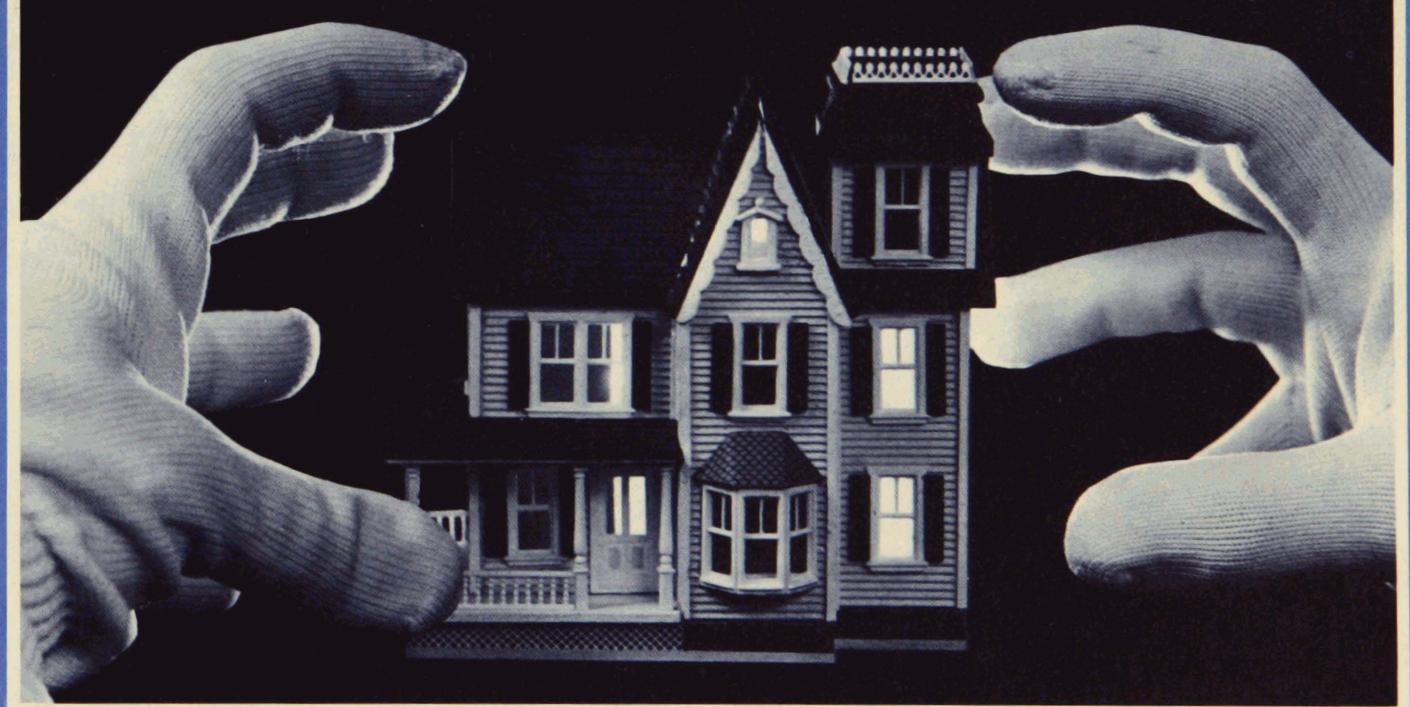
Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 28, NUMBER 2, WINTER 1984

Francis Allen: Nineteen Eighty-Four and the eclipse of private worlds



Lee Bollinger on Government Secrets
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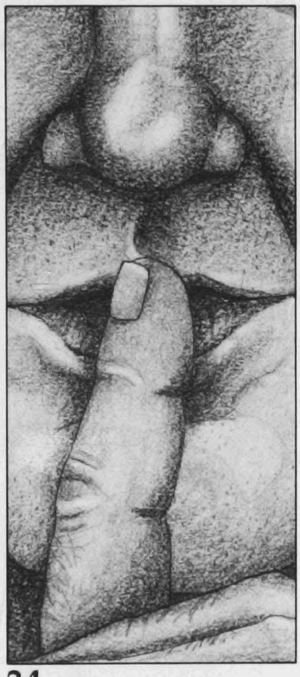

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The insolvent solution

Bankruptcy may help firms and unions abandon untenable positions

by James J. White

Every day in the bankruptcy courts, bankrupt lessees reject unfavorable leases, bankrupt franchisees shed burdensome franchise contracts—and an occasional rock star even escapes an improvident contract with a recording company. These are grist for the bankruptcy mill; they are routine applications of the principle that a reorganized corporation must avoid burdensome contracts, but may enjoy beneficial ones in the hope of saving its business from extinction.

The recent rejections of labor contracts by Continental Airlines and Wilson Foods cannot be distinguished from the more routine cases on a principled basis. The cries of outrage over Continental's acts are not the result of a dispassionate analysis of the bankruptcy law but the political response of those who are offended to find that bankruptcy can be used on *behalf* of the capitalist as well as *against* him.

How does the union differ from the lessor, the franchisor or the recording company? Not significantly.

Although the bankruptcy law applied in these cases was enacted in 1978 by a liberal Congress under President Jimmy Carter, and despite the fact that many previous cases had raised the issue of the proper standard for abrogating a labor contract in bankruptcy, Congress chose not to single out labor contracts for special treatment. Moreover, the courts have shown growing skepticism about the unions' claim for special treatment in bankruptcies.

These congressional and judicial responses are not taken in ignorance of the policies but as a response to them. They are a recognition of the fact that labor unions have become large, powerful and highly self-interested institutions.

And far from regarding labor unions as champions of the underdog, the public, courts and legislatures are more likely to view them as intractable resisters to workrule change, unreasoning claimants to higher wages and relentless protectors of an aging and declining membership against the desires for employment of large numbers of younger people.

Indeed, Congress' omission of any special rules to deal with labor contracts in its enactment of the bankruptcy law may be a silent recognition that today's unions and today's society are different from those that existed in the 1930s.

From a different perspective, one can defend the use of the bankruptcy law in the collective-bargaining process as a logical extension of mediation and arbitration. Because of politics, face-saving and a variety of other reasons, unions and management are often incapable of extricating themselves from self-destructive positions. For example, union leadership may realize that the union must grant wage concessions in order to keep a company in business, yet it may be incapable of controlling the rank-and-file—or unwilling to do so.

Third-party intervention, in the form of mediation, arbitration or fact-finding, has developed as a way of untangling these situations so that parties can arrive at an agreement that is better for both than the one to which they have bound themselves. Arguably, the bankruptcy code is just such a facilitating device.

Because it gives power to management only, some might respond that the bankruptcy law is not analogous to mediation and arbitration. But that is not the case. The court must approve the rejection of any labor contract, and the reorganized corporation must bargain collectively with employees, just as the old one had to do.

Others may raise the specter of healthy companies frivolously filing under Chapter 11 for the sole purpose of escaping their collective-bargaining agreements. These fears are unfounded. Although neither Wilson Foods nor Continental had spent its last dollar, each had enormous and continuing losses. Without drastic changes, neither company could have long survived.

Moreover, the filing of a petition under Chapter 11 is not done

lightly. Employees whose contract is rejected have a claim for damages against the company that may equal as much as a year's pay. That claim will have to be paid in full before the shareholders receive anything in the reorganization. Management also risks the possibility that the court will oust it and appoint a trustee—a most unwelcome event to all managements.

Finally, management and shareholders run the risk that they will lose not only control but ownership as well upon a corporation's reorganization. Unless all of the creditors (including the fired employees) are paid in full under the plan, shareholders generally may not have an interest in the successor corporation.

For these reasons, no healthy company that is merely displeased with a labor contract is likely to take the step into Chapter 11.

The bankruptcy code should not draw a significant distinction between collective-bargaining agreements and other continuing contracts. On a grand scale, the bankruptcy law may constitute a subtle modification of obsolescent rules still embodied in the National Labor Relations Act. Alternatively, it may be regarded as an appropriate third-party intervention device—similar to mediation or arbitration—to break logjams in extreme cases.

Written originally for the Los Angeles Times' *Op-Ed page, this article by James J. White also appeared in the* Detroit News *and other newspapers last fall. Since its publication, the Supreme Court decided* In re Bildisco, _____ *US* _____ *(1984). In that case the Court unanimously rejected the union arguments for a rule that would have restricted bankruptcy courts' power to abrogate collective bargaining agreements. White is the Robert A. Sullivan Professor of Law at The University of Michigan and an expert on commercial law.*

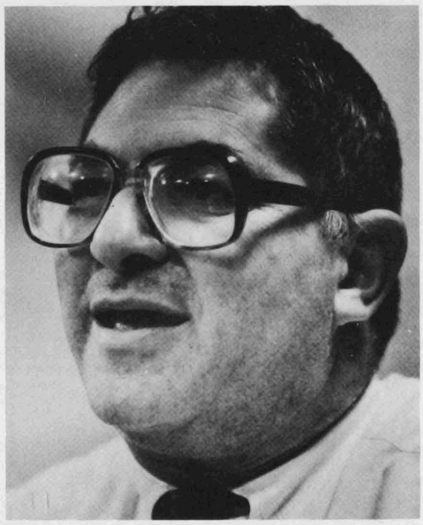
Judgment on Solomon

Kahn speaks out on the controversial amendment

The Solomon Amendment, proposed by Representative Gerald Solomon (R-N.Y.) and passed as a rider to the Defense Authorization Bill in July, 1982, requires all students applying for federal financial aid to certify that they have registered for the draft or to state the reason for their exemption. Its passage and subsequent signing into law by President Reagan touched off a storm of protest on college campuses, where students and administrators troubled by the yoking of financial-aid eligibility and draft registration insisted the two simply did not mix.

This fall, with the question of the amendment's constitutionality before the Supreme Court, Douglas A. Kahn, Paul G. Kauper Professor of Law, addressed the questions it raises in two different campus forums. In an article published in *Consider,* a weekly journal devoted to informative debate of campus issues, and in a panel discussion that included presentations by Howard Simon, head of the Michigan ACLU, Harvey Grotrian, director of the U-M Office of Financial Aid, Thomas Butts, assistant to the vice president for academic affairs, Regent Gerald Dunn, and State Representative Perry Bullard, Kahn took the somewhat unpopular position that either of the amendment's two purposes constitutes adequate justification for it. He also stated that, in his opinion, the amendment does not violate the Constitution.

Estimates of the number of men who have failed to register for the draft vary from 43,000 to more than 350,000, depending on the informant. A Department of Education spokesperson contacted by Kahn placed it at six percent of the eligible registrants, but admitted that the department has no idea how many of these go on to college or seek financial aid there. (At the U-M, five students seeking financial aid have either refused to certify registration or have refused to register,



Kahn told the audience that either of the amendment's two purposes constitutes adequate justification for it.

according to Financial Aid Office Director Grotrian.)

That the amendment has attracted so much attention despite the small percentage of nonregistrants and the presumably even smaller subset of nonregistrants it might uncover, is a measure of its symbolic meaning for those who disapprove of a draft and of draft registration, Kahn said.

Indeed, Congress's message in passing the amendment, Kahn wrote in *Consider*, was that "students who shirk a major responsibility [draft registration] imposed by their government are less worthy of [federal] financial support than are those who comply."

On a more concrete level, Congress sought both to detect and to penalize men who refuse to register. The idea, Kahn explained, was "to raise the cost of noncompliance. The risk of detection and prosecution is so small that a person who fails to register may feel relatively safe from any penalty. Presumably, Congress believed that the bulk of the noncompliants . . . become college students." Its members viewed denying federal aid as "an effective and relatively inexpensive means of inducing them to comply."

The idea of enforcing one government program via another is not new, Kahn observed in *Consider*. "For example, where a school discriminates on the basis of race or sex, it may be denied federal funds and various tax benefits. Such denials are a convenient and relatively inexpensive means to increase the cost of discrimination."

The Solomon Amendment's route to the Supreme Court began in U.S. District Court in Minnesota last March, when Judge Donald D. Alsop issued a temporary injunction barring its enforcement in any state, on grounds that it unconstitutionally violated the right to avoid self-incrimination and punished students for nonregistration before they had had their day in court. The federal government appealed the ruling to the Supreme Court; Chief Justice Warren Burger ordered the injunction stayed to allow appeal, and in December, the court announced it would hear the case.

Amendment opponents like the U-M's Harvey Grotrian concede that the Supreme Court decision may go against them. Kahn tends to agree, seeing little merit in the constitutional issues Judge Alsop and others have raised.

"The beauty of this system," he said, "is that it is self-enforcing. It is not a disclosure system—that is, it does not force nonregistrants to disclose the fact that they have violated the law. If a student (who is required to do so) has not registered for the draft and if he is unwilling to register, he simply does not apply for federal funds. The 'penalty' is the unavailability of such funds. The requirement for qualifying for the funds is *compliance* with the registration law. The student's 'disclosure' of registration is merely evidence that he has registered. It is not a disclosure of those who refused to register.

"A student who fails to register on time is in continuous violation of the law each succeeding day he does not register. Thus a nonregistrant is denied federal funds for his continuous commission of a crime; it is not punishment for past behavior. If a delinquent nonregistrant wishes to qualify for federal funds, he can simply register at that time. No matter how late he registers, he will thereafter qualify for federal aid. The nonregistrant himself possesses the key to qualification for aid; he need only comply with the law."

Kahn also noted that no person who registers late has ever been prosecuted and that it is "a public policy of the Department of Justice not to prosecute a person if he registers before being indicted."

Nonetheless, enforcing the law does take a toll on university administrators and budgets. Although the Financial Aid Office need not verify students' claimed compliance with draft registration—under current regulations students simply *X* a box—Grotrian finds it distasteful to be in the business of *denying* rather than granting financial aid.

Despite the procedure's simplicity, compliance with the amendment's provisions is not free of charge. Start-up costs and the legal proceedings that made the amendment an in-again, out-again proposition will result in a $20,000 bill to the University this fiscal year. The amount, far from inconsequential but far smaller, Grotrian concedes, than that required to comply with other government requirements, is expected to decline by 60 to 70 percent next year.

Although Kahn feels that the Court will probably allow the amendment to stand, he does not necessarily believe that the statute should be retained by Congress. Its constitutionality is but the tip of an argument that has to do, at base, with politics and symbolism.

"Even though constitutional, if it is unwise or ineffective, we should get rid of it," he told the audience attending the panel discussion. The amendment's doubtful effectiveness is what gives Kahn pause. "If you put it through a cost-benefit analysis, I doubt that it would prove to be worthwhile. On the other hand, the value of making a symbolic gesture in support of registration is difficult to measure."

The Grenada debate

Law professors ponder the invasion's legal issues

Most post–World War II American military engagements have let lie the constitutional dimensions of direct conflict between the government's legislative and executive branches. To extended wars such as Korea and Vietnam, Congress gave subsequent, if tacit, approval via large, continued appropriations. In other situations in which armed forces were deployed abroad without prior congressional approval—the Berlin Airlift, the blockade of Cuba, or the Iranian hostage rescue attempt—the clear need for secrecy, the mission's brief duration, or favorable congressional opinion of the action limited serious questioning of presidential power.

Such was not the case, however, in the October, 1983, American invasion of Grenada, an action that raised as many constitutional and international law questions as it did political and philosophical issues.

To explore the invasion's legal ramifications, Visiting Professors of Law Frederick Schauer, Ted Stein, and Joseph Weiler joined Professors Alex Aleinikoff and Sam Estep in a Law School panel discussion entitled "Grenada: The U.S. Constitution, the War Powers Act, and International Law."

Aleinikoff opened the panel by outlining the two basic constitutional issues the Grenada invasion raised: Absent congressional authorization, what is the President's power to commit U.S. troops abroad? And, assuming that at least under some circumstances the President has inherent authority to commit troops abroad, what may Congress do to limit and control this authority?

Both Aleinikoff and Schauer noted that the Constitution is hardly exhaustive on the executive and legislative branches' respective responsibilities for troop deployment and military actions. Article II provides that the President "shall be Commander-in-Chief of the Army and Navy"; Article I gives Congress the power to collect taxes to fund the common defense, to declare war, to raise and support an army and navy, and to make rules governing them. But nothing in the document expressly addresses the circumstances under which troops may be stationed, deployed, or placed in hostilities overseas.

Overall, however, the Constitution's provisions imply congressional control of troop deployment decisions, Schauer said. The President, he suggested, was to function as tactical military commander in congressionally designated operations.

To limit unilateral presidential decisions to commit troops abroad and to ensure its own involvement in situations precisely like Grenada—which the faculty panel did not consider an "in-and-out" rescue mission—Congress passed the War Powers Resolution in November, 1973. In a broad sense, Schauer concluded, the act's consultation requirement, expressed in Section 3, is also part of the constitutional plan to ensure at least some meaningful congressional involvement; where consultation is possible—as Schauer felt it was in Grenada—and where no effort to consult is made, both documents are violated.

Agreeing with Schauer that the prior consultation requirement was ignored, Estep also noted that the Grenada action did not fall within any of the resolution's Section 2 exceptions: declaration of war; specific statutory authorization; or national emergency created by an attack upon the United States, its possessions, or

The panel: (from left) Professors Ted Stein, Alexander Aleinikoff, Frederick Schauer, Samuel Estep, and Joseph Weiler.

its armed forces. "If the troops stay more than 60 days (with a possible 30-day extension) without a congressional declaration of war, this also will be a violation of the resolution," he said. "It may well be," he added, "that a serious constitutional power question is raised, or will be."

What are Congress's remedies if the President has indeed gone beyond his constitutional authority in the Grenada action? There are several, Estep said, including impeachment, request for Supreme Court hearing, and denial of funds for troops and equipment used in Grenada. Each, however, is problematic.

Both the OAS and UN Charters, panelists Ted Stein and Joseph Weiler said, place the invasion in clear violation of international law. Possible justifications for the U.S. action—self-defense, intervention pursuant to a regional plan, intervention upon invitation of the Grenadian government, and assertions that the invasion was a simple rescue mission—are insufficient to upset that conclusion, they contended.

Weiler further maintained that the invasion calls into question the adequacy of international norms in "Grenada" situations. He noted, for example, that "current rules legitimating armed intervention on the invitation of a 'government' engaged in an internal war seem unclear and open to serious manipulation. Even if observed, they fail to ensure the non-internationalization of a local conflict."

The equality of states is a foundation of international law; it is also, in the face of bloc politics, something of a legal fiction, Weiler said. His conclusion: The escalation of superpower confrontation could conceivably set the stage for "reception into international law of a Reagan-Brezhnev doctrine of bilateral hegemony."

Reviews redux

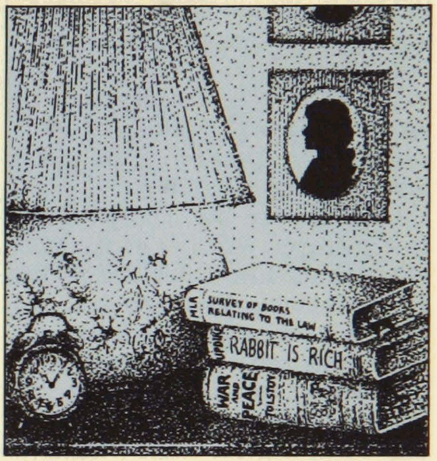
Michigan Law Review champions an endangered species

Once they were found at the back of the book; but even in last place, their numbers began to dwindle. Then, six years ago, they were rescued and restored to a place of honor.

