# Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 30, NUMBER 2, WINTER, 1986



**Jackson on Import Practices • Schneider on Rights Discourse and Neonatal Euthanasia**

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## ARTICLES




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## DEPARTMENTS



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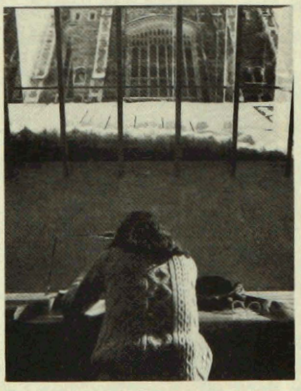

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# Life after retirement

## *Continued intellectual involvement, new sights and scenes accompany emeritus status*

*Editor's note: This is the first in a series of articles updating the activities of retired faculty. Activities of professors not covered in the present article will be treated in a future issue of* Law Quadrangle Notes.

Is there life after retirement? An emphatic "Yes!" is the answer given by retired Michigan faculty when asked this question recently by *LQN*. As the following responses indicate, "retirement" often translates into continued involvement in teaching and professional organizations with the added bonuses of new opportunities for travel and the time to enjoy it.

***Professor William W. Bishop*** *held the chair of Edwin DeWitt Dickinson Professor of Law when he retired in 1976, after having taught at the Law School for 45 years. Bishop, who will celebrate his 80th birthday in the summer of 1986, is best remembered for his important work in the field of international law, having served on the Permanent Court of Arbitration of the International Court of Justice. His casebook,* International Law Cases and Materials, *a landmark volume when it first appeared in 1949, has been widely used.*

*A naturally reserved and quiet man, Professor Bishop has endeared himself to generations of students by his constant accessibility, unfailing sympathy, and warm encouragement.*

"Since retiring from the Law School, I have continued part-time teaching: I've taught the international law course once, seminars in international law (chiefly on treaties and on the law of the sea) five times; and the political science department's international law course twice.

"I've liked keeping active in the American Society of International Law, and on the board of editors of its *American Journal of International Law*. I served as honorary president of the Society for two years, and as one of its honorary vice presidents the rest of the time. At the Society's 75th anniversary meeting in 1981, I gave the 'lead-off' talk on 'International Law, 1906-1981.'

"I've done a little consulting; and from 1976 to 1982 served as one of the four U.S. members of the Permanent Court of Arbitration (whose chief function is to nominate judges for the 'World Court').

"In 1981 I traveled to Greece with an A.A.R.P. group; and in 1982 to Rome with the University of Michigan Alumni Association. I've enjoyed auto trips with my daughter to Yellowstone, Teton, and Glacier National Parks; to the Canadian Rockies, to Quebec, Prince Edward Island, Nova Scotia, and northern New England; and to Virginia, North Carolina and Tennessee. I've managed to get to Washington once or twice a year; and have visited New Orleans, San Francisco, New York, Dallas, and Hawaii, as well as places closer to home.

*William W. Bishop*

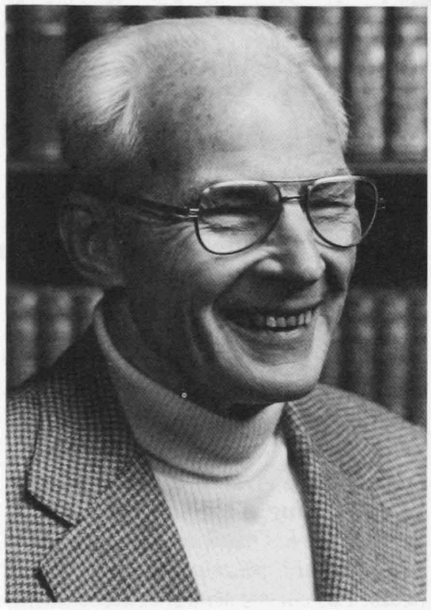
"I get to most of the University Musical Society's 'Choral Union' series of concerts except when out of town; to all of Michigan's home football games; and to many basketball games. I continue to serve on the executive board of the Wolverine Council of the Boy Scouts.

"I'm glad to have my small office at the Law School, and to keep in touch with my law students and the School's activities. Reading, walking, swimming, and bird-watching are other pursuits I enjoy. Since my wife's death six years ago, I have been keeping house for myself, with welcome visits from my daughter, and aid by a weekly cleaning woman. I've been blessed with good health, and have 'never found time to become bored.'"

***Professor Alfred F. Conard,*** *who began teaching at the Law School in 1954, made his mark as a great scholar and seminal thinker in many diverse fields. His classic study,* Automobile Accident Costs and Payments *(1964), in collaboration with economics professor James Morgan of the U-M, paved the way for the no-fault compensation movement. In the comparative law sphere, his works have been translated into several languages, he served as editor of the* American Journal of Comparative Law *from 1968-1971, and he has since served as chief editor of Volume 13 of the* International Encyclopedia of Comparative Law. *Professor Conard, who held the Henry M. Butzel Professorship at the Law School when he retired in 1982, is described by former colleague Stanley Siegel as "a gift from The University of Michigan to the world of law and to those fortunate ones...who have the joy of working with him."*

# B R I E F S

"I am currently spending a year as Distinguished Visiting Professor at the Pepperdine University School of Law, teaching agency and partnership, securities regulation, and corporate governance during two semesters. The school is situated in a building overlooking the Pacific Ocean. My wife, Georgia, and I are occupying a house on Malibu Beach. The location is not only beautiful; it is adventurous. One of the local brush



*Alfred F. Conard*

fires, which swept over a couple of thousand acres, came just across the road from us, showered our roof with sparks, and filled the air with suffocating smoke.

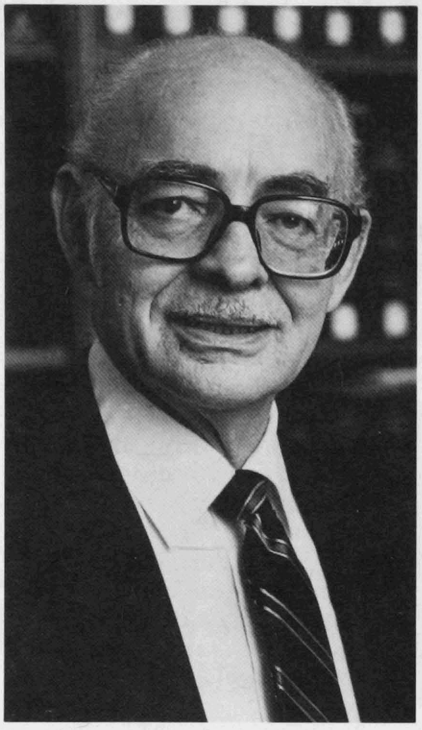
"Since beginning my phased retirement in 1981, I have filled visiting appointments at the University of Arizona (Tucson) in 1981, the University of California (Berkeley) in 1982, Florida State University (Tallahassee) in 1983, University of Colorado (Boulder) in 1984, and Pepperdine University (Malibu) in 1985-86.

"During this time I have published a revision of my casebook, *Enterprise Organization*, and its split-off, *Agency and Partnership*, in collaboration with Dean Robert L. Knauss of the University of Houston (Michigan Law '57) and Professor Stanley Siegel of the University of California at Los Angeles (Michigan Law faculty '66-'69), four law review articles and a few short essays, some of which appeared in *Law Quad Notes*. Currently in press are "The Nobel Prize for Law" in the *Michigan Journal of Law Reform* and "Theses for a Corporate Reformation" in the *UC Davis Law Review*. I have begun work on the fourth edition of *Enterprise Organization* and *Agency and Partnership*."

***Professor Frank R. Kennedy,*** *widely regarded as the nation's leading expert on bankruptcy, is also respected for his knowledge of reorganization as well as debtors' and creditors' rights. Kennedy entered on retirement furlough on July 1, 1983, and was officially retired as of June 30, 1984. As executive director of the Commission on Bankruptcy Laws of the United States from 1970 to 1973, Professor Kennedy was the principal architect of the Bankruptcy Act. The author of more than a hundred articles, papers, and books, he also served on numerous University and Law School committees. Kennedy, who held the Thomas M. Cooley Professorship, is remembered for his patience and compassion as well as his command of a difficult subject matter.*

"Since July 1, 1983, I have been of counsel to the Chicago law firm of Sidley & Austin. I devote half a working week to assignments for the law firm, which permits me to remain in Ann Arbor, except for bi-weekly trips to Chicago.

"I devote most of the rest of each working week to research and writing in the area of bankruptcy and reorganization. Articles in various stages of galley



*Frank R. Kennedy*

proof are awaiting publication in the *Vanderbilt Law Review, Tulane Law Review, Iowa Law Review,* the *Uniform Commerical Code Law Journal, and the Bankruptcy Strategist*. I also have a long-term commitment for the writing of a treatise on bankruptcy with Professor Vern Countryman of Harvard, to be published by Little, Brown & Co.

"Considerable time and effort are devoted to activities of the National Bankruptcy Conference, of which I am secretary, chairman of the drafting committee, and chairman of two other committees. The Conference is an organization devoted to the improvement of bankruptcy administration, and has been deeply involved for more than 50 years in drafting and advocating legislation on bankruptcy and reorganization. In November I testified before the Senate Judiciary Committee on proposals for family farm debtor relief.

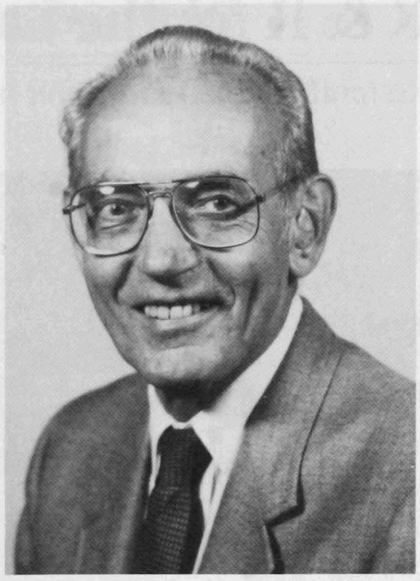
# B R I E F S

"In 1984 I completed an assignment as reporter for the Committee on the Uniform Fraudulent Transfer Act of the National Conference of Commissioners on Uniform State Laws. The Act has now been enacted by three states, and I am engaged in discussions and committees in other states where the legislation is being considered.

"I give a lecture about once a month on a subject in the area of bankruptcy and reorganization, sponsored typically by the Practicing Law Institute, the Institute of Continuing Legal Education, the Section on Corporation, Banking & Business Law of the American Bar Association, etc."

***Professor Allan F. Smith** retired in 1982 after a 35-year academic career at the University of Michigan. An authority on the law of property, Smith joined the law faculty in 1946 and became dean in 1960. Smith's deanship marked the beginning of the modern history of the Law School, during which a large number of exceedingly talented faculty members were hired, many of whom have since become major figures in the law. He left the deanship to become vice-president for academic affairs in 1965. From 1979 to 1980 he served as interim president of the University until a successor was named for retiring President Robben Fleming. In 1980, upon completion of his presidency, Smith was awarded an honorary doctorate of laws by the Regents. The citation noted in part: "Rarely has a single person had such a telling impact on every facet of the University's mission. Allan Smith is at once author, scholar, educational leader, and spokesman."*

"Achieving emeritus status in 1982 did not really mean retirement. In fact, only recently has the word 'retirement' crept into my vocabulary. In the winter term of 1982, I was invited to teach at the University of Georgia, at Athens, and enjoyed a second stint at that



*Allan F. Smith*

University. In the fall of 1982, I returned to Michigan, to help with the small group freshman program, and taught a small section of property here at Ann Arbor. The winter of 1983, however, found me in a newly acquired condominium in Sarasota, Florida, enjoying some sunshine instead of snow. The following term I taught at Michigan, again in the small group program, and then returned to Florida.

"In fall of 1984 I was invited to become the first Wallace/Fujiama Visiting Professor at the William S. Richardson School of Law at the University of Hawaii. This was an extremely rewarding term, particularly since there were three Michigan Law School graduates on the faculty.

"My only publication as an emeritus comes as a result of the appointment in Hawaii. A speech which I gave in connection with the professorship has been published in 7 *University of Hawaii Law Review* p. 1 (1985).

"I still take an active interest in the Ann Arbor Summer Festival, and serve on its board of directors."

***Professor Eric Stein,** internationally famous for his work on the Common Market and American relations with the European Community, retired in the spring of 1983 after 28 years of distinguished teaching at Michigan. Stein, who was the Hessel E. Yntema Professor of Law, authored or co-authored five major books on international law as well as numerous articles.*

*He has served on the staff of the Department of State, on the U.S. Delegation to the United Nations General Assembly, and on the United States Arms Control and Disarmament Agency. He has lectured widely in the United States and Europe, including the Hague Academy of International Law and the Max-Planck Institutes in Hamburg and Heidelberg. A scholar and teacher of extraordinary scope and vision, Professor Stein has continued his work of fostering a global perspective in his students throughout the world.*

"In the fall of 1983, I taught at the European University Institute in Florence, Italy and participated in a major international meeting organized by a German foundation in Ludwigsburg, Federal Republic of Germany, on the subject of private international law. The following year I served as a member of the Council of the American Bar Association Section on International Law and Practice, and in that capacity I chaired a panel at a meeting of the Section on Problems Facing American Companies in the European Common market.

"In April, 1984, I went to China as a member of the United States Committee for Legal Exchange with China. The purpose of this meeting was to negotiate an exchange agreement with the Chinese government by which Chinese lawyers and scholars would study or do research at American universities, and their American counterparts would go to China. The exchange that was

set up as a result of these negotiations has enabled several Chinese students to study at Michigan. I visited also Shanghai and Wuhan, stopping at several universities there. As everywhere, I was warmly received by our former students.

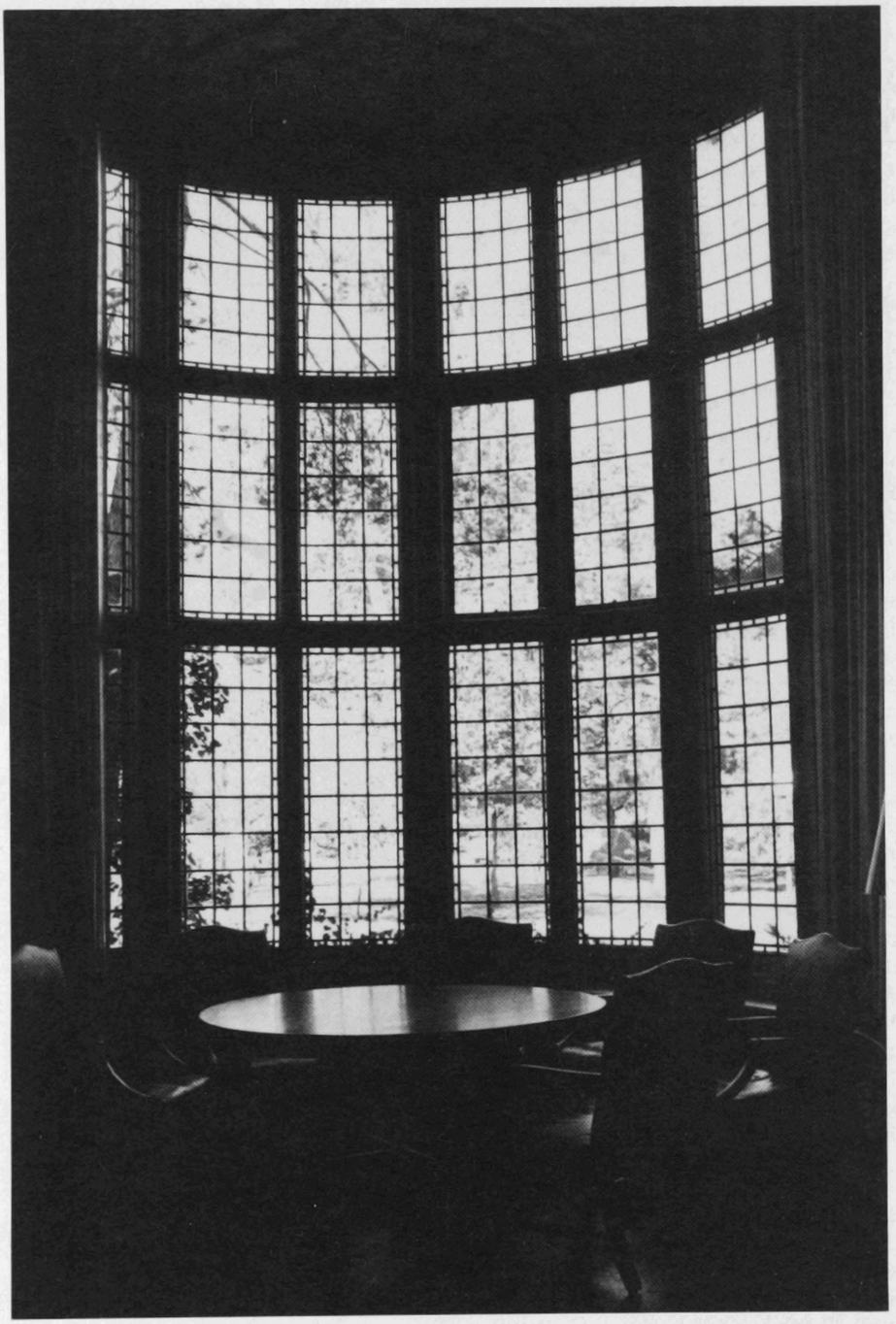
"In the fall of 1984 my wife and I returned to Florence where we spent a most agreeable month, some work but mostly sightseeing in this remarkable city.

