University of Wisconsin Law School Forum

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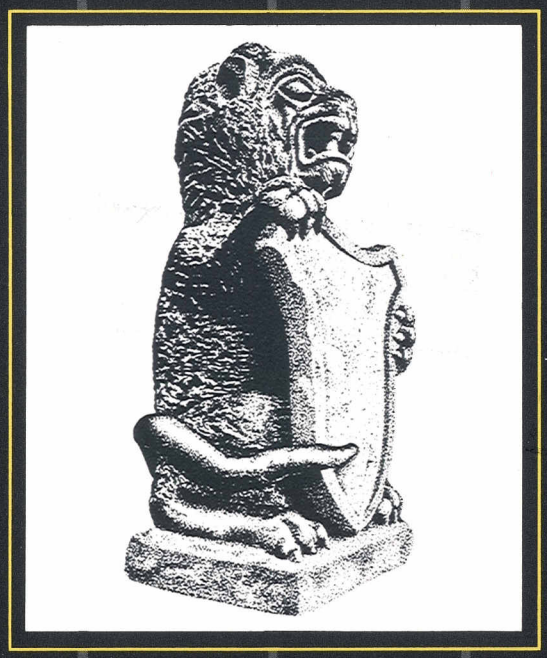

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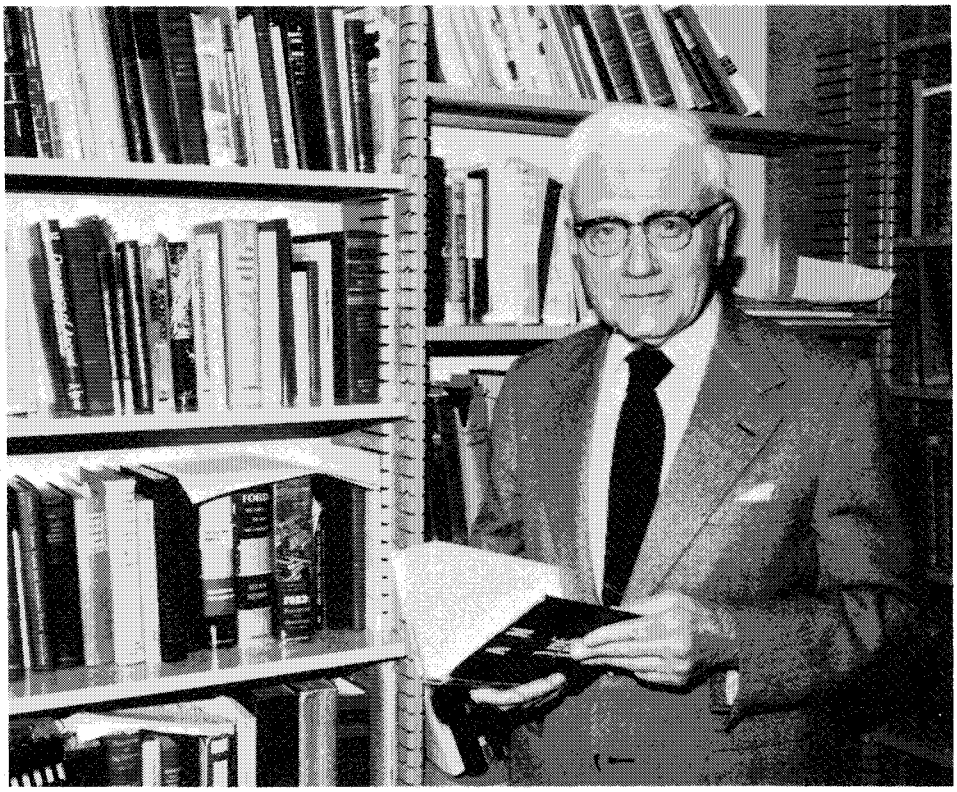
The State of Legal History

James Willard Hurst

Willard Hurst, in more than four decades as a member of the faculty of the University of Wisconsin Law School, achieved a towering reputation for his pioneering work in the legal history of the State.

Legal history has, indeed, become in recent decades an increasingly significant—and, in fact, a major—element in our continuing search for better understanding of contemporary economic, social and political institutions. And it is no accident that the rise in the importance of legal history parallels Professor Hurst's career at the Law School.

Joining the faculty in 1937, having just spent a year as law clerk for Justice Louis D. Brandeis of the Supreme Court of the United States, Willard thereafter made Nineteenth Century Wisconsin his laboratory. There he sought the origins of Wisconsin public policy in the broad context of the economic, moral, political and sociological forces which shaped the State's laws, forces which in turn were in some measure themselves shaped by the laws as well. Professor Hurst's own work in the Wisconsin laboratory—his monumental study of the white pine industry is illustrative—would, standing by itself, have profoundly influenced the methodology and content of legal history. But he attracted others to his laboratory as well and they, helped by his guidance and constructive criticism of their work, made their own contributions to understanding of the way in which Wisconsin's legal institutions took their shape in such fields as regulation of insurance and railroads. And these regional models were to guide others elsewhere to like kinds of inquiries and, inevitably, critical comparisons.



Through this work, Willard Hurst himself became an institution at Wisconsin. Or—perhaps more accurately—Willard can be seen as a major force in shaping the University of Wisconsin at Madison into the kind of interdisciplinary institution that it is. And in his wake today are those who carry forward in the directions he has charted.

The article reproduced here appeared in Reviews in American History in 1982, shortly after Willard took emeritus status at the Law School, and is reprinted with the permission of the Johns Hopkins University Press, holder of the copyright.

Ed.

Law has been both a distinctive institution in United States history, and a material factor playing on and influenced by other factors of that history. Until about the last forty years, however, historians paid relatively little attention to legal elements in the country's experience, and worked within only a narrow conception of the scope of legal history. The last generation has witnessed a substantial growth in the literature, expressing enlarged ideas of the socially relevant subject matter of the field. The expanded definition ranges more widely over (1) time, (2) place, (3) institutional context, and (4) legal agencies studied. The fourth dimension of this growth reflects the other three and forms the core character of legal history as a new-shaped specialty.

Work on legal history in this country before the 1940s tended to a relatively narrow focus on place. Most study went into legal activity along the Atlantic seaboard, largely neglectful of varied roles of law in the continental expansion of the United States. There was, of course, a good deal of attention given to federalism, but mostly in terms of constitutional doctrine and related aspects of politics. Although marked economic and cultural sectionalism mingled with the development of a national economy and elements of a national culture, it is only within recent years that students of legal history have begun to explore ways in which legal doctrine and uses of law may have shaped or responded to sectional experiences and patterns different from or in tension with interests taking shape on a national scale. The country is too big and diverse to warrant assuming that what holds for New England, the Middle Atlantic, or Southern coastal states holds for all of the South, the Mississippi Valley, the Plains, the Southwest, or the Pacific Coast.

In fact, an early, instructive lesson in regional differences in legal history was provided in 1931 by studies distinguishing development of water law in areas of generous and of limited rainfall; but until recently such essays had few counterparts. Moreover, from the 1880s on, the growth of markets of sectional or national reach under the protection of the federal system gave impetus to expanded roles of national law, ranging into quite different realms of policy from those embraced within the bounds of pre-1860 state common law or state statute law of corporations and private franchises. Legal historians have only lately begun to come abreast of the last hundred years' development of law made by the national government.

Allied to limitations of place in earlier work in legal history were limitations of time. To an extent disproportionate to social realities, research centered on the colonial years, on the first years of the new states, and on the creation of a national constitution. Until the 1940s students badly neglected the nineteenth century, though in important respects that century did at least as much to determine the character of twentieth-century society in the United States as the colonial years or the late eighteenth century. Specialized studies have now revealingly appraised relations of law to the economies of selected states between 1800 and 1860. But the Civil War and the headlong pace, depth, and diversity of change from the 1880s into the 1920s produced a new economy and a new society.

Historians have just begun to examine that critical span of growth and default in public policy. Tardy attention to such later periods may reflect a mistaken notion that history resides only in a distant past. So far as that bias exists, it does not withstand analysis. Obviously the closer students come to their own times, the more danger that their readings may become skewed by confusions, feelings, and interest peculiar to their immediate experience. But the hazard points to cautions in technique, not to a justification for limiting the proper subject matter of inquiry. What historians study is the time dimension of social experience, a dimension that extends into the present as well as the past. Indeed, the generation since the end of World War II has seen a period of creative and destructive disjunctions in developing roles of law that is at least as important as any other in the prior record.

Early in the twentieth century Roscoe Pound challenged legal scholarship to seek deeper insights through a sociological jurisprudence which might put law into realistic context with other institutions. Legal historians have been slow to respond to the challenge. The most distinguished scholarship of earlier years largely treated law as a self-contained system, with prime attention given to its internal structure and procedures and scant attention to its working relations to the environing society. So far as research has broken out of those bounds, it has tended to give most attention to relations of law to the changing character of the private market. Even in that domain we lack studies of concrete particulars, of where and how law may have helped or hindered in meeting functional requisites of market operations.

Emphasis on law-market relations fits the reality—that the private market has been central to ideas and styles of action which have determined the location and character of prevailing political power in the country, especially over the last 150 years. But, beyond that range, social reality requires that legal historians pay more attention to the interplay of law and the family and sex roles, the bearing of law on the church, on tensions between conventional morality and individuality, on education, and on the course of change in scientific and technological knowledge.

Particularly since the 1880s social developments have fostered a society of increasing interlock of processes and relations. Demands on public policy regarding the good order of social relations have tended to mount to an extent and over a range which legal historians have yet to match in their studies. To press the point is not to imply an exaggerated estimate of law's importance. To the contrary, more institutionally sophisticated study of legal history is likely to yield modest estimates of the comparative impact of law and of other-than-legal

institutional factors. What such study may produce is better answers to Roscoe Pound's probing question about the limits of effective legal action. But only broad concern with law's operational ties to other components of social order will lead to the contributions the study of legal history should make to an illuminating sociology of law.