The attorney for the defense? The *Michigan Law Review*, whose annual *Survey of Books Relating to the Law* has permanently reversed the fortunes of book reviews in law reviews, and, according to some, made law reviews bedside reading again.

There was no dearth of books to review in the years before the *Law Review's* first book review issue, which appeared in March, 1979. (The 1984 issue is slated for spring publication.) Indeed, as Harvard legal scholar David F. Cavers noted in the *amicus* brief he felt moved to write for the first annual issue, there are more books and monographs of legal interest today than ever before. Published more, they were simply reviewed less—a hunch he substantiated by examining twelve major law reviews and the book review sections of three 3-year compilations of the *Index to Legal Periodicals*.

Carl Schneider, the Michigan Law Review's editor in '79, names Law School professor Francis Allen as the book review issue's muse. Schneider, now a law professor at Michigan, recalls Allen urging that he and the journal take book reviews more seriously. To Schneider, whose staff was small but eager for fresh ideas, an annual issue consisting of nothing but book reviews—most written by outside experts—seemed the ideal way to answer Allen's call and to provide the "frank and vigorous reviewing



. . . owed to the intellectual well being of the profession."

Why are book reviews in law reviews important?

"It's very discouraging," Schneider says, "to write books and have them ignored in the literature." Cavers cites them as an impetus to the reading, as well as to "the writing of books on or about the law, especially works to be read as distinguished from 'law books' to be referred to as the exigencies of legal research or teaching may dictate."

Book reviews in journals like *The New York Review of Books* or *The New York Times*, written by non-specialists or by specialists for a general audience, do not play the important part in scholarly discourse that book reviews *by* specialists *for* specialists play, Schneider says. "Often," he adds, "serious books are not reviewed at all."

If book reviews afford lawyers and legal academics access to the increasing number of books in all disciplines that touch on legal issues, they may also constitute an essay forum for ideas the

reviewer could not relate conveniently otherwise. "There is no easy way for legal academics to write about a question except in an article or in the form of lectures," Schneider observes. "The book reviews were expressly an attempt to reform the modes of legal discourse."

The 70 books current Book Review Editor Gary Rosen selected for inclusion in the *1984 Survey of Books Relating to the Law* go beyond the strictly legal to encompass relevant books in other fields, like Ithiel de Sola Pool's *Technologies of Freedom.* They are reviewed by scholars of law, American history, classics, philosophy, and sociology; by judges; by practicing lawyers; and by law review staff. "Many people who wouldn't normally write for law reviews will write for us," Rosen says. "I think that's important." He points with pride to the large number of returning reviewers and to the heavy percentage of queries from eminently qualified reviewers in all disciplines.

Among those contributing this year are David Belin, Barry Boyer, Lea Brilmayer, Francis Dummer Fisher, James Fishkin, Willard Hurst, David Lyons, Martin Redish, David Trubek, Ernest van den Haag, Andrew von Hirsch, and Mark Yudof. Also participating are Michigan Law Professors Yale Kamisar, Wade H. McCree, Jr., and Michael G. Rosenzweig, as well as Visiting Professor of Law Frederick Schauer.

The issue will feature two reviews, by Schauer and by University of Pennsylvania Law Professor Paul Bender, of *The Burger Court: The Counter-Revolution That Wasn't,* a collection of essays edited by former U-M Law Professor Vincent Blasi, now at Columbia. The book includes contributions by Yale Kamisar on criminal procedure and by Theodore St. Antoine on labor law. Other books to be reviewed include new works by H.L.A. Hart, Malcolm Feeley, Norval Morris, Phillip Bobbitt, Michael Walzer, and Robert Stevens.

The issue's subject list includes pluralism, madness and criminal law, court reform, heroin and public policy, criminal justice in Colonial America, Love Canal, disorganized crime, taxpayers and arts policy, and computer crime.

Tempted? There's clearly only one thing to do: read this year's *Survey of Books* for more details. (Non-subscribers may purchase the *Survey* issue for a cost of $10. Address inquiries to Eleonora Eckert, Business Manager, the *Michigan Law Review,* Hutchins Hall, Ann Arbor, MI 48109-1215.)

Rara avis

An important Environmental Law Society book is also an unusual achievement

As the field of environmental law expanded in the last decade, books treating the "big picture"—the federal aspects of environmental issues—proliferated apace. But comparatively little was written to aid lawyers seeking comprehensive treatment of state statutes, rules, and court decisions.

In Michigan, a state with a lot to protect and a strong legal basis to protect it, practitioners can thank the Law School and the Institute for Continuing Legal Education for one of the few books in the nation to collect, reference, and analyze state environmental law. Published in late 1982, *Environmental Law in Michigan* is a *rara avis* in another respect: it was written entirely by students.

In a sense, it had to be. "No law professor would ever get tenure for a book like this, and therefore they don't get written," says Professor Joseph Sax, advisor to the Environmental Law Society, ten of whose members—Michael Donovan, Charles H. Knauss, Bradford Kuster, Sanford Lewis, Ronald Mock, Kevin T. Smith, Michael Strugar, Joseph Van Leuven, Mark Van Putten, and Lois Witte—wrote the volume. Kevin Smith, who earned an M.S. in Natural Resources from the U-M in addition to his J.D., served as editor.

When a group of students approached Sax with the idea for the book in 1980, he was encouraging, eager to see them fill this open niche in the legal ecosystem. But the vastness of the undertaking forced him to remind the would-be authors of students' propensity to "feel more ambitious in September than in May." As the work went on and on and deadlines once considered realistic ceded to the exigencies of checking and rechecking facts, drafting and redrafting chapters, the students had reason to remember Sax's cautions. Ultimately, the book took two years to complete.

"It was a much bigger project than any of us realized," admits Smith, who just completed a clerkship with Judge Noel Fox of the U.S. District Court for Michigan's Western District. "I had promised my fiancée that the

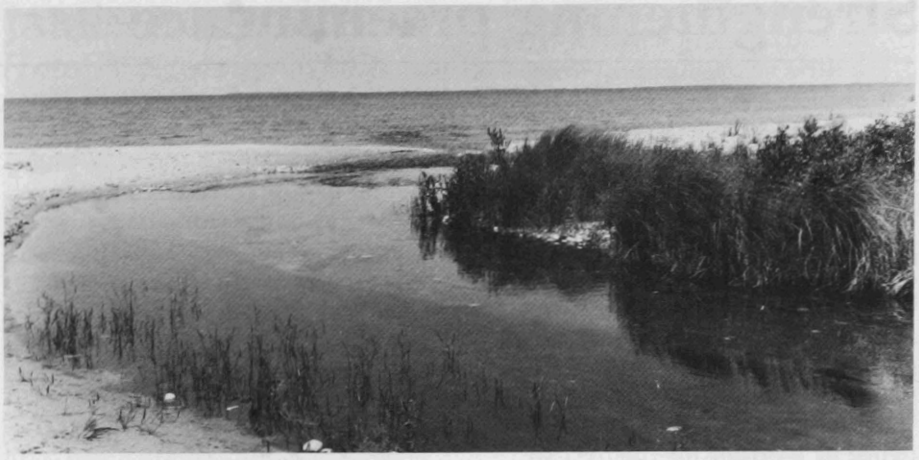
book would be done by our wedding in March [1982]. We came within six months of that, and that was about the closest we came to a deadline."

All the care and rechecking have payed off in a book that, according to Sax, has a lot more going for it than its status as one-and-only. "It's complete and sophisticated," he says. "Conceptually, the book is very skillfully done."

Directed primarily to local attorneys in small firms, *Environmental Law in Michigan* contains chapters on common law, agencies and administrative law, the Michigan Environmental Protection Act, land use, water pollution and water use, land pollution, air pollution, and public law. Its goal, in a sense, is to answer all the questions these lawyers may not have the resources or the familiarity to ask.

"Environmental problems," says Smith, "are recognized first by local people; they usually turn to the local attorneys who may have handled their divorce or traffic cases. Our basic idea was to make the full range of law available to them. Michigan has a pretty good environmental protection scheme; we thought that making it accessible, more than creating new law, would reduce environmental litigation and conflict and result in protecting the environment."

Page citations for every case mentioned in the book, telephone numbers for Michigan agencies concerned with the environment, the text of the Guidelines for the Preparation and Review of Environmental Impact Statements ("They're a matter of public record, but where do you find them?" Sax asks)—these are the types of detail that make the book a practical tool. And although the emphasis is on intra-state regulation, relevant national acts and programs, such as the Freedom of Information Act and the National Flood Insurance Program, are also discussed. "They've ranged pretty widely," Sax comments.



A unique combination of characteristics makes Michigan an ideal breeding ground for environmental conflict. Giving lawyers the tools to resolve such conflict is the ELS book's goal.

Rendering the students' task more difficult was the fact that, in many cases, they were the first to tackle particular subject areas. This was true of the discussion of Michigan administrative agencies, a topic Sax calls "one of the most diffuse areas in the law." Several students did manage to coordinate their writing with academic projects, however. Smith, for example, used his chapter on public lands as his Natural Resources practicum.

If the final product pleased Sax, so did the process through which it emerged, which substituted collegiality for the usually hierarchical relationship between professor and student. Along with appreciation for the moral support of Dean Terrance Sandalow, who also offered the project a modest grant, Sax expresses admiration for ICLE. Its willingness to publish a book in an area of the law that is not greatly remunerative was critical in bringing the project to fruition.

Two-thirds of the 500 copies printed have already been distributed; according to ICLE Publications Director Lynn Chard, the institute will eventually break even on the book. Smith says he receives phone calls from people who are using *Environmental Law in Michigan*; his wife, Susan, sees it on desks around the state legislature, where she works.

With hindsight, Smith understands why such books are unusual; he admits he would be reluctant to tackle such a mammoth project again. He is proud, however, of the Environmental Law Society's accomplishment, and his work stands to benefit him as he follows in several co-authors' footsteps and searches for an environmental law position.

"It helps to carry around a 450-page writing sample," he laughs.

Environmental Law in Michigan is available through ICLE, Hutchins Hall, Ann Arbor, MI 48109-1215. The cost is $50, plus $2 for Michigan sales tax where applicable.

Strengthening preeminence

With two new faculty appointments, the Law School becomes even stronger than before

This fall the Law School welcomed James E. Krier and James Boyd White to the faculty. Krier's appointment affirms Michigan's position as the tallest tree in the forest of environmental law; White's strengthens its preeminence as a center for the humanistic study of law.

One of the nation's foremost legal authorities on air pollution, Krier has written on a wide range of environmental issues. He has served on National Academy of Sciences committees and panels and has been called upon to testify before federal and state committees. He is also co-author of leading casebooks on environmental and property law, and of a legal history of the air pollution problem in California.

Krier received his B.S. and J.D. from the University of Wisconsin, then clerked for Chief Justice Roger Traynor of the California Supreme Court prior to practicing law in Washington, D.C. In 1969 he joined the law faculty of the University of California at Los Angeles. With the exception of two years as Professor of Law at Stanford University, he served at UCLA until coming to Michigan.

Author of *The Legal Imagination*, as well as of *When Words Lose Their Meaning*, White is widely known for his work on the relationship of language and culture to law and to the functions of lawyers. He holds an A.B. in Classics and English from Amherst College, as well as an A.M. in English and an LL.B. from Harvard. White practiced law in Boston and taught law at the University of Colorado before joining the University of Chicago law faculty in 1974. Highly regarded by both legal and literary scholars, White also held professorial appointments in the liberal arts college and in the Committee on the Ancient Mediterranean World. At Michigan, he is professor of English and adjunct professor of classical studies as well as professor of law. He was a visiting professor at the Law School in the fall of 1982.

In recent interviews, Krier and White discussed their work and the roads that led to their specializations and to Michigan.

JAMES KRIER

Knotty environmental problems that demand strategic solutions

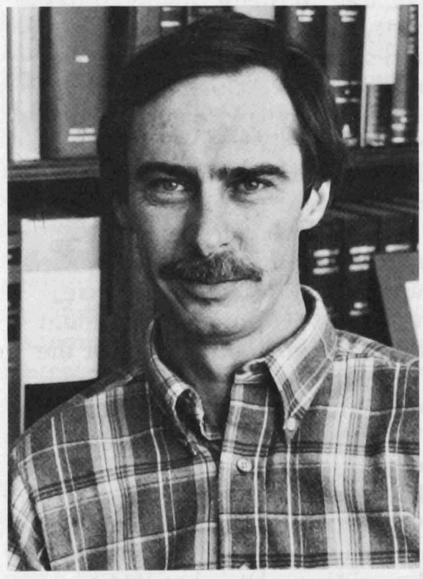
After years in California, environmental law authority James Krier jokes that he had forgotten that not all trees were either eucalyptus or palm. The rediscovery of their rather less exotic Midwestern cousins has been a happy event for the Wisconsin native, as has been his move to the town and school that restored them to mind.

"I find the faculty here unimaginably collegial, supportive, and fun," he says of the Law School. "And my environmental law class this fall was the most rewarding teaching experience I've had in 15 years."

Krier's choice of Michigan was carefully considered; his choice of specialization he attributes to "serendipity." When just beginning his teaching career, he was lured to his future field by a promise of summer support for developing the environmental law component of a Ford Foundation grant on land use and environmental law made to UCLA. Krier accepted; the materials he developed became the book *Environmental Law and Policy*, now in a second edition co-authored with Professor Richard Stewart of the Harvard Law School.

"If the call had been health law, it would have been health law," he reflects wryly. "But I have no regrets. Environmental law has let me learn a little bit about a number of disciplines."

Krier's manner of entry into the field may account for the intellectual, non-partisan approach he has taken toward his subject. "You're supposed to be 'pro-environment' in environmental law," he notes. "It's the same in welfare law—but not, I guess, bankruptcy or criminal law. I started out being neutral. With advancing years my views have slowly



James Krier's move to Michigan coincided with a new research interest.

become more conservation oriented. But I'm not an activist. I take an academic approach."

Best known for his work on air pollution, which he characterizes as a tactical problem, Krier is now embarking on a new generation of knotty environmental problems that instead demand strategic solutions. Some, particularly intractable, may require redefinition before they can be "solved," he says. He intends to pursue research on these problems with Clayton Gillette of Boston University, who was a visiting professor at the Law School this fall.

Of particular interest to Krier are "zero-infinity" problems that couple a low risk of mishaps with catastrophic costs if they do in fact occur, usually many years after a decision is made. The use of toxic chemicals illustrates the management dilemmas this new generation of strategic problems poses.

"Their effects," Krier points out, "may not be felt until 20 years after exposure; they may be mutagenic and affect the next generation. How do you make decisions about them? In the past, we used a trial-and-error process. We got quick feedback and interesting feedback. Now, by the time the feedback comes, it may no longer be 'interesting' if you want to avoid the negative consequences. The lesson may be too late."

In many ways, governments today are ill-equipped to make such decisions, Krier says. "Our whole government structure seems to be based on short-term feedback and short-term accountability. Now we have problems we can't deal with that way. There will always be a lot of tactical problems, but the number of strategic problems will grow and the conventional problems may become unconventional as we learn more about them."

JAMES BOYD WHITE

How is a lawyer like a literary critic?

Just as James Krier likes the Law School's collegiality, so James Boyd White—the second James White on the faculty and one of three legal educators by that name—expresses admiration for the Law School's intellectual character, citing it as motivation for his move.

"The place is characterized by a kind of thoughtfulness and openness in its intellectual style," he says, "which isn't the norm for a law school. It's really remarkable the extent to which this is true. And much of this same quality shows up in the students."

This fall, students in White's small-section criminal law class found themselves reading the *Oresteia* and short stories by Katherine Anne Porter, works that are hardly traditional fare. White brings a literary perspective to the law, a concern with language in the small—how words and their meanings change—and with language in the broad—how communities are held together by common terms of discourse. He comes by these concerns honestly: he originally planned a career as an English professor.

While pursuing an A.M. in English at Harvard, White found he disliked "professionalizing" this side of his life. A visit to moot court—his brother was in law school at the time—made him switch his course to law.

"I found the argument utterly gripping," he recalls. "It was also about that time that Kennedy was elected. It made me think that the public world might be a world where someone I might admire could do something."

White was surprised, in law school, to discover that there were many ways in which a lawyer was like a literary critic. "I expected no continuity with my past life," he says, "but I found close textual analysis enormously helpful."

His interest in the similarities and differences between legal criticism and literary criticism continued to prevail and, after a postdoctoral fellowship and a short stint with a Boston law firm, White went into teaching to seek answers to questions about lawyers as readers and writers.

To White, law is a way of claiming meaning for experience in language: either argumentatively, as one side gives its account of the actors and their circumstances and what justice requires, or in explanation of a decision, by a judge or administrator, for example.

In his early casebook, *The Legal Imagination*, White compared legal modes of thought and expression with other modes, mainly literary ones, with the idea of helping students come to a new sense of the possibilities of legal language and expression. Different aspects

The Law School's open and thoughful intellectual character attracted James Boyd White to the faculty.

of the same relation are the subject of *When Words Lose Their Meaning*, in which a series of great texts—from the *Iliad* to *McCulloch* v. *Maryland*—are compared as ways of establishing meaning and constituting communities in language.

White believes it is helpful to regard many things as "text." The text's language, simultaneously presenting the relationship between mind and language and between person and person-as-constituted-in-language, instructs the reader how to regard and use its words. "It sets up a challenge for the law and the lawyer," he says. "What kind of community can we develop?"

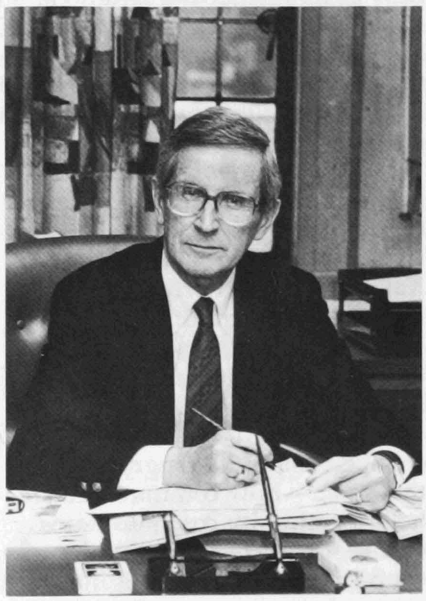
Such a viewpoint makes White a staunch supporter of the humanistic study of law that is Michigan's pride. To him it signifies an understanding of law as a whole-mind activity, "an art and a creative process" in which the lawyer is "an imaginer, a person who makes a community and remakes language, a creator."

Reed is recipient of Tweed Award

A lighthearted book of candid photographs of Michigan's law faculty, published in 1959 to celebrate the Law School's Hundredth Anniversary, shows Professor John W. Reed, feet on desk, speaking into a dictating machine. "And so, members of the Gogebic County Bar Association," the caption has Reed saying, "you can see that the hearsay doctrine is made easy by the simple application of the seventeen rules that I've given you tonight."

From speeches before bar associations as far flung as Gogebic County's to directorship of Michigan's Institute of Continuing Legal Education, John Reed has provided lifelong continuing education to the American bench and bar for over 25 years. This year, the Association of Continuing Legal Education Administrators honored Reed for his outstanding service to the field by conferring upon him its prestigious Harrison Tweed Award.