"From October, 1984 through the end of August, 1985, I was a fellow at the Institute of Advanced Study in Berlin. The Institute, modeled after the Princeton Institute of Advanced Study, is both international and interdisciplinary and the group of fellows provided a most stimulating company. My only obligation was to give a colloquium for the fellows and invited guests on the subject of my work and to take five meals a week in the Institute. I first worked on a paper for the Max-Planck Institute in Hamburg dealing essentially with an aspect of the American federal system. This will appear in both English and German. I also started research on a major piece involving German case law and legislation dealing with neo-Nazi activities." ◘

*Eric Stein*

# R & R for the Lawyers Club

*Restoration and renovation revitalize much-used lounge.*



*Continuing renovation of the Lawyers Club under the direction of Diane Nafranowicz has included cleaning the marble window sills in the lounge, which had darkened with exhaust fumes from the traffic on South University Avenue.*

# Leading a world-class field

*Jackson teaches three-day marathon course on international trade, economic relations*

When John H. Jackson talks about international trade, the experts listen. The Hessel E. Yntema Professor of Law at the University of Michigan is frequently called upon by Congress, the administrative departments of the federal government, and the private sector for his advice and expertise. Late last year, more than 50 practitioners and government officials, including a group from Canada, gathered at the Aspen Institute's Wye Plantation, in Queensland, MD, for an intensive three-day course taught by Jackson.

"The Law of International Trade and Economic Relations," as it was called, was sponsored by the Section on International Law and Practice of the American Bar Association to give the participants an overview of the international and national trading system, including GATT and U.S. trade laws. The ABA called upon Jackson to present the course after the enthusiastic response generated by a similar one he developed and presented earlier for the U.S. Treasury Department. For that course, the Treasury Department awarded him the Office of the Secretary Honor Award "for outstanding service to the government."

The course format was largely lectures by Jackson, interspersed with debates, guest speakers, panels, and a colloquium. Topics included tariffs and other import restrictions, rule implementation, dispute resolution, most favored nation obligations, safeguards and the escape clause, and unfair trade practices (anti-dumping and subsidy-countervailing rules). One of the high points of the Wye session was "the problem," a hypothetical situation presented to the audience the last evening of the course. The participants, most of whom brought the perspectives of their own special areas to the group, found the session totally engrossing. As one of them remarked to Jackson later, "We started at eight o'clock and suddenly it was ten and we had to adjourn."

The author of five books, including *World Trade and the Law of GATT* (1969) and *Implementing the Tokyo Round: National Constitutions and International Economic Rules* (1984), Jackson is now at work on two new volumes. One is a second edition of a casebook on trade law, which he is co-authoring with William Davey, a U-M alumnus (J.D. '74, A.B. '71) now teaching at the University of Illinois Law School; the other is a monograph, as yet untitled, on international trade policy, which is to be published by the M.I.T. Press. ◘

*John H. Jackson*

# James A. Martin

*Law professor remembered for his keen logic, wide-ranging scholarship, and delightful foibles*

James A. Martin died December 10 of a prolonged illness. He was 41.

Known for his diverse knowledge of civil procedure, commercial transactions, and conflict of laws, Martin was the co-author of one of the country's leading law textbooks, *Civil Procedure, Cases and Materials*.

He was born April 5, 1944, in Elmhurst, Illinois, and received his B.S. from the University of Illinois. He received the M.S. in mathematics from The University of Michigan, where he earned the J.D. in 1969. He joined the U-M faculty in 1970 and had been full professor since 1975.

Professor James J. White, the Robert A. Sullivan Professor of Law who has taught at the School since 1964, remembers Martin as a student. "Almost from the day he arrived, he demonstrated a capacity for legal analysis and logical thought that far surpassed the typical student," he recalls.

"In addition to his writing and teaching, he chaired the review committee drafting the recent revisions of the Michigan Court Rules and worked closely with members of the bar in that capacity," White added.

Martin served as a Visiting Distinguished Professor of Law at the University of Hawaii Law School and was acting U.S. delegate to the Hague Conference on the Private International Law of Agency.

His other books include *Conflict of Laws* and *Basic Uniform Code Teaching Materials*, both in second edition, and *Michigan Court Rules Practice*, published last August.

A memorial service for Professor Martin was held at the Lawyers Club in January. Professor White was among those who spoke at the service. His remarks follow.

Jim Martin was a student, a colleague, and a close friend. His was a mind of independent ideas and uncommon sharpness. He was a scholar of national reputation, not just in one subject, but in three. Books that he authored or co-authored in conflict of laws, civil procedure, and commerical law were used in courses from coast to coast. He was a principal draftsman of a new statute on the law of leases that will soon be proposed for adoption in every state of the United States. He was a drafter of and a commentator on the Michigan Rules of Civil Procedure. These are remarkable accomplishments for a man of 41 years. In his books, in the court rules, and particularly in the new statute, his memory will live with us. Neither I nor anyone else need speak for them; they speak for themselves.

In the minutes given to me I would like to honor a part of Jim's memory in a form not preserved by his books and scholarly work. I fear that the rigor and careful logic with which Jim wrote and spoke portrayed him as a man of keen but unidimensional intelligence. In fact, Jim Martin was many persons. To think him merely a keen and logical thinker would be wrong.

One Jim Martin was a highly traditional, even prudish, product of a Roman Catholic upbringing. A second was an avante-garde devotee of science and science fiction. Yet a third, who co-existed with the other two, was a practitioner of a decidedly non-traditional life style. The traditional and conservative Jim Martin rebelled at lawlessness and disorder, was repelled by slovenliness of writing or thought, and was invariably offended by pretension and self-righteousness in all of its forms. Yet it was the non-traditional person who spoke out about such lawlessness, slovenliness, and pretension. These responses to such matters were always informative, usually clever, and occasionally humorous, not only in their content, but in the scolding officiousness that they revealed. To demonstrate this engaging and eccentric facet of Jim's character, I wish to read parts of four of his letters. Each of these letters was published or offered for publication—so be assured that I do not reveal something that was private.

*James A. Martin*

The first is a serious letter about a statement of a member of the Board of Regents on a topic that deeply interested Jim. This letter appeared in the March 18, 1984, *Ann Arbor News*.

"A Regent was quoted as urging caution about non-discrimination against gays, based upon 'public appearances' and 'what legislators think.'

"I am glad that the Regent keeps practicalities in mind, but after he has considered them briefly, I hope he will dismiss them forthwith. Can you imagine him making the same statements about discrimination against blacks or Jews? ('I would like to oppose discrimination against you, but, you know, I have to think about those anti-black and anti-Jewish legislators in Lansing. Of course *I* think you're okay . . . kind of.')"

Of course this letter properly criticized a Regent for a statement the Regent would not have made had he thought about it carefully. It shows Jim's capacity to draw a biting analogy that brings the issue into focus.

The second letter is less serious. In it we see the conservative Jim Martin responding on a political issue, but stimulated by the pretentiousness and self-righteousness of his political opponents. This was published in November, 1984, in the *Ann Arbor News*.

"Walter Mondale's concession speech was gracious and dignified, and showed the warmth that has made him a successful human being if not a successful presidential candidate. . . .

"In marked contrast, the statements of the proponents of the Nuclear Free Zone, both before and after the election, have been ungracious and mean-spirited.

"With the knowledge that free advice is usually ignored, I nonetheless offer the following to the nuclear free folks for their next campaign . . . [And he then gives them various pieces of advice, among it the following:]

"3. Don't try to convince us that you lost only because you were outspent. Money doesn't guarantee victory, as Republican House and Senate candidates found out this year. Moreover, your opponents actually published the text of your proposal in a full-page newspaper ad. Whether you like it or not, and whether it was accompanied by their own commentary or not, that *was* voter education—much more than in the usual election. Accept the fact that educated voters, rightly or wrongly, disagreed with you. They weren't bought. They read, they listened, and they weren't convinced. Stop whining.

"4. Next time, try at least to pretend that you accept the possibility that someone who disagrees with you may do so on the basis of principle and honest disagreement, and not instead for reasons of stupidity, greed, or a desire to see the end of the human race. You may not believe it's true, but if you pretend that you believe it, you will turn off fewer people who, this time, were unimpressed by your self-righteousness."

In the third letter we see Jim at his officious best. Here he is springing to the defense of a group of which he was clearly not a member. This is the group of those who are both fat and gullible. He is responding to an advertisement titled "Thrilling Japanese Super Pill Guarantees Rapid Weight-Loss!" that appeared in a stuffer in the *Ann Arbor News*. He writes to the Federal Trade Commission to "initiate formal procedures for complaining" about this fraudulent advertising. Not only does he take the perpetrator of the advertisement to task, he asks how he might initiate a complaint "against the *Ann Arbor News*." He states, correctly, that the *Ann Arbor News* has no obligation to use the *Family Weekly* as a stuffer, and, always ready with an analogy, suggests that the *Ann Arbor News* would not carry the *Family Weekly* if, for example, it ran pornographic photos or libelous articles.

The final letter is a quintessential Martin letter. It complains about English language usage, a topic dear to his heart. It was directed at his favorite target, the *Ann Arbor News*, only last July.

"I am perplexed by the continuing misusage by the *News* of "media" as a singular noun. The most recent example was a headline . . . "Terrorists' control over media illustrates how non-objective *it* really *is*."

"Irregular plurals are admittedly troublesome. . . . But the proper use of "medium" and "media" should not appear beyond your capabilities, expecially since newspapers *are* one of the news media and intelligent people are usually expected to know the proper usage of words touching upon their very livelihoods.

"Since this issue has been raised many times in your letter columns without apparent effect, I wonder if you would descend from your customary icy editorial silence and share with the readers your views on the subject—are these misusages mere oversight, are they attempts at linguistic reform, or is there some other explanation I haven't thought of?"

So we see it. Jim Martin was a brilliant man, but not merely a brilliant man. He was a man of grand strengths, but also of delightful foibles. I hope that the weight of his tragic and early death can be lightened, if ever so little, by our appreciation of the many things that he left for us in the scholarly literature, in our daily discourse with him, and also in the pages of our newspapers.

*Memorial contributions in Prof. Martin's name may be sent to the U-M Law School, Dean's Office, 302 Hutchins Hall, Ann Arbor, MI 48109.* ⊠

# In step with the times

## *Law library keeps up with changes in legal research*

**by Margaret Leary**

Change is constant in legal research. Plucknett's work describes, for example, the modern textbook replacing published case reports as the most important form of legal literature. More recently, A.B.W. Simpson has argued that the law review article has displaced the treatise. Apart from these changes, the law itself has continued to embrace concepts from other disciplines and deal with facts and methodologies of an increasingly technological society.

These changes are readily apparent when we examine a contemporary topic such as hazardous waste disposal, which only recently has appeared in legal literature. A library user in the 1970s would have found comparatively little on this subject, since a comprehensive system for regulating hazardous waste did not exist until the Resource Conservation and Recovery Act of 1976. Since then, publications have burgeoned in the form of federal statutes, regulations, court decisions, books, articles, and government documents.

The earlier user would have found fewer than 50 monographs in the Law Library dealing with hazardous waste. By the mid-1980s, the number had approximately doubled. Since 1976, 850 publications from the U.S. government printing office alone have dealt with the topic. Approximately 15 law review articles were published on hazardous waste in 1973; the number was close to 1,000 in 1985.

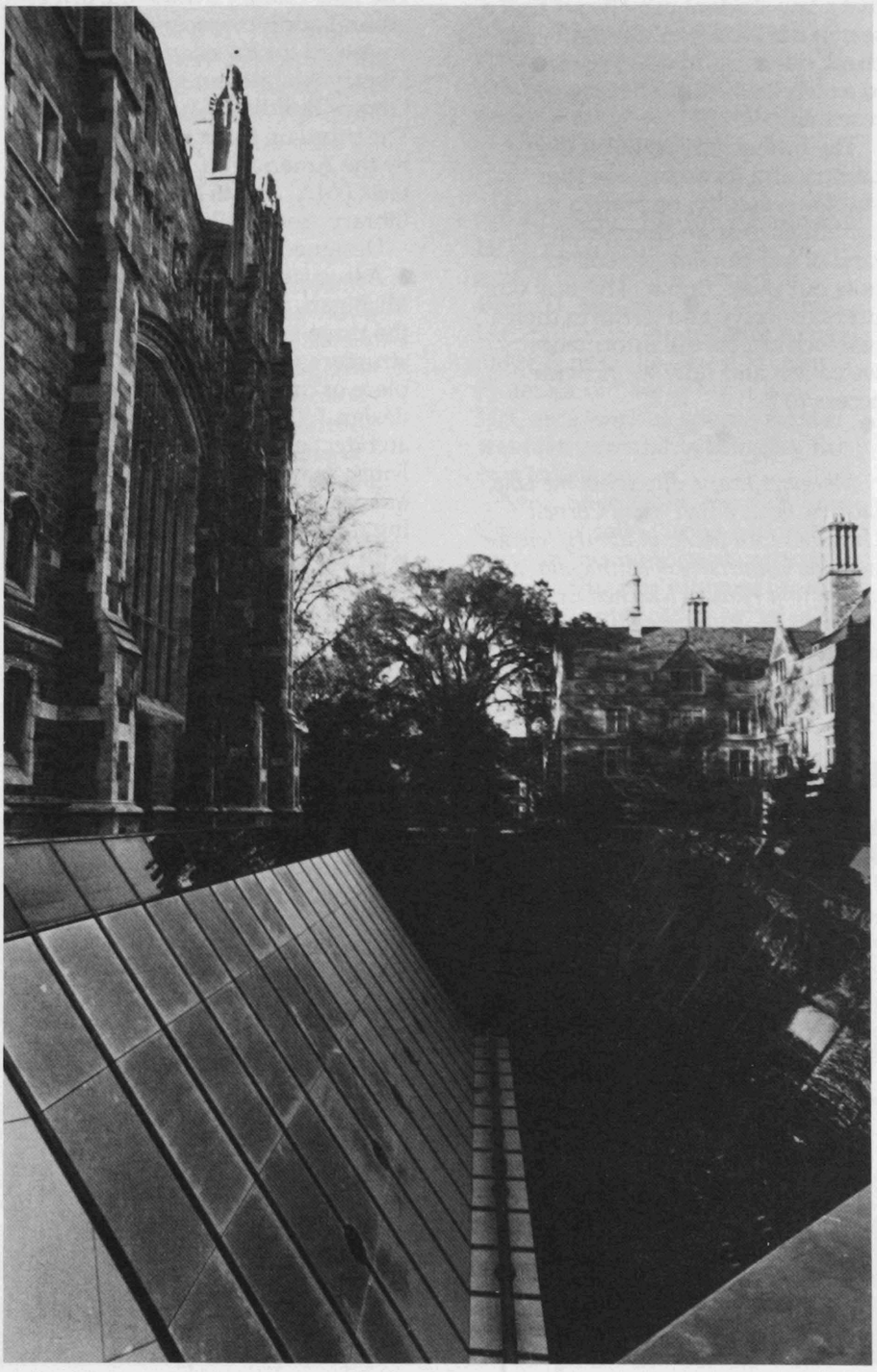
The Michigan Law Library has responded to the demands generated by these changes in a number of ways. The need for more book stack space, better study space, and more efficient library staff areas stimulated the drive that culminated in the Law Library Addition, occupied in 1981. The increase in available research resources has been matched by improvements in resources and finding aids and by the physical facilities of the Law Library.

Compare the process of finding an appropriate introductory monograph and some key journal articles; or a federal statute and the hearings which preceded it and the regulations that followed it; or citations to materials not purchased by the Law Library. In each of these standard steps, students and faculty in the 1980s have a substantial advantage over their peers a decade ago.

The first step—finding pertinent descriptive, or secondary material—is fundamentally easier now. In the Addition, reference librarians and the public catalog are visible and accessible, not hidden as they were in their former locations in Legal Research. Moreover, an automated circulation system and the capacity to retrieve books in circulation greatly improve users' ability to find out about, and get their hands on, needed material. During the hours when professional reference librarians are not available, printed handouts on doing research allow the researcher to get a productive start. A new index to periodical literature, *Legal Resource Index*, provides in a single cumulation references to some 6,900 articles on the topic of hazardous waste published between January, 1980 and September, 1985. The reel microfiche is updated monthly and is much speedier to use than the printed counterpart with its many paper supplements.

*Margaret Leary*

The method of finding federal statutes, hearings, and regulations has also changed substantially. The Law Library has both the current CIS *Congressional Index and Abstracts* and the fiche which contain the indexed Congressional publications. The Library provides duplicate fiche free, on request, to users, as well as both reading and paper-printing equipment. Congressional Information Service, which publishes these reference works, also publishes the *Federal Register Index*, a substantial improvement over any official finding aid. This index is particularly necessary for research on hazardous waste regulation or any other area where changes and additions to regulations are frequent. In addition, the Library subscribes to on-line versions of the *Federal Register* and the *Code of Federal Regulations*, which provide yet another research approach.



Much of this research is also facilitated by use of LEXIS or WESTLAW. Students and faculty use LEXIS and WESTLAW about 400 hours each month now; neither was available at all until 1976. Faculty have access to both systems either through terminals in the Faculty Library or from personal computers in individual offices. Student access through personal computers may be available in the next year.

