize a situation in which an employee might choose to violate the rules of Section 2-615 to speed personal advancement.

Also important are the contract administrators' relationships with persons associated with the buying companies. Contract administrators repeatedly reported that they gained more than they otherwise would have, or expected to receive additional orders after the shortage was over, because of their particular relationship with persons in the buying or selling departments of other companies. They reported that these benefits would last only as long as the same personnel were in those organizations and they had varying opinions about how long such benefits were likely to survive a shortage period. It was obvious their personal and moral obligations to persons in those companies would influence their pattern of purchases both during and after the shortage.

After one has examined barriers to the law's reach and has observed the manifold pressures to escape even its weakened grasp, one wonders if the law has any effect at all on contract administration in a shortage. The respondents confessed a variety of behavior that was in violation of section 2-615 and the cases. Yet none of them reported any significant legal challenge from a party who might have been injured by their deviation from the law's dictates.

Even when the parties conformed to the rules of section 2-615, their conformity may not have been dictated by the rules of law but by intelligent self-interest. Pro rata allocation based on historic take is probably a sensible economic compromise between one's long- and short-term interests. I saw no evidence such an allocation method was adopted because the law of contracts called for it.

If the law was incapable of shaping these contract administrators' behavior, are we to conclude it is truly an artifact of twentieth century commercial life, an external substance of no significance to the economic life of these companies? The results fall far short of proving that, yet they do not conflict with that idea. I found considerable evidence that lawyers were diligent in attempting to interpret the law and careful to advise their clients but found little evidence there was any significant change in any company's behavior in response to the law.

If one assumes for the moment that my hypothesis is correct, namely, that the law is in fact irrelevant in determining the behavior of chemical companies during allocations, what can one conclude about commercial contract law in other areas? Are we to conclude that buyers' and sellers' behavior in contract formation, in contract modification, in determining whether to take actions that might be regarded as breach of contract are all taken in ignorance of or without regard for the law? Of course that is not true. Obviously, when there are millions of dollars at stake, when the risks and costs are very high, any sensible businessman will consult his lawyer.

Yet corporate lawyers, law teachers, and students might well be surprised by the implications of my study of allocation. My findings are compatible with the idea that many corporate acts which accord with the law, as well as those which do not, are taken in ignorance or disregard of it.

How should we shape our behavior in response to that learning? It will confirm house counsels' darkest fears about their clients' disregard for their advice. It will demand a search for new ways to make one's client listen and conform. For the legislator and judge, it will call for more humility. The lawmakers must be more willing to make the law conform to the sensible practices of business and to accept the fact that the law is incapable of changing those practices except at great cost. For teachers of contracts, it means acceptance of a diminished role. If our students are truly to understand contracting parties' behavior, perhaps we must integrate our contract teaching more fully with the conflicting currents of commercial life.

# SOCIAL PROBLEMS AND LEGAL ANSWERS

**by William T. Coleman, Jr.**

*Mr. Coleman delivered these remarks on the integration of public service and private practice of law at Law School Senior Day last spring. Mr. Coleman's own career is an eloquent testimonial to his argument that skilled and principled lawyers are uniquely qualified to serve their nation and society.*

*Now a senior partner in the law firm of O'Melveny & Myers, Mr. Coleman was Secretary of the U.S. Department of Transportation from March 1975 to January 1977. In addition to this post in President Ford's Cabinet, Mr. Coleman has held many national public service positions and has served in advisory or consultant positions to five former presidents.*

*He now serves on the board of directors of several major American corporations, notably IBM, American Can Company, Pepsico, and Pan American World Airways. He is a trustee of the Rand Corporation, the Brookings Institution, the Urban Institute, the Philadelphia Museum of Art, of which he is also Vice President, and a member of the Overseers of the University of Pennsylvania Law School.*

*Mr. Coleman has been a Distinguished Fellow at the Woodrow Wilson International Center for Scholars. He graduated summa cum laude from the University of Pennsylvania in 1941 and magna cum laude from Harvard Law School in 1946. While at Harvard Mr. Coleman was a member of the board of editors of the* Harvard Law Review *and received the Joseph E. Beale prize. Institutions including Yale University, Amherst College, Swarthmore College, Williams College, and Howard University have awarded Mr. Coleman honorary degrees, and the president of France has nominated him an officer of the National Order of the Legion of Honor.*