Named for the distinguished New York lawyer Harrison Tweed, to commemorate his "quarter century of service to the course of



John Reed

continuing legal education and the high standards he set for professional legal education," the award has been given only 10 times since its establishment in 1970.

In making Reed its recipient, ACLEA hailed Reed's "benchmark" achievements as teacher, author, and professional administrator. "His imagination and creativity," the citation observes, "have had a tremendous impact upon the development of continuing legal education for practicing lawyers and members of the bench. His leadership as director of Michigan's continuing legal education program has been a model for other administrators and has inspired many to strive for the same goals and ideals. He has selflessly shared his knowledge of the law with students, practitioners, and judges throughout the United States, exemplifying the role of the law school professor in continuing legal education."

A graduate of William Jewell College and the Cornell Law School, Reed practiced in Kansas City before receiving graduate law degrees from Columbia University and teaching in Oklahoma. With the exception of a term as dean of the University of Colorado Law School and visiting terms at Chicago, Yale, and Harvard, he has taught at the University of Michigan since 1949.

It was after his 1968 return from Colorado that Reed served a five-year term as ICLE's director. He has been active in continuing legal education through ABA and AALS committees, CLE organizations, the Judge Advocate General's School, and government programs. He is also editor of the *International Society of Barristers Quarterly*.

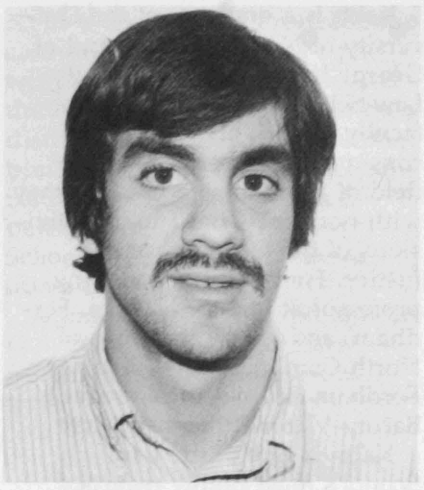
Alumni serve as Supreme Court clerks

This year, two recent Law School graduates are serving as Supreme Court clerks.

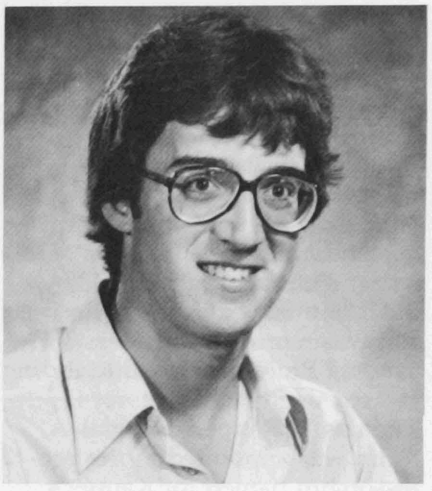
☐ **Peter Michael Lieb,** who is clerking for Justice Byron White, received his J.D. magna cum laude in 1982. A managing editor of the *Michigan Law Review*, Lieb was also a recipient of the Howard Coblentz Prize and the Raymond K. Dykema Award, and was elected to the Order of the Coif. After graduating from the Law School, he was clerk to the Hon. Edward S. Godfrey of the Supreme Court of Maine.

As an undergraduate, Lieb majored in sociology at Yale.

☐ **Richard Irving Werder,** who received his J.D. magna cum laude in May, 1982, is clerking for Chief Justice Warren Burger. Werder came to Michigan from Canisius College, where he majored in economics and history. During his Law School career, Werder won the Class of 1908 Law Memorial Scholarship, the Henry M. Bates Memorial Scholarship, the Abram Sempliner Award, and the Frederick L. Leckie Scholarship, and was elected to the Order of the Coif. He also served as editor in chief of the *Law Review*. After graduating, he was clerk to the Hon. Harry Edwards of the United States Court of Appeals, District of Columbia Circuit.



Peter Michael Lieb



Richard Irving Werder

Thirty-eight alumni who graduated in August and December 1982 and May 1983 hold state- and federal-court clerkships this year:

Mark F. Anderson (Hon. Boyce Martin, Sixth Circuit Court of Appeals, Louisville, Ky.); **Anne Bachle** (Michigan Court of Appeals, Lansing, Mich.); **Donald Baker** (Hon. Dickson Phillips, Fourth Circuit Court of Appeals, Chapel Hill, N.C.); **Mark T. Boonstra** (Hon. Ralph Guy, U.S. District Court, Eastern District of Michigan, Detroit, Mich.); **Ellen Carmody** (Hon. Douglas Hillman, U.S. District Court, Western District of Michigan, Grand Rapids, Mich.); **Anne Dayton** (Hon. James Spronse, Fourth Circuit Court of Appeals, Charleston, W. Va.); **Don Dripps** (Hon. Amalia Kearse, Second Circuit Court of Appeals, New York, N.Y.); **Jon Eager** (Hon. John Feikens, U.S. District Court, Eastern District of Michigan, Detroit, Mich.); **Michael Flanagan** (Hon. Sherman Finesilver, U.S. District Court—Colorado, Denver, Colo.); **John B. Frank** (Hon. Frank Coffin, First Circuit Court of Appeals, Portland, Maine); **Norman Gross** (Hon. Charles Joiner, U.S. District Court, Eastern District of Michigan, Ann Arbor, Mich.); **Michael Hainer** (U.S. District Court—Colorado, Denver, Colo.); **David Hartsell** (Michigan Court of Appeals, Lansing, Mich.); **Mark Herrmann** (Hon. Dorothy Nelson, Ninth Circuit Court of Appeals, Los Angeles, Calif.); **Hugh Hewitt** (Hon. Roger Robb, District of Columbia Circuit Court of Appeals, Washington, D.C.); **Bernard James** (Hon. Myron Wahls, Michigan Court of Appeals, Detroit, Mich.); **Michael Kaufman** (Hon. Nathaniel Jones, Sixth Circuit Court of Appeals, Cincinnati, Ohio); **Michael Kelly** (Hon. Daniel Friedman, District of Columbia Circuit Court of Appeals, Washington, D.C.); **Anne Larin** (Hon. Cornelia Kennedy, Sixth Circuit Court of Appeals, Detroit, Mich.); **Michael Maurer** (Hon. Donald O'Brien, U.S. District Court, Northern District of Iowa, Sioux City, Iowa); **Greg McAleenan** (Hon. Douglas Hillman, U.S. District Court, Western District of Michigan, Grand Rapids, Mich.); **Deborah Miller** (Hon. John Feikens, U.S. District Court, Eastern District of Michigan, Detroit, Mich.); **George Pierson** (Hon. Harry Edwards, District of Columbia Court of Appeals, Washington, D.C.); **Denise Polayac** (Hon. John Pratt, U.S. District Court for the District of Columbia, Washington, D.C.); **Ethan Powsner** (Hon. James E. Townsend, Ottawa County Circuit Court, Grand Haven, Mich.); **Kathryn Reid** (Hon. William Beasley, Michigan Court of Appeals, Detroit, Mich.); **John Relman** (Hon. Sam Ervin, III, Fourth Circuit Court of Appeals, Morganton, N.C.); **Sherry Rubin** (Hon. William Turnage, Missouri Court of Appeals, Western District, Kansas City, Mo.); **Ira Rubinfeld** (Hon. J. Edward Lumbard, Second Circuit Court of Appeals, New York, N.Y.); **Tina Schneider** (Hon. Robert Keeton, U.S. District Court—Massachusetts, Boston, Mass.); **Gare Smith** (Hon. Kenneth Hall, Fourth Circuit Court of Appeals, Charleston, W. Va.); **Mark J. Stein** (Hon. Thomas Griesa, U.S. District Court, Southern District of New York, New York, N.Y.); **H. Mark Stichel** (Hon. Francis Murnaghan, Fourth Circuit Court of Appeals, Baltimore, Md.); **Barbara Strack** (Hon. Charles Richey, U.S. District Court, District of Columbia, Washington, D.C.); **Karen Strandholm** (Hon. Stephan Karr, U.S. District Court, Western District of Michigan, Grand Rapids, Mich.); **Michael Strugar** (Hon. John Feikens, U.S. District Court, Eastern District of Michigan, Detroit, Mich.); **Janet Van Cleve** (Michigan Court of Appeals, Detroit, Mich.); **Judith Weisburgh** (Hon. W. Arthur Garrity, U.S. District Court—Massachusetts, Boston, Mass.).

New names for distinguished professors

Three Law School faculty were honored with named chairs this September. Upon Eric Stein's retirement, former Henry M. Butzel Professor of Law John Jackson was named to the Hessel E. Yntema Professorship. Succeeding Jackson as Butzel Professor is Thomas E. Kauper. Douglas A. Kahn was appointed to the professorship named for Kauper's father, Paul G. Kauper, an esteemed member of the law faculty for nearly four decades.

☐ A leading authority on taxation, **Douglas Kahn** is the second Kauper Professor of Law. Dean Terrance Sandalow calls Kahn a "worthy successor" to L. Hart Wright, who held the Kauper chair until his death last year. Both Wright and Kauper pioneered the introduction of taxation courses into law school curricula.

Kahn is a graduate of the University of North Carolina and of George Washington University Law School. He joined the law faculty in 1964 after acquiring considerable experience in the field of taxation as a trial attorney with both the Civil and Tax Divisions of the Department of Justice. He has been a visiting professor at Stanford, Duke, Fordham, and the Universities of North Carolina and Florida. At Fordham he held the George Bacon–Victor Kilkenney Chair.

Kahn is one of the Law School's most highly regarded teachers, admired both for his effectiveness and for the close relationships he has established with large numbers of students outside the classroom. The author or co-author of four texts on various aspects of taxation, Kahn is also a frequent contributor to scholarly and professional journals.

☐ **Thomas Kauper's** government service, professional activities, and frequent contributions to professional and scholarly journals have earned him a reputation as one of the nation's leading experts on antitrust law. Dean Sandalow hails him for his "incisive mind," his "penetrating yet broad understanding of antitrust law and policy," and his "balanced judgment regarding the difficult and controversial issues with which law must grapple in this important area of economic regulation." A gifted scholar, Kauper is also a respected and popular teacher.

Kauper received both his A.B. and J.D. degrees with honors from The University of Michigan. He joined the Law School faculty in 1964, following a clerkship with Supreme Court Justice Potter Stewart and several years practice in Chicago.

In recent years, Kauper has twice served in ranking positions with the United States Department of Justice, first as deputy assistant attorney general in the Office of Legal Counsel (1969-1971) and then as assistant attorney general in charge of the Antitrust Division, the chief enforcement officer in that field.

Douglas A. Kahn

Thomas E. Kauper

John Jackson

He has served as vice chairman and Council member of the Antitrust Section of the American Bar Association.

□ Profiled in detail last year (see *Law Quadrangle Notes*, Vol. 27, No. 2), when he was named to the Butzel Professorship, **John Jackson** is an internationally recognized authority on international trade law and one of the Law School's most admired teachers. His appointment to the Yntema Professorship continues the tradition, begun with Eric Stein's appointment to the chair, that its incumbent be a distinguished scholar of international or comparative law. Dean Sandalow calls him an "indispensable figure" in the Law School's Graduate and International Law programs.

A graduate of Princeton and the University of Michigan Law School, Jackson has served as general counsel of the United States Office of the Special Trade Representative and as a consultant to the Senate Committee on Finance. He has studied, lectured, and taught throughout the world and has been a frequent advisor to U.S. government and international agencies. Before joining the Law School faculty in 1966, he taught at the University of California at Berkeley and practiced law in Milwaukee.

For seekers of legal archaisms

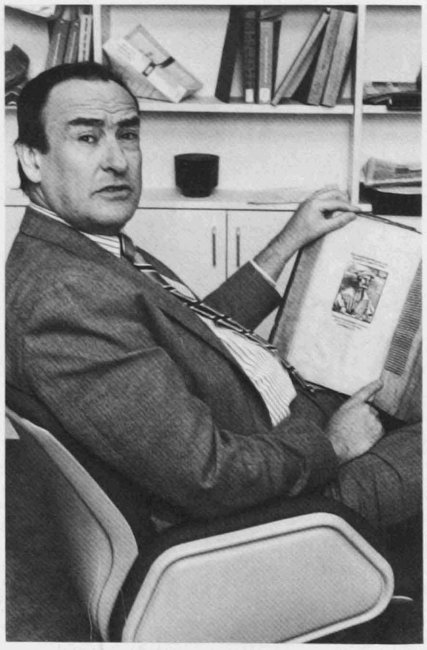
Michigan's Legal Research Library is greatly indebted to Lawrence E. Curfman, Jr. (J.D. 1932) for a valuable addition to our small but impressive collection of rare books. Mr. Curfman has given the Library a German volume, consisting of four books all bound together in 1556 but printed at different times.

The volume catches the eye not simply because of its great age, its contemporary binding, or its very great rarity, but because of the purpose for which the first of the books was published. It is a very early form-book, and the language of the title page (a misnomer, since the book has no title) bears a remarkable resemblance to more modern publishers' announcements.

Wes jeden Notarien/Schreibern/Procuratorn/Advocaten/Gerichts/Raths/unnd Ampts Personen/oder Verwaltern/In Reden unnd Schreiben/In unnd Ausserhalb Gericht/Ihrer Practic/Handlung unnd Commission jeder Sachen/Contracten unnd Verbrieffungen zuwissen/Schrifftlich unnd Mündtlich zuversehen unnd gebrauchen von nöten.

A translation, kindly provided by University of Michigan Emeritus Professor of German Otto Graf, reads as follows:

A handbook in both technical and vernacular language containing what every notary, scribe, procurator, attorney, court, council, and bureau personnel or administrators need know in and out of court, in their practice and in the execution of all legal matters, contracts, documents,



Beverley Pooley displays one of the fine illustrations from the 1556 book.

providing a reliable reference for both written and verbal discourse.

In the text, one finds appropriate modes of address for various officeholders, petitions to state and church officials, form wills, and form commercial letters.

The second book has to do with civil procedure—"According to the usage and practice common in the Holy Empire of the German nation." This work is dated 1555. The third book, dated 1556, is in fact a treatise on the law of succession, compiled by Herr Wolff Losen.

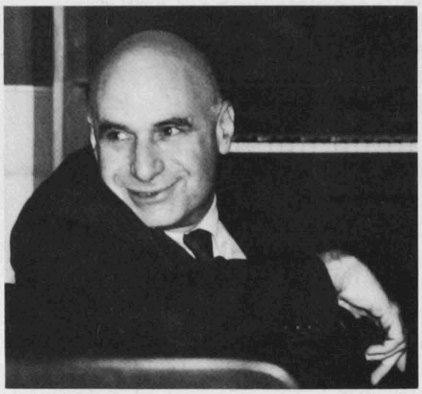
The fourth and last book, by Erasmus Sarcerius, provides texts of natural, divine, imperial, and popish laws, in part extracted from the books of other learned theologians, in part written by the compiler himself . . . "on matrimony and related matters." This last was printed in 1553 at Leipzig, whereas the other three were printed in Frankfurt.

This is a most handsome book, and in remarkably good condition. The Library is most grateful to Mr. Curfman for his generosity in making this splendid gift to the School.

by Beverley J. Pooley
Professor Pooley is the director of the Legal Research Library

Pluralism in America

Cook lectures explore the changing nature of religion and morality



Berger brought erudition as well as a sense of commitment and wit to his lectures.

It was to questions of secularization, the responses its evokes from organized religion, and the challenges it poses for a pluralistic society founded on a religiously tinged civil creed that this year's William W. Cook Lectures on American Institutions were devoted. They were delivered by Peter Berger, the distinguished sociologist and author whose books include *The Heretical Imperative, The Sacred Canopy,* and *Pyramids of Sacrifice: Political Ethics and Social Change.* Currently University Professor at Boston University, Berger has been hailed as a highly original thinker who has had a major impact on the social sciences, most notably in the areas of the sociology of knowledge, modernization theory, the politics of development, ethics, and religion.

To the examination of "Dimensions of Pluralism: Religion and Morality in America," Berger brought erudition, organization, and a sense of commitment leavened by dry wit.

In his first lecture, "Secularization and Counter-Secularization," Berger identified secularization as a dialectical process that increases with modernization and results in a transfer of power from the religious to the lay.

Today's America, Berger said, is far more secular than it was 25 years ago. As signs of the change, he cited the shocks to the national creed of the last two decades, the increasingly sharp line the courts have drawn between church and state, and increasing secularization within the church itself. From increasing secularization have come the seeds of the neotraditionalist, evangelistic religious movements whose goal it is to return the country to perceived nineteenth-century values.

A search for the mechanism underlying the secularization–counter-secularization dialogue leads to America's commitment to pluralism, Berger said. In a society characterized by both pluralism and secularization, pluralism's fluidity and tentativeness infuse the religious domain; religious certitude becomes a rare commodity, and a religious marketplace develops—witness the consumer-oriented phrase "religious preference"—in which there is ample room, indeed demand, for those who purport to purvey certitude.

The protagonists in the secularization–counter-secularization dialogue are as different from one another as an "*enragé* undertaker from Indianapolis" and a "public interest lawyer from Cambridge, Massachusetts," Berger said. Exemplars, respectively, of the counter-secularization and secularization forces, Berger's "*enragé* undertaker" and "public interest lawyer" also represent today's two middle classes, the business class and the smaller, but more influential, knowledge class, which split the old middle class vertically between them. The causes that have become symbols of the knowledge class—abortion and school prayer, for example—are also the rallying points for those who resent this class and its thrust for power.

In his second lecture, "From Religious to Moral Pluralism," Berger focused on the consequences of what he calls "the heretical imperative"—modern man's "condemnation" to freedom of choice, in Sartrian terms.

In the religious sphere, dispassionate turns of phrase such as "religious preference," or the declaration that one is "into"

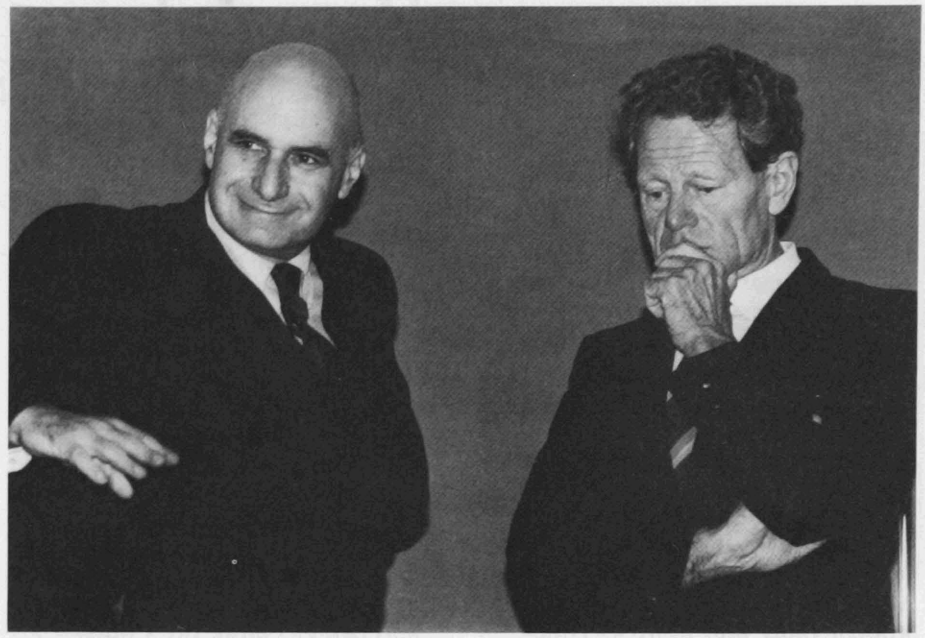
Buddhism (or Judaism, or born-again Protestantism) imply a voluntary commitment that goes beyond the Constitution's legal institutionalization of tolerance.