The most immediate as well as most stringent effect in limiting the range of work in legal history has been the preoccupation of students with courts and judicial process. Indeed, to put the matter so understates the limitation, for in fact historians have not been mainly concerned with courts, but specifically with the reported opinions and judgments of appellate courts. Of course courts have been important in the system of law. From about 1810 to 1890 judge-made (common) law provided a great bulk of standards and rules for market operations (in the law of property, contract, and security for debt), for domestic relations, and for defining familiar crimes against person and property.

Even so, from the late eighteenth through the nineteenth century legislation dealing with government structure and with grants of franchises and corporate charters to private persons formed a large part of legal order; from the 1880s on, statute law and rules and regulations made by executive and administrative officers under broadening currents of power delegated by legislators grew to become the predominant body of public policy dealing particularly with the economy.

Nonetheless, in the face of growth of the legislative components of legal order, work in legal history has long been inclined to put disproportionate, indeed more often than not nearly exclusive, emphasis on the activity of appellate courts. There have been understandable reasons for this bias, but they do not justify it. Appellate court opinions typically offer more explicit and available identification and rationalization of public policy choices than do statutory or administrative materials. Court cases present relatively sharply drawn dramas of confrontation; the well marked roles of plaintiffs and defendants at least give more appearance of explaining the relevant interests and issues than the often more diverse, confused, imperfectly stated positions taken in the pulls and hauls of legislative process and the maneuvering of special interests as these play on legislators and administrators. Responsive to different social functions, legislative and executive or administrative lawmakers are likely to deal with diffuse or varied concerns, not as well defined as those aligned in lawsuits.

Until the 1940s students badly neglected the nineteenth century, though in important respects that century did at least as much to determine the character of twentieth-century society in the United States as the colonial years or the late eighteenth century.

Some commentary distinguishes "law" from "government." This formula may have contributed to the idea that "law" consists simply in what courts do. There may be an imputation in the distinction that once we step outside the area of judicial action we confront only arbitrary exercises of will—that statutes and executive or administrative rules and precedents do not provide principled or predictable lines of public policy. Facts do not bear this out. Over spans of years legislative and administrative processes have produced sustained rankings of values and predictable regularities of choice. For example, there has been no whimsical or sheer flux of will in developed patterns of statute and administrative law dealing with the organization of markets, with public health and sanitation, safety on the job, allocation of costs incident to industrial accidents, or with taxation. Of course these bodies of law have reflected a good deal of push and pull among contending interests. But such maneuvering has been no less present, if more below the surface, of much common law development.

As with the substance of public policy, so it has been with procedures for making it. The observer can identify and predict continuities in development of legislative and administrative procedures as well as of judicial procedures in such matters as setting terms of notice or hearing to affected interests, fixing relations of legislative committees to their parent bodies, and arranging modes of making administrative rules or orders.

The tendency to identify "law" with courts may have stemmed in part from roles of judges in reviewing actions of other legal officers. A norm of our system has been that aggrieved individuals or groups should be able to seek a remedy in court against official actions which exceed authority conferred by constitutions or by statutes. In this sense law created and operated by judges has had an existence apart from activities of other legal agencies. But this fact does not justify disproportionate attention to judicial process. In practice, relatively little legislative or administrative action has come under judicial review. Mostly, legislatures and administrators set and enforce their own limits on themselves, defined by their own doctrine and precedents in interpreting relevant constitutional and statutory provisions. In addition, administrative law making stands under scrutiny in legislative hearings and through the process of legislative appropriations. Outside spheres of official action, it is true that in the nineteenth century courts predominated in structuring private relationships, as through the law of contract and property. But in the twentieth century statute and administrative law enter largely into the governance of private relations; "law" in this domain can no longer be identified simply with what judges do.

If one implicitly identifies "law" with commands, the more likely focus is courts, which seem the distinctive source of judgments or decrees. In two ways this approach distorts reality.

Even if we focus on commands, for the past 100 years at least the bulk of legal commands have rested on statute books, administrative rules or regulations, or have been embodied in administrative precedents. Granted, from the 1790s to the 1870s administrative law making had a limited role compared to the surge of common law growth. But even in that earlier time the statute books contained a substantial volume of binding standards and rules. From the 1880s the trend accelerated to more and more governance of affairs through statutory and administrative directions; by the 1980s lawyers were turning most of the time to legislation or delegated legislation, or to administrative case law to find what the law might command their clients to do or not to do.

More important than identifying the source of the command aspects of law, however, is to take account of great areas of public policy in which command has been less to the fore than the positive structuring of relationships, and in which statutory and administrative outputs have always dominated. The power of the public purse has resided firmly in the legislature; judges have never had authority to levy taxes, and only by indirection and to a marginal extent have their judgments determined for what public money should be spent. Resource allocation through public taxing and spending has long been a major source of impact on the society.

In the nineteenth century, Congress—and state legislatures under delegation from Congress—set terms for disposing of a vast public domain, an immensely important style of legal allocation of resources in times when a cash-scarce economy found it hard to raise money by taxes. Statutory provision of tax exemptions and selectivity in taxable subjects were also means for promoting favored lines of economic activity.

In the twentieth century growth in general productivity created unprecedented liquidity in the economy, with direct money subsidies from government assuming the dominant role that land grants had in the nineteenth century. By conditions set on government grants in aid, and by elaborating exemptions, credits, and deductions under individual and corporate income taxes, twentieth-century tax and appropriations law became of major importance in regulations and channeling economic activity and affecting the distribution or allocation of purchasing power. Public policy also affected resource allocation by legislative and administrative action controlling, or at least materially influencing, the supply of money (including supply of credit), and (for better or worse) deflationary or inflationary trends in the economy.

Courts have had only marginal involvement in these matters, which legal historians have neglected in proportion to the exaggerated attention they have given judicial process.

Narrow identification of law with commands—and of commands with courts—ignores other major sectors of legal action than those involved in direct allocation of resources. Even from the late eighteenth century legislative grants of patents, of special action franchises (as for navigation improvement), and provision of corporate charters were important means of promoting as well as legitimating and to some degree regulating forms of private collective action. Government licensing, always within statutory and administrative frameworks, carried on to play a salient role in the twentieth century.

From the late nineteenth century the character of the society was shaped much by activities of business corporations, and, especially in the twentieth century, by the influence of lobbies pursuing profit and nonprofit goals; the structure and governance of corporations and of pressure groups derived primarily from private initiatives, but also could not be divorced from statutory and administrative law which profoundly affected the scope given to private will.

Moreover, overlapping the resource-allocating, licensing, and regulatory roles of law, yet with their own special character, were uses of law to promote or channel advances in science and technology. Here again, one encounters a major sector of modern legal history, built more from legislative and administrative than from judicial contributions, which would be ignored insofar as one identifies "law" and legal history with courts and with commands issuing from courts.

Until recent years legal historians wrote as if their subject defined itself within narrow jurisdictional limits of place, time, and institutional reference. However, over the last forty years broader currents of ideas have begun to move through the area. Livelier concern with roles of law in dealing with social adjustments and conflicts has fostered fresh attention to theory. Legal historians have been appraising issues of (1) consensus or want of consensus on values, (2) pluralism expressed through bargaining among interests, and (3) social and economic class dominance in legal order.

Critics have found want of realism or sophistication in a good deal of work in legal history, which they read as portraying the United States as a society of substantial harmony, based on almost universally shared values, marked by little or no use of law by the powerful to oppress the weak. Much of the criticized work is not as naive as the criticism would suggest. It

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is no new discovery that law has often involved severe conflicts over power and profit, or that the realities of conflict have not always been plain on the surface of events. These themes sounded in Federalist Number Ten, in the attacks leveled by Madison and Jefferson on Hamilton's programs, and in Calhoun's Disquisition on Government.

On the other hand, conflict has never been the whole of law's story. A substantial part of social reality has been the presence of some broadly shared values which have shaped or legitimated uses of law. Wholesale denial of that could hardly stand against stubborn facts which show that this has been, overall, a working society; an operational society can only rest on some substantial sharing of values.

The real issue in appraising the social history of law is not to establish consensus or no consensus as the single reality, but to determine how much consensus, on what, among whom, when, and with what gains and costs to various affected interests. Law has embodied values shared among broad, yet diverse sectors of interests. The course of events has borne witness, for example, to long-held, broadly sustained faith that social good follows from an increase in general economic productivity measured in transactions in private markets. Similar faith has accorded legitimate roles to the private market as a major institution for allocating scarce economic resources. Over most of the country's past people have shown a belief that they would benefit in net result from advances in scientific knowledge and in technological capacity to manipulate the physical and biological environments. These articles of faith have come under rising challenge in the past fifty years. But the challenges themselves evidence the felt reality of earlier consensus, even as new public policies bearing on the environment attest emergence of some new areas of value agreement. In some criticism of "consensus history" there seems to lurk confusion between recognizing facts and evaluating the social impact of the facts. The critics plainly disapprove some values which broad coalitions of opinion embodied in past public policy. But to disapprove now of a shared value of the past is not to disprove that people in the past in fact shared the value. To recognize the realities of shared values does not require that we disregard all grounds of skepticism toward consensus. Constructive criticism will weight the history of public policy with consideration of the parts played in affairs by force, indoctrination, despair, and indifference.

To the extent that it has been effective, legal order in the United States has rested on unsuccessful assertion of a monopoly of physical force in legal agencies and their ability to fix terms on which private persons may properly wield force. The constitutional ideal is that public force be used only for public good. An important task for legal historians is to probe the amount of fiction and reality in the pursuit of this constitutional ideal. The record shows uses of law which have put the force of law at the disposal of private greed for power and profit. The record also shows that in considerable measure law has been too weak, incompetent, or corrupt to prevent uses of private force against workers, the poor, or racial or ethnic minorities. Recognition of realities of consensus should not ignore these dark aspects of the legal record.

People may be brought to accept public policy through indoctrination against their best interests, under guidance and for the benefit of special interests. Because of the legitimacy which the idea of constitutional government has tended to confer on legal order, law may be a useful instrument for such manipulation. Past politics has shown the effectiveness of rallying slogans based on law, including appeals to "law and order," to "freedom of contract," and to "due process and equal protection of the laws." Historians need to be aware that, while law may rest on consensus, law may be used to build consensus, and to do so in service to diverse special interests.

