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An Outside Educator Views Michigan's Legal Education from the Inside

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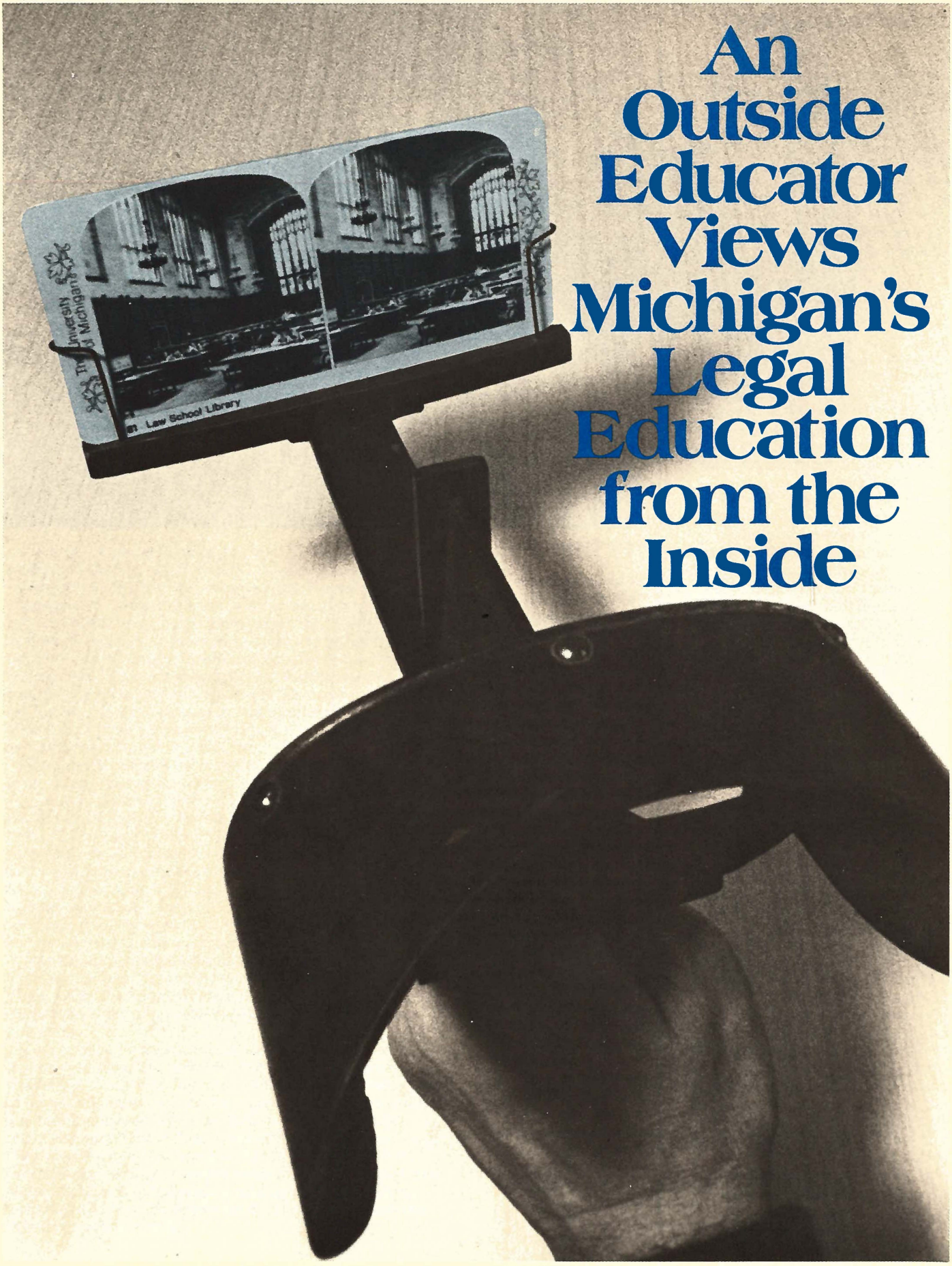
An Outside Educator Views Michigan's Legal Education from the Inside



by Harold J. Spaeth
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Editor's Note: *Harold J. Spaeth is a Michigan State University political science professor who has attracted considerable attention for his computer predictions of the outcomes of U.S. Supreme Court cases. Over the past seven years, his predictions are said to have had an accuracy rate of more than 93 percent. Spaeth's approach is to analyze the "voting records" of justices to determine personal attitudes and other factors influencing their decisions. He says these voting records are usually more revealing than legal "theories" which may mask the underlaying motivations in the particular judgment. A U-M law student since the summer of 1979, the 50-year-old professor says "a law degree will assist my future writing and research, and better equip me to do consulting work for attorneys who try cases before the Supreme Court."*

