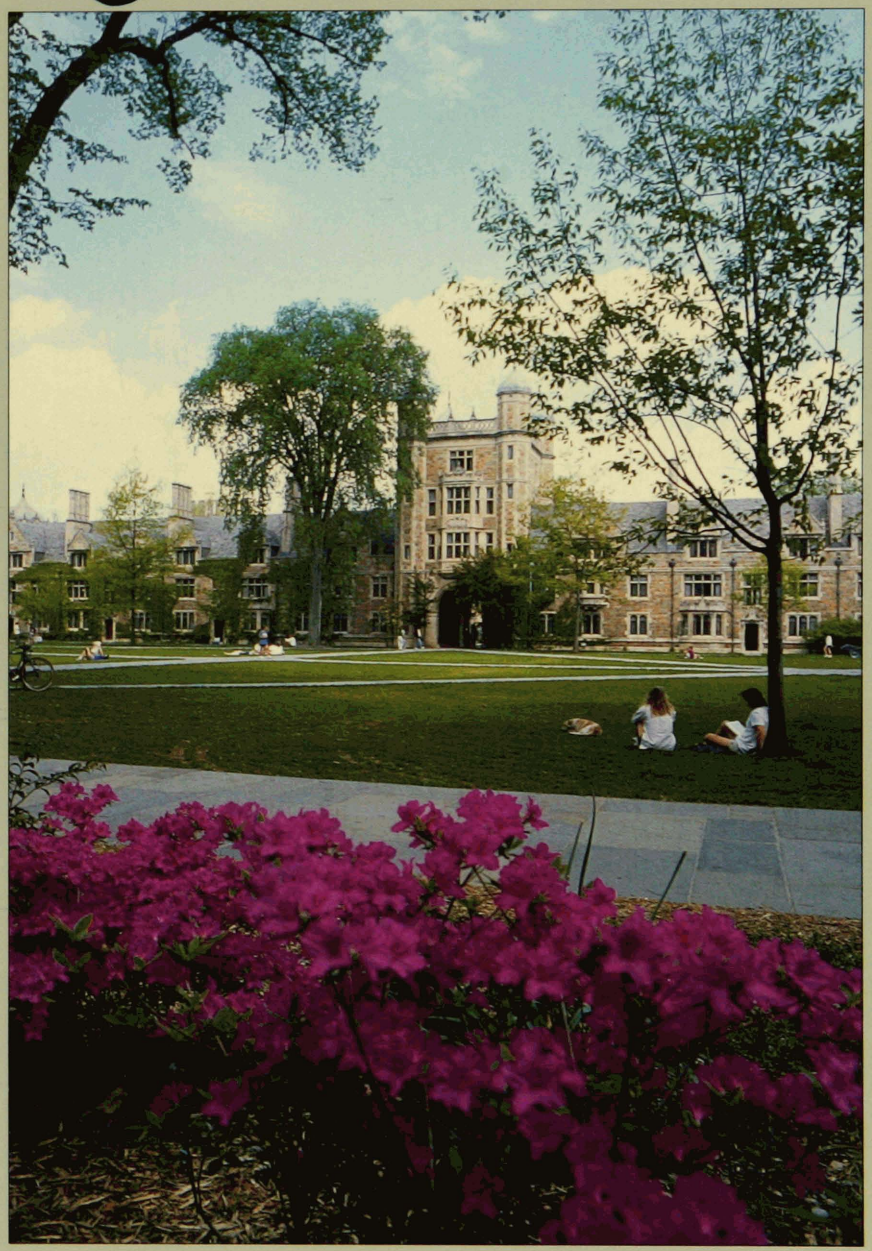
THE UNIVERSITY OF MICHIGAN
LAW SCHOOL

VOLUME 38 • NUMBER 1
SPRING 1995

LAW QUADRANGLE NOTES



The Lessons of War
The Romance of Revenge
Planned Parenthood v. Casey

UNIVERSITY OF MICHIGAN
LAW SCHOOL

ALUMNI EVENTS

April 11–13	Cooley Lectures "The Authority of Tradition in American Constitutional Law" Mike McConnell, William B. Graham Professor of Law University of Chicago 4 p.m., Room 250, Hutchins Hall
April 20	"Mergers & Acquisitions in the '90s" Conference sponsored by the U–M Law School and the Business Law Section of the State Bar of Michigan Honigman Auditorium 9 a.m. - 4:30 p.m.
May 5	"Meet the Dean" Luncheon Wisconsin Alumni Luncheon
May 12	Honors Convocation 5:30 p.m., Honigman Auditorium Hutchins Hall
May 13	Law School Senior Day 2:30 p.m., Hill Auditorium
May 18	Ohio State Bar Alumni Breakfast Radisson Hotel, Toledo
May 25–26	Class of 1940 55th Reunion Law School
June 23	Florida Bar Annual Meeting Luncheon Orlando World Center
Aug. 3–9	ABA Annual Meeting Chicago
Sept. 12	"Meet the Dean" Luncheon London, England
Sept. 29	California State Bar San Francisco
Sept. 29–Oct. 1	Minority Alumni Weekend Law School
Oct. 6–8	Reunion 1995 Classes of '50, '55, '60, '65, '70 Law School
Oct. 26–28	Committee of Visitors Meeting Law School
Nov. 10–11	Reunion 1995 Classes of '75, '80, '85, and '90 Law School

Have you moved lately?

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LAW QUADRANGLE NOTES

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MESSAGE FROM DEAN LEHMAN

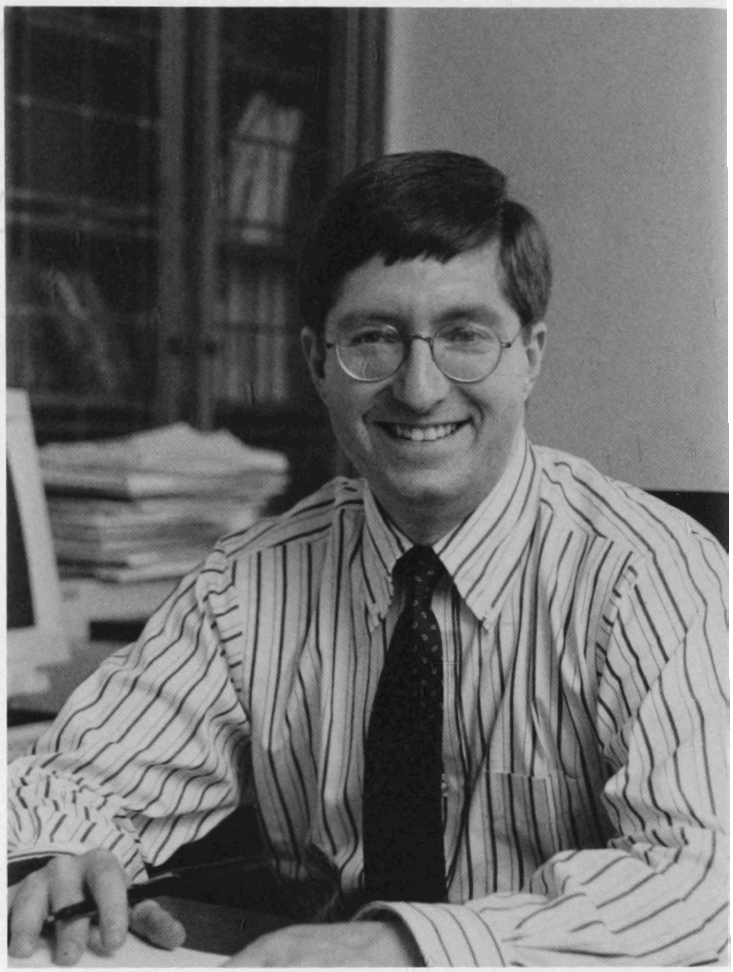
THIS IS MY THIRD MESSAGE about the importance of a commitment to continuous intellectual growth and renewal. I am thrilled to report that the Law School's own program of institutional renewal has been unfolding more quickly than I had imagined. And I would like to use this message to say "Thank you" to the readers of LQN for making that program possible.

No skill is more central to the lawyer's art than the ability to write in a way that is properly called "persuasive" as opposed to "argumentative." Persuasive writing addresses the concerns of a skeptical but open-minded reader with a crisp, reflective, and balanced style. It is as much the hallmark of an outstanding client memorandum as it is of an outstanding brief.

At Michigan, we have long sought to impart that skill through our Case Club program. And yet, in recent years we have heard many of our graduates wonder whether we might not be able to improve on Case Club. So last fall, I appointed a special committee of faculty and students to design a new program for teaching the craft of persuasive writing.

In early January, the special committee brought to the faculty an ambitious plan to replace the Case Club program with a new Legal Practice program. Whereas the Case Club program has depended primarily on third-year students, the Legal Practice program would deploy a group of full-time professionals who have demonstrated their talents as legal writers and teachers. The new program would offer first-year students a new quality of intensive, individualized instruction in persuasive legal writing.

When the proposal reached the faculty for a vote, the only serious question had to do with the new program's cost. The Legal Practice program will cost more than three times as much as the Case Club program; some of my colleagues properly wondered where the money for the new Legal Practice program would come from. Fortunately, I had a ready answer. At Michigan, the dean may direct any annual growth in the Law School Fund to support new initiatives. I very much wanted to have the resources to inaugurate the Legal Practice program at Michigan.



Your generosity provided those resources. During the first seven months of my deanship, substantial numbers of you chose to significantly increase the amount of your gifts to the Law School Fund, so that contributions to the Fund totaled much more than they had during the equivalent period a year earlier. The trend toward increased alumni support for the Law School enabled us to approve the Legal Practice program with excitement and enthusiasm.

Persuasive writing will be even more valuable to future legal practice than it is at present. Thanks to you, our program of institutional renewal will begin precisely where it should: by designing and implementing a model program of instruction in the craft of persuasive writing. I have every confidence that, thanks to your support, fifteen years from now the true masters of the art of persuasive legal writing will be graduates of the University of Michigan Law School.

Jeffrey S. Lehman

Peace & prosperity at hand, yet at risk

We stand at the threshhold of the Age of Global Capitalism, in which international harmony and prosperity are at hand, and yet far from guaranteed. Democratic nations and international institutions now face a rare opportunity and a tremendous responsibility to secure these gains by supporting fragile fledgling democracies.

This was the theme of the 1995 William W. Cook Lectures on American Institutions, delivered by preeminent economist Jeffrey Sachs Jan. 17–19.

"I believe we are at one of history's great pivotal moments. We have choices before us that will determine nations' security and prosperity for years to come," Sachs told a large and attentive audience.

Sachs is the Galen L. Stone Professor of International Trade at Harvard University, a faculty fellow at the Harvard Institute for International Development, and a research associate at the National Bureau of Economic Research. In the early 1980s, he helped developing nations overcome hyperinflation and national insolvency; more recently, he has advised China, post-Soviet Russia, and Eastern European nations on market reforms. In an introduction at the first lecture, Dean Jeffrey Lehman called Sachs "the world's best known economist" and a premier example of an academic who put his scholarship to practical use advising administrations and governments. He also has strong Michigan ties: his father Theodore, J.D. '51, and his mother Joan are strong supporters of the University, and his sister, Andrea earned a J.D. here in 1978 as well.

In his first lecture, Sachs reviewed the remarkable changes that have brought about what he has dubbed the Age of Global Capitalism. In recent years, the collapse of state-run economies around the globe has brought 3.5 billion people into market economies. "The principles of capitalism have expanded all over the world and created an economy more extensive and integrated than ever before in history," he said. "The international linkages of commerce, finance, production, and labor are mind-boggling."

Citing Immanuel Kant's views expressed in a 200-year-old essay on eternal peace, Sachs stressed that global capitalism is the key to worldwide harmony. "Kant wrote that the spread of international commerce is the glue between nations. The spirit of commerce is opposed to war and will triumph," he said.

Sachs demonstrated the success of capitalism with statistics showing that democracies with market economies achieved unprecedented long-term growth, while socialist, state-run industrial economies collapsed in a common pattern. "They came spiraling down not in social or political revolution, but simply in Chapter 11 insolvency. These states could not pay the bills," Sachs said. Thus, when such nations made market reforms, it was from a position of utter economic chaos.

In the second lecture, Sachs stressed the potential of and necessity for foreign aid to stabilize these fragile economies and promote democracy. In the United States, economic assistance to foreign governments is "widely perceived as a budget buster and useless at that," Sachs said. He pointed out that in public opinion polls, Americans wildly overestimate the amount of the budget spent on foreign aid. The actual share of foreign aid, including military expenditures, is less than 1 percent of the gross domestic product, with nearly 45 percent of that going to just two nations — Israel and Egypt. "The reason we get so little out of it is that we put so little into it," he observed.

Sachs said foreign aid should be timely, temporary, conditional upon actions required of the recipients, and provided by other democracies besides ours. "The U.S. should not and need not do it alone. I'm highly disturbed that there are no (international) agreements on aid. It is subject to enormous 'ad hocery', with almost no aid flowing and no general principles in place on when to give aid."

He detailed the potential impact of aid with examples of three nations. Poland was a success story. At the end of 1989, Poland was on the

"I believe we are at one of history's great pivotal moments. We have choices before us that will determine nations' security and prosperity for years to come."

— JEFFREY SACHS

brink of starvation and civil war. The United States responded with a $1 billion line of credit to back a convertible currency. "It was limited, discrete, specific, and conditional, and it was a godsend. It was the push that allowed the Polish government to vote for reform and that convinced the Polish people that this must be a smart thing." Today, Poland boasts the fastest growing economy in Europe.

Late in 1991, Russia, hoping to emulate Poland, asked for a $6 billion stabilization fund. "What happened, I believe, is one of the greatest foreign policy blunders of the twentieth century. Russia was waved away by the Bush administration, the World Bank, the International Monetary Fund, and others. It took Russia a year and a half to get any usable aid at all. To this moment, there is no stabilization fund. We utterly neglected this choice for three years and lost a critical opportunity." The delay left Russia in dangerous straits; it has "20,000 nuclear weapons and 2 million men under arms, in a country as disrupted, confused and bankrupt as can be."

Today, it will be difficult to choose to support Russia when it is embroiled in a brutal and unpopular war with Chechnya, and it's probably too late, Sachs said soberly. "I'm not optimistic about Russia; we probably shouldn't give aid now, but should wait to see if the democrats are really in charge, or just dangled forth by hardliners to convince us."

Jeffrey Sachs

In the third example, Sachs said total refusal of emergency aid to Algeria over the last seven years killed hopeful democratic reforms. When France, Japan, and other world creditors refused to reschedule debt repayments, debt service rose to nearly 5 percent of the gross domestic product and inflation soared. In such economic strife, democratic elections were postponed, then led to a landslide against reform. The day after the elections, there was a military coup. Today, Algeria is again asking for a bailout.

"I'm afraid that we've missed such important opportunities that what should have been a glorious era of post-Communist reform is a time of destabilization," he said. It's clear that successful reform "is not going to happen by itself."

Besides foreign aid, the transition to market economies requires codification and transplantation of international laws and standards. "The implementation and serious reintegration of these economies into the world system will depend on the effective work of lawyers," he noted. It also depends on international institutions such as the World Bank, the International Monetary Fund, and the new World Trade Organization.

By supporting convertible currency, open trade, foreign investment, and private property rights, such organizations play a vital role in reintegrating countries that have been operating outside the industrial postwar economy. These international institutions also are pivotal in the harmonization of laws among nations that is essential to commerce.

Sachs' talks were the 37th in a series endowed by William W. Cook. Deeply interested in uniquely American institutions, Cook provided in his will for a lectureship that would explore them in light of broader social issues. The lectures are jointly presented by the Law School and the College of Literature, Science and the Arts.

(Look for an excerpt of Sachs' Cook Lectures in a future issue of LQN. — Eds.)

A win–win solution from Washington

In an era of great disillusionment with the federal government, former Law School Professor Joseph Sax offers an example of positive action coming out of Washington.

Sax, a leading authority on environmental law and a professor at the University of California-Berkeley School of Law, was on the Michigan faculty from 1966-87. He recently took a leave of absence to serve as counselor to U.S. Secretary of Interior Bruce Babbitt. In his new role, Sax is engaged in an effort to use the controversial Endangered Species Act in an innovative, nonadversarial way that both preserves precious natural habitat, yet allows landowners to realize some gain through economic development. He desribed this initiative when he addressed graduates at Senior Day in December.

The Endangered Species Act calls for not only listing threatened species, but identifying and protecting land that contains the habitat essential to their survival. Naturally, landowners resist efforts to set aside land that has economic as well as ecological value.

Babbitt's initiative is to make deals with landowners, helping them secure land that they can develop in exchange for an agreement to preserve valuable habitat areas. Working primarily in the Southern California, he is pulling together pieces of land that can be traded for biologically important areas.

For example, "We're reaching out to the military to make deals to acquire lands on bases they've vacated," Sax explained. In Orange County, California, he is working on a three-way deal involving a Marine air base. "We ask the Marines to give us land they are leaving. We will have it appraised and exchange it for privately owned land with biological value that is under pressure for development. The landowners will realize their economic return by developing the former base land."

If areas on military bases have biological value, they are turned over to the Department of Interior for management, and protected land elsewhere is freed up for development. Because many bases are closing, "there are many thousands of acres available that can be exchanged for acres of privately owned land we can then set aside for environmental uses," he says.

Lands reclaimed by the Resolution Trust Corp. in savings and loans failures provide another source of valuable habitat that can be traded to free up privately-held acreage. In addition, Sax said, the Bank of America has proposed a "mitigation bank" of foreclosed lands. Any landowner who is required to mitigate for developing protected land can buy acreage out of this bank to be preserved.

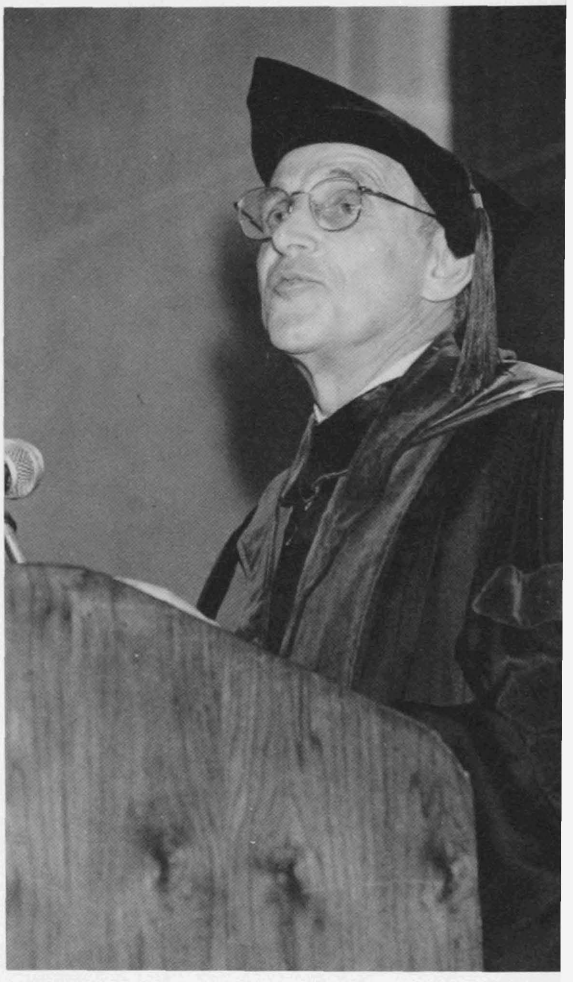
"All of this is done outside the usual regulatory command-and-control scheme. Landowners are not *told* that they must participate," Sax explained. "It's a voluntary program. Owners are invited to contract with the Department of Interior on the understanding that if enough land is set aside to protect endangered species, they are free to develop their own land."