*An ardent defender of civil rights, Mr. Coleman was one of the authors of the legal brief that persuaded the Supreme Court in 1954 to outlaw segregation in public schools. In 1965 he was retained by former Governor William Scranton of Pennsylvania to assist in removing racial restrictions at Girard College in Philadelphia. He presently serves as Chairman of the Board of the NAACP Legal Defense and Education Fund.*

*In his lecture, Mr. Coleman draws on his various experiences to construct an argument for lawyers' vital contribution to many aspects of traditional American life. He urges this year's graduates to consider the particular challenges they will face in fulfilling the lawyer's professional responsibilities today.*

Justice Holmes once said, "Your education begins when what is called your education is over." In my day, we got through law school without ever drawing or reading a contract or a will; we never tried a case and never negotiated a settlement in a room full of outraged and offended parties. Your professors will forgive me, although your parents and spouses, who paid your tuition, might think they have a cause of action for breach of contract, if I suggest that now that you have completed law school, you can no longer avoid beginning your legal education—preparing for what lawyers really do!

You have had a wonderful launching pad. This great law school was a pioneer in American legal education even before the Civil War. Its graduates, in this country and abroad, have a distinguished tradition of service to governments, courts, universities, corporations, and private law firms, including my own. Generations have been nurtured on the scholarly work of Cooley, Sunderland, Dawson, Simes and Judge Harry Edwards, who at a frightfully young age became a giant teacher in Labor Law and who is now adding grace, learning, and style to one of our most important federal appellate courts. You are fortunate to have as a recent addition to your faculty Judge Wade Hampton McCree who graced the state and then the federal courts in Michigan and thereafter served his country and the legal profession brilliantly as Solicitor General of the United States.

Justice Holmes gave many commencement addresses. (It is a chronic ailment for those of us above 60). He once remarked that the best thing an experienced traveler in the law could do was to report to those about to start on what was to be expected along the way. In 1897, when Justice Holmes spoke, he probably felt sure he could foresee the future of the law and legal practice. Today, I am less confident.

This afternoon let me simply share some thoughts about the role of lawyers in our economic and social system at the end of the twentieth century. You will notice I do not say *legal* system. For lawyers, by virtue of their education, their ability, their position in the community, and above all their profession, hold a special trust from society to direct their practice outward to society at large. Despite the bitter criticism that, recently, has been directed at the legal profession, lawyers perform a valuable—indeed an essential—role in preserving the diversity and innovation that uniquely characterize American culture and industry. The creative and constructive participation of lawyers is vital to assure the efficient and productive working of our economic and social system, and to continue the struggle for a more just, fair, open, and civilized society.

It is by no means assured, however, that lawyers in the last score years of the twentieth century will play a role that is positive, constructive, and productive. Whether lawyers will be part of the problem or part of the solution will depend completely on your view of the very essence of law and justice.

This essence, unfortunately, does not come stamped on the diploma you receive today. It is not revealed in a shimmering light the day you pass the bar exam. It requires a lifelong commitment to political and cultural awareness and creative participation in one or many communities. It involves a recognition of the public responsibility that underlies every professional activity of the practicing lawyer. It demands persistent effort to help realize the promise of a just, open, and diverse society, the fragile form of which ultimately rests, in a democratic nation, on a system of laws and courageous human beings.

You graduate from law school in an era filled with uncertainty. International tensions are increasing. We live with the ghastly threat of nuclear or chemical warfare. Our economy is in the worst shape it has been in since the 1930s. Here in Michigan, which built so many things for America, a true depression is at hand. The problem is not just a sluggish economy. We seem to have lost the innovation and leadership that once characterized American industry.

We could name a dozen scapegoats: government regulation, a "national malaise," either political party (depending upon which you are in), the insidious influence of television. And some would add: lawyers.

Lawyers are undeniably unpopular in our country. One reason is their sheer numbers. Japan, as you know, has only one lawyer for every 10,000 citizens; Western Europe averages one lawyer for every 1,500 people. The United States has one lawyer for every 450 people. One in every 200 working Americans is a lawyer.

Another major reason for the unpopularity of lawyers is that, in this century, the law has grown increasingly complex. As laws become more numerous, more intrusive, and more oppressive, lawyers become increasingly necessary to untangle the law's impact on the lives of everyday citizens. People's dependence on lawyers makes them understandably uneasy, especially when our Chief Justice charges half the litigation bar with incompetence.

