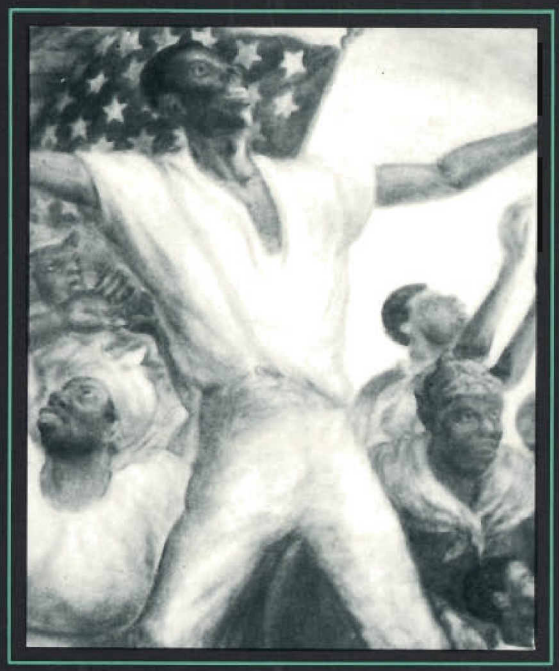
University of Wisconsin Law School Forum

GARGOYLE



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"A Single Step Begins with a Journey of a Thousand Miles" "There are Two Kinds of UW Law Grads"

Dean Cliff F. Thompson

Dean Cliff F. Thompson

As many of you know, I and other members of the Law School have been visiting within and outside of Wisconsin to report to you on our efforts, and to hear your reflections about legal education from the perspective of your practice and public service. Most recently, Professor Stu Gullickson, UW Foundation Vice President Dave Utley, and I covered some 1000 miles, dropping in on alums and other lawyers in Sparta, Eau Claire, New Richmond, Amery, Balsam Lake, Baron, Rice Lake, Superior, Ashland, and Rhinelander, which was our destination. I was scheduled for the UW Founders Day speech there, so we decided to use a Sunday and an extra day of travel for some additional visits. Everyone seemed as enthusiastic as we did about the value of these contacts, so there will be more. The recent trek was actually only one of several short tours to see our graduates in the past year. I believe a trip like the one to Rhinelander is a good step for a new dean. Therefore, I cannot resist turning on its head one of President Kennedy's phrases (which no one has been able to trace to its alleged origins in China) to arrive at the symbolically appropriate "A single step begins with a journey of a thousand miles."

In order to help us with these journeys, let me know shortly after you receive this GARGOYLE if you'd like to be included in my itinerary around the state during late August. Of course, there will be other occasions, so keep that invitation generally in mind, and write me a note when you are so moved.

Although there seems to be much to catch up on when I return from visits, I feel renewed by the meetings with alumns who span more than six decades. After many conversations, I have discovered an obvious but little known fact: there are two kinds of UW law graduates. There are those who have Herbie Page stories, and those who don't. For those who don't, I should say that Professor William Herbert Page was a faculty member for 36 years, ending his service in 1952.

I have been associated with several law schools, and all of them have some kind of legendary Mr. Chips. But I have never seen anything like the Herbie Page phenomenon. The enthusiasm with which the amusing, outrageous, and occasionally unbelievable tales are told is amazing. After I'd heard ten stories, I thought I'd heard them all, since there were sometimes more than one version of the same basic story. How wrong I was! A collection of these tales would only be a footnote in the history of the Law School, but it would be a long one, and, like many such notes, more interesting than some of the text. Here is what I'd like you to do. Send me your stories. Do include details of the appearance and mannerisms of the characters, and indicate whether you saw the event or heard about it, but do not worry about your literary style. We will collect, compile, and edit the tales until we have a suitable pamphlet. This may take some time, but I suspect that the supply is endless, and our first edition may not be the last.

Copyright and Metaphysics

Professor John Kidwell

John Kidwell, whose reflective essay on American copyright law appears below these introductory remarks, produced this piece at the request of the GARGOYLE. What we'd asked him for was a kind of view from Olympus into this esoteric body of law and policy and what he has turned out fits the bill—in our view, at least—graciously and well indeed.

Since 1972, John has been a member of the Wisconsin law faculty, having come from two years in private practice at Denver following his graduation from the Harvard Law School in 1970. As a hobbyist, he has become a skilled cabinet maker and, in more recent time, has developed into a considerable computer buff. Small wonder that the challenges of copyright law have attracted him.

John Kidwell's essay on copyright law follows.

In 1841 Justice Story wrote that copyrights and patents ". . .approach, nearer than any other class of cases belonging to forensic discussion, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent." *Folsom v. Marsh, 9 Fed. Cas. 342, 344, No. 4901 (C.C.D. Mass. 1841).*

I suspect that many modern lawyers and students of copyright law, confronted with this observation, might add, "Right on!" And, although the revision of the federal copyright laws in 1976 has eliminated some of the confusion and "modernized" the law, I would guess that most people familiar with copyright law would still endorse Story's observation. But, I hasten to add, it is this very quality that makes copyright law so interesting—or at least I find it so. That is, I find copyright law fascinating simply BECAUSE it seems to test the very limits of what law can be made to do (and sometimes, it could be argued, to exceed those limits).

What I would like to offer are some examples of the kinds of questions now troubling Congress and the courts in copyright cases, as well as some of my thoughts on what it is about the copyright law that makes Story's observation apt. I think that we will discover that copyright law is uncertain in its application (for that is what I take Story to mean) not only because it is, or approaches, the evanescent, but for a host of other reasons as well.

An Overview of Copyright Law

As most of you may already know, copyright is a creature of federal law. The Constitution authorized Congress to create a copyright system, which it did in 1790. The statute was amended from time to time, usually with the effect of increasing the scope of copyright by adding new kinds of subject matter, or new rights.

Until the most recent revision the states had substantial authority to protect unpublished copyrightable material by means of so-called "common law copyright." One of the most significant changes introduced in the 1976 statute was the pre-emption of the authority of states to offer such protection; unpublished works were brought under the federal umbrella and the states were prohibited from enforcing rights equivalent to those granted under the federal statute.

The core purpose of federal copyright is to provide protection to the writings of authors. "Writings" has been expansively defined to include not only books, but paintings, motion pictures, sculpture, maps, speeches and computer programs. In order to qualify for protection a work must possess the attribute of "originality" and be "fixed" in a tangible form. The degree of originality has generally been thought to be very modest, so that telephone books and art reproductions have qualified for copyright protection but there has been some recent controversy about the meaning of even this most venerable, and one might assume settled, substantive requirement.

Copyright protection does not extend to protect ideas or processes, but only to the particular expression of an idea, or the description of a process. Copyright protection is similarly unavailable for utilitarian devices, though it may extend to the description of the utilitarian item, or to separable decorative features of the item.

Contrary to what some people seem to expect, there are almost no formalities associated with obtaining copyright protection. The copyright arises when the work is fixed (written down, for example) and a notice is required only when it is published. This represents another significant change introduced by the 1976 Act; prior to that time the federal copyright interest was created by publishing the work with the prescribed notice. Registration of the work with the Copyright Office and deposit of copies is necessary only to obtain certain advantages in enforcing rights. and not to preserve the right itself.

The rights secured by the copyright are enumerated in the statute, and

include rights to reproduce the work, to distribute it, to display it, to perform it publicly, and to utilize it in the creation of new works. All of these exclusive rights are subject to a general privilege of "fair use" and a series of quite specific limitations that vary by kind of subject matter; while the copyright owner of a "musical work" has the exclusive right to perform a song publicly, for example, the copyright owner of a "sound recording" does not have such a right. What this means is that the heirs of Hoagy Carmichael must be paid when Willie Nelson's rendition of *Stardust* is played on the radio, but that Willie himself, the author of the "fixed", and hence copyrighted, rendition need not be paid. (Until 1972 Willie would have had no copyright at all—but that is another story.)

The foregoing is, of course, only a crude description of the structure of a copyright system that is the subject of a four-volume treatise and innumerable journal articles. But it may be sufficient for my purpose, which is merely to provide a background for some more pointed observations.

A Taxonomy of Legal Uncertainty

In the course of another project (not yet quite ready for publication) I have been working on a taxonomy of legal uncertainty. I have taken as a starting point the suggestion by Professor Danzig that most legal problems arise from uncertainty about the facts, uncertainty about the values that bear on the interpretation of rules, or from the limitations on the capability of courts. To this I have added uncertainty that comes out of the nature of language. There isn't room here to fully develop this structure, but I can sketch its outline in a metaphor, and this should be sufficient to allow me to use the structure as a way of organizing the balance of the discussion.

I would ask you to imagine that Sam owned a new kind of watch with which he was unhappy, and which he wished to repair. He took it to a watchmaker, who indicated a willingness to attempt the job. The watchmaker, after commenting on the novelty of the timepiece, noted that he needed some time to figure out how the watch works. He had, in my taxonomy of difficulty, a FACT problem. In any event, after careful examination, he at least believed he knew how it worked. He then asked Sam what he meant by "repair." What degree of accuracy was required? Because even after he knew how it worked, to make it accurate to within a minute a month is a very different matter than to make it accurate to within a minute a day; in terms of my model, both he and Sam had a VALUE problem. They discussed the advantages of more, as opposed to less, accuracy, and balanced the degree of accuracy against the cost of the corresponding repairs. Knowing how the watch works really implies relatively little about the desired degree of accuracy, though it does constrain the range of choice. They agreed on a minute a month. At this point the watchmaker faced a CAPABILITY problem. He knew how the watch worked and understood what needed to be done in order to make it accurate to within one minute a month but lacked the tools that such a repair required; even a skilled watchmaker cannot repair a watch with a hammer and chisel.