By using the carrot of cooperation instead of the stick of regulation, everybody wins. Landowners can capitalize on land previously tied up by the Endangered Species Act, while the government preserves habitat that otherwise might have remained unidentified and unprotected. Under the Base Closure Act, other federal agencies have the first crack at lands the military is no longer using, so it has cost the Department of Interior very little to save these lands. Because the program pleases landowners, it also is supported by local public officials, even in ultraconservative communities.

It was his respect for Babbitt's willingness to try new approaches to ecosystem protection that lured Sax from Berkeley to the government. In his 30 years as a professor, he has seen environmental trends shift. In his long view, we now have entered an era where ecosystem

By using the carrot of cooperation instead of the stick of regulation, everybody wins. Landowners can capitalize on land previously tied up by the Endangered Species Act, while the government preserves habitat that otherwise might have remained unidentified and unprotected.

— JOSEPH SAX



Joe Sax

planning and protection are the key environmental issues.

Using a medical metaphor, Sax said Secretary Babbitt's programs act as "preventive medicine" to avoid the "heroic measures" involved in saving land or restoring habitat through costly, contentious litigation. "If we can set aside biological preserves without impacting the economy adversely, we don't have to list species as endangered in the first place, and protect more habitat," he explains. "With this program, we can go into a community and point to other areas where there was chaos and panic and litigation to protect land, and suggest to landowners that this is a way that they can avoid such problems."

About three dozen deals with landowners have already been concluded, and more than 100 are in process. Sax is delighted to find that there is a lot of land available for reclamation and preservation. "I think we have a tremendous unexplored opportunity to create incentive compliance. If we are imaginative enough, we can accomplish a great deal."

'Come back and stay'

The Law School leaves the light on for its newest graduates

Before they receive their diplomas, University of Michigan Law School graduates receive something even more significant: a certificate of membership to the Lawyer's Club.

At Senior Day on Dec. 3, Dean Jeffrey Lehman outlined for 86 graduates the rights and privileges this entails.

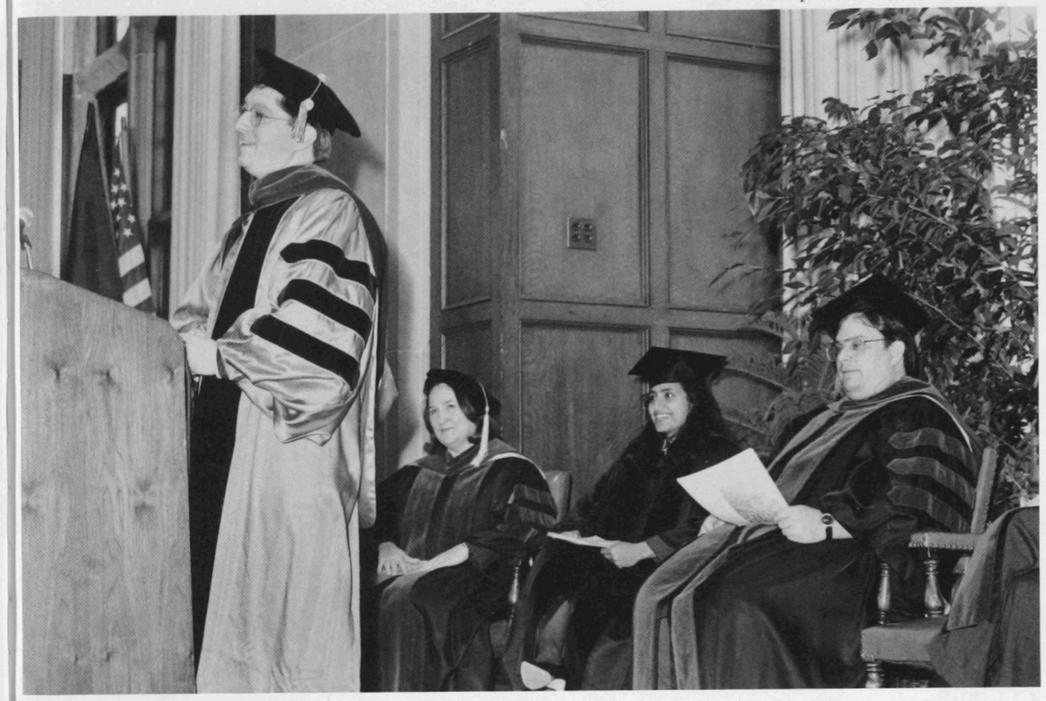
"First, this entitles you to come back and stay," he said, drawing a laugh from graduates who were no doubt eagerly anticipating the end of their days in Hutchins Hall. "It's true. There are seven guest rooms. A single is $45 per night ... Rates subject to change ... Guests who mention my name will receive a free game of pinball in the basement," he deadpanned.

This first privilege "pales in comparison to the second, which is to *go out* and stay," Lehman said. The new lawyers will scatter to succeed in all sorts of careers, but wherever they go and whatever they do, they will remain members of the extended family of 17,000 Michigan Law School graduates around the world.

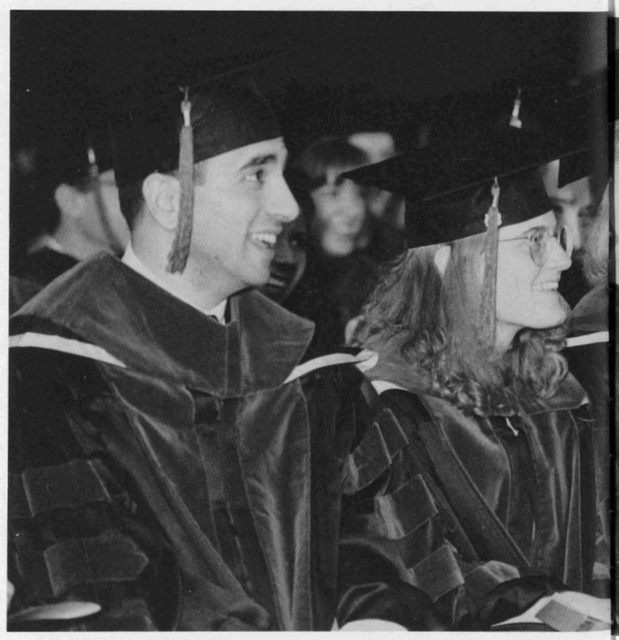
Instructions to go out and stay seem contradictory, but the class excels at considering contradictions. After three years of legal education, Lehman said, "if we have done our job well, critical analysis has become such a habit of mind that you may find you can't take a position on any issue without immediately having doubts. If we have been successful, you will welcome those doubts.

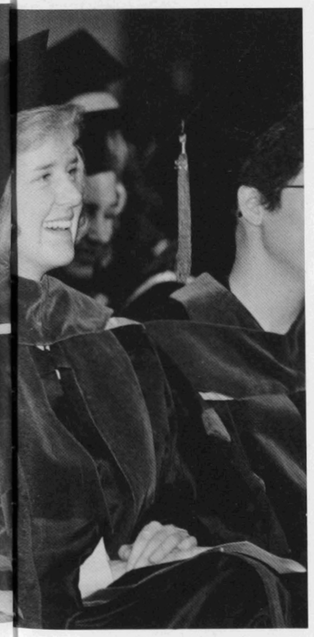
"The habits of mind you have developed here should be linked to the habits of the heart," he added, encouraging students to work for the public good. "Deal with adversaries in an attitude of mutual respect, and encourage your clients to live up to their responsibilities to society."

Most of all, he encouraged students to pursue continuous growth and renewal in their lives, and to exercise the first right of Lawyer's Club membership: "Come back and stay. We'll leave the light on."



Dean Jeffrey Lehman's address entertains Associate Dean Susan Eklund, Law School Student Senate President Roopal Shah, and Class Representative Robert L. Bronston.





BRIEFS

In recent presentations at the Law School, special guests shared their views on ethical issues at stake in high-profile cases they handled.

Investigating the President —

In an October visit to the Law School, Robert Fiske said his recent stint as independent counsel investigating the Whitewater investments was like being "the attorney general for purposes of investigating the President and Mrs. Clinton." Fiske emphasized that during his six-month tenure before he was replaced by Kenneth Starr, the Department of Justice made no attempts to influence his investigation.

Doing the right thing —

"When people do bad things, they ought to be punished." That's what Brian O'Neil, J.D. 74, told the jury in civil trials over the Exxon Valdez , and the jury came back with an uprecedented $5 billion jury verdict against Exxon for the Alaskan fishermen and natives. O'Neil spent five and one-half years in Alaska as head of the plaintiffs' legal team, ultimately putting the morality of Exxon's corporate culture on trial. In January, he visited the Law School twice in less than two weeks to talk with students and faculty about what the case says about corporations and about ethical survival within a large law firm. A partner at Faegre & Benson of Minneapolis who has become a leading environmental lawyer by handling pro bono cases, he advised students to "become a cabinetmaker" — to work hard at mastering solid legal skills at a big firm, where the best lawyers are trained. With these skills to sell, a lawyer will be able to afford to listen to the voice inside saying "This is not right, and I'm going to do something about it," and develop a morally satisfying practice.

Gift will endow happy endings

Alberto A. Munoz II describes his career in law as "nothing less than a Cinderella story."

While he may not have gone literally from rags to riches, the 1974 graduate says he's come a long way from his parents' ranch in a small town near the Mexican border to his thriving Texas law practice today. Amazed and grateful for his successful career, Munoz decided this year to give something back to the school that gave him a start.

He established the Alberto and Sharon Munoz Endowment Fund with an initial gift of $100,000. "Eventually, what I'd like to do is build the fund to endow a professorship," says Munoz. For the present, proceeds from the endowment will be used for scholarships.

The son of a rancher and a high school teacher, Munoz had never been out of Texas before he came to the University of Michigan Law School. "Law school was a fantastic experience," he recalls. After school, he set up a practice in McAllen, Texas that has grown into a thriving, six-lawyer civil litigation firm. He specializes in liability cases, representing plaintiffs in product liability claims and defending doctors, lawyers and other professionals in malpractice cases. One of his most notable cases involved a Coca Cola Bottling Co. truck that crashed into a school bus and killed 21 students; he won a $72 million award for the plaintiffs.

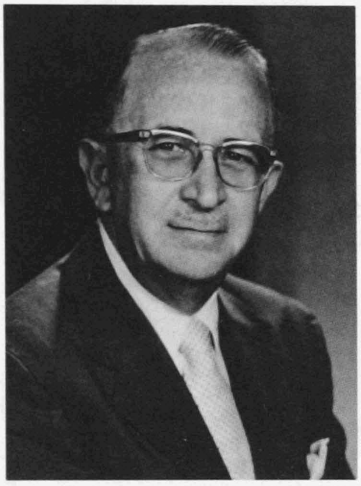
Munoz always wanted to be a lawyer, but he never envisioned achieving such success. "Coming out of school, I never expected to have the practice I have now. It's like a fairy tale," he says. As he talks about his work and his life in the Rio Grande valley with his wife, Sharon, and their three daughters, it's clear that he's living happily ever after.

He has been a generous supporter of the Law School — in 1993, he made a $10,000 gift. Now, he is increasing his support to match his gratitude for his opportunities. "I decided that it was time to put my money where my mouth is and give something back," he said while in Ann Arbor for his 20th Law School class reunion in October.

Munoz has set no restrictions on the scholarship awards; he wants to support "whoever needs it." "I needed it. It made law school possible," he says simply. Now, his gift will help a new generation of students write happy endings to their own Cinderella stories.

Students like Cynthia Rincon (left) will benefit from the generous gift of Alberto Munoz II and his wife Sharon.

Bequest honors prominent Iowa attorney



THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY

Beahl Perrine

A generous bequest in memory of 1927 graduate Beahl T. Perrine will establish an endowment at the Law School in his name.

Perrine, a lawyer and leading industrialist in Cedar Rapids, Iowa for more than fifty years, was a well-known benefactor to his community. Before his death in 1989, he and his wife planned to include the Law School in the wide range of organizations the family supported. Upon her death in October 1994, Irene H. Perrine bequeathed to the school $300,000 to establish the Beahl T. Perrine Endowment Fund, the income of which may be used at the school's discretion.

Perrine opened the firm of Perrine & Keyes just two years after graduation, and later founded the firm of Simmons, Perrine, Albright & Elwood. He also worked closely with his brother-in-law, Howard Hall, founder of Amana Refrigeration, Inc. and other industries. Perrine served as secretary, general counsel, and a director of Amana for many years. From 1948-71, he also was secretary and director of the Iowa Manufacturing Company, which produced equipment to process paving materials. He became president of the company in 1972, and also served as president of its affiliate, Iowa Steel and Iron Works.

These companies were acquired by Raytheon Corp. in 1972; their sale resulted in the fortune that Perrine and Hall reinvested in their community through the Hall Foundation. Since the early 1970s, the foundation has generously supported area health care facilities, cancer research and other scientific endeavors, colleges, and local libraries. "Mr. Perrine, until his death in 1989, served as chair of the foundation board and really was the Father Superior to our enterprise," recalls William P. Whipple, now president of the foundation. "He was a wonderful man with an extraordinary sense of conservatism and stewardship."

While the family focused its philanthropy in Cedar Rapids and the surrounding county, Perrine also supported the University with several significant gifts in his lifetime. "He thought highly of the Law School and felt privileged to have attended the University of Michigan," says Whipple. The bequest provides enduring testimony to his affection for the school and his appreciation for the education he received here.

A challenge to graduates

A unique gift from two staunch supporters of the Law School challenges students to give back to the school after they graduate.

John Nannes, J.D. '73, and Terrence Elkes, J.D. '58, have jointly contributed $25,000 to establish the Nannes-Elkes Challenge Fund. They are challenging students in the Class of 1995 to make a pledge to contribute to the Law School annually for four years after graduation. In return, the first 100 students to accept the challenge may each direct $250 from the fund to the student organization or Law School initiative of their choice.

Participants can allocate their $250 to any officially recognized Law School student group or activity, including Student Funded Fellowships, need-based financial aid, the Debt Management Program, or the Dean's Discretionary Fund.

The challenge provides a new pool of funding that will support projects important to students. At the same time, it will encourage graduates to develop the habit of stewardship that will ensure excellence in legal education for students to come. The amount of the annual contribution is left to the individual; the expectation is only that it be a good faith gift

to support the school.

In a letter inviting students to participate, Nannes and Elkes wrote, "We are pleased to be able to give something back to the Law School that launched our careers. We hope you will join us."

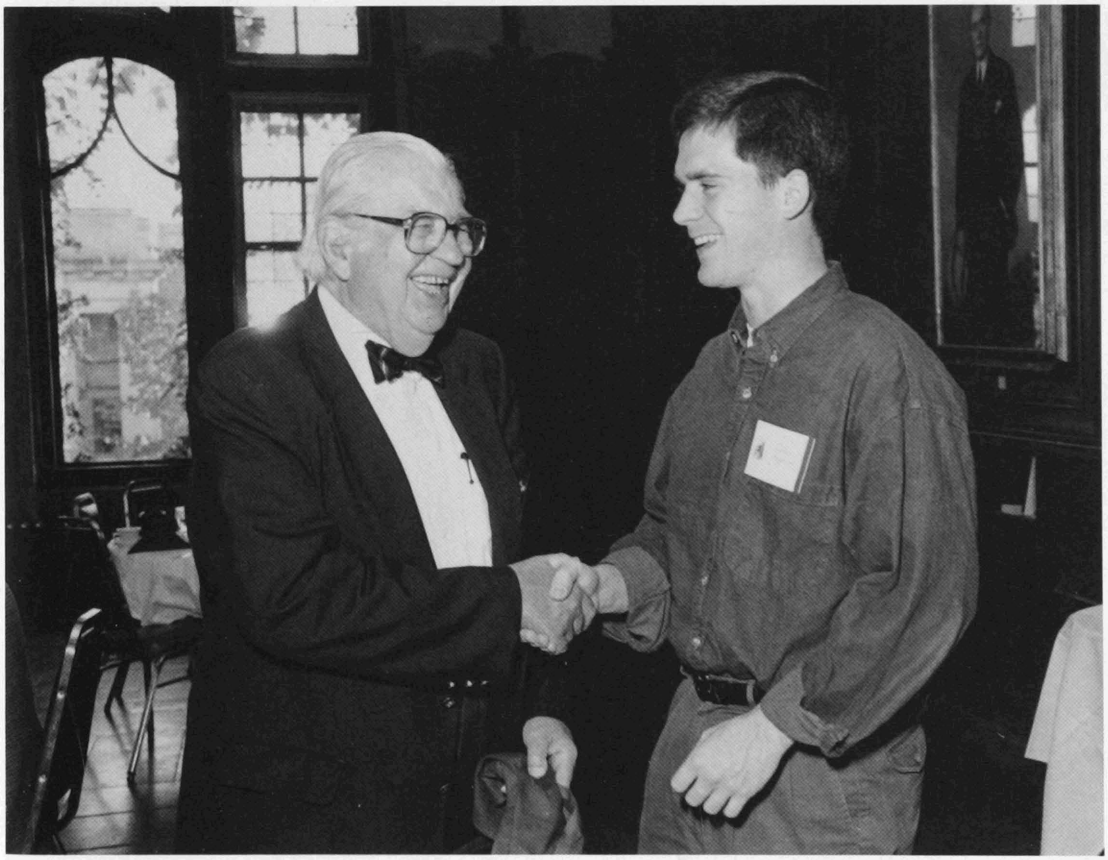
Dean Jeffrey Lehman was effusive in expressing the Law School's gratitude to Nannes and Elkes. "John Nannes and Terry Elkes are two truly outstanding human beings. Each of them has helped the Law School in many ways over the years; and yet, I must say that I find this gift especially meaningful.

"In the short term, it will help to provide a special margin of discretionary funds for the aspects of the school that today's students find most important. But in the long term, it will help to prepare our newest graduates to show Michigan the same dedication that people like John and Terry are showing the school today.

"When I was a law student here in the 1970s, the Law School was able to thrive because of public support — because Michigan's taxpayers were committed to providing the critical margin of excellence," Dean Lehman explained. "Today, changes in the state economy and in state politics mean that public support is no longer available. As a result, we can continue to compete with schools like Columbia and Yale only when our graduates support us every bit as generously as their counterparts support their almae maters.

"We are pleased to be able to give something back to the Law School that launched our careers. We hope you will join us."

"By their generous example, and by the structure of their challenge, John and Terry are showing this year's students what a vital role they, as graduates, will soon play in ensuring that Michigan continues to provide each succeeding generation of students with an outstanding legal education."



Scholarship brunch —

Scholarship donors and recipients had a chance to get acquainted at a brunch held in October. Here, second-year student John Stanley meets his benefactor, John Pickering, J.D. '40.

Briefs

Congressional debate —

The Law School Student Senate organized a debate among candidates in the competitive race for Michigan's 13th Congressional District seat. Participating were Helen Halyard, an independent Socialist candidate; Democrat Lynn Rivers; and Libertarian Craig Seymour. Gail Petrosoff of the Natural Law Party and Republican John Schall did not attend. Professor Steven Croley moderated.

Castillo speaks at scholarship banquet —

The Hon. Ruben Castillo, federal judge for the Northern District of Illinois, was the keynote speaker for the annual Juan Tienda Scholarship Fund Banquet held in October. The scholarship is in memory of a former student who was dedicated to advancing the rights of migrant workers. At the banquet, scholarships were awarded to Liz Provencio, a first-year student of Las Cruces, New Mexico, and David Arroyo, a second-year student from Brooklyn, for their commitment to the Latino community. The banquet, a fundraiser for the scholarship, is sponsored by the Hispanic Law Students Association together with the Latino Alumni Network.

Conservative journal, progressive online one launched in 1994

Michigan students launched a new journal called *The Michigan Law & Policy Review* in September. The journal will emphasize conservative and libertarian scholarship.