Apparent agreement on values embodied in law may reflect not so much positive consent or wish as resigned or despairing acceptance of superior force, directly or indirectly applied. Thus, immigrants' acceptance of "Americanization" may have sprung from a sense of insecurity and lost roots rather than from positive commitment. Again, it is difficult to grapple with the element of "class war" in the content of a society in which so much combat among interests has stayed within bounds of regular processes of the market, of politics, and of the law.

Another factor which may have diluted the effect of common will has been the presence of contradiction among shared values. The course of antitrust policy is a notable example. Since the Sherman Act a substantial public opinion has accepted the idea of using law to give positive protection to the competitive vitality of the private market. On the other hand, people have learned to prize a rising material standard of living, and to associate this satisfaction with fruits of large-scale production and distribution; these attitudes have developed in continuing tension. Government has given firm institutional embodiment to antitrust programs. But public policies, not only toward the antitrust effort, but also regarding tariffs, patents, taxes, and public spending have failed to withhold governmental subsidies from or mount effective challenges to the growth and entrenchment of concentrations of private control in markets. In such varied respects the country's experience cautions legal historians to explore the origins and quality of will behind apparent sharing of values.

There is another element in apparent policy consensus to which critics of "consensus history" do not give due weight. This has developed into a society of increasing diversity and numbers of roles and functions. Amid this complexity most people have in fact probably been indifferent to particular uses of law to affect allocations of gains and costs among specialized interests; most people have not sought

specific involvement in specific decisions of public policy. Instead they have tacitly if not explicitly shared a value distinctive to the legal order—acceptance of certain regular, legitimated, peaceful processes for making decisions, whatever the particular substance of the decisions taken.

Public budgets provide an outstanding example. For the most part voters do not send members to the legislature under specific mandates to spend so many dollars on public health inspection of food processors, or on university libraries, police radio transmitters, or any other of the myriad items of appropriations acts. The voters are content that their votes legitimate a public process for deciding on all these particulars. True, indifference to the particulars may sometimes rest on indoctrinated ignorance. But, more likely, it rests on valid, rational perceptions of self interest; as creatures of limited time, energy, and capacity, most individuals can not busy themselves in helping decide how every competition of focused interests should be worked out. Thus a valid indifference toward many substantive specifics in uses of law has probably been a continuing element in a real consensus which accepts legal processes. The reality of this consensus has grown with the need of it, as the society has grown more diverse in the experiences its members encounter.

Growth in diversity and interlock of relations in the United States has emphasized uses of law to channel and legitimate bargains struck among competing interests. The significance of legal processes for the operations of a pluralist society is attested to by the accommodations evident in state session laws and in the federal Statutes at Large in the nineteenth century, and in both statute law and administrative regulations of the twentieth century. In the growth of common law bargaining uses of law have been less overt, and within the close bounds of propriety, but they have been present nonetheless. Resort to political parties and party politics has been woven into activities of formal legal agencies in such bargaining to give a generally centrist character to pursuit of major interest adjustments.

More open to dispute than the general acceptance of interest bargaining through law have been assessments of the social results and the social and political legitimacy of such uses of legal process. Some observers may have read the bargaining record too complacently, taking the law's contributions to have been only to the public good; there is some of this tone even in the sophistication of Federalist Number Ten. But as early as the Disquisition on Government (1831) Calhoun pointedly questioned whether bargaining might amount to no more than creation of artificial majorities based on selfishly opportunistic coalitions.

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Modern criticism of faith in the general benefits of a pluralist social-legal order have suggested several useful cautions to legal historians. First, over sizeable periods of time and ranges of interests, inequalities in practical as well as in formal legal power have barred or severely limited access to the bargaining arena for Indians, blacks, and other disadvantaged ethnic groups, women, and the poor in general. Moreover, inequalities have limited those who did enter the arena; bargaining power was often in gross imbalance, as for example between big business and small business, between urban creditors and rural debtors, and between employers and workers.

Further, apart from excluded or generally disadvantaged sectors of society, some interests have been so diffuse or unorganized as to have only limited say about what went on. This was the position in the late nineteenth century in relations of farmers and small businessmen with the railroads, and in the twentieth century in dealings of consumers with big firms supplying mass markets. In this respect white middle class people who in other ways shared profits of dominance over less advantaged groups were themselves disadvantaged.

The most subtle, but probably most harmful limitation on the bargaining process derived from the sharply focused self interest which typically provided the impetus in resorts to legal processes. Perceptions of self interest usually brought to bear will to initiate and sustain uses of law to serve particular ends. What did not enter perception did not stir will. In an increasingly diverse, shifting society, even among relatively sophisticated and powerful individuals and groups, perceptions of interest tended to concentrate on rather short-term adjustments, specialized and intricate in detail. Such factors fostered narrowly pragmatic uses of law which were likely to slight broad reaches of cause and effect and long-term impacts. The second half of the twentieth century showed some tardy realization of these limitations of interest bargaining. Thus there were moves to invoke law to regulate the course of technological change and even of scientific inquiry, as well as to reassess social gains and costs from operations of the private market.

For all the qualifications, there were positive aspects in the history of interest bargaining through law. There were disquieting trends toward increased concentration of private and

public power. Nonetheless, the society continued to show a considerable dispersion of different types of practical power, and a material challenge for legal historians was to improve our understanding of the qualities and defects of legal processes in affecting both concentration and dispersion. Interest bargaining through law seems to have contributed to creating socially productive elaboration of the division of labor within and outside of market processes.

Finally, harsh experience with abuses of various types of legal order has suggested no convincing alternative that seems likely to improve on interest bargaining within constitutional legal processes as a means toward a legal and social order that will be at once efficient and humane. The principal alternatives that history offers have involved narrowly based, centralized authority, which typically has fallen into abuse without serving either efficiency or humanity. Overall, our experience teaches that a just and efficient society needs more guidance for policy than mere bargaining among a plurality of interests may supply, but that the society cannot afford to do without a substantial bargaining component in its legal order.

Some interpret United States legal history as a record of uses of law by a narrow sector of society to help get and control the principal means of production so as to dominate all other social sectors for the gains that concentrated wealth and power afford. In this view all else in the law which does not seem to fit this reading of events—constitutional structures, Bill of Rights guarantees, or generalized legal rights of property, contract, and individual security—is only a facade for the real, tight monopoly held by an inner circle of private powerholders.

This critique carries useful insights for legal historians who do not accept its ultimate thesis. Concentrated private wealth has used and abused its influence on law to its own advantage. It has fostered or accepted, though it may not always have initiated, exclusion of disadvantaged minorities from the circle of effective interest bargainers. It has proved capable of subverting to its ends the organized physical force of the law. Short of resort to overt force, sustained, gross inequalities in private command of wealth and income have promoted unjust uses of law to serve special interests. Concentrated private control in large business corporations has brought into question the legitimacy of the private market as an institution for healthy dispersion of power.

However, United States legal history seems too rich and diverse to be understood simply as recording the success of a small class of controllers of the means of production in dominating the whole course of the society. That interpretation underestimates the realities of shared values and interest bargaining, neglects the extent to which public policy embodied in law has responded to functional needs of life in society, and fails to appreciate some more profound limitations on the success of efforts to create a social order at once effective and humane.

An analysis which rates the country's legal history as simply a product of ruling class domination must deal with the fact that some broadly shared values have had important roots other than in the distribution of control of means of production. Thus from the adoption of the First Amendment separation of church and state developed into a substantially unchallenged premise of public policy. Into this item of consensus went influences derived from the sectarian diversity of the country, memories of religious wars and persecution abroad, and an individualistic outlook on life born of mixed parentage in religious, economic, and cultural factors that reached back some centuries.

Another salient example is the great impress on public policy of broadly shared values which grew out of the experience of growth in science and technology. True, this experience was affected by the market. But it involved reckonings not limited simply to those of a market calculus. Technical and science based confidence that material advance would boundlessly improve the quality of life did as much to sustain faith in the social merits of the market as market activity did to promote faith in science and technology. Continuing exposure to what people saw as evident benefits from additions to their technological command of nature made them the more receptive to change brought by technology; the idea that such change might properly call for some legal regulation was therefore the slower to emerge.

Further, a ruling class interpretation of the country's legal history underrates the extent to which interest bargaining through law has curbed private operation of means of production. Public policy in this domain was often defective in content and in execution. Nonetheless, out of interest group bargaining within legal processes emerged substantial regulations protecting workers, consumers, and small and moderate sized business firms in matters of health, safety, collective bargaining, honest dealing, and maintenance of some extent of competition in market. By the 1970s one could not realistically define the structure and governance of even the largest business corporations without adding to provisions of corporation law proper a range of legal controls external to corporation law in matters of finance, credit, marketing practices, taxation and accounting, labor relations, stockholder relations, and impacts on the environment.

Apart from expansion of legal controls, another aspect of affairs puts in question a diagnosis which explains legal history in terms of big business dominance. Through the nineteenth century and into the twentieth a large proportion of legal contests among competing interests seems to have been intraclass rather than interclass collisions among different assignments of entrepreneurial property owners who, though of varying means, all played capitalist roles. This appraisal fits much of the development of law dealing with creditor-debtor relations, the money supply, regulation of insurance and banking, relations between corporate promoters and managers and investors, and with antitrust protection of the market. In these aspects

law has often reflected a degree of fractionalization of capitalist interests substantial enough to put in question the dominance of a high capitalist sector. To all of this, one must add account of the more or less distinct impact of political processes.

Another dimension of legal history which a ruling class interpretation slights has been the response to what broad sectors of opinion have perceived to be functional requisites of a working society. Population growth and concentration, broader and more complex market operations, and effects of advancing technology multiplied the pressures of functional considerations, especially from the 1880s. Such pressures seem to have been material, for example, in the development of law dealing with public health and sanitation, with promotion of predictable regularities in market transactions, and with organizing and administering a supply of basic facilities for transport, water supply, and generation of electric power. Of course the capitalist context often puts its distinctive stamp on these developments. But comparison with operations in non-capitalist societies suggests the presence of pressures likely to attend large-scale, bureaucratized, technically intricate social arrangements as such. So far as care for function took on a character specially adapted to capitalism, legal historians need to learn more about the concrete particulars of uses of law to serve those functional needs.