The use of the watch-repair metaphor to exemplify the LANGUAGE problems is more difficult, though the very fact of difficulty may be revealing; a problem is no less real by being hard to describe. But imagine that the watchmaker, after having understood the problem, and decided what the repair's objective should be, and having acquired the necessary tools, explained to Sam, or better yet, his apprentice, what to do. "Now as you know, this is a new kind of timepiece. Most watches have a mainspring and a balance wheel. Now this doesn't have a mainspring. Instead it appears to have a magnetic gizmo that moves the hands by nudging up against this thingamabob. Now in a regular watch, we would adjust the tension on the mainspring. Here, I've discovered that if you just jigger with the gizmo, it appears to nudge against the thingamabob a little more slowly—rather the same effect as tightening the mainspring—and the timepiece goes a little faster. Understood?" Two days later Sam picked up the watch, repaired. On the repair slip the watchmaker had written, "Adjust tension on the mainspring—$25."

This brings me, finally, to a partial catalogue of hard questions in copyright law, organized according to the categories explored in my metaphor.

Trouble With the Facts

Only a moment's thought is required to confirm that copyright law disputes involve many problems of fact, and that these factual problems exist at two levels. The first level is what I call the micro-factual; we often don't know who did what, for example. The other level of uncertainty—the macro-factual—results from our ignorance about how the world works. First of all the very nature of the subject matter of copyright means that we constantly confront hard micro-factual problems. It is often difficult to adequately describe the subject matter of the copyright itself, for example. The copyright is said to extend to the "expression of the idea". Remember that anyone is free to borrow the idea itself, but no one may copy the particular expression. But where does idea end, and expression begin? Copyright clearly protects against non-literal as well as literal copying; protection for the expression of the idea prevents paraphrases or recastings of a script, or work of art, as well as preventing verbatim duplication of the work. Judge Learned Hand indicated that ". . .as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that. . .the decisions cannot help much in a new case." Later in the same opinion, speaking of the boundary between idea and expression, he noted, "Nobody has ever been able to fix that boundary, and nobody ever can." *Nichols v. Universal Pictures Corporation, 45 F.2d 119 (2d Cir. 1930).* The intangibility of the subject matter means, then, that the very description of the "facts" of a copyright dispute may attain the evanescent character suggested by Story.

Another factual problem centers on the difficulty of determining the genealogy of ideas and their expressions. Because copyright law, unlike patent law, protects only against copying and protects only against copying material that was original with the copyright claimant, it is often necessary to investigate the genealogy of the works of both the plaintiff and the defendant; given their intangible character this is no mean feat. The cases are filled with controversy concerning the maternity and paternity of plays, and poems, and songs, and scenarios. A jury or judge is often asked to draw an inference as to the genealogy of a work based on a degree of similarity which falls short of being literal, but which appears to go beyond the coincidental. The Bee Gees were recently defendants in a suit by a person who claimed they had copied his song and, though the Bee Gees prevailed, the degree of similarity between the two works was apparently quite striking. It has been held, by the way, that conscious borrowing is not required—the famous songwriter Jerome Kern was once found to have infringed another's composition even though the court was willing to believe the copying had been unconscious.

Macro-factual uncertainty abounds in copyright law. For example, how does the marginal interpretation of copyright law affect the incentives for production and dissemination and utilization of copyrightable material? If we increase the incentive for creators by strengthening, or deepening the copyright monopoly, do we discourage creative borrowing and the production of derivative works? This is a point that is often overlooked in

arguments about copyright policy. Copyright law prevents not only the reproduction of the original, but also the use of the original to create a derivative work. And so, were Shakespeare alive today, the copyright monopoly would likely have prevented Leonard Bernstein from producing "West Side Story" without the Bard's permission since it would probably infringe "Romeo and Juliet". But one needn't use hypotheticals to demonstrate the application of copyright law to chill creative efforts. Howard Hughes at one point bought the copyrights to all of the magazine articles that had been written about him and then attempted (unsuccessfully, as it turned out) to prevent the publication of a biography that relied on those articles as sources. The Walt Disney Studios have been quite aggressive, and more successful, in attempting to prevent the utilization of their characters in the context of parodies of mainstream values. Other contributors to the popular culture have been similarly hostile to borrowing; a campus newspaper in Wisconsin was sued for printing an ad showing a pregnant Lucy warning that "It can happen to anyone," and counseling awareness of birth control. Does the use of copyright law in these cases impoverish us by chilling references to popular culture that enrich our capacity to communicate to our fellow citizens about issues of contemporary concern? This is first a factual, and then a value, question. Will standard A reduce bad behavior B, and at what cost to good behavior C? And then, is it worth it?

Both micro- and macro-factual problems arise in the application of the copyright law to the computer. First of all, judges and lawyers are presently struggling to understand distinctions between RAM and ROM and between DOS and MOS. Recent decisions have, for example, confirmed that a software author is entitled to copyright protection even if the program is embodied in a computer chip which is essentially illegible to a human being. The courts and scholars have argued about what metaphor to use when bringing copyright to computers. Is a computer program in fact like a machine—and so unprotectible—or like the plans for a machine—and so protectible? In the course of this same debate the contending interests disagreed about the macro-facts. Would software borrowing destroy incentives to produce quality software? Or were those incentives so powerful that software production would continue, the only result of strong software protection being to retard the kind of progressive borrowing that contributes to rapid progress in a new field?

But there is not really room here for a complete catalogue of all the kinds of factual uncertainty that beset legislators, judges, juries, and lawyers as they consider copyright controversies. I hope that the few examples I have offered are sufficient to justify my assertion that factual problems are ubiquitous, and that this explains some of the uncertainty so typical of copyright cases.

The law relating to photocopying certainly exemplifies the problem I am describing. Rarely does a week pass without a call from someone in the university who wants to know how much they can photocopy; I find I can rarely give them a very helpful answer. There is relatively little case-law, and what there is seems always to appear idiosyncratic. The "guidelines" that appear in the House Report to the Revision Bill appear to be most appropriate in the context of primary and secondary schools, and can be seen as unduly protective of the interests of authors and publishers. But quite apart from the lack of clearly articulated rules (which are probably impossible) I think that one of the sources of difficulty here is the lack of any very strong sense, in ordinary life, of right and wrong when it comes to photocopying. That is, contrast our sense of right and wrong about infringement by photocopying with our attitudes with respect to shoplifting. Publisher and authors constantly characterize copying as stealing, and yet the characterization strikes many as hyperbole. Home taping of phonograph records, the use of VCR's to duplicate copyrighted movies or television programs and the copying of copyrighted computer programs and games present similar problems. The computer magazines are filled with articles and letters debating the ethics of copying software complete with lots of finger-pointing, name-calling, and self-justification on both sides. I would suggest that this "on the street" difference of opinion about the rightness or wrongness of the behavior is necessarily reflected in our legal norms, which ends up leaving more than the usual amount of room for arguments on both sides.

A Question of Capacity

Even in the cases where the facts are relatively clear, and the objectives similarly uncontroversial, we face capability problems. How capable are our existing judicial institutions of deciding whether a computer program written in COBOL is substantially similar to a program written in FORTRAN, or of making that same determination when the subject of comparison is a gospel tune and the refrain for a rock and roll song? How reliably can we make decisions about the economic effects of borrowings of

SUPREME COURT OF THE UNITED STATES

Syllabus

SONY CORPORATION OF AMERICA ET AL. *v.* UNIVERSAL CITY STUDIOS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1687. Argued January 18, 1983—Reargued October 3, 1983—Decided January 17, 1984

Petitioner Sony Corp. manufactures home video tape recorders (VTR's), and markets them through retail establishments, some of which are also petitioners. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Respondents brought an action against petitioners in Federal District Court, alleging that VTR consumers had been recording some of respondents' copyrighted works that had been exhibited on commercially sponsored television and thereby infringed respondents' copyrights, and further that petitioners were liable for such copyright infringement because of their marketing of the VTR's. Respondents sought money damages, an equitable accounting of profits, and an injunction against the manufacture and marketing of the VTR's. The District Court denied respondents all relief, holding that noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement, and that petitioners could not be held liable as contributory infringers even if the home use of a VTR was considered an infringing use. The Court of Appeals reversed, holding petitioners liable for contributory infringement and ordering the District Court to fashion appropriate relief.

Held: The sale of the VTR's to the general public does not constitute contributory infringement of respondents' copyrights. Pp. 10–36.

(a) The protection given to copyrights is wholly statutory, and, in a case like this, in which Congress has not plainly marked the course to be followed by the judiciary, this Court must be circumspect in construing the scope of rights created by a statute that never contemplated such a calculus of interests. Any individual may reproduce a copyrighted work

copyrighted material, either for the purposes of deciding whether the borrowing was a "fair use", or to decide what the damages should be? Or what contribution does a copyrighted story make to a successful movie if the story has been reworked by a screenwriter, and the movie made by a famous director utilizing the services of talented actors and actresses? Since I needn't "prove" anything here let me suggest that it may be that, generally, law is most predictable when acting to support economic activity in the context of relatively monotonic economic goals. Copyright poses special capability problems because the values it serves are aesthetic as well as economic, and the norms are articulated in an effort to combine both value structures.

The Shifting Sands of Language

Language-based uncertainty different from the inevitable vagueness or ambiguity common to all rules is also present in copyright problems. First of all, the law of copyright has been confronted on a number of occasions with changes in technology which required the interpretation of language in situations not within the contemplation of the rule framers. Probably the most famous example of this was a case shortly after the turn of the century involving the question of whether a piano roll was a copy of a musical composition. The Supreme Court ruled that it was not, since it was not a visually perceptible embodiment of the work. The interpretation of the word "copy" to include the storage-medium of punched paper simply exceeded the imagination of the majority. The courts have faced analogous problems with the development of photography, motion pictures, the phonograph, television, cable television, the photocopy machine, and the computer. In each situation there has been an inevitable uncertainty.