It is the second new journal established in 1994, following on the heels of the Michigan Telecommunications and Technology Law Review, which will be the nation's first law journal to be published electronically.

The Michigan Law and Policy Review will focus on legal issues affecting national public policy.

MLPR co-founder and editor-in-chief Jeff Pombert told the *Res Gestae* that an informal student poll last spring showed strong support for a journal emphasizing conservative thought. "The tremendous success of the Harvard Journal of Law & Public Policy is an indication that we can tap into the prestige of Michigan to publish something similarly successful," says Pombert, a second-year student.

The journal has nineteen active members. Its editorial board is planning its first issue, with a few strong submissions already in hand. Plans are in the works for a symposium in 1995. In addition to its own symposium, the editorial board hopes to publish works from the Federalist Society's symposia.

To launch the technology journal, editors held a symposium in September called "Competition and the Information Superhighway" featuring leaders in telecommunications business and policy. The online journal will be available through Lexis. It will not only explore the legal implications of new technology, but use that technology to enhance and expand the conventional use of a journal. One notable change is that the online journal will be interactive; each article will carry an e-mail address for the author, so readers can easily respond with questions or comments.

The two new publications bring to six the number of journals at the Law School.

— Res Gestae *reporter Peter Krumholz contributed to this report*

Ruth Milkman, senior legal advisor to the Federal Communications Commission chairman, discussed regulation of competition among providers of communication technology at the Michigan Telecommunications and Technology Law Review symposium. Other panelists were (from left) Frank Lloyd, a partner at the firm of Minz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.; Thomas Sugrue, deputy assistant secretary of commerce for communications policy; and Michigan Law Professor Sallyanne Payton, moderator.

BRIEFS

Custom-designed lights, decorative millwork, and new ornamental plaster conceal new air conditioning ductwork in the ceilings of renovated Law School classrooms like this one. Quinn Evans/Architects of Ann Arbor skillfully upgraded major building systems while preserving the rich style of the rooms. For its work, the firm won an Interior Award from AIA Michigan, a society of the American Institute of Architects. Several generous gifts combined with University funds helped make the renovations possible.

PHOTO BY FRED GOLDEN

Clinic helps reach $172 million settlement

The Environmental Law Clinic, working with the National Wildlife Federation, played a role in negotiating one of the largest environmental damage settlements in U.S. history.

More than a decade ago, NWF filed complaints before the Federal Energy Regulatory Commission against Consumers Power and Detroit Edison for failing to prevent fish kills at a hydroelectric power plant on the shores of Lake Michigan in Ludington. The Michigan State Attorney General also filed suit against the power company for illegally killing fish belonging to the state.

After years of legal maneuvers, Consumers and Detroit Edison resolved all claims last fall in a settlement valued at $172 million in benefits to the people of Michigan.

The utilities will mitigate and prevent future fish kills and compensate for past fish kills. They also will immediately pay $5 million into a Great Lakes Fisheries Trust Fund, and pay another $3 million annually for 18 years. The trust fund will support projects that enhance the Great Lakes fisheries habitat.

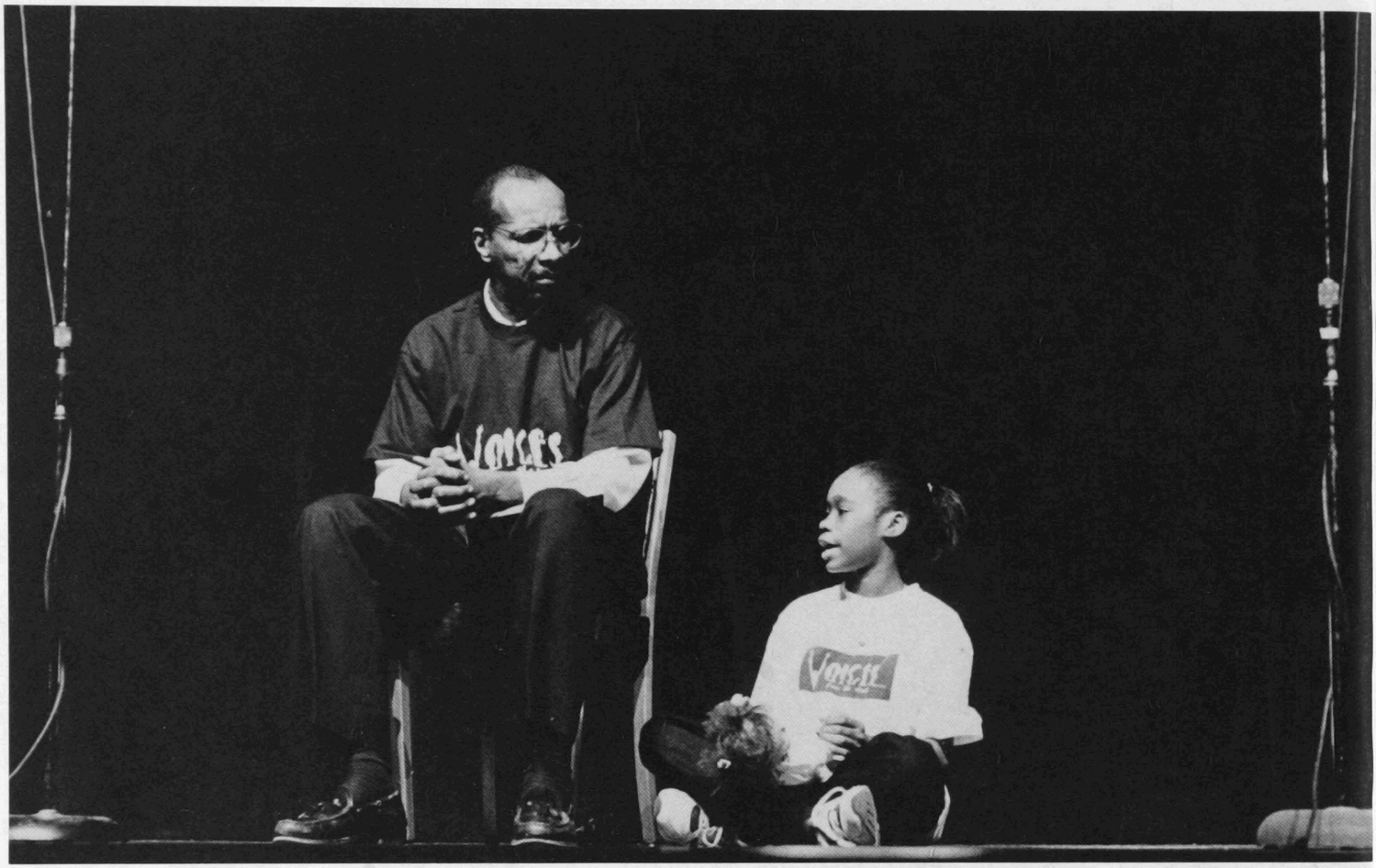
In addition, the utilities have agreed to employ "environmental dispatching" of power to reduce plant operations and limit fish kills. This relies on a pricing system that adds the value of fish killed into the cost of power produced at the Ludington plant. Power from this plant has been cheaper than from other sources, so it was heavily used. Now, for the first time, environmental impact costs will be figured into the price of power, and as the price rises to reflect true costs, other power sources will be tapped and the Ludington plant will be used less.

Throughout the decade-long dispute, Environmental Law Clinic interns assisted with the various legal proceedings and in the years of negotiations leading to the settlement.

Russian judges learn about juries —

A group of twenty-two judges from throughout the Russian Federation learned about juries by playing the role of one in a mock trial during a ten-day visit to the Law School last fall. The judges, most of whom were from commercial arbitration courts, also attended customized classes on commercial law, civil procedure, juries, and law and economics taught by Professors James J. White, Kent Syverud and Avery Katz.

BRIEFS



MLK's dream remembered —

Voices from the Street, a dramatic troupe of children and adults who have experienced homelessness, brought tales of their troubles, hopes and fears to the stage in the Law School's Martin Luther King Jr. Day presentation. Here, Peppertina Williams plays the role of an HIV-positive child planning to spend the time she has left "taking care of the babies who have nothing else" while Dwight Fowler looks on. Broderick Johnson, J.D. '82, a Washington attorney who serves on the Voices from the Street Board of Directors, introduced the troupe and urged students to act to "save the lost generation" of minority youth. Also on MLK Day, Professor Rick Pildes participated in a panel discussion on the effects of Brown v. Board of Education *along with Cheryl Brown Henderson and Linda Brown Thompson, two sisters for whom the desegregation case was fought. Later that week, students acted on King's dream, spending a service day working with a Detroit community development organization.*

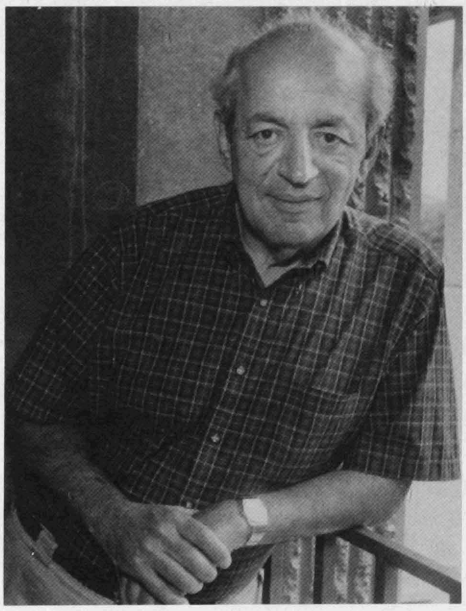


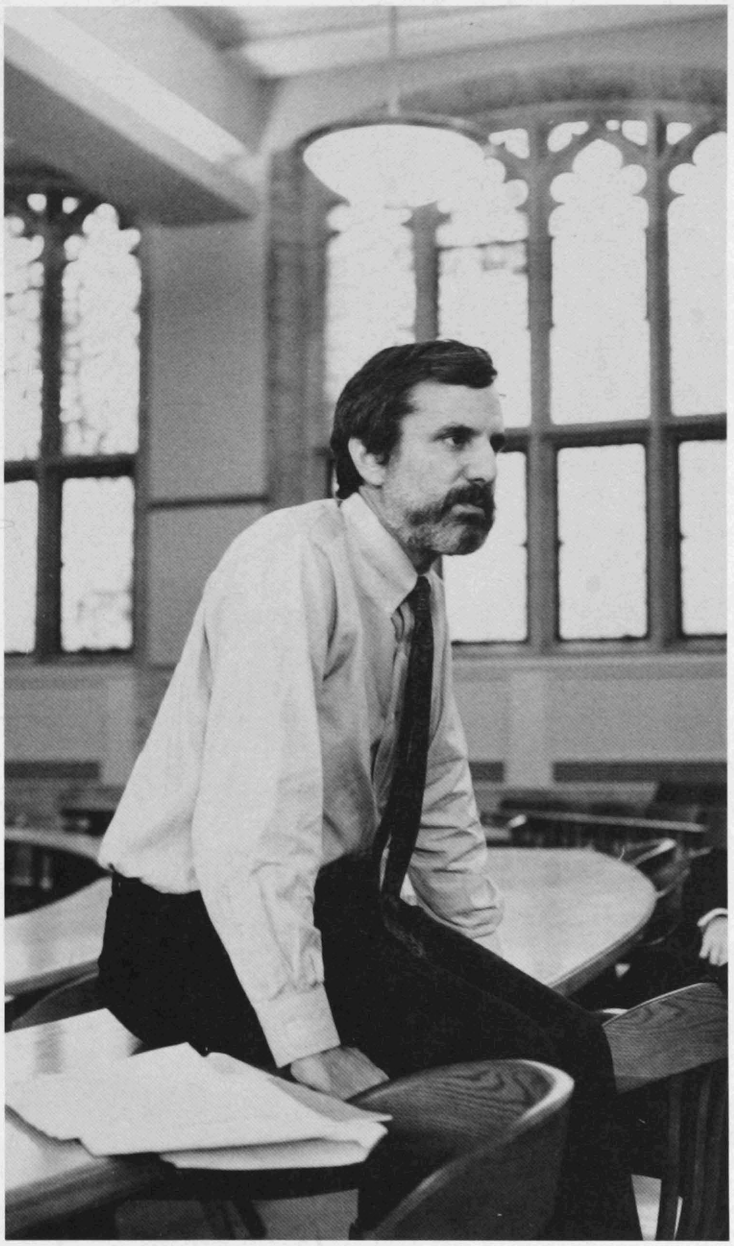
PHOTO BY WENDY LAMM

Tales of Learned Hand —

In a visit to the Law School last fall, Gerald Gunther, author of the new biography Learned Hand: The Man and the Judge, *shared intriguing tidbits and tales drawn from his research and personal acquaintance with the legendary judge. A noted constitutional law scholar, Gunther is the William Nelson Cromwell Professor of Law at Stanford University.*

A DAY IN THE LIFE OF *Alex Aleinikoff*

Early in 1994, Michigan Law Professor T. Alexander Aleinikoff took a leave of absence to serve as General Counsel of the Immigration and Naturalization Service at the United States Department of Justice. Third-year student Rebecca Storey also took a break from the Law School and spent the fall semester working at INS on an externship, handling potential appeals of adverse court decisions in refugee and asylum cases. She also spent a day following Aleinikoff to observe him in action, and shared with LQN this account of a typical day in the life of the INS General Counsel.



Alex Aleinikoff

Dec. 2, 1994, 8:00 a.m.
In the quintessential Washington power meeting place, the Willard Hotel on Pennsylvania Avenue, just one block from the White House, Alex Aleinikoff is in the middle of an immigration debate. His meeting with a conservative, reform minded immigration group has turned into a challenge of current United States policy. Aleinikoff is increasingly the Clinton administration's front man on immigration policies, which were major news stories for months as waves of refugees from Cuba and Haiti headed for the United States.

The meeting typifies the way many mornings begin in Washington, especially for political appointees — continental breakfasts and constituent relations, meeting and greeting. It is the inside-the-Beltway tango, a dance Aleinikoff is learning in his new role.

It has been nearly a year since Aleinikoff got the call from U.S. Attorney General Janet Reno to head the INS's legal division. But the transformation from University of Michigan law professor to Washington insider seems to suit him well.

"After more than ten years of writing about government policy, I finally have the opportunity to shape it," Aleinikoff says. "The change has been very rewarding." But being in the thick of things has not come without sacrifices, some of which strike close to Aleinikoff's heart. "One of the biggest things this job has done is take me away from my family," he muses. He missed his daughter's eighth birthday when the Department of Justice sent him to Cuba in October to negotiate with Cuban refugees in the camps at Guantanamo Bay.

9:30 a.m. Aleinikoff wraps up his meeting in time to catch a ride back to headquarters so he can join high-level INS and Department of Justice officials for a congressional briefing. The INS, responding to increasing political pressures, is announcing new streamlined political asylum procedures designed to deter fraud. On the short ride to Capitol Hill — in the obligatory dark blue, government-issue Lincoln — Aleinikoff and the other Department of Justice officials engage in some last-minute preparation. Spirits are high as they review documents and share late-breaking information.

Aleinikoff's job today is to serve as an educator as well as legal advisor, helping to explain the new policies to Senate and House staff members. After more than a decade of teaching constitutional law, immigration and refugee law, and race discrimination at the Law School, the educator's role comes naturally. His role as Department of Justice attorney is also familiar, however. Before joining the faculty, Aleinikoff spent three years in the Office of Legal Counsel of the Department of Justice and as counselor to the associate attorney general.

Wielding press releases, informational packets, and good humor, Aleinikoff's group takes the podium. The growing national controversy over illegal immigration and related issues has drawn a standing-room only crowd.

After the briefing Aleinikoff is ecstatic. "This was double the normal turnout," he remarks as he wades through a crowd of Hill staff. With the INS frequently under fire from both the public and the Congress, he is encouraged by the generally friendly tenor of questions from congressional staffers.

The INS, a long-neglected and underfunded agency, frequently has suffered accusations of a lack of professionalism. One of Aleinikoff's main goals as general counsel is to make the agency more service-oriented and to restore a sense of professionalism. His obvious pride in a job well done is evident. "It was a polished presentation," he remarks, "We were well-prepared and it showed."

11:15 a.m. Back at the INS headquarters in its crowded, windowless conference room, Aleinikoff stands beside his long-time friend and colleague, INS Commissioner Doris Meissner, as they face representatives of non-governmental organizations. The educator in him once again takes center stage as he and Meissner explain the new asylum regulations to the group. Traditionally watchdogs of the agency, the NGOs are surprisingly docile today and express only mild dismay about the restrictive new policies. Their cooperation is a testimony to the effectiveness of Aleinikoff and Meissner's consensus-building philosophy and approach.

"When the agency began to consider proposals for asylum reform, we brought NGOs in on the process," Aleinikoff explains. "We also seriously considered all of the comments that were submitted in response to the proposed regulations. Where it was feasible and appropriate, we incorporated the suggestions into the final rule."

12:00 p.m. Amidst glaring lights and camera crews jockeying for position, Aleinikoff confers with Commissioner Meissner as she prepares to give a press conference. All the major networks are represented. Aleinikoff stations himself off to the side, just outside the range of the numerous assembled cameras and microphones.

"This is just how I like to keep things," he remarks. "I like to be keeping an eye on things from the sidelines. I'm there if they need me, but I'm not in the spotlight." However, anonymity is not in the cards for Aleinikoff today. As the press conference draws to a close, reporters descend upon him.

After handling a few questions, Aleinikoff invites reporters to call him in his office that afternoon. In the solitude of the empty corridor Aleinikoff explains, "It is important to develop a good relationship with the reporters. If you have a relationship, they are more likely to contact you and listen to what you have to say before they run a critical story."

1:00 p.m. Armed with a tuna sandwich and a thick stack of message slips, Aleinikoff settles in at his desk to fire off a few calls. He speaks with a *New York Times* reporter and confirms a speaking engagement. Next, he calls a call to a senate staffer. "The senator was too busy to take the Attorney General's call, so I've been asked to call his staffer," Aleinikoff explains. "Can you imagine being too busy to take Reno's call?"

1:45 p.m. Aleinikoff is on the move again, this time to a highly confidential meeting at the White House. A core group of top administration officials are discussing pressing immigration-related issues. "I wish I could take you with me," he tells an aide, "but it is very top-secret. I'm surprised I'm even invited," he jokes.