In the summer of 1979, after 25 years behind a podium, I became a student at the Law School. Call it role reversal with a vengeance. Now, 14 months and 45 credits later, some observations on the producers, products, and processes of legal education at the University of Michigan.

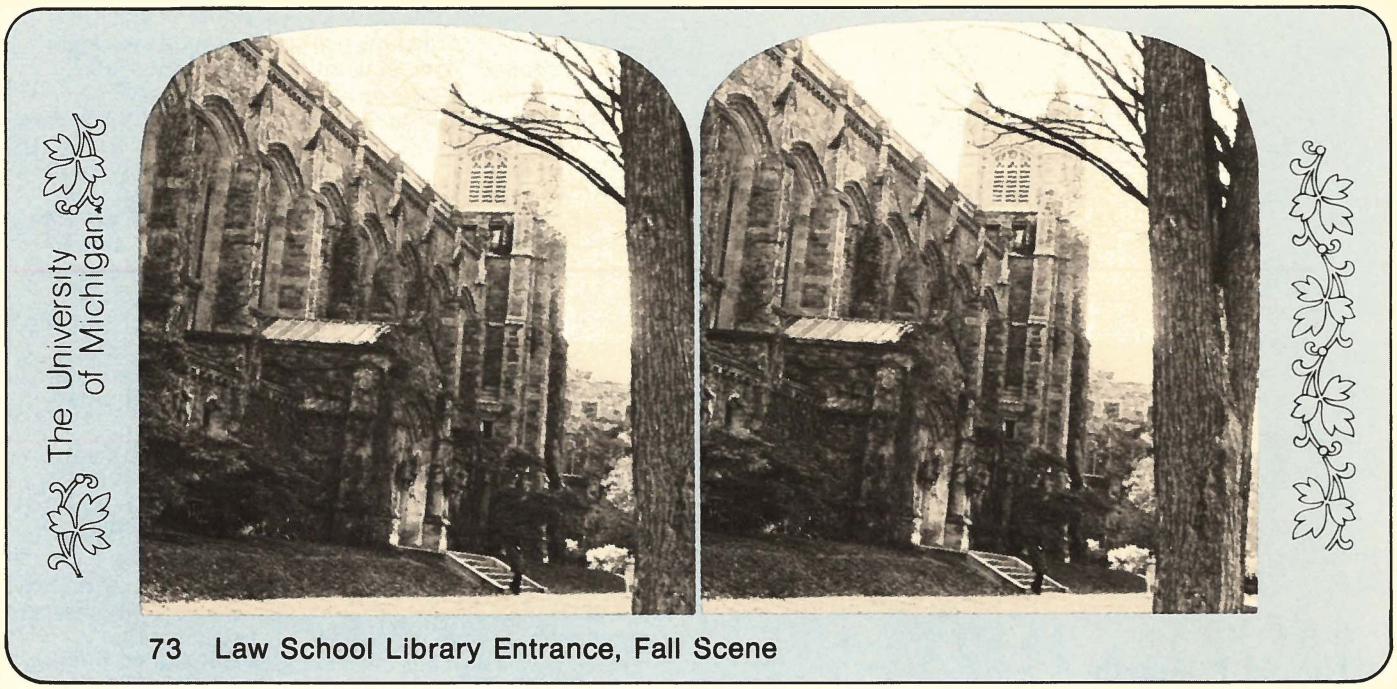
The Faculty

Mastery of a subject does not necessarily correlate with an ability to teach. It does among those members of the faculty I have encountered. Not only is their command of the subject complete, so also is their commitment to scholarship and, equally pronounced, to the practitioner's art. The pedagogical approach taken dovetails most impressively with the nature of the subject matter: from black letter doctrine at one extreme to policy at the other. But even where the subject lends itself to a policy orientation, a steady undercurrent of attention to detail prevails. It is this unwavering attention to detail—to specific facts—that, in my judgment, best characterizes legal education and sets it apart from its sister disciplines.