A second variety of language-based uncertainty seems to have arisen at least once in copyright law. I have argued at some length elsewhere that one of the problems with the generation of rules for the computer software industry is that the language of the industry itself is so new and relatively undeveloped that it has failed to provide stable linguistic raw material for the articulation of legal norms. An example is the use in developing legal doctrine of the words "hardware" and "software." As computer technology developed, the function of those words seemed to change. There may have been a time when it was thought that the distinction between hardware and software was stable, and critical. As both software and hardware changed computer scientists began to speak of "firmware"—and it became clear that the distinction in some cases was relatively unimportant, if not irrelevant; a particular algorithm may be embodied in either software or hardware. And so the legal norms mirror the instability of distinctions, real and linguistic, in the technology.

Getting Used to Uncertainty

What I am trying to suggest is that copyright is interesting because it is difficult. And it is difficult not because of inadequacies in our analytic effort, but because of structural difficulties largely beyond the control of the lawyers, judges, and legislators who are charged with forming the law. It is not as if there is a legal Rubik's Cube that has a solution if only we are clever enough to find it, but rather that there are some relatively permanent conditions which simply make the law of copyright uncertain both for the present, and the foreseeable future.

Balancing Conflicting Values

Even if we set aside the uncertainty that results from fact problems, we quickly confront our apparent uncertainty about the values we wish to promote. One of the most fundamental tensions in the law of intellectual property is between the "natural right" and "public benefit" theories of copyright law. Is a copyright owner entitled to reap all of the fruits of exploitation, or only enough to encourage appropriate investment in production and distribution?

A recent example of this tension can be seen in the "Betamax" case in which the Supreme Court held that the owners of copyrights in movies shown on television had no claim for copyright infringement against the manufacturers of equipment (VCR's) that allows people to make copies of those movies in their own homes, for later viewing. Although the reasoning of the case is complex, the Court did ultimately reassert that the question was NOT whether the copyright proprietor had wrung the maximum reward from his creation, but whether, in this difficult and new case, the protection of the copyright law was necessary to achieve the benefit to the public of stimulating creation and distribution of the writings of authors. Score 1 for the public benefit theory!

But even though the Supreme Court has frequently asserted that the copyright law's justification must be found in the public benefits of extending the privilege of a limited monopoly to authors, the power of an explicit or implicit appeal to the natural right of a creator to control the exploitation of a work is evident again and again in the arguments made to courts and the Congress, and at the margin of decision. The Betamax battle is not over even now; while it appears that efforts by the movie industry to place a "tax" on blank videotape have gone nowhere, in what could be seen as a related development Congress has outlawed the commercial rental of phonograph records which was believed to be facilitating massive copying by consumer on home equipment, to the injury of the record industry; efforts to outlaw rental of videocasettes and computer software are apparently underway.

I would suggest that the difficulty that we have been having with some of these cases is attributable to a diffidence in our commitment to the copyright proprietor's interests—a diffidence which I share, by the way. This ambivalence, I assert, is evident in the substantial substantive complexity of the Copyright Statute. Not since the heyday of the great Wallendas have we seen so much balancing! Section 106 lists the exclusive rights of authors, boldly, and decisively, in half a page. Sections 108 through 118 (25 pages in my copy of the statute) catalogue the limitations on those exclusive rights. Many of these limitations bear the fingerprints of the many interests that were represented while the statute was hammered out over the years; what else could explain, for example, the exemption for the performance of non-dramatic musical works by non-profit agricultural organizations in the course of an annual agricultural fair! (17 U.S.C. 110(6)) While it could be argued that these sections don't really represent a lack of commitment, but rather define the compromise between the authors and the users—a compromise to which we are wholeheartedly and enthusiastically committed—I remain unconvinced. I say its diffidence, or if you prefer, ambivalence. Section 107—the "black hole" of the law of copyright, which grants the privilege of "fair use" notwithstanding the grant of exclusive rights in Section 106—provides further evidence that the statute mirrors our indecision about the substantive objectives, since it is becoming ever more clear that the provision goes well beyond merely exempting de minimis copying.

Foundations of Freedom

Honorable Thomas E. Fairchild
United States Court of Appeals for the Seventh Circuit

Near the end of October 1984 ceremonies were held at Madison, dedicating a new building to house the United States District Court for the Western District of Wisconsin. While the District embraces counties covering considerable more than half the area of Wisconsin, Madison is the principal place within the District in which sessions of the court have been held. And as the size of the court's workload increased and the number of judges assigned to it expanded—there are one senior and two active District Judges these days—facilities in the old Post Office Building on Monona Avenue became sorely inadequate.

The new Federal Courthouse is colorful (a strong blue dominates its exterior) and a striking building. And to listen to the District Judges who are using it, the new facility has been welcomed enthusiastically.

Judge Thomas E. Fairchild (LL. B. '38)—whose remarks at the dedication of the new courthouse are reproduced below—has been a close and long-standing friend of the Law School. He has, however, earned the vast respect with which he is regarded not from his U.W. Law School connections alone but from a life that has been primarily devoted to public service, both in professional and private, personal terms.

Like his father before him, Judge Fairchild served as Attorney General of Wisconsin and as a Justice on the Wisconsin Supreme Court. In between those two roles, he took on a challenge in 1952 to Wisconsin Senator Joe McCarthy—and as the Democratic Party candidate in a year that General Eisenhower and the Republican Party swept the statewide elections, Tom Fairchild gave Joe McCarthy a close and hard run, though McCarthy returned to the Senate, soon afterwards to stub his toe on the events which led to his downfall.

Judge Fairchild left the Wisconsin Supreme Court in 1966 when President Johnson appointed him to the Court of Appeals for the Seventh Circuit. Honored from his days at the U.W. Law School forward for his very special intellectual abilities, he was among the first of a new generation which was to elevate the Seventh Circuit from the cellar (or close to it) among the federal Circuits to a position of respect that for a time was unsurpassed. (U.S. Supreme Court Justice John Paul Stevens—who arrived somewhat after Judge Fairchild—was among the illustrious band who raised the Seventh to pre-eminence).

Judge Fairchild's remarks at the dedication of the Federal Courthouse at Madison follow.

In this courthouse the federal courts of this district will enforce and apply federal law. There will be prosecution of offenders, disputes between private persons, and cases where individuals seek redress against state and federal authorities. In all these proceedings, the courts will protect and implement rights which reflect the foundations of American freedom. Thus the courts, and this building, will be symbols of these rights.

Most Americans deeply believe in the dignity of the individual and the importance of personhood. Privacy, freedom from invidious discrimination, liberty of conscience—we want these for ourselves. We give at least lip service to preserving them for others. And it is our good fortune that our Constitution secures these interests from interference by government.

Some of our needs can be fulfilled only by collective, community action, and to this end government must exist. But we are mindful that limitations on government power are essential if individuality is to be preserved. A principal enforcer of these limitations is the judiciary, federal and state—remarkably independent of the other branches of government, and thus able to take, when necessary, the unpopular course of protecting the minority from the occasional tyranny of the majority.

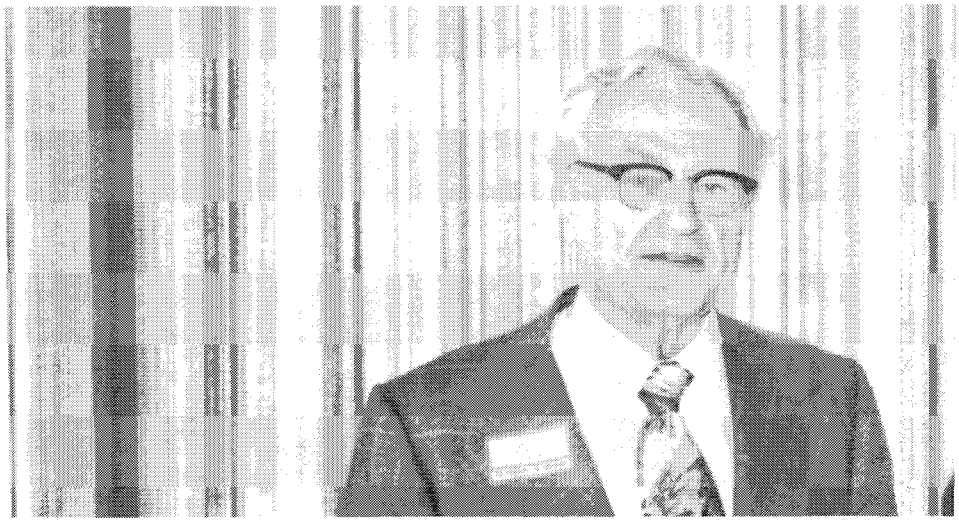
When our forbearers wrote the original federal Constitution, they provided mainly for the structure of the new national government, and the types of power delegated to it. But so strong was the popular commitment to individual freedom and dignity that the Bill of Rights was immediately added, forecasting the types of assault upon individual liberty which might be feared from the new government, and prohibiting or limiting its impact in those fields.

In matters of faith, expression, and thought, the First Amendment flatly prohibited the government from concerning itself with whether particular things of the mind or spirit were or were not in the public interest.

Several other Amendments dealt with the procedures by which the national government might call offenders to account. No unreasonable search or seizure, no one compelled to be a witness against himself, the accused shall have the right to assistance of counsel, to summon witness in his own behalf, know the accusation, confront the witnesses against him and speedy, public jury trial. These stipulations were the product of experience with tyranny.

Following the Civil War federal constitutional limitations were placed on the states as well. Doubtless, the principal purpose of the Civil War Amendments was to guarantee equal status to those who were freed from slavery. In any event, the Fourteenth Amendment created federal constitutional limitations on the impact of state action upon personal liberty. It has proved to be a major adjustment in the relationship between the national government and the states. New developments in this area continue to be pronounced by the Supreme Court.

Honorable
Thomas E. Fairchild



Two phrases in the Fourteenth Amendment, "equal protection of the laws" and "due process of law" have been the principal bases for the adjustment.

Only twenty-two years ago the Supreme Court discarded the doctrine that there was no judicial remedy for unequal representation in state legislatures. Ultimately the Court decided that the "equal protection clause demands no less than substantially equal state legislative representation for all citizens." As a result of the new thinking, substantially equal representation in state legislatures and the federal House of Representatives, enforceable by the courts, became the rule.