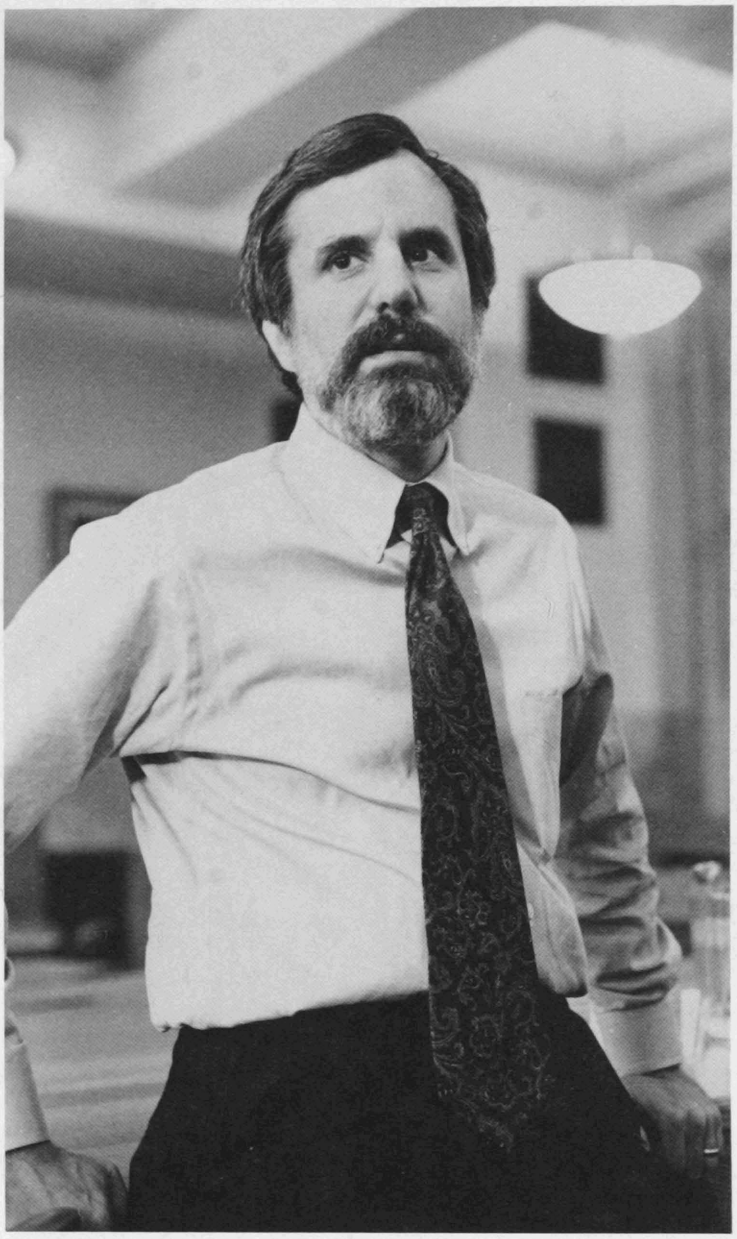
4:00 p.m. Top secrets aside, Aleinikoff is attending to the less glamorous side of his job — supervising a staff of more than 400 attorneys. He is interviewing a candidate for a position in the General Counsel's office. "The INS is an agency in transition," he explains to the candidate. "It is moving away from its Cowboy Agency image and becoming more of a policy agency." That's precisely the reason that the administration has recruited academics like himself.

The interview is interrupted by a puzzling call on Aleinikoff's secured phone line, a line which cannot be tapped. It is the first call he has received on this special line in almost a year on the job. "When I answered the phone," Aleinikoff recounts, "the person on the other end said, 'Hi there, Prairie Dog.'" It is a wrong number, but he laughs and jokes that somebody must have forgotten to tell him his code name.

4:45 p.m. Aleinikoff is rushing down the hall in typical fashion (his secretary says she needs running shoes just to keep up with him) to check in on the status of pending litigation. Halfway down the hall he stops to help a secretary who is struggling to load heavy computer boxes onto a dolly. He commonly takes time for such courtesies, and it makes him popular with his staff.

6:15 p.m. As evening descends on Washington, Aleinikoff is still immersed in legal briefs and memos. After stopping to spend a few minutes in shared camaraderie with some of his attorneys, Aleinikoff turns out his lights and heads for home to spend a few precious hours with his family. But tomorrow he will be back, with his dancing shoes laced, performing the inside-the-Beltway tango once more.

— by Rebecca Story, 3L and Jay Reiff, freelance writer



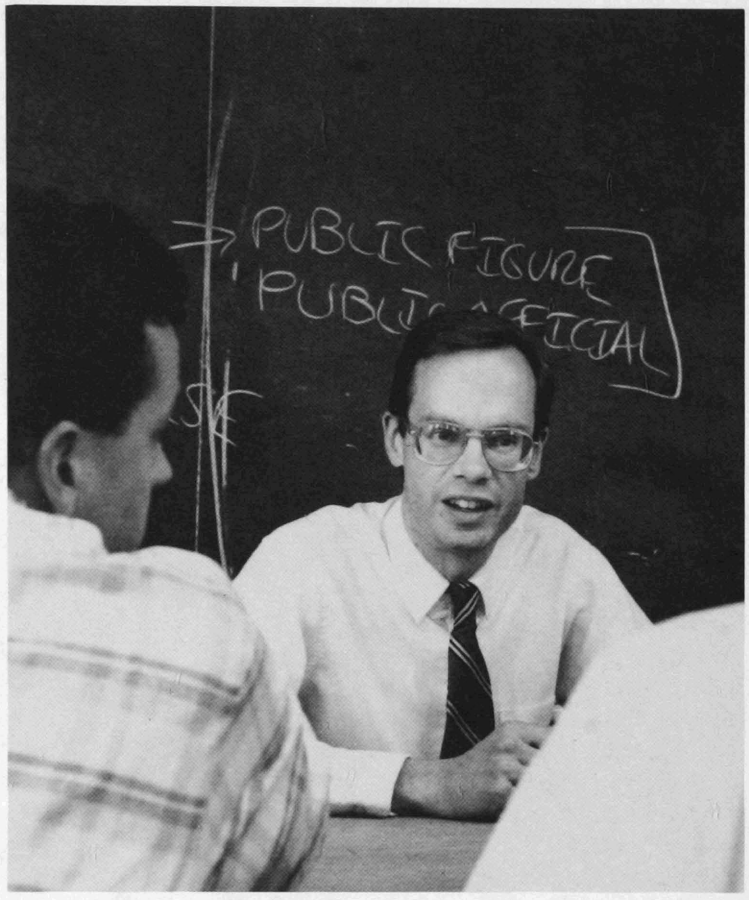
"After more than ten years of writing about government policy, I finally have the opportunity to shape it. The change has been very rewarding."

— ALEX ALEINIKOFF

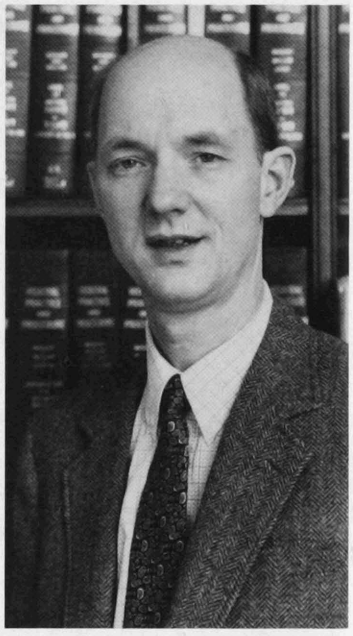
Syverud replaces Cooper

in associate deanship

Kent Syverud



Ed Cooper



AFTER THIRTEEN AND HALF years of dedicated service, Ed Cooper has stepped down from his post as associate dean for academic affairs.

Dean Jeffrey S. Lehman has appointed Professor Kent Syverud to the post. Cooper resumed teaching duties as Syverud became associate dean January 1.

Dean Lehman said, "The position of associate dean for academic affairs is a complex, often thankless job, requiring almost infinite resources of tact, creativity, and patience, as well as a pretty thick skin. The Law School benefited enormously from Ed Cooper's long and devoted service in this position. His calm, unflappable nature, his supremely good judgment, and his gentle wit have been a source of strength for the Law School during three different deanships, and we are all profoundly grateful to him."

An expert in civil procedure, Syverud is also well-known as an exceedingly civil individual. He will bring to the role his deep concern for students, staff, his fellow faculty, and the Law School itself. Said Lehman, "I count myself extraordinarily fortunate that Kent Syverud has agreed to serve as associate dean for the next two years. A high priority of my deanship is to make sure that we are providing our students with the finest professional education available, and no member of the faculty is more devoted to our students than Kent is. He has the universal respect of his colleagues, and I look forward to a successful and rewarding collaboration with him."

U-M Law School awarded $1.5 million from W. K. Kellogg Foundation

A more effective legal system for foster children is the goal of a new Child Welfare Law Program at the University of Michigan Law School.

The Law School won a $1.5 million grant from the W. K. Kellogg Foundation to create the program. The grant is part of the Kellogg Foundation's $22 million Families for Kids Initiative to reform foster care in the belief that too many children spend too long in such care. The initiative targets nine states and communities throughout the nation in a multi-year effort to facilitate dramatic changes in the child welfare system.

The purpose of the Law School's program is to enhance the quality and availability of child-centered legal services in the nine target areas. The Child Welfare Law Program will be connected with the school's Child Advocacy Law Clinic, headed by clinical professors Donald N. Duquette and Suellyn Scarnecchia.

The three-year Kellogg grant will fund six major activities. These activities were carefully designed to refocus the legal aspects of the child welfare system on the needs of individual children and to promote legal advocacy for children.

The new program will:

- Create Kellogg Child Law Fellows. Each summer, twenty law students with ability and interest in child welfare law will receive training at the Law School, then be placed for ten weeks in child welfare law offices. At least five of the fellows each year will be Michigan law students.
- Identify and network existing child welfare law offices in the target areas throughout the United States, disseminate information on model child welfare programs and practices, and help establish new ones.
- Develop an active network of child law teachers and scholars who will share materials to encourage and improve the teaching of child welfare law and to pursue national standards for lawyer performance in this field.
- Select four advanced Child Welfare Law and Policy Fellows each year from attorneys, judges, or law professors in the target communities. These advanced fellows will spend a semester at the University of Michigan and eight months in their home communities. The educational goal for the advanced fellows is exposure to an interdisciplinary approach to child welfare law and an in-depth knowledge of current law and public policy in the field.
- Direct legal reform in Kellogg target communities. The program will offer legal consultation on child welfare law, legal policy and child welfare law training. The program will also lead legal reform focus groups and follow-up legal reform progress meetings, involving lawyers, judges, members of key legislative committees, social workers, state child welfare agency officials, advocacy group representatives, and foster parents. The focus groups and progress meetings will allow communities to compare their experiences, discuss areas of mutual concern and share strategies for improvements.
- Establish a Child Welfare Law Resource Center for Michigan. The center will have four major objectives: organizing a network of lawyers practicing child welfare law in the state; providing high-quality training sessions for 50 to 100 such lawyers and judges annually; developing practice manuals for each attorney role (the agency, child's and parents' attorneys); and providing technical assistance to member lawyers, including phone consultation, research assistance, a computer network, and a quarterly newsletter. The Michigan resource center will be a prototype for the development of similar centers in the other target communities.

"It is terrific to receive this grant," said Duquette, who was instrumental in crafting the program proposal. "Child welfare law is an important field, and combining our talents and experience with the foundation's resources should improve the lives of children who are in foster care or facing foster care. Ours will be an important partnership with the Kellogg Families for Kids Initiative and the target communities.

"The goal of achieving permanent families for children will be frustrated without a child-sensitive legal system. In turn, a child-sensitive legal system depends upon a bench and bar of considerable sophistication and competence," Duquette added.

Law School Dean Jeffrey Lehman noted, "This grant will greatly strengthen the postion of the Law School as a leader in this important field and will help focus law

"The goal of achieving permanent families for children will be frustrated without a child-sensitive legal system. In turn, a child-sensitive legal system depends upon a bench and bar of considerable sophistication and competence."

— DONALD N. DUQUETTE

schools and the legal profession generally on the serious unmet legal needs of children."

The Kellogg Foundation has five specific outcomes it hopes to promote through the Families for Kids Initiative. They are: that any family in contact with the child welfare system will have ready access to services which help them solve or cope with everyday problems; that within one year, each child who enters the child welfare system will be found a permanent home; that to ensure consistency, a family and a child will work with the same caseworker or casework team until the child finds a permanent home; that a family's needs will be evaluated by a single, coordinated assessment process that includes all family members; and that children will not be shuttled between foster homes but will remain in a single, stable foster home in their own neighborhood.

The W. K. Kellogg Foundation was established in 1930 to "help people help themselves." As a private grant-making organization, it provides seed money to organizations and institutions that have identified problems and designed constructive action programs aimed at solutions.

Most foundation grants are awarded in the areas of youth, leadership, philanthropy and volunteerism, community-based health services, higher education, foods systems, rural development, groundwater resources in the Great Lakes area, and economic development in Michigan.

Clinics expand staff

The Law School's clinical programs added three new staff members this fall, and are expanding enrollment capacity for these popular courses.

Mary Ann Snow and Brenda Thornton joined the Women and the Law Clinic as clinical assistant professors.

Snow, an attorney with Legal Services of Southeastern Michigan, has been supervising Michigan law students with the Family Law Project since 1992. She previously was an assistant U.S. attorney in the Eastern District of Virginia and an assistant prosecuting attorney for the Commonwealth of Virginia. She defended legal and medical malpractice cases at the appellate level as an associate with the Washington, D.C. firm of Jordan, Coyne, Savits & Lopata from 1985 to 1988, and handled a similar caseload when she moved to Norfolk and joined the firm of Williams, Kelly & Greer. She earned her law degree from the Catholic University of America Columbus School of Law in 1983.

Snow notes that her new role with the clinic expands upon her work with the Family Law Project. "The work at the Women and the Law Clinic is somewhat broader; it includes sexual harassment and employee discrimination, in addition to domestic violence and child custody cases," she says. "With the clinic, I've really enjoyed teaching in a structured classroom setting and working with law students on cases, simulations, and mock trials. We're offering students a lot of practical application opportunities with real cases as well as simulations, which is just a tremendous experience to take into their lives as new attorneys."

A desire to teach brought Thornton to the clinic. She has six years' experience in private practice, where she specialized in family law and employment law. Most recently, she was assistant general counsel for SMART, the regional transportation authority for the Detroit suburban area. In 1989, she taught legal research and writing at Oakland Community College. Thornton graduated cum laude from Detroit College of Law in 1987.

With additional staff, the Women and the Law Clinic was able to expand enrollment from ten students to twenty in the winter term.

Naomi Woloshin joined the Child Advocacy Clinic this fall as a staff attorney. She previously was in private practice in Chicago, specializing in domestic relations. She also has prosecuted attorney misconduct hearings for the Illinois Attorney Registration and Disciplinary Commission of the Illinois Supreme Court. She worked as a mediator for the Circuit Court of Cook County. "The thing I'm most excited about is integrating my mediation experience into the clinic and handling cases in the Washtenaw Juvenile Court," Woloshin says. She graduated cum laude from the University of Wisconsin Law School in 1984.

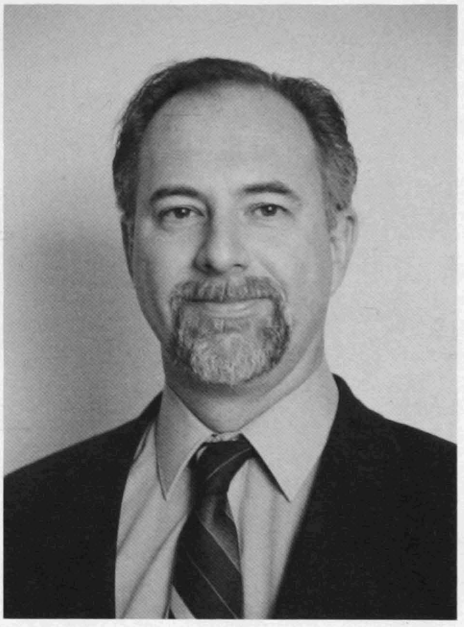
The Program in Legal Assistance for Urban Communities welcomes Warren T. Dean, new clinical assistant professor and specialist in urban economic development law. Dean was most recently assistant director of the law, properties and development section for the city of Cleveland, where his work particularly related to housing and economic development. Prior to that he was an associate at Jones, Day, Reavis and Pogue in Cleveland, where he practiced as a member of the environmental health and safety section. Dean is a graduate of Stanford Law School and he also has a master's degree in urban and regional planning from the University of Wisconsin.

He will be involved with students on a number of projects, including some possible new rental housing construction in the Detroit area. "I'll also be working with students on monitoring state legislative proposals related to urban development," adds Dean.

The Law School is continuing to explore ways to make diverse clinic experience available to the increasing numbers of interested students.

Brenda Thornton

Naomi Woloshin



Warren Dean

Mary Ann Snow

Field's efforts for women recognized

Julie Field received the 1994 Mary Foster Award from the Women Lawyer's Association of Michigan.

The award is given to a WLAM member who has demonstrated leadership, talent, and significant contributions to women attorneys and women in general. Field was recognized for representing the victims of domestic violence or discrimination at the Law School's Women and the Law Clinic, which she directs. She currently represents Jennifer Ireland, a U-M student who is appealing a Macomb County Circuit Court ruling that grants custody of her 3-year-old daughter to the child's father because Ireland uses day care while she is in class.

Field is the director at large for WLAM and co-chair of its Reproductive Rights Committee.

Shaw argues desegregation case before Supreme Court

Theodore Shaw, an assistant professor now on leave to the NAACP Legal Defense and Educational Fund Inc., argued a case before the U.S. Supreme Court in January that could have a significant impact on the future of school desegregation.

Shaw is representing the Kansas City School District and a group of African American parents in *Missouri v. Jenkens,* a case that questions how to determine the success of integration efforts. The State of Missouri claims it has met its court-ordered obligations to provide equal education opportunities; the school district and parents are arguing that desegregation efforts must continue because student achievement has not improved.

In 1986, the state and the school district were found to share liability for unconstitutional segregation in the schools. Since then, the state has spent $800 million and the school district another $500 million to upgrade facilities and educational programs. Two lower federal courts have found that the state must continue to pay for school improvements, in part because student achievement test scores are at or below national norms.

The state contends that test scores are an irrelevant measure of whether or not discrimination still exists in the schools. The schools believe achievement scores provide evidence that the state has not adequately remedied the actions that resulted in substandard schools.

The high court's ruling could affect hundreds of school districts that remain under court-supervised desegregation plans.

Visiting faculty

Another group of accomplished visiting faculty are enriching the Law School's curriculum. Winter term visitors include:

Elizabeth Anderson is an associate professor of philosophy and women's studies at the U-M. She teaches and conducts research in the areas of ethics, social and political philosophy, philosophy of the social sciences, and feminist theory. Anderson was awarded the University's Arthur F. Thurnau Professorship for excellence in undergraduate teaching in 1994 and is the author of *Value in Ethics and in Economics.* At the Law School, she is teaching a seminar called Law, Economics, and Alternatives to Both.

Charles Borgsdorf is a partner in Hooper, Hathaway, Price, Beuche and Wallace in Ann Arbor. He taught Lawyers and Clients here last winter and is offering the class again this term.

William E. Fisher is a partner at Dykema Gossett in Detroit, specializing in estate planning. He is co–teaching a course on Estate and Gift Tax with Professor Douglas Kahn.

Koichiro Fujikura is a professor of law at the University of Tokyo. He holds undergraduate degrees from Doshisha University in Kyoto and from Amherst College. He also has earned graduate degrees in law from the Northwestern University and Harvard Law Schools. He last visited and taught at the Law School in 1987. This term, he will teach the Japanese Legal System course.

Rod Glogower is rabbinic advisor for B'nai B'rith Hillel Foundation serving U–M and Ann Arbor. Also a repeat visitor, he is again teaching Jewish Law.

Elizabeth Kinney, a 1968 graduate of the Law School, is regional director for the National Labor Relations Board, processing unfair labor practice cases in the Chicago area. Previously, she was assistant general counsel to the Division of Operations Management for the NLRB in Washington. She is teaching Advanced Problems Before the National Labor Relations Board.

Peter Kuijper, a legal advisor to the European Commission, will be teaching the European Union and International Economics/Trade Relations.

Michael McIntyre, a graduate of Harvard Law School, has taught various tax law courses at Wayne State University for more than fifteen years. He is the founding editor of *Tax Notes International* and currently serves on its advisory board. He also has been a consultant to the Navajo Tribe on business activity tax matters and has taught American Indian Law. He is teaching Tax I this term.

Leo O'Brien is a professor emeritus at the University of California Hastings College of Law. He previously has served on the faculties at the University of San Francisco, Gonzaga, and Notre Dame Law Schools, and was dean of Loyola Law School. At the Law School this term, he is teaching Evidence and Civil Procedure II.

Steven Pepe, a frequent Law School visitor, is again teaching Lawyers and Clients. A U.S. Magistrate, he formerly was director of the Law School's clinical programs.