As a political scientist, my concern has been the macroscopic—to describe and synthesize the forest, never mind the trees. Given my previous training and proclivities, re-education directed toward the recognition of the importance of detail has been especially difficult. But the difficulty I have had has been more than offset by a degree of intellectual stimulation and a joy of discovery that I did not know I was capable of. The primary source of this stimulation has been the classroom lecture. For five weeks this summer, Monday through Thursday, I sat in the same seat in the same classroom for four hours and ten minutes, broken only by two five-minute intervals, thoroughly engrossed by the lectures of Donald Hagman (visiting from UCLA), Marcus Plant, and James Martin. At the other extreme, more than once have I driven two and one-half hours to attend a single fifty-minute lecture by Jerold Israel, Yale Kamisar, or Allan Smith. Such teaching has been the frosting on the cake of the assigned reading. Arguably, much of the instruction appears on its face to be nit picking, but in the real, as opposed to the academic, world, the nit picked (or the one unscratched) may well determine who wins and who loses. This, then, is the value that the faculty brings to legal education. Whether the instructional mode be purely or marginally Socratic, the focus on specifics, on refined distinctions, suffuses their courses from start to finish, and makes the faculty's labor worth its salt.

Teaching style mixes well with subject matter. From the black letter doctrine presented by Israel, Martin, and Smith (imagine learning real property or the UCC from a policy focus), to the blenders of doctrine and policy (Whitmore Gray in contracts, Plant in workers' comp, and Victor Rosenblum [visiting from Northwestern] in torts), to the policy orientation of Hagman in land use, and the apodictic fulminations of Kamisar in criminal law and police practices.

No curriculum can be better than the faculty who teaches it. Michigan's curriculum matches its faculty—unbelievably full and variegated. If areas of the law are uncovered, they presumably are exceedingly esoteric. My count of the *Bulletin* totals 119 course offerings. By any reasonable measure, a plentiful sufficiency. A sound balance exists between required and elective courses. Students quickly find their interests and choose their courses accordingly. Although the discussion paper issued by the Law School's Curriculum Study Group in September, 1979, proposed a "reshaping," I would caution doing anything more than a bit of fine tuning. Too much tinkering may transform a silk purse into a sow's ear.



73 Law School Library Entrance, Fall Scene

Contrast, if you will, what it would be like to learn the law solely by resort to casebooks. While some may curse the invention of the printing press because it produced pornography, I suggest that a few curses might more appropriately be directed at the casebook. They are written as though Demosthenes were speaking with a mouth full of pebbles—cumbrously, infelicitously, and as syntactically as hiccupping. I occasionally sympathize with the practitioner deficient in writing skills. Consider the model on which he cut his legal teeth—those good old casebooks, in which the elements of good writing—clarity, unity, and emphasis—are as visible as sunlight in a fog.

Now, not all casebooks fall into the preceding category. I know of one that an intelligent person can profitably read on his own: Marcus Plant's *Workers' Compensation and Employment Rights* (with Malone and Little), 2d ed. (West, 1980). If there are others, they are not among those I have used. This notwithstanding the fact that the authors of many of the assigned casebooks are the self-same individuals for whom, as teachers, scholars, and practitioners, I have the highest respect and unqualified admiration. Not that I do not respect them as writers. Articles and books that they have otherwise written are well done indeed; the most current example is Yale Kamisar's *Police Interrogations and Confessions: Essays in Law and Policy* (U. of Michigan Press, 1980). It's just that when it comes to writing casebooks, their otherwise exceptional talents fall on evil ways.

But perhaps I harp too much. Casebooks do provide a sort of perverse pleasure to the reader. The pleasure of a challenge, of efforted accomplishment, akin to the exertion of those last ten sit-ups, or the jogging of that extra mile. If the authors instead wrote as they spoke—taped their lectures or used their class notes around which they built their casebooks—how much better they would be. But if they did so, the bottom would undoubtedly fall out of the Nutshell, Sum and Substance, and commercial outline markets. And that just might be the straw that broke the economic camel's back.