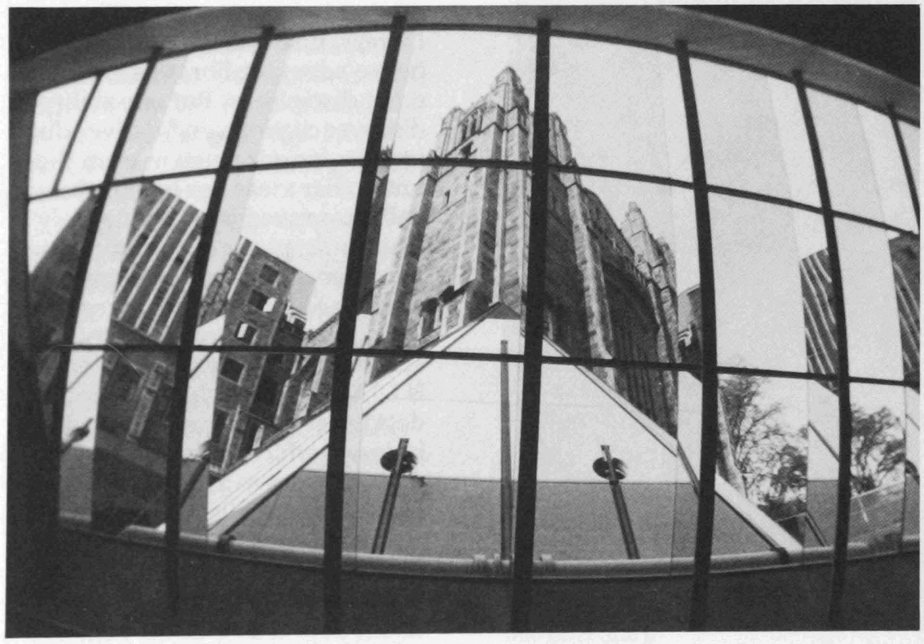
Hazardous waste is clearly an area in which legal principles may matter less than do scientific facts and principles of chemical and mechanical engineering. The Law Library, just as clearly, cannot house adequate libraries for these other disciplines. But our ability to discover citations and deliver documents for our users in even these unfamiliar areas has been substantially improved by two relatively new applications of computers to information data bases. One such data base is a commercial resource, the other a non-profit library consortium. The commercial resource is DIALOG, a machine-readable data base of bibliographic citation indexes, which is the equivalent of print indexes to the periodical literature of all disciplines. Our librarians conduct searches and create bibliographies for students and faculty, and then give advice about how to obtain the articles.

The Research Libraries Group, a non-profit consortium to which The University of Michigan belongs, provides roughly the same sort of machine-readable index to separately published monographs. Member libraries cover the intellectual spectrum in their book collecting policies. Since we can search the data base by subject, we can locate material we would never be able to buy. We can also request an interlibrary loan through the system at the same time, if need be. Agreement among member libraries also allows us to obtain free photocopies of articles, and allows members of the Law School community free access to other member libraries, including Harvard, Yale, and Columbia.

Improvements in the physical facilities affect even those users who read only their own notes and casebooks, but especially those who do original research. Students now have better access to library resources than ever before. Instead of competing, as they did in 1975, with 1,100 peers for 400 seats in the Reading Room and the dark, hot, and dusty old stacks, students are now assured a one-third share of a study carrel in the location of their choice. The Library restricts access to the Addition to those who need to use the books there, which means that a law student can always find a seat in the Addition. Students can check out as many as 15 books to a carrel, so everyone can do research.

The interaction between the Library and its users, whether students, faculty, or practitioners, continues despite changes in the kind of information we collect or how our users find it. The way our users conceive and perform their research affects the information we collect and how we provide access to it.

*Margaret Leary, director of the Law Library, holds a B.A. from Cornell University, an M.A. in library science from the University of Minnesota, and a J.D. from William Mitchell College of Law in St. Paul. In addition to her position at the Law School, she also serves as a lecturer in the U-M School of Library Science.* ⚄



## Library addition wins award for design

The Law Library's dramatic underground addition recently received an Award for Excellence for Library Architecture in the 11th Library Buildings Award Program. The program is sponsored jointly by the American Institute of Architects (AIA) and the American Library Association (ALA).

Designed by Gunnar Birkerts & Associates of Birmingham, Michigan, and completed in 1981, the three-story underground structure was cited as "a masterpiece of campus planning and design." The jury remarked, "The architect enriches the place by brilliantly leaving the corner of the quadrangle open, thus emphasizing the existing neo-Gothic tower with the new library below grade. A dramatic concave skylight that fills the reading room with light and opens a view of the Gothic tower from below grade is both unique and dramatic. The new space and renovation are executed with great skill."

The library awards are given every other year jointly by the AIA and the ALA's Library Administration and Management Association to encourage excellence in the architectural design and planning of libraries. ⚄

ALUMNI CENSUS
1986
The University of Michigan

A comprehensive all-university survey of Michigan alumni is being conducted by the University's Office of Administrative Services this spring. Please complete and return your copy of the questionnaire.

# Making news

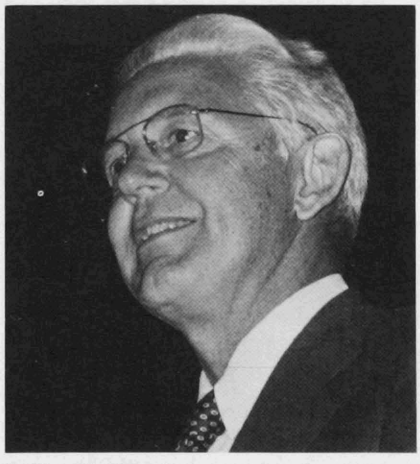
*Fleming, McCree, Sax receive recognition*

Professor **Robben W. Fleming** was granted emeritus status at the December meeting of the Regents.

Fleming, president of the U-M from 1968 to 1978, rejoined the University in 1982 as professor of law following a term as president of the Corporation for Public Broadcasting.

In conferring on him the joint titles of professor emeritus of law and president emeritus of the University of Michigan, the Regents stated, "he has been a dedicated teacher of the law and a leader of national stature in the field of education. He has been a versatile and compassionate administrator, enjoying the nearly unique distinction of heading two of the most respected public universities in the nation." Before coming to the U-M, Fleming was chancellor of the University of Wisconsin-Madison.

In recent months, Fleming's work has been directed toward finding a solution to the problem of soaring premiums for medical malpractice insurance. Appointed by Michigan Governor James J. Blanchard to study the issue, Fleming recently presented his findings and recommendations in a 31-page report.



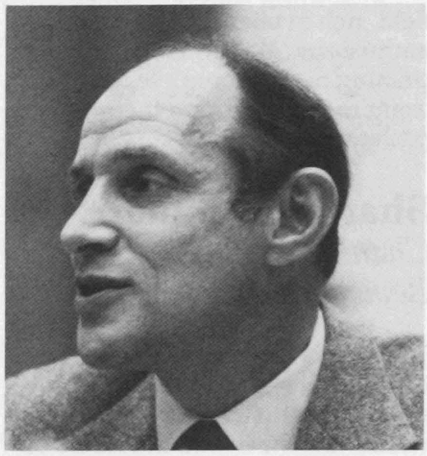
*Robben W. Fleming*

Last spring, the long-contested Howard Hughes case came to a close through the efforts of **Wade H. McCree, Jr.** The former U.S. Solicitor General and federal judge is now the Lewis M. Simes Professor of Law at Michigan. McCree's work as special master was instrumental in bringing the case to a close.

Now, once again, the Supreme Court has called upon McCree to serve in this important capacity. The fact that it is unusual for a person to be appointed special master more than once indicates the esteem with which McCree is regarded in the highest legal circles. His new appointment involves a dispute over shipment of radioactive dirt from New Jersey to Nevada.

In the case, New Jersey v. Nevada, New Jersey, wishing to transport 7,200 tons of radioactive dirt out of its own territory, applied for and was granted by the state of Nevada a permit to transport and dispose of radioactive material in that state. After New Jersey had obtained the permit, the governor of Nevada objected to the transportation and disposal of the contaminated soil into Nevada. The state of Nevada then banned the agreed-upon shipment, a move New Jersey contends is inconsistent with federal regulations.

*Wade H. McCree, Jr.*



*Joseph L. Sax*

**Joseph L. Sax,** the Philip A. Hart Distinguished University Professor of Law at Michigan, has received the Environmental Law Institute Award for 1985. The award recognizes an individual who has made an outstanding contribution to better environmental law and policy. A noted professor of law, Sax has helped to create the field of environmental law through teaching, legal scholarship, and law reform efforts. He has revitalized the public trust doctrine, brought new legal resources to the protection of America's parks and wildlands, and pioneered the concept of private environmental law enforcement, opening the courts of the United States to citizens seeking stronger enforcement of the law. ◘

# Focus on Students

*Eight sketches highlighting the varied backgrounds, interests, and prospects of the class of '86*

*LQN* recently talked with eight seniors about their past achievements, their law school experiences, their plans for the future. As the following profiles demonstrate, the latest crop of future lawyers comes from a national field, rich in talent, energy, and enthusiasm. With their basic legal training nearly complete, they are eager to embark upon their new professions.

## Sharon Beckman

*Channel swimmer, Law Review editor*

Two works of art decorate her *Law Review* office: a print of a swimming pool and a painting of a whale. On the inside doorknob of the office hang a Speedo tanksuit, a cap, and goggles. "I keep them here in case I don't get up early enough to swim with my usual group," explains Sharon Beckman. *Michigan Law Review*'s editor-in-chief usually rises in time to begin her day with a two-mile swim at 6 a.m. She spends most of the remainder of the day—and night—working on *Law Review*.

"There are certain parallels between marathon swimming and *Law Review*," she observes. "They both take a lot of endurance and commitment."

As a marathon swimmer, Beckman's efforts led her to be ranked first in the United States, and third in the world, in 1983. As *Law Review* editor, her rewards are somewhat less visible, but no less real. "This is the most intellectually exciting year I've ever had," claims

*Sharon Beckman*

Beckman. "I've learned so much from the articles I've read. We receive works from really brilliant people. What I enjoy most is talking with people about their work."

Beckman, who was captain of the varsity swim team at Harvard, swam the English Channel in 1982. The crossing took her nine hours, which was the 17th best time then. "I swam under ideal conditions," she recalls with her usual modesty, explaining that the water temperature, currents, and unexpected Soviet freighters can pose serious problems to Channel swimmers. (Soviet ships are the only ones that refuse to alter their course to accommodate Channel crossings.)

Prior to entering law school, Beckman worked as a paralegal with a small criminal defense and civil rights law firm in Boston. "Before then, I had a really negative image of lawyers, toting their briefcases and acting as if they knew it all. The job gave me a lot of real experience and I could imagine myself being a lawyer. I've always been bothered when I think something is unfair. I think that, as a lawyer, you may not win, but at least you have the power to *try* to fix something you think is unfair."

Next year Beckman will be clerking in Portland, Maine, for Judge Frank M. Coffin, of the U.S. Court of Appeals for the First Circuit.

## Bea Hernandez

*From migrant farming to political theater*

"I was surprised at what hard work law school turned out to be, after gliding through as an undergraduate. But I have no trouble working hard," says Bea Hernandez, a characteristic smile lighting up her face. One of eight children of a family of migrant farm workers, Hernandez first came to the state of Michigan as a child to work on the fruit harvest. She recalls, "I began picking cotton when I was seven. We were living in Texas, and my dad took all of us kids out to the fields to work. He gave us little burlap sacks and told us to fill them. That was how I spent my

*Bea Hernandez*

summers. I also picked tomatoes, grapefruit, oranges, and watermelons. Now, watermelons—they're really tough. You stand in rows and pass them along to the person next to you. The last person lifts them up into a truck."

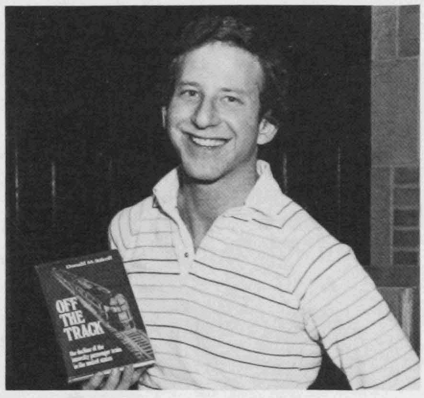
Hernandez received an undergraduate scholarship to study at the U-M where she majored in French with a career as a translator in mind. After spending her junior year in France, she returned, disenchanted with French culture and looking for an alternative. "I decided to enter law school because I wanted to do something in politics. My family and I had been involved with the United Farm Workers in Texas since I was a child. We participated in marches, walkouts, and organizing."

With her sights now set on a job in legal services or public interest law (one of those "low-paying jobs," she says jokingly), Hernandez works part-time with the UAW, a position she began last summer. Since 1981, she has also been a performing member of the Common Ground Theatre Ensemble, a political theater group in Ann Arbor. "We do a lot of plays and skits in prisons, and at rallies and conferences," she explains. Despite her poised and serene demeanor, Hernandez describes her first experience in front of an audience as "terrifying." But at the performance, she recalls, "it was exhilarating to be able to say a line and touch the audience, and then hear their response."

## Donald Itzkoff

*Documenting the decline of the passenger train*

"Where have all the trains gone? Two generations ago, 20,000 passenger trains a day carried Americans everywhere in the country. . . . As late as the 1930s, the railroad passenger train dominated contemporary perceptions of progress, future prosperity, and industrial design. Even the comic book hero Superman measured his strength against the current apex of technological achievement, the train, for he was undoubtedly 'more powerful than a locomotive.' Half a century later, nothing remained of the old mystique."




*Donald Itzkoff*

So begins *Off the Track*, a book by Donald Itzkoff documenting the decline of the inter-city passenger train from the peak years of the luxury limiteds to the present. Growing out of a history honors thesis at Brown University, the book is a readable, well-documented piece of railroad historical literature.

Neither a railroad buff nor a model train collector, Itzkoff explains that he was always interested in how technology responds to social change. "All the books on railroads just talked about the great glory days of the trains. I got into analyzing what actually happened to the passenger train. After winning a prize for the best history honors thesis, I sent out feelers to some publishers.

"The day I left for law school I received a contract and a letter suggesting a few changes," Itzkoff remembers. The "few changes," however, proved to be more time-consuming than Itzkoff could have imagined. "I probably spent about 60 to 70 percent of my time on the book during my first year of law school," he recalls. "I was able to finish it after the deans allowed me to take constitutional law during my second year so I'd have time for the book."

Since the book's publication (by Greenwood Press) last year, Itzkoff has appeared at several conferences and on a number of radio talk shows.

After graduation, Itzkoff plans to travel across Europe (by train). In the fall, he'll fly down to Washington, D.C. where he will join Pierson, Ball & Dowd.

## Sheryl Moody

*Motorcycle mechanic, mom, Army Reservist*

Ten years ago, Sheryl Moody went out into the world in search of career skills. Equipped with only a high school diploma, the recently divorced mother of two pre-school children took a 16-week course in motorcycle mechanics. After finishing at the top of her class, Moody secured a purchasing position with a motorcycle parts store through which she gained computer experience. Within a few months, she had landed a job with the Ford Motor Company's computer operations division. The job lasted until 1979, when Moody, like thousands of other automotive employees, was laid off, a victim of the economic recession.

"By that time I was remarried, and since my husband was working, I had the choice of either going back to motorcycles, or going to college," she recalls. "Going to college was an oppor-

*Sheryl Moody*

tunity I never thought I'd have at this point in my life, having gotten married right out of high school."

Moody entered the U-M, majored in political science and economics, and graduated with honors in three and a half years. "I would have finished in three years," she explains, but my husband got laid off during my last semester, so I joined the Army Reserve to help pay our expenses." Moody, who earned a Meritorious Conduct Medal during summer training between her first and second years of law school, admits that the most difficult thing about being in the army was being away from her family. The leader of a 34-member girl scout troop, Moody takes her troops on frequent camping trips and outings. "These activities are my obligations to have fun," she explains. "They're good—they keep law school in perspective."

With a job lined up with the Detroit firm of Butzel Long Gust Klein and Van Zile, Moody is counting the days until graduation. In the fall her husband, a hot air balloon artist, will begin his undergraduate studies in engineering. She estimates that when he graduates, they'll have a year off before the older of her two daughters, now 12, begins college.

## Dana Newhouse

*Musician, family law advocate*

"I think that people should try to be and do as many things as possible. There is much you can do with an education in law that you can't do without that background," states Dana Newhouse. Law is a second career for Newhouse, who has already made his mark as a successful musician. The Eastman School of Music graduate has composed scores for documentary films, the Detroit Institute of Arts, and PBS.

Since his first year as a law student, Newhouse, a Michigan resident for most of his life, has worked with the Family Law Project, which he now heads.

*Dana Newhouse*

The project is a non-profit agency tangentially connected with the University, which provides legal services for indigent women. "There are about 30 to 60 student volunteers, three supervising attorneys on the FLP board, and one paid attorney handling day-to-day operations," Newhouse explains.

Clients are referred to the Family Law Project by Legal Services of Michigan. "A common denominator among the clients is that they're all physically abused," says Newhouse. "Unfortunately, many of the clients drop out along the way. There are a lot of pressures to drop out of the legal system. It's part of a whole psychological condition that goes with being battered. As a volunteer, you begin to realize after a while that you can't do as much as you thought you could. All you can really do is *enable* your clients to take the steps they need to take and help them make the choices for themselves. If you approach your work in this way, then it's worthwhile."