Steven W. Rhodes, J.D. '72, a federal bankrupcy judge in Detroit for the past ten years, has taught bankruptcy at the Law School twice. This term, he returns to teach Advanced Chapter 11 Bankruptcy.

Mark Rosenbaum, general counsel of the ACLU Foundation of Southern California, taught Public Interest Litigation in the 90's last year. This year he returns for six weeks to repeat that seminar and to teach Advanced Constitutional Litigation and Remedies.

Benjamin Schwendener, a partner in Honigman Miller Schwartz and Cohn in Lansing, returns to the Law School for the second year to teach State Taxation.

Ted Shaw, currently on leave from the Law School faculty to serve as associate director-counsel of the NAACP Legal Defense and Educational Fund, Inc., will return for a week in February and again in April to teach a seminar called Race, Racism and American Law.

Steven D. Smith is an associate professor at the University of Colorado Law School. A First Amendment scholar, he has written many articles on the free exercise of religion, the separation of church and state, and related court decisions. He is teaching Introduction to Constitutional Law and a course called Religion and the Constitution.

Al Sommer, a 1958 Harvard Law School graduate, served as a commissioner with the U.S. Securities and Exchange Commission from 1973-76. He has been a partner at Washington law firms, most recently Morgan, Lewis & Bockius. He is teaching Securities Regulation during the winter term and residing at the Lawyer's Club.

Edward Stein, J.D. '66, is a partner at the Ann Arbor law firm of Stein, Moran & Westerman, P.C. He is teaching Trial Practice.

1994 Faculty publications

It was another prolific year for the University of Michigan Law School faculty, who published the works listed below in 1994.

Layman Allen

"Controlling Inadvertent Ambiguity in the Logical Structure of Legal Drafting by Means of Prescribed Definitions of the A-Hohfeld Structural Language," with Charles Saxon, 9 *Theoria* No. 21 135-172.

Jose Alvarez

"Legal Issues," a chapter in *A Global Agenda: Issues before the 49th General Assembly*, (S. Woolfson and J. Tessitore, eds).

"Positivism Regained, Nihilism Postponed," (review essay) 15 *Michigan Journal. of International Law* 747.

"The 'Right to Be Left Alone' and the General Assembly," in 5 *ACUNS Reports and Papers* 5.

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David Chambers

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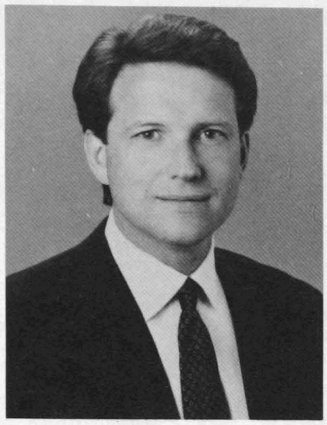
Ready for prime time



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David Westin

You might say David Westin watches television for a living. Every day he monitors the major network newscasts to compare their contents. He keeps a sharp eye on ratings and advertising revenue. He worries about election coverage and O.J. Simpson coverage and prime time programs. It's all in a day's work for Westin, a 1977 Law School graduate who was named president of ABC Television Network Group in September.

IT'S A POST HE NEVER DREAMED he'd hold as recently as five years ago when he was a partner practicing international corporate law at Wilmer, Cutler & Pickering. "I was a lawyer well removed from television and entertainment law generally," he says. "This was not part of my plan at all."

But late in 1990, Westin got a call from a former Wilmer partner who was about to leave the general counsel's post at Capital Cities/ABC, Inc. He offered the job to Westin. They met, they talked with network officials, and six weeks later, Westin was the new general counsel.

Both the management role of a general counsel and the legal issues involved were new to him, but he obviously learned the TV business quickly and well. After just two years, he was named senior vice president of Capital Cities/ABC; six months after that, he was named president of production for the ABC Television Network Group. After 14 months of steering ABC's new in-house production unit, he was named president of the entire network.

Television — especially the programming arena — is nothing if not a high-risk venture, which was brand new territory to a lawyer trained to minimize risk. "When I was a partner in a law firm, my job was essentially to make sure my clients had no risk, or as close to no risk as possible. If you go into television production with that view, you simply won't make any shows," Westin says.

"A drama costs well over a $1 million per episode, and a comedy is about three quarters of that per show. You make these in groups of 13 or 22 episodes," he explains. "You have to invest millions of dollars in a program before it's even on the air, and even after it's on the air, it will be months or even years if you know if you have an asset that's worth anything," he says. "It's a situation where you either have a very big hit and you make hundreds of millions of dollars, or you lose tens of millions. You know going into it that most of your shows w fail, and it will cost a lot of money to fi the few that will succeed. It's just a fundamentally different mindset."

Until recently, it was production studios, not the networks, who took th huge financial risk of developing prime time programming. Historically, net-works sold advertising time, collected t cash, purchased programs from studios and tried to come out in the black at th end of the year. Recently, Federal Communications Commission regula-tions relaxed to allow the networks to own and produce more of their own shows." That's a fundamentally differen business for Capital Cities/ABC than jus about any business it's been in before," Westin says.

Like traditional television studios, ABC Productions contracted with creators to develop and produce new shows. However, like any good risk manager, Westin diversified by trying new joint ventures, too. "We have some arrangements where we provide financ-ing to independent producers for movi or series because we thought they were established, accomplished people who could succeed without the backdrop of a studio to help them along," he says. In another joint venture, ABC co-owns programs with two major studios, Warner Brothers and MCA-Universal. Third, the network struck a deal with Los Angeles talent agency Brillstein-Gra to develop shows by working directly with the talent, without a studio in the middle. And in December, Westin announced that ABC had formed a $200-million partnership to create a new TV studio with the production group recently established by entertain-ment moguls Steven Spielberg, Jeffrey Katzenberg, and David Geffen. "Which of those approaches will succeed, if any I can't tell you. We tried a range of alternatives to find one or two new way that will work, but it's too soon to say."

Of the new programs ABC produced on his watch, Westin says, "I don't think I have huge hits, but frankly, it's too early to judge. The show I care about the most is 'Me and the Boys,' a sit com with a star, Steve Harvey, who I think will do very well on television. It's doing well, but not as well as I'd like it to."

He is proudest of "My So-Called Life," an hourlong drama about teenage angst from the producers of "thirtysomething." "I'm very glad we made that show. It's powerful television that we should always have a place for in our schedule," says Westin, who has two teenage daughters himself. "Having said that, it's not a runaway commercial hit," he admits.

In his new role as president, Westin watches over much more than the hits and flops. ABC has about 4,800 employees in five divisions that correspond roughly to the types of programming you can watch at different times of the day (prime time, daytime, news, sports, and children's shows), plus sales, affiliate station relations, accounting, and public relations. Like any business executive, what he does is try to keep all that running as smoothly as possible. "It ranges from personnel decisions to programming decisions to acquisitions and joint ventures," he says. The difference is that he makes those decisions in an office equipped with two televisions with split screens, so he can watch four channels at once to keep an eye on the competition. The work he carries home each night includes four or five videotapes of potential new shows. When he's not watching those, he's watching the ABC line-up or the competition.

On paper, Westin doesn't seem like the kind of guy you'd find running a television studio or network. He possesses the ultimate lawyerly pedigree: a bachelor's degree with honors from Michigan, first in his class at the Law School, a member of the *Michigan Law Review*, a Supreme Court clerk for Justice Lewis Powell. It's a resume that would lead to a practice in a prestigious firm or to teaching at the best law schools. In fact, Westin has done both. He joined Wilmer, Cutler and Pickering in 1979 and made partner in 1985. He also has been an adjunct professor at Harvard and Georgetown and coauthored a treatise on international civil litigation.

However, he already sounds like an experienced television executive, speaking with an impressive grasp of both the economics and the ethics of television. Law Professor Peter Westen (no relation), who has known Westin well since collaborating with him on a faculty-student research project, says his former student has succeeded at the network because he's a quick study with good judgment. "David is very quick to master the details of something new," he said. "He has confidence in his ability without being at all arrogant. He's gained the confidence of network executives by impressing them with his judgment."

The network president displays that grasp of detail and good judgment when asked about violence on television. He gives a thoughtful, comprehensive answer that, at its heart, goes to television's role in society. About violence, he says:

- On-air violence is a serious issue and networks should be reviewing it constantly.
- That said, the issue is often oversimplified; networks are inclined to say there is no problem with violence, while social scientists say all TV violence is bad. "The fact is, it depends on the violence, on how it's portrayed, and how it's watched. There are some portrayals of violence that are inevitable. They are an essential part of telling a dramatic story. The proper depiction of violence can be prosocial, because it can show that there are bad consequences of violence."
- TV may not cause viewers to imitate a violent act, but it may desensitize the audience to violence.
- Today, there is probably less violence in the prime time schedule than a decade ago because comedies have replaced action-packed crime dramas like "Starsky and Hutch," mostly because they are cheaper to produce.
- Violence is worst on the local news, which both desensitizes and creates fear with a steady flow of grisly murder stories, and on promotions for movies, which package together all the violent scenes with no context at all.

In Westin's view, it is the misuse of television, not the violence it shows, that is dangerous. TV is wonderful for seeking news or entertainment, he says, "but TV was never designed for people to spend eight hours a day watching. No one in their right mind would have invented this as a babysitter, where you sit your kids down to watch for six or eight hours a day.

"I say that recognizing that it's against my interests, but the fact of the matter is, you are not supposed to get all your education from TV.

"You are not supposed to get all your nurturing from TV. You are not supposed to get all your stimulation from TV. It wasn't supposed to substitute for family and church and friends and all the other societal institutions."

Any child watching that much TV is bound to do antisocial things, he adds, "but I'm not sure how much of that is because of violence; it might well be true if I showed him sit coms all day."

LQN

— by Toni Shears

Spotlight on

RHONDA EDWARDS, J. D. '93

Her job: A second-year associate in general corporate law at LeBoeuf, Lamb, Green and MacRae in Manhattan.

Her avocation: The Pennsylvania Project, a weekly literature program for minority teens she launched in her living room in September 1993. About a dozen students between the ages of 12 and 17 gather in her apartment for snacks and discussions of fiction, autobiographies and historical works that help add a richer context to their high school education.

Her inspiration: When she started college at Harvard, she realized that her high school education had missed much of the literature by minority and female authors. "I read everything I could get my hands on to broaden my knowledge, but I really wished I had been exposed to this when I was younger," she says. When she returned to her hometown of Mount Vernon, New York after law school, she realized the teenagers living on her parents' block seemed bored. "They didn't have anything to fill their time but music videos and video games. Some went to exclusive private or parochial schools, but I noticed their vocabularies weren't that good. I thought I could get them together to do something to improve vocabulary and reading comprehension and improve their college admission test scores. It would be nice if they didn't have to catch up at college."

Her impact: "At first students came because their parents said they had to. Now they seem to love coming. They tell me they are doing fine in school but there is nothing in their school work that seems familiar, that they can connect to. I've tried to give them books by minority authors that are interesting and fun for them that they haven't been exposed to before. They feel more connected when we read historical or autobiographical works written by authors who place their observations in an ethnic context, simply by virtue of their being African-American, Latino, Asian, or Native American. These books help students put the history they learn in school in the context of their people. For example, we've read things that showed them that the end of the Civil War did not bring an immediate change in the status of African Americans or women. They had no idea how recently the empowerment of these groups occurred.

"The literature discussions sometimes get sidetracked into current issues on their minds. For instance, *The Autobiography of Malcolm X* turned into a referendum on the treatment of women by Black men. We had a meaningful discussion about harassment, the content of music videos, and the (derogatory) terms used for Black women. The boys and girls talked to each other in a respectful way. A lot of the boys are very upset about what they perceive as the widespread image of Black men in America as being on the way to jail or just out. The young women get tired of hearing young men complain about the poor image projected of them because they feel that the Black woman's image is projected just as badly. The small setting of our session gives the young women and some of the young men who are often reluctant to express their thoughts a chance to assert themselves."

What it takes: "I spend about fifteen hours a week to read the assigned works, keep up on the news for discussions of current events, and grade homework assignments. Sometimes I'll bring in movies or rap music or plan outings; in February, we're going to see an exhibit called 'The Black Male' at the Whitney Museum in New York."

What they are reading: *A Lesson Before Dying* by Ernest Gaines; *Devil in a Blue Dress*, a Walter Mosely mystery; *Luna* by Octavia Butler; *The Fire Next Time* by James Baldwin; *Lucy* by Jamaica Kincaid; *Meridian* by Alice Walker.

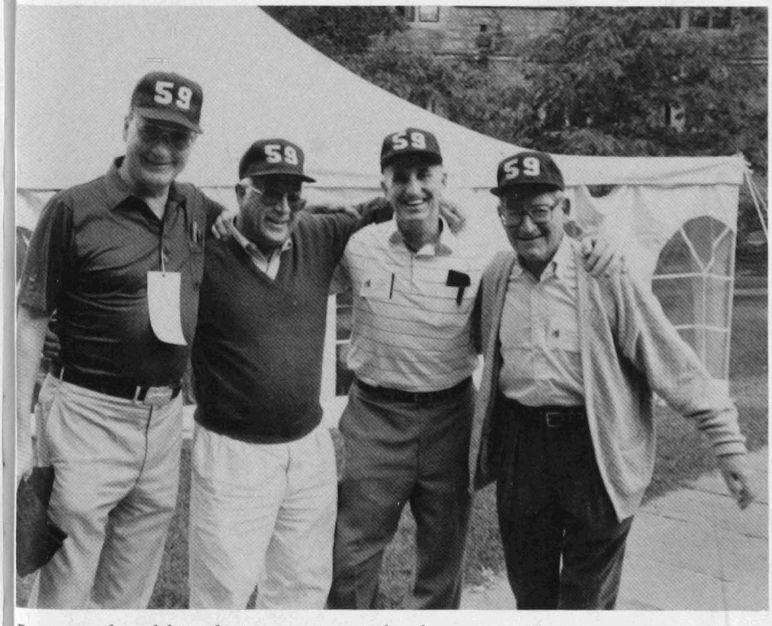
What she is reading: Martin Luther King's *Why We Can't Wait*; Isabella Allende's novels; Chinua Achebe's *Things Fall Apart*; *The Speeches of Malcolm X*; anything by Derrick Bell.

Her aspirations: Someday, a doctorate and a post in academia where she "could be deliriously happy teaching, reading, and writing."

LQN

Renewal at reunions —

Two reunion weekends at the Law School last fall were occasions for graduates to renew friendships with classmates and their relationship with the Law School itself. More than 350 graduates from nine classes returned to the Law Quadrangle for reunions held Sept. 23-25 and Oct. 28-30. As always, the reunions offered plenty of time to get reacquainted over class dinners and brunches in the Quadrangle, as well as an opportunity for intellecual renewal at faculty presentations. The Class of '49, not content with only the dramatic Colorado football game for entertainment, put on musical skits.



Renewing friendships during reunion weekend were (l-r)Fred Furth, Ron St. Onge, John Swinford, and Stanley Bergman.

The Classes of '43, '44 and '45 were inducted into the Emeritus Club at a June reunion.

CLASS *notes*

1936

William A. Groening Jr., founding chairman of Saginaw Valley State University, was honored in August at the groundbreaking for a new complex there to be named in his honor. Groening now resides in Delray Beach, Florida.

1939

Earl C. Townsend Jr., a trial lawyer in Indianapolis for 55 years, still tries criminal cases regularly. He writes: "I miss John Dillinger and Al Capone. I represented their machine gunners to the last man, and brought Al's men to Indianapolis, set them up in the restaurant business, and hired them as truck drivers for my Consolidated Freightways. They were expert drivers, as they had much experience driving getaway cars for John and Al." Townsend played basketball for Michigan and roomed with Gerald R. Ford at the Deke House. "Ford and my brother and I were the dishwashers. We never smoked cigarettes, and are the only ones alive of the 48 in the 1935 Deke picture."

1940

John H. Pickering continues to collect awards honoring his remarkable career. The Fellows of the American Bar Foundation recently presented him the Fifty Year Award for adhering to the highest principles and traditions of the legal profession and public service for a half–century. In August, he received the Allies for Justice Award from the National Lesbian and Gay Law Association. The award recognizes his efforts in obtaining American Bar Association affiliated status for the group. He also was honored by the Emeritus Foundation, a Washington, D.C. group he helped found. The Emeritus Foundation provides retired members of the D.C. Bar an opportunity to perform volunteer service as emeriti attorneys, matching their legal experience with a wide range of unmet community needs. The foundation created the John H. Pickering Community Service Award in his honor. It will be presented each year to an emeritus attorney in recognition of excellence in public service.

1949

Avern Cohn, U.S. district judge for the Eastern District of Michigan, recently was re–elected to the American Judicature Society's Board of Directors at the society's annual meeting in New Orleans.

1950

45TH REUNION

The Class of 1950 reunion will be Oct. 6-7.

The Hon. Robert J. Danhof was appointed to the Michigan Historical Commission by Gov. John Engler.

1952

Bernard Petrie will serve on the board of the foundation created by his late father, Milton J. Petrie, founder and majority owner of Petrie Stores. The foundation leaves its trustees considerable latitude to act on their own charitable impulses.

Joseph Shulman of Southfield has been appointed a vice–chair of the Marketing Legal Services Committee in the General Practice Section of the American Bar Association.

1954

Giorgio Bernini, L.L.M. '54, S.J.D. '59, was elected to the Italian parliament in March 1994 and named minister of foreign trade in May. Bernini is a professor of commercial law at the University of Bologna as well as president of the International Council for Commercial Arbitration.

President Clinton recently named **Stanley M. Fisher** to the Federal Service Impasses Panel, an entity of the Federal Labor Relations Authority. The panel assists federal agencies and unions representing federal employees in resolving negotiation impasses. Fisher is of counsel with the Cleveland law firm of Arter & Hadden.

St. Louis attorney **Marvin O. Young** won the Distinguished Service Award of the Coal Lawyer's Conference for his legal service the American coal industry.

1955

40TH REUNION

The Class of 1955 reunion will be Oct. 6-7.

Robert C. Strodel of Peoria, Illinois has been certified a diplomate of the American Board of Professional Liability Attorneys. Such certification is by invitation only; it is based on professional peer review of a candidate's involvement in liability litigation.

1956

William L. Randall received the Milwaukee Foundation's 1994 William C. Frye Award for civic leadership. The former president and chief executive officer of First Bank Milwaukee, Randall has lead many efforts to improve the city and has been a strong advocate for education, youth services, and the arts.

1957

John M. Saylor has been elected chairman of the Michigan Construction Industry Self Insurance Fund Board of Trustees.

1958

Fritz W. Reichert–Facilides, law professor at the University of Innsbruck, has been decorated with the Große Silberne Ehrenzeichen für Verdienste um die Republick Österreich, one of the highest honors awarded by the Federal Republic of Austria, for his lifetime achievements.

1959

J. Richard Emens was named vice–chairman of Franklin University in Columbus, Ohio.

1960

35TH REUNION

The Class of 1960 reunion will be Oct. 6-7.

1961

U.S. **Rep. John Edward Porter** (R–Ill.) has been named the new chairman of the House Appropriations Subcommittee on Labor, Health & Human Services, and Education. In addition to funding the departments in its title, the subcommittee covers a wide range of related programs, including biomedical research, assistance for the disabled, Medicaid, Medicare, and Social Security.

1963

A. **Paul Victor** has been elected vice–chair of the American Bar Association's Section of Antitrust Law for 1994–95. He is a partner specializing in antitrust and international trade law with the firm of Weil, Gotshal & Manges.

1965

30TH REUNION

The Class of 1965 reunion will be Oct. 6-7.

Paul C. Sprenger was among the attorneys who successfully represented more than 350 African American employees in a discrimination suit against the U.S. Department of Labor.