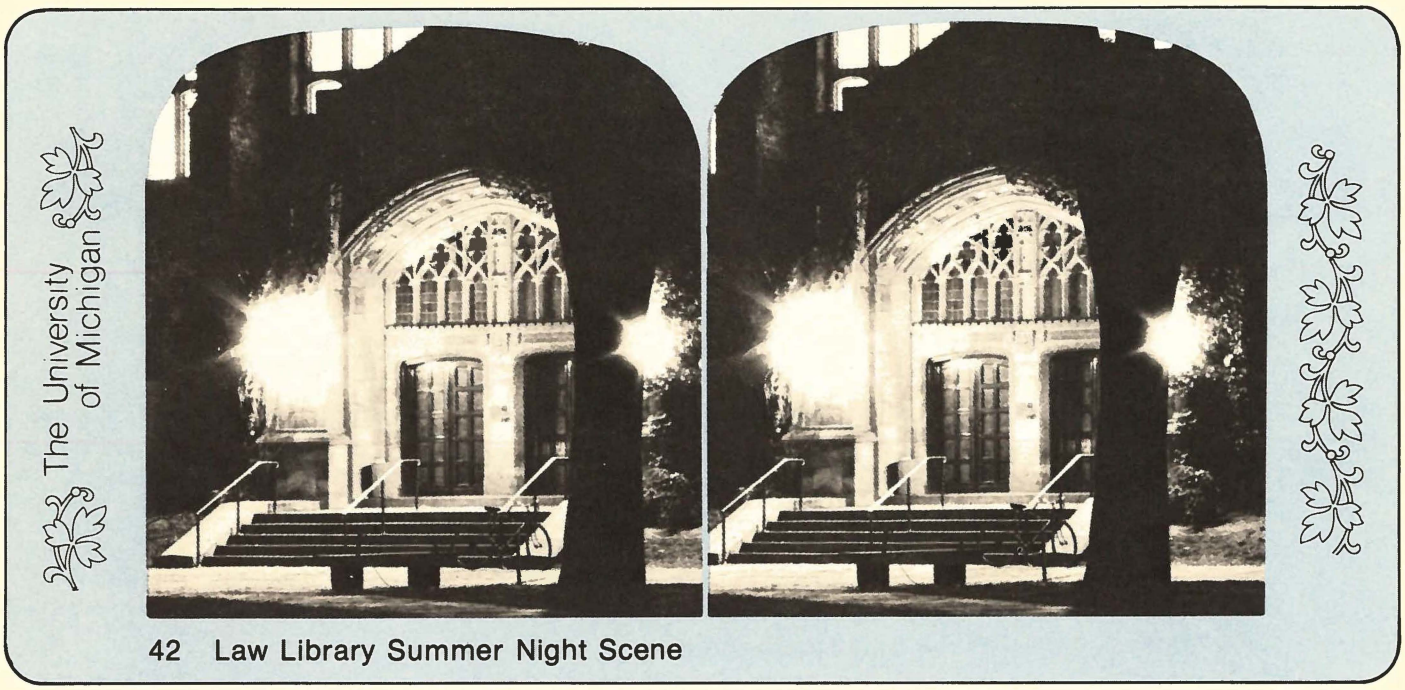
The Administration

Here my admiration is unequivocally unqualified. Actually, my reaction is less admiration than awe. The reason? An apparently total absence of bureaucratization. Yet the School contains several dozen faculty members, an equivalent number of secretaries, librarians, and support staff, plus a thousand students. All of the bureaucratic ingredients are here: specialization of function, fixed rules, and a hierarchy of authority. Nonetheless, the net result approximates the proverbial Mark Hopkins on one end of the bench, the individual student on the other. The only plausible explanation for this wondrous phenomenon is the absence of administrators. But such a situation, the experts tell us, produces chaos. That may be true of some organizations; it is not true of Hutchins Hall. Not only does anarchy not reign supreme, it doesn't even reign constitutionally.

Credit for this remarkable state of affairs rests—and I think this is a consensual judgment—with Assistant Dean Susan Eklund. Her organizational skills, her ability to operate a complex organization sans red tape, and her consummate talent in treating people as individuals have produced what I will wager is the best run educational institution extant. That may not be saying much these days, but I am speaking in absolute, not relative, terms.