Finally, legal history needs to take due account of how far much of what happens in society is grounded in the fact that under all kinds of social organization, capitalist, socialist, or whatever, humans are limited beings. We need to be cautious about fixed definitions of "human nature;" exploitation has often sought to justify itself by appeals to that "nature." But the stubborn fact remains that we are creatures of limited physical, intellectual, and emotional capacity, with limited ability to transcend sense of self or of the groups to which we feel near, and with limited courage and energy of will. Within such limitations we confront overwhelming detail and density of experience, sometimes moved by changes which in pace, range, depth, and intricacy outstrip our understanding. To our limitations as individuals we must add limits set, sometimes below awareness, by cultural inheritance and mass emotion.

Whatever the particular organization of power in society, general experience teaches that under any system people will feel the impacts of greed, lust for power over others, fear of the stranger, and yearning for individual and group security against primitive fears of what lies in the surrounding murk and muddle.

Out of this mixture which makes up our human predicament as individuals and as members of social groups, history tells how much has happened from unchosen unplanned, often unperceived accumulations of events and their consequences. Probably these elements account for more legal history than all of the deliberate strivings which our vanity likes to dwell on. Here perhaps we confront limits of effective legal action that are more deeply rooted than any ruling class theory can measure.

Yet law has been a major instrument for combatting mindless and chaotic experience. Hardly any aspect of legal history more poignantly bears on our human situation than resort to legal processes to move against the daunting forces of individual and social drift and inertia. But this is an aspect which legal historians have tended to leave unexamined. By definition and interpretation which reads legal history in terms of dominant and dominated sectors of society deals largely with conscious and deliberate striving. Thus, along with all other interpretations that turn on estimates of will, it omits the great darkness which surrounds all striving. Realism calls for including in the story the influences of existential fears and insecurities. Whatever the particular organization of power in society, general experience teaches that under any system people will feel the impacts of greed, lust for power over others, fear of the stranger, and yearning for individual and group security against primitive fears of what lies in the surrounding murk and muddle. However imperfectly seen or realized, some responses to such threats and challenges have appeared in the country's legal history. Those responses are deep in constitutional structures and in provisions of the Bill of Rights, in uses of law to allocate resources so as to advance knowledge and provide education, and in creation of legal standards and rules which may foster empathy among individuals who stand to each other in no close ties of blood, kin, clan, religion, race, or nationality.

True, the law's responses have been conditioned by many features of this particular social context—in the setting of North America, with its social growth timed in the surge of the commercial and industrial revolutions and the rise of the middle class, its values stamped as predominantly white, middle class, and capitalist, Christian, individualist, and pragmatic. But there is a substratum of meaning here which study of such contextual particulars does not reach. No more will that substratum be reached by a ruling class interpretation. Law has nothing to do with creating these ineluctable terms of existence. But the presence or absence of response to them through law, and the qualities or deficiencies of response provide inescapable dimensions of legal history, whether or not legal historians have the sensitivity to see this.

The Defender: William Coffey

Doug Moe

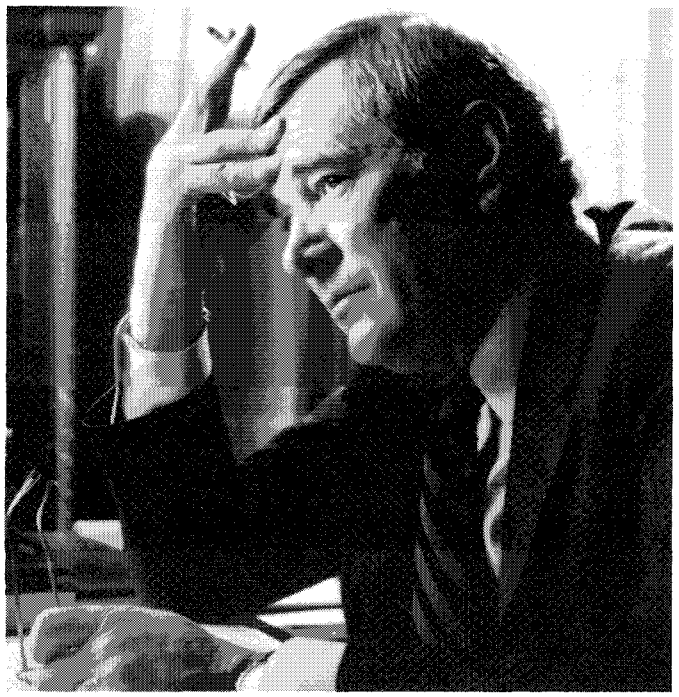
Bill Coffey graduated in 1961 from the University of Wisconsin Law School and has established himself as a pre-eminent figure among criminal defense lawyers.

The article which follows is the work of Doug Moe, a Madison-based freelance writer, and appeared first in Milwaukee Magazine *(which has permitted reproduction of the piece here).*

Doug Moe's article, standing alone, warranted reprinting here as an account of a notable and colorful alumnus of the Law School. But beyond the wish to relay a salute to Bill Coffey in his professional role as a criminal defense lawyer, the Law School has special reason to use this occasion for adding a few words of its own to this salute to him.

For more than a decade and a half now Bill Coffey has—as a practicing lawyer—helped the Law School in educating its students. The School from its beginning has counted on practicing lawyers to assist it in legal education and Bill is among some 120 Milwaukee area lawyers honored in an Appreciation Dinner on March 21, 1984, for their contributions to our education efforts. In Bill's particular case, the contributions have been frequent and most important: On several occasions, he has appeared for as long as a week in our General Practice Course. He has taught Advanced Criminal Procedure at least ten times, taught Trial Advocacy almost as frequently and at least once has taught Evidence. Beyond this, he has devoted a great deal of time to the Legal Assistance to Institutionalized Persons Program. (LAIP—as the Program is known—was reported on in Gargoyle for Winter 1984 as the Law School's notably successful program for learning by doing the real thing.)

And so, Bill Coffey, the Wisconsin Law School salutes you. And in doing so, we intend as well to salute those practicing lawyers—numbering now in the hundreds—who have made available their skills and experience to assist in the education of Wisconsin law students.



Among the desk-pounding, publicity seeking band of criminal defense lawyers in Wisconsin, William Coffey may not be the most famous or the most flamboyant. He's just the best.

Bill Coffey's client had this thing about supply-side economics. He liked it so much, in fact, that he supplied himself with $700,000 in bills of various denominations, which in his entrepreneurial zeal, he printed himself.

When he was caught by government agents, the guy knew he was in very serious trouble. He was stone-cold guilty and he knew it; and, more importantly, the government knew it. They had $700,000 in counterfeit currency as evidence and, as a result, the outcome was all but inevitable—convictions followed by two decades in federal prison.

"Coffey, the last thing I want is justice," he told the Milwaukee defense attorney at their first meeting, "because if I get justice I'll get 20 years."

The counterfeiter was, Coffey recalls, "the most honest defendant I've ever represented . . . he was a client I got along with well."

Which is to say: they understood one another. The case was hopeless; but it was the kind at which Bill Coffey excelled. As it turned out, the counterfeiter had not misplaced his faith. Coffey got the guy off.

Coffey successfully moved to suppress the counterfeit money as evidence, arguing that the federal agents had obtained it in an illegal search. Without the $700,000 in damning currency, the government's case evaporated and the charges were dismissed.

Score: Counterfeiter-1; Justice-0.

"Had the federal government not searched the premises illegally, had the $700,000 in counterfeit money been admissible in evidence," recalls Coffey, "there isn't any question but that man would have gotten 20 years. The federal agents in executing the search warrant violated the fourth amendment to the Constitution of the United States. As a consequence that man went home.

"That does not in my mind create a moral problem for me, because I accept the fundamental premise on which this system of justice is constructed, and any blame for that man not being convicted should be directed toward the authorities who made an illegal search. If people want to get upset and aggravated, they should get upset and aggravated with people who conduct illegal searches, not with the criminal defense attorney."

People do still get upset with criminal attorneys, however, who have increasingly found themselves at the center of a spreading public debate over the moral ambiguities of their role.

But Bill Coffey has no apologies to make.

"I represent a lot of people who did what they're charged with, or did something close to it," says Coffey, "and I understand that.

"But my function is not to be prosecutor, judge, jury, and God. Whatever they did, the state is required to prove their guilt beyond a reasonable doubt with competent evidence, evidence that is obtained within the limits of the Constitution of the United States. If the prosecution can't do that they're not entitled to a convictions."

Because William Coffey doesn't crave publicity, because he doesn't brawl with cops or otherwise engage in headline-hunting, the 51-year-old lawyer is not widely known outside the briefcase jungle of the state legal system.

Among his peers in the Bar, however, Coffey is routinely referred to as one of the best, or, as often as not, simply as "the best" attorney in Wisconsin.

Robert DeChambeau, a veteran assistant district attorney in Dane County, calls Coffey "the best defense attorney in the state. A gentleman in and out of the courtroom."

Dane County Circuit Court Judge Michael Torphy, who presided over one of Coffey's most publicized cases, the 1968 disorderly conduct trial of Father James Groppi, says of Coffey: "He's very well respected—an excellent lawyer. I really couldn't find enough good things to say about him. I think he's a master technician in his field, a considerate and courteous man who knows what he's doing. Bill's one of the best attorneys in Wisconsin and probably in the Midwest."

It's such a flattering refrain, one can't help wondering whether *anybody* has a bad thing to say about Coffey.

"Everybody is going to say the same thing," says Robert Donohoo, an assistant district attorney for Milwaukee County. "Everybody is going to say Bill is very honorable, and a very good attorney. He's one of those attorneys whose word is good. The number of attorneys you can say that about has dwindled as time goes on."

