September 7, 1973

University of Michigan Law School
Those who place the ultimate blame for Watergate on Richard Nixon's childhood go back too far. Those who place it in the tendency of White House power to corrupt don't go back far enough. The origins of moral relativism lie somewhere between, in a quasi-mystical, demeaning, aggrandizing, relativizing, inflating, mind-sharpening, boring, stimulating, feared and corrupting experience known as law school.

It is at law school that life begins to be lived on the Slippery Slope. Law school students are introduced to the Slippery Slope fairly quickly. The first slide usually takes this format:

Professor: (Bored condescension.) Mr. Smith, do you believe that the police should torture people?

Smith: (What is he getting at?) No, sir.

Professor: Do you believe that the police should ever torture suspects?

Smith: (Pause.) No, sir.

Professor: (Volume goes up half a notch.) You're sure of that, are you?

Smith: (Longer pause.) Yes, sir. I don't think it would be right.

Professor: (Sotto voce) Not right huh? (Back to courtroom tone.) Picture this situation, Mr. Smith. A suspect is known to have an atomic weapon. He is also known to have planted this weapon somewhere in the labyrinthine tunnels below Manhattan. It is known that the device will detonate in one hour. The police have tried unsuccessfully, after reading the suspect his Miranda warning, to learn from him where he has planted the weapon. It is known

Does America really believe in the free enterprise system? The top cop on the antimonopoly beat sometimes has his doubts.

"This is probably not the kind of thing I'm supposed to say," says Thomas E. Kauper, the assistant attorney general who directs the U.S. Justice Department's antitrust division, "but I have always had a little doubt about how committed the general public really is to the notion of competition."

Congress has also displayed less than a total dedication to the principle of free enterprise. Currently it is listening sympathetically to pleas for exemptions from the antitrust laws voiced by soft drink bottlers and executives of huge multinational corporations.

Even his fellow federal officials regard Kauper as an unwelcome interloper when he appears at regulatory agency hearings to plead the cause of open competition.

His proposals for more marketplace rivalry among energy suppliers or common carriers (airlines and truckers, say) have generally been met with icy stares at the agencies that regulate (critics say, protect) those industries.

Most corporations, of course, will stump all day for vigorous antitrust enforcement -- against the other guy. But what Kauper calls "the midnight merger," rushed through in hopes of outwitting the trustbusters, is still part of the business scene. So are outright price-fixing deals, as well as more sophisticated arrangements put together by high-priced legal talent.

None of this discourages Kauper. Behind his somewhat professorial manner is a tough prosecutor who thinks executives who violate the monopoly laws should go to jail.
Letters

To the Editor: September 6, 1973

Enclosed is a letter to the Law Review which may be of interest to you. If you're planning on doing something on Law Review and related absurdities (like last year's first issue I think) and can make any positive use of this letter or parts of it, feel free to do so.

s/ Jim Jenkins L'75

Michigan Law Review August 2, 1973
Hutchins Hall
Ann Arbor, Michigan.

To the Michigan Law Review:

I am writing to decline your invitation to join the staff of the Michigan Law Review.

In doing so, I do not intend any criticism of the Michigan Law Review as a scholarly publication or its legitimate role as an institution to foster legal research and publication. I do, however, ask the staff to assess carefully the role which the Law Review represents itself to fulfill as distinguished from the actual functions it serves in our law school community, particularly the manifestations which can be attributed to its principal method of selection on the basis of grades.

The purpose of any such publication seems to be, most simply, to encourage and communicate scholarly publication which will enlarge upon the general knowledge of law and provide valuable material for the study and practice of law. Although I do not presume to assess how well the Michigan Law Review fulfills this role, my experiences of the last year give me -- and any other veteran of first year at this institution -- adequate standing to address the roles Law Review and related pressures play, in reality, within our law school.

(see REVIEW page four)

We're looking for people who like to read and write

In fact anyone who can read or write. There's plenty of room this coming year for articles, interviews, essays, reports or just plain bitching in the RG. If you're interested, leave a note at our office in 102A LR, or merely shove your stuff under our door. We print anything under the following Editorial Policy. And remember, being on the RG staff pays.

The deadline for material published on a given Friday is the preceding Tuesday noon.

All material received over the author's true name will be printed. Material without attribution will only be printed if reasons for anonymity are set forth in an accompanying note by the author and are acceptable to the Editors.