The students, moreover, are treated respectfully, as adults, not as inmates. The rules are few and reasonable. Those that exist serve a rational purpose. I have detected no buck passing from one office to another. Registration for classes—a bane of students everywhere—is conducted painlessly and efficiently.

The consideration accorded students extends beyond Dean Eklund's office. I have found the staff and secretaries unfailingly helpful, interested, and accommodating. The faculty also. Unlike the situation at many other institutions, the faculty are accessible outside the classroom. Three examples: 1) It was not uncommon winter term to observe small groups of students clustered around Allan Smith as long as 30 to 45 minutes after his property class had adjourned. 2) Early in the fall, a classmate mentioned to me



42 Law Library Summer Night Scene

his interest in a career in criminal law and wondered about the availability of summer employment. I suggested he talk to Yale Kamisar. The student demurred, remarking that Kamisar not only was a busy person, his rough and gruff in-class demeanor also suggested inaccessibility outside of class. "Nothing ventured, nothing gained," said I. The student went off, returning an hour later. He was positively beaming. Not only had he been cordially received, he had also obtained a list of pertinent firms and Kamisar's permission to use his name as entree. 3) After presiding as senior judge for two days (including a Sunday) at my case club's oral arguments, Samuel Estep, ably assisted by his charming spouse, opened his home to the 18 of us, where we were wined and dined in a most enjoyable fashion. Note that in no sense of the word were any of us his students, but rather a bunch of strangers. Nonetheless, the Esteps' warmth and welcome were genuine, and much appreciated by all concerned.

Where the formal head of the Law School, Dean Terrance Sandalow, fits into the scheme of things, is beyond my ken: budget, personnel, alumni relations, AALS liaison, *etc.* Suffice it to say that he knows how to be unobtrusive. Administratively speaking, that is a rare talent, indeed. He presides over a well-oiled and finely calibrated machine, one which is highly responsive to the individual's wishes. The day-to-day operation of this machine is the bailiwick of Sue Eklund. If all administrators were her and Dean Sandalow's alter egos, bureaucracy's image would soon equal those of God, motherhood, and homemade apple pie in the shrine of national esteem. If you doubt the accuracy of this assessment, come see for yourself.

The Students

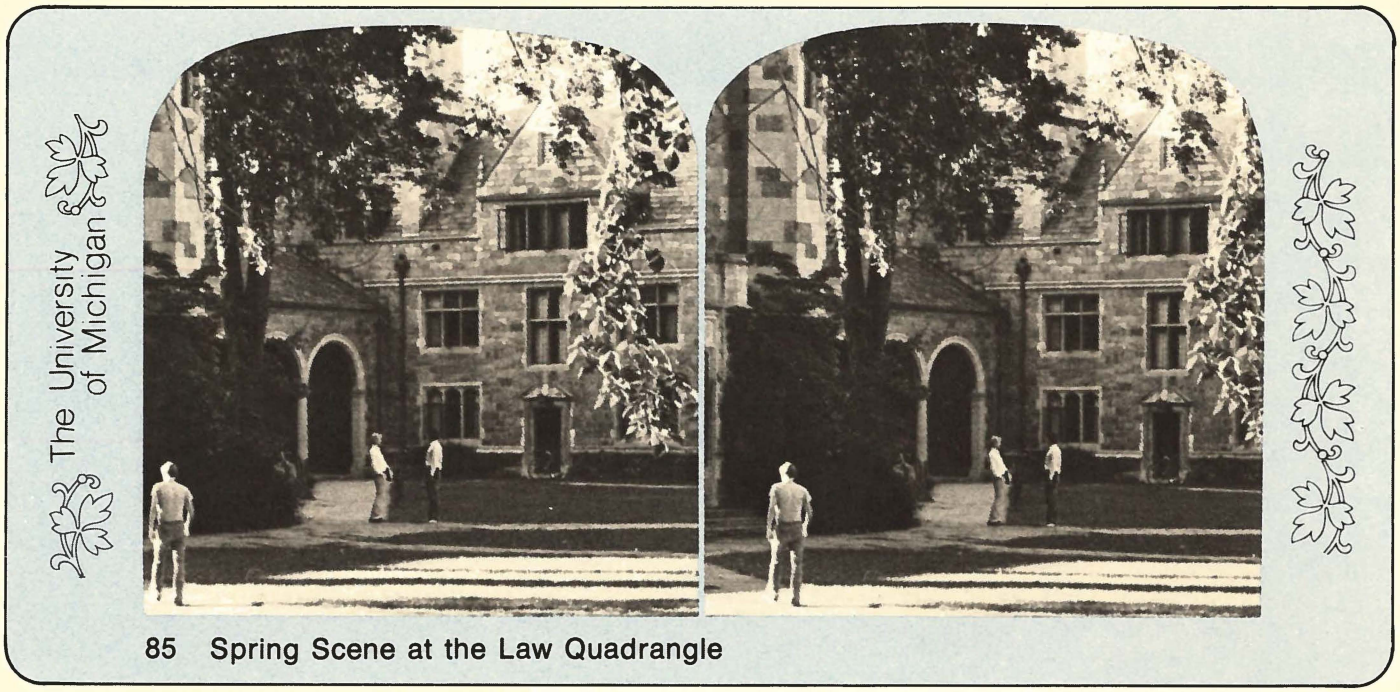
My duties at Michigan State University and the time lost in a 130-mile daily commute have precluded me from interacting with my fellow students as much as I would have liked. Nonetheless, certain observations are readily apparent.