When a society is secularized, Berger noted, the Ten Commandments lose their "divine clout" and are subject, as is religion itself, to preferential options. We chose among the Commandments as among other beliefs: adultery, yes; killing, no. Religious pluralism and tolerance for others' beliefs, however, demand a firm underpinning of moral consensus on basic, central issues. "A functioning society," he stated, "must have consensus on moral issues or it will cease functioning." Therein lies the rub.

The country's division on abortion, the challenges to the Protestant ethic (and hence, to capitalism), the surprising diffusion of pacifist attitudes, the widespread delegitimation of patriotism and the "American creed" are some of the many signs, Berger said, of moral fissure in today's America. The "faults" frequently run along class lines, coincide with class interests, and acquire denominational characteristics as the opposing camps and their churches employ religious legitimations for their positions.

Advancing the idea that the central rituals and the legitimating underpinnings of American society have been religious in character, Berger explored the consequences of America's religious and moral pluralism in his third lecture, "Churches as Mediating Structures." How can a society hold together, he asked, when there is no "sacred canopy" that all of its members acknowledge in common?

One could argue, he said, that modern society does not need a "sacred canopy," that there is no longer a need for religion as a force for symbolic integration, that society can function like a traffic system or any contractually based association held together by mutual interest and rational agreement. Yet such solutions are at best short term, Berger insisted, viable only in a society untroubled by inter-group conflict, economic recession, international crisis, or war.



Before his lecture, Berger (left) engaged in discussion with the noted theologian Hans Kung, a visiting professor at the University during the fall semester.

Indeed, their viability may be even more limited, for as the German proverb has it, "the devil always dwells in the particular." What keeps a rushed driver from knocking down a little old lady now and then? Individuals must have reasons to refrain from surmounting personal difficulties in a manner injurious to social order. "There are sound reasons for wondering how society can be held together," Berger said, "if it no longer has an overarching canopy of meanings and norms."

While agreeing that secular meaning systems do exist—democracy, socialism, and nationalism were three he named—Berger argued that they hold societies together only if major crises occur. Religion, on the other hand, inspires and motivates in all seasons, he said.

Historically, American political ideology combined the ideals of democracy and nationalism with a pervasive religiosity; despite the Enlightenment rhetoric, Berger noted, God was never very far away. It was His proximity that gave the American civil religion subjective plausibility for most Americans; ideology, for most people, had to be mediated by the religion of the churches.

For this reason, Berger said, the Supreme Court decision on prayer in the schools was "an act of folly, an instance of the legal mind going berserk in a sociological vacuum. Predictably, the consequences have been far reaching, as large numbers of people have come to feel that the state, thus deprived of all religious symboli-

zation, lacks true legitimacy."

Churches, however, still act as mediating structures in our secular, pluralistic society. They function in either interventionist or non-interventionist modes, with the former predominating.

Berger does not share the pro-interventionist bias he says marks discussions of religion's proper place in American society. There is reason to be skeptical of social action by churches, he said, particularly when that action turns out to be in the service of one of the two competing elites. In addition, he finds the flexibility of religious symbols troubling. "As the two middle classes of Western society assemble for battle," he said, "members of the clergy appear more and more as chaplains for the respective class armies, invoking God's blessing on their particular cause."

If churches take an interventionist stance, Berger believes they should choose the "dialogic" option, in which the church is not a staging area but a politically neutral place for discussion and reflection about current social issues. To Berger, this is the more promising approach in a pluralistic situation, "where it is not easy to locate absolute justice at any point of the societal map."

Removing the sociologist's mask, Berger concluded his lectures with remarks made as "a morally concerned Christian," remarks very much in harmony with his subject.

"I believe in pluralism and that it is a challenge and not a threat to Christian faith," he said. "What I've tried to do is to give a picture of the enormously complex phenomenon we know as moral pluralism, especially from the sociological perspective. If you find this picture plausible, I must leave it up to you to figure out the implications in terms of your own values and beliefs."

Hogan's hero

Wilbur Colom, civil rights lawyer, is DeRoy Fellow

Wilbur Colom practices law with his wife and three others in Columbus, Mississippi, a town of 35,000 where lawyers, by unwritten convention, refrain from attacks on each other and on local institutions.

Four years ago, when he was still fresh enough out of Antioch Law School to have barely gained eligibility to argue before the Supreme Court, he took on a case that pitted him against the town's university, Mississippi University for Women, and placed him front and center before the Court, where he had been an intern in the Office of the Administrative Assistant to the Chief Justice while in law school.

The case earned Joe Hogan, a male nurse, the right to enroll at MUW, a school that had previously admitted only women. It also brought national recognition to the young black attorney and civil rights activist who fought the case all the way from the local federal court to the Supreme Court. Recently, Colom chronicled the ethical and professional complexities of his civil rights practice in a *New York Times Magazine* article, "Trials of a Mississippi Lawyer."

Thanks to the generosity of Helen L. DeRoy, University of Michigan Law students got a chance to meet Colom this October, when he spent four days at the Law School as a DeRoy Fellow. During his stay he met informally with students and faculty and addressed classes in criminal law, civil procedure, evidence, trial practice, and the Fourteenth Amendment.

The DeRoy fellowships, endowed by DeRoy in her will, were initiated in 1980 to bring leading lawyers and national figures to campus for sufficient periods to attend classes, meet with students, and offer their insight and expertise in a variety of informal settings.

Eminently approachable and, at 33, many law students' contemporary, Colom was actively sought out by his intended audience. If his down-home style surprised students who expected more pomp and circumstance from one who had argued before the Supreme Court, it also pleased them. A superb storyteller, Colom held classes in the palm of his hand with tips on litigation and nuggets about Supreme Court personnel and procedures.

"It was refreshing to have him here and to have him stress the practical side of the law," said Robert Jonker, a second-year student. "It was a different perspective. He wants to tell you what it's like to be a lawyer in his kind of practice."

To point out the possibility of "setting up an extremely interesting practice in a small town" was precisely what Dean Terrance Sandalow had hoped Colom would do. "These practices," Sandalow said, "often have more human contact than large-firm practices and may offer the same opportunity for intellectual challenge and for work on important issues."

Surprised by the students' overwhelming bias toward corporate practice, Colom stressed "that there are other alternatives. It's good for a law school to have people successful in different legal roles and to have that encouraged," he said in an interview.

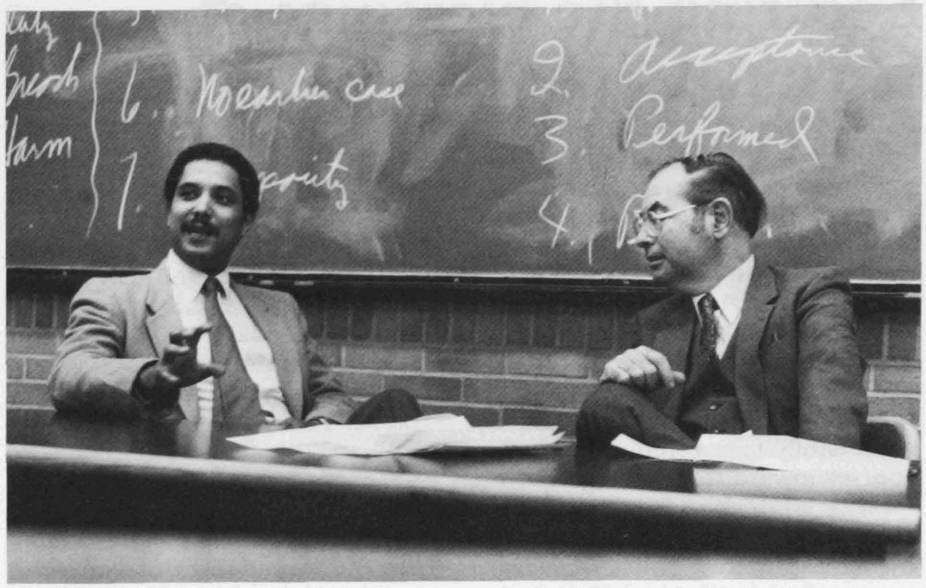
In the area of civil rights, he added, practitioners in small firms are the front-line combatants. "In larger firms, they give you time to do your 'social consciousness' work, but the difficulty is, no one approaches you, nobody comes to you with real problems—you're establishment."

In the course of Colom's practice, he has represented a white child charging discrimination in a black-run school system and aided a Spanish immigrant to regain custody of the daughter her husband had given to welfare officials while his wife was hospitalized. In Professor Donald Regan's Fourteenth Amendment class, however, Colom turned his attention to his best-known case, Hogan.

In a lively presentation, Colom outlined Hogan's issues, the strategies that allowed him to expedite the case's progress through the courts, and the difficulties he had holding onto it as its importance and its Supreme Court destination became apparent. "There were more people willing to argue this case for me than [there are] in a hot Mississippi cotton field in the fall," he told Regan's students.

Within one year of filing, the case had made its way from the local federal court to the United States Court of Appeals for the Fifth Circuit, which reversed the federal court's decision. Colom said he made haste quickly, but deliberately, choosing not to file a class action, for example (he asked for a declaratory judgment against MUW's nursing school), and allowing a summary judgment to go through in anticipation of an "opinion so bad" it would net an expedited appeal from the Fifth Circuit.

Contained in Colom's account of the case's progress toward the Supreme Court, which ruled on the case in July, 1982, two years from its filing, were a number of personal recommendations. Colom advised avoidance of time-consuming class actions and judicious use of pre-trial motions and memorandums. "Why tell them what you're up to, as long as you know what they're up to?" he asked.



Yale Kamisar listens as Colom (left) makes an amusing point for students in his criminal law class.

He also counseled sparing use of expert testimony—"Big law firms are real high on experts; also, these experts are real high on their fees"—and careful reading of relevant cases for useful, buried facts. In researching the Hogan case, for example, Colom found that in every Fifth Circuit decision in favor of a single-sex school like MUW, there had been a "separate-but-equal" facility for the opposite sex.

Colom likened opening MUW to men to taking on the U-M football team in Ann Arbor. The case, which had important national ramifications for women's rights, gave him a local reputation as a men's rights champion—and as a troublemaker.

In defending "principle of law over race"—without considering "whose ox is being gored," as he put it in his *New York Times Magazine* article—Colom has represented whites against blacks and Hispanics against whites. Walking that straight and narrow road, Colom has encountered disparaging comments from some local white attorneys and questions from blacks about his allegiances.

"You build up black leadership when you stand for principle," Colom has responded to blacks who forget, or ignore, his track record battling Jim Crow and his sixties black power activism. Because today's civil rights issues have become "grayer" and the good guys "less clear," the onus must be on lawyers, Colom argued, to elucidate them for the public.

"The issues are harder to explain, but no more difficult to understand," he insisted. "The side political considerations are the ones that give you problems, not considerations of law."

Securing the blessings of personal liberty

Cooley lectures offer perspectives from abroad

Although Americans have long taken it as an article of faith that constitutional specification of human rights is the surest route to their preservation and protection, other free nations have successfully followed different courses toward that same goal.

Since World War II, however, such countries have expressed increasing interest in the "American way" of fortifying delicate civil rights terrain against erosion, via constitutional guarantees and institution of judicial review.

The paths taken in Canada, Europe, and the United Kingdom were the focus of this year's Cooley Lectures, "Constitutional Protection of Human Rights: Perspectives from Abroad." The talks were delivered by three distinguished scholars who have also been active participants in these national and continental movements, Professors Jochen A. Frowein, Francis G. Jacobs, and Paul C. Weiler.

Frowein, a member of the European Commission of Human Rights since 1973 and its vice president since 1980, teaches constitutional and public law at the University of Heidelberg and is a director of the Max Planck Institute for Comparative Public Law and International Law. He received his M.C.L. from The University of Michigan and his doctorate from Bonn University.

Jacobs, who holds an M.A. and D. Phil. from Oxford, teaches European law at King's College, London. Director since 1981 of the Centre of European Law, he has served on the Secretariat of the European Commission of Human Rights and is author of an important book on the European Convention on Human Rights.

Weiler, a graduate of the University of Toronto and York University Law School, is professor of law at Harvard University. A former chairman of the Labour Relations Board of British Columbia and a specialist in labor law, he played an active role in the formulation of the new Canadian Charter of Rights, adopted in 1981. He has also written on Canadian constitutional law.

In a talk entitled "Judges and Rights in a Democracy: The New Canadian Version," Weiler offered a fascinating account of the Charter's evolution. Interest in such a charter developed, he said, as part of broader efforts at constitutional renewal designed to preserve a united Canada in the face of French-Canadian nationalism. In its final form, the Charter is a distinctive Canadian document that squares the country's British inheritance of parliamentary sovereignty with the American practice of judicial supremacy.

If the American experience with rights and constitutions has been dominated, historically, by racial questions, north of the border the questions have revolved around language, Weiler said. Because the majority of Canada's French-speaking populace has been located in one province, Quebec, the country has been torn between assuring minority rights through provincial autonomy and guaranteeing them through constitutionalization. Which would provide better safeguards? Which would best facilitate the drawing of the difficult line between individual claim and community need?

With the adoption of the Charter—much opposed in Quebec in the seventies, Weiler noted—the question of whether to constitutionalize was settled, as was an additional question: the role the Canadian judiciary would play in adjudicating rights issues.

Written in broad moral terms, the Charter makes it clear that the Canadian judiciary, not Parliament, is responsible for drawing the lines of "reasonable rights in a free democracy." Although there were clear indications that judges need not be bound by the current state of Canadian law, the Charter's framers, Weiler said, left no hints about how such lines were to be drawn.

Constitutionalization of rights was desirable, Weiler said, because of the more sophisticated discussion it engenders; but there were concerns, he recounted, about the Canadian judiciary's talent for its new-found adjudicatory role. Solutions to rights protection should draw on a country's institutional strengths, he said, and that is where the Charter's *non obstante* clause—which gives Parliament the right to enact statutes superceding the Charter's authority—comes into play.

Some have viewed the clause as mere political expediency. Weiler, who had a hand in its devising, justifies it institutionally, as an "escape valve" from judicial decisions with an awkward real-life fit. "We must make a practical judgment about the relative competence of two all-too-human institutions," he said.

In the second lecture of the series, "European Integration through the Protection of Funda-

mental Rights," Jochen Frowein focused on the quiet legal revolution effected by the 1950 European Convention on Human Rights, to which 21 countries are now signatories.

Until the first quarter of this century, he noted, judicial protection of human rights against the legislature was impossible in most European countries. The legislature was the last arbiter on the compatibility of regulations and bills of rights. The Convention, a quasi-constitutional bill of rights that established a supranational court and commission, made available an apparatus for the judicial protection of fundamental rights.

Effective since 1953, the Convention was something of a "Sleeping Beauty" for the first twenty years of its existence, Frowein said. He dated its awakening to the early 1970s; today, few of its signatory states have not been found in violation of the Convention at least once—including those with a proud history of protecting human rights. The Convention has jarred countries out of complacency and caused them to question the adequacy of existing legal safeguards. It has also emphasized the notion of proportionality.

The result has been an impetus for internal change. Some countries have modified their laws in response to judgments against other countries, and the legal procedures of member states have become increasingly consonant. Meanwhile, the supranational court, located at Strasbourg, has developed a significant body of case law to which the countries look for guidance, Frowein said.

The Convention's major drawback—mentioned by Frowein and central to Francis Jacobs' talk, "Towards a United Kingdom Bill of Rights," is its lack of force as domestic law in one third of its signatory states. Britain is one such state, a fact Frowein and Jacobs cite as a possible reason for Britain's record number of Convention violations.

In his lecture, Jacobs advanced the case for adopting the Convention as a British bill of rights enforceable in British courts. Historically, fundamental rights have been protected by common law in Britain, subject to statutory acts of Parliament; but such protection is no longer sufficient, according to Jacobs. Noting that Parliament will legislate on rights issues only under extreme stress, Jacobs argued that the Convention offers an ideal solution to the need for a United Kingdom bill of rights—a document no nearer to reality now than it was 10 years ago.

Incorporation would give the Convention's provisions internal effect in Britain and eliminate the "recipe for chaos" that overlapping provisions of a separate, British-devised bill might create. It would allow for the required balance between Parliament and the courts, which would continue to be the beneficiaries of Strasbourg case law. The lack of flexibility and the narrow constructions that might be engendered by a tightly worded British bill would be avoided.

Barring a political crisis resulting in a wholly new constitutional settlement, full entrenchment is not a realistic option, Jacobs said. The interim solution, he concluded, is for the courts to "embrace the Convention wholeheartedly," abandoning the "delicate two-step" of the past.

To conclude the lecture series, faculty and speakers joined forces for a lively panel discussion. From left: Paul Weiler, Donald Regan, Terrance Sandalow, Jochen Frowein, and Francis Jacobs.

Back in the classrooms again

Committee of Visitors meets at the Law School

Approximately 50 members of the Law School's Committee of Visitors returned to Ann Arbor for an October annual meeting that featured classroom visits, discussions on curriculum, talks with students and faculty, dinners at Dominick's, the Union, and the Lawyers Club, and last, but certainly not least, Michigan football.

The schedule was consonant with the purposes stated at the committee's 1962 founding. It was to serve, *Law Quadrangle Notes* reported, as an alumni body that would convene once a year to "examine the Law School's program of undergraduate, graduate and continuing legal education . . .; its contribution to the legal profession and the improvement of law and society; and its relationship to its alumni."

Members of the Committee of Visitors are appointed by the president of the University and serve a two-year term. Following a two-year reappointment, they enter "alumni" status. The current committee's members, 194 in number, span 52 years of graduating classes from 1924 to 1975 and come from all parts of the country. This year's appointees are: Edward Bransilver (J.D. '59), William J. DeLancey (J.D. '40), Hurticene Hardaway (J.D. '75), Eugene L. Hartwig (J.D. '58), James P. Kennedy (J.D. '59), Robert P. Luciano (J.D. '58), Richard H. May (J.D. '60), Richard W. Odgers (J.D. '61), Mary M. Waterstone (J.D. '65), and Jane S. Whitman (J.D. '52).

For Dean Terrance Sandalow, the committee is "a valuable sounding board . . . a group of thoughtful alumni from whom the faculty and I can get the reactions of able lawyers to the issues we are, or should be, thinking about at the school. In the five years that I've been dean," he says, "I've found it very useful."