Some condemn the growth of the law outright; but the sincere critics should first explore *why* the law has become so complex. In the United States, the law is the instrument that we have chosen to express, to protect, and to execute our national ideals. It is a path to our highest aspirations. Those aspirations have recently grown even more ambitious as we try to preserve the capitalistic system and as we endeavor to ensure to all individuals our national ideals of equality and liberty. In part, the complexity of the law reflects the amibitiousness of our goal.

Yet we, as lawyers, must be aware of a central dilemma in our system of law. That system holds the potential for achieving great heights. If, however, the law grows too complex and too unwieldy, it threatens to strangle the society it serves. Indeed, even when the law is pursued with righteous motivation and all diligence, it may be enormously inefficient and counterproductive.

Alexis de Tocqueville, a shrewd observer of the

United States, understood the dilemma posed by our legal system. In *Democracy in America*, he was particularly perceptive, although not always flattering, about the role of American lawyers. Tocqueville felt lawyers were indispensible to a free society. Indeed, he classified lawyers as one of the American institutions that mitigates tyranny. "I cannot believe," he wrote, "that a republic could hope to exist . . . if the influence of lawyers in public business did not increase in proportion to the power of the people."

Tocqueville also observed that political issues in the United States are almost always resolved into judicial or legal questions. I might add that social and even ethical questions also find resolution in our courts. This is because our executive and our legislators often do not have the political courage to resolve potentially divisive social issues. It is also because our executive and legislators often purposely leave statutes unclear so that one of the courts can resolve the controversy. Moreover, the Bill of Rights and the Thirteenth, Fourteenth, and Fifteenth Amendments affirm our faith in the law's capacity to ensure to all individuals our ideals of equality and liberty. We have not always succeeded in, but we have never abandoned, the struggle toward those ideals.

When Tocqueville wrote, however, he was speaking of a society far different from our own. That society was remarkably homogeneous, rural, sparsely populated, and shared a more singular vision of America. Its moral foundation was plain and simple. Today, our society is heterogeneous, pluralistic, and increasingly aware of the limited nature of its physical and social resources. Today, moral assumptions are contradictory and contested.

Our Constitution, forged for one type of society, has admirably served our own very different society. This is the surest proof of that document's grandeur and the vision of our founding fathers. Yet as the complexity of the social needs addressed by the law has grown, so has the complexity of the law itself.

Today the law must mediate among and adjust the inevitable conflicts that arise in a pluralistic society. In the past, the law has performed brilliantly. The law—and lawyers—gave us the decisions in *United States v. Darby* (Congress could prohibit the interstate shipment of goods made by workers paid less than the federal minimum wage), *Gideon v. Wainwright* (the State was required to furnish the indigent at the State's cost counsel even in a non-capital case), and *Brown v. Board of Education* (racial segregation was impermissible in education). Lawyers, working through the courts and the legislatures, have made significant contributions to the quality of our nation's environment, to safety in the work place, to the safety of consumer products.

Even about the historical role of lawyers, Tocqueville was not always correct. He wrongly felt lawyers were, by and large, defenders of the establishment. In fact, however, lawyers have repeatedly challenged, to use John Hart Ely's theme, the actual and pervasive traditions of our society which fall far short of the theoretical traditions and promise of our Constitution. Lawyers attacked the citadels of McCarthyism, of racial segregation; they challenged the extremes of poverty, the deficiencies of our voting system, and sex discrimination. They have been ready warriors in the struggle to define and improve our society and to realize our national ideals.

We have also seen the use of law and the work of lawyers put to the very purpose Tocqueville noted—the resolution of increasingly complicated political and social problems. Yet the very success of that process has led to the "over lawyering" of society—too many laws and too many lawyers. This is a central dilemma that will occupy your practice in the last decade of this century and the first decades of the next.

*People's dependence on lawyers makes them understandably uneasy, especially when our Chief Justice charges half the litigation bar with incompetence.*

What can you as an individual lawyer offer that is valuable and distinctive to society?

First, the excellent lawyer is, above all else, a detached observer. The lawyer approaches particular cases with a broad base of experience and a long-range perspective. The excellent lawyer can counsel settlement to an individual intent on litigation. He or she can suggest a solution that participants, engrossed in a matter, might not see. The discipline of rational reason is often the leaven that persuades a contender that what he seeks is irrational. To perform this function well, however, a lawyer must be a person of broad vision, with an appreciation for trends in art, culture, economics, poetry, and history, and a profound knowledge of the business, political, and social events in the country.

