

# Law Quadrangle (formerly Law Quad Notes)

---

Volume 26 | Number 2

Article 8

---

Winter 1982

## The Legalization of American Society

Francis A. Allen

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/lqnotes>

---

### Recommended Citation

Francis A. Allen, *The Legalization of American Society*, 26 *Law Quadrangle (formerly Law Quad Notes)* - (1982).

Available at: <https://repository.law.umich.edu/lqnotes/vol26/iss2/8>

This Note is brought to you for free and open access by University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Law Quadrangle (formerly Law Quad Notes) by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mLaw.repository@umich.edu](mailto:mLaw.repository@umich.edu).

# The Legalization of American Society

A Symposium  
Commemorating  
the Dedication of the  
Law Library Addition



Francis A. Allen (second from right) with symposium participants Thomas E. Kauper (left), Roger Cramton (right), and Peter O. Steiner (far right).

Francis A. Allen, the Edson R. Sunderland Professor of Law, delivered the introduction to the symposium. He described law libraries as symbols of the importance of the word in legal education and law practice, since it is in libraries that students learn to draw on, and to shape, the written word. "Dedication of the library addition," he said, "provides an opportunity to express our commitment to the humanistic ideal, an expression all the more significant when the place of the word in law training appears to be under concentrated attack."

The faculty committee's choice of a topic for the conference, "The Legalization of American Society," clearly serves that end. Its breadth encourages the exploration of a range of legal subject matters. The topic "reflects a popular perception that a significant expansion of law has occurred in recent years; that areas earlier free of governmental and legal intervention have become fields for legal regulation; and that in areas earlier subjected to legal controls, new and more intrusive forms of regulation are being applied." The symposium should examine the validity of these popular perceptions of the growth of legal regulation and, if they proved accurate, examine the possible causes and consequences.

"Those who devise themes for conferences," Allen said, "must be prepared for the complaints of skeptics." Historians might dispute the immediacy of this topic, pointing out that Americans have always been extremely litigious, ready to delegate to courts not only the settlement of disputes but also basic issues of social and economic policy. Political scientists, like conference participant Professor Theodore Lowi, may question whether American democracy does not suffer more from having too little law than from an excess.

While acknowledging the force of these views, and asking Professor Lowi to elaborate them, the committee initiated the conference with the continued conviction that "the displacement of private discretion by government decision making, and a number of closely related phenomena, create issues meriting identification, attention, and analysis." Increased legislation of social relations might simply codify existing practices, indicating the achievement of a social consensus. While that was the case in England in the early modern period, Allen maintained that in contemporary America the push for recognition of new rights, especially constitutional rights, reflects not consensus but the insulation of private or group interests from the ordinary functioning of democratic politics.

Professor Allen questioned the cost of such new legislation of rights, using his own situation as example.

"Soon the federal government will be telling me that if I survive, retain my health, and behave myself, I have a right not to be forced into retirement by the University because of my age until I am seventy. What does the conferring of this right on persons like me do to the ability of universities to keep open doors of opportunity for young people desiring to embark on teaching careers in these times of fiscal stringency, and what will the inconsiderate longevity of elderly faculty members do to the chances for promotion of younger people already on the faculty? What basis is there to believe that Congress is better qualified than the universities themselves to balance such considerations or more likely to resolve the issues with greater efficiency or decency?"

Professor Allen concluded his overview of the problems of regulation by distinguishing, using Isaiah Berlin's terminology, between "negative" and "affirmative" liberty. While the former implies an absence of controls, "affirmative liberty contemplates some sort of social action to create circumstances permitting enjoyment of liberties otherwise unattainable." Negative liberty alone does not encompass all we intend by freedom, Professor Allen said, yet the concept of affirmative liberty is a dangerous one which has been used to rationalize governmental coercion by totalitarian regimes. "Yet surely," he continued, "if extremes can be avoided, it is apparent that legal regulation may provide the basis for new and larger liberties. Traffic lights no doubt limit my negative liberty, but they powerfully advance my freedom of movement when I wish to get across Ann Arbor at rush hour."

In conclusion Professor Allen mentioned some areas of increased legislation which might appropriately have been considered in the symposium: the new law relating to the rights of students in public schools or judicial recognition of prisoners' rights. Yet legal developments affecting families, he went on to say, present some of the most revealing and universally felt dilemmas through which to understand the legalization phenomenon. With this introduction, Professor Allen welcomed the first speaker, Professor David Chambers.

*The following pages contain summaries of each of the five major papers delivered at the symposium. Each summary is followed by an excerpt from the speech. A commentator's prepared remarks on each speech are summarized after each excerpt, except in the case of the final paper, which was followed by a panel discussion which is also summarized.*

*The complete texts of the speeches are to be published in a commemorative volume.*