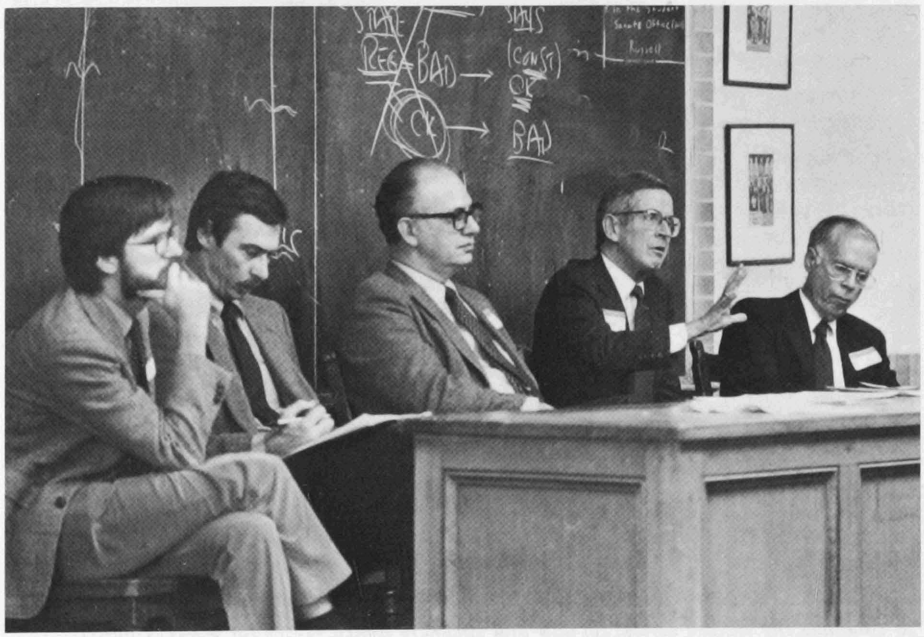
Both Sandalow's view of the committee and the program designed for its three-day meeting emphasize the symbiotic relationship between alumni and alma mater, the sense of mutual responsibility for school and profession that bind them together.

And so, after class visits and a luncheon that featured, strictly in order of appearance, fillet of sole and Professor Lee Bollinger on the First Amendment implications of prepublication review (see article, page 34), the committee repaired to Hutchins Hall for a state of the Law School talk by the Dean.

Indicating that the seven retirements of the last three years have represented a "substantial loss" for the Law School, Sandalow went on to describe the period upon which the school is embarking as "one of great opportunity for us, a chance to make Michigan even stronger than it is now" through new appointments.

As evidence of the school's strength, he cited its continued ability, in the face of Michigan's uncertain economic climate, to attract first-rank scholars like James Krier and James B. White, both of whom joined the faculty this year. He expressed the hope that future appointments would increase the number of women and minorities on the faculty while further broadening the diversity of intellectual perspectives represented at the school.

Like some other highly selective schools, Michigan



What should a law school teach? From the left: Professors David Chambers, James Krier, Terrance Sandalow, John Reed, and Francis Allen discuss the question.

New committee member Eugene Hartwig talked with first-year student Dean Van Drasek before dinner at Dominick's.

Alan I. Rothenberg, Mrs. Theodore Sachs, and Dean Terrance Sandalow chatted with the Hon. G. Mennen Williams at lunch in the Michigan Union.

Left to right: Committee members Frank Jackson, Hurticene Hardaway, Theodore Sachs, and Leon Irish concentrate on the Dean's "State of the Law School" address.

experienced a drop last year in the number of applications for space in the first-year class, Sandalow told the committee. The quality of the class is undiminished, however. The previous academic records and LSAT scores of the entering class are at the same levels as those of other recent classes. Sandalow reported with satisfaction that the school was able to meet the financial need of every applicant through a combination of guaranteed student loans and grants. He expressed concern, however, that a loan debt estimated at $20,000 by graduation—now about the average for students who receive financial aid—might make low-income college students reluctant to attend Michigan despite the degree's considerable earning potential. The average salary for Michigan law graduates immediately upon graduation, he pointed out, is higher than the current average income of lawyers in the state of Michigan.

Proving that the more things change the more they stay the same, the committee listened, following Sandalow's talk, to a faculty panel discussion on curriculum—a subject that figured on the agenda of its first meeting some 21 years ago. Panelist Francis Allen wryly noted that the topic has come up for "melancholy" review over the entire span of his career, which he laughingly dated from the time of the Peloponnesian War.

The panel chaired by Sandalow was anything but melancholy, however, in its consideration of the issues. Allen, David Chambers, James Krier, and John Reed responded thoughtfully and, often, passionately to the questions Sandalow posed: Does curriculum matter? Should the Law School require certain courses for second- and third-year students? Should law schools specialize? Should this one offer more Psychology? Sociology? Economics?

The answers to these questions included the case, presented by James Krier, for a second- and third-year curriculum that might "provide a liberal education . . . for people whose opinions will shape society," and concerns, voiced by John Reed, about the wisdom of offering "remedial culture."

David Chambers cited alumni survey responses that suggest the

school enhance the "skills-related portion" of the curriculum. "Our graduates need more work on fact gathering, on interaction with clients," he said. "The issue is, Do they pick that up in the early years of practice? I believe a large number never develop as well as they should." Cautioning against the conclusion that the university is necessarily the best place for such skills training, Chambers nonetheless outlined ways in which the school might integrate it into the present curriculum.

The discussion raised an even more fundamental issue: What should the primary goal of a legal education be? Is it to turn out successful bar examination candidates, to provide firms with polished associates, or to provide "the shaping and theory," as John Reed put it, "for 45 years of practice?"

Committee members' responses to the discussion reflected a wide diversity of opinion. There were advocates of a practice-oriented curriculum, as well as many votes for the prevailing, more theoretical approach.

In the face of these divergent views, Francis Allen saw fit to remind the group that course content is constantly adjusted by the faculty. "Intra-course curricular change," he noted, "should not be underestimated or undervalued, especially at a time when there is a lack of consensus on what changes should be made."

If the subject of curriculum proved as intractable as ever—ensuring its future reappearance on committee agendas—the debate was nonetheless stimulating.

Subjects more amenable to tidy conclusions do have their attractions, however; obligingly, in Saturday's cool and rainy weather, the Michigan football team provided a decisive, if last minute, victory over Iowa.

Plain speaking

An alumnus makes the case for "readable writing"

Groucho Marx: *Pay particular attention to this first clause because it's most important. Says the—uh—the party of the first part shall be known in this indenture as the party of the first part. How do you like that? That's pretty neat, huh.*

Chico Marx: *I don't know. I don't even have dentures. Let's hear it again.*

Groucho: *The party of the first part should be known in this contract as the party of the first part.*

Chico: *That sounds a little better this time.*

Groucho: *Well, it grows on you. Would you like to hear it again?*

Chico: *Just the first part.*

Groucho: *The party of the first part?*

Chico: *No, the first part of the party of the first part.*

* * * * *

If you want to know where the "Plain English" movement got its start, turn to the Marx Brothers, says Charles Averbook, J.D. '72, B.S.E. '69.

Averbook used their famous *Night at the Opera* movie sketch to begin a 1981 *Florida Bar Journal* article on "Legalese vs. Clear, Readable Writing" that has seen considerable circulation since then. Endorsed by no less a legal luminary than U.S. Supreme Court Justice (then nominee) Sandra Day O'Connor, the article was so readable it was reprinted in the California Bar's *Litigation Section Journal*, the *Iowa Bar Journal*, the *Iowa Association of Legal Secretaries Newsletter*, and the *New Jersey Bar Newsletter*.

What Averbook espouses in his article is a farewell to pomposity and "words of art" that obfuscate rather than clarify. The days of the lawyer-alchemist, mystifying clients with convoluted sentences (or worse yet, non-sentences) and arcane turns-of-phrase, are numbered, he says. A sign of the changing times: The Federal Appeals Court for the Ninth Circuit refused to enforce a clause in a real property lease that talked about "subordination of the fee." Its rationale was the clause's "gross uncertainty" and the parties' clear ability to spell out the remedies referred to.

Like those states which have legislated the use of clear, readable English in various types of legal documents, Averbook disputes the contention that legalese is more precise, and therefore better, than its vernacular kin.

"Persuasion, explaining ideas, documenting promises and defining obligations are a lawyer's stock in trade," he states in the article. "To pretend to communicate by using words that most people do not understand does not demonstrate great legal writing ability. It just shows fluency in a foreign, archaic language. When lawyers write legal documents or letters, they should use words that communicate."

As the readable writing movement gains increasing publicity, more and more legal consumers are agreeing. Along with many lawyers, they are discovering that phrases like "in witness whereof," "on the date first above written," and even, in many cases, the time-honored "know all men by these presents" are not required to make a document legal. (*The Michigan Bar Journal*, which devoted its entire November, 1983, issue to Plain English,

included an article by another Law School graduate, Diana Pratt, J.D. '76, Director of the Legal Research and Writing Project at Wayne State University.)

The readable writing Averbook advocates is a stylistic middle ground between legalese and Plain English. How is it defined? Many simplified-communication laws, Averbook notes, measure readability by a test devised by Columbia University Professor Rudolph Flesch. The Flesch test combines average number of words per sentence with average number of syllables per word to derive a readability score. More, needless to say, is less.

In the *Florida Bar Journal*, a clip-and-save legal translator offered an easy overview of some of Averbook's suggested replacements for common legalese expressions. It is reproduced here in *Law Quadrangle Notes*. Averbook also presented these ideas for turning legalese into clear, readable prose:

• Use simple definitions and then be consistent. "Don't refer to the seller in one paragraph as the 'Seller,' in the next paragraph as 'Mr. Jones' and in the third paragraph as 'the Vendor,'" he warns.

• Use articles (*the, this, that, these, those*) with nouns.

• Avoid the unneccesarily long sentences English teachers call "run-ons." Counsels Averbook: "Rediscover the period."

Averbook's legal—and writing—skills recently earned him the position of vice president, general counsel and secretary of Diversifoods, a publicly traded company headquartered in Chicago. Before joining Diversifoods, he was general counsel at STP Corporation. He has also been assistant general counsel at Burger King Corporation in Miami and was an associate with McDermott, Will & Emery, Chicago.

Clip-and-save legal translator

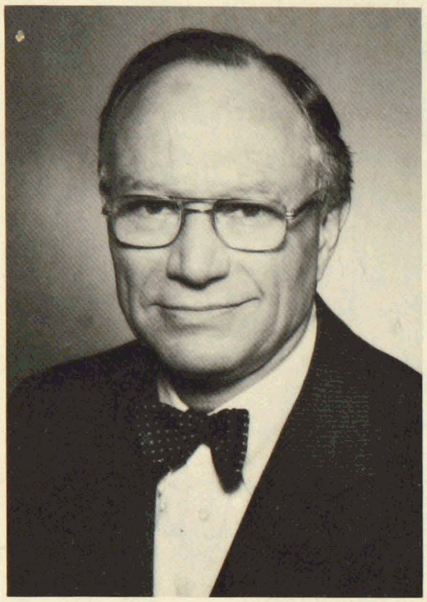
Here's an easy to use legalese translator showing the words and phrases you should abolish from your writing, along with a suggested replacement (or two) for each.

Legalese (avoid them)	*Readable English (use them)*
prior to	before, earlier
subsequent to	after, later
commence	begin, start
indicated	said, listed, stated
purchaser, vendee	buyer
vendor	seller
covenants, warrants	promises, agrees to
indenture	agreement, contract, mortgage, will, promissory note
estopped	prevented from
lessee	tenant
lessor	landlord
please find	is, are
shall have the right	may
herein, hereby, hereof, hereto, herewith, hereunder	in this agreement, by this agreement, etc.
hereinafter	("Seller"), etc.
hereinabove	earlier in this agreement
hereinbelow	later in this agreement
thereto, therein, thereof, thereby, therewith	to that agreement, in that agreement, etc.
shall be	is
shall	will, must, agrees to
said, same, such, subject	the, this, that, them, these, those, it
wherein	where, in which
in the event	if
upon	on
undersigned	("Seller"), I, etc.
please be advised	This is to inform you, this is to let you know
witnesseth	background facts
whereas	[eliminate without replacing]
fails to	doesn't

Alumni notes

☐The new president of the Alumni Association of The University of Michigan is **Lawrence B. Lindemer.** Mr. Lindemer is vice president and general counsel of Consumers Power Company in Jackson, Michigan. He holds his undergraduate degree, as well as his J.D., from the University.

In the interim between obtaining the two degrees, Mr. Lindemer served in the United States Air Force. He returned to Michigan to attend law school in 1945. After graduation, he became assistant prosecuting attorney for Ingham County, Michigan. In 1951, he was elected to the Michigan House of Representatives. Two years later he joined the staff of the Hoover Commission in Washington, D.C.; in 1955 he entered private practice. He was a partner in Foster, Lindemer, Swift & Collins and predecessor firms between 1955 and 1975. During that time he also served as Republican State Chairman, was a Republican candidate for State Attorney General, and sat on the Board of Regents of The University of Michigan.



Lawrence Lindemer

Mr. Lindemer was commissioner of the State Bar of Michigan from 1962 to 1970. He is a fellow of the American Bar Foundation, a member of the American Judicature Society and a member of the Michigan State Board of Ethics. He was a Justice of the Michigan Supreme Court in 1975-76. He is Director of the Auto Club of Michigan; he chaired the Governor's Special Committee on Prison Disturbances, and now serves on the Judicial Candidates Review Committee on Character, Fitness, and Merit.

Presumably, the Alumni Association believes in the adage which holds that if you want something done well, you should ask a busy person. They are also following tradition in calling on an alumnus of the Law School to serve in the president's post. In fact, the first president and the first general secretary of the Alumni Association were both Law School graduates. Ralph C. McAllaster of the class of 1887 served as general secretary in 1897-98. The first president was Levi L. Barbour of the Law School class of 1865. A record of the subsequent tradition is given here.

Presidents of the Alumni Association who were graduates of the U-M Law School.

Levi L. Barbour '63, '65 Law, AM '76	1897-1899
Andrew McLaughlin '82, '85 Law	1901-1901
Victor H. Lane '74, '78 Law	1901-1923
Emory J. Hyde '04 Law	1934-1938
Christian F. Matthews '19, '21 Law	1940-1944
Walter G. Kirkbridge '00 Law	1944-1946
Glen M. Coulter '16, '20 Law	1950-1952
John P. O'Hara '14 Law	1954-1956
Joseph C. Hooper '25 Law	1956-1958
Frank J. Ortman '23, '25 Law	1960-1964
Reino Kolvunen '38 Law (Interim President)	1969
Jack H. Shuler '40, '42 Law	1969-1971
Samuel Krugliak '38, '41 Law	1977-1979
Lawrence B. Lindemer '43, '48 Law	1983-

☐ Two Law School alumni, **Wallace D. Riley,** J.D. '52, and **Fred G. Buesser, Jr.,** J.D. '40, were elected to important positions at the American Bar Association's annual meeting last August. Riley will serve a one-year term as president of the ABA, whose membership of 300,000 makes it the largest voluntary professional association in the world. Buesser assumed the chairmanship of the important ABA Standing Committee on the Federal Judiciary.

In addition to his U-M law degree and two U-M business administration degrees, Riley holds a bachelor's degree from the University of Chicago and a Master of Laws degree from George Washington University.

He is a founding partner in the general-practice law firm of Riley and Roumell.

Long active in the ABA, Riley has been a member of the policy-making House of Delegates since 1972. He was a member of the Board of Governors from 1977 to 1980, chaired its Finance Committee in 1979-80, and served on its Long Range Financial Planning Committee from 1978 to 1980. He also served on the ABA's Standing Committee on Judicial Selection, Tenure and Compensation from 1962 to 1968, as well as on other committees.

President of the State Bar of Michigan in 1972-73, Riley also served it in many other capacities, including an eight-year term on its Board of Commissioners. He has also been active in the Federal Bar Association, of which he was national vice president in 1963-64. He has been a trustee of the Federal Bar Foundation since 1968.

A special assistant attorney general for the state of Michigan since 1969, Riley was a member of Michigan's Board of State Canvassers from 1970 to 1983, serving twice as its chairman.

Buesser, senior partner in the Detroit and Bloomfield Hills law firm of Buesser, Buesser, Snyder & Blank, is also a former president of the State Bar of Michigan as well as a former president of the Detroit Bar Association.

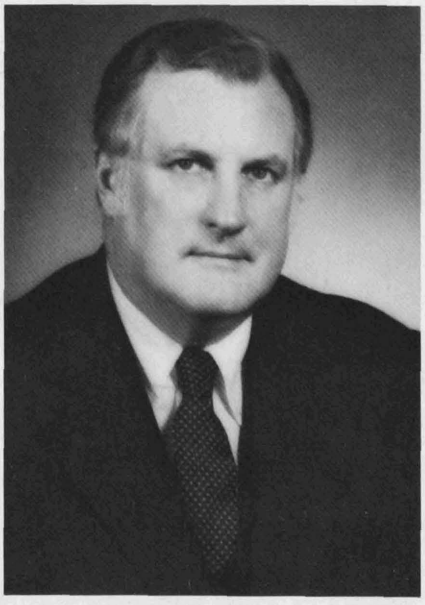
As chairman of the Standing Committee on the Federal Judiciary, he heads a 14-member unit (one member for each federal judicial circuit) charged with the evaluation of prospective nominees for federal judgeships. The President of the United States sends candidates' names to the Committee through the U.S. Attorney General; the committee then solicits the views of all segments of the Bar and makes a recommendation to the Attorney General. Its evaluation and recommendation is also made available to the U.S. Senate Committee on the Judiciary.

In addition to his other services to the profession, since 1972 Buesser has been Michigan's delegate in the ABA House of Delegates. A fellow of the American College of Trial Lawyers, the International Society of Barristers, the American Bar Foundation, and the American Academy of Matrimonial Lawyers, Buesser is also a life member of the Federal Judicial Conference for the Sixth Circuit Court of Appeals.

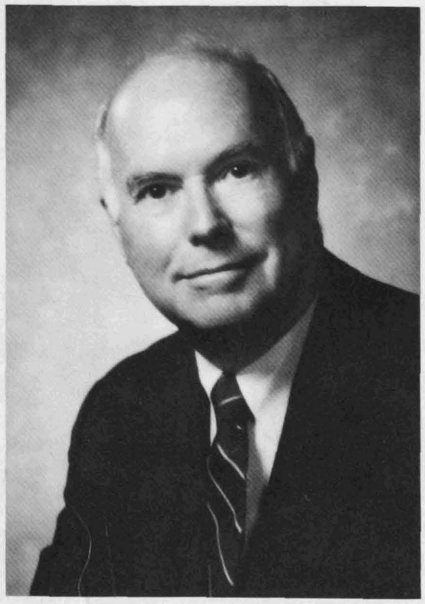
☐ **R. Arnold Kramer,** J.D. '46, has been elected chairman of the board of the American Judicature Society. He succeeds Martha Redfield Wallace of New York, its chairman since 1981.

Founded in 1913, the AJS is a national organization of more than 30,000 concerned citizens working to improve the administration of justice through research, educational programs, and publications.

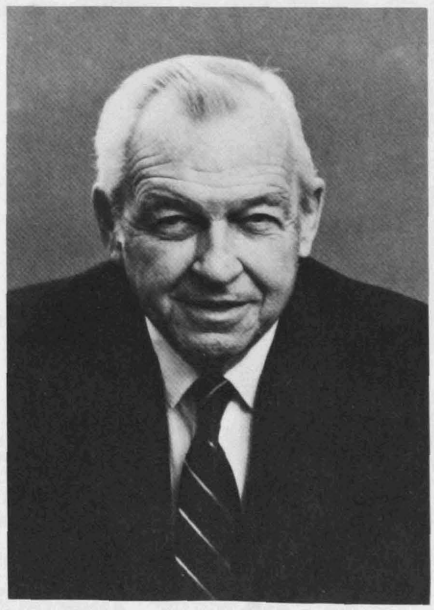
Executive vice president and general counsel of the Aluminum Company of America, Kramer is a former executive secretary of the Tennessee Code Commission and a member of the bar associations in Pennsylvania, Tennessee, and Knoxville, and of the American Bar Association. He is also a director of the Alcoa Foundation.