1966

I. William Cohen recently was appointed by the U.S. Department of Labor to evaluate the aggregate assets and liabilities of the nationwide Federal–State U.S. Employment Service. A nationally recognized bankruptcy

lawyer, Cohen will design and carry out a study of the service using techniques and disciplines typically used to evaluate a corporate enterprise rather than those more traditionally applied to a federal program.

George A. Cooney and co–author Harold A. Draper have published the fourth edition of *Probate Administration in Michigan: A Systems Approach* (Institute of Continuing Legal Education, 1994). Cooney is a partner in the firm of Cooney, Trainer & Wall, P.C., of Bloomfield Hills.

Ingham County Circuit Court Judge **Michael G. Harrison** has been reelected president of the Michigan State Bar Foundation, a charitable organization that provides grants to worthy programs intended to advance the administration of justice.

Pace University School of Law Professor **John Nolon** has won a Fulbright Scholarship to analyze Argentina's legal system for controlling land and natural resource use. Nolon, director of the Pace Land Use Law Center, also has received a $30,000 grant from the Henry Jackson Foundation to continue his research on the land use system in the United States.

Richard F. Vitkus was elected to the board of directors of Zenith Electronics Corp., where he is senior vice president and general counsel.

1967

John H. Norris recently served as the court–appointed natural gas law counsel to the claims mediator in the Columbia Gas Transmission Corp. bankruptcy pending before the U.S. Bankruptcy Court in Wilmington, Delaware. This complex case is one of the largest bankruptcies ever in the energy industry. Norris also was recently re–elected to the Board of Trustees of the African Wildlife Foundation and as vice–chair of the board of the Salk Institute for Biological Studies.

Stephen V. Petix left government service in June after more than 20 years with the United States Attorney's Office in San Diego. He has formed a law partnership with colleague Michael Quinton, also a former assistant U.S. Attorney. They will concentrate on federal civil litigation, defending medical malpractice, law enforcement misconduct and aviation accident cases.

1968

James Schwab was named vice president of finance and administration of Xtek Inc., a Cincinnati–based manufacturer of steel components for heavy industry.

Carl H. von Ende of Miller, Canfield, Paddock and Stone, P.L.C., was inducted as a fellow of the American College of Trail Lawyers in September. This national association of 4,800 fellows aims to improve the standards of trial practice, the administration of justice, and the ethics of the profession.

1969

John J. Collins has published a new book, *Buying and Selling a Business in Michigan* (Institute of Continuing Legal Education, 1994), with co–editors Charles W. Borgsdorf, an adjunct lecturer at the Law School, and Michael A. Indenbaum.

Thomas A. Goeltz has been appointed to the Washington State Regulatory Reform Task Force. He co–chairs the committee reviewing environmental permitting and land use reforms. He practices law at Davis Wright Tremaine in Seattle, where he is chairman of the Real Estate and Land Use Department.

Robert J. Millstone has been elected vice president and general counsel of ARCO Chemical Company. Millstone was a senior executive of the Securities and Exchange Commission and a partner in a Washington, D.C. firm before joining ARCO in 1989.

CLASS *notes*

1970

25TH REUNION

The Class of 1970 reunion will be Oct. 6-7.

James N. Barnes and his wife, Anne Fuhrman, have moved to France, where he has taken the position of counseiller to the Friends of the Earth affiliate in Paris. He will be working with other affiliates throughout Europe on a project that focuses on the accountability of the World Bank, International Monetary Fund, European Bank for Reconstruction and Development, and other international development agencies.

1971

Edward T. Butt Jr. has become of counsel to Swanson, Martin & Bell, a litigation firm with offices in Chicago and Wheaton, Illinois. He will continue his practice with emphasis on the defense of industrial machinery manufacturers and on insurance coverage issues.

Abraham Singer recently was named managing partner of the Detroit office of Pepper, Hamilton & Scheetz. A senior partner at the firm, he has conducted an active business litigation practice at the firm for twenty years.

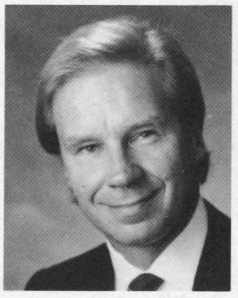
1972

Rick Lavers has left the firm of Michael Best & Friedrich in Milwaukee to become the general counsel of RMT Inc., an international environmental engineering firm headquartered in Madison, Wisconsin.

1973

Kristena A. LaMar of Portland, Oregon, was awarded an honorary certificate in dispute resolution by the Dispute Resolution Center of the Willamette University Law School. She also was named 1994 Legal Citizen of the Year by the Classroom Law Project.

1974



Patrick J. Hindert has been elected chairman of the board and treasurer of R.A. Jones & Co., a manufacturer of packaging machinery for the food, beverage, and pharmaceutical industries. Hindert also continues to serve as president of Benefit Designs, Inc. a national structured settlement company.

1975

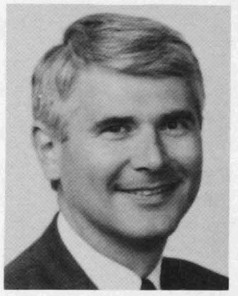
20TH REUNION

The Class of 1975 Reunion will be Nov. 10-12.

San Jose attorney **Scott Ewbank** has been elected to the Board of directors of International Voluntary Services, a private nonprofit development agency in Washington, D.C. IVS provides technical assistance and training for community development in underdeveloped countries, including programs in nutrition, AIDS prevention, agriculture, disaster preparedness, and empowerment of women. Ewbank first served with IVS in Vietnam in the late 1960s, running community development projects with mountain tribesmen.

Municipal bond executive **Stanley Grayson** was appointed to newly elected New York Governor George Pataki's transition team.

Martin T. McCue has been named corporate vice president of legal and planning at Rochester Telephone Corp.



Dennis K. Loy has opened a corporate, finance, and business law practice in Eastpointe, Michigan. He formerly was a partner at the firm of Miller, Canfield, Paddock and Stone of Detroit. Loy also is a founding member and current president of the Canada–U.S. Business Association.

1977

Alexander R. Domanskis has joined 1966 Law School graduate David L. Shaw in the firm of Shaw Gussis Fox & Domanskis, where he will continue his practice in real estate, business representation, and estate planning.

1978

John E. Grenke has been added to the name of the Bloomfield Hills, Michigan firm formerly known as Monaghan, LoPrete, McDonald, Sogge & Yakima. He has been a partner in the firm since 1988.

Chris E. Limperis has joined the Chicago office of Rooks, Pitts and Poust, where he will concentrate his practice in the area of health care law.

1979

James A. Burns Jr. has joined the Chicago law firm of Katten Muchin & Zavis as a partner. He continues to practice labor and employment litigation. He and his wife, Lori (Dickerman) Burns, also a 1979 graduate, live in Highland Park with their daughter Rachel.

Richard E. Cassard, a partner with the Grand Rapids, Michigan firm of Warner, Norcross & Judd, recently was elected to the council of the Michigan State Bar Health Care Law Section. He is among thirteen health law experts serving on the council of the new section.

David M. Lesser, has founded Klarian Enterprises, a telecommunications consulting and financial advisory firm. The firm specializes in matching businesses with equity sources; it also helps clients reduce the cost of telephone and data line use, with a particular focus on small– and medium–size law, accounting and other professional firms. Lesser also is a part–time partner at Katten Muchin & Zavis in Chicago.

1980

15TH REUNION

The Class of 1980 reunion will be Nov. 10-12

James A. D'Agostini has left the firm of Dickinson, Wright, Moon, Van Dusen and Freeman to become vice–president and general counsel of L. D'Agostini & Sons, Inc. and its affiliates. He is responsible for management and legal issues for the companies, which are engaged in public works construction and private development projects in southeastern Michigan.

Carol L.J. Hustoles now is associate general counsel at Western Michigan University.

Dale K. Nichols recently was named senior attorney in the legal department of the Northern Trust Company, Chicago. He focuses on trust, custody and fiduciary issues related to employee benefit plans.

Myra C. Selby has been appointed to the Indiana Supreme Court. She is both the first woman and the first African American justice to serve on the court. Selby was Indiana Gov. Evan Bayh's director of health care policy for the past sixteen months. Before that, she was an attorney with Ice, Miller, Donadio and Ryan for ten years.

1981

Brent J. Graber has joined the Chicago law firm of Blatt, Hammesfahr & Eaton as a partner. He will continue to represent insurers and reinsurers, particularly in insurance coverage litigation.

John C. Grabow has moved to Jackson Hole, Wyoming, where he operates a real estate development company and practices law. He also has a law office in Idaho. He formerly was a partner at the Washington, D.C. firm of Richardson, Berlin & Morvillo, and an adjunct professor at Georgetown University Law Center.

Jonathan Klein is general counsel for the Community Builders, a Boston organization that develops, finances and manages affordable housing. After six years in this role, he writes: "For me, this position was made to order. It gave me the chance to practice full time in the public interest. My work is extraordinarily satisfying. I consider myself quite lucky to have come so close to what I would consider an ideal career."

1982

Bryant Frank, senior counsel for City Management Corp. in Detroit, was named president of the Jewish Ensemble Theater this year. His goal is to widen the audience of the theater, which strives to preserve and nurture Jewish culture.

Sue O. Conway recently was appointed to serve on the State Bar of Michigan's Special Committee on the Hall of Justice. This committee is examining the feasibility of a privately financed hall of justice in Lansing that could serve as headquarters for the judicial branch of the state government. Conway is a partner in the Grand Rapids law firm of Warner, Norcross & Judd.

Suzanne M. Mitchell recently married Richard Zansitis. They live in Oak Park, Illinois. Mitchell continues in her position as associate general counsel to the University of Chicago Hospitals.

James G. Pachulski recently was promoted to vice president, general counsel and secretary of Bell Atlantic – Pennsylvania, Inc.

David Sandalow has been named an associate director in the White House Office on Environmental Policy.

Pauline Terrelonge joined the U.S. Department of Justice Civil Division, Office of Immigration Litigation in November. Previously, she was with the San Francisco city attorney's office, where she handled federal and state court litigation.

1984

John Ramsay was appointed counsel to Commodity Futures Trading Commission Chairman Mary Schapiro at the Securities and Exchange Commission.

Glen A. Schmiege has been named a shareholder at the law firm of Foster, Swift, Collins & Smith, P.C. A member of the firm's Government and Commerce Department, he practices primarily in the areas of telecommunications, oil and gas law, and administrative law.

Kathryn E. Szmuszkovicz now is serving on the management committee of Beveridge & Diamond, P.C., where she has practiced environmental law in the firm's Washington, D.C. office for the past ten years.

1985

10TH REUNION

The Class of 1985 reunion will be Nov. 10-12.

Susan T. Bart has joined the Chicago office of Sidley & Austin.

Steven L. Brenneman has been named a partner at Matkov, Salzman, Madoff & Gunn in Chicago.

Julie Greenberg is among several attorneys from the firm formerly known as Krass & Young, P.C., who have merged with Gifford, Groh, Sprinkle, Patmore & Anderson, P.C. Other graduates at the new firm of Gifford, Krass, Groh, Sprinkle, Patmore, Anderson & Citkowski, P.C., are **Doug Sprinkle**, J.D. '75, a partner; and **Ted Sherman**, J.D. '93, an associate. **Roberta Morris**, a visiting instructor at the Law School for several years, is of counsel to the firm.

David K. McLeod has become of counsel in the Detroit office of Miller, Canfield, Paddock and Stone, P.L.C. He previously was with the firm of Harvey, Kruse, Wexter & Milan, P.C., of Detroit.

Knute Rife has been elected prosecuting attorney in Klickitat County, Washington.

CLASS *notes*

Robert F. Schiff joined Public Citizen's Congress Watch in January as a staff attorney and lobbyist. He is responsible for Public Citizen's efforts on campaign finance reform, lobbying reform, and other congressional ethics issues. He also works on regulatory proceedings before the federal Elections Commission, and testified before Congress on the FEC's budget request.

1986

Kurt Becker has joined the Seattle office of Perkins Coie. He concentrates in business reorganization, bankruptcy and insolvency, and is board certified in business bankruptcy law.

Ronan P. Harty was named a partner at the New York firm of Davis Polk & Wardwell, where he specializes in antitrust law.

Mark A. Moran has been named a partner in the Washington, D.C. office of Steptoe & Johnson, where he practices in the areas of international law and international trade.

Andrew C. Richner recently was reelected to a two–year term on the Wayne County Board of Commissioners. He represents Detroit, Harper Woods, and the Grosse Pointes on the board. He also was elected minority leader of the commission.

1987

David R. Abrams has joined the Minneapolis office of Dorsey & Whitney as a partner specializing in health law. Previously, he served for three years as director of legal and policy affairs for the Minnesota Department of Health.

Brian K. Beutner has been promoted to assistant general counsel and assistant secretary at Jostens, Inc., a Fortune 500 company that provides products and services for the youth, education, sports and corporate performance and recognition markets.

Thomas J. Flanigan recently has joined M.D. Hodges Enterprises, Inc., an Atlanta, Georgia real estate development, leasing, and management firm. Previously, he was associated with the Atlanta law firm of Long, Aldridge and Norman.

Dan Pelekoudas has joined Latham & Watkins' Costa Mesa, California office. He concentrates his practice in the area of corporate securities.

Suzanne J. Thomas has become a shareholder of the Seattle firm of Stokes, Eitelbach & Lawrence, P.S.

Mary Jo Newborn Wiggins has been tenured as a professor of law at the University of San Diego School of Law. Her most recent articles include: "The New Rawlsian Theory of Bankruptcy Ethics," 16 *Cardozo Law Review* 111 (1994), and "Critical Race Theory and Classical Liberal Scholarship: A Distinction Without a Difference?", 81 *California Law Review* 101 (1994), with Roy Brooks.

1988

Paul A. Blumenstein has joined the Palo Alto office of Gray Cary Ware & Freidenrich as an associate, specializing in corporate and securities law.

Fernando A. Borrego has joined the Bloomfield Hills, Michigan office of Howard and Howard. He concentrates his practice in intellectual property law.

Anders Fallman has become a partner at Advokatfirman Cederquist in Stockholm, Sweden, where he practices in the area of corporate and securities law.

Karen M. Hassevoort has joined the Kalamazoo office of Miller, Canfield, Paddock and Stone, P.L.C., where she will handle local and national litigation matters.

Matt G. Hrebec has been named a shareholder at the firm of Foster, Swift, Collins & Smith, P.C. A member of the firm's Business & Tax Department, he practices primarily in the areas of employee benefits and securities law.

Margaret Lynch (formerly **Cegelis**), together with **Michael V. Kell**, J.D. '72, have formed the litigation firm of Kell & Lynch, P.C., in Birmingham, Michigan. The firm specializes in trials of civil litigation matters.

1989

T.J. Conley has joined the Minneapolis law firm of Leonard, Street and Deinard, where he specializes in employment law. He formerly was with the Legal Aid Society of Minneapolis.

Robert D. LoPrete has been named partner at his firm, McDermott, Will & Emery. He practices in the Estate Planning Department at the firm's Chicago office.

Lydia R. Kelley (formerly **Barry**), **Robert D. LoPrete**, and **Matthew Preston** have been named partners at their firm, McDermott, Will & Emery. All three practice at the firm's Chicago office. LoPrete practices in the Estate Planning Department; Preston's practice focuses on deferred compensation arrangements and benefit plan design; and Kelly focuses on federal income tax matters.

1990

5TH REUNION

The Class of 1990 reunion will be Nov. 10-12.

James D. Henderson recently joined the Boston law firm of Jager, Smith, Steler & Arata after four years with Cummings & Lockwood in Stamford, Connecticut. Also, in 1994 he successfully argued a case before the Connecticut Supreme Court in which a legal resident alien had been denied state welfare benefits. The Supreme Court found that his client had been denied equal protection of the law.

Rick Kornfeld has joined the firm of Isaacson, Rosenbaum, Woods & Levy in Denver after four years as an assistant U.S. attorney in Chicago. He and his wife, Julie Malek, became parents April 30 to a daughter, Madeleine Malek Kornfeld.

Joseph A. Messing now is counsel in the legal department of Morgan Stanley & Co., specializing in matters relating to the firm's asset management business. He formerly was an attorney with the New York firm of Rogers & Wells.

1991

Michael R. Carrithers Jr. has joined the U.S. Attorney's Office in the Eastern District of Michigan as an assistant to the General Crimes Unit of the Criminal Division. He formerly practiced commercial litigation at Gallard, Kharasch, Morse & Garfinkle in Washington, D.C.

Jordan R. Schau has joined the Kalamazoo, Michigan office of Miller, Johnson, Snell & Cummiskey, P.L.C., where he practices in the areas of litigation and family law.

1992

Victoria T. Aguilar has joined US WEST Inc. as an attorney in its State Regulatory and New Product Development Counseling Division. She married her classmate **Blair A. Rosenthal** in a November 1993 ceremony that included **Christopher Madel**, **C.J. Peters, Kate Poole**, **Steve Rosenblatt**, **Scott Schraeder**, and **Mark Stubbington**, all 1992 graduates. Rosenthal left the Minnesota Attorney General's Office to join the law firm of Winthrop and Weinstein, where he practices in the area of complex civil litigation and government relations.

Todd S. Holbrook has joined the litigation department at Bernstein, Shur, Sawyer and Nelson in Portland, Maine. He will concentrate his practice in the areas of intellectual property, product liability, and general commercial litigation.

Ger O'Donnell has joined the Chicago office of Vedder, Price, Kaufman & Kammholz as an associate. He is a member of the firm's commercial finance group.

Robert A. Seltzer has joined the Chicago law firm of Cornfield and Feldman as an associate. The firm specializes in labor relations and employment rights law.

Thomas L. Shaevsky has become associated with the law firm of Jaffe, Raitt, Heuer and Weiss in Detroit. He formerly was a law clerk to Judge John Feikens, U.S. District Court for the Eastern District of Michigan.

1993

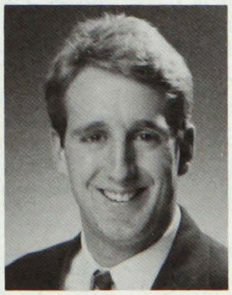
Christopher Ballard has joined the firm of Foster, Swift, Collins & Smith, P.C., as an associate. He is a member of the firm's Business and Tax Department. He formerly practiced at Coopers & Lybrand.

Kristen A. Gulling and **Amy Johnson** started a law firm called Johnson & Gulling in Minneapolis in January 1994. The practice handles general business law, estate planning, real estate and sexual orientation discrimination matters.

Dr. Peter Kresak, a 1992–93 research scholar from Comenius University School of Law in the Slovak Republic, recently served as advisor to the prime minister of the republic on constitutional matters. He also has advised the chief justice of the Slovak Constitutional Court, and has taught American students at the Bratislava summer school organized by the University of Tulsa.

1994

Sylvia Y. Chen has joined the Washington, D.C. office of Fulbright & Jaworski L.L.P. as an associate in the intellectual property and technology department.



Michael J. Puca recently joined the Grand Rapids, Michigan law firm of Warner Norcross & Judd as an associate.

Gregory Ritts joined the law firm of Nixon, Hargrave, Devans & Doyle.