The Fourteenth Amendment arose largely out of a demand for protection of the rights of Black Americans. Accomplishment of that goal has taken many generations. By 1896 the Supreme Court had decided that it was enough if "separate but equal" public facilities and services were provided to Black people. Almost 60 years later, and only 30 years ago, the Supreme Court decided that separate educational facilities are inherently unequal and outlawed racial segregation in public schools. Still later the Court held that separation by race in other public facilities denies equal protection.

Here again the thinking of the justices in 1954 was different from the majority view in 1896, but the intervening years had demonstrated the nation's failure to accord first class citizenship to Black Americans.

We need to acknowledge progress in erasing invidious discrimination, but shortcomings remain. Full integration of schools is prevented by housing patterns which have been produced by social and economic forces. Central cities suffer from flight to the suburbs. Real freedom and equality of opportunity are often frustrated by inferior schools. Where a metropolitan community embraces a number of separate municipalities, and the minority group is concentrated in one, should the legal duty to correct the situation be shared throughout the community? The larger community is integrated in its economy and reason for existence, but socially and politically segregated. There is logic in requiring the entire community to join in the solution, but a Supreme Court decision, dealing with schools, reached a negative answer. If this is to be the final answer as to federal constitutional power, the solution will be left to state action and the slow process of change in social attitudes.

Congress, by using its full commerce power, has outlawed discrimination in employment on the basis of race, religion, ethnic origin, sex and age. The Supreme Court some years ago discovered a fresh interpretation of old civil rights statutes, creating civil liability for refusal, on the basis of race, to employ or to sell real estate. These rights will be enforced here.

Discrimination has not been limited to the relationship between Whites and Blacks. Discrimination and second class citizenship appeared in the earliest days in Massachusetts when the authorities persecuted the Quakers. Asians, Indians, Irish, Italians, Germans, Poles, Catholics, Jews, and Women, as well as Blacks, have all felt at some time or other the badge of inferiority placed upon them as groups in the minds of those who happened to be dominant.

An advance in freedom for one group inevitably brings greater freedom for all. President Kennedy was elected within the memory of most of us. His time as President, unhappily, was cut short. But if he had accomplished nothing else, his very election disproved an old political adage that a Catholic could not be elected President. His election and able performance struck a devastating blow against bigotry. More recently Blacks have been elected mayors of some of the greatest American cities. In 1984 a woman is a serious contender for Vice President. Everyone of us, of whatever faith, race, or sex lives more freely today because these things have happened.

Supreme Court decisions have at times discerned other rights so fundamental as to be entitled to constitutional protection, although not expressly described in the Constitution. The right to travel, to marry, to choose the education for one's children, are examples. The Court has also discerned rights with respect to the use of contraceptives and abortion which are protected under some circumstances from interference by the state.

Through the years, the Supreme Court has decided that the due process clause of the Fourteenth Amendment requires the states to observe most of the procedural guarantees of the Bill of Rights in state Criminal proceedings. Other decisions have spelled out rights for those convicted of crime and serving sentences in prison.

This protection of individual rights, written into our Constitution, accepted to a high degree by the people, and diligently enforced by the courts, has distinguished our society from authoritarian systems.

One of the most important rights of the individual is the right to dissent—the right to be different in thought, belief, and speech. It is guaranteed in the First Amendment.

The Fourteenth Amendment was early deemed to have made the First Amendment binding on every state. In case after case, courts have found statute and ordinances void and have enjoined official acts where they would limit the exercise of First Amendment rights. Opposition to the Viet Nam War and the struggle of Black Americans for equal

rights are examples of mass movements against the establishment and the status quo. They were rocky roads at best, but were sometimes made easier by court decisions upholding First Amendment rights.

We can be sure that freedom of thought, conscience, and expression was strong in the hearts of Americans before the words were put in the First Amendment.

Apart, however, from government action, our society at times creates social pressure towards conformity of faith, thought, and expression. The phenomenon of equating dissent with disloyalty or immorality is the most formidable weapon in this arsenal. One who expresses a minority view may escape with being termed an oddball. When he is called pink or a communist dupe, the welts begin to appear. The persecution of dissenters is often generated among community majorities or vigorous pressure groups before it is manifest in government activity. The paradox is that protagonists of freedom can prevail only by reason and persuasion, and must fully accord unstinted freedom of expression to their antagonists.

The enforcement of First Amendment rights often puts the courts in the role of protecting unpopular people. The cases where religious freedom is protected by a court often involve small groups with beliefs or practices which appear strange to those who deem themselves in the mainstream. Free speech cases often involve people who express unorthodox ideas, or books which people may find offensive. Persons accused or convicted of crime, but claiming their rights, are often unlovely characters. The significant thing , however, is not the popularity or attractiveness of the individual or faith or idea protected, but the truth that this protection of rights for anyone protects them for everyone.

We search for the real foundations of our freedom in our willingness to respect the rights of others, in our tradition that the courts enforce these rights for all, and in our willingness to support that kind of enforcement.

As we dedicate this building, we cherish the rights which will be vindicated by the courts which sit here. We are indeed fortunate people, and must be grateful for our system. May I, however, express two thoughts today in counsel against complacency?

Many of the significant principles of constitutional law and rights which we enjoy today are not described in exact terms of the Constitution. Rather they represent fresh interpretations by the Supreme Court of the United States, often significantly different from some earlier interpretation. As the process goes farther and farther from the literal text, it is evident that the perception and philosophy of each justice on that Court must ultimately determine that justice's choice of interpretation. Although the relative stability of the judicial process exists because the process is in evolution, and only very rarely direct overruling of what has been decided before, many of the principles we know today will change with time, often by the closest of votes among the members of the Court. Given the significance of individual perception and philosophy, I think it has been correctly observed that a most significant outcome of the upcoming election will be the choice of the new justices who may come to this Court in the next few years. Their perceptions and philosophies will have profound effect on the direction of changing constitutional doctrine.

I offer one other thought which militates against complacency in a very different way.

It is a truism that today's powerful governments are capable of destroying mankind and the world as we know them. Nuclear destruction can be unleashed by mistake, accident, or miscalculation, even if we accept the proposition that intelligent leaders with reasonably accurate information would not deliberately turn it loose.

Twenty years ago there were people who could solemnly predict that by now, 1984, the United Nations would evolve into a limited world government, capable of preserving world peace through law. I am appalled at so little movement toward world peace and justice and that we still rely on a balance of terror and the absence of accident to prevent the holocaust. It is wonderful to seek to build a better American internal system, but these thoughts haunt us all.

We Americans are the fortunate ones, both in the well being and the constitutional system we enjoy, but an island of plenty cannot permanently survive in a world where there is so much destitution. We cannot escape the challenges of the modern world. Our American fine machinery of government, with its judicial protection of individual freedom, cannot exist in isolation. Humanity must somehow solve the problems of adequate food for all God's children, create an ordered world .

Chief Judge Crabb, and ladies and gentlemen, may this courthouse and those who function here, long continue to be the symbols of the best in the American System.

The Law School's Curry Mural:

One of the Grandest and Most Distinguished Works of Art in Wisconsin

Paul Reidinger

Across the north wall of what the current generation of Wisconsin law students know as the old Reading Room of the Law Library is a vast and eye-catching mural, "The Freeing of the Slaves."

But there was a day when what now is the old was, instead, the new Reading Room, just added as part of a new wing to the original Law Building built with funds supplied by one of the alphabetical agencies of President Franklin Roosevelt's New Deal. And the striking mural which adorned the new Reading Room was the product of an understanding collaboration between the artist, John Steuart Curry, and the then Law Dean Lloyd Garrison.

The following is a brief account of the origins and an interpretation of the execution of that collaboration which was written by Paul Reidinger, now a second-year law student at Wisconsin.

It is no exaggeration to say that the mural "The Freeing of the Slaves" dominates the Law Library's old Reading Room. Indeed the work is probably the visual centerpiece of the entire Law Building: it announces itself to the most fleeting of glances. The mural was painted in the Law School more than forty years ago by John Steuart Curry, one of America's leading regional artists of the twentieth century and a native Midwesterner. It is one of the grandest and most distinguished works of art in the state and the most conspicuous of a number of Curry works located on campus and around Madison.

Curry originally conceived the mural in the early 1930s as a depiction of the experience in America of Blacks and other immigrants. By 1936, when he proposed the design for the new Justice Department building in Washington, D. C., he had reduced its theme to a treatment of the Emancipation Proclamation. But nervous politicians deemed this idea too politically difficult and rejected it. An annoyed Curry removed to Madison, where the proposed painting drew the attention of Lloyd Garrison, then Dean of the UW Law School.

Garrison's interest in "Freeing of the Slaves" was more than cursory: his grandfather was William Lloyd Garrison, the famous nineteenth century Abolitionist, and Dean Garrison maintained a deep interest in the history of the Civil War and related matters. He suggested to Curry that the mural might fit nicely in the reading room of the library addition then under construction, and Curry agreed. For his efforts Curry received a modest $6000, paid from a contribution by the Pabst family in Milwaukee.

Execution of the project posed few difficulties. The design was traced onto a canvas-covered board fitted into the

The Curry mural measures an impressive 12 by 35 feet. The central figure stands almost 11 feet tall.

Photo by Gary Schultz
UW Photo Media Service

pediment-shaped space atop the north wall, and tilted downward slightly to prevent accumulation of dust. The images were then painted in over a period of a about a year. According to Maurice Leon, Professor Emeritus and then long-time Law Librarian, Curry and one assistant worked from a system of scaffolding erected over the loan desk, which continued to function despite the proceedings directly overhead.

In theme and expression, the mural is vintage Curry: it is straightforward, vivid, almost crude. Curry, along with Thomas Hart Benton and Grant Wood (painter of "American Gothic"), was one of the great visual exponents of prairie populism in the first half of this century. These painters practiced what is called "socialist realism": their art eschews the genteel and pretty in favor of portrayals of everyday lives and broad social realities. Their style was not refined and delicate but simple and clear.