First and foremost, the student body comprises a very thin cross-section of the best and the brightest as measured by the "objective" indicators of LSAT scores and undergraduate grade point average. So thin is this slice that it is impossible to determine, without being told, which students sit at the top of their class, and which occupy the nadir. Notwithstanding the slenderness of this sliver, the student body contains an incredible diversity of curricular and academic background, as well as an extraordinary richness of nonacademic experience. Nothing could be less true than that the students are all peas from the same pod—most of them aren't even peas. Credit for this lavish variegation accrues to Admissions Dean Allan Stillwagon.

Given this profusion of discrete talents, skills, and experience, recruiters who interview only those in the top 10 or 20 percent of a class are behaving in a less than optimal fashion. Would not a firm heavily into oil and gas profit from a geology major, regardless of class standing? Workers' compensation from a graduate with several years' experience on the line? Trade expansion from someone fluent in Russian? P.I. from a physician-attorney? Communications law from a professional journalist? Such experiences and accomplishments characterize the few students I know. Perhaps recruiters do behave rationally. Again, I know not. The chase after grades suggests that I am not wholly wide of the mark, however.

Apart from the absurdity of finely drawn grade point (or class rank) distinctions, what correlation is there between graduation *summa cum laude* and social presence, or other personality characteristics essential to the successful practice of law? I doubt that it approximates statistical significance, to say nothing of motivation, industry, persistence, creativity, or ethical sensibility. Perhaps a salutary solution might be to prohibit recruiters from inquiry about grade point averages, as is the case with regard to the maternal plans of female interviewees.

The foregoing should not be construed as denigration of those who have done well grade-wise. A good grade point average does demonstrate an ability to take tests and associated skills: to regurgitate, to psyche out the instructor, and to think quickly and accurately under great time constraints. How pertinent these skills are to the successful practice of law I leave to the next section of this essay.



85 Spring Scene at the Law Quadrangle

Before leaving the subject of my classmates, a final observation. As between male and female students, I believe that a richer diversity exists among women. Although this presumption is rebuttable in individual cases, I think it sustainable as a general rule. A legal career for a woman is not yet exactly conventional. It is, and has been, for the middle-class male college graduate. Although one can manipulate the numbers in such ways as to show that the law is approaching nursing, education, and retailing as women's fields, that day has not yet arrived. (And if Phyllis Schlafly has her way, female attorneys may again be as few and far between as traffic lights on an expressway.) Be this as it may, a woman opting for a legal career is, by definition, an unusual person. She possesses certain qualities that have set her apart. These qualities not only individualize her, they are also the sort, it seems to me, that bode well for professional success. Accordingly, the wise firm ought to seek out more than a token woman or two. They may find themselves pleasantly, and profitably, surprised.