Wallace D. Riley



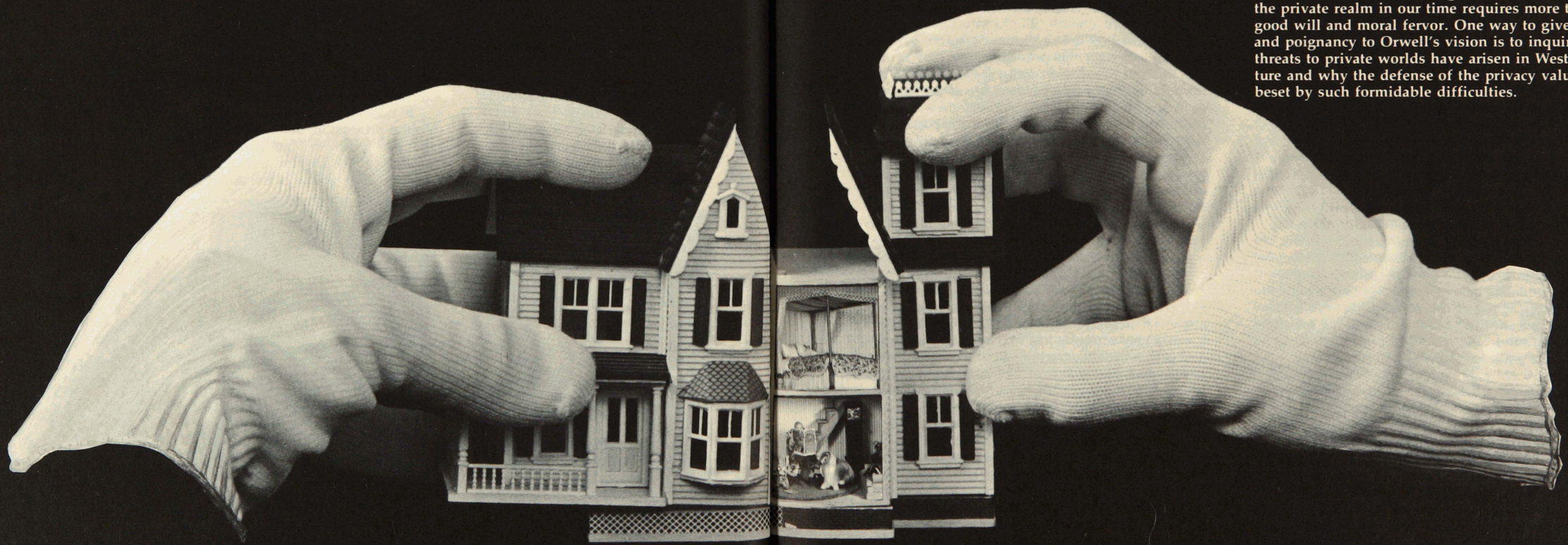
Fred G. Buesser, Jr.



R. Arnold Kramer

Nineteen Eighty-Four and the eclipse of private worlds

by Francis A. Allen



Editor's Note: *This article is excerpted from a paper Professor Allen presented last year at a University of Michigan symposium on "The Future of 1984." It appears* in toto, *along with the other papers presented, in the collection of essays* The Future of Nineteen Eighty-Four, *published by the University of Michigan Press and edited by U-M Professor of English Ejner J. Jensen.*

To answer fully why a novel for over a generation has remained embedded in the consciousness of persons in widely differing situations and of varied backgrounds and convictions, would be, perhaps, to say more about the society than the work of art. George Orwell's *Nineteen Eighty-Four,* whatever its limitations, has amply demonstrated its power to strip bare many of the half-realized fears of persons inhabiting the Western world in our time, and of giving the terrors tangible shape. The book has transcended a merely literary influence. Just as many persons ignorant of *Don Quixote* speak of tilting at windmills, so too Big Brother is regularly denounced from public platforms and in newspaper columns by persons unable to account for the origin of the term.

When one inquires more precisely about which fears of modern men and women are identified and confirmed in Orwell's somber vision, more than one answer may be forthcoming. Some may point to Oceania's systematic debasement of language, for example, or to the extinction of memory by the deliberate falsification of the past. Yet it seems likely that for most readers the particular horror evoked by the society imagined in *Nineteen Eighty-Four* stems from its brutal and premeditated destruction of the private worlds of its members.

Orwell's delineation of a society committed to the destruction of private worlds may be seen as containing, among other things, an urgent message for the public policy of modern pluralistic states. An initial response to the novel's forebodings might take a form such as this: If the preservation of the values of human individuality depends on the drawing and maintaining of clear lines separating the public realm from the private, let us by all means build walls about the private worlds; let us build them boldly and high and defend them against any who would weaken or penetrate them.

Yet reflection on the nature of human aspirations and human affairs quickly leads to the conviction that exhortation is not enough, that the defense of the private realm in our time requires more than good will and moral fervor. One way to give point and poignancy to Orwell's vision is to inquire why threats to private worlds have arisen in Western culture and why the defense of the privacy value is beset by such formidable difficulties.

The persisting populist and egalitarian tendencies in American society have often weakened defense of the privacy value, the concept of a protected private world being seen at times as elitist and at others sinister.

I

The concept of the private world is obviously central to the liberal society, and support for the value predates the recent centuries of the modern era since that society came into being. Deep countercurrents emerged early in the history of Western culture, too, and continue strong in modern America. The society envisioned in Plato's *Republic* is one in which the good life is conducted in the public world almost to the exclusion of the private. The persisting populist and egalitarian tendencies in American society have often weakened defense of the privacy value, the concept of a protected private world being seen at times as elitist and at others sinister.

In the post-Vietnam, post-Watergate world, new and exotic manifestations of populist attitudes have burgeoned, many of which express hostility to the private world. Characteristic phenomena of the present and recent past include the rise of investigative journalism under the banner of "the people's right to know," the flourishing of the gossip industry, "sunshine" laws, the encounter movement. Some social analysts have found little more in the defense of the private world than a pathological effort to escape legitimate social obligations and involvements. Indeed, it is not possible to give assurances that privacy will not often be used for ignoble and selfish ends, just as other great privileges such as freedom of speech or of economic enterprise may be employed in destructive and inhumane activity. These concessions, however, do not detract from the assertion that enhancement of the quality of the public life, if it occurs, will result, not from the weakening, but the strengthening of the private worlds, in which friendship, compassion, and the other life-enhancing values are first and most strongly experienced.

It should not be overlooked that the political alienation of many persons in American society, in particular many members of the intelligentsia, has resulted from a political style, populist in origin, that reveals small regard for personal privacy and at times results in gross assaults upon the private worlds of individuals. The McCarthy era, to cite only one series of events, confirmed the anti-political biases of many intellectuals, attitudes founded on over a century of American experience. There is ample reason to suppose that the losses in personal autonomy that underlie alienation are exacerbated by the invasions of the private world characteristic of modern technological society.

Nineteen Eighty-Four's affirmation of the importance of the private world to human interests and humane values eases the burden of its modern defenders. It is, however, one thing to affirm, quite another to define and protect. These latter difficulties reveal themselves most clearly in the legal experience, and consulting that history may contribute to their understanding. The private world encompasses some of the most basic of human aspirations; inevitably such aspirations are reflected in jurisprudential reflections and in the definitions of legal rights. Yet the "legalization" of the private world gives rise to perplexing problems, and its results are often tentative and unsatisfactory.

The difficulties are in the first instance conceptual in nature. Privacy has proved to be a mercurial idea, one difficult to capture within the confines of a legal formula. Not all privacy claims are of the same kind or of similar importance. They arise in extraordinary profusion, and they tend to adopt the coloration of the particular context from which they arise. The rights of privacy visualized in the law of torts to protect individuals from unwelcome public exposure by other private persons are significantly different from the constitutional right against compelled inquiry by the state or against the unsanctioned invasion of homes or papers by police functionaries. The right of a woman to determine when or if she is to bear a child is different from either.

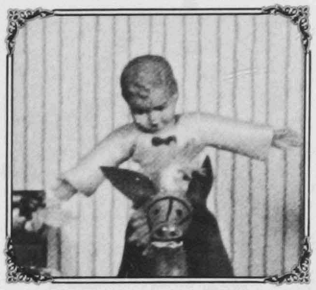
Although the privacy value is the subject of considerable legal attention, no completely satisfactory analytical structure defining and supporting the various privacy interests has to date emerged. In such a situation the disorderly conduct of concepts can be anticipated, and that expectation is amply realized in much of the judicial literature. Some judges have promoted a bold and imperialistic expansion of the privacy concept. Thus, in the well-known case of *Griswold* v. *Connecticut* Justice Douglas for the Court invalidated a state statute that provided criminal penalties for "Any person who uses any drug . . . or instrument for the purpose of preventing conception."[1] The interest that the state statute was said to have offended was a constitutional right of privacy. And where does the right come from? It is not to be found in the express language of the Con-

stitution, said Justice Douglas; the right has its origins in "emanations" from the "periphery" of several Bill of Rights provisions.[2] But why the privacy rationale? The Fourteenth Amendment forbids a state to deny "liberty" without due process of law. The injury done by the statute might be thought to fit comfortably into that historical category, but the category had been engulfed in all too much history. "Substantive due process" doctrines were employed by the old Court at the turn of the century to invalidate such legislation as that limiting the hours of labor of workmen, and the present majority was unwilling to revive doctrines tainted by such uses in the past.

Since the case of *Meyer* v. *Nebraska* in 1923, the Supreme Court has announced a small number of decisions, including those in the abortion cases,[3] that are said to delineate a sphere of interests, denominated privacy concerns, in such areas as marriage, procreation, and child rearing. The cases are, as one commentator observed, "a rag-tag lot." Many of them appear to speak principally to values other than those now attributed to them. How broadly or narrowly the constitutional right of privacy is to be drawn in the future, and by what processes of reasoning such questions are to be resolved or even thought about, remain obscure. These efforts of the Court to give constitutional definition to the privacy interest are not the products of principled decision making, and whatever social benefits they confer do not include that of strengthening the rule of law.

A very different and perhaps equally dubious reaction to the privacy value can be found in the reductionist positions taken by other courts and by some legal commentators. These writers and judges, far from urging an amorphous inflation of the privacy concept, believe it in most situations to be extraneous and unnecessary. Typically, it is said, questions of privacy are associated with other interests and values—interests in reputation, in the protection of property from trespass or appropriation, and the like. Proper resolution of such disputes is facilitated by proceeding directly to the consideration of such interests unencumbered by reference to the privacy concept.

It may be doubted, however, that such a rigorous purging of privacy from the vocabulary of the law best serves our long-term interests. It is clear that in much modern discourse, both within and outside the legal arena, there is reluctance to confront fundamental issues of the private world and that the shyness is often displayed even when the privacy concern is real and in need of identification and consideration. The tendency to evade basic issues may well be encouraged by the absence of an established conceptual system persuasively and usefully articulating the privacy values. Thus, in the debates that have arisen from time to time in the last two decades concerning the use of lie detectors in the hiring practices of public and private employers, discussion tends to



The values of the private world are not our only values, and the defense of that world consists largely in struggles over where boundaries dividing the private from the public and the social are to be drawn. Unhappily there is no calculus that unfailingly locates the borders of these realms in positions guaranteeing optimum social and personal advantages.

wind down in questions about the technical reliability of the polygraph, leaving fundamental concerns of human dignity unidentified and unanalyzed. The use of so-called rehabilitative techniques on persons convicted of crime or suffering from mental disorder, especially such procedures as psychosurgery, aversive conditioning, and extreme drug therapies, tend to be opposed, if opposed at all, on grounds that they do not work, are unreliable, or produce unfortunate side effects. Remaining unstated and unconsidered are questions of the propriety, in a liberal society, of the government's manipulation of human beings by penetrating or engulfing their conscious defenses.

The difficulties encountered in the legal defense of the private world, however, are not confined to problems of definition and articulation, important as these matters are to the life of the law. Even more significant is the circumstance that the claims of the private realm are by their nature contingent rather than absolute. In a famous dissenting opinion, Justice Brandeis referred to a "right to be let alone—the most comprehensive of the rights and the right most valued by civilized men."[4]

Yet clearly no individual can be both in society and also wholly immune to its demands. The values of the private world are not our only values, and the defense of that world consists largely in struggles over where boundaries dividing the private from the public and the social are to be drawn. Unhappily there is no calculus that unfailingly locates the borders of these realms in positions guaranteeing optimum social and personal advantages. In a liberal state, unlike Oceania, attacks on the private realm are ordinarily launched by those who, often sincerely,

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profess attachment to the privacy value, but who in the particular instance urge that a larger value is gained by a constriction of the private world.

There is, of course, nothing surprising in this. The fashioning of all basic legal and constitutional immunities involves problems of balancing interests and values (although some have dreamed that First Amendment rights can be defined as absolute). Seeking equilibrium between centrifugal and centripetal tendencies is the constant preoccupation of liberal societies. Yet if the problems of maintaining the values of the private world are not unique in this respect, their defenders are, nevertheless, often in positions of comparative disadvantage. In a world of conflicting values and interests the most important question may often be, Who has the burden of persuasion? It might be thought that, given the importance of the private world to the most fundamental liberal values, the onus of proof should be placed on those who seek to justify invasions of the private realm on the ground that larger social interests are being served. In many areas of American law and policy precisely the opposite presumption is being applied.

An especially stern test of our commitment to privacy values is to be found in the area of criminal law enforcement. Before the decision of the abortion cases and their antecedents, a lawyer speaking of "the right to privacy" was most likely referring to the protections afforded by the Fourth Amendment to the United States Constitution. The contingent nature of those rights is made apparent in the language of the amendment itself. It is only "unreasonable" searches and seizures that are forbidden. Privacy may be invaded and papers and other evidence seized, provided formalities of justification have been satisfied and the official conduct does not transgress the scope of the authorization. Nevertheless, the bulwark of the Fourth Amendment is constantly beseiged by claims of social interest and expediency, and for constriction of the rights it protects.

The first and perhaps most important reason for this is that Fourth Amendment privacy rights are most often asserted by persons who have something criminal to hide. In a period of extreme public sensitivity to crime like the present, many in the community tend to regard the Fourth Amendment simply as a refuge for felons. Even when privacy values in criminal justice administration are identified and it is recognized that a police establishment ignorant of and hostile to such values constitutes, in the long run, a peril to the entire community, the claims of privacy may be perceived as weak, speculative, and remote when compared to the insistent demands of law enforcement.

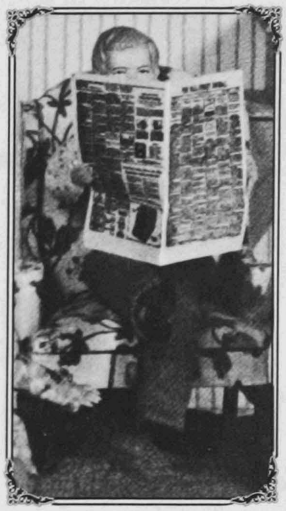
Vigorous judicial enforcement of privacy values is also inhibited by the fact that courts are agencies of government and under constraint to permit legislatures and administrative personnel to perform, and within limits to define, their own functions. Once the legislature initiates a penal policy that, for example, criminalizes the use of drugs and alcohol, gambling, and certain forms of sexual expression, the courts will often respond by conceding authority to the enforcement agencies to perform their difficult duties; the concessions tend toward the limitation of constitutional inhibitions on governmental action. However persuasive the case for contemporary penal policy in these areas, the fact, plainly stated, is that it has substantially constricted the boundaries of the private world in American society.

The implications of these developments are more somber than is sometimes understood. A contagion effect sets in. Attitudes formed in the context of counterespionage or organized crime are readily transmittable to surveillance of the activities of politically suspect groups or even of political rivals. Watergate taught us that.

Sometimes, in responding to the exigent claims of law enforcement, the courts, with insufficient awareness, appear willing to open wide the gates of the private world to state power. In the famous "pen register" case, a prevailing majority of the present Supreme Court held that the government, without a warrant, may acquire evidence of the phone numbers dialed by a suspected person, apparently on the ground that because the caller necessarily discloses this information to the telephone company it cannot be deemed private.[5] Yet in an interdependent technological society one cannot function, or even survive, without a plethora of limited disclosures. If the tendency of this decision continues and if, as against government, the citizen is not permitted to maintain the limitations on his limited disclosures, then we shall have ceded an enormous tract of the private world to uninhibited state scrutiny.

The canvass of dilemmas and difficulties encountered in the legal experience does not and is not intended to suggest that the record of the law in defining and protecting the limits of the private world is simply one of waste and futility. In Oceania there is no law, and maintenance of the values of

human individuality is hardly conceivable without it. Yet if the private world is to have meaning in the postmodern age, we must be disabused of the notion that all that is required of us is to permit the law to undertake its initiatives and pursue its objectives. The law ultimately reflects the struggle of interests and values going forward in society, and the future of law is one of the interests at stake in the struggle. That there are dimensions to the social and ethical issues in dispute that transcend the merely legal is best demonstrated by a scrutiny of the legal experience itself.



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II

Given a political society as intent as Oceania's to blot out the past, it is perhaps not surprising that the reader of the novel is left in doubt about how the regime, firmly ensconced in Winston Smith's day, had established itself. Orwell tells us only a little about the events that led to the reality of 1984. Although the history of the previous half-century is shadowy, one deduces that Oceania did not emerge from an established Hitler-like or Stalin-like dictatorship. Rather it appears in some way to have evolved principally from the Western capitalist societies of Britain and the United States. One suspects that a warning is being issued here, and the suspicion is strengthened when Orwell is found writing in "The Prevention of Literature," one of his best-known late essays: "In our age, the idea of intellectual liberty is under attack from two directions. On the one side are its theoretical enemies, the apologists of totalitarianism, and on the other its immediate, practical enemies, monopoly and bureaucracy."

The notion that the modern threat to individual autonomy and the other values fostered by the private world comes not alone or, even, principally from the state, but rather from society itself, has been frequently advanced in the recent past. The great dichotomy is not that of public and private; it is that of the *social* and the private. In short, it is modern culture that subverts the private world, and, according to some who have addressed the question, the true issue is how the grip of society can be eased or the culture overthrown.

Before proceeding with a consideration of this argument and the evidence invoked to support it, one preliminary matter requires attention. Either as a political tactic or as a rhetorical embellishment, some who attack Western society as depersonalizing and, hence, as dehumanizing, have argued that the true enemy of the private world is not the state and that the defenders of that world need not maintain their traditional wariness of state intrusion. Such assurances convey no conviction and deserve no credit. Any governmental organism commanding the sorts of electronic and computer technology that are available today in all developed nations must be regarded not simply as a potential but as an active antagonist of the private world. We shall ill serve our vital interests if in our haste to indict Western culture we underestimate the current massive and burgeoning threat of state power.

Yet one need not assume the diminishment of the political threat to recognize the force of the argument of those who indict modern culture for its devastating effects in the private realm. According to the picture drawn, the inhabitants of the Western world with its mass media, mindless popular entertainment, and advertising, are being manipulated and conditioned, not in the fashion of Oceania's tyrannical rule over party members like Winston Smith and Julia, but rather in a manner closer to its handling of the lower orders of society, the proles.