The underlying principle of this policy is simply that coupled with the right of free expression is the responsibility of acknowledgement.

Res Gestae

The Law School Weekly

is published on Friday of each week the Law School is in session and may be obtained outside Room 100 HH, at the Library desk, in the 9th floor LR and 3rd floor HH reception areas and in the Lawyers Club lobby. Apologists for pomposity and self-importance by the Right or Left will be consistently offended.
Case of the Week

(Edited's note: In this week's case, reported in the Village Voice, August 2, 1973, p. 32, col. 1, and sent to us by Keith Pinter '74, the limits of enforcement of a unilateral contract through specific performance are considered.)

by Stephen Gillers

Emphasizing that "the law must keep up with the times," State Supreme Court Justice Lloyd P. McDermott has handed down a decision that could revolutionize the computer dating industry. Justice McDermott has ordered a 22-year-old woman from the Upper East Side to submit to a young man whom she entered into dating her by misrepresenting her sexual attitudes in a computer dating questionnaire. The woman's lawyer says he will immediately appeal.

Justice McDermott has sealed the court records to spare both sides embarrassment. But according to his opinion, which identifies the parties only as James Doe and Jane Smith, this is essentially what happened.

Jane Smith came to New York 16 months ago from an unidentified Midwestern state after graduating from a small liberal arts college. She stayed at a hotel for women until she could find an apartment to share with three other women and a secretarial job at a midtown brokerage office. Her salary, according to the judge, was "the going rate—that is, enough to pay her share of the high rental and little else beyond real necessities."

James Doe, a native New Yorker and graduate student, was handed a computer dating questionnaire last June outside the City University Graduate Center on East 42nd Street. Although he had never completed one before, he did this time "for the hell of it" and sent it and his $12 check to the computer dating company.

The company's form asks applicants, among other things, to indicate their sexual attitudes by checking one of five boxes: Conservative, Moderate, Liberal, Very Liberal, and Anything Goes. The applicant is also asked to indicate the corresponding attitude he wishes to find in his ideal mate.

According to Justice McDermott's opinion: "Mr. Doe, who claims to be an adherent to the ideas of Wilhelm Reich, checked the fifth box, Anything Goes, in both instances. Miss Smith did the same." The remainder of the story follows from the opinion:

"Mr. Doe and Miss Smith were instantly matched by the computer because they were the only applicants then on file who had checked Anything Goes twice. They dated nearly three months.

Suffice it to say that Miss Smith's attitudes are not Anything Goes, nor Very Liberal, nor Liberal, nor even Moderate. Generosity impels us to call them Conservative, though that description may also be arguable. At the end of three months, Mr. Doe was prepared to give up in disgust—Why throw good money after bad? I believe was his testimony. He grudgingly accepted Miss Smith's insistence that she had simply checked the wrong box on her questionnaire. She had meant, she told him, to indicate the opposite end of the spectrum.

"If this matter had ended there, this Court, like Mr. Doe, would accept Miss Smith's claim of error and dismiss the suit. But on cross-examination, Mr. Doe's counsel elicited the fact that Miss Smith had done the identical thing in at least nine other computer dating applications in the last 11 months.

"Under questioning, Miss Smith admitted that she had checked Anything Goes intentionally, but attempted to justify her action. She said that she didn't know many people in New York, that the only places she knew to meet young men were the singles bars in her neighborhood, which she found distasteful, and that she was becoming terribly lonely. Although I find all this a little hard to believe, since Miss Smith is a remarkably attractive young woman, I accept her explanation as true.

"That, however, does not excuse her deliberate falsifications on 10 questionnaires in about as many months. One wonders how many frustrating dates and confused young men resulted from this duplicity. In this modern age, the computer dating questionnaire should be no less binding a contract than its more formal counterparts. Miss Smith has contractually obligated herself to perform with Mr. Doe in a sexual capacity, as it were. Her attorney argues that she should simply be allowed to reimburse Mr. Doe his monetary expenses and perhaps something extra for pain and suffering, but I believe that that result would be essentially inequitable. Nothing short of full performance will repair the breach here. It is so ordered."

(Next week's offering in this series will feature the recent case of Res Gestae v. Pinter, which discusses whether having one's leg pulled is a common enough social interaction to take the offense out of the normal rules of civil battery.)