In memoriam

The Law School notes with regrets the passing of these graduates:

'27	Erwin H. Haass	June 10, 1994
	Harry L. Hall	July 8, 1994
	W. Hugh Wiliams	June 29, 1994
'29	John R. Hahn	Nov. 6, 1994
'31	Kenneth W. Cole	June 29, 1994
	George Meader	Oct. 15, 1994
	Robert B. Romweber	April 21, 1994
'32	Calvin A. Brown	Sept. 30, 1994
	Wilfred A. Steiner	October 28, 1994
'33	Frederick C. Nash	Aug. 3, 1994
'38	Douglas R. Welch	July 28, 1994
'39	Melvin P. Lewis	Aug. 30, 1994
	Robert Meisenholder	
'40	G. Randall Price	July 13, 1994
'42	Howard R. Eckels	Sept. 10, 1994
'46	Hon John C. Timms	Aug. 31, 1994
'48	Arthur J. Feeney	Sept. 10, 1994
	William E. Fowler Jr.	Oct. 17, 1993
	Harry M. Kelsey	Sept. 18, 1994
	Roswell C. Prince	Jan. 8, 1994
'49	Leonard E. Bullard	Aug. 29, 1994
	Fredrick E. Laymon	
'50	Thomas H. Healy Jr.	Oct. 29, 1994
'51	Lyle H. Long	
'52	Robert B. Krueger	Sept. 11, 1994
'54	Sander Bernstein	Sept. 16, 1994
'55	Robert W. Thomas	May 1, 1994
'56	Dennis M. Aaron	July 6, 1994
'57	Dennis M. Aaron	July 6, 1994
	Rev. Leroy E. Endres	
	Herbert Rusing	
'59	Richard F. Bannasch	Oct. 1, 1994
'63	Michael H. Metzger	March 1, 1994
'73	Ned L. Fisher	
'75	Douglas A. Watkins	Dec. 3, 1994
'82	Michael L. Lencione	Nov. 6, 1994
	Lloyd Miller	July 1994

Keep in touch

Take a moment to let your classmates know what you're up to. Send news to Class Notes, *Law Quadrangle Notes*, 727 Legal Research, Ann Arbor, MI 48109-1215. Send items by Internet e-mail to tshears@umich.edu

THE LESSONS OF WAR

— BY TONI SHEARS

For years, the average size of a University of Michigan Law School graduating class has hovered around 350 students. One clear exception is the class of 1970; the normal number of students enrolled in 1967, but by graduation three years later, the class numbered only 242.

The Vietnam War played a significant role in shrinking the class. As class members were enrolling, the Selective Service eliminated the graduate school draft deferment, making law students eligible for the draft. The potential of being called to serve and the growing anti-war sentiments on campus made the faraway conflict in Southeast Asia an inescapable part of many students' Law School experience.

Students with low draft numbers worried about interrupting their education to fight; those who had already served in the military and those who were ineligible for the draft couldn't help noticing classmates who left abruptly or didn't return in the fall.

"Over that first year, a large number of the people in our class wound up being drafted or chose to drop out and enlist in the service," recalls Robert O. Wefald, J.D. '70, who had served a three-year stint in the U.S. Navy with a six-month tour off the coast of Vietnam before Law School. "My roommate left and a couple of guys across the hall in the Lawyers Club left during our second year. As many as could tried to at least finish the first year."

Many classmates who left school for military service returned and graduated with later classes, says Wefald, a solo practitioner and former North Dakota attorney general who served as 1970 class agent for several years. One classmate, John Allen Howe, did not return; he was killed in action.

The draft continued to take its toll on the class of 1971; of those who enrolled in 1968, "more than a third of the class was gone by the end of the year," says class member Bettye Elkins, who actually graduated early in December 1970. "It made for an unstable beginning for the class, and there was a strong sense of community among the 'survivors'; those of us who were left really did bond together." The dozen women in her class "mainly sat around and sympathized; we had husbands or significant others who were drafted, at risk of being drafted, or had already served," notes Elkins, whose own husband had just left the Air Force at the time.

Certainly this was not the first war to interrupt educations and career plans, but as a central event in an era of social upheaval, it drew more vocal opposition than earlier conflicts. Graduates of the late 1960s and early 1970s say that the dominant view of Vietnam among the student body was antiwar. "I didn't know anyone who was *for* the war," recalls Elkins. Graduates agree Vietnam was often the topic of intense discussion and debate outside of class. On at least one occasion, a Hutchins Hall classroom was invaded by campus protesters who pounded on wastebaskets, taunted professors, and almost started fistfights. While such dramatic events were rare, for many students the war was seldom far from their thoughts. "It was not something that occupied us for a few minutes. It was a daily event, something that weighed heavily on our minds," says Stephen C. Ellis, J.D. '70.

Of course, Vietnam was only one of several hot-button issues in those days; the demonstrations and demands of the Black Action Movement shook the Law School to an equal or greater extent. In this politically charged atmosphere, both those who served in Vietnam and those who faced the prospect said they learned to question authority.

This lesson was perhaps most dramatic for Ellis, who was among a group of students who sued their draft board for the right to finish school and graduate with the class of 1970. "I spent all of my second and third year in suspense as to whether I was going to get hauled off by the Army," he

"I didn't know anyone who was for the war."

— BETTYE ELKINS

PHOTO COURTESY OF THE *MICHIGAN DAILY* - BENTLEY HISTORICAL LIBRARY, UNIVERSITY OF MICHIGAN

PHOTOS COURTESY OF THE U-M NEWS AND INFORMATION SERVICES - BENTLEY HISTORICAL LIBRARY, UNIVERSITY OF MICHIGAN

recalls. The Selective Service Act of 1967 had eliminated draft deferments for students who had previously obtained a deferment or had a baccalaureate degree. In a class action in U.S. District Court, Ellis and a group of his classmates argued that they were exempt from these provisions because they had obtained their deferments or degrees before June 30, 1967, when the act took effect.

The court, finding no language establishing retroactivity in the act, agreed; it found that the students were entitled to deferment until the end of their current academic year and to pre-induction review of their draft classification. [See *Ellis v. Hershey,* 302 F. Supp. 347 (1969).]

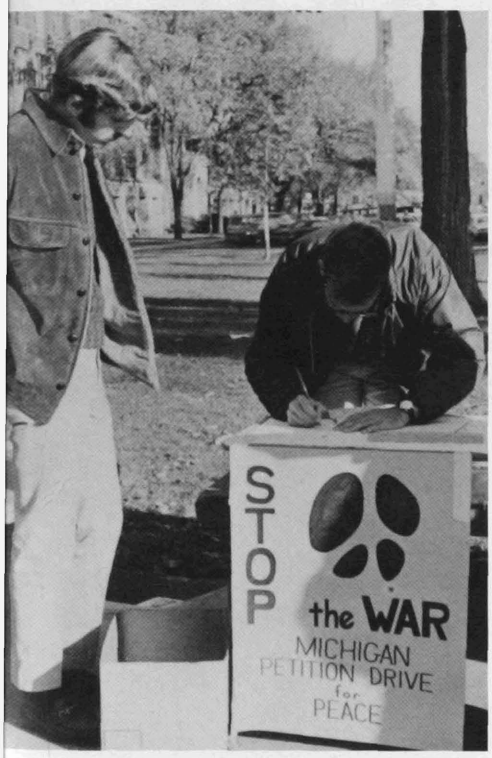
The successful suit against his draft board was an act of defiance that still seems to shock Ellis today. "I grew up in a conservative small town in Washington State where the word Democrat was almost a swear word. Where I came from, young men went off to serve their country unquestioningly," he explains. "To be in court with my draft board fighting to stay in school would have been unthinkable to me in high school or college or even my first year of law school. Only all the ongoing protest activity at the time made you begin to feel you had the right to question official policy," says Ellis, who has spent his career in private practice in Seattle. "The most startling thing was the way we questioned authority. That didn't happen in the 1950s. It had a lasting impact on me."

Veterans also began to question their experience when they encountered opposition to the war on campus. Darrel J. Grinstead, J.D. '69, served in the Navy and came to the Law School "unquestioning of the mission of the military and the government. The antiwar atmosphere I encountered was culture shock of the first order," he says. "I sometimes felt like an observer who couldn't fully share in the views of the class."

However, he made friends with students who had not served and were questioning U.S. involvement in Vietnam. "I engaged in quite a bit of debate and discussion, and came out of the experience with a very different attitude. I wasn't completely anti-war; I didn't feel uncomfortable about my role, and

I continued to participate in the Naval Reserves, but I was more doubting, more questioning. Those debates were a completely eye-opening experience, and I got more out of law school because of it," says Grinstead, now the chief counsel at the Health Care Financing Administration of the U.S. Department of Health and Human Services.

Wefald, influenced by his upbringing in the traditionally isolationist state of North Dakota, notes, "I never was one who thought Vietnam was a place we should be, but as a child of the 1950s, I did what my country asked and was proud of my service. I was sort of curious about the antiwar movement. I guess I didn't understand the depth of the feeling as I came to understand it later. I felt I'd done my time, and I didn't understand what the problem was." Although he served in the Naval Reserves from 1967 until 1991 when he retired at the rank of captain, Wefald came to believe that in Vietnam, "we lost too many people, killed too many people, and spent too many resources. It wasn't worth it."



"We did it for the benefit of other people, to protect them from the onslaught of a totalitarian state."

— TOM CARHART

If Robert Wefald was confused by opposition to the war, Tom Carhart, J.D. '72, was shocked by it. A 1966 West Point graduate who enrolled at the Law School after a tour in Vietnam, Carhart vividly recalls returning home from the war in uniform only to be spat upon by a teenager in a Chicago airport. "That girl's spittle went through me like a lance," he says. "I was proud to offer my life in the service of my country and I did what I felt was my duty, and that was what I came home to."

Carhart responded by trying to blend into the antiwar atmophere he encountered on campus. "I wanted nothing more than to be accepted, and I paid a high price for that. To fit in, I mouthed a lot of antiwar cant, but it was just cant." He wrote letters to the editor about the war, but he stopped short of actively protesting because "I wouldn't turn my back on my brothers in arms," he explains. Then and now, he feels the war was morally justified: "We did it for the benefit of other people, to protect them from the onslaught of a totalitarian state. It turns out that we were myopic, and that there are other parts of the world so foreign that we can't easily transplant democracy there, but that doesn't mean we shouldn't try. Democracy may be flawed, but it's still the best system of government there is."

Carhart, wounded twice in the war, wrote a book called *The Offering* about his combat experience and was part of the veterans group formed to establish a Vietnam memorial. He disliked the resulting design for the black wall of names so much that he led the effort to create a more traditional sculpture of soldiers that stands near The Wall in Washington. Now he has left law practice and government positions to pursue a doctorate in history and write books about the military. Still, he says that the war is no longer a big issue for veterans or those who didn't serve. "For most members of my generation, it's ancient history. It took a big chunk out of my youth, not to mention my body, but we're grown-ups now, and we've forgotten about it and moved on."

Detroit attorney David Baker Lewis, J.D. '70, says he didn't worry about the draft while in school because he had a medical condition that precluded service, but he wasn't unaffected by the war. "I guess I felt to some degree gratified that I had a medical deferment because the reason for the conflict didn't make a lot of sense to me, but I also felt guilty that some of my friends and acquaintances were drafted and had their lives endangered and their educations disrupted." Lewis, who remembers several high school classmates killed in Vietnam, says: "I often look back on those circumstances and see how random and fortuitous life itself can be."

Says Ellis, "While we were in school, the war affected us greatly in lots of strange ways. Do I think about it constantly today? No, but it does color my view of life in this country and of the government."

Wefald and Ellis say the war and the other political issues of the times often surface in conversation when graduates get together. It will probably come up when the class of 1970 gathers for its twenty-fifth reunion in Ann Arbor Oct. 6-8. While the graduating class was smaller, the reunion need not be; the class warmly welcomes those who were separated from the class by the war and ended up graduating later to return for a true reunion.

LQN

Graduates who began Law School in the fall of 1967 but graduated after the Class of 1970 are asked to contact Anne Griffin Sloan or Jennifer Teichow at (313) 998–7970 to make reservations to attend the reunion.

THE Romance OF REVENGE

AN ALTERNATIVE HISTORY OF JEFFREY DAHMER'S TRIAL

— BY SAMUEL R. GROSS

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On Feb. 17, 1992, Jeffrey Dahmer was sentenced to fifteen consecutive terms of life imprisonment for killing and dismembering fifteen young men and boys.[1] Dahmer had been arrested six months earlier, on July 22, 1991. On Jan. 13 he pled guilty to the fifteen murder counts against him, leaving open only the issue of his sanity. Jury selection began two weeks later, and the trial proper started on Jan. 30. The jury heard two weeks of horrifying testimony about murder, mutilation and necrophilia; they deliberated for five hours before finding that Dahmer was sane when he committed these crimes.

After the verdict, a minister who had counselled members of the victims' families told the *Chicago Tribune*, "I think this will be the beginning of a healing." At his sentencing two days later, Dahmer said, "I take all the blame for what I did.... Your honor, it is over now. This has never been a case of trying to get free. I never wanted freedom." His lawyer told the press that no appeal was planned.

What happened after Dahmer's arrest is of minor importance by comparison with what he did, which is unspeakable. Still, the criminal justice system did very well in this case. It handled a revolting set of crimes and a potentially explosive trial with as much civility, compassion, and dispatch as possible. Half a year after the arrest, the trial was truly over, and, let us hope, the healing did begin.

Jeffrey Dahmer was tried in Wisconsin — one of the fourteen American states that have no death penalty. How would this drama play in one of the thirty-six other states? He would certainly be charged with capital murder, and then a new set of horrors would begin.

CAPITAL PUNISHMENT IN AMERICA

At the outset, it is very unlikely that Dahmer would plead guilty if he faced the death penalty. He might still want to do so, at least initially; after all, at his sentencing Dahmer told the judge, "Frankly, I wanted death for myself." His lawyers, however, would feel ethically bound to advise him against pleading guilty to a certain death sentence. At a minimum, they would delay entry of a guilty plea for as long as possible, to prevent their client from taking a fatal step that he could not undo. If necessary, they might attempt to get the court to declare him unfit to enter a plea on his own behalf. In addition, if their client were facing the electric chair (or the gas chamber, or lethal injection), Dahmer's lawyers would be much more concerned about preventing him from cooperating with the police investigation and from confessing fully, repeatedly, and in detail — as he did.

As soon as Dahmer was arrested in Wisconsin, it was clear that he would never be released. (Indeed, less than three years later, on Nov. 28, 1994, Dahmer was killed in prison by another inmate.) That would be equally true if he was charged across the border in Illinois, or in any other death penalty state, but the significance of that fact would be vastly different. In Milwaukee, it meant that the defense had no strong incentive to delay the day of judgment, since the only open question was *which* state institution Dahmer would live and die in. In Chicago, the issue would be *how long* he would survive in state custody: Would he live to die of natural causes or would he be executed, and if executed, when? In that context, Dahmer's attorneys would slow the proceedings down as much as possible, to make sure that they did whatever could be done in a case in which their client's life was at stake, and to postpone a judgment that could only hasten his death.

The trial would be delayed by any number of possible pre-trial motions: to determine the present sanity of the defendant, to declare the applicable death penalty statute unconstitutional, to challenge the seizure of evidence from Dahmer's apartment, to suppress his confessions, to challenge the composition of the jury panel, and so on. Some of the rulings on these motions might be appealed before trial.

As trial approached, the defense would probably try to obtain special procedures to insure the impartiality of the jury: a change of venue, special and time-consuming procedures in jury selection, a further long delay, and so forth.

A capital trial of Jeffrey Dahmer (beginning perhaps a year or two after the arrest) would be a vast event. Jury selection alone could easily take longer than the sanity trial that actually occurred. In addition, the state would have

to prove that Dahmer committed each of fifteen cruel, disgusting murders. Dahmer could hardly deny that he killed any of his victims — the physical evidence was overwhelming — but the prosecution might not have an easy a time proving that he killed *each* of them, with "malice aforethought" and with "premeditation and deliberation." Weeks, if not months, would be consumed reviewing his atrocities in detail — pictures of mutilated bodies and body parts, testimony from pathologists and criminologists, descriptions of how the remains were found, evidence of bite marks and knife wounds — all to a packed press gallery, if not on live television. Some of this did happen in the sanity trial that actually took place, but not nearly as much as we might expect in a capital case.

Along the way there would be numerous objections and arguments about evidence and procedure, which would fuel future appeals. Everybody involved — the police, the prosecutors, the judge, the defense attorneys, the city administration, perhaps the jurors, perhaps even some of the victims or their kin — would come in for their fair share of abuse.

At the end of the trial, Dahmer would undoubtedly be found guilty on all or most counts — at the cost of millions of dollars and incalculable additional suffering. Then his sanity would have to be determined, as it was in real life. In this scenario, however, that, too, would be a much slower, more contentious, and more expensive proceeding. Finally — if (as I expect) he was found to be sane — there would be a penalty trial, probably before the same jury.[2]

The penalty proceeding in Dahmer's actual case was short: Nine relatives of victims spoke about their sorrow, pain, and anger, and Dahmer himself spoke briefly. A capital penalty trial would be very different. The victims' relatives would be allowed to speak as they did, but much more would ride on their statements.[3] As a result, the defense attorneys would have the right to cross-examine the bereaved survivors. Some of them might not want Dahmer to be executed; that division could surface. (On the other hand, if some of the victims' relatives told the jury that they did want him to be executed, that could be a basis for a later reversal on appeal.[4])

In addition, the defense would probably present testimony from psychiatrists and psychologists who would describe Dahmer's obvious mental pathologies in elaborate detail; the prosecution would counter with its own experts. Dahmer's childhood and upbringing would be scrutinized. If there is any pain or humiliation that his parents and relatives have in fact been spared, they would not escape it in a capital case.

And then Dahmer would be sentenced. If he were not sentenced to death, there would be fury, frustration, recriminations, perhaps even violence. If he were sentenced to die, at least the prosecution would have achieved its goal. But it would not be over, not nearly. In that situation, unlike in the actual case, Dahmer would appeal.

A CAPITAL CASE ON REVIEW

Procedurally, the appellate review process for a death sentence is quite complex. First, Dahmer would be entitled to direct review of the trial record by the state supreme court; if he lost, he could petition the U.S. Supreme Court to review that appeal by a writ of certiorari. If the Supreme Court declined to do so, he could file a petition in a state court (usually a state trial court) for "collateral" or "post-conviction" review, raising issues that could not be determined in the first round of appeals. A typical issue at this stage is that the defendant's trial or appellate attorneys were ineffective — a claim that frequently cannot be addressed on the trial record alone.

State collateral review is extremely variable. The initial proceeding might be over in hours, or it might take years. If Dahmer lost again at that stage, he could probably appeal to a state appellate court — perhaps even to two levels of state appellate courts — and then, again, seek discretionary review from the U.S. Supreme Court. Finally (if he lost at every stage up to this point) he could petition for federal collateral review by filing a petition for a writ of habeas corpus in a federal district court. If that petition was denied, he could appeal to a federal court of appeals, and then ask the Supreme Court for certiorari review a third time. If his third petition to the Supreme Court was denied, Dahmer could file new ("successive") petitions for collateral review in state and federal courts, and (if necessary) appeals from the denials of these petitions. Successive petitions are increasingly disfavored, but they still succeed sometimes, at least temporarily.

For the most part, any convicted prisoner has these same appellate options. But there are four differences in capital cases:

[2] See *Lockhart v McCree*, 476 U.S. 162 (1986).
[3] *Tennessee v Payne* 111 S.Ct. 2597 (1991).
[4] See *Lockhart*, note 2; *State v Huertas*, 51 Ohio St. 3d 22, 553 N.E. 2d 1058 (1990).

BY ALL ESTIMATES, IT IS CONSIDERABLY HIGHER THAN THE COST OF A NON-CAPITAL MURDER CONVICTION FOLLOWED BY LIFE IMPRISONMENT.

First, traditionally, courts are more careful in reviewing claims of error in capital cases. There is a strong norm that is still widely shared (except, perhaps, by the United States Supreme Court) that a defendant who is facing death is entitled to a higher level of due process than one who is merely at risk of losing time or money.[5]

Second, a non-capital sentence can be implemented before appellate review is complete. Some convicted defendants (Leona Helmsley, for example) are allowed to remain free on bail pending direct appeal, but others (Mike Tyson) are remanded to custody; almost all remain imprisoned during collateral review proceedings. Many defendants never make bail at all, and remain in custody from arrest through the completion of their sentences. One way or another, a sentence of imprisonment may be over by the time the federal courts complete their review of a habeas corpus petition in a non-capital case; post-conviction delay favors the state. By contrast, appellate review of any sort is impossible after a prisoner is executed — the case is moot — so death sentences must be stayed during both collateral and direct appeals.