In what is probably the ultimate compliment one lawyer can pay to another, Madison's Donald Eisenberg, who gained statewide notoriety during his unsuccessful defenses of murder suspects Barbara Hoffman and Lawrencia Bembenek, retained Coffey to represent him when Eisenberg was investigated on conflict of interest allegations relating to the Hoffman case.

The verdict on Coffey's ability seems clear. Why then is he less than a household name in Wisconsin? Not that he's unknown—far from it. But compared to the flamboyant Don Eisenberg (or Milwaukee's Alan Eisenberg, for that matter), Coffey maintains a low profile.

The answer may be that while Coffey has a driving ego, seeing his name in 60-point type is not what fuels it. Ask him to list his favorite cases, and he'll say you never heard of most of them, because they never came to trial. Certainly not. Bill Coffey got the charges dismissed before the case made it to court.

I saw him recently in the Dane County Courthouse on a fairly minor "possession with intent to deliver" drug matter, and he seemed much the same man the *Capital Times* newspaper described as tall, suave, and articulate" more than a decade and a half ago. He said about 30 words to the judge and got what his client wanted—a signature bond.

Coffey's physical presence fits well into his overall style: sharp but understated. You wouldn't know his shirt was monogrammed unless he took off his jacket. A sharp contrast, to say the least, to the more colorful criminal attor-

neys who approach the courtroom with enough body jewelry to shame an Aztec princess (or who are known for giving television interviews while their sometime clients—somewhere off camera—are being carted off to Waupun for 30 years of state-sponsored hospitality.

"Some lawyers' view on how they can be most effective representing their clients is confrontational," explains Coffey. "I, as much as I'm able, avoid trying to be that confrontational. First of all, most of my clients are people who have already had more publicity than they need or care for. It is not in their interest to generate more attention and publicity. It is not in their interest to have me making statements in the press or to other people that may get my name in the newspaper but will not aid the case of my client.

"I think the day you're really worth your salt is the day that you convince the prosecutor not to bring charges in the first place, or where you get the charges reduced or affect the charging decision. As a trial lawyer I love trying lawsuits, and while I enjoy trying lawsuits, from the client's standpoint the best conceivable thing that can happen is to have that matter taken care of under terms acceptable to my client as quickly and efficiently as possible with as little publicity as possible. My clients do not need more publicity. It is my obligation to them to avoid generating more publicity for them."

Coffey admits that he did not always affect a low-key courtroom style.

"When Christ Seraphim used to be on the bench in misdemeanor court early in my practice, there were days when as soon as I stepped into that courtroom the confrontation would start—we'd be screaming, hollering and making comments—and they were still being made as I was walking out of the courtroom.

"On other days, in other courts, you'd get the case dismissed or you'd get the charges reduced and it's all very effective and very quiet and nobody knows you're out there. Unfortunately, a lot of people confuse screaming and hollering and aggressiveness with effectiveness. I think it's important that a lawyer be recognized as someone you can't steamroller or run over, and if you try he's smart enough to stand up and not let it happen, but I don't think you have to go around generating screaming matches to demonstrate that you have that quality."

Surprising as it may seem, Bill Coffey himself worked as a prosecutor for the U.S. government, for a little more than four yours.

Born and raised in Racine, a graduate of St. Catherine's High School, Coffey spent three years in the Army and then returned to Wisconsin, graduating from UW-Madison with a degree in political science in 1959.

Growing up, he had devoured books about Earl Rogers and Clarence Darrow, so when he enrolled in the UW Law School it was with the idea of becoming a criminal defense attorney.

Few fledgling defense attorneys try lawsuits, however, and Bill Coffey very much wanted to try lawsuits. To that end he took a job—-after graduating law school in 1961—as an attorney with the United States Security and Exchange Commission in Chicago, in the stock fraud division. Two years later he signed on with the U.S. Attorney's office in Chicago as an assistant U.S. Attorney in the criminal division.

Little more than a year later, anticipating a move into private practice (and not wanting to settle in Chicago), Coffey switched to the U.S. Attorney's office in Milwaukee. On January 1, 1966, he joined the prestigious Milwaukee law firm of Shellow and Shellow; within a few months the firm's name changed to Shellow, Shellow and Coffey.

Early in his practice, it became apparent that Coffey was a liberal with a social conscience and a nose for ripe legal issues. He defended Father Groppi and *Kaleidescope* magazine, and he sat on the first board of directors of the state public defender's office. In 1968, Coffey filed a motion challenging the constitutionality of Wisconsin's anti-marijuana law, which at the time carried a penalty of up to 10 years just for possession. Marijuana, Coffey asserted, "is not a narcotic drug and poses no danger to the public health, safety, welfare or morals of the community."

Of cases such as Groppi's, Coffey today reflects: "There wasn't a lot of compensation in any of those cases, but they were cases that appealed to me and they were cases I thought were important. I thought the people were doing things that mattered. Unfortunately, there's not a lot of that sort of legal work being done these days."

The Groppi trial is a favorite. In October 1968, Father James Groppi led a group of welfare mothers into the chambers of the Wisconsin State Legislature in Madison in protest of a plan to cut back on welfare benefits. It was a non-violent protest, but disruptive enough for Groppi to land in jail on a charge of disorderly conduct and legislative contempt. When word reached Coffey in Milwaukee, he raced (literally—he was ticketed doing 88 m.p.h. on I-94) to Groppi's aid.

The highly-publicized trial before Dane County Judge Michael Torphy lasted only a day and a half. The jury hung 11-1 for acquittal, and Torphy dismissed the charges.

"That was a well-tried case," Coffey says. "But I probably shouldn't say that's one of my greatest memories because it hung 11-1 and the woman who hung the jury was someone I was satisfied was going to be sympathetic and receptive to the defense.

"On the other hand, it turned out there was an older gentleman on the jury, a plant worker from Madison whose plant had closed, and three days after the trial he showed up in my office unannounced and asked me if I could arrange for him to meet Father Groppi because he wanted to get Father Groppi involved in helping the elderly and things like that."

When the Legislature ordered Groppi jailed on legislative contempt without due process, Coffey swung back.

"Everyone talks about the 'disgraceful conduct' allegedly engaged in by Father Groppi and his supporters," he said at the time, "But few people have expressed any indig-

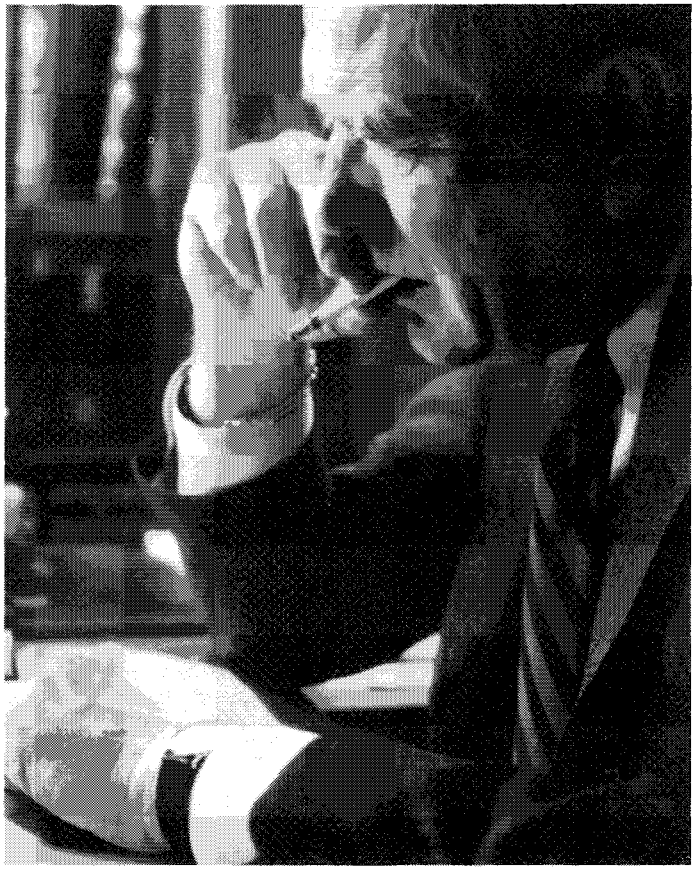
nation about the illegal and disgraceful conduct of the Assembly in connection with the manner in which they secured his confinement."

Such blatant attacks on individual rights have colored Coffey's thinking—even on those cases where the principles at stake are more easily obscured, such as defending counterfeiters or accused child-molesters.

"I'm like anyone else," he says. "I have particular aversion and difficulty with certain kinds of crimes, and with certain kinds of people. Still, I have and do defend people charged with these crimes.

"I don't think there's a morality problem. I think people who have the morality problem, or raise the morality issue, don't understand the basic concept and the fundamental principles of the administration of criminal justice. I think that's unfortunate. I'm always appalled at the general public's lack of comprehension and understanding of the theory and principle of the system. I say that, however, knowing full well that in my law school teaching of advanced criminal procedure and trial advocacy, I'm fairly often taken aback by the fact that law students don't understand the concepts and the principles.

"I think that to understand, it's important to remember that people are presumed innocent of criminal charges. That no matter how much evidence there is or isn't, no matter how heinous the crime is or isn't, a person is entitled to require the state or federal government to prove guilt beyond a reasonable doubt. If the state can prove guilt beyond a reasonable doubt with competent, probative evidence they're entitled to a convictions. If not, they're not entitled to a convictions."



"... I think it's important that a lawyer be recognized as someone you can't steamroller or run over, and if you try he's smart enough to stand up and not let it happen, but I don't think you have to go around generating screaming matches to demonstrate that you have that quality."

Throughout the late sixties, Coffey was involved again and again in groundbreaking civil rights and liberties litigation.

When, for instance, the Shellow firm represented the editor of *Kaleidescope* magazine, charged with obscenity in Milwaukee County for a poem that appeared in the magazine, it went all the way to the U.S. Supreme Court before Coffey's client was acquitted.

"In the book *The Brethren,*" Coffey says, "that was said to be the case where the United States Supreme Court was going to say once and for all the printed word could never be obscene." The decision didn't ultimately read that way, but it nevertheless remains a Coffey favorite: an important defense on an issue that mattered.