Newhouse looks forward to working in litigation with Irell and Manella in Los Angeles after graduation. "Whatever I do," he says, "I intend to make some contribution to things I believe in. At the same time, I hope to earn enough money to buy some musical instruments and recording equipment."

## Lowell Peterson

*Ann Arbor's mayor pro tem*

Although law school is a frequently traveled path to the field of politics, Lowell Peterson has approached the J.D. from the opposite direction. An Ann Arbor city councilman for three years before entering the U-M, Peterson found that his experience in policymaking only whetted his appetite for knowledge about the broader aspects of the law.

Peterson, who describes himself as a socialist within the Democratic Party, moved to Ann Arbor after graduating from Yale in 1979. He ran for office two years later and is now not only the youngest but also the most senior council person. With the Democrats currently in the majority, Peterson also serves as the city's mayor pro tem.

*Lowell Peterson*

In his five years of office, Peterson has focused on three main issues: affordable housing, rape prevention, and alternative economic development. The experience has been a valuable one, because, in his words, "it has forced me to do more than simply talk about things. I've had to come up with specific proposals, and then work to get them passed and implemented. I've also had to make some tough decisions and not just sit back and criticize others for their decisions."

An idealist since his undergraduate years, Peterson has found that "the only way to be true to my ideals is to make something happen in accordance with those ideals, which sometimes includes having to make compromises in order to get along. City government is a system like any other, and you have to learn how to work within it to get things done."

Peterson estimates that he spends between 25 and 40 hours each week on city council business. "Often I spend 30 hours a week just at meetings," he said. When asked how this commitment has affected his law studies, Peterson replied, "I'd get bored if I had more time. Before I entered law school, I talked to some friends who were already in and they told me that the worst thing I could do would be to let it rule my life."

## Russell Smith

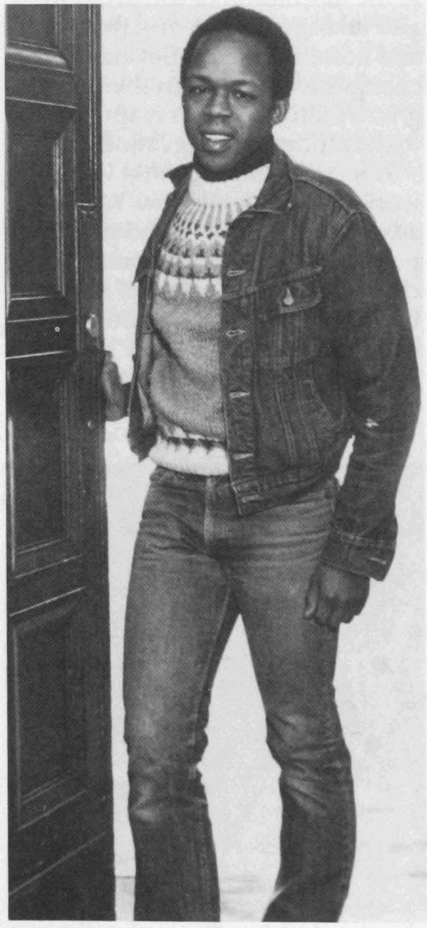
### *Realist looking for social change*

"The most valuable part of my law school experience has been realizing how naive my reasons for coming here were," says student senate president Russell Smith. The New Jersey native explains, "I thought that by becoming a lawyer, I could change the world by changing the way people relate to one another. I had great hopes of eliminating racism, sexism, anti-Semitism, and general intolerance of those who are different. Law school has given me a more realistic perspective on the limitations of law in accomplishing social change."

A psychology major at Yale, Smith postponed entering law school for three years. "I was only 20 when I graduated. I needed some time to grow up," he explains.

In the interim, Smith worked as a research project director with Warner Lambert in Milford, Connecticut, and then as a paralegal with Dykema, Gossett, Spencer, Goodnow, and Trigg in Ann Arbor. "I feel fortunate that other circumstances in my life brought me to Michigan and I applied to the law school here," he states. Smith has been active in the Black Students Alliance and the Headnotes singing group at the U-M. After spending his summers working as a law clerk for the Center for Constitutional Rights and for the UAW, Smith has come to feel that there is a role for the legal profession in social change. "I no longer believe, however, that lawyers working alone can be the great saviors of our society," he says. "Achieving the type of social change which I would like to see requires that people from many different backgrounds, classes, and occupations work together."

It is to public interest groups that Smith will be looking for employment when he completes his clerkship with Judge Douglas W. Hillman (J.D. '48) of the U.S. District Court for the Western District of Michigan, in Grand Rapids, next year. He adds, "I've also thought about community organizing. And both politics and music continually haunt my life."



*Russell Smith*

## Lynn Smith-Capehart

*Artistic, organized, outspoken*

"At Columbia, where I did my undergraduate work, they let you run wild with your ideas," Lynn Smith-Capehart recalls. "Here, they don't let you get away with anything like that. You have to substantiate your ideas with principles of law."

Smith-Capehart put her outspokenness to good use during her first year when she led a successful petition drive calling on the School to reexamine the writing and advocacy skills program, a first-year requirement, and a source of dissatisfaction among students. The petition contributed to the discussion of the program also taking place among the faculty and administration. Several changes were made in the program, many in direct response to the students' suggestions.

A former graphic artist who worked for several New York City advertising agencies and national publications, Smith-Capehart chose the U-M because of its location as well as its reputation. "I'd had enough of New York by then. And I like Midwestern people," she notes. "I like their friendly, 'I'll help you; take your time' attitude." She had a chance to meet Ann Arborites during the summer of her senior year when she reported for the Arts and Entertainment section of the *Ann Arbor News*.

Besides her artistic background, the 34-year-old Smith-Capehart can claim six years of experience in New York as a business manager, advertising agent, and contract negotiator for professional singers, actors, and dancers.

She owned and operated, concurrently, three different businesses, managing, promoting, and representing entertainers. "It was simply a matter of organizing a system and delegating authority. But in the process, I found myself handling contracts and legal matters," she explains. "People kept asking me, 'Are you a lawyer?' and I began to think more and more seriously about the legal profession."

A job with Holtzman, Wise and Shepard awaits her in Palo Alto, California where Smith-Capehart will be looking for ways to bring entertainment businesses to the firm. ◘

*Lynn Smith-Capehart*

# Guests of honor

Thirteen visiting faculty joined the Law School this fall, bringing with them a cross-current of ideas and approaches to legal education.

Four visiting faculty members were here for the entire school year.

**Stephen B. Burbank** visited from the University of Pennsylvania, where he has taught since 1979, and where he formerly served as general counsel. He is twice a graduate of Harvard University, which awarded him the A.B. in classics in 1968, and the J.D. in 1973. His major academic interests are court rulemaking, judicial discipline, resjudicate, and evidence reform. At Michigan he taught civil procedure both semesters.

**John H. Garvey,** visiting from the College of Law, University of Kentucky, is a graduate of Notre Dame and of Harvard Law School. From 1982 to 1984, he served as assistant to the Solicitor General of the United States. This fall Professor Garvey taught a course on the Fourteenth Amendment and a seminar on freedom and choice. During the winter term, he taught constitutional law and a seminar on Title VI, IX and Section 504.

**Michael C. Harper,** a visitor from Boston University, received both the A.B. and the J.D. from Harvard. A former staff attorney for the Center for Law and Social Policy in Washington, D.C., Professor Harper taught courses on employment discrimination and enterprise organization this fall. During the winter, he taught labor law and a seminar on labor relations.

**Larry D. Ward** is an alumnus of the University of Kansas, which awarded him the B.S. in 1966 and the J.D. in 1969. Visiting from the University of Iowa, Professor Ward taught several courses on taxation this year. He has also been a visiting professor at New York University, the University of Florida, Cornell, and the Ministry of Finance, Republic of China.

Nine visiting faculty joined us at the Law School for the fall term only.

# B R I E F S

**Richard F. Babcock,** a practicing attorney with the Chicago firm of Ross & Hardies, is a graduate of Dartmouth College, the University of Chicago Law School, and the University of Chicago School of Business. He has been a consultant to public agencies and private developers in land use and housing, and has been a visiting professor at Santa Clara Law School, Dartmouth College, Duke University, and the University of North Carolina School of Planning. He taught a land use clinical seminar and a course on land use planning this past semester.

**William J. Carney** visited from Emory University Law School, where he has been Candler Professor of Law since 1978. Professor Carney holds both his undergraduate and law degrees from Yale University. He has practiced law with the Denver firm of Holland & Hart, and with Shellman, Carney & Edwards in Aspen, Colo., as well as on his own. Before teaching at Emory, he was on the faculty of the University of Wyoming for five years. This fall he taught courses on securities regulation and corporate governance reforms.

**Rudolf Dolzer,** who visited the Law School in the fall of 1984, returned again to teach introduction to constitutional law and protection of foreign investments. A specialist in international law, he is on the faculty of the Max-Planck Institute for Comparative Public Law and International Law. Professor Dolzer holds a B.A. from Gonzaga University, a doctorate from the University of Heidelberg Law School, and an LL.M. and S.J.D. from Harvard Law School. He has taught at the University of Heidelberg and at the University of Tubingen.

**Alan L. Feld,** on the faculty of Boston University, is a graduate of Columbia College and Harvard Law School. He has been a visiting professor at the University of Pennsylvania School of Law, and was formerly associated with Paul, Weiss, Rifkind, Wharton & Garrison, and Barrett, Knapp, Smith & Shapiro, both of New York City. This fall he taught a course on Congress and another on taxation.

**Bruce H. Mann,** a visitor from Washington University in St. Louis, formerly taught at the University of Connecticut. He was a visiting professor at the University of Texas. He holds both a J.D. and a Ph.D. in history from Yale University. This fall at the Law School he taught courses on property and oil and gas. Mann is married to Elizabeth Warren, another visiting professor, whose specialty is commercial law. (See below.)

**David G. Owen,** a professor at the University of South Carolina Law School since 1973, taught two sections of torts. He holds both an undergraduate degree in business and the J.D. from the University of Pennsylvania.

**Tom Rowe** visited from Duke Law School. He was awarded the B.A. from Yale University, with majors in political science and economics; the M.Phil. from Oxford University in comparative literature; and the J.D. from Harvard Law School. He has been associated with the Washington, D.C. firm of Miller, Cassidy, Larroca & Lewin, and was a visiting professor at Georgetown University Law Center. This fall he taught a seminar on constitutional law and a course on civil procedure.

**A. W. Brian Simpson,** who is on the faculty of the University of Chicago, previously served as professor of law and dean of the faculty of social sciences at the University of Kent, Canterbury, England. His background includes service in the Royal West African Frontier Force and law studies at Queen's College, Oxford. He also spent a year as the dean of the faculty of law of the University of Ghana. This fall at Michigan he taught contracts and legal history.

**Elizabeth Warren** visited from the University of Texas at Austin, where she is Professor and Conoco Faculty Fellow in Law. She formerly taught at the University of Houston and at Rutgers School of Law. A law graduate of Rutgers, Professor Warren did her undergraduate work in speech pathology at George Washington University and at the University of Houston. She taught commercial transactions this fall at the Law School.

Two visitors are here for the winter term only.

**Herbert J. Hovenkamp** is visiting from Hastings College of the Law in San Francisco, where he has been an associate professor since 1980. He has been a visiting professor at the University of Iowa College of Law and a Rockefeller Foundation Humanities Fellow at Harvard Law School. Professor Hovenkamp previously taught at the University of Texas, where he earned both the Ph.D. in American studies and the J.D. He did his undergraduate work at Calvin College in Grand Rapids. This winter he is teaching a section in property.

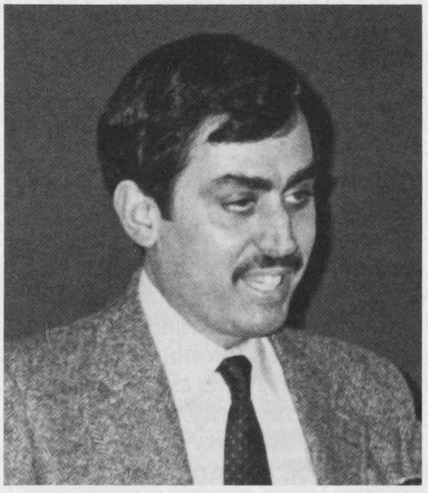
**Charles F. Wilkinson,** visiting from the University of Oregon Law School, holds the LL.B. from Stanford and the B.A. from Denison University. His background includes five years of private practice in Arizona and California, four years as a staff attorney with the Native American Rights Fund in Colorado, and visiting professorships at the University of Minnesota and the University of Colorado Law Schools. At Michigan he is teaching courses on Indian law and public lands. ◘

# Was Miranda a mistake?

*Kamisar, Grano debate decision before overflow crowd in Room 100*

*Students jammed the aisles and doorways and stood on tables outside Room 100 to hear the spirited two-hour debate, which was moderated by Professor Jerold Israel.*

*In a debate at the Law School this winter Michigan's Professor **Yale Kamisar** who has written extensively on the Miranda case, argued that the so-called Miranda rights are constitutionally required and that any abandonment of the current rule would lead to the excesses of the 1930s when police abused their power, questioning suspects for hours on end.*



*Professor **Joseph Grano,** Distinguished Professor of Law at Wayne State University, termed the Miranda decision an illegitimate exercise in power by the Supreme Court, and, if deemed appropriate, can only be found so by a strained reading of the constitution. Public policy, he argued, is against such a reading.*

# Honoring the honorable

*Justice Dando, foremost Japanese scholar, receives Doctorate of Laws degree*

*The Honorable Shigemitsu Dando, a former justice of the Supreme Court of Japan, who twice served as a visiting professor at the Law School, was awarded an honorary Doctorate of Laws at the winter commencement. Mr. Dando's nomination for this award was initiated by a group of Law School professors. Their petition to the University Committee on the Award of Honorary Degrees follows in edited form.*

Justice Dando was born on November 8, 1913, in Yamaguchi, Japan. In 1935 he received his degree (Hogakushi) with high honors from the Tokyo University Faculty of Law. Dando served as associate professor at the Tokyo University Law School from 1937 to 1947. In the latter year he was promoted to the rank of professor of law, and held that position until 1974 when he reached the mandatory retirement age. Between the years 1963 and 1965 he served a distinguished term as dean of the Faculty of Law at the University of Tokyo.

Many of the best known Japanese legal scholars and academic administrators are protegés of Justice Dondo. These include, among many others, Ryuichi Hirano, the current president of the University of Tokyo, and Koya Matsuo, the present dean of the Faculty of Law at that institution.

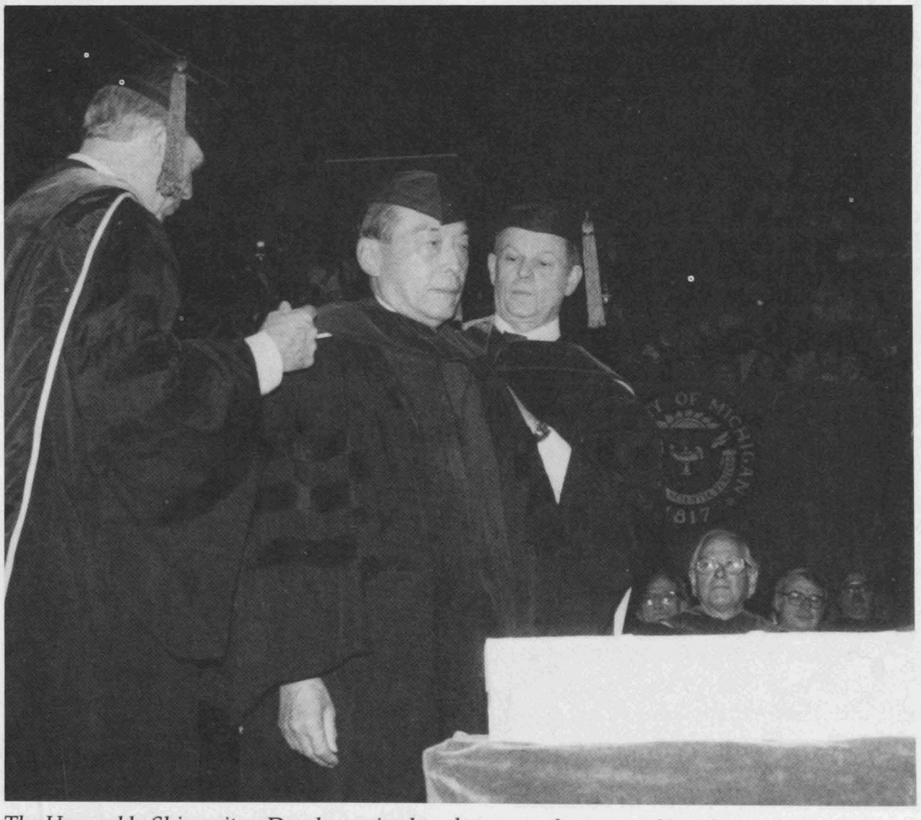
Justice Dando has also taught and lectured throughout the world: North America, Europe (including the Soviet Union), Asia, and Latin America. He was a visiting member of the faculty of the University of Michigan Law School in 1959 and again in 1965.

While carrying forward his unusually fruitful academic and scholarly career, Justice Dando was able to make important contributions of public service. In 1945, when drastic changes were being imposed on the Japanese legal system, he served as the only academic member of the working group that formulated a new law of criminal procedure. These contributions plus his own writings on the same subject caused him to be recognized as the prime architect of modern Japanese procedural law, a structure that has remained essentially unchanged in the intervening years. He was an active organizer of the Criminal Law Society of Japan, one of the most distinguished associations of its kind in the world, and for many years served as its executive head.