These characteristics are much in evidence in "The Freeing of the Slaves." The theme of the mural itself touches a vast social upheaval: the release from slavery of millions of blacks. The human figures are not highly individualized but members of one of two groups—slave or soldier. Two dead soldiers—one Union, one Confederate—lie in the dust in the corner of the foreground; to the left dark clouds roil as frightened slaves emerge from their shabby huts; to the right Union bayonets gleam in the sunlight that begins to shine through the storm. These images are powerful, direct, and simple.

Their effect is heightened by Curry's use of color. Not for him delicate pastels and subtle shadings; instead he uses clear, strong colors that express some of the fundamental passion of the work. The contrast is particularly striking between the purplish-gray storm clouds and the flaring orange-yellow sunlight that begins to dissipate them.

Perhaps because of these very qualities, Curry's reputation in recent years has declined somewhat. What was once thought honest and lucid is now said to be vulgar and provincial. Such is generally the fate of painters, who—like all other artists—must ride the historical rollercoaster of critical opinion. There is an element of truth in the current deprecations of Curry: he was proud of his Midwestern heritage and celebrated it in his art. No doubt at some point in the future his reputation will regain some of its lustre; critics, after all, thrive on revising the opinions of their predecessors.

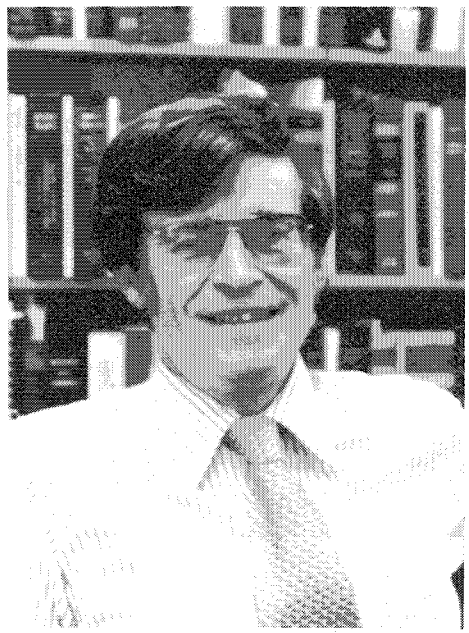
But in an important sense Curry's status among critics is irrelevant to the splendid work of art he left to the UW Law School. "The Freeing of the Slaves" is ambitious in theme, spectacular in execution, and deeply interwoven with the long history of the institution.

Exchanging Professors:
The Summer Program With Giessen University

During the second five week term of the coming summer session, University of Wisconsin students will have an opportunity to sample a comparative introduction to fundamental aspects and selected problems of Contract and Corporation Law of Western Europe. The course offering is the result of a summer professorial exchange program between the University of Giessen, West Germany, and the University of Wisconsin Law School.

In June, UW Law Professors Larry Church, Chuck Irish and Zig Zile will travel to West Germany to offer University of Giessen students their perspectives on Corporation and Contract Law; The University of Wisconsin Course will be instructed by Professor Doctor Thomas Raiser and Professor Doctor Guenther Wieck.

Professor Zig Zile



Associate Dean Gerald Thain

Professor Chuck Irish

At U.W, the comparative studies will incorporate the German, French, and English legal systems with references to U.S law. The course has been divided into two parts. The first, taught by Professor Wieck, will start with a survey of the historical development of Civil Law in Western Europe, and examine basic concepts and principles of the Law of Contract. It will also concern itself with some characteristic steps toward unification of parts of the law in Western Europe.

Part Two of the course will deal with business corporations and the basic principles of Corporation Law. Also to be examined are the efforts of the European Economic Community to unify Corporation Laws within Europe, and the results achieved by those efforts up till now.

Gerald Thain, Associate Dean of the Law School, and coordinator for the U.W side of the exchange, is particularly enthusiastic about the potentials of the program: The offering of first-hand exposure to students interested in international Corporation and Contract Law, the numbers of whom have been growing rapidly; the opportunity for exchange for faculty members without the usual logistical difficulties that programs of longer duration often entail, and the chance the program provides for non-law students to investigate a wide range of courses the Law School offers that accommodate a variety of interests for those in, and outside of, the Law School. The European side of the program should likewise offer German students a unique insider's view of the workings of American Contract and Corporation Law. What above all is hoped, indicates Mr. Thain, is that the Giessen Summer Exchange represents merely the beginning of a program which promises a rich future.

Changing Age-Old Ways:
Creating Careers in Legal Education for Minority Law Graduates

William G. Moore

Over the years, the University of Wisconsin Law School has established itself as an institution committed to aiding minority and disadvantaged students.

In 1967 the commitment was formalized with the establishment of the Legal Education Opportunities Program (LEO).

In the early 1970s, through the initiative and major efforts of UW Law Professor James E. Jones, Jr., the Hastie Fellowship Program was launched in the Law School. The Fellowships were named for the Honorable William H. Hastie (1904–1976), a Black educator and judge who, devoting his life to public service, had shaped with excellence everything he touched. The list of capacities in which Judge Hastie had served was long and distinguished: Dean of the Law School at Howard University, Assistant Solicitor in the Interior Department, U.S. District Judge in the Virgin Islands, aide to the Secretary of War, Governor of the Virgin Islands, then Judge and later Chief Judge of the United States Court of Appeals for the Third Circuit. In these roles, he had been a man "profoundly committed to the betterment of his race and to the law as the avenue by which that improvement might be reached most speedily." And central to those commitments was his belief that equal education was one of the first steps toward elimination of inequality in the United States.

Wisconsin's Hastie Fellowship Program was designed to assist in implementing Judge Hastie's views toward equal education, for the program was uniquely fashioned to "assist minority law school graduates in preparing for a career of legal education." More than a decade after the launching of the Fellowships, and twelve "Hasties" later, it is clear that the program has made a small but very important contribution to "meeting the critical need for a greater number of members of minority groups on law school faculties."

Bill Moore—a writer who shortly expects to attend graduate school (and a big help to the GARGOYLE of late)—relates below the story of the Hastie Fellowship Program at the UW Law School.

"If the law is perceived as an ocean wave," related Professor James E. Jones, Jr. of the University of Wisconsin Law School to an audience of the AALS section in Minority Groups in late 1974, "and the Golden 60s productive of one of tidal proportions in the equal employment area, it seems that by the time that wave reaches the shores of academia it will be little more than a mild ripple that threatens to leave few, if any tracks in the campus sands."

The statistics revealed a grim picture indeed. In 1974, when Professor Jones made the remarks just quoted, less than 2% of the practicing lawyers in the United States were Blacks. Among legal educators, as distinguished from practicing lawyers, the fraction of Blacks at that time was almost surely smaller still. Other minority groups likewise were disproportionately represented in the ranks of practicing attorneys and law professors.

To those small numbers of racial minority lawyers, the UW Law School had in the past contributed. Professor Jones himself earned his law degree here in 1956 but he had arrived on his own initiative and it was not until the early 1960s that the Law School began its first affirmative efforts to interest young Blacks and recruit them for Wisconsin. Those affirmative action efforts were formalized with the establishment in the Law School of the Legal Education Opportunities Program (LEO) in 1967. The LEO program was charged not merely with seeking out Blacks but was designed more broadly to "institutionalize admissions and financial support for minority law students to help remedy the deficiencies of minority law students in Wisconsin and the country."

Wisconsin's efforts down through the time in which the LEO program was installed focused primarily on efforts to interest and encourage minority students in obtaining a legal education. For some time, however, the Law School had sought to add minority lawyers to its faculty. For years, the faculty had urged Jim Jones to cast his lot with the School and in 1968, he arrived to serve as its first minority representative.

The LEO program at Wisconsin was making some progress by the early 1970s, for the number of participants had continued to grow. Often, though, problems which existed for non-minority students in Law School pressed on minority students with still greater force. In the turbulent late 60s and early 70s, it was often asserted that a chasm separated alienated students from their professors. But if this were so as to students generally, it could be said that a veritable abyss separated the LEO students from their professors. Moreover, the attrition rate among first year minority students, for a variety of reasons, was exceedingly high. A number of things needed to be done.

No one perceived more clearly than Professor Jones that his appointment could not by itself close the abyss separating LEO students from the faculty. Minority law professors were going to be essential to that process and the law schools had not merely to interest and recruit minority law students; they had to take on the further task of encouraging and training some of them to enter a career in legal education. Closing the abyss—in Wisconsin and elsewhere—would call for the education of a great many others to equip them, as he had been equipped, to

take on the challenges and responsibilities of a career as law professors.

With America's minorities essentially absent from the legal profession, law was an almost exclusively white field, and it promised to remain that way unless a conscious dismantling of the condition were undertaken. Through the initiative of concerned faculty members, the Law School took further steps to do just that.

The Establishment of the Hastie Fellowships

On April 27, 1973, Professor Jones, encouraged by several of his colleagues, sent a memo to Dean George Bunn proposing the "establishment of the William H. Hastie Fellowships," named in honor of William H. Hastie, former Chief Judge on the United States Court of Appeals for the Third Circuit, Dean of Howard Law School, and "incisive polemicist in the Civil Rights Movement," ranked with such figures as Thurgood Marshall and Charles Houston.

The proposed Hastie Fellowship, in Professor Jones' words, would aim to

> "provide advanced legal training to exceptional minority students to qualify them for, and encourage them to undertake, the teaching of the law," thus focusing an attack on the deficiency of minorities in legal education;
>
> "provide faculty level support for the LEO Program through the utilization of such teaching fellows as counselors, tutors and 'academic buddies' of the LEO students," thereby easing the high attrition rate among first year students;
>
> "expand faculty-level capacity more adequately to meet the special needs of our minority students, and the needs of the university community," in an attempt to bridge the gap between faculty and LEO students while, again, addressing the attrition rate issue.