In *Nineteen Eighty-Four* the telescreen that may be dimmed but never turned off constitutes a primary symbol of the state's intrusions into the private lives of its subjects. Yet how great are the differences between such a society and one in which persons who because of cultural constraints, loneliness, apathy, and diminished sense of personhood, can never

There is irony and danger in the fact that a strategy for defense of the private world necessitates struggle in the public arena.

bring themselves to turn off the television set? And what is seen on television may often consist of education in the devaluation of privacy. Much of its "harmless entertainment" consists of revelations into the intimate lives of media personages. If, even with their complicity, we scrutinize the lives of public personalities as if they were animals in a zoo, have we not suffered losses in human dignity of all persons and reduced the value of privacy in our own lives?

Other expressions of the policy of Oceania have been identified in contemporary Western society. We are developing, some have said, our own versions of Newspeak. Thus, Herbet Marcuse argued that the technological culture promotes a language of overwhelming concreteness, highly functional in character, ill-adapted to conceptual thinking, and discouraging to criticism and evaluation. Perhaps of more immediate concern is our apparent inability to inculcate language facility of any sort in many of our young. Because it has become familiar, it no longer startles us that it is possible for young persons to complete their studies in what are ostensibly the great universities without gaining a command of language above the levels of technical literacy and without acquiring sufficient understanding of language to respect it. Such persons are deprived of a capacity essential to autonomy, and lack adequate defenses against the aggressive inroads of political propaganda and cultural imperatives into their private worlds.

It is argued by critics on the right that the very assumptions of a liberal society unleash the assaults of popular culture on certain vital aspects of privacy. The unrestrained license of speech and publication mandated by that society denies refuges and living space free from recurrent manifestations of overt sexuality to individuals and families desiring such freedom. Even the huckstering of hammers and saws takes place in a synthetic atmosphere of blatant sensuality, even the sale of candy bars to children. These phenomena are importantly implicated in the rise of political activism within fundamentalist religious groups. Their aggressive political program may rest less on optimism about the redemption of American society than on a determination to make effective their separation from the moral contaminations of society. It reflects a purpose to construct areas of privacy for themselves, however destructive the agenda may be to the autonomy and privacy of persons committed to different values and perceptions. The liberal society thus creates its own enemies and provides them with their most effective weapons.

The critique of modern culture is many faceted, but the overarching allegation is that it produces human beings crippled in character and personality, incapable of autonomy, lacking in identity, leading lives of despair, and prone to violence. One recalls a recent rash of instances of persons falsely claiming to have found dangerous foreign objects in packaged food and drugs. Most often, motivation for the claims appeared to include a thirst for attention, a craving for an identity created by a minute's exposure before a television camera. If it is argued that the behavior is merely that of a lunatic fringe, the answer is that the form a society's lunacy takes may have much to say about the attributes of the prevailing culture. The tendency in American society to identify fame with notoriety is surely not one confined to an eccentric few. There is reason to suspect that the tendency points to a weakening of the sense of self, a shrinking of what Erickson calls "ego identity": in short, a condition in many persons that renders the concept of the private world unfathomable and ultimately frightening.

In an almost perfect phrase, Montaigne asserted that "a man must flee from the popular conditions that have taken possession of his soul." It is hard advice. Given the force of the intrusions in the modern world, both those launched by the state and also those created by the prevailing culture, where is the man to flee? And, even more difficult, how may the "popular conditions" be altered and made less threatening to his private realm? In much of the current literature, especially that coming from the left, a strong note of fatalism is sounded about the capacity of Western society to cure itself. That society, it is asserted, is impotent to confront the drift toward destruction of the private worlds by measures short of an overturning of social institutions and a complete recasting of social, political, and economic relations. If the prescription is rejected, then inevitably the Western world will keep its rendezvous with the cold day in April when the clocks are striking thirteen.

It is a somber forecast and one sufficiently buttressed by evidences and omens to be taken seriously. Yet the diagnosis and prescription are hardly disinterested. The cure proposed, moreover, may prove more virulent than the disease. Still, troubling questions persist: Is Western society any longer capable of producing and nourishing an individualism appropriate to the times? Will it prove able to hold back the threatened eclipse of the private worlds?

There may, indeed, be reason to hope that, despite evidences of decay, Western individualism is a hardier plant and its roots more firmly anchored than the critics of the modern state and contemporary culture allow. The values of human autonomy and uniqueness are susceptible of many forms of expression. Manifestations of the ideals that emerged in the early decades of the Industrial Revolution do not represent their only possible expressions. The rejection or modification of some earlier manifestations does not necessarily entail surrender of the values themselves.

The critical issues in the defense of the private world may prove to be questions of will and strategy. There is evidence that the desire to promote and defend some privacy interests has waned. But not all the evidence points in the same direction.

In the course of the past two decades a stronger outcry than ever before has been raised against certain intrusions into the private realm. The widespread protest against subliminal advertising supplies one illustration. A proliferation of statutory enactments dealing with a broad spectrum of privacy intrusions and a plethora of judicial decisions concerning related issues provide other examples.

It is true, of course, that the growing public sensitivity to at least some privacy issues and the reaction of legislatures and courts may itself constitute evidence of increasing and intensified assaults against the private world in the United States. The burgeoning of law relating to the rights of individuals is indicative of a crisis of liberty that has persistently afflicted the Western world since the First World War. But if modern concerns reflect an ominous challenge to the private world, they are also part of a defensive response. And response is vital to any hope that Oceania is not to be the ultimate destination of Western society.

There is irony and danger in the fact that a strategy for defense of the private world necessitates struggle in the public arena. Such a strategy necessarily entails more than the framing and enforcement of legal measures, but the existence of enforceable rights constitutes a vital part of it. The rise of electronic and computer technology and their ready availability to government and private business groups enormously complicates the devising of strategy. The private world lies continuously under the shadow of power capable of being used for invading and obliterating the private realm. These exigencies, however, provide opportunities for the creation of policy. We are unable to eliminate such threats, but there are ample occasions for mandating uses of technology that minimize, instead of magnify, interferences with private lives.

Nor should one overlook the importance of the judicial and legislative defense of privacy values in the development of personal attitudes. Learned Hand once suggested that the freedoms of the First Amendment thrive only among a people capable of valuing them. Yet it is also true that debates on freedom-of-speech issues in the Supreme Court since 1917 have done much to educate public attitudes and that modern support of the values springs in important part from the advocacy of great judges, sometimes expressed in dissent.[6] So also, adjudication of interests vital to the private world may contribute to the formation of a vigorous public opinion and hence produce effects going far beyond the particular issues adjudicated.

Yet there are limits on what may be demanded or expected from law and public policy. It is surely not paradoxical that the survival or loss of the privacy value depends most importantly on what is done by individuals in their private lives. What is done may, in turn, depend importantly on how well institutions dedicated to cultivation of the life of the mind and to aesthetic sensibility perform their tasks, and whether those efforts can escape submersion in the mindlessness this society spawns.

There are no guarantees. The case for hope is an uneasy one, but this is a time when all liberal hopes rest on uneasy premises. As this becomes increasingly clear, many persons will return to *Nineteen Eighty-Four* to be reminded of what is at stake.

FOOTNOTES

1. 381 U.S. 479 (1965). The criminal defendants in the case were not marital partners who used birth control substances but rather employees of a birth control clinic who provided materials and instructions to clients and were charged as accessories to the statute's violation.
2. "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J., (1971).
3. These include such cases as Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Skinner v. Oklahoma, 316 U.S. 535 (1942); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973).
4. Olmstead v. United States, 277 U.S. 438, 478 (1928).
5. Smith v. Maryland, 442 U.S. 735 (1979). See also United States v. Miller, 425 U.S. 435 (1976).
6. See especially the opinions of Justice Holmes and Brandeis in Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927).

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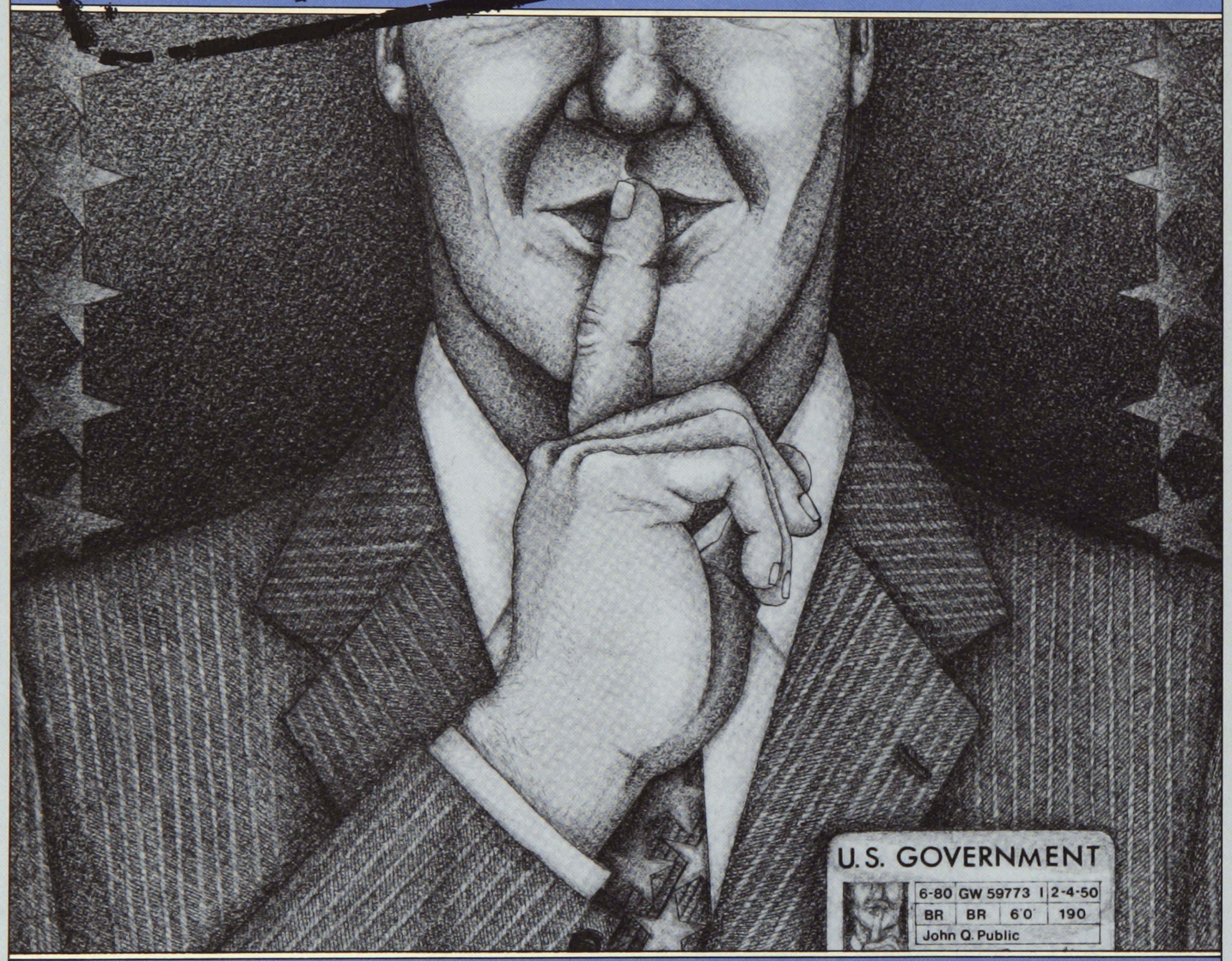
GOVERNMENT SECRETS:



THE FIRST AMENDMENT IMPLICATIONS OF "PREPUBLICATION REVIEW" AGREEMENTS

Statement for the Committee on Government Operations, U.S. House of Representatives, October 19, 1983.

BY LEE C. BOLLINGER

In recent months, public discussion has begun to focus on a variety of measures now being implemented, or being proposed, by the present administration, all of which are intended, and designed, to prevent public disclosure of government information. Of principal concern to many have been the administration's efforts to restrict the operation of the Freedom of Information Act, to increase the amount of material which will receive the designation of "classified," and to require that all government officials with "authorized access" to "Sensitive Compartmented Information (S.C.I.)" will sign an agreement that they will forever thereafter—during the whole of their lifetimes—submit their writings to a system now referred to as "prepublication review." These actions (and others of like intention and effect), many have argued, pose a serious risk of inhibiting the free exchange of views within the country and, for that reason, raise serious First Amendment problems. Claims that this or that policy violates the principle of freedom of speech and press are now being heard with greater and greater frequency.

In this statement, I address only the First Amendment implications of one of these information policies—the prepublication review agreements now being circulated among various departments and agencies of the federal government. Does this particular policy, instituted by a presidential directive in March, 1983, violate the constitutional principle of freedom of speech and press? The answer I give here is that it does.

As we begin to consider that question, we must understand in what way the prepublication review contract is different from the other actions of the administration with which it has been lumped together. It is understandable and appropriate that people should try to draw together a variety of seemingly discrete decisions with regard to government information policy in order to obtain a better sense of the overall impact of those decisions; but, in trying to see the whole we may fail to see, or at least underestimate, the significance of some of its parts. We emphasize the similarities at the expense of the differences—and the differences in degree may be profound. Such, at least, is the case with the prepublication review agreements.

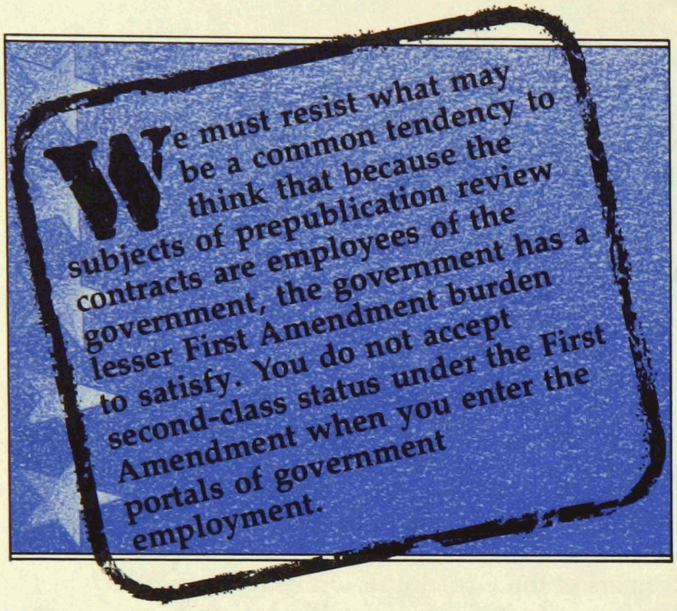
Hiding behind the euphemism of the term "prepublication review" is the bare fact that what we are facing amounts to nothing less than the institution of an extensive licensing system for publication in American society. Although this particular licensing system now being imposed is of more limited proportions than the notorious—and to the American colonists the infamous—licensing system of sixteenth- and seventeenth-century England (against which John Milton's magnificent *Aereopagitica* was directed), it is, in form and effect, a licensing system nonetheless. Prior to any publication, those affected by the system must seek the permission of a government official, who will scan the work for improper disclosures. As must be true with any effective licensing regime, if a work is not submitted prior to publication, punishment will be imposed, even though the work on later examination can be shown to contain no improper communications. Such is the simple operation of a system we have come to know in free speech terminology as prior restraint.

For more than six decades now, the courts of this country have struggled with the task of defining a workable set of concepts and principles for the First Amendment. Throughout this time, however, a virtual consensus has formed around one basic idea: that prior restraints are the least favored, most distrusted, method of proceeding against harmful speech activity.

Licensing, or prior restraint, it has been repeatedly noted in the literature and cases, is the one matter, perhaps the only matter, we can be confident the framers of the Constitution intended to prohibit by the free speech clause. Even Blackstone, when in his *Commentaries* he defined the extremely limited concept of free speech in England, said it prohibited prior restraints: "The liberty of the press is indeed essential to the nature of a free state; but this consists of laying no *previous* restraints upon publications. . . ." Professor Leonard Levy's study of the original understanding of the First Amendment concluded that it surely encompassed Blackstone's notion.[1] Furthermore, in one of the earliest free speech cases in this century, *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907), Justice Oliver Wendell Holmes observed that "the main purpose" of the First Amendment was "to prevent all such previous restraints upon publications as had been practiced by other governments. . . ." In *Near* v. *Minnesota*, 283 U.S. 697 (1931), the Supreme Court translated this view of prior restraints into constitutional doctrine.

Under the "heavy presumption against [their] constitutional validity,"[2] licensing schemes have rarely been upheld. Even when national security information has been the object of the government's quest for prepublication restraint, the Supreme Court has given precedence to the principle that licenses are antithetical to the idea of free speech.[3]

The primary reasons for this wariness toward licensing systems are not difficult to understand. Licensing systems are intellectual roadblocks, operating indiscriminately. By subjecting everyone encompassed within the scheme to systematic inspection, the vast numbers of innocent along with the guilty few, they inflict heavy costs of delay and disruption on the communities they touch. Conducting general searches as a method of uncovering criminal activity is bad enough in any free society, and barely tolerated; when they are introduced into the arena of public debate, the concerns about them increase exponentially. For then the problems are not just that added burdens are imposed on our ability to get to and from places, but that relevant information and ideas will become stagnant while trapped in the inev-



itably delay-ridden review process, that people will forgo participation in public debate rather than submit themselves to the indignity of obtaining government permission to speak, and that government officials empowered with control over peoples' access to public debate will let their judgments be swayed by political self-interest and small-mindedness.

This last-mentioned risk cannot be overstated. Not every censor is bad; Rousseau noted in his *Confessions* that he received editorial assistance from the French censor, a man of apparently great intellectual and literary sophistication. But Rousseau's censor is surely untypical of those who have occupied the position throughout history, most of whom we may safely assume resembled the caricature of the petty bureaucrat we encounter in fiction. For those of weaker, less lofty natures, a system of prepublication review offers tempting opportunities for making life difficult for those they dislike.

Now, granting that licensing systems for speech activity are—to put it in the form of an understatement—unfavored under the First Amendment, we are still left with the fact that not every licensing system will be held unconstitutional. For the licensing scheme now under review, there are several factors to be considered in deciding whether it falls within that small category of schemes that will be, or ought to be, permitted under the First Amendment. Specifically, we must consider the significance of the following features of the proposed plan: first, that it will apply only to *government employees*; second, that it will be accomplished through *contractual agreement*, that is to say, it will apply only to those people who *agree* to submit to it; and, third, that it is said to be justified by an extraordinary governmental interest and, for that reason, is constitutional.

In assessing the relevance and weight of these considerations, we of course must take into account the 1980 decision of the Supreme Court in *Snepp* v. *United States*, 444 U.S. 507. In that case, a majority of the Court upheld the constitutional validity of a prepublication review agreement that Mr. Snepp had signed when he began working for the Central Intelligence Agency and further held that Snepp's violation of that procedure justified the lower courts' imposition of a constructive trust on the profits derived after the breach. The present question for the legislative and executive branches, and in the future for the Court, is what limit to impose on that holding. The following discussion attempts to identify that limit.