In recognition of his erudition and extraordinary public services (only a few of which have been listed here), he was appointed to the Supreme Court of Japan in 1974, retiring at the mandatory age of 70 in 1983.

Upon his retirement from the Court, Justice Dando was named and is now serving as counselor to His Royal Highness the Crown Prince, an honor constituting a rare public tribute to Dando's distinguished achievements.

The range and quantity of Justice Dando's scholarship is perhaps sufficiently indicated by the



*The Honorable Shigemitsu Dando received an honorary doctorate of law degree from the University of Michigan at the winter commencement.*

bibliography assembled for his published *festschrift*. Dando is an international scholar and his works have appeared in English-language and German publications, including his monumental 663-page treatise entitled *Japanese Law of Criminal Procedure* (B. James George, trans.).

Dando's writings encompass the subjects of constitutional law, criminal law, and legal philosophy. All these contributions maintain high levels of scholarship. But it is clearly in the field of criminal procedure that his work has been principally focused. Competent observers rank Dando as the primary creator of the modern Japanese law of criminal procedure and as the most distinguished commentator on the subject among contemporary legal scholars.

Justice Dando is recognized in the Japanese legal community as one of the most distinguished judges in the post-World War II era. The Supreme Court of Japan consists of 15 members. Most cases are not decided by the full court, but rather in panels of three judges drawn from the full bench. It follows that the institutional practices militate against any single judge dominating the bench or securing overriding influence over his colleagues. Yet all competent observers appear to agree that Dando displayed a fine consistency with his scholarly concerns by making important contributions on the Court in the areas of constitutional law and criminal procedure.
The statement of Professor B. James George, Jr., of the New York Law School and a member of the U-M faculty from 1952 to 1968, is typical. Professor George, in a letter dated September 20, 1984, says: ". . . Justice Dando has been one of the strongest justices, in terms of doctrinal development in constitutional law, ever to have served on the Supreme Court of Japan since its establishment in 1946. The panel over which he presided . . . issued a precedent-breaking decision recognizing a qualified form of exclusionary rule in search and seizure cases. He also wrote opinions in important environmental cases before the Supreme Court. In short, his stature in the Japanese judiciary is extremely high."

Finally, Dando's quality as a judge can be discerned in his published reflections on the problems and dilemmas of judging. His introspective essay on "The Conscience of the Judge" is part of a small and select literature of useful writings on the processes of judicial decision-making. See *Studies in Comparative Law* (Wise and Mueller, eds.), 1975, pp. 13-25.

A word needs to be said about the importance of criminal procedural law to modern Japan and the significance of Dando's choice of this field as his primary area of concentration. Containment of the powers of law-enforcement officials and agencies is one of the principal objectives of any system of constitutional government. It should not be forgotten that in the United States, for example, four of the nine amendments in the American bill of rights refer expressly to matters of criminal procedure, and several of the others are directly applicable to the administration of criminal justice. Thus, in their broadest significance, the principles of criminal procedure engage basic constitutional concerns and issues of human rights.

This fact is especially apparent in modern Japan. Torture as a routine method for interrogating suspected persons survived the Meiji Restoration, and was not officially eliminated until a decade later in 1879. The old practices persisted, however, and it is clear that a kind of Star Chamber procedure continued in Japan at least until the enactment of the Code of Criminal Procedure in 1922.

As a scholar, Justice Dando embraced an area in which in his country there was no strong historical tradition supporting the rule of law. Indeed, even the concept of "rights of the people" achieved no vigorous consensus at many periods during Justice Dando's life. By concentrating his energies and thought in the area of criminal procedure, he has made fundamental contributions to a liberal, constitutional regime in Japan.

Those submitting this memorandum believe that Justice Dando clearly merits the award of an honorary doctorate from the University of Michigan. ◘

Supporting letters were also written by the following law professors: Francis A. Allen, Edson R. Sunderland Professor and former Dean, U-M Law School; Sanford H. Kadish, Morrison Professor of Law and former Dean, University of California, Berkeley; Koya Matsuo, professor and Dean, Faculty of Law, University of Tokyo; Shinichiro Michida, professor, Kyoto University; Norval Morris, Julius Kreeger Professor, University of Chicago; and Allan F. Smith, Professor Emeritus and former Dean, U-M Law School, and former Vice-President for Academic Affairs, U-M.

## Thomas Kauper lives!

In an article on alumnus Francis X. Beytagh, Jr. in the last issue of *LQN*, reference was incorrectly made to "the late Thomas Kauper." As most readers undoubtedly realized, this should have read *Paul* Kauper. Professor Thomas Kauper, son of the late Paul Kauper and the Henry M. Butzel Professor of Law at Michigan, is very much alive and well.

# "Practicing" lawyers

*Trial practice course offers rare opportunity for clinical experience*

*Ann Arbor attorney and Law School graduate Edward Stein (J. D. '66), who organized the course, worked closely with the students and offered practical advice after each performance. Five other trial lawyers, a judge, and a communications expert also participated in the small sections.*

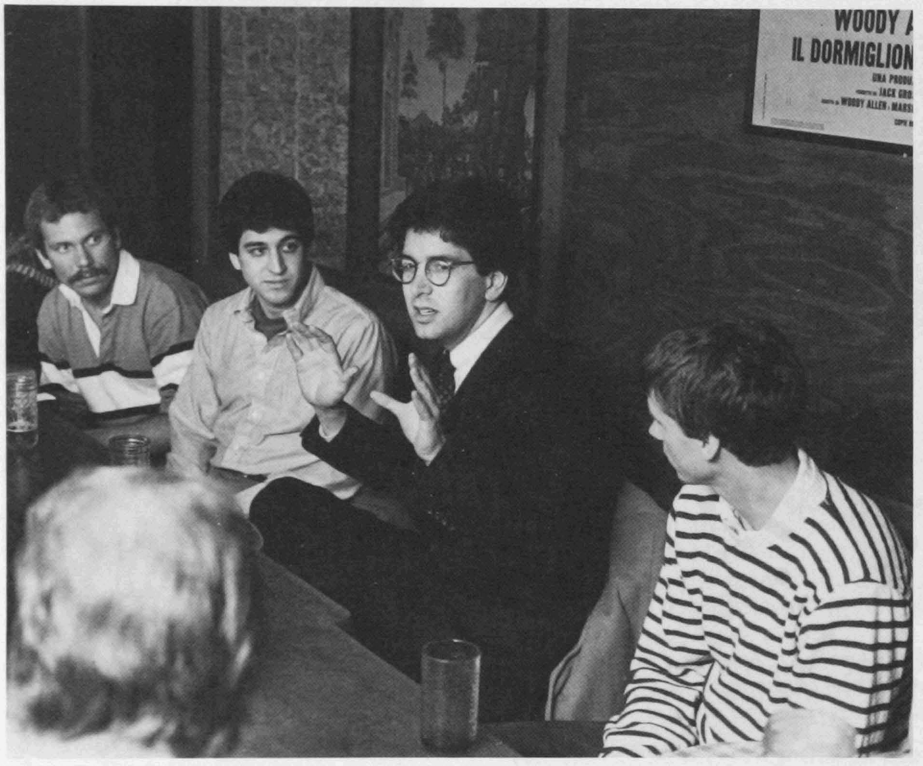
*Video monitors allowed students to critique their own performances and those of their peers.*

*Lori Silsbury was among the 72 students who opted to spend spring break participating in this year's week-long intensive trial practice course. The class was divided into six sections, giving each student the opportunity to perform a specific trial task before a video camera.*

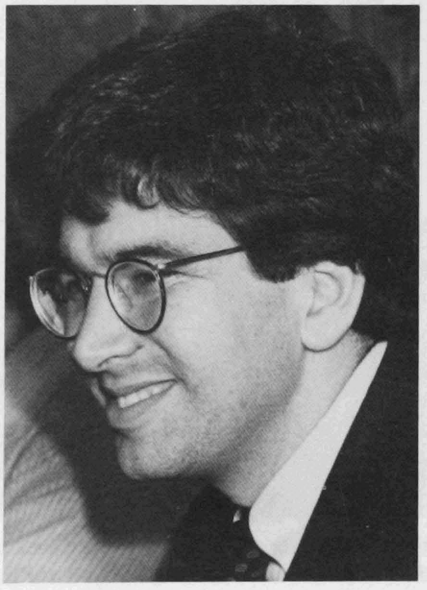
*Mock trials were held on Saturday and Sunday with local residents, many of whom were senior citizens and high school students, serving as jurors. Most of the jurors remained to ask questions after the trials had ended. Local attorneys acted as judges.*

# Hearing it from the experts

*Krupp, Rivlin, Shapiro visit Law School*

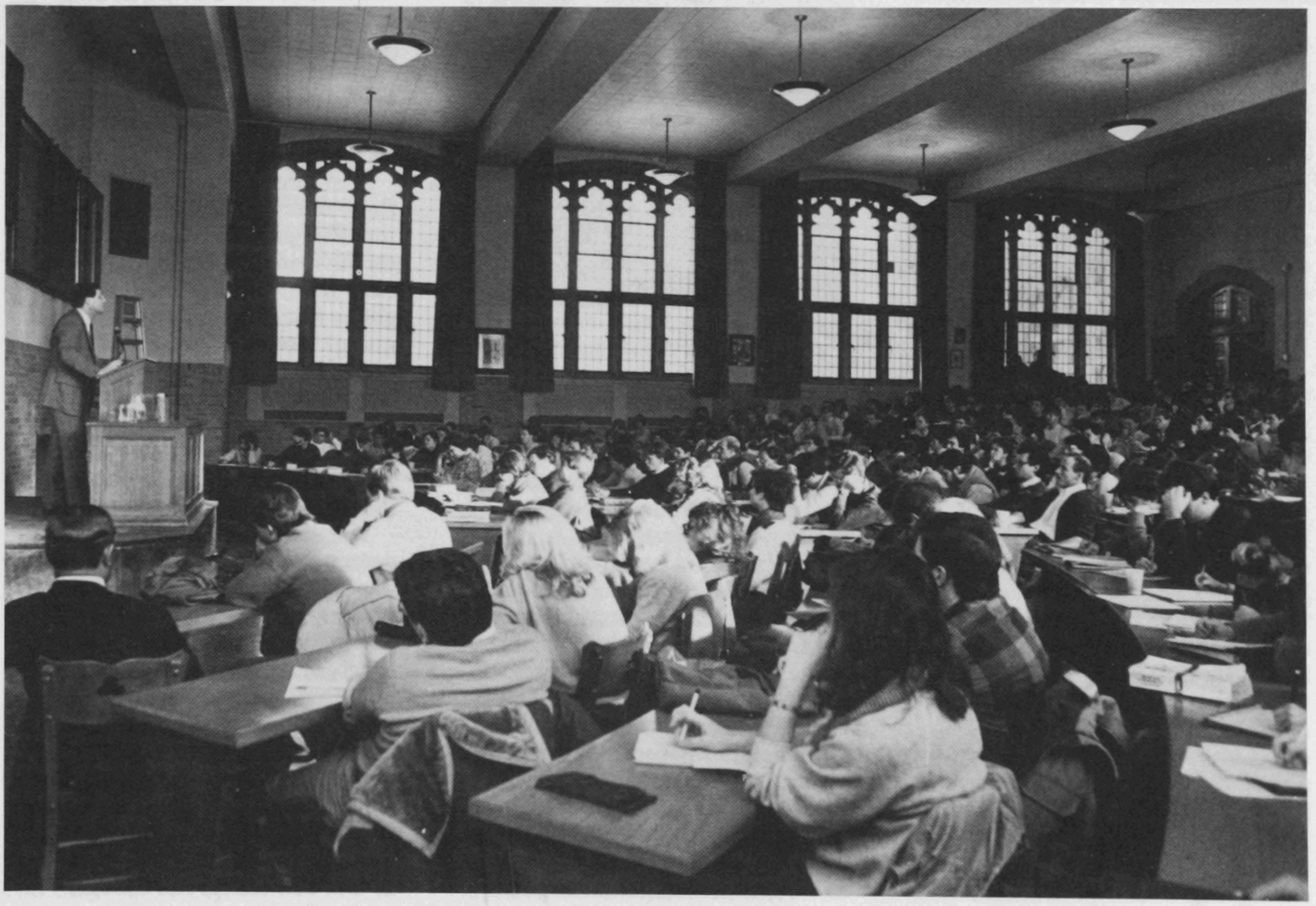



*De Roy Fellow* ***Frederic Krupp,*** *a 1978 Michigan graduate and founder of the Connecticut Fund for the Environment visited the Law School for three days. During this time, he visited classes and met informally with students to discuss public interest work. One of his meetings included a session with Environmental Law Society students at Dominick's Restaurant. Krupp, since 1984, has been executive director of the Environmental Defense Fund, a coalition of scientists, lawyers, economists, and computer programmers working toward new solutions to environmental problems.*



***Alice M. Rivlin,*** *director of the Economic Studies Program at the Brookings Institution, was featured in the 29th William W. Cook Lectures on American Institutions. In a series of three lectures, entitled "Making Government Work Better," Rivlin described the substance of a new reformist policy as "aggressive moderatism," with a strong emphasis on a healthy economy.*

***Stephen Shapiro,*** *a Chicago attorney who has worked on more than 400 U.S. Supreme Court cases, spoke on effective oral argument tactics to a full house in Room 100 this winter. Shapiro identified the keys to good writing as brevity, clarity, and vividness. His practical suggestions on "how to be superb" in oral arguments included reviewing briefs from the viewpoint of a skeptical judge, practicing the argument, and being courteous to the court.*



# The legal sporting life

## *Alumnus combines successful law practice with athletic ventures*

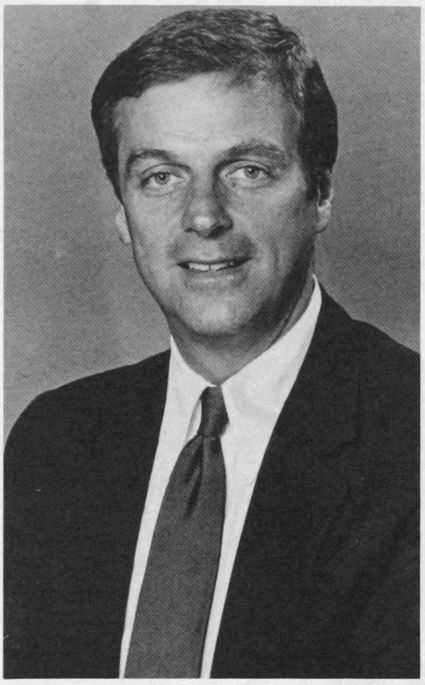
**by Sam McManis**

His resumé runs four pages long and is crammed with job titles, achievements, and lists of distinguished organizations he has been associated with. Still, four pages doesn't seem space enough to chronicle the activities of Alan Rothenberg. Something the size of a phone book might be more like it.

By profession, Rothenberg, 46, is an attorney specializing in litigation, business, and commerical law. Since 1968, he has been a senior partner of Manatt, Phelps, Rothenberg and Tunney, one of Los Angeles's fastest-growing law firms, and he says it always has been his top priority.

These days, though, you are more likely to see his name in the sports section than in the business or news sections. He is president of the Los Angeles Clippers, the National Basketball Association team that Rothenberg and owner Donald T. Sterling moved to L.A. last year after six losing seasons in San Diego.

If Rothenberg's name is familiar to sports fans, it should be. He has at various times been general counsel and right-hand man to Jack Kent Cooke, former owner of the Lakers and Kings; owned and operated a professional soccer team, the L.A. Aztecs; was seriously considered in 1974 as a replacement for retiring NBA commissioner Walter Kennedy, then headed the committee to select Kennedy's successor; and represented Steve and Cyndy Garvey in their much publicized 1981 libel suit against *Inside Sports* magazine.



*Alan Rothenberg*

Rothenberg, it seems, is forever involved in some sports venture. Last year, for instance, besides moving the Clippers to L.A. and maintaining his law practice, he served as soccer commissioner for the Los Angeles Olympic Organizing Committee. He also has regular engagements as a college lecturer and as an analyst on a cable-TV sports program, and is chairman of the Entertainment and Sports Law Committee of the American Bar Association.

In addition to his sports activities, Rothenberg heads his firm's growing litigation department, is a director of two banks and two corporations, and is on the board of governors of the Century City Bar Association.

Rothenberg has a lot of other things to occupy his time. Mostly, there is the law firm, which has grown from three lawyers—original partners Charles Manatt, Thomas Phelps, and Rothenberg—into a 100-lawyer firm with offices in Century City, downtown Los Angeles, Washington, D.C., and San Francisco.

Phelps jokingly says Rothenberg gives 100% to the firm, "but we all know Alan operates on a 200% schedule.... Alan has unbelievable energy. He packs more work into 24 hours than anyone I know. He is at the office by 6 a.m. It's influenced me to be a morning person."

Although a self-professed "sports nut," Rothenberg considers himself as basically a litigation trial lawyer who happens to have clients in professional sports.

"I'm foremost a trial lawyer," Rothenberg said. "There have been times when sports have not been on the front burner for me, business-wise, and I've managed to get by fine. I've got a lot of things going. From a professional standpoint, I am unabashedly a gun for hire. That's what a good trial lawyer is. You want variety. I love the variety of my job. It's like a smorgasbord. Something new every day, and that keeps it exciting."

The variety in Rothenberg's life comes from dealing with bankers one day, a basketball owner the next, and a major concert promoter the day after that. Sometimes, in fact, he does all of that in a single afternoon.