At the start, the program consisted of two Fellows per year for a two-year period. During this time, the Fellows would tutor, counsel, participate in recruiting and retention concerns, and aid minority students on a half-time basis, while the corresponding portion of their time was devoted to working for LL.M. degrees. Then, as now, the Fellows were selected with the same admissions standards applying to other law graduate students, from a pool of applicants of minority or disadvantaged backgrounds, by a faculty committee established for the purpose. Those chosen were provided with a stipend out of which they were required to pay in-state tuition for courses taken in pursuit of the LL.M. degree.

Short on Resources, Long on Ideals

Like the initial LEO Program, funding for the Hastie Fellowships came from research and staff funds, "a little from here, a little from there." State funding came later, in 1976. The program found itself shaped by available resources.

But, notes Professor Jones, if the program was short on resources, it was long on ideals. Only suggested in the ambitious proposal, the delicate and intricate nature of the fellowships was revealed through time. The tasks were demanding indeed.

William H. Hastie's qualities of "expert counsel" which "made him a cynosure for students and faculty alike" were to prove to be helpful, if not essential traits for the Fellows. In many respects, the void between students and faculty became, in effect, the Hastie Fellows' home, and placed them in the position of middlemen, at once suspected by faculty members of "playing surrogate," for minority students, and by students of acting as buffers, installed for the benefit of the faculty. George Bunn illustrated the Hasties' position in a letter written to introduce the first Fellows to the faculty. "They are," he wrote, "really neither students nor faculty, but in between, 'go betweens.' Unless we give them respect and attention the students will not."

In addition to their duties as counselors and diplomats, it should be remembered, the Hasties were expected to pursue their own advanced degrees, saddling them simultaneously with the tensions encountered by both students and faculty.

The First Hasties and Demonstrable Success

With these difficult roles to fill, and the accompanying problems to surmount, the fate of the program, and to some degree, the subsequent success enjoyed by it and those connected with it, was determined by the first Hastie team.

This consisted of Daniel O. Bernstine, currently a UW Law Professor, and Nancy T. Bernstine, today Assistant Professor at Antioch Law School. Their efforts produced results which furnished concrete evidence that a program like the Hastie Fellowships could succeed. And succeed not mildly, but markedly. For, not only did the Bernstines help to reopen the lines of communication between faculty and minority students, but during their tenure managed to bring off a marked improvement in the academic performance of first-year minority students: In 1969, only 50% of the first-year minority group had achieved a passing average of 77. In 1974, 88% of that year's group met or bettered the 77 mark. Moreover, both the Bernstines, having completed their graduate work, went on to

Assistant Dean Stephan Rocha

Professor James E. Jones

secure teaching positions—an ultimate goal of the Hastie program.

The Bernstines' success at mitigating the "antagonism that had pitted special program students and faculty against each other," and at catalyzing the significant academic improvement among first year LEO students, was achieved largely through voluntary support services—voluntary because much of the initiative was left to the students themselves. The Bernstines, rarely playing the role of teachers themselves, acted as ringmasters in organizing special review and tutoring sessions where small groups of students met with individual members of the faculty. Informal, friendly counseling was frequently a by-product of these review and tutoring sessions. A great deal of the Bernstines' time also went into similar counseling of the minority students. But with dialogue between faculty and students established, the result was more and more the propagation of a feeling of mutual respect and cooperation between faculty and students, a feeling which grew over time.

The Bernstines refused adamantly to be either buffer or babysitter. Their ability, as team and individuals, to balance independence of opinion with understanding of both sides enabled them to "assist and criticize both faculty and minority students without damaging (their) relationship" with either group. With the voluntary support system in place, morale of minority students considerably lifted, faculty encouraged, and concrete results established, the program was off to a fine start.

Evolution of the Fellowships

The Bernstines' record at the Law School as Hasties is a particularly celebrated one, and understandably so. The Bernstines turned in performances difficult to equal but subsequent Hasties have also been successful. There are cases, it cannot be denied, where the Law School and the individual participant were not as well served by the program as it might have been hoped; still, it appears that the successes far outweigh the failures. And in no case has the experience of the institution or the individual Hastie proved to have been fruitless.

Some Hastie Fellows did not complete their LL.M. degrees. The ideal situation would call not only for completion of the LL.M. paper but also publication of its contents in quintessential form. While publication has probably facilitated placement, absence of a publication record has not hindered their securing positions in either legal education or other areas of the law.

A greater concern is voiced over those Hasties who, after leaving the Law School, do not enter legal education. Most have taught for at least a time and those who have not yet done so indicate that at some point they do intend to teach. Some feel that work in the field is essential before undertaking teaching, and thus delay entering the field immediately. The program can, in any case, boast a very high success rate. Of the twelve participants to date, eight have taught at one time or another.

There were bugs in the Fellowship design. And some remain. Hasties were encouraged to voice their concern over problems, so that later participants and the program itself might benefit from their experience. With a number of these suggestions heeded, the fellowships have been improved and reshaped for the benefit of everyone concerned.

One major change set the program on a staggered schedule, which allowed for greater continuity among the Fellows. Thus, for a time, while one Hastie was in his or her second year, the counterpart was just beginning his or her program. Counseling and academic time was divided to provide each participant with opportunities for uninterrupted writing and research periods.

One Hastie termed admissions and recruiting duties "the most difficult undertaking I experienced as a Hastie." Others were concerned about the enormous amount of time spent in counseling. With time it was clear that the Jack-of-all-trades role designed for the Fellows was simply too burdensome for them to bear efficiently. In 1980, it was proposed that a position of Assistant Dean be established to handle the counseling, admissions, recruiting and retention duties previously provided by the Hastie Fellows. The first official Assistant Dean was Nancy T. Bernstine, certainly no stranger to counseling and recruiting. Since 1982 Stephen Rocha has assumed these duties.

At the same time that the Assistant Deanship was established, the program was shortened. With the counseling continued only on a voluntary basis, the Hasties were left to pursue an LL.M. degree and gather some teaching experience in a year instead of two years' time.

Today

Currently for the 1984-1985 year, the Hastie Fellowship is held by Kimberle Crenshaw. Ms. Crenshaw completed a B.A at Cornell University and went on to receive her J.D. at Harvard.

The Fellowship earns high marks from Ms. Crenshaw. She praises its flexibility but cautions that its offerings are only what one decides to make of the program. From the start, she has been, in her own words, after a "total experience," and has expressed her eagerness to teach. She is now supervising the Douglas Competition.

Ms. Crenshaw recalled her first year at Harvard, and wished she had had the opportunity to talk and relate with older, more experienced students. In view of this, she has gone out of her way to open her doors to first and second year students. Thus, Ms. Crenshaw defines her role informally as a "student who is a friend to a lot of first year students" and she finds the Fellowship virtually "tailor-made" to her interests.

Ms. Crenshaw will clerk for Shirley Abrahamson, Justice of the Wisconsin Supreme Court (and UW Law Faculty member on leave of absence), when she completes her year here, and, in the near future, intends to take up teaching, something in which she has always had an interest.

The Future

The founding of the Hastie Fellowships was a response to an acute situation in the Law School itself and to a broader, deeper and persistent malaise found in legal education institutions throughout the country. The program set out not only to contribute to the pool of aspiring, qualified minority and disadvantaged would-be-educators, but more idealistically, to begin a dismantling of the image of law and legal education as white professions.

Steps on the road to success have come. Of the twelve Hasties thus far, eight—as noted earlier—have been involved in teaching at some point. One Hastie is an assistant law dean.

The Law School's commitment to aiding minority and disadvantaged students continues. But it is essential that other schools pledge themselves to the same task, for it is, sadly, the uniqueness of the Hastie Program that makes the force of the wave, in Professor Jones' metaphor, slow to the point that it leaves "few tracks in the campus sands."

Kimberle Crenshaw

Notes on Alums

Who's Oldest of Them All?

Frank W. Kuehl (LL.B. '23) closed the letter he wrote **Dean Cliff Thompson** in late January 1985 with the question, "Am I your oldest grad?" If Frank—aged 90 when he wrote Dean Thompson—wasn't our oldest Law Alum at that point, he was, at least, the oldest the Law School was aware of at the time. But close on Frank's heels for the most senior status was his classmate, **Christian H. Bonnin** (LL.B. '23), who wrote Dean Thompson at almost the same time, announcing his age as 89. These two elders both live in the East these days, Frank Kuehl at 3717 Igomar Street, N.W., Washington, D.C. 20015, and Christian Bonnin at 47 North Fullerton Avenue, Montclair, N.J. 07042. Frank spent much of his professional life as a lawyer in various federal agencies, while Christian retired as Associate General Counsel for Metropolitan Life Insurance Company (for which he had worked more than a quarter of a century).

How about it? Who was our oldest law graduate in January 1985? Was it Frank Kuehl, then 90? We'd like to hear from others of our more senior graduates, whether they claim the record for age or not.

OOPS!

When listing U.W. Law graduates engaged in law teaching in the GARGOYLE for Fall 1984, we failed to include **Sidney Harring** (J.D. '72; Ph.D. '76), now an Associate Professor in the CUNY Law School at Queens College, Flushing, N.Y. 11367.One of the "founding" professors of this new law school, his name wasn't on the print-out of our graduates in law teaching which had been supplied us by the Association of American Law Schools (though the AALS had listed him, large as life, in the then current Directory of Law Teachers). Sorry about this, Sid.

Other Alumni News

Frederick J. Hertz (J.D. '43) has just marked his tenth year as a judge on the Bankruptcy Bench. Prior to his service there, he practiced law in Chicago for thirty years. Mr. Hertz indicates that he is anxious to hear some news of his classmates. Phone him at (312)565-1970 or write him at 155 N. Harbor Drive, Chicago, IL 60601.

Gerald Kahn (LL.B.,'50) of Milwaukee's Godfrey and Kahn, S.C., has announced that his firm will merge with Eagan and Laird, S.C., of Green Bay.