Coffey at times appears nostalgic for those days, when the lines of battle were drawn so clearly.

A framed picture of Father Groppi still hangs on the wall of Coffey's seventh floor offices at 1100 W. Wells St. Next to it are a *Kaleidescope* magazine cover, a picture of a race horse (Coffey's very short career as a thoroughbred horse owner came about when a client bestowed a race horse on Coffey in lieu of a fee), and a decidedly unflattering caricature of Richard Nixon, a figure with obvious symbolic importance for Coffey.

But, as he concedes, "the practice changes over the years." Coffey left the Shellow firm late in 1969 and since that time he's been in private practice on his own with a variety of people. His firm currently is called Coffey, Coffey, and Geraghty—the other Coffey being his brother Dennis, who's also highly regarded.

Coffey's practice has changed primarily because federal prosecutors (he tries mostly federal cases) today are interested in different types of crime: large-scale drug cases, white collar crime, Medicaid fraud.

"A good part of our practice is drug-related," he says.

But Coffey also continued to work closely with the state public defender's office and the UW-Madison Law School.

He sat on the first board of directors of the public defender's office.

"The vast majority of the so-called street crime cases are handled by the public defender's office," Coffey says, "because people don't really have sufficient funds to be hiring private lawyers. People who find themselves in that kind of trouble, that is. They wouldn't be out stealing $30 if they could afford to hire a lawyer."

For the past nine years, Coffey has worked closely with the UW Law School, teaching a class some semesters, and helping out with Professor Frank Remington's Legal Assistance to the Institutionalized program, in which law students give legal help to prisoners and mental patients.

Remington is also the UW's faculty representative to the Big 10 athletic conference, and when the Wisconsin athletic department had to hire an independent investigator as part of an NCAA probe, they chose Coffey.

But even though Coffey is less likely nowadays to mount the legal barricades as he did in the sixties, he is no less a hard-liner on the question of the rights of the accused. And he is worried that those rights have already been dangerously eroded.

"I don't think the general public is even aware of how serious the encroachment on the rights of people are," Coffey says.

"I suppose that even if they were aware they might not care."

As an example, Coffey points to recent legislation that deals with property and money belonging to a defendant. Via legislation defining a "continuing criminal enterprise," law enforcement officials may now seize all a defendant's property and money and proclaim it forfeited to the government, unless the defendant can prove it did not come to him as a result of a crime.

"It completely shifts the burden of proof," Coffey says, adding that it is only one of several encroachments.

"It's so easy for the general public to identify with the prosecutor," he continues. "It's very difficult to get people, to incite people to be concerned about high-handed tactics or questionable tactics engaged in by law enforcement officials or prosecutors because they always cloak themselves by saying they're protecting us or they're protecting people. You know, nice people don't think they do it to them and the people they do it to are considered bad and so most people don't get very excited about it. There are a lot of questionable activities engaged in by law enforcement people."

Coffey cites the recent bugging and wiretapping operation orchestrated by the federal government in an effort to nail alleged Milwaukee mobster Frank Balistrieri and several others on conspiracy and gambling charges. Coffey represented one of the defendants, Peter Picciurro, during the trial. (He was acquitted on all five counts.) Coffey says the authorities had the goods on one local bookie, but indicted several others because at least five conspirators are needed to make it a federal rap.

"That was a good example of the government overreaching to try to make a federal violation of what is clearly a violation of state law," Coffey says. "The state of Wisconsin has gambling laws. The state of Wisconsin is qualified, capable and able of enforcing these laws.

"They had one guy, and he was a bookie, clear and simple. But they take that offense, and they try to make it into a federal offense, not because the facts and circumstances of the case were so compelling, or that it was such a large scale operation, but because that was the vehicle by which they might be able to get Frank Balistrieri. When you start directing offenses to get people rather than to get violations of law, you create all kinds of trouble.

"People blame the defense attorneys. They talk about 'technicalities.' They talk about 'loopholes.' Someone said a technicality is a law the speaker finds inconvenient at the moment. I believe that, and I believe the concepts and principles are valuable. I'm very distressed by what I consider to be an effort in the past 10 years to dilute those principles and not adhere to them.

"Politicians found it convenient to make law and order and crime in the streets campaign issues and everybody—by legislation and tampering with basic fundamental rights—tries to change and cure that and their cures were worse than the problems.

"I feel today for people in education, because politicians have now left crime, after screwing it up, and they're turning to education.

"If they do as bad a job as they did in the area of criminal law, we'll probably be turning out functional illiterates for the next 40 years."

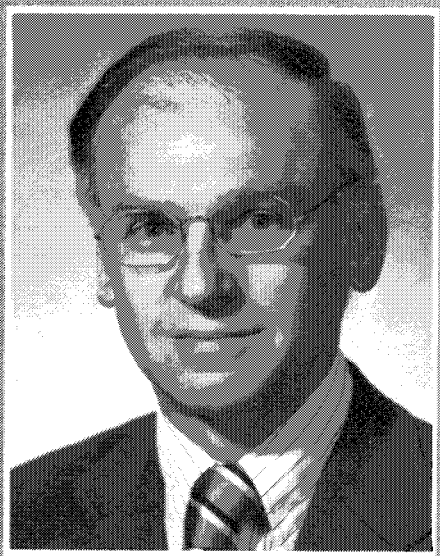
Remembering Law School

Do you remember your first day at the University of Wisconsin Law School or your last day at the Law School? Do you ever think about what a great difference attendance at the Law School has made in your life?

For most of us, our Law School education has been one of the most important events in our lives. It gave us training in a profession and made possible the kind of life we lead. It enhanced the quality of our lives both socially and economically.

Now each of us has an opportunity to give back to the Law School a tangible expression of our regard for the education we received. We, all of us together, can help the Law School to maintain the reputation of excellence in legal education which we enjoyed and which enriched our lives. By contributing to the Law School campaign, we will create an endowment fund which will make a real difference in the ability of the Law School to attract and retain superior legal scholars and teachers. We each have the opportunity to associate our names with this noble effort to preserve for us, for our state, and for the future of our profession the great reputation of our Law School.

I am proud to be a part of this fund raising effort. I know that many of you have already joined with me in this enterprise. Now is the time for all UW law alumni to come to the aid of the Law School. Please call or write me if you need more information about how to make your contribution. Join us in honoring the great professors of our day and ensuring the excellence of the faculty of the future.



Irving B. Charne
National Campaign Chairman

The Law School Campaign

David G. Utley reports here on the first Capital Campaign in the 116 year history of the Law School. The Campaign is a major fund-raising effort designed to raise $4,000,000 in endowment. During 1983 attention focused on enlisting alumni volunteers to assist in the drive around the country, and in beginning the solicitation phase within Wisconsin. Now, with the campaign moving into its national phase, a fuller description of the undertaking, its rationale, goals and progress to date, is in order.

Dave Utley has in the past two years been seen by and talked with more graduates of the University of Wisconsin Law School than has any member of the law faculty in the same period. And both the organization and the success to date of the Campaign are owing primarily to the combination of support from law alumni Dave has already contacted and to Dave's very considerable abilities and efforts in directing the development of the campaign so far.

Shortly before Christmas 1981 David Utley arrived on the Madison scene as Director of Development for the Law School and Vice President of the University of Wisconsin Foundation. He walked in to find the law faculty awash in the periodic flood of bluebooks to be graded at the end of a semester and for some weeks got little help from that front in acquiring understandings of the faculty's perceived needs of the School and its dreams for the Law School's future. But Dave, a patient and understanding man long associated with efforts to provide support for scholarly and intellectual activities, found more than enough to do in other areas relevant to establishing an effective and successful capital campaign. He had done this kind of thing for some time at Beloit College and, after that, had been Director of Development for the prestigious Council on Foreign Relations in New York (which he left to join us here).

And in the two years he has been with us at the Law School, this amiable, urbane and very intelligent man has come to know us very well, well enough indeed to make us squirm now and then at the way he grins at some extravagant remark we make. But the faculty like Dave a great deal and from the record to date the law alumni who have met him appear to share the faculty's judgment.

Ed.

David Utley's report on the progress of the Law School Campaign follows.

Background

For many years observers of American higher education have noted that the nation's public universities—at least the better among them—depend on more than public funds alone. Indeed, it has become something of a cliche to refer to our major public universities as "state-assisted" rather than "state-supported" institutions. Whatever language one uses in describing the economics of higher education, it is clear that multiple sources of support are required if public institutions are to achieve and maintain excellence. At the University of Wisconsin-Madison, for instance, only about 35% of the operating budget comes from state appropriations. That figure will vary among the schools and colleges on the Madison campus, it is true, but in virtually every case support from nonstate sources, including private contributions, is required to maintain and improve the academic programs.

The Law School is no exception to this, and it has officially recognized the importance of private, voluntary support since 1969 when an annual giving program among alumni was instituted. Valuable as the Annual Fund is as a supplement to state funds, it has become clear over the past few years that by itself it will not provide the additional funds needed to maintain the level of excellence to which the Law School aspires. In addition to the Annual Fund income, there is a need for new revenues to allow medium and long-range plans for the teaching program, faculty recruitment and retention, public service and legal research.

Wisconsin alumni can be proud of their school as one that has established a national reputation for combining thorough and rigorous legal training with a rich and exciting research environment. But the fortunes of even a strong institution can be precarious. The quality of faculty and of programs can be eroded with surprising suddenness and, once lost, can be regained with only the greatest difficulty. For the past several years the Law School, like the rest of the University, has been operating under significant financial constraints as the real dollar value of state funding has declined. In 1976-77 the state funded portion of the School's budget was $2,160,296. In 1982-83 it was $3,305,952. When inflation is taken into account, this 53% increase in nominal dollars turns out to be a 6.5% decrease in real dollars. The following table shows what happened.