Rothenberg said he wasn't always so ambitious. Growing up in Detroit in the 1950s, Rothenberg worked at the family's corner drug store, played sports for fun, and, he said, coasted through high school and college. In college,

Rothenberg has said, he "stayed up all night playing cards and slept all morning because I felt guilty if I was awake and didn't go to class."

Rothenberg said he had always wanted to be a lawyer, though, and finally settled down in 1960, when he married Georgina, now his wife of 26 years, and started working hard at law school. He graduated in the top 10% of his class at Michigan and essentially had his choice of law firms.

At 25, he chose to seek his fortune in Los Angeles. Three years later, Rothenberg became heavily involved in sports using Cooke's influence and funds.

"No doubt about it," Rothenberg said, "working for Cooke got me exposure."

In 1968, Rothenberg became general manager of something called the L.A. Wolves, a professional soccer team Cooke owned. Now Rothenberg is back once more with an L.A. sports franchise and is faced with the challenge of trying to build a winner in a city that already has one—the Lakers.

"He loves the challenge of the Clippers," Rothenberg's wife, Georgina, said. "He just loves working in sports law. He finds it intellectually challenging. There's a tremendous amount of lawyers who would love to do what Alan does."

Georgina Rothenberg said that despite her husband's schedule, he always finds time for his family. (The couple has three sons.) "A friend of ours put it best. She said, 'Some people have hobbies like sculpting or art or stamp collecting. Alan's hobby is his family.' Any moment he's not working he spends with us. Plus, he tries to incorporate us into his work. When he was Olympic soccer commissioner, he got volunteer jobs at the Rose Bowl for all of us so we could be together."

If spending time with the family is Rothenberg's hobby, what is sports?

"His passion," Georgina Rothenberg said. ◘

*The above article is an abridged and edited version of a longer piece that appeared in* The Los Angeles Times, *September 13, 1984, and is reprinted with permission of the Los Angeles Times Company.*

# Fourth U-M alumna joins U.S. Court of Appeals

## *Deanell Reece Tacha appointed circuit judge*

Deanell Reece Tacha, a 1971 Law School graduate and University of Kansas law professor, was recently appointed to a newly established position on the U.S. Court of Appeals for the 10th Circuit.

Judge Tacha had been serving as vice-chancellor of academic affairs at Kansas University at the time of her appointment. "It's a tremendous honor. The federal bench is a position of high public trust, and I'm honored to be part of it," she said.

A native of Scandia, Kansas, Judge Tacha practiced in Washington, D.C. and Concordia, Kansas, before joining the university faculty. She also served one year as a White House Fellow in the U.S. Department of Labor, where she directed a task force on welfare reform.

The court, based in Denver, was enlarged to 10 judges by an act of Congress last summer. The 10th Judicial Circuit has jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

Tacha's appointment makes her the fourth woman from the U-M Law School serving on the U.S. Court of Appeals level. The others are Amalya Kearse (J.D. '62) on the 2nd Circuit, Cornelia Kennedy (J.D. '47) on the 6th Circuit, and Helen Nies (J.D. '48) on the Court of Appeals for the Federal Circuit. ◘

*Judge Deanell Reece Tacha*

by John H. Jackson

# IMPORT PRACTICES: Are They Really Unfair?


*Editor's note: The following paper is an edited version of testimony presented before the Finance Committee of the United States Senate on November 21, 1985.*

**SUMMARY OF PRINCIPAL POINTS**

1. Interdependence reduces sovereign independence and frustrates national governments and leaders in their attempts to carry out programs on behalf of their constituents.

2. To a large extent, the current conditions of interdependence result from the success of the Bretton Woods System which includes the GATT.

3. "Unfair trade laws" are based on the policy of the "level playing field" and market economic principles. Not all nations agree with these principles.

4. Major differences in economic systems, such as between market and non-market economies, or developing and industrial countries, can create problems in trading relationships. But even relatively minor differences between two similar countries, such as two industrial market democracies, can by coincidence create situations which appear unfair and cause tensions and disputes. We need to think of some of these situations as requiring an "interface" mechanism to assist such nations to trade amicably together.

5. Subsidies are the most significant problem of current trade policy. They are deeply intertwined with national sovereignty. International rules on domestic or general subsidies often involve balancing legitimate national government policy goals with the "level playing field" policies. Consequently, a set of rules to help accomplish this balancing is important. These rules include an injury test and various principles of excluding from international consideration subsidy-like practices which either do not have an effect across borders, or are de minimus. The specificity test would be included.

"Interdependence" may be an overworked word, but it accurately describes our world today. The United States depends on exports and imports for an increasing percentage of its national economy, and many other countries have a much higher dependence on trade. Under these conditions, economic influences flow with great rapidity from one country to the next. Thus, despite all the talk about sovereignty, independence, and equality of nations, these concepts are fictions if used to describe today's real world. What is the sovereignty of the government of a country whose trade is so dependent on a neighbor that it cannot set its own interest rate, specify its own tax system, or design its own program of incentives for business or talented individuals? As a result, there is much frustration among governments and their leaders. Most governments find it difficult to carry out such program goals as providing full employment, or increasing economic benefits on behalf of their constituents.

To a great extent, today's international economic interdependence can be attributed to the success of the institutions put in place just after World War II—what I will loosely call the Bretton Woods System, which includes among others the IMF and the GATT. To be sure, decreases in the costs of transportation and communication may have had the largest role, but without the rules of the Bretton Woods System, governments could easily have acted to negate many of those advantages. The efforts of the GATT over 38 years, for example, can be praised as the cause of the dismantling of un-economic tariffs on trade in industrial goods, at

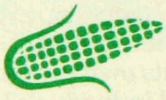
least among the democratic market-oriented industrial countries.

This success has caused us to face a new set of problems.

With the decline of tariffs almost to irrelevancy, other much more complex barriers or distortions to trade appear to be relatively more important. Non-tariff barriers are myriad, and the ingenuity of man to invent new ones assures us that the problem of trade barriers will never go away. This is why one of the most important problems facing us is institutional — the question of whether national and international governmental institutions (such as GATT) have the capacity to meet the challenges of private and governmental behavior which could impose great risks on the interlinked trade and investment world in which we find ourselves.

You have asked me to address particularly the problem of what is "fair" or "unfair" in today's international trade practices. As the focus has shifted from tariffs responding to fair trade, or even from escape clauses or so-called safeguard practices also responding to fair trade, enterprises troubled by foreign competition have increasingly turned to the unfair trade laws for relief from that competition. In many, perhaps most, cases it is appropriate that they do so. It must be recognized, however, that in some cases, attempts are being made to respond to practices abroad which are unfair only in the eyes of the domestic industries which would like freedom from the challenges which competition brings. There is an increasing number of situations which involve very difficult balancing of contradictory economic, cultural, and political goals.

**Non-tariff barriers are myriad, and the ingenuity of man to invent new ones assures us that the problem of trade barriers will never go away.**



The essential policy behind unfair trade practice rules is the notion of the "level playing field." This is the idea that enterprises should be able to compete in the open markets of the world on the basis of market economic principles which apply equally to all participating enterprises. Unfortunately, as we are well aware, many societies do not have the affinity for market economics which we in the United States do. Thus, at the very base of the idea, we are troubled by deep and fundamental differences of opinion about the appropriate economic role of governments.

I cannot comment about all of the many rules regarding "unfair trade." Instead I would like to use a hypothetical example to illustrate the conceptual problem of applying some of them. Then I would like to comment on what seems to be the most difficult current trade policy subject — that of government subsidies and the appropriate responses to such subsidies. I have brought with me several exhibits designed to help me make certain points about these.

It is reasonably obvious that nations with very different economic systems are likely to have some difficulties in trading together. For the United States, with its market economy, to trade extensively with a non-market country like the Soviet Union, presents a number of problems. With good reason, enterprises in the United States worry whether they are facing competition which is essentially underwritten by the government of the non-market economy. The international rules, such as those of GATT, were not well designed to govern such situations.

**The essential policy behind unfair trade practice rules is the notion of the "level playing field."**

Likewise, an industrial nation will face problems in trading with a developing country. Low wage rates, as well as many non-market features of the developing country's government, can impose considerable adjustment strains on the industrial society. On the other hand, the developing country worries about the strains which high efficiency and high technology can impose on it through imported goods.

What is often surprising, however, is that even nations with very similar economic systems, such as two industrial country market economies, can find that minor variations in their economic systems can create situations which have the appearance of unfairness. These situations may have arisen almost completely by accident. That is, there may have been no intention to engage in any practice which is deemed "unfair," or which appears to shift burdens such as unemployment or adjustment onto another society. Let me illustrate this with Exhibit 1. In this exhibit, a situation is posed which is based on trade between moderately different economic systems. The fact that, in an industry in one society, a higher portion of average costs are fixed costs means that it has lower variable costs. In times of slack demand, enterprises of that industry will rationally seek to continue producing if they can sell at any price which will be slightly above their variable costs. Under conditions of liberal or free trade, such a low variable cost society will very likely export extensively to a society with higher variable (i.e., lower fixed) costs, thus causing adjustment and unemployment in the latter. This is so even though long term average costs in both societies are the same. Is this "unfair," or is it a coincidental (but real) problem which the two societies should try to solve with a buffering mechanism which minimizes administrative and advocacy costs as well as moral terminology?

In some of my writings I have termed this problem the "interface" problem. This word draws on the termi-

nology of computer technology. When it is desired that two computers of different makes work together, it often takes some kind of "interface" mechanism or program to mediate between them and to translate the language of one machine to that of the other. Likewise, when two societies with even minor economic differences desire to work together, frictions or misunderstandings can occur unless there is an interface mechanism. To a certain extent, the national trade laws and the GATT-Bretton Woods System are operating today as a rather crude interface mechanism. The problem often is that policy leaders have not perceived this, but instead believe that it is necessary to characterize some practices as "unfair" or "illegal." In at least some of the international trade problems which exist today, a more neutral terminology and policy approach that would avoid moral overtones may operate with greater utility for world economic welfare and harmony.

It may be that, to a certain extent, the anti-dumping rules and/or the subsidy rules are performing this interface function, although with much administrative cost and overtones of moral indignation that may not always be appropriate. With respect to the anti-dumping laws, incidentally, it must be recognized that they are based on policies very analogous to our domestic price-discrimination laws, and that there have been important criticisms of those policies. Many economists suggest that price discrimination by an enterprise is not only *not* unfair, but can have a pro-competitive effect which strengthens an economy.

Exhibit No. 1

VARIABLE COSTS AND THE INTERFACE PRINCIPLE

Assume the following facts: In the same industrial sector (e.g. steel) in two societies (e.g. Japan and the United States) the following different characteristics are present: (No assertion is made that these facts are real. This is an hypothetical case to illustrate a principle.)

Society A: Worker tenure (no layoffs, etc.) High debt-equity ratio in capitalization (e.g. 90% debt)

Society B: No worker tenure (worker costs thus are "variable costs") Debt-equity ratio not exceeding 50% (dividends can be skipped)

Examine the implications for variable cost analysis in times of slack demand:

Economists note that in times of slack demand, a firm is rational to continue producing as long as it can sell at or above its short term variable costs (because it must continue paying its fixed costs anyway). Of course this can only continue for limited periods, persumably over the complete business cycle the firm must not incurr losses.

Analysis of short term variable costs in Societies A and B:

Assume: (million $ unless per unit)

| | Society A | Society B |
|---|---|---|
| Costs of a firm:(Average prod) | | |
| Plant upkeep etc. | 20 fixed | 20 fixed |
| Debt Service: | 90 fixed | 50 fixed |
| Dividends (cost of capital) | 10 var | 50 var |
| Worker costs (ave workforce) | 40 fixed | 40 var |
| Cost of materials (ave) | 40 var | 40 var |
| TOTAL COSTS: | 200 | 200 |
| Fixed: | 150 | 70 |
| Variable: | 50 | 130 |
| Variable costs per unit if ave output 1 mil. units (i.e. price needed to produce) | 50 | 130 |

RESULT if imports from A to B: Plant in B closes. (Is A "unfair"?)

**...it is clearly very important to draw some border lines around the concept of "subsidy" for trade policy purposes.**

I believe that the most important trade policy problem today is that of subsidies for goods which move across borders. This includes not only the pure export subsidy, but also general or domestic subsidies benefiting all goods of a particular type which are produced in a society, whether or not they are exported.

Sometimes it is suggested that imports of subsidized goods ought not to be a subject of concern. Indeed, the consumer or buyer in the importing country clearly benefits from the subsidy. Thus it is said that such country should send the export country a "thank-you note."

I do not join this viewpoint. First, it does not adequately take into account the broader world perspective by which economists demonstrate that subsidies have a distorting effect on market economic principles. Such effect tends to reduce world welfare.

Second, subsidies could in some cases have a predatory intent. They could be used to assist an industry to gain foreign market share, with a view that after driving out foreign competitors, prices could be raised to capture so-called monopoly "rents." Even if this is not the case, there still is the legitimate worry that when the subsidy begins, it can cause adjustment costs in the importing country. When it ends it can again cause such costs, and these costs can be substantial, possibly even rivaling the benefit to the importing society from the subsidy itself.

Third, and more subtle, subsidies on imported goods can have an effect on the efficiency and initiative of a market economy, by adding to the risks of innovation, small business start-ups, and general entrepreneurial activity. The businessman sometimes says that he can compete against fair trade, on a level playing field, but he cannot compete against the deep pockets of a foreign finance ministry with government taxation at its disposal. Even if these fears are exaggerated, a subsidy offered by a foreign government may

be designed to shift political burdens to foreign countries, as the exporting society struggles to maintain a majority in its parliament by propping up sick industries in key constituencies. One approach is for the importing country to "counter subsidize," but in doing so it may be simply altering its own economic system. Why should an exporting nation be allowed to impose such changes on an importing nation?

All of these arguments have led statesmen for a century to recognize that international rules are needed to limit the uses of subsidies in international trade, and importing nations should be allowed a unilateral permitted response of a countervailing duty to offset the subsidy effect of imports. The really tough question, however, is how far to take this principle.

If the word "subsidy" for these purposes is used in a broad sense, such as the way some economists use it to indicate any economic benefit furnished by a government, the result becomes absurd. Even good fire and police protection is a subsidy in this sense, since it reduces the insurance cost of producing goods. Roads and schools likewise can be called subsidies. Soon importing societies could be countervailing right and left, with grave implications for the policies of liberal trade.

Consequently, it is clearly very important to draw some border lines around the concept of "subsidy" for trade policy purposes. I prefer to think in terms of a sub-set of activities within the universe of broadly defined subsidy, which I would term "actionable subsidies." These "actionable subsidies" are the only subsidizing activities to which the international and national trade rules should respond. The critical question then becomes defining a set of rules that can identify which subsidies should be considered "actionable."

**The United States has become far and away the largest user of countervailing duty procedures.**

This is not always an easy task, however. In the case of export subsidies it may be relatively easy. Usually such activity has an apparent motive of shifting certain kinds of political or adjustment burdens to other nations and arguably should be prohibited or at least countervailed, possibly as a "per se" violation of the rules without benefit of an injury test.

Domestic or general subsidies are another matter, however. Such subsidies are an important tool of government policy. They are used extensively by all governments, and often for laudatory policy goals, such as redressing unfair imbalances of income, alleviating distress of poverty, or pursuing democratic priorities of various types such as cultural, religious, national security goals. They are mixed deeply into the fabric of national sovereignty. In these cases, the objectives of international trade rules to minimize market distortions must be balanced against the competing legitimate government goals.

**Recognition must be given to the reciprocity and fairness of symmetry of subsidy rules: whatever rules the United States follows it must recognize the right of other countries to also follow...**

One way this is done is to provide an "injury test" as a prerequisite for unilateral countervailing duties of an importing nation. As long as the subsidies on the imports do not in fact cause a sufficient threshold injury to the competing industry of the importing country, no countervailing duty response should be permitted. This is essentially the structure of the international and national rules on the subject. However, the importance of the injury test as a mediating or "interface" mechanism between two opposing and equally legitimate policy objectives is sometimes forgotten.

In the testimony I presented before the Sentate Finance Committee, I set forth a large number of specific subsidy-like practices.* Some of these practices should clearly be designated as "actionable subsidies." Others should clearly not be so designated, because they are common activities of governments, and because they have so little distorting effect. Still other practices on the list illustrate how deeply entwined into the fabric of society are certain activities which could be called subsidies. In an inappropriately broad sense of subsidy, even bankruptcy or social security could be swept into the category of "subsidy."

The United States has become far and away the largest user of countervailing duty procedures. All other nations combined have probably not used countervailing duties explicitly to offset subsidies on imports more than about two dozen times. Yet since the 1974 Trade Act, the United States has had about 250 petitions for countervailing duties, and found affirmatively so as to apply such duties in approximately 30 cases. As I mentioned above, there are good policy reasons for this approach. But the United States is blazing a trail. Its administrators have had to face tough questions well in advance of international agreement on many subsidy issues. Because of it's economic importance, its actions have an asymmetrically weighty impact on the trade of our partners.

Countervailing duties applied by many small nations would have essentially no impact. Such duties by the United States can have serious impacts on foreign national policies, economic welfare, debt service capability, and political stability. These imports impose on the United States important responsibilities, which some of our trading partners are not certain we are

prepared to fulfill. We need to proceed fairly, and in a principled manner. We need to avoid the processes themselves becoming burdensome out of proportion to their benefits. We need to be prepared to discuss and enter into international agreements on many of the subsidy issues, and to submit as well as demand others submit to objective dispute settlement procedures concerning these issues. We need to be able to implement into our own legal system the results of these agreements and dispute settlement determinations (a question on which there is some doubt).