Roy M. Mersky (J.D. '52), Professor of Law and Director of Research at the Law School of the University of Texas, has been appointed to an endowed professorship there named in the memory of Elton M. Hyder, Jr. and Martha Rowan Hyder.

Melvin Wiviott (LL.B. '53) is Professor at the Air Force Institute of Technology, Air University, Wright-Patterson Air Force Base, Ohio 45433, teaching Government Contract Law.

The Honorable William F. Eich, Jr., (J.D.'63)—his judicial capacities well established by his service in the Circuit Court for Dane County—was recently named by Wisconsin Governor Anthony Earl to the Wisconsin Court of Appeals for the Fourth District.

Dan Rinzel (J.D. '68) is the new Chief Counsel and Staff Director of the Senate's Permanent Subcommittee on Investigations.

Fran Ulmer (J.D. '72) is currently Mayor of Juneau, Alaska, chairs the Organization of Women Mayors, and is a committee member of the U.S. Conference of Mayors.

George A. Northrup (J.D. '73), victorious in the 1985 Spring elections, became a judge on the Circuit Court for Dane County, Wisconsin.

Michael N. Nowakowski (J.D. '74), victorious in the same elections, likewise landed a judgeship on the Dane County Circuit Court.

Lawrence R. Hitt II (J.D. '75), partner in Heyl, Bostrom, Haring and Hitt at Denver, was appointed in Fall 1984 to the National Big Brothers Board of Directors in Philadelphia, the first Denverite to serve on the national board in the 38-year history of the Big Brother organization.

Ann Walsh Bradley (J.D. '76) was appointed by Governor Anthony Earl in Spring 1985 to the Circuit Court for Marathon County, Wisconsin.

Susan R. Steingass (J.D. '76) is a tough one to label. Until recently, a partner in the Madison firm of Stafford, Rosenbaum, Rieser and Hansen, she was appointed in Spring 1985 by Wisconsin Governor Anthony Earl to the Circuit Court for Dane County. The Law School had been courting her vigorously before that time, trying to persuade her to consider an appointment to the Faculty. Susan—who in the past has given the Law School a hand in teaching Civil Procedure I and II (and in Fall 1984 taught Evidence)—says not to count her out for part-time law teaching now that she's a judge. So, as before, she seems ready to crowd a great deal into any particular day of her life.

Jaroslawa Zelinsky Johnson (J.D. '77) became a partner in Reuben & Proctor at Chicago in October 1984.

Paulette B. Siebers (J.D. '78) was recently appointed by Governor Earl to the seat on the Dane County Circuit Court that will be vacated by Judge **Bill Eich** (J.D. '63) when he moves to the Wisconsin Court of Appeals for the Fourth District.

Barbara A. Nieder, Thomas M. Pyper and Ted Waskowski, all of the class of 1980, have become partners in the Madison law firm of Stafford, Rosenbaum, Rieser and Hansen.

Carmen Alvarez (J.D. '80)—now Carmen Sciackitano since her marriage in December 1984—is an attorney with United Airlines in Chicago these days, specializing in employment litigation.

Cecile Rizzardi Faller (J.D. '82), formerly associated with the law firm of Dorothy Nelson Topel, S.C., in Marinette, Wisconsin, reports that she has recently joined the Recka and Joannes Law Firm in Green Bay, specializing in business law, and partnerships and corporations through patent, trademark, copyright and bankruptcy law.

Faculty Briefs

Peter Carstensen has been named an editor of a part of a new series of microfilms produced by University Publications of America. The series will contain briefs and arguments in major cases in selected topic areas; Peter will head that which is to be entitled "Briefs and Arguments of Major Cases from U.S Courts of Appeals, U.S. District Courts and State Supreme Courts: Antitrust."

Ken Davis is presently working on two articles, one of which deals with the economic aspects of various securities fraud remedies; the second is a survey of the law on corporate social responsibility and management's discretion to pursue and expand resources on goals other than shareholder gain. Of the latter, Ken hopes to make it a part of a long term project on the application of recent theories of managerial behavior toward certain traditional tenets of corporate law.

Howard Erlanger and **Margo Melli** will complete this summer a study funded by the National Science Foundation on the process of divorce in Dane County. The two indicate that they have found that very few cases go to trial, and that extra-legal factors in the negotiations process are critical in determining outcomes. It also seems that satisfaction with outcome may be more dependent on attitudes towards divorce and the negotiations process than on the financial settlement received.

Marc Galanter has just released a book entitled *Competing Equalities—Law and the Backward Classes in India,* published by Oxford University Press in India. The American edition was handled by the University of California Press. The volume involved over 25 years of research by Marc, who is termed by the Indian Press as "a pioneer indiologist on legal studies," and a "leading American scholar on Indian law." Just recently, Marc also participated in a colloquium at the University of Texas dedicated to "The Bhopal Tragedy: Legal and Social Issues."

As an authority on policing, **Herman Goldstein** attended and addressed an Executive Session on Community Policing, held in March at Harvard University.

Orrin Helstad reports that he is in the process of updating the roughly 1500 pages of text material used in the General Practice course.

Steve Herzberg and **Joseph Thome** are working to help organize a trip for lawyers, law school deans, members of the Supreme Court and "other legal figures" to Nicaragua. The trip is coordinated through W.C.C.N., the Wisconsin Coordinating Committee on Nicaragua, which has organized similar trips for doctors, state officials and farmers in the interest of promoting better relations between the United States and Nicaragua.

Charles Irish—something of a one-man band these days—has just finished a report on the proposed tax treaty between Nepal and India for the Government of Nepal. Recently, he took on an "of counsel" position in the Madison law firm of Stafford, Rosenbaum, Rieser and Hansen. And this Summer, after he completes the teaching of a course on U.S law affecting international transactions at Giessen, West Germany, with UW Law Professors Church and Zile (see p.X), Chuck will head to Taipei, Taiwan, in August to instruct a class on tax reform in newly emerging industrialized countries.

John Kidwell is currently a member of the Legislative Council's Committee on

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the Uniform Trade Secrets Law; he is also working independently on an article which will address the question of why it has been so difficult to create legal doctrine to deal with computer software.

Anita Morse is currently working on several articles which concern themselves with such topics as "Proposed Amendments to the ABA Standards for the Approval of Law Schools," and the legal issues surrounding the importation and migration of labor. She is also the editor of a forthcoming volume on law library reference for non-law librarians.

Walter Raushenbush and James MacDonald have just published their volume *Wisconsin Real Estate Law,* with the Extension Law Department. The co-authors are also involved with the C.L.E Real Estate Update, a program at which they will offer lectures to lawyers and real estate brokers in March and April in Appleton, Madison and Milwaukee. Mr. Raushenbush is in the process of revising his 1974 book, *Wisconsin Construction Lien Law,* and the 1974 edition of his volume *Real Estate Transactions: Cases and Materials.*

In May, **Gerald Thain** will address the National Society of Public Accountants annual convention in Chicago on issues of occupational licensing.

June Weisberger plans to attend the Third Oxford University Symposium on Comparative Industrial Relations from August 4-17. This summer she and Howie Erlanger will complete an article that discusses the new Marital Property Act from the point of view of the estate planner.

Wisconsin Law Alumni Association

Board of Visitors Report

The Board of Visitors of the Wisconsin Law Alumni Association was created in 1957 ". . . for the purpose of assisting in the development of a close and helpful relationship between the Law School and the University of Wisconsin Law Alumni on all matters of mutual interest including Law School facilities, curriculum, placement, admission and public relations of the School and the Bar." The Board of Visitors continues a tradition started in 1969 to assume an active and visible role in the Law School by participating in law school visitations.

This year's annual visitation was held on Monday, October 29, 1984. On the evening prior to the visitation, October 28, the Board of Visitors sponsored a dinner meeting at the Inntowner Motel. Faculty members, law school administrative staff, members of the Board of Directors of the Wisconsin Law Alumni Association and the Board of Visitors attended the dinner. The dinner gave everyone the opportunity to become better acquainted and to increase areas of communication between the alumni and the staff. The Board of Visitors appreciated the excellent faculty participation and the Board hopes to continue this event during future visitation sessions. The dinner was followed by three brief, informative presentations by faculty members. Summaries of the faculty reports are as follows:

1. Advances in Technology are Expected to Have A Significant Impact on the Law Library (Anita Morse)

Ms. Morse reported that the Library faces a great deal of change in the next decade due to advances in technology. The American Bar Association is considering new accreditation standards permitting a refocus of law school libraries from book form materials to automated legal information systems. The proposed standards delete any reference to specific, countable volumes and, instead, refer to a core collection "reasonably necessary to the school's program." These changes will radically affect access to law school materials and librarian responsibility for instruction. Automated information systems will:

1) require the integration of the law librarian into law school programs;

2) pose both a challenge to defining the law school program and a threat to a reliance on using number of volumes to justify financial support. It will mean large initial investments, although it may produce long term savings; and,

3) offer the law school improved access but decrease public access to legal information. Westlaw and Lexis are privately owned and law school libraries have restricted use contracts. Increased substitution will mean decreased public access.

The ABA proposal encourages an increase in technology and high volume legal service, but it may create unequal library service based on ability to access. The ABA will be discussing these changes in January and February and a vote is expected in August.

2. The U.W. Law School Continues it's Important Research Role and Alumni are Thanked for Continued Support (Marc Galanter)

Even though the time allotted for the presentation did not allow Professor Galanter to identify and define the extensive research projects at the Law School, he addressed generally the important role of research for the efficient and effective design and operation of the institutions over which the profession presides, including those institutions which deliver justice to the public. An example of this research cited by Professor Galanter, was the recent UW Law School Study which attempted to dispel the notion that Americans are faced with a great litigation menace. Professor Galanter pointed out that the University of Wisconsin is one of the few law schools that has embraced its responsibility to be a center for systematic learning about the legal process. The UW Law School has recently received national recognition for its research but he noted that this work has been a tradition at the law school for over a quarter of a century. On behalf of the research community, Professor Galanter thanked the Alumni for its continuing support and hoped the Alumni would find it gratifying that the research it helped make possible has been so well received.

the Uniform Trade Secrets Law; he is also working independently on an article which will address the question of why it has been so difficult to create legal doctrine to deal with computer software.