Any third year student interested in clerkships, please pick up a memorandum at the copy center from Lee Bollinger.

Any third year student interested in a clerkship with Judge Talbot Smith, please pick up an application at the copy center.
The role Law Review plays in recruitment and job opportunities of our graduates is no secret. From the outset, the first year student is made aware of the necessity of academic achievement. During the early months of my first year, I repeatedly heard how the bottom third of the class would have difficulties finding suitable "placement;" how only the top third could really look forward to certain jobs; how the only ones who were really sought out were on Law Review and that many of the big firms would not even speak to you if you weren't on Law Review; and, with the economic situation being what it is and increased enrollment... Law Review, in addition to being a scholarly publication, clearly was not -- and is not -- unrelated to employment and recruitment. Indeed, it might be said to constitute the most refined tool of selection and recruitment operating in our community.

Further, the purpose of selecting the majority of the staff on the basis of grades would seem to be to attract the most talented and hardest working among the first year class to publish a scholarly journal. However, in doing so the Law Review also functions to channel such individuals and their energies into pure academic pursuits for two years, and then right on to what Justice Douglas calls "the Golden Gravy Train" -- a train which, incidentally, does not stop everywhere: A train which does not stop for the 56 former Attica inmates now under the heel of a $3,000,000 prosecution charging them with 1300 crimes in an encounter which left 39 people dead from police bullets; or for 80 Native Americans being prosecuted for their attempt at Wounded Knee to dramatize the treaty violations of our government; nor for the thousands of other even less conspicuous legal disasters perpetuated daily, primarily because the victims who get little more than legal first aid do not have the resources to flag the attention of the legal talent at this or any other school, which races blindly after law reviews, financial rewards, and the Golden Gravy Train.

Closer to home, it is not irrelevant to consider the effect of Law Review and the competitive atmosphere it encourages. This competition manifests itself in many ways inconducive to a healthy atmosphere for real learning -- or anything else. From the beginning, the drive for academic success (symbolized by Law Review) enhances the pressure on a group of people whose academic achievements belie the need for such excessive and artificial encouragement. Further, this press of competition fosters isolation and alienation from fellow students, the headlong dash for grades quickly becoming every person for him/herself. The more overt manifestations of this were stolen research books, missing notebooks at exam time, cheating on exams, and a lurking atmosphere of tension and distrust.

The reverse of this coin is that there is a generalized "respect" for first year instructors arising in many cases out of an unspecified fear that any instructor could give you a bad grade and consequently lower your class standing or -- horror of horrors -- eliminate your chances at Law Review. Such an atmosphere, in my observation, lead to a drastic lack of critical evaluation of both the materials presented in class and the performance of the person presenting them. This power of intimidation was such that even the most overt exhibitions of unfairness -- the scheduling of an entire semester of classes in one course for each Saturday morning, for example -- resulted in only the most tentative and ineffectual protest. This atmosphere also lead to the same small
clutch of people around every instructor at the end of every class who seemed more interested in being known than in knowing; letters being written to the administration assessing the performance of a particular instructor with the full intent that they be read eventually by the instructor and credited to the writer; even to Christmas cards sent to individual instructors who were at the same time derided in most unseasonal tones.

The role the Michigan Law Review plays in all this may not be self-evident to many. I can attest only to my own observations as to the interest and motivations which Law Review engendered and the conduct which went on around us all during the past year -- conduct which I fear is more a part of our law school education than we -- or those who direct it -- dare to admit. If the Michigan Law Review is, indeed, an institution whose purpose is to encourage research and publication, it should be the first to disavow any other role, particularly of the nature touched on in this letter that may be identified as intimately related to the selection process on the basis of values.

For these reasons I can in no way participate in the Michigan Law Review; to participate would be to legitimize and perpetuate the unspecified and clearly unscholarly functions of the institution. Further, I suggest it is imperative that the staff, on its own initiative, critically evaluate its selection procedure so that it might fit the professed ends of a law review -- and no others.

Let the Michigan Law Review be a scholarly publication for those who appreciate it and let it be carried on by those who have the interest and time to pursue academic research and publication, not for those who, for whatever twists of fortune or drive, stumbled to the top of the first year heap to enjoy this senseless status.