**Because of the economic importance of the United States, its actions have an asymmetrically weighty impact on the trade of our partners.**

In conclusion, let me suggest a few principles which might form part of a larger set of rules designed to help define the border lines of "actionable subsidy" in a way which appropriately balances the various conflicting policy goals of giving maximum possible freedom to national sovereigns to pursue goals of their constituents, while preventing international trade activity that tends to shift the burden of those national programs onto other countries. I would suggest:

1) Recognition must be given to the reciprocity and fairness of symmetry of subsidy rules: whatever rules the United States follows it must recognize the right of other countries to also follow and that therefore such rules may affect United States exports as well as imports.

2) Response to subsidies should only occur when it can be shown by economic analysis that a particular subsidy practice can have an effect across a border. If a particular nation wishes to distort its own economy, or reduce its own welfare by subsidizing some group, that should be considered a national decision not of concern to the international trade system, unless some reasonably significant effect on other countries can be shown. In some cases, for example, regional aides would fall in this category when they only shift the location of an industry but do not affect amounts or prices of goods exported. Likewise, some natural resource policies may be shown to cause no changes in export amounts or prices, but instead merely to redistribute economic "rents" within the exporting country.

3) Some practices, such as most export subsidies, should probably be defined by international agreement to be "per se" violations of fairness rules, so that a rapid response could be implemented even without an injury test.

4) A de minimus termination at an early stage of cases is important to minimize procedural and administrative costs and to minimize unnecessary intrusion into the internal affairs of other countries. The current United States de minimus level of 0.5 percent is probably too low. A higher de minimus could be the prima facie case, with opportunity for petitioners in certain specific circumstances of low margin goods to show that a lower de minimus is necessary.

5) The injury test is an important mediating "interface" mechanism, and should not be weakened by devices such as cumulation, or departure from a "margins" causal analysis.

6) The "specificity" (or general availability) test can be a very useful principle to avoid using subsidy response rules for many government practices which are often common among all governments, and which probably have little distorting effect. Roads, schools, and fire and police protection all come to mind. This test needs to be refined and rethought to avoid its inappropriate use, however.

7) More effort is needed to reduce the costs of procedure and administration, so that these do not themselves become trade barriers. Some principles mentioned above would help. ◘

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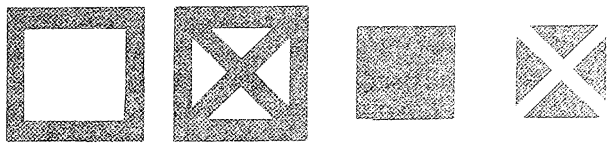
# Rights Discourse and Neonatal Euthanasia



**Carl E. Schneider**

Hard cases, they say, make bad law. But hard cases, we know, can also make revealing law. Hard cases identify for us problems we have not solved. They reveal how our goals conflict. They force us to articulate the assumptions implicit in our approach to a problem, and to identify and evaluate the ways of talking and reasoning the law has gradually come to use.

If there was ever a hard case for the law, it is the problem whether, how, and by whom it should be decided to allow newborn children who are severely retarded mentally and severely damaged physically to die. For many years, the law has not had to confront that hard case. Recently, however, the issue has evoked intense public and legal concern. The Department of Health and Human Services has, after receiving more than 115,000 comments on a proposed rule, issued final regulations requiring states to be ready to respond to reports of newly born infants being denied medical treatment, and the Supreme Court has agreed to hear a case arising out of a predecessor to those regulations.[1] Legal battles over several "Baby Does" have dramatized the issue.

The public and legal debate over neonatal euthanasia reveals what our understanding of hard cases leads us to expect: both the law and the debate about it are awkward, anomalous, and unsatisfactory. The law is marked by an increasingly prominent disjunction between the law on the books (which seems to make neonatal euthanasia criminal) and the law in action (which never prosecutes neonatal euthanasists). Positions in the debate about neonatal euthanasia have developed in startling ways. One might expect, for instance, that conservatives, believing in the autonomy of the family and the authority of the parent, would let parents make this decision as they make other medical decisions for their children. Yet many conservatives would use federal power (which they distrust) in the form of anti-discrimination legislation (which they dislike) through the device of conditions on federal aid (which they detest) to intrude into an area of classic state-government authority (which they revere). One might expect, for instance, that liberals, believing in the rights of the individual against the state, believing in the autonomy (state-aided, if necessary) of children from their parents, and in the rights of groups (like the handicapped) traditionally discriminated against, would advocate affirmative action to protect those rights. Yet many liberals would leave these decisions to parents (helped, perhaps, by a committee of doctors).

This essay is an attempt to understand something about how the debate over the law regulating neonatal euthanasia has been shaped. In it, I am particularly interested in the fact that that debate involves or must respond to various "rights" modes of thought which have become increasingly prevalent in American family law. That prevalence comes at a time of social ambivalence about rights. On one hand, even the Burger Court has been willing to extend the regime of rights, if not by finding new rights, at least by finding fresh implications of old ones. And in our intellectual and social life, rights modes of thought have achieved a centrality unmatched in our history. On the other hand, there has arisen a sense, expressed at various levels of sophistication, that those modes of thought have reached the limits of their usefulness, or at least need to be tempered by giving greater prominence to other modes of thought. A development so multifaceted and momentous as this one cannot readily be surveyed, much less evaluated. But I wish to use the problem of neonatal euthanasia to begin to explore the usefulness of talking about social issues in terms of rights.

At the heart of our problems in approaching neonatal euthanasia lie the intractable questions that issue raises: What is human life? When is death preferable to life? What do parents owe their children? Those moral questions are further complicated when they must be resolved in terms of generally applicable social rules: It is hard, and even perhaps impossible, to write rules that will command widespread respect and work well for the entire spectrum of cases. These difficulties press us to take the problem of neonatal euthanasia outside

the sphere of substantive social rules. Where there is such pressure, the law generally, and especially family law, has developed procedural devices that seem to obviate the need for substantive rules. In the case of neonatal euthanasia, this approach commonly entails establishing a hospital committee to decide case by case whether neonatal euthanasia is appropriate.

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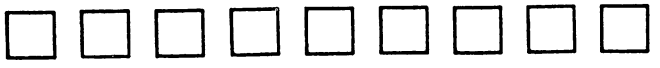

The difficult substantive questions of neonatal euthanasia can, however, be treated in an alternative non-substantive way. This alternative is to define the issue in terms of rights. If parents, for example, have a right to decide whether their children will receive medical treatment, the substantive issues will be theirs, not society's, to resolve. The appeal of this alternative is enhanced by the fact that, when we think about a social problem, we in America today tend to think about it in terms of rights. That tendency is specially marked in lawyers, since rights solutions arise readily from formal legal (especially constitutional) doctrine as administered by courts—sources which are basic in lawyers' training and which they monopolize. But the civil rights movement, as the central moral enterprise of our time, has made "rights" solutions to social problems paradigmatic and has lent them powerful moral authority in popular as well as legal thought. Thus it should not surprise us that rights solutions have been attractive to both wings of the debate over neonatal euthanasia.

Proponents of neonatal euthanasia can use the familiar constitutional doctrine arising from *Meyer* v. *Nebraska*, *Pierce* v. *Society of Sisters*, and *Parham* v. *J.R.* that parents have a "privacy" right to control decisions about their children's welfare in general and their children's health and medical care in particular. Of course, this doctrine does not wholly liberate parents from governmental supervention: their decisions have been over-ridden where they have refused medical care for their children on religious grounds, and their behavior is still criminal when it amounts to clear-cut child abuse. But the parental-rights doctrine *can* plausibly be applied where non-treatment is arguably in the child's best interests. Furthermore, of course, the doctrine reflects the practical reality that parents ordinarily make medical decisions for their children and that the government is ill-situated to intervene. Finally, the doctrine is sustained by the lively public feeling that parents have and ought to have such a legal right.

The doctrine of parental rights pervades the background of neonatal euthanasia decisions, though the argument for the doctrine is made with varying clarity and emphasis. One prominent commentator, for example, would permit the state to intervene in parental medical decisions only where the medical procedure was "proven" and where "its denial would mean *death* for a child who would otherwise have an opportunity for either a *life worth living* or a *life of relatively normal healthy growth* toward adulthood . . . ." This commentator believes that these are "highly personal terms about which there is no societal consensus," and that "it must be left to the parents to decide, for example, whether their congenitally malformed newborn with an ascertainable neurologic deficiency and highly predictable mental retardation, should be provided with treatment which may avoid death, but which offers no chance of cure . . . ."[2] Courts have applied the parental-rights doctrine in a number of child-medical-care cases. In one life-or-death case, for instance, the court said, "It is fundamental that parental autonomy is constitutionally protected. . . . Inherent in the preference for parental autonomy is a commitment to diverse lifestyles, including the right of parents to raise their children as they think best."[3]

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*It is hard to say to what extent the law should encourage people in their better impulses. Many of the law's attempts to do so—Prohibition comes to mind—have been moralistic in the narrowest sense and unsuccessful in the broadest sense.*

Opponents of neonatal euthanasia can likewise employ rights solutions. Indeed, although no single rights solution as powerful as the parental-rights doctrine is available to them, they can call on a striking range of conceivable rights. Thus the Reagan administration, when it wished to attack neonatal euthanasia, used a provision of the Rehabilitation Act of 1973 which bars discrimination against the handicapped. Advocates for the retarded urge that retardation should be treated as a suspect classification, and though the Supreme Court recently rejected that proposal, the Court's treatment of the factual issue in the case seemed to signal some enhanced level of scrutiny.[4] Those advocates have also contended that there is a constitutional "right to treatment" which applies when the handicapped are in a state institution. Opponents of abortion argue for a "right to life" held by the defective newborn and the fetus alike. Finally, the Court has often said that children have constitutional rights, although the nature and scope of those rights is uncertain.

I wish now to suggest that, despite its apparent attractions, discussing the problem of neonatal euthanasia in terms of rights is awkward and inapt. This is so for several reasons. The first is that, when we in America think in terms of rights, we tend to think in terms of the "Mill paradigm." That is, we think in terms of the state's regulation of a person's action. In such conflicts, we are predisposed to favor the person, out of respect for his moral autonomy and human dignity. We have, to use a legal expression, a presumption in favor of a decision by the person. This presumption is tolerable partly because society can afford to bear the risk an incorrect substantive decision better than a person can. Thus the classic liberal position on voluntary euthanasia—that the individual has a right, against the state, to decide for himself whether to live or die—is thought proper partly because the consequences for the state of an incorrect decision may be unfortunate but are relatively slight, while the consequences for the individual of being compelled to bear a life he would rather give up are great.

In family law, however, the "Mill paradigm" often breaks down, because in family law the conflict is often not between a person and the state but between one person and another. In that conflict, we cannot be guided by our presumption in favor of the person: both contenders have their claim to moral autonomy and human dignity; neither is *a priori* better situated than the other to bear the risk of improperly allocated authority. Our legal thinking about rights has conspicuously, if understandably, failed to develop a satisfactory alternative to the Mill paradigm with which to approach this kind of problem. That failure is reflected in the painful awkwardness of the Supreme Court's treatment of, *inter alia*, statutes requiring parents' consent to their minor children's abortions, of statutes requiring a husband's consent to his wife's abortion, of statutes prohibiting abortion, and of the question whether foster parents acquire constitutional rights in other people's children. As we will see, the legal issues raised by neonatal euthanasia likewise exemplify the ways the Mill paradigm breaks down in family law.

Thinking about neonatal euthanasia in terms of rights is awkward for a second reason: The origin, scope, justification, and purpose of parental rights are all uncertain. That uncertainty inheres first in the absence of a constitutional text in which such a right is stated or from which it could be inferred. Such uncertainty, of course, is not unique to constitutional analysis. But in many other areas of constitutional analysis, some kind of theory—usually some kind of political theory—is available as a guide either to the intent of the framers or to modern analysis. In the area of personal rights, we lack and need, as H.L.A. Hart has repeatedly argued, "a sufficiently detailed or adequately articulate theory showing the foundation for such rights and how they are related to other values which are pursued through government."[5] We particularly lack a satisfactory theory of parental rights. Perhaps in consequence, neither the courts nor the commentators explain satisfactorily why we accord parents rights over their children, and each of the possible explanations is in important ways unhelpful in resolving the legal dilemmas of neonatal euthanasia. Let us briefly see how this is so.

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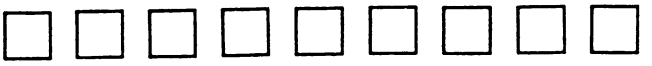

First, some of the holdings and language of courts intimate that parents are accorded rights because that is best for the parents themselves. Seen this way, the parental right is analogous to the right to marry and to live the intimacies of married (or, to some uncertain extent, single) life as one chooses. On this view, parents have a right to carry on their relations with their children in the way they prefer and to express parental feelings freely. A right so based has, perhaps, some appeal in some circumstances, as when it prevents the state from ending a parental relationship without a hearing. But, as that illustration suggests, its appeal is substantial only in easy cases; only, that is, in cases where the parents' interests and the child's are essentially the same and which thus fit the Mill paradigm. But in cases which do not fit the Mill paradigm, and especially where parental choices determine whether the child lives or dies, the rationale collapses under the weight it is asked to bear, unless we are to believe that parents' interests regularly outweigh their children's basic well-being. This version of the parental right, in other words, too readily conflicts with the commitment to "the best interests of the child," a commitment central to American family law.

Second, some of the holdings and language of courts intimate that parents are accorded rights because that is best for their children. This rationale assumes that parents will make better decisions about their children than the state because the parents know the child best, love him best, and can make decisions for him taking into account considerations—like religion or ethnic traditions—which are desirable for individuals but illegitimate for the state. This rationale, however, seems essentially prudential and therefore insecure: If we attribute rights to parents because doing so generally helps children, may we not, ought we not, deny parents rights in any class of situations in which attributing rights to parents would generally not help children? And is not the prudential rationale one which ill fits a situation like neonatal euthanasia,

where the parents seem in many ways quite bad decision makers? In the few traumatic days after the birth of a defective child, the parents cannot be said to know their children well, may not have begun to love (and may even have come to hate) their child, suffer harsh emotional and social pressures, have many interests which conflict with those of their child, are thinking often for the first time about moral issues of the cruelest difficulty, and frequently lack accurate information about their child's condition and prognosis. Even this we could perhaps put aside, were the decision not one of life or death for the child.

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*...even if the law ought not, or cannot, encourage people in their better impulses, we should at least be aware of ways in which the law seems to encourage people in their meaner impulses.*

Third, some of the holdings and language of courts intimate that parents are accorded rights because that is best for society. On this view, parental rights promote society's interest in what we loosely call "pluralism," that is, society's interest in social and ideological diversity. In some ways this seems to have been the value most expressly served by the Court's leading "parents' rights" decisions. Indeed, there is a sense in which the whole rights approach itself is an elaborately constructed means of promoting pluralism. Yet serving pluralism through parental rights is instinct with irony. First, parents' rights decisions often broaden the range of choices available to adults by decreasing the range of choices available to their children. In *Yoder v. Wisconsin*, for instance, Amish parents had removed their children from school after they finished eighth grade. The Supreme Court held that Wisconsin could not enforce its truancy statute against Amish parents after that point. The Court's decision served the interest in pluralism because it allowed Amish parents to live according to their particular traditions, and because it helped to perpetuate an unusual community which other American adults might choose to join. But the Court's decision also disserved the interest in pluralism because it allowed Amish parents to "standardize" their children by removing them from the larger community and from the range of choices which education through high school provides.

The "pluralism" rationale for parental rights is ironic in a second way. Where the pluralism interest of the parents has been strongest—where parents resist medical treatment for their children on specifically religious grounds—courts have readily found that the child's interest in physical health overrides the parents' interest in their religion, the child's interest in his soul, and society's interest in pluralism.

The usefulness of the "pluralism" rationale for parental rights is made further uncertain by our uncertainty about the role pluralism should play in American law. Everyone likes pluralism, where pluralism means only some loose kind of cultural tolerance. But the role of pluralism as such in American law has—outside of the area of freedom of religion—been virtually unaddressed in scholarly writing, and the sporadic cases arguably espousing pluralism have hardly enunciated any discernible systematic doctrine. For example, pluralism as it is ordinarily conceived speaks to the protection of diverse *groups*, yet the pluralism of the courts seems sometimes to protect *ad hoc* social diversity. If pluralism serves the former interest, it has little to do with parental decisions about neonatal euthanasia, since few, if any, groups in American society make beliefs about that subject central to their way of life. If it serves the latter interest, we are left uncertain just which kinds of "diversity" merit special protection. That uncertainty reflects another important limit on the usefuless of the pluralism rationale for parental rights: We lack a sense of the limits of pluralism. Pluralism is not an absolute, and is perhaps not even a pre-eminent, value, since some common views about behavior and morals are necessary if society is to function at all, to say nothing about functioning well. And questions about when one human may end another's life are classically and properly central among the views about behavior and morals which society as a whole has been thought entitled, even obligated, to address.