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3. A Faculty Committee is Reviewing the Clinical Program (June Weisberger)

Professor Weisberger reported on the Ad Hoc Clinical Programs Review Committee which she presently chairs. (Other committee members are Professors Ted Finman and Walter Raushenbush). A Clinical Program is a faculty supervised student law practice in which the needs of the client determine to a significant degree the student's activities. At the present time there are 6 clinical programs: (1) LAIP (Legal Assistance to Institutionalized Persons); (2) LDP (Legal Defense Program); (3) CPR (Center for Public Representation); (4) the Judicial Internship Program; (5) the Public Intervenor Clinical Program and (6) the Labor Law Clinical Program. The last review of the program took place in 1977 and the current Ad Hoc Committee is reviewing the appropriateness of the 1977 Faculty legislation governing the clinical programs. Other issues being addressed by the Committee include job security arrangements for full time clinical teaching staff and the continuing concern that academic credits be given to students only for significant educational experiences. After reviewing these issues, the Committee plans to report its recommendations back to the faculty this year.

Classroom Observations

The Board was Again Impressed with the Excellent Teaching and Classroom Presentations

On the morning of the visit the Board of Visitors and members of the Board of Directors divided into groups to observe 10 first year courses and 14 second and third year courses. The Board of Visitors was again impressed with the high quality of teaching and classroom presentations from both the new faculty and the experienced staff. The Board was also pleased with the excellent student response and participation.

The Board of Visitors especially wanted to note that the Board is impressed with the apparent high faculty morale even in the face of low faculty salaries. This is clearly a credit to the excellent faculty, to the law school administrative staff and to the new Dean, Cliff Thompson. All of the staff is to be commended for these efforts.

The Board Met with Chancellor Shain to Discuss Law School Faculty Salaries

The most important portion of this year's Visitation was the Visitor's meeting with Chancellor Irving Shain to discuss the growing disparity that is developing between salary levels of the law school faculty at Wisconsin and other major law schools. In the last few years the U.W. law school faculty salaries have moved from a traditional 50th position to 92nd among 170 law schools. Our school is on the bottom of the Big 10 and at the bottom of our peer group of law schools for annual faculty salaries. The Board expressed concerns over our ability to retain the current excellent staff and to hire new staff in the future. The Board also thanked the Chancellor for his recent efforts in substantially assisting the law school. The board of Visitors asked what the Alumni could do to assist in obtaining higher salaries. Among other suggestions made by the Chancellor, the Chancellor urged alumni to talk with their legislators to seek more support for sufficient funding.

Note: In addition, the Board of Visitors urges all Alumni to give generously to the current Law School Fund Raising Campaigns—through your efforts, to date we have been able to fund four professorships which will help supplement law school faculty salaries.

Student and Faculty Open Forum

Another important part of the Visitation was the discussion the Board had with students and faculty during the Monday Noon luncheon. Although the number of students attending was small, the discussions were interesting and dealt with a number of important issues.

1. Both Basic Writing Skills and Advanced Legal Writing Issues were Discussed By The Board

A concern was raised on two levels centering around the issue of legal writing. *First,* there is an increasing concern about the level of basic English, grammar and writing skills exhibited by new students being admitted to the law school. The Board does not believe it is the duty of the law school to teach these basic skills. The Law School uses the assistance of the general University program in this area to assist students and the Board encourages the continued use of these U.W. programs. the Board was informed by the Law School Administration that a portion of the L.S.A.T. now tests basic writing skills but that this section of the test is not used as a determining factor for law school admission. The Board was divided on the issue of whether to recommend that the writing sample portion of the L.S.A.T. be used for an admission standard, but recommended that the faculty study the issue further. The Board did agree that at a minimum the writing sample portion of the L.S.A.T. continue to be used to identify students with writing problems.

Second, there was a concern raised that some students who want advanced legal writing opportunities do not have sufficient opportunity due to staff limitations. It was pointed out that legal writing opportunities are presently available especially in small sections and in the clinical program. The Board recommends that the faculty determine whether more advanced legal writing opportunities are necessary and/or feasible. Further the Board invites Professor Kidwell to discuss these legal writing issues with the Board at a future meeting.

2. The Purchase of Additional Computers and the Westlaw Services is Suggested

1) Faculty Computers

There was a concern expressed about the need of the entire law school, staff and students, to have the opportunity to make better use of the significant advances in technology. A faculty committee is urging all faculty to obtain and use computers for research and teaching. The Board suggests that the faculty decide whether to place faculty computers on a high priority list for designation of financial contributions by law firms.

2) Westlaw Service for Students

Although the law school has made significant strides in recent years in offering the Lexis service to students, the Board is concerned about the fact that Westlaw is not available to law students at this time. The Board believes that it is important to offer both services in order to adequately prepare students to keep up with modern legal technology.

3. The Alumni are Urged to Include Minority Attorneys in Future Hiring Plans

The Board also discussed an issue raised by several minority students that it appeared that law firms were not making sufficient efforts to recruit minority candidates. The Board of Visitors therefore wants to take this opportunity to remind Alumni of the excellent minority recruitment and educational programs at the U.W. and we urge each of you to take advantage of these programs by including the hiring of minority lawyers in your future recruitment plans.

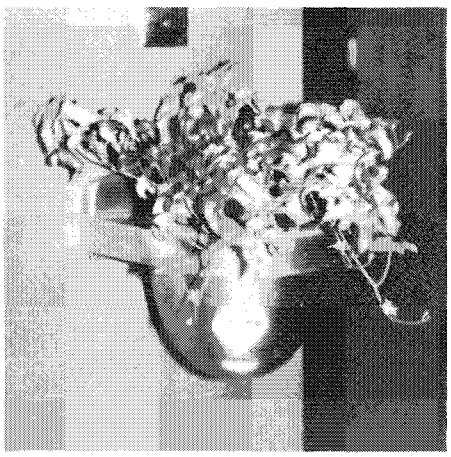
Respectfully submitted,
Susan Wiesner-Hawley, Chair, '73
Judge John W. Reynolds, V. Chair, '49
William E. Dye, '51
Lloyd A. Barbee, '55
Stanley C. Fruits, '37
Kirby O. Bouthilet, '73
Thomas R. Hefty, '73
Christopher Bugg, '78
William Rosenbaum, '50
Peter C. Christianson, '77
Mark E. Sostarich, '78
David Y. Collins, '52

Mystery Picture: 1959? Were You There?

Someone wrote "1959" on the back of this one Wisconsin Supreme Court Justice Grover Broadfoot and UW Law Dean George Young are pretty clearly visible. Are you there? Who else? Let us know.

Editor's Note

Ed Reisner



For the past twenty years the phrase "halls of ivy" has not had much meaning at our Law School. The old Law Building may in fact have had ivy-covered walls, but the new building had only a patch of periwinkle in the courtyard and a planter of petunias near the main entry.

Recently, however, all that has changed. Last session our state Legislature passed an indoor clean air law that severely restricts smoking in public places, including the classrooms and hallways of the Law School. Scores of wall-mounted ashtrays in our building suddenly became obsolete. Removing them was considered but they would have left lots of obvious holes in the vinyl wallcovering.

Early this semester, with equal funding from the Student Bar Association and and Alumni Association, the now useless ashtrays became very attractive planters filled with philodendron and, yes, ivy plants. After some two months, the plants seem to be prospering. Perhaps it proves that plants do thrive when spoken to, or at least spoken of.

There have been a variety of other student activities that have enlivened our halls lately.

The new Women's Law Journal sought money to get itself off the ground with a silent auction. Items included a week at the Martha's Vineyard cottage of one faculty member and a Chinese dinner with another faculty member. W. C. Fields probably would have suggested bidding on the opportunity not to have dinner with a faculty member.

There is also on-going fund raising to assist a blind, second-year student from Nigeria. Stranded here when his government was overturned, this student then had his scholarship revoked. Our students have so far raised over $3000 to keep him here in school.

On top of all this, it has been Student Bar election time, with spirited campaigning not only for the various offices but also for graduation speaker. This year the University is trying a separate graduation ceremony for law, medicine and other graduate-degree candidates. Unfortunately, it is scheduled for the time when the Law School's four year old Convocation program would have been held. Undaunted, the students have scheduled their own party for the night before the University event.

Ellen Kozak (J.D. '69) sent the GARGOYLE a beautiful calligraphic letter in response to our recent story about Georg Currie. It turns out that Ellen not only helped draft the student testimonial to George, but she also penned it in the same style as her letter. The Currie testimonial itself was pictured in Volume XV, No. 3, of the GARGOYLE, at page 9.

As this is being written, Volume XV, No. 4, is on its way to you with a new mystery picture for your identification. A number of you did write or call with comments about the picture in No. 3, of the "first class" in the new Law Building The class must have been Torts or Civil Procedure, and **John Crosetto** (J.D. '67) remembers it as **Professor Richard Campbell's** Torts class. Among those identified in the picture are: **Crosetto, Cosmo Giovinazzi** (J.D. '67), **Martin Dean** (J.D. '67), **James Everson** (J.D. '67), **Arnold Brustin** (J.D. '67), **Alvin Kriger** (J.D. '67), **Aaron Goodstein** (J.D. '67) and **Richard Freedman** (J.D. '67). Goodstein says, "Judging from the fact that I was wearing a jacket and tie, it must have been very early in the first semester!" Freedman sees himself in the 3rd row and his "clones" several other places in the class as well.

In this issue, our "Mystery Picture" is tentatively placed in 1959 (at least that's what someone has written on the back of the print). Wisconsin Supreme Court Justice Grover Broadfoot appears to be administering the attorney's oath to a group of UW Law grads as **Dean George Young** looks on.