Let me give you an example. I had litigated several matters for what was then the largest home builder in the United States, a man who built cities and towns which still bear his name. Because our firm had been able to help this company in the past on problems of zoning, public utilities, and tax, his company brought another matter to us. They wanted us to help them resist the sale of houses to Blacks in the cities and towns they were building. At that stage in our nation's history, the company won in the federal district court and perhaps would have prevailed in the appellate court on a strict view of the law. In 1952 however, signs suggested that things would change.

So I went to the president of the company and convinced him that his position was wrong. Not only that it was morally wrong, and eventually would be legally wrong as well, but that it would hurt his company financially. He listened to me and his company did very well by making housing available to all races long before he was required to by law. The wisdom of his judgment was confirmed by the Fair Housing Act of 1964, by the Supreme Court's decision in *Jones v. Mayer*, and by President Johnson's appointment of Robert Weaver, the first Black cabinet officer, as Secretary of HUD.

In a sense, the craft of an excellent lawyer is very like the craft of a painter. A painter must pay meticulous attention to detail and must achieve technical mastery, both in an individual painting and in his or her art as a whole. The painter never loses sight of the broad picture—in the most literal sense. From time to time, the painter steps back from the canvas and looks at the work. Every brush stroke is controlled and directed to some conscious end, quite apart from the skill that controls the brush.

If you will allow me to push this metaphor a step further, please observe that no two acclaimed painters have the same style. Each portrays his or her subject in a unique and individualistic way. Each lawyer must bring this individual view to each matter he or she undertakes. Not every lawyer or law firm will deal with a problem in the same way. The law needs both its Rembrandts and its Chagalls.

Second, I think that lawyers are valuable because they help our heterogeneous, pluralistic society manage its conflicts. A society that buries its conflicts stifles its people and builds intolerable burdens for the future. A society that lets its conflict explode suffers divisiveness and civil war. When conflict is handled responsibly, the whole society benefits.

We have advanced beyond the stage when champions determined the truth of competing claims with physical combat. However, we cannot escape the fact that our legal system is built on the conflict of adversaries. For more than 700 years, the common law has worked on the principle that opposing two points of view led most surely to a just result.

In the United States, we have carried that idea much farther. Our society values and demands diversity, candor, change, freedom of expression. Inevitably, this ideal generates conflict. This conflict is one of the pillars of our liberty, the ferment from which creativity, individual choice, and progress emerge.

To our legal system we have entrusted the task of managing and mediating these necessary conflicts. This is one reason we need more lawyers than do the Japanese, who value conciliation above the need to assert a variety of points of view or ideas.

Yet conflict unfettered could lead to disaster. In practice you will meet lawyers who will break a deal over the use of "that" or "which." The answer, however, is not less use of the law for resolving social conflicts, but rather more responsible use of it.

In a vast number of cases, the lawyer's role is to reach a satisfactory conclusion without litigation. Nine out of ten civil cases filed are eventually settled out of court. Many other cases are settled before reaching court. As an architect of settlement, a lawyer has a unique opportunity to create constructive and useful solutions to problems. This creative resolution of conflicting interests is one of the highest forms of the lawyer's craft.

Excellent lawyers thus are valuable to society because they provide a detached perspective and because they help preserve the diversity and energy of our society through the mediation of conflict.

Third, and most important, excellent lawyers are valuable to society because they are public persons. The law offers unique opportunities for individual lawyers to participate in a wide variety of service. In my own firm, for example, lawyers frequently take time away from their practices to work in governments, universities, corporations, or other fields before returning to practice. Indeed, I am pleased to note that one member is currently serving on the faculty of this law school. Practice and public service follow naturally upon one another.

It is not sufficient to say that the legal profession offers opportunities for public service. More accurately, the legal profession demands public service. Mr. Justice Potter Stewart recently observed in a tribute to Washington superlawyer Lloyd Cutler:

> In the early years of the Nation's history, it was almost impossible to find a person of superior ability and education who did not take an active part in public life. Then came the dreary years, when far too many such people devoted their careers to storing up possessions, personal privilege and personal power. . . . [There is, however, a] distinguished company of Americans who have believed that a superior education and superior ability bring to a person not alone an opportunity to build a citadel of personal privilege, but an obligation to build a life of public service.