Testing

Exams remain the bane *par excellence* of law students. And well they should. I find it utterly incomprehensible that an otherwise rational and orderly enterprise can collectively display mass irrationality in its examination processes. (My remarks here are not peculiar to Michigan; they apply to all law schools and even more forcefully to the dutiful souls serving as bar examiners in the several states—more forcefully to the latter because the stakes are higher there.)

One may accurately object that law school and bar examinations are no different, other than in content, from the types of examinations to which students have been subject since they learned how to write a simple sentence and fill in a blank. That, dear reader, is precisely the point: they aren't, but they should be. Legal education is **professional** education. It most assuredly is not liberal education. Therefore, the *ars gratia artis* principle does not apply. Society properly expects that as one passes through the educational system a person will have mastered the multiplication tables, the dates of significant historical events, some scientific facts, and a command of the language. Liberal education, in short, distinguishes itself from its professional counterpart in that the former concerns the development of the individual's mind, *qua* individual, and not as a doctor, lawyer, plumber, or accountant.

Professional education further separates itself from liberal education in that it provides training for specific roles in the real world—marketable skills, if you will. Consequently, it should not be asking too much that the measure of skill possession pertain to the real world that the professional education prepares students for. And how, pray tell, does regurgitated knowledge, off the top of one's head, of the difference between vicarious liability and imputed contributory negligence measure lawyerly competence? Or the distinction between remainders and executory interests? Or between deliberate bypass and *Francis v. Henderson*? How about an authoritative explication of Section 4-406(2)(b) of the UCC? Or the motivation behind a SCREWT? Answer, in a technical word: orthogonally. Answer, in plain English: abysmally.

Actually, Michigan is not the worst offender. Relative to other law schools and to the bar exams, sweet reason prevails. Typically, inanimate sources may be consulted—with some exceptions. Unfortunately, resort to notes and books often becomes illusory, as when 45 multiple choice questions are spread over an *equal* number of pages—each to be answered at the rate of one every four minutes. Or when a diabolically contrived essay question contains a fact situation that approximates a Byzantine maze.

"But," says the mossback, "this is the way I had to do it and, for all I know, this is the way it has always been." Mossback is probably correct, but the sense of this system departed, and senselessness set in, soon after the invention of the printing press. Prior to that time, the lawyer's stock in trade was in his head. No other source existed, except other attorneys' heads. A few things, however, have changed since 1440—not the least significant of which is the preservation and retrieval of information.

Consider rationally (if you can) what transpires at the bar exam. A student is presented with a batch of problems, answerable by way of an essay. No sources, animate or

inanimate, may be consulted. If that same student, after licensure, received a similar problem (one not heretofore confronted) and responded to his or her client in precisely the same fashion as he or she replied to the bar exam problem, should that not be grounds for disbarment? If such conduct is not unconscionable, then villainy has become virtue. Neither is the multistate portion an improvement. Only the name of the game changes; its relationship to the real world remains as distant as Alpha Centauri. This time it's called "say the Magic Words" (by filling in the proper blank) and win yourself a license. Not only has Bleak House not been dismantled, it has been institutionalized and enshrined. Cultural anthropologists should take note: Fetishism lives!

To deny an otherwise entitled law school graduate licensure on the basis of such an exam qualifies as a blatant denial of due process. Granted that, technically, said student hasn't been denied anything; nonetheless, conduct more arbitrary, in the sense of being ill suited to its ostensible purpose, or more unreasonable, defies the imagination. An argument analogous to the white primary won't wash. Bar examiners are governmental agents exercising powers reserved to the states. More credible perhaps is an argument that the Fourteenth Amendment only prohibits unreasonable action, not that which is irrational. After all, we don't hold those who are *non compos mentis* accountable for their actions. Maybe the best solution would be to resurrect the discarded doctrine of *Memoirs v. Massachusetts* and apply it to bar exams: "*utterly* without redeeming social value." It is a standard immeasurably better suited to bar exams than pornography.