Law School Budget—State Funds

Year	Budget	Nominal Change	Real Value (In 1977 dollars)	Real Change (From 1977)	% Change (From 1977)
1976-77	$2,160,296				
1982-83	$3,305,952	+$1,145,656	$2,019,300	-$140,996	-6.5

In 1982, following an extensive review and analysis of the Law School's programs and finances, the faculty determined that the single most effective way to meet the School's resource needs in the foreseeable future was to increase substantially its income-producing endowment. Unlike the better private centers of legal education, and even some of the public ones, Wisconsin's law school entered the 1980's with a very modest endowment of approximately $750,000. This left the school dependent on state appropriations, occasional research grants from foundations and government agencies, and annual contributions from alumni, all of which are subject to fluctuation, and the first two have been declining in recent years. On the other hand, if the Law School could substantially increase its endowment, two benefits would quickly result. First, of course, the funds available for annual operations would be significantly increased. Equally important, the assurance that these funds would be available year after year would permit more effective long-range academic planning.

Accordingly, the decision was made to undertake a capital campaign to raise $3,000,000 in endowment. The dollar goal was established after reviewing the Law School's needs in several areas (described below), but it was influenced also by an awareness that this would be the School's first major fund drive, and that the goal should be a reasonable one for a school with a modest history of private support.

No sooner had the goal been agreed upon than the School unexpectedly became the beneficiary of a truly magnificent bequest of $1,400,000 from the estate of Mr. James P. Shaw, LL.B. 1899, and the late Mrs. Shaw. This gift, the principal of which resides with the Milwaukee Foundation, is being used to endow a scholarship and loan fund at the Law School. Because of the size and the early arrival of this addition to the Law School's endowment, it was quickly decided to raise the campaign goal, and we now have our sights set on increasing the endowment by at least $4,000,000.

Components

When raised, the $4,000,000 in added endowment will be used to support a number of Law School programs. Approximately two-thirds ($2,600,000) will be allocated to the overall legal education program. Just over one-third ($1,400,000) is sought for the support of three particular programs—Business Law, Interdisciplinary Legal Studies, and Labor Law—in which the Law School has established a national reputation, or, as in the case of Business Law, where the faculty has agreed additional support and strengthening is desirable. A fuller description of these objectives follows.

I. Support of the Overall Legal Education Program: $2,600,000

A. The Endowment of Six Bascom Professorships: $600,000

One of the major challenges facing the Law School today is that of faculty recruitment and retention. Wisconsin is facing increasingly stiff competition for the best faculty. Put simply, Wisconsin's faculty salaries, traditionally somewhat lower than those at our peer institutions, have been falling further behind. A somewhat grim joke has been heard on campus for years: Lake Mendota is worth (name your figure) thousand dollars in salary. Perhaps. But an essential qualifier to any such assertion is: "up to a point." Unfortunately, the Law School has passed that point. The average "gap" in salary between that of our faculty and faculty at comparable law schools has more than doubled during the past five years. To date this state of affairs has cost the Law School several new additions to the faculty, as promising teacher-scholars who were asked to join the teaching staff have accepted offers elsewhere. While Wisconsin salaries at the junior faculty level were in general competitive, what had turned them away were the very substantial lags in salaries in the mid range and senior levels of the law faculty. This salary deficiency, if not corrected or compensated for, may result in loss of some of the best of the current faculty and, more seriously for the long-run interests of the Law School, turn away the kinds of people who make up a great faculty.

By providing support for scholarly and professional activities, the Bascom Professorships can make the Law School more attractive to top legal scholars and teachers. Bascom Professorships, to be endowed at a minimum of $100,000 each, have been identified by the university as an important inducement in attracting outstanding professors. Such professorships will be rotated among distinguished faculty, teaching in different areas of the law, and, by providing funds for released time for research and for the development of new courses, as well as for secretarial support, attendance at professional meetings and scholarly materials, will strengthen the entire educational pro gram.

B. For Scholarship Endowment: $1,250,000

Currently 80 percent of Law School students are receiving some sort of financial aid, but of the amount devoted to scholarships and loans only six percent comes from the School's own funds. Ninety-four percent consists of federal and state aid programs now threatened with reductions and eligibility limitations. To assure that qualified students will not be barred from obtaining a legal education, the Law School has sought to establish an endowed student aid fund which will provide an adequate level of scholarship and loan assistance.

C. For Support of the General Law Curriculum: $750,000

While a high quality faculty, and an able, motivated student body will always be the key elements in the learning process, other resources are essential for a quality legal education. Unfortunately, today's budget constraints prevent the Law School from providing them in sufficient measure. Compared to that of other schools the Law Library is underfunded and additional resources are needed for acquisitions. Support is needed for the lectureships and fellowships which, by bringing to campus outstanding legal scholars and practitioners, greatly enriches the learning program. The Legal Education Opportunities Program is playing a significant role in helping minority and disadvantaged students to earn their degrees, but it needs additional funds to support intensive instruction in writing and legal analysis. Finally, the additional resources sought would enable the Law School to expand its offerings in clinical and practice skills, to develop new courses, to support teaching methods workshops for the faculty and would allow more small group instruction.

II. Support of Programs in Business Law, Interdisciplinary Legal Studies, and Labor Law: $1,400,000

In recent years the Law School has been fortunate to have on its faculty three men who established themselves as leaders in their field: James Willard Hurst in Legal History, George Young in Business Law, and Nathan Feinsinger in Labor Law. The substantive areas in which these men worked are fields in which the Law School already enjoys considerable strength and upon which it wishes to build. We believe the most appropriate way to do this is to establish an endowment fund to support teaching and research in each of the fields in which Professors Hurst, Young and Feinsinger worked so productively. In so doing we intend both to honor these men and carry on the work they so significantly advanced. Specifically we will seek gifts to establish:

A. The George H. Young Fund for Business Law: $300,000

The George H. Young Fund is intended to strengthen teaching, research and education in the field of business law. This field, including all the regulatory programs and tax laws affecting business, is becoming increasingly complex. The faculty has determined that added emphasis should be placed on this area of the law in order to meet the more demanding needs for business law education in the 1980's.

To carry out this goal, the faculty has voted to establish the George H. Young Fund for Business Law as a memorial to the late Dean Young, whose work in this area is well known to generations of students, practitioners and alumni. A principal purpose of the Young Fund will be to establish a George H. Young Professorship of Business Law. Distinguished members of the faculty active in areas of law affecting business will be eligible for the Young Professorship, and Professorship funds will be used to support teaching, research and education in the business-related portion of the

Law School's curriculum, including the development of new or improved courses. At the discretion of the appointees, the Professorship income could be used for research and secretarial support, conferences, and other purposes approved by the faculty.

In addition to financing the Young Professorship, income from the George H. Young Fund for Business Law will be used to support visiting lecturers, scholars and professors in the business law field, and generally to support faculty research and curriculum development in this area.

B. The James Willard Hurst Fund for Legal Studies: $800,000

In the classroom and through his writing, Willard Hurst taught that the law can only be understood when seen in its historical and social perspective. From this lesson several generations of Wisconsin scholars have developed a unique approach to the study of "law in action;" an approach which made the school one of the major centers for legal research in the country. The Hurst Fund will support the investigations and publications needed to continue this tradition of research on the history, meaning and impact of the law.

We propose to establish the Hurst Fund at this time for two reasons. First, we wish to honor Professor Hurst on the occasion of his recent retirement from active teaching, and we want to acknowledge the central role he has played in the school and in its research effort. Secondly, our research program faces a serious challenge which must be met. Only six percent of the regular law school budget is available for research. For many years that modest amount was significantly supplemented by federal and foundation research awards. More recently however, these awards have been drastically curtailed in number and amount. If we are to continue to be a major center of legal scholarship we must secure other sources of support.

The Hurst Fund will provide an initial endowment of $700,000 for the Law School's planned Institute for Legal Studies. By assuring a source of ongoing support, the Hurst Endowment will enable the Law School, through the Institute, to maintain and build upon its present status as a leader in the study of law in action. The Institute will support faculty research and disseminate the results of such investigations to the legal profession and the public. By concentrating on issues of current concern and fundamental importance it will contribute significantly to both the teaching and practice of law. Examples of the types of studies to be conducted under the Institute's auspices includes the administration of civil justice, the costs of litigation, the role of lawyers and of law in the regulation of business, and the changing nature and needs of the legal profession.

Most encouragingly, the firm of Foley & Lardner and the Wisconsin law alumni in that firm have gotten this segment of the campaign off to a good start by endowing the Foley & Lardner-Bascom Professorship in honor of Willard Hurst. This professorship will be awarded on a rotating basis to faculty members whose scholarly work continues the Wisconsin tradition of the study of law in action.

C. The Nathan P. Feinsinger Fund for Labor Law: $300,000

The third goal is to strengthen a well established program of teaching, research and service in the labor law field.

Sixty years ago—in 1922—the Law School was one of the first in the United States to officially recognize this emerging field when it added courses in labor law and collective bargaining to its curriculum. During the subsequent half-century the School has continued to build on its pioneering efforts and has become a leader among law schools in labor law teaching and research.