Many law students and lawyers have too narrow an interpretation of the kinds of public service that are open to lawyers. The proposed revisions to the Code of Professional Responsibility, for example, specify that so-called mandatory pro bono work must be discharged in the area of poverty law, civil rights law, public rights law, charitable organization representation, or the administration of justice and availability of legal services.

It is essential, of course, that the private bar, with its vast store of energy, ability, and knowledge, fulfill its duty to make legal services available to those who cannot afford the legal help they require. This duty goes back to the origins of the legal profession itself and the roots of our Western heritage. It is particularly perverse for a lawyer in the 1980s to limit his or her concept of pro bono publico to a few hours a month of free legal

services. All legal work ought to be performed for the public good, or it ought not to be performed. This is just as true whether you are preparing a contract, deposing a witness, writing a Supreme Court brief, or investigating a tort claim. Without an organized society, law and the lawyers would not exist. In a society, moreover, that transforms its political and social problems into legal questions, the lawyer receives an important trust. It is a breach of that trust not to discharge professional responsibilities with the polestar of the public good constantly in mind.

American lawyers have taken on and overcome many hard public problems in the past. Two of the great public problems of your generation are economic stagnation and international conflict. Your generation is challenged to apply the indigenous ingenuity and creativity of the American bar to these issues. We must lick the problem of the national budget, but not by anything so foolish as a Constitutional Amendment. It is vital that we shift our economic focus from the short-term issues of the moment, from the monthly unemployment figures, the quarterly report of corporate earnings, and find new mechanisms for long-term planning for growth. It is equally vital that we learn to manage our international relations with the skill that we apply to our domestic conflicts. For the Western democracies, and indeed the nations of the world have only two choices: creativity together or destruction apart.

In this task, American lawyers have much to teach the world. For we, without war or violence, have transformed our society from one divided by race to one increasingly free of race. For we, without war or violence, have transformed our society from one where it was a crime for two employees to join to seek better wages to one where workers could strike for better employment conditions at the height of the Korean War without the threat of a jail sentence. For we, without war or violence, were able to remove through law and an outraged public opinion an elected President who had broken faith with the American people.

It is especially hard for young lawyers to turn their practice outward. They have their own careers to worry about. They have to "make partner." They have to pay the bills. Yet a public practice is especially vital in the early stages of a lawyer's career. As Justice Holmes said:

> Happiness . . . cannot be won simply by being counsel for great corporations and having an income of $50,000 [or today, $500,000.] An intellect great enough to win the prize needs other food besides success.

You have given me the rare honor of addressing an audience of young lawyers who are among the brightest and most able young men and women in the country today. Our society is well served if so many talented individuals have chosen the law.

Recently, however, a number of articles and commentators have questioned the wisdom of devoting so many of the brightest young minds in this country to the law. I do not share the pessimism of those who feel our brightest minds are wasted in law. For the law is the instrument with which we seek to achieve our social goals. The law encompasses not only legal issues, but also the fundamental political and social concerns of our time. The law, and lawyers, perform vital services. These include lawyers' function as detached counselors, their role as managers of conflict, their role as public persons, their role as innovators, and their obligation—indeed their solemn duty—to put to each generation the question of how we approach nearer to the ideals enshrined in our Constitution and to our heritage as free women and men.

The law does present a curious dilemma, however: The tendency of our society to transform social or political controversies to legal questions can lead to strangulation by law, in which the outflow of law and regulation costs society more than the benefits it creates.

*I do not share the pessimism of those who feel our brightest minds are wasted in law. For the law is the instrument with which we seek to achieve our social goals.*

Some have charged that our society is overlawyered; but as long as lawyers seek to make the private enterprise system serve the needs of the customer, the shareholder, the worker, and the nation, they are vital actors in the struggle against those who would destroy the system. As long as lawyers seek justice and equality, they are vital actors in the struggle against injustice and inequality. A skilled and devoted bar provides leadership, energy—and hope—to our efforts to attain our national goals.

We extend that conviction and obligation into your competent hands, to this graduating class of the Law School of The University of Michigan, to this great class of 1982.

Law Quadrangle Notes

The University of Michigan Law School/Ann Arbor, Michigan