As matters stand, I refuse to consider examinations a measure of self-worth. Needless to say, I study for them, but only because I firmly believe in the minimax principle. In an ideal world, they would be viewed as next of kin to party games and boob tube quiz shows. Fortunately, Michigan, for all practical purposes, has a no-attrition policy, thanks to Allan Stillwagon's careful prescreening of applications. But I fear that my classmates, who understandably view grades as the ticket to success, pay a much higher price: the avoidance of courses and instructors, though admittedly of value, that might jeopardize their grade point averages; exclusion of material pertinent to the course that is not a likely subject of examination; and an emphasis on memorization rather than comprehension, understanding, or reflection. I cannot document this, but I suspect that much of the distaste many attorneys have for legal research and their reluctance to utilize legal scholarship results from their examination experiences.

Now, I labor in what is reverently known as an ivory tower. I am not expected to consort with the real world; what I teach is purely academic by conventional, i.e. commercial, standards. Any marketable use that my undergraduate students derive from my musings is purely fortuitous. At the Ph.D. level, however, where we hope our students get jobs, albethem academic, we at least have enough good sense to correlate the examination process with what we expect our students to become: productive scholars. (Admittedly, many Ph.D.'s choose to perish rather than publish, but that's another matter.) How do we measure this potential for productive scholarship? Quite simply and directly: by requiring a series of term papers, topped off by a dissertation, that evidences ability (admittedly not motivation or devotion) to do original research.

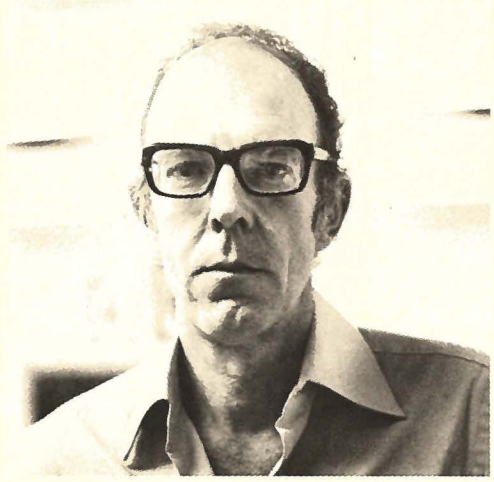
Why doesn't the legal profession do likewise? One devil theory suggests itself: *sine qua non* to employment as a law professor is medically corroborated evidence of latent sadism. Or better still: evidence of the Hyde-Jekyll syndrome. When I have broached the question (of the insanity of law school and bar exams, not latent sadism) to friends who are themselves law professors, they have looked at me as though I were crazy. Therefore, I don't know the answer. But inasmuch as my criticism has been mildly caustic, I deem a reformatory proposal in order.

Actually, my proposal exists within the monastic walls of Hutchins Hall in the required course, Writing and Advocacy. All testing is take home; time constraints are effectively abolished; and sources external to the student's head are expected to be consulted. Even so, an element of madness persists: it is the sole required course that is *ungraded*. Why could not all courses be similarly examined? Distribute the questions and allow the students a reasonable length of time to turn their answers in. Analogize to the intern or junior associate who is assigned a memo to write, or a letter to a client. Judge what is a reasonable time for completion. Typed answers could be required, and a maximum page length prescribed. The costs? Less than at present. If nothing else, professorial eye strain would markedly diminish. The benefit? Twofold. First, an effective correlation with the real world would ensue. Secondly, given the profession's rightful concern with clear and effective writing, examinations could be scored on this basis as well as on content. The 25 or 30 final examinations (to say nothing of midterms and similar assignments) that a student typically takes during his or her program of study would salubriously emphasize the importance of clarity of expression. And inasmuch as the students writing today's exams are the authors of tomorrow's casebooks, the quality of the latter may also be enhanced.

What I have said concerning in-school examinations applies more forcefully to bar exams. The logistics may differ, but administrative convenience does not justify senselessness. The examination could be staggered over the calendar year and questions randomized so that applicants taking the exam one week would not overtax library resources by seeking out identical materials. Typed answers could again be required, and effective expression and congruence with the model answer heightened. The multistate exam could then be consigned to its rightful place: a depository for hazardous waste.

* * * * * * *

If the irreverence detectable *in passim* has offended some readers, I apologize. Note, however, that though I plead guilty to irreverence, do not construe this plea as encompassing disrespect. Reverence is alien to me; respect is not. I hold legal education and the profession in high regard. If I did not, I would not have driven daily to Ann Arbor these past 14 months; neither would I have written this.



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