This last point suggests a third and final way in which the rights approach to neonatal euthanasia is troublesome. It is hard to say to what extent the law should encourage people in their better impulses. Many of the law's attempts to do so—Prohibition comes to mind—have been moralistic in the narrowest sense and unsuccessful in the broadest sense. What, then, can the law reasonably ask of parents of a severely impaired child when they decide whether he should live? The difficulty of that question may be indicated by the rarity with which it is directly addressed. One begins, perhaps, by acknowledging that to ask parents to raise such a child is to ask them to suffer. One response often made to that acknowledgment is that many parents have raised such a child, have found doing so rewarding, and have made it inspiring. Yet it seems callous to tell the parents of such a child to wait and they too will know the joys of difficult parenthood; and it seems presumptuous—and in some cases false—to tell them that eventually the joy will outweigh the pain. In any event, I doubt that we should suggest that the parents' decision *ought* to rest on the chances that they will, on balance and in the end, benefit by it: I would suppose that parents have a moral obligation to their children independent of any such calculation; and I would suppose that we want to
encourage parents to make their decision as selflessly as possible. Yet this last supposition eventually leads

toward the disquieting position the court in *Regina v. Dudley & Stephens* maintained:

> It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.[6]

My project in this essay is not to say whether, and how far, we can set up such standards and rules for decisions about neonatal euthanasia. But I do suggest that, even if the law ought not, or cannot, encourage people in their better impulses, we should at least be aware of ways in which the law seems to encourage people in their meaner impulses. I wish to raise, cautiously, the possibility that, as a matter of practical psychology, to frame the question of neonatal euthanasia in terms of parents' rights is to encourage parents to be "self-regarding." In one sense, of course, rights are "other-regarding": rights are an acknowledgment by society that its members have claims against it. But by the same token, and I think more commonly in ordinary thinking, rights are claims by individuals against society, and are "self-regarding." Thinking in terms of rights encourages us to ask what we may do to free ourselves, not to bind ourselves. It encourages us to think about what constrains us from doing what we want, not what obligates us to do what we ought. Legal rights are significantly different from moral rights in this respect: When philosophers talk about rights, they talk of a complex web of relationships and duties between individuals. When lawyers talk about rights, they tend to talk about an area of liberty to act without interference. This difference is inevitable, since law's scope must be less than morality's, but this inevitability probably does not greatly affect the psychological consequences of the system of legal rights.

It is of course true that the system of legal rights is not entirely self-regarding, for most rights find some kind of limit in a conflicting right. But in the context of our discussion, that limit is precisely the problem, for it is not restrictive enough. Rights not only conflict with rights, "they conflict in the demands they make upon us with moral considerations to which the concept of a right does not seem to apply at all: the requirement that we help someone in need, the generosity or kindness we ought to extend to persons simply out of love and affection for them. . . ."[7] Rights discourse in the law encourages us to think of the claims of others on us in terms of their legal rights; the danger is that it may thereby encourage us to feel those rights fully describe the limits of what we should do for them.

The self-regarding quality of the rights approach may be seen in the extent to which it has become acceptable to weight the interests and even the comfort of parents against the life of their child. This weighting of interests is perhaps foreshadowed in *Roe v. Wade*, where the Court seems to found the very right to an abortion on the "detriments" a woman would suffer who could not have an abortion. Similarly, writing about neonatal euthanasia, one leading medical commentator won the approval of a leading legal commentator when he said: "Families know their values, priorities and resources better than anyone else. . . . If they cannot cope adequately with the child and their other responsibilities and survive as a family, they may feel that the death option is a forced choice. . . . But that is not necessarily bad, and who knows of a better way."[8]

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As a logical matter, of course, one may have a right without exercising it or feeling encouraged to use it. But I have been speculating about what we might call the socio-psychological consequences of the mode of rights discourse in the United States today. My sense, which is strong but not susceptible to ready proof, is that that mode has encouraged us to feel that "to demand our rights, to assert ourselves as the moral agents we are, is to be able to demand that we be dealt with as members of the community of human beings."[9] The civil rights movement taught us the reasons for that attitude. But attitudes appropriate to civil rights may be inappropriate to privacy rights. Civil rights are rights to participate in self-government and society. Such participation is at least a virtue and may be a duty. But privacy rights are in a sense the opposite of civil rights—they are rights *not* to be affected by government and society—and to forego their use can be a virtue and even a duty. A person may, for example, have a privacy right to father more children than he can support, but he presumably has a moral duty to refrain from exercising that right.

I said at the beginning of this essay that opponents of neonatal euthanasia also have available to them various rights approaches, particularly those dealing with the rights of children or of the handicapped. I cannot in this essay canvass them fully; I can only briefly suggest that here too a "rights" approach is awkward and inapt.

First, a children's rights approach is problematic for the same reason a parents' rights approach is—it does not fit the Mill paradigm. The Mill paradigm, we may recall, involves a single individual versus the state. However, when we use children's rights (or the handicapped's rights) in the neonatal euthanasia situation, we have two individuals—the child and the parent—

as well as the state. We lack here, as we did with parents' rights, criteria for choosing between the two sets of rights. We encounter a further difficulty as well. Insofar as the state tries to protect children from parents by strengthening children's rights, it becomes hard for parents to protect children against the state by the traditional means—invoking parents' rights.

Children's rights are incompatible with the Mill paradigm in another way. As Professor Sumner notes, "Rights theories have generally been formulated for the paradigm right-bearer—a competent adult human being. The existence of nonparadigm beings (children, infants, fetuses, the severely abnormal, nonhuman animals, perhaps also artificial intelligences) is awkward for such a theory."[10] If we give people rights out of respect for their status as independent moral agents, it makes little sense to give rights to people who cannot be independent moral agents. This problem is particularly acute for neonatal euthanasia, since severely retarded, newborn infants are patently incapable of making or articulating any kind of decision at all, and, unlike other children, they will never develop fully the ability to do so.

Children's rights, particularly in the context of neonatal euthanasia, differ from the Mill paradigm and from parental rights in yet another significant way. Parental rights are rights to make decisions unregulated by the state. Since children cannot make decisions for themselves, children's rights are commonly formulated in terms of some view of what is good for children. In simple formulations, the right is a right "to life"; in the many grander formulations, the right is to conditions necessary to make life happy. Thus a crucial inaptness of rights discourse is that it simply leads us back to the substantive questions about the rights and wrongs, the benefits and costs, of neonatal euthanasia. One of the attractions of a rights approach is that it seems to relieve society of these difficult questions and to transfer decisions to those most concerned. Where a rights approach serves neither function, we must ask whether it has any utility.

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If newborn children are nevertheless to have rights to choice, someone must exercise them. That someone is ordinarily the parent, but in the context of neonatal euthanasia it is precisely the parent whose influence one attempts to check by giving rights to children. That someone cannot be the state, because privacy rights are precisely rights to act free of state supervision. Even if the anomaly of a privacy right exercised by the government could be overcome, it still would not be clear *how* that right should be exercised for the child. There is no way to know how any particular newborn child, much less a severely retarded child, would exercise his rights, and thus one is again cast back to the basic substantive questions about neonatal euthanasia. It is instructive and (from this perspective) ironic that, when courts have attempted to think in terms of the rights of patients unable to speak for themselves, they have sometimes interpreted those rights as rights to die, not to live.

At the beginning of this essay, I observed that the rights approach and the committee approach have in common the purpose of avoiding social discussion of the substantive issues of neonatal euthanasia. Yet the rights approach does not achieve that purpose satisfactorily, for those issues keep cropping up even in discussions phrased in rights terms. To some extent, the jurisprudence of rights attempts to factor in those issues when it defines the right at stake. Thus we saw that questions of children's rights and of the handicapped's rights regularly devolve into questions about the substantive desirability of neonatal euthanasia. Substantive considerations that are not factored into the definition of a right seek accommodation elsewhere. Fourteenth-amendment jurisprudence attempts to create such accommodations by "balancing" the "state" interest against whatever private rights are asserted. But it is symptomatic of the rights mode of legal discourse that state-interest analysis is the least developed aspect of fourteenth-amendment jurisprudence. In judicial opinions, that analysis is often perfunctory and rarely dispositive. In scholarly commentary, state-interest analysis is slighted in discussions of particular issues and virtually ignored as a separate topic of inquiry, especially compared to the cascade of attention given to identifying and enforcing rights. Consequently, the substantive issues of neonatal euthanasia are neither avoided by the rights approach, nor dealt with satisfactorily.

The committee approach, of course, relieves society as a whole of the debate over the substantive issues, and leaves them to be thrashed out case by case by many discrete committees. Yet I believe it is a failure of both the rights approach and the committee approach that they seek to avoid a social debate of the issues involved in neonatal euthanasia. These issues seem to me matters in which society as a whole has an interest, which it may legitimately bring into public discourse, and in which it may, as in some measure it does now, legitimately try to set standards.

Society as a whole has an interest not just in setting standards for the treatment of severely handicapped infants; it also has an obligation to do what it can to help both them and their parents. Politically, that help will be provided only if some sense of communal responsibility is widely felt. There is nothing logically inconsistent between such a sense of communal

responsibility and the rights approach. Indeed, a community with a developed sense of mutual responsibility may gladly acknowledge a wide range of rights against itself. Yet it seems to me possible that, as a practical matter, the rights approach, when used broadly, discourages such a sense of responsibility. A community that attempts to unite itself largely in terms of the rights each citizen has against the whole has little to stimulate in each citizen concern for the others. A community which relies too completely on the rights approach can too readily slip into viewing rights as stating the maximum as well as the minimum it owes its citizens. Thus, I hope that an approach to neonatal euthanasia based on a sense that society has a legitimate interest in the question might stimulate a sense that society has a duty to commit resources to what would be seen as a common problem.

I have argued that rights discourse is, in its present form, an inapt means of discussing problems like neonatal euthanasia. The significance of my argument, if such there be, lies in its doubts about a deeply ingrained, deeply useful mode of social and legal thought. Yet these doubts themselves have their limits: they are directed toward rights discourse in its present form, and rights discourse may someday develop "a satisfactory theory of basic human rights and their relationship to other values pursued through law."[11] Further, some of the inadequacies of rights discourse may be due to conflicts in social values which will eventually resolve themselves. In any event, while my doubts about the rights approach may all be justified, I have not asked what alternative modes of discourse would be more satisfactory.

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*I would, at least temporarily, retain the law on the books while society, in the numerous ways available to it, debates the social and moral problems neonatal euthanasia presents.*

This essay, however, is not the place to propose an alternative to the rights mode of discussing neonatal euthanasia. But perhaps I owe the reader some clearer, more specific sense of how I would begin to confront, though not resolve, the practical issues of neonatal euthanasia. Because of the difficulties I have described with the rights approach to neonatal euthanasia, and because I share the skepticism of other commentators about "legalizing" these decisions by adopting the committee solution, I share their reluctance to change the law on the books, despite its disjunction with the law in action. I would, at least temporarily, retain the law on the books while society, in the numerous ways available to it, debates the social and moral problems neonatal euthanasia presents. I am drawn to this hesitant conclusion because I see human life as an ultimate value; because I believe the helpless and deformed deserve compassion, not calculation; and because I believe it would be degrading to live in a society which permitted children to die because they are burdensome. I concede that there will be cases in which euthanasia is proper, though I believe such cases are extraordinary and few. But like other commentators, I do not see how standards can be written which limit euthanasia to those few cases, which do not depersonalize questions of life and death, which do not dangerously diffuse responsibility for people's lives, which do not ask the state to endorse the principle that some lives are not worth living. Perhaps these are very personal reasons, but they seem to me directed toward a question of legitimate public concern.

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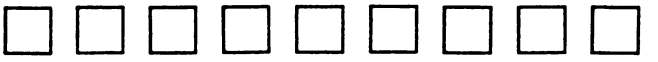
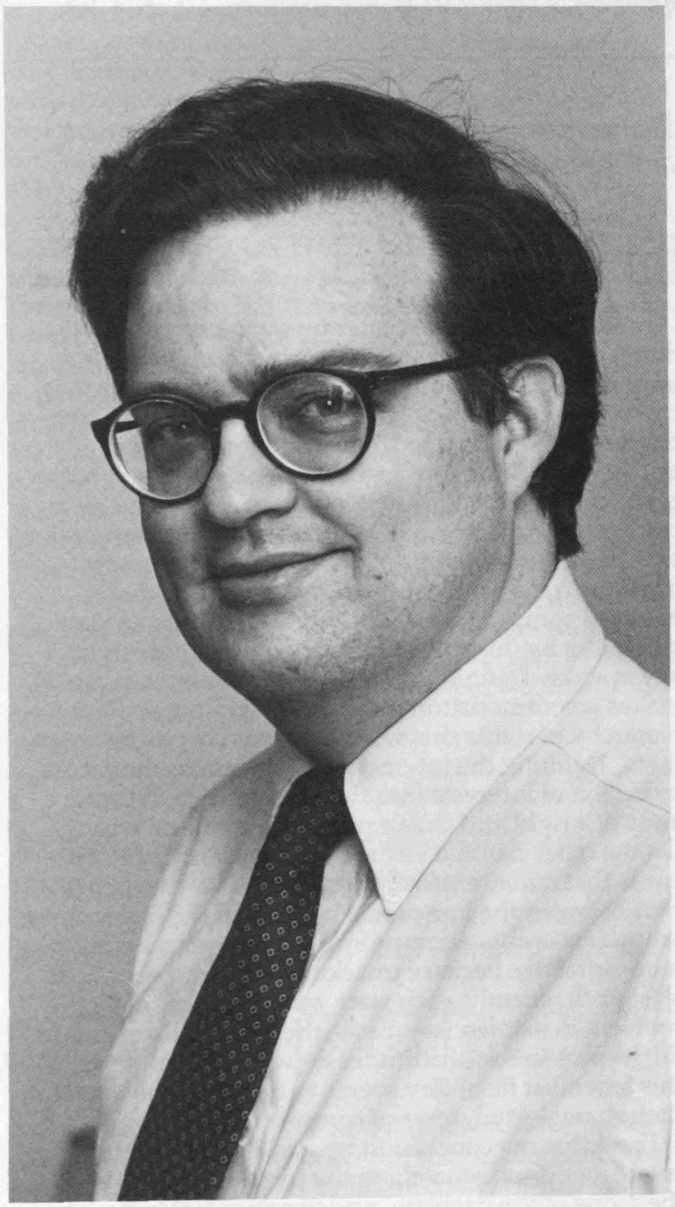


I see this, then, as a matter involving important moral principles. Others see it as a matter involving important human rights. The danger of either view is that both moral principles and human rights are commonly felt to be, and to some extent ought to be, uncompromisable. But in a complex democracy, some compromise of both principles and rights, some decent respect for the opinions of others, some realization that time has upset many fighting faiths, are necessary. It seems to me a fault of the rights approach that it impedes compromise. Defining something as a right masks the nature and complexity of the interests actually at stake. Defining the interests at stake as rights makes accommodation more difficult, since we lack a hierarchy of rights that would help us choose between them. Defining the interests as rights turns the accommodation of interests into the breaching or defining away of a right and thus a political and moral wrong. On the other hand, a virtue of the present state of the law is that it may ease compromise. First, the dichotomy between the law on the books and the law in action represents a compromise, a compromise all the more attractive because unacknowledged. Second, at least until recently, each state was able to regulate the problem in its own way. Since there are still important differences in social attitudes between many states, this federalist flexibility seems to me to permit a useful, though neglected, form of compromise.

I said that my conclusion was hesitant. Whether the law responds adequately to the problem depends on the scope of the problem, and we seem not to have a clear sense of how common neonatal euthanasia actually is, nor of how unbearable the lives of its victims actually were or were to be. I hesitate out of fear that

cases like that of Phillip B. may be common. He is a Down's Syndrome child. His IQ is 57. He may someday be able to learn a job and to live independently or semi-independently.[12] He is capable of "true love and strong feelings."[13] When he was twelve, he needed a heart operation to prevent his gradual suffocation. His parents, with whom he had never lived, refused to permit the operation, and the California courts refused to order it. Custody of Phillip has now been sought by and given to a couple who befriended him, and he has, belatedly but successfully, had the operation.[14] But if mere retardation, to say nothing of retardation so mild, is commonly cause for denying children medical care, I hope the law in action, at least, will change. ◘



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1. Heckler v. American Hospital Assoc., 84-1529, cert. granted, 54 U.S.L.W. 3053 (1985).
2. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy,* 86 Yale L.J. 645, 651 (1977) (emphasis in original).
3. In re Phillip B., 92 Cal.App.3d 799, 801 (1979), cert. denied sub nom. Bothman v. Warren, 445 U.S. 949 (1980).
4. City of Cleburne v. Cleburne Living Center, 53 U.S.L.W. 5022 (July 1, 1985).
5. Hart, *Utilitarianism and Natural Rights,* in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 195 (1983).
6. 14 Q.B.D. 273, 288 (1884).
7. A. MELDEN, RIGHTS AND PERSONS 1 (1977).
8. Dr. Raymond Duff, quoted in Goldstein, *supra* note 3, at 656.
9. A. MELDEN, *supra* note 7, at 25.
10. L. SUMNER, ABORTION AND MORAL THEROY 56 (1981),
11. Hart, *1776-1976: Law in the Perspective of Philosophy,* in H.L.A. HART, *supra* note 5, at 158. I discuss some of these doubts and place them in a larger context in Schneider, *Moral Discourse and the Transformation of American Family Law,* 83 MICH. L. REV. 601 (1985).
12. Guardianship of Phillip B., 188 Cal.Rptr. 781, 788 (App. 1983).
13. 188 Cal.Rptr., at 787.
14. New York Times, October 10, 1983, at 10.

# Law Quadrangle Notes

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