Sincerely,

s/ Jim Jenkins

(ORIENTATION cont'd from page one)

that he is very sensitive to electric shocks. Would you allow the police to give him a few quick jolts to find out where the bomb is, or would you prefer no torture -- not even a teenie-weenie electric shock -- and the certainty that say, three million people will perish?

Smith: (How much time is left in this class?) Well...

Professor: Now, Mr. Smith. You aren't quite sure that the police should never torture suspects, are you? It's really a question of drawing a line somewhere, isn't it? In short, it's like the rest of life--it's all a question of where you want to draw the line.

From the Slippery Slope the student is led to Cost Ben analysis. Cost Ben helps the student to decide where the line should be drawn. The instruction takes this form:

Professor: What's the benefit involved in torturing the suspect, getting the information and deactivating the bomb?

Smith: Three million lives.

Professor: Good. What's the cost?

Smith: (The values I came in here with.) The pain inflicted on the suspect. Possible encouragement to the police to torture in the future. A weakening in the public ethic against torture. A dehumanization of the policemen who did the torturing...

Professor: Now, Mr. Smith. Don't you think the public would want the police to torture in such a situation? Don't you think the police can be restrained by efficient management and control? When you jettison all that fuzzy-minded-social-science-garbage (pronounced as one work) and do a tough-minded, a practical Cost Ben analysis, isn't it fairly clear that they ought to torture in that, and perhaps other, situations?

If you start at the top of the hill marked Presidency, take the first road that says Slippery Slope, climb into the long black Cost Ben limousine and take your foot off the brake, you will soon reach: Watergate.

- Robert M. Smith
New York Times, a former Washington correspondent for the and now in law school at Yale.
(KAUPER cont'd from page one)

He isn't kidding. "We recommend jail sentences quite regularly." Judges often find the idea hard to accept, he says, since "price fixing often involves people who are otherwise very respectable members of their communities, not the type to be rehabilitated by a jail sentence."

But "I'm convinced that the thought in an executive's mind that there's a chance he is going to go to jail if he engages in price fixing is a pretty significant deterrent."

After a batch of executives served prison terms in the early 1960's for fixing prices in electrical generating equipment, he says, such activity dropped sharply in all industries for several years.

The tough line taken by the 37 year-old former law professor at the University of Michigan during the 14 months he has headed the division has surprised some people in Washington. The antitrust unit has been filing cases at a record level.

Even, the administration's critics seem impressed.

"Those interested in effective antitrust enforcement breathed a sigh of relief when he was appointed, considering the hacks President Nixon could have put in," says Mark Green, head of Ralph Nader's corporate accountability project.

Kauper has had his problems with Congress, which has either failed to seek his advice on several major bills affecting the antitrust laws, or ignored his advice when he offered it.

Despite his vocal opposition, the Senate voted overwhelmingly to pass a bill exempting soft drink bottlers from parts of the antitrust laws.

He was not asked to testify at Senate hearings on a bill to extend additional exemptions to dairy cooperatives -- even though his office is involved in antitrust lawsuits against some such co-ops.

A bill he supported that would have modernized transportation laws to increase competition died in committee. A bill now before the Senate would hamper his division's ability to negotiate settlement of lawsuits.

Given this long list of congressional snubs, Kauper admits that his Capitol Hill constituency "isn't terribly strong." He is far from alone, however; antitrust chiefs have traditionally had a cool reception from Congress.

Trustbusters usually are forced to talk about potential problems and economic theories, while the businessmen and lobbyists can talk about lost business and lost jobs -- and can hint darkly about lost campaign contributions.

But antitrust at present is hardly a vote-getting topic. "I don't see an awful lot of people bombarding their congressmen with letters asking what they are doing to preserve competition," Kauper observes.

- Alexander Auerbach
Washington Post,
August 21, 1973

"You'll have the government on our neck for violating the anti-trust laws, Figby! ... We can't monopolize ALL the ailments!"

The Michigan Law Review will add to its staff as of the date of publication those students who submit work that is eventually published as a student note in the Review. Editorial assistance will be available for any piece that appears to have a substantial possibility of publication. Assistance will also be available in selecting a topic on which to write. The Review has added three members to its staff through publication in the last six months. For an example of a student note submitted under this program, see 71 Michigan Law Review 1212 (1973). Questions should be addressed to Brian O'Neill, Room 410 Hutchins Hall.