The relevance of government employee status

It is a constitutional commonplace that those employed by the government must sacrifice some of their political freedoms, including the freedom of speech, which, as ordinary citizens, they would retain under the Constitution. The Hatch Act, which the Supreme Court has specifically upheld as constitutional (*United States Civil Service Comm.* v. *National Assoc. of Letter Carriers*, 413 U.S. 548 (1973)), seriously restricts the political activities of government servants. Yet it has been thought desirable to impose these restrictions in order to maintain a civil service free from the distorting, partisan pressures of those who happen, at the moment, to hold the reins of power. Members of the military forces must also forgo many of the freedoms of ordinary citizens.

It would, however, be a grave mistake to conclude from these examples that those who are employed by the government are somehow not entitled to any protection from the First Amendment; or, even more to the point, that whenever government employees are the subjects of speech restrictions we need not demand of the government the same degree, or burden, of justification as we would if an ordinary citizen were affected. The restrictions that have been permitted under the Constitution have been authorized because the governmental interest at stake was viewed as greater with respect to those employees than to the population generally and not because the claims of those individuals were somehow worthy of less regard. In short, we must resist what may be a common tendency to think that because the subjects of prepublication review contracts are employees of the government, the government has a lesser First Amendment burden to satisfy. You do not accept second-class status under the First Amendment when you enter the portals of government employment.

This leads to a related point, one which bears on the proper emphasis to be placed on the fact that these prepublication review agreements arise out of an "employment relationship." The majority opinion in *Snepp* makes frequent reference to the notion that Snepp had a "trust relationship" with his employer, the CIA, and suggests that, as with any employment relationship, there were obligations of confidence

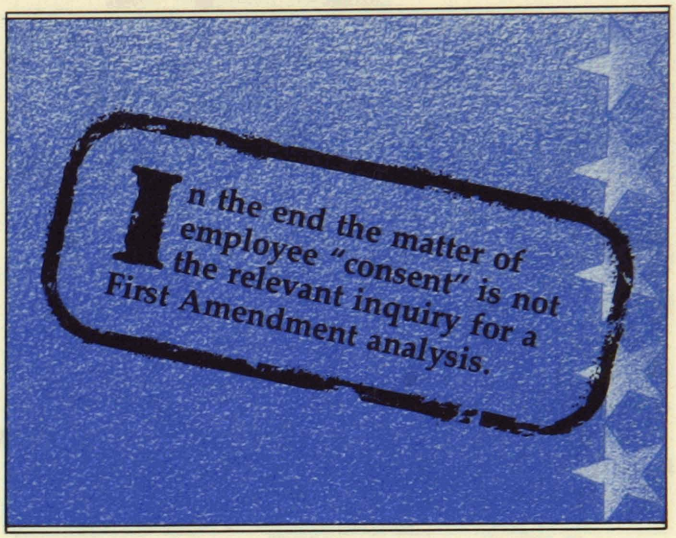
implicit in that relationship. It is certainly true that the common law of agency imposes various restrictions on a former employee's freedom to disclose information obtained during the employment relationship. Whether under the common law prepublication review agreements would also be regularly enforced we need not consider here. The only point I wish to emphasize at the moment is the simple, yet possibly neglected one that what is done with respect to private employment relationships may not be permitted when the *government* is the employer—precisely because the First Amendment exists to restrict governmental interference with speech activity in the society. Because of the First Amendment, in short, there cannot be a perfect analogy between what private employers can do in the marketplace and what the government can do there.

The relevance of the contract

In assessing the degree to which the proposed licensing–prepublication review process runs contrary to our First Amendment values, it seems often to be emphasized that the system is the product of a "contract." It is true that the government has not adopted a *regulation* or *statute* imposing the prepublication review obligation on every government employee who has access to certain intelligence information. Every person affected will have *agreed* to submit to the procedure. Should, then, this element of "agreement" be treated as significant in the First Amendment analysis?

In the footnote in *Snepp* where the Court disposed of the First Amendment issues, the majority appears to rely on the contractual factor. The footnote points out that "[w]hen Snepp accepted employment with the CIA, he *voluntarily signed the agreement* that expressly obligated him to submit any proposed publication for prior review" (emphasis added). It goes on to note that he did not "claim that he executed this agreement under duress," that "he voluntarily reaffirmed his obligation when he left the Agency," and that, generally, he had "signed" the "agreement" which he now sought to challenge as unconstitutional.

On the other hand, the footnote intimates that the contractual element may not have been a crucial factor in the minds of the majority justices when it says that "even in the absence of an express agreement," the agency "could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." What these "reasonable restrictions on employee activities" might be, and whether they would encompass a general licensing scheme such as that which Snepp had agreed to, the Court did not specify. Because of this vagueness, one comes away from reading the footnote with the sense that the fact of employee consent to a licensing scheme is important to establishing its constitutionality.



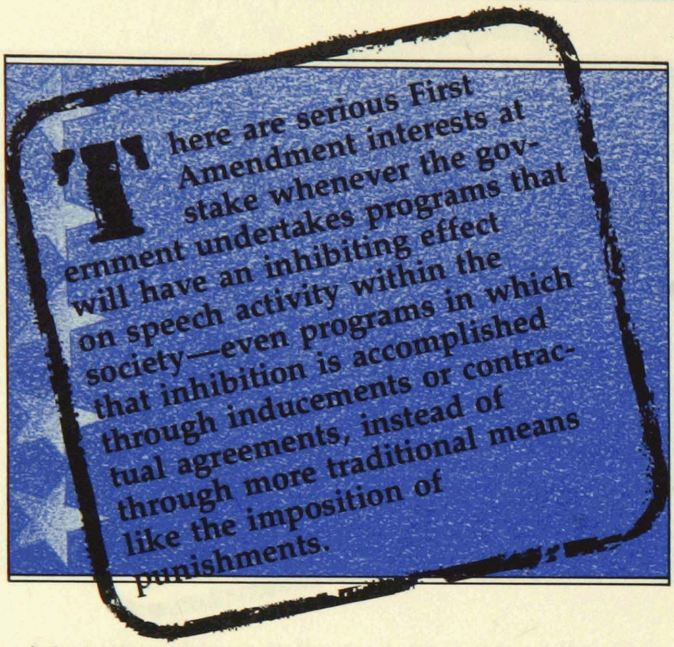
Should this be so? I do not believe that ultimately the "contractual" underpinnings of a licensing system, even one such as we saw in *Snepp*, will or should prove to be a relevant factor in this area.

Before explaining that judgment, it should be noted that Snepp, as the Court stated, did not raise a claim of "duress" or, what is probably more appropriate to the circumstances of his case, argue that he had signed a contract of adhesion which should not be regarded as a voluntary engagement on his part. The Court therefore properly assumed a "voluntary" agreement in that case, and necessarily left undecided the question whether in another case that assumption might successfully be attacked. Realistically, however, it seems unlikely that someone like Snepp could have mounted a viable challenge to the voluntariness of the agreement.

Perhaps a much more credible challenge along the lines of involuntariness could be mounted by an employee who had signed a prepublication review contract while *already* holding a government position rather than at the initial stage of accepting employment. Once a career of government service is underway, only a very hardy soul indeed will refuse to "accept" the government's "offer" and thereby expose himself or herself to dismissal or to other possible career disadvantages.

It would not be fruitful to dwell further on this claim, however, for in the end the matter of employee "consent" is not the relevant inquiry for a First Amendment analysis. For even if the employees can be said to have "voluntarily" signed the contracts, that willing behavior would not aid the government's position in favor of a licensing system.

To develop the point, we can begin with what I think is a reasonable assumption—that the government's efforts to secure a contractual limit on the employee's future speech activities will have an impact on public dialogue. The nature of public discussion, in other words, will be changed as a result



of the government's behavior, not only by reducing in some measure the risk of improper disclosures but—as noted before—by introducing the costs of delay and improper censorship into the system. The system will be different because of the government's proposed action.

If one accepts this assumption as true, as I think one must, then we can move to a second premise—namely, that the First Amendment does not exist simply to protect the free speech rights of particular individuals but to serve a general societal, or "collective," interest that we all share as a nation. If the only function of the First Amendment were to protect the individual interest of each of us to be free to speak as we wish, then we would not be concerned if any one of us "voluntarily" agreed with the government to limit his or her speech freedom. What you choose to do with your speech rights would be of no interest to me, at least in First Amendment terms. If, on the other hand, we *all* have an interest in preserving the general opportunities open for expression—or, to put it slightly differently, if we all have an interest in how we behave toward the speech activities of others—then we would also have an interest in overseeing how the government was acting to shape the speech behavior of members of the society.

That the First Amendment embodies this latter idea of free speech is clear under the existing jurisprudence. Free speech is not simply concerned with protecting the atomistic interests of discrete individuals; rather, it establishes a societal, or collective, norm under which we have committed ourselves to a position of extraordinary—and even extreme—self-restraint towards speech activity (primarily *political* speech activity) within the society. Why this choice has been made—whether it is because of an interest we have in getting as much information and as many ideas as we possibly can or, more generally, because we learn about our capacities to tolerate behavior we find generally distasteful or troublesome—we need not resolve here. What is significant for the present discussion is the recognition that there are serious First Amendment interests at stake whenever the government undertakes programs that will have an inhibiting effect on speech activity within the society—even programs in which that inhibition is accomplished through *inducements* or contractual agreements instead of through more traditional means like the imposition of punishments.

It cannot ultimately matter that the people who were approached by the government with its "offer" of a licensing scheme agreed to sign it "voluntarily." To make the point with emphasis, we might ask ourselves whether the First Amendment would permit the government to institute a national plan in which, in exchange for a tax credit of $1,000, it sought to obtain "voluntary" agreement on the part of each citizen to refrain from criticizing the government during the remainder of his or her lifetime. Would such a scheme be upheld as constitutional, being sustained on the ground that the only concern of the First Amendment is to ensure that the state does not deprive citizens "involuntarily" of their basic freedom to speak out on public issues? I think not, so long as the First Amendment embodies its larger social function.

Is there a sufficient governmental interest?

We come, then, to the principal consideration. It is not true that under the First Amendment we are somehow less concerned about what happens to the speech freedom of government employees; nor is it determinative that the individuals affected by the government's program have "voluntarily" sacrificed their freedom. That determined, we must still ask whether the government can meets its extraordinary burden in justifying the extension of the licensing–prepublication review system throughout the government, as it now apparently proposes to do.

It must be understood that this is a matter of some difficulty. By the *Snepp* decision, a majority of the Supreme Court has approved a prepublication review system in a part of the government. It is possible to say, of course, that the decision is incorrect under existing constitutional standards and that it may not withstand the scrutiny of time; but that seems unlikely. On the other hand, even if the decision survives as part of our free speech jurisprudence, it must be given a boundary. It seems clear that *Snepp* would not justify a government plan to require every citizen in the country to submit for prepublication scrutiny any writings on public affairs so that the government could ascertain whether, by chance, some classified information is about to be publicly disclosed. In such a case, the free speech interests at stake would certainly overwhelm the government's purported interest in keeping classified information secret. The point is, quite simply, one we might per-

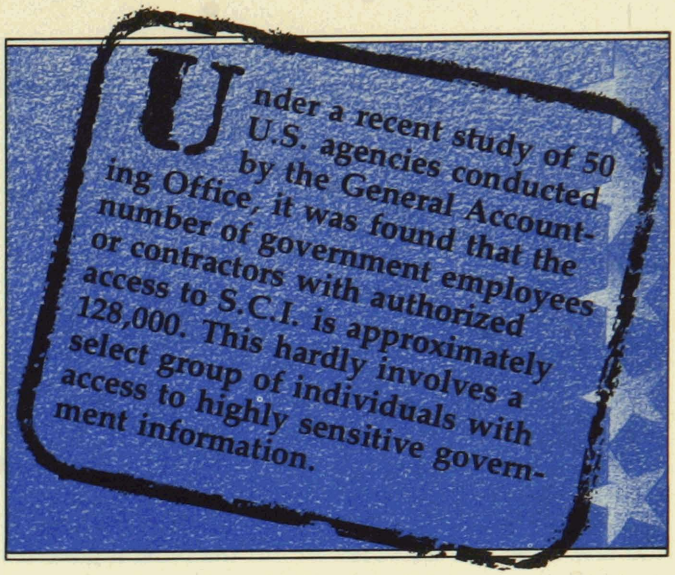
haps overlook: that *Snepp* must be given a limit. And so the question becomes what that limit should be.

One path to follow in defining the boundaries of *Snepp* would be to focus on the categories of material which the government proposed to protect through the licensing system, and perhaps additionally on the nature or degree of access to that material which those who would be subject to the licensing system would have. By seeking prepublication review agreements from all government employees who have "authorized access" to "Sensitive Compartmented Information," this appears to be the interpretation of *Snepp* that the government is following. To the government, in other words, *Snepp* is an *information* case: As long as the government can demonstrate that the information it seeks to protect would bring great harm if publicly disclosed, it should be constitutionally free to implement a licensing system for those who have once had access to that information. At the present moment, the government's only claim is that "Sensitive Compartmented Information" is such a category of information.

Such an interpretation of *Snepp*, however, seems both misguided and highly unlikely to prove acceptable to the courts. There are two reasons for this.

The first is quite simply the massiveness of the intrusion into public discussion under an S.C.I.-related licensing scheme—intrusion unaccompanied, in all likelihood, by a parallel increase in security for vital government information. Under a recent General Accounting Office study of 50 U.S. agencies, it was found that the number of government employees or contractors with authorized access to S.C.I. is approximately 128,000. This hardly involves a select group of individuals with access to highly sensitive government information. Furthermore, this number by itself does not reveal the full impact of the proposed system of prepublication review on the openness of political dialogue. We must take into account the fact that, given the especially high turnover rate among government employees, the number of individuals subjected to the licensing system will be increasing yearly. Finally, as for the potential gains in enhanced secrecy from the proposed system, the GAO study found that the relevant government agencies could only point to five instances in the last five years in which S.C.I. had been improperly disclosed, of which only two, in the judgment of the agencies surveyed, would have been averted by a licensing system. This hardly seems the solid basis the government needs to meet its extraordinary burden of justification.

The second reason *Snepp* should and will not be extended to authorize the proposed system is one that most people would probably not anticipate. The argument is simply that the legal principle underlying the government's claim—that the licensing system is valid because the importance of the area of information to be protected outweighs the burdens the system imposes on open, uninhibited discussion—is



not one that courts are equipped to decide. It proposes that we launch the courts on a decision-making course for which they are ill-suited.

One must appreciate the labyrinthine complexity of the issue the courts will be asked to resolve under the administration's position. Minimally, there is involved the task of assessing just how seriously harmed the country would be by public disclosure of some of the information. As *Pentagon Papers* demonstrated, that in itself is an assignment of great difficulty and delicacy, one demanding expertise few judges possess. But *Pentagon Papers* was actually a far easier case in comparison to the kind courts would be considering if we accepted the Administration's extension of *Snepp*. An injunction is directed at a specific set of documents, but a category of information like "Sensitive Compartmented Information" encompasses a vast, perhaps incomprehensible, range of documents. Courts must assess not only the range of importance to national interests of the multitude of documents in that category, but also the likely impact on public debate if information in, or related to, that category had to pass through a prepublication censorship process before it could be publicly released. The actual *operation* of the classification process must be assessed *in its entirety*. That is an assignment beyond the competence of the courts.

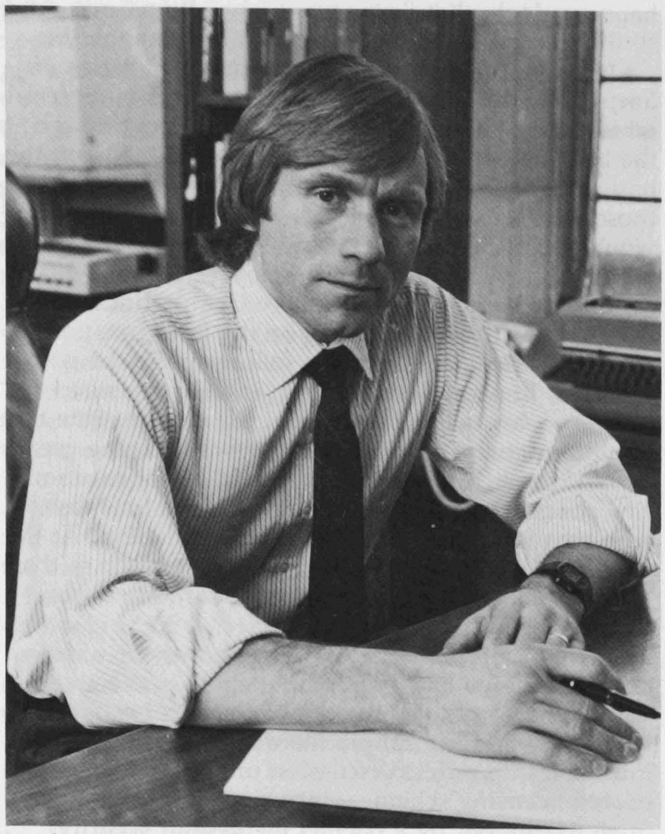
The administration would appear to be suggesting at the moment that "Sensitive Compartmented Information" is a peculiarly significant category of information, one dealing with the "methods and sources"—or procedure—of intelligence information gathering and not with the substance of intelligence. By taking this position they no doubt hope to allay concerns over an unending case-by-case evaluation of licensing systems. Procedure-substance distinctions rarely hold up over time, however, and it is difficult to see why what the government has actually come *to know* through its "methods and sources" should not contain data that is just as important to our national

interests as the "methods and sources" themselves. One can fairly anticipate that precisely that claim will be raised at some future time, no doubt with a tone of incredulity toward those who would then seek to limit the *Snepp* rule to information about the intelligence-gathering procedures. We would then be on the path of having to evaluate the competing costs to the government, and to the First Amendment, of a variety of licensing schemes for all kinds of government-held information, responding to concerns not just over national security but over matters such as individual privacy.

In the face of this serious problem of judicial competence, it is wiser for courts to seek an alternative method of demarcating the boundaries of *Snepp*. The most likely candidate would be that of limiting the case to the Central Intelligence Agency and perhaps the few other like agencies within the federal government. Rather than engaging in an evaluation of categories of information, the courts would extend the *Snepp* exception for a prepublication review system to those few groups within the government whose assigned task is the acquisition of highly sensitive foreign intelligence. This would provide a far more workable rule for courts, one that reflected a general understanding, within the government and the larger society, about these agencies' exceptional character and one that was most consistent with the general First Amendment concerns about maintaining a narrow role for licensing schemes.

In the final analysis, then, the administration's position ought to be rejected not for its assessment of the potential harm the society may suffer from improper disclosure of some information within the category it has presently selected for a licensing system but rather because it proposes a line of inquiry—not just for this case but for others in the future as well—which is beyond the competence of the judicial system to administer. A study of classes and categories of information and of the potential for harm from data disclosures within those groups is unwise for courts to undertake. The better alternative, the one with the sharpest available stopping point, is that of restricting *Snepp* to certain agencies that gather foreign intelligence. In all probability, this seems what the Court in *Snepp* had in mind when it emphasized, repeatedly, the special nature of the employment relationship between agents like Snepp and an agency like the CIA.

Author's note: Following congressional hearings on the censorship directive, Congress imposed a temporary suspension on its implementation until April 15, 1984. In February, the White House announced that the President had decided "not to implement" the original directive. Several members of Congress, however, have expressed their intention to continue to seek legislative restrictions on the future use of lifetime prepublication review agreements.



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FOOTNOTES

1. See L. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* (1960).
2. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1968).
3. The New York Times Co. v. United States, 403 U.S. 713 (1971). See also, Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

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