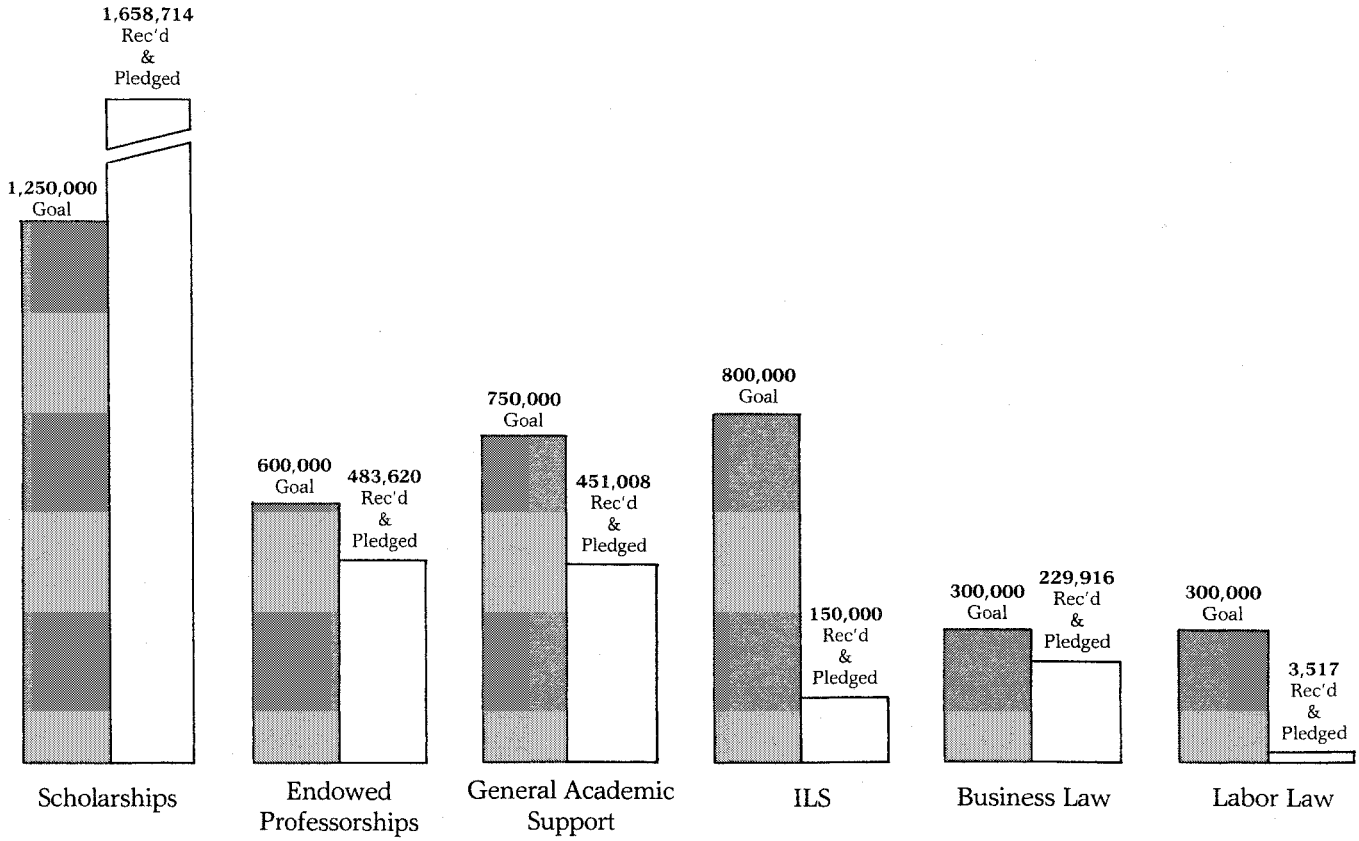
The Law School's prominence in labor law is attributable importantly to the work of Professor Nathan P. Feinsinger. Upon joining the faculty in 1929, Professor Feinsinger pioneered in the fields of labor law and collective bargaining, and well before his retirement from active teaching in 1973 had established a national and international reputation as a mediator and arbitrator. His scholarly research was augmented by an exceptional career in public service.

This tradition, of outstanding teaching and direct personal involvement in the practical aspects of labor law, remains a strong and active one at Wisconsin. Indeed, the Law School's program is one of the strongest in the country. Faculty members working in the field are nationally renowned teacher-scholars with extensive experience in labor-management relations. Students interest in the field also is exceptionally high. With additional support this already very good program could become truly outstanding.

Today, new laws and court decisions dealing with equal employment opportunities, worker safety and pension rights are appearing with growing frequency. At the same time, increased recognition is being given to the problems of productivity, comparable worth, and the role of the work force as vital factors in the long term health of the American economy. As a result of these developments, the field of labor law is acquiring additional significance. We propose to build on the tradition of excellence and achievement Professor Feinsinger brought to the discipline by establishing an endowment fund to support research and teaching in the field, to fund graduate study in Labor Law, to arrange for national and international conferences, and to establish an endowed Bascom Professorship. With such resources we can capitalized on our strengths and supplement them, thereby assuring Wisconsin's continued leadership in the field.

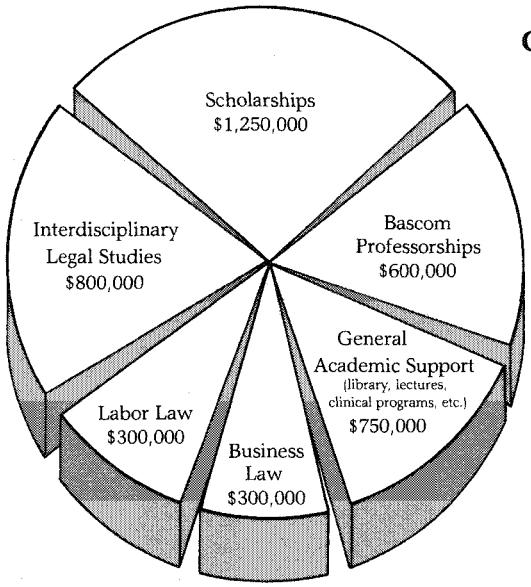
Progress To Date

As of December 31, 1983, $2,976,842 in gifts and pledges to the Law School Campaign had been recorded. Of this amount, $2,672,248 had been received and was functioning as endowment.



While the drive has thus gotten off to an encouraging start, with over 70% of our goal achieved, much remains to be done. The total amount added to the Law School's endowment is indeed gratifying. But as in most major fund drives, substantial early progress was made possible by a relatively small number of very generous donors who contributed to the support of particular components of the Law School's program. As a result, we are much closer to reaching our goal for some segments of the drive than for others. The endowed scholarship fund, for instance, which benefited from the Shaw bequest and a few other generous gifts, has already exceeded our dollar objective. In other areas, much remains to be done, and the following graph illustrates.

With the campaign now moving into its national phase, the Law School are confident we will reach our overall goal. The support received to date from law alumni in areas where the drive has been underway has been very encouraging and augurs well for the remainder of the drive. The substantive objectives of the drive—maintaining a top flight program of teaching, public service and scholarship at the Law School—is surely one that all law alumni can support. As the case for the Law School is carried to alumni during the coming year, we are confident it will receive a sympathetic hearing, and, we hope, a generous response.



Goal: $4,000,000

The Bascom Hill Society

The Bascom Hill Society consists of those individuals who have contributed $10,000 or more to support the programs of the University of Wisconsin. The Law School wishes to express its deep appreciation to the following alumni and friends who have contributed to the Law School Campaign by making Gifts or pledges at The Bascom Hill Society level during 1983.

Mr. & Mrs. Robert W. Arthur
Joseph R. Barnett
David E. Beckwith
Glen H. Bell
Mr. & Mrs. John S. Best
Mr. & Mrs. Theodore C. Bolliger
James P. Brody
Mr. & Mrs. Patrick Cotter
Evjue Foundation
Mrs. Leon F. Foley
Foley & Lardner (firm)
Laurence C. Hammond, Jr.
Gerald J. Kahn
Marvin E. Klitsner
Charles A. Krause Foundation
Robert W. Lutz
Thomas G. Ragatz
Harry V. Ruffalo
Helen M. Schlough
Leonard F. Schmitt
Virginia Wattawa
William J. Willis

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Many friends of the Law School may wish to support the Capital Campaign by feel their circumstances do not permit them to make an outright gift at this time. In that case they may want to consider arranging for a bequest or other form of deferred gift which will benefit the School at a later date.

Such gifts can be of great importance to the Law School, as recent experience demonstrates. In addition to the Shaw gift, described elsewhere in this issue, the Law School has received over the past year and a half several other sizeable bequests. These include gifts of $143,000 from the estate of the late Thomas M. Tracey, LL.B. '37; $287,000 from the estate of William H. Voss, LL.B. '29; over $106,000 from the estate of M.E. Davis, LL.B. '39 of Green Bay; and $35,000 from the estate of Mrs. Maud E. Otjen. All of these gifts have been added to the Law School's permanent endowment.

The Thomas M. Tracey gift is being used to provide badly needed support for the Law Library. The Voss bequest will be used to establish one or two Bascom Professorships in Law. The Davis and Otjen gifts will provide additional scholarship support, with Mrs. Otjen's bequest being added to the Christian J. Otjen Scholarship Fund previously established in memory of her late husband.

A Word of Thanks

No fund drive of the size being undertaken by the Law School could succeed without the active support of concerned alumni willing to invest time and effort in the undertaking. The Law School is fortunate to be receiving the active assistance of numerous alumni who have agreed to serve on campaign committees in various parts of the country.

To date the following area chairmen have agreed to lead the Law School's fund-raising effort in their areas. To them, and to the many additional loyal alumni who have agreed to help, we extend our deepest thanks.

Finally, a thanks also to alums Douglas H. Soutar, Sr. of New York and David Previant of Milwaukee and Washington, D.C. who have agreed to co-chair a special fund-raising effort in support of the Labor Law program at the Law School. Unlike the other segments of the drive which are being organized primarily on a geographical basis, the Labor Law component is being organized substantively, with a national committee now being formed. The fund-raising efforts of this group will be getting underway this year.

Area	Campaign Chariman
Milwaukee	*John Best*
Dane County	*Richard L. Olson*
Kenosha & Racine Counties	*William E. Dye*
Green, Rock, Walworth & Jefferson Counties	*Rodney O. Kittelsen*
Sheboygan, Calumet & Manitowoc Counties	*John R. Holden*
Sauk, Columbia & Dodge Counties	*Carroll B. Callahan*
La Crosse, Trempealeau & Vernon Counties	*Daniel T. Flaherty*
Outagamie County	*Don R. Herrling*
Winnebago County	*Jerome T. Bomier*
Wood, Portage, Marathon & Oneida Counties	*G. Lane Ware*
Grant, Crawford, Richland, Iowa & Lafayette Counties	*Mac A. McKichan, Sr.*
Northwestern Wisconsin	*Harold Witkin*
Eau Claire area	*George Carroll*
Chicago	*Tomas M. Russell*
Minneapolis-St. Paul	*W. Thomas Doar, Jr.*
Washington D.C.	*Arnold H. Weiss*
San Francisco	*Allan Joseph*
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