Third, non-capital defendants have limited access to lawyers. Every defendant has the right to an appointed attorney on direct appeal,[6] but there is no such right for collateral review,[7] and very few prisoners can afford to hire lawyers. Prisoners with death sentences, however, are almost always represented by attorneys throughout this process, frequently by first-rate volunteer lawyers.

Fourth, capital trials and the appeals that follow are typically far longer and more complex than those in other cases, even non-capital murder trials.

If Dahmer's capital trial followed the course I have described, it might take one to three years simply to complete the record for the first appeal. After that, the process of reading the record and writing the briefs might take another six months to a year, perhaps longer. After the case is briefed, the state supreme court would schedule oral argument. This might entail another six- or twelve- or twenty-month delay, depending on the backlog of other capital and non-capital cases. Eventually, the court would hear the arguments and reach a decision — after another lengthy delay during which the judges and their staff digest the small mountain of paper such a case generates, analyze and decide the issues, and come to terms with their own feelings about this horror. They could reverse Dahmer's murder convictions (or some of them), or they could affirm the convictions and reverse the sentence. Karima Wicks, former research director of the NAACP Legal Defense and Educational Fund's Death Penalty Project, estimates that perhaps half of all death sentences or the underlying convictions are reversed on initial appeal — a far higher reversal rate than in other criminal cases. Dahmer's appeal could present excellent grounds for reversal; in a case as complex and messy as this one would be, there is plenty of room for misconduct, unfairness, and error. Nonetheless, I expect that his death sentence, like those of most serial murderers, would be affirmed.

If the death sentence were affirmed at this initial review (perhaps four years or longer after the verdict), the process would continue. In general, the likelihood of success diminishes at each successive stage of defense that follows direct review, but the chance of winning something somewhere in the multi-step process is still substantial. Equally important, each stage takes time. If there is a reversal at any point, the case is sent back to an earlier point in the process — for a habeas corpus hearing by the federal district court, for a redetermination of an issue on appeal by the state supreme court, for a new penalty trial in the state trial court, etc. — and restarts from that point. Any time this happens, the state has to decide whether to throw in the towel and settle for a life sentence, or start up the hill again. In "ordinary" capital cases, the prosecutors frequently decide to give up the quest after an appellate setback. In Dahmer's case, the prosecution would probably never give up, in part because every visible event would produce a new wave of publicity, new anger, new recriminations — and renewed suffering for the survivors of all the victims.

No End in Sight

How would it end? Perhaps after five or ten years Dahmer would have his death sentence reversed and reduced to life imprisonment. This is the same sentence he in fact received, but it would not carry the same meaning; it would cause an explosion of pain and anger. Many who were satisfied when he was sentenced to the maximum penalty — life — would be furious that he received only life when death was possible. They would feel devalued, humiliated, cheated — and it's easy to understand why, considering the enormous costs of achieving this outcome, and comparing Dahmer's crimes to those of other murderers who are occasionally put to death.

[5] One of the classic statements of this position is by Justice Harlan, concurring in the judgment in *Reid v Covert,* 345 U.S. 1, 77 (1956): "I do not concede that whatever process is 'due' and offender faced with a fine or prison sentence necessarily satisfies the requirements of the constitution in a capital case. The distinction is by no means novel ... nor is it neglible, being literally that between life and death." See also, for example, *Woodson v N. Carolina,* 428 U.S. 280, 305 (plurality opinion) (1976).

[6] *Douglas v California,* 372 U.S. 353 (1963).

[7] *Murray v Giarrtano,* 492 U.S. 1 (1989).

A PERSONAL ACT OF VENGEANCE, PROPERLY EXECUTED, IS TIMELY, PASSIONATE, AND PERSONAL.

On the other hand, Dahmer might someday be executed. That possibility, presumably, is the only justification for this entire process. Perhaps his death would afford some satisfaction to the relatives of his victims, but could that satisfaction possibly make up for the years of gratuitous agony they would have endured? What they really want is an end. On April 21, 1992, Robert Alton Harris became the first person to be executed in California in twenty-five years. The day before the execution, a CNN television news report on the mother of one of the victims stated that "[her] grief began nearly fourteen years ago when her son Michael and his friend John Mayeski were killed by Robert Alton Harris. Over the years her pain has gotten worse instead of better, as Harris' execution dates came and went." The report quotes the mother as saying: "It's time that this particular case came to an end. It's been inhumane and terrible anguish for the family members, and we want peace."

And when would this final act take place? There is no saying. As of September 1992, the average stay on death row for all prisoners executed since 1976 is eight years and five months; for those executed since 1989 it is more than ten years, and many are on death row for crimes that took place twelve years ago, or longer, and yet they have no execution dates in sight.[8] Probably, most death row inmates will never be executed. There is no plausible way to estimate the likely delay for a defendant who is sentenced to death in 1992 and who is among the minority of such defendants who are destined for execution. The best description is that he will remain in limbo and his case will remain open indefinitely.

THE HUMAN AND FINANCIAL COSTS

Obviously, Jeffrey Dahmer is not typical of homicide defendants, and his trial would not be typical of capital trials. Most capital cases are simpler, cheaper, and less promiscuously agonizing. The scenario I have sketched shows what the death penalty *can* do to a homicide case, under extreme circumstances. Often there are fewer steps to the process — or they are less carefully executed — for reasons that are as arbitrary and unfair as any other aspect of the system: because the defendant was inadequately represented, or, in the later stages of review, not represented at all. In general, cases that are less expensive and less excruciating than Dahmer's to begin with are subject to the same range of distorting effects that I have described, but on a smaller scale.

Although cases like Dahmer's are rare, they are central to any discussion of capital punishment. These are the crimes for which there is the strongest consensus that the punishment should be death, and these are the defendants who are most likely to be sentenced to death — and sometimes executed. It's important to consider the damage the death penalty can do in those situations in which we want it most.

The financial cost of pursuing a capital prosecution through to execution is high; by all estimates, it is considerably higher than the cost of a non-capital murder conviction followed by imprisonment for life.[9] But that expense — multiplied by ten, or twenty, or thirty executions a year — captures only a small fraction of the price of running a capital sentencing system. For every murderer who is executed there may be ten on death row who will never be executed, and many more who were convicted of capital murder but not sentenced to death, or tried for capital murder and convicted of lesser offenses, or charged with capital murder but tried or allowed to plead guilty to less serious charges, or acquitted entirely. There are thousands of such cases each year, and for each one we pay some proportion of the added costs of an execution — less when the process is aborted early, more the closer it approaches the ostensible goal.

Estimates of the total cost of using the death penalty are exorbitant. In July 1988, for example, the *Miami Herald* reported that since 1973 the state had spent over $57 million on capital punishment and executed eighteen prisoners, at a cost of over $3.2 million a piece. In states with fewer executions, the costs per head are necessarily higher. In 1987, the Kansas legislature rejected the death penalty for financial reasons. A budgetary analysis prepared for the legislature estimated that the added expense would be $10 million in the first year, and at least $50 million before the first execution took place several years down the road.

Money provides a measure of the magnitude of an enterprise, and in this case the measure is startling. Still, we are a rich country. We can afford to spend $200 million or half a billion dollars a year on death sentences, if we want to. The personal and social costs of process are not quantifiable, but they may be harder to bear.

[8] These calculations are based on NAACP Legal Defense and Educational Fund, *Death Row U.S.A.*, Spring 1993, and additional data provided by courtesy of Ms. Karima Wicks, research director of the NAACP Legal Defense Fund's Capital Punishment Project. The averages given exclude "voluntary executions" — cases in which a prisoner was executed after waiving an available avenue of review.

[9] M. Garey, "The Cost of Taking a Life: Dollars and Sense of the Death Penalty," 18 *UC Davis Law Review* 1221–1273 (1985); R.L. Spangenberg and E.R. Walsh, "Capital Punichment or Life Imprisonment? Some Cost Considerations," 23 *Loyola of Los Angeles Law Review, 45–58* (1989); P.J. Cook & D.B. Slawson, *The Costs of Processing Murder Cases in North Carolina,* Terry Stanford Institute of Public Policy, Duke University.

[10] See Francis A. Allen, *The Decline of the Rehabilitative Ideal, Penal Policy and Social Purpose,* 4–8 (Yale Univ. Press: New Haven, 1981); Francis A. Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal," 50 *J. of Crim. L., Criminology & Police Sci.* 226 (1959).

VENGEANCE AND THE BUREAUCRATIC STATE

Why would anyone even consider a death penalty regime of the sort we now have?

There are two parts to the question. First: Why do so many people want the death penalty at all? Second: Having chosen to use the death penalty, why have we ended up with this Kafkaesque system to implement it?

The most telling answer to the first question is the simplest and most natural: People want the death penalty for revenge.

Vengeance has an ambiguous position in our culture. In more liberal times, many would disclaim revenge as a justification for punishment: it seemed too cruel, barbaric, inhumane, selfish, pessimistic. To many, vengeance is un-Christian. A liberal and civilized people should not seek revenge but improvement, of the offender or of society.[10] Even now, in an increasingly conservative era when revenge is regularly described as a justification for punishment, it is renamed "retribution." The change is telling; it removes the subject from the description. Revenge is what the avenger wreaks; retribution is simply what happens to the wrong-doer.

Revenge is not the only possible justification for capital punishment. Most people who favor capital punishment also believe that it deters homicide. Unlike revenge, deterring killing is a universally acceptable objective.[11] This would be a powerful justification for the death penalty, if true. But it is not, in two senses. First (although I will not describe the evidence in this context), there is no systematic evidence that the death penalty for murder *does* deter homicide to a greater extent than lengthy prison terms. The best evidence suggests that it has no effect on homicide rates, and a few studies hint that it might increase the number of murders.[12] Second, belief in deterrence is not the basis for the position of most proponents of capital punishment. In one survey, for example, when asked if they would continue to support the death penalty if it were proved to have no deterrent effect, two-thirds or more of respondents said yes.[13]

I have no difficulty understanding the desire for revenge, even deadly revenge, especially in cases like Dahmer's — a vicious predator who raped, tortured, killed, and dismembered helpless victims, some of them mere children. If a relative of a victim did kill him, I would feel a great deal of sympathy for that relative, and little, if any, for Dahmer. But we do not allow relatives to avenge their dead, not even in egregious cases, and state-administered capital punishment is a poor vehicle for revenge.[14]

A personal act of vengeance, properly executed, is timely, passionate, and personal — the grieving father tracking down and killing the killer of his child. The death penalty, in this society, is none of these things. It is slow, passionless, and impersonal, unreliable and rare. And that brings us to the answer to the second question: Why do we have the bizarre death penalty apparatus I have described?

Part of the problem is that we feel that we have to take great care to insure that the death penalty is used fairly. The most basic concern is to avoid errors. Nobody wants a part in executing the wrong person, or even the right person if the judgment is marred by serious mistakes on issues of intent or sanity.

If capital punishment were restricted to serial killers with bodies in the freezer, the question of possible errors might not be very troubling. Obviously Jeffrey Dahmer (or John Gacy or Ted Bundy) acted with malice and premeditation, without provocation, and under no threat of personal danger. Moreover, most people probably don't care whether a serial murderer is insane; they want him killed just the same. But our death penalty laws are not restricted to the rare, extreme, and bizarre murders. A capital trial is much more likely to involve an addict who kills a checkout clerk at a convenience store. In that context, the jury's judgment may well turn on uncertain and disputed evidence, or on slippery interpretations.

There is no obvious best way to avoid errors in criminal prosecutions. Our American adversarial system of adjudication, for better or worse, relies heavily on procedural devices to guarantee fairness and accuracy.[15] An accused has no particular right to a careful and thorough investigation by the police. He does, however, have rights to counsel, to remain silent, to privacy, to an impartial jury, to confront his accusers, to present a defense, and so on. These rights may be implemented by judicial action at every stage — pre-trial, trial, post-trial, appeal, collateral review. All this takes time, but we can hardly deny these rights to those defendants who stand to lose the most simply because time (for a change) is on their side. In the heat of the moment in some cases we may want to drag the culprit straight out and hang him. But when that passion subsides we will still believe that those the state wishes to kill are entitled to at least the same level of

[11] See, e.g., P.C. Ellsworth and L. Ross, "Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists," 29 *Crime and Delinquency,* 116–16 (1983); and Alec Gallup and Frank Newport, "Death Penalty Support Remains Strong, But Most Felt Unfairly Applied," *The Gallup Poll News Service,* Vol 56 No. 81, 3 (June 6, 1991).

[12] R. Hood, *The Death Penalty: A Worldwide Perspective*, 117–148 (Oxford: Clarendon Press, 1989); R. Lempert, "Desert and Deterrence: An Assement of the Moral Bases of the Case for Capital Punishment," 79 *Michigan Law Review* 1776–1231 (1981); Zimring and Hawkins, *Capital Punishment and the American Agenda,* 167–186 (New York: Cambridge University Press, 1986); and W.J. Bowers and G.L. Pierce, "Deterrence or Brutalization: What is the Effect of Executions," 26 *Crime and Delinquency*, 511 (1980).

[13] Ellsworth and Ross (cited in note 11).

[14] Lempert, 1981, 1185–1187.

[15] See Samuel R. Gross, "Loss of Innocence: Eyewitness Identification and Proof of Guilt," 16 *Journal of Legal Studies,* 395–453 (1987).

THE SYSTEM DOES PRODUCE WHAT THE PUBLIC DEMANDS:

procedural care and due process as other defendants — and probably more.

Factual errors are not the only problem. Through the 1980s, nearly 20,000 people were arrested for homicides annually; of these, fewer than 2 percent were sentenced to death. Were these 200 to 300 people really the most heinous murderers we caught? Or were they chosen by chance, or, worse, because of some impermissible criteria — race, poverty, the race of their victims, and so forth? Walter Berns, an articulate advocate for capital punishment, has summarized the problem well: However strongly one may favor the death penalty in principle, its propriety in practice "depends on our ability to restrict its use to the worst of our criminals and to impose it in a nondiscriminatory fashion."[16]

The dangers of arbitrariness and discrimination are not restricted to capital punishment, but they are at their worst in this context, for three reasons.

Infrequency. Again, if we limited the death penalty to serial murders, we could probably do a decent job of identifying capital homicides and imposing death sentences uniformly. Instead, most death-penalty states select a small number of capital cases from a large and amorphous range of death-eligible crimes. Many are at risk, but few are condemned. As a result, every potentially capital case is subject to a series of discretionary choices — by the police, the prosecutor, the judge, the jury — each of which might be based on happenstance or bias.

Salience. The death penalty is a troubling and divisive institution. A substantial minority (18 percent in a 1991 Gallup and Newport poll) still oppose it in principle, and those who favor the death penalty are divided about when and how to use it. As a result, life or death decisions may turn on the identity of the prosecutor, the jurors, or the judge, or on their reactions to peculiar, incidental facts. For example, the most memorable fact of Robert Alton Harris's crimes is that after he killed his two teenage victims, he ate the hamburgers they had bought at Jack-in-the-Box. This incident was mentioned repeatedly in news stories throughout the fourteen-year life of the case; it almost certainly influenced the jury that sentenced him. How much does this five-second sound bite tell us about Harris? Would he have deserved death any less if he had eaten lunch before he kidnapped his hapless victims?

Juries. Jury sentencing is uncommon for non-capital crimes in the United States, but it is the rule in capital cases. In other words, the hardest and most discretionary sentencing decisions are made by ad-hoc panels of one-time lay decision makers — hardly a process calculated to minimize arbitrariness and discrimination. And yet we believe that jury sentencing plays an important rule in legitimating the death penalty, and ensuring that its use reflects community values.[17]

The sum of the effects of these forces is a depressing fact: Consistency in criminal sentencing is least likely in decisions on life and death, where it matters most. Not surprisingly, there is a great deal of evidence that race and chance both play large roles in determining who is sentenced to death in the United States, and who is spared.[18]

Consider two stylized capital punishment systems. System I: We grab every person who commits a murder and quickly kill them. System II: We (equally efficiently) grab every person who commits a murder and put them into a holding pen. After five years, we empty out the pen and decide which of the inmates to kill. System I has a harsh, Old Testament quality, but if you want revenge, it might seem right. The execution is a direct response to the murder. System II, however, is a closer approximation of what we actually do, and must do; but in this version the task is very different. It's not just the wait, it's the process of *choosing* who will die and who will live: Death is now served by a repetitive, comparative, untrustworthy, selection procedure.

Judges and legislators are aware of this arbitrariness and potential discrimination. They have tried to curb these problems by creating an array of elaborate procedural devices such as trial-like capital penalty hearings and post-verdict "proportionality review" of death sentences. These procedures may or may not have any effect — they certainly are not entirely successful — but they do take time. Moreover, the knowledge that death row prisoners may have been unfairly or arbitrarily singled out makes judges move more carefully and less expeditiously on all other procedural points as well.

Perhaps executions could be speeded up somewhat. I can imagine that we could contrive to conduct most of them within five years of arrest, rather than ten. We can't go much faster than that without dismantling the procedural structure of our system of criminal justice — a structure that was created largely to protect defendants. This cuts strongly against the grain; it will not happen. Given that limitation, there is little incentive to accelerate the process at all,

[16] W. Berns, "Defending the Death Penalty," 26 *Crime and Delinquency,* 511 (1980).

[17] *Witherspoon v Illinois,* 391 U.S. 510, 519 (1968.)

[18] See D.C. Baldus, G.G. Woodworth, and C.A. Pulaski Jr., *Equal Justice and the Death Penalty,* (Northeastern University Press, 1990); S.R. Gross and R. Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing,* (Northeastern University Press, 1989).

[19] *Death Row U.S.A.,* cited in note 8.

[20] P.C. Ellsworth, "Attitudes Toward Capital Punishment: From Application to Theory," a paper presented at the SESP Symposium on Psychology and Law, Stanford University, October 1978.

[21] H.A. Bedau, *The Death Penalty in America,* at 68 (New York: Oxford University Press, 1982).

since even a five-year delay is enough to gut the meaning of revenge. The man you wanted to kill was the abusive robber, high on crack, who pistol whipped and shot two customers at a Seven-Eleven store in 1984. Instead, in 1990, the state electrocutes a balding, religious model prisoner in a neat blue denim uniform.

The processes I have described feed on themselves, and on each other. To reduce errors in capital cases we generate new procedures; these procedures must be followed in future cases, which increases delay. As executions are delayed, they are increasingly drained of content as acts of revenge; as a result, it is increasingly easy to accept further delays, or to forego the killings altogether. As delays and reversals become more common, executions become increasingly rare; the more rare they are, the more likely it is that those who are killed will be the victims of bias or caprice — and the more distasteful the task of singling out and killing the few who will die. Rising concerns about discrimination and arbitrariness — and growing uneasiness with the whole process — in turn, generate new doubts, new procedures, and new delays.

MORE OF THE SAME

At a glance, the death rows of America seem headed for a massacre. As of April 1993, there were 2,729 prisoners on death rows in the United States, and about 250 new death sentences are meted out each year.[19] Public support for the death penalty is intense, politicians fan the heat, and condemned prisoners pile up like dry brush. When Robert Alton Harris was put to death in April 1992, some observers speculated that the first execution in California in a quarter of a century would be the spark.

This was hardly the first time that massive executions have been predicted. It hasn't happened. I do not think it will happen now either, although the rate of executions is likely to move up a notch from twenty or thirty a year to forty or conceivably fifty. That would be a change, but only in degree, not in kind. Even at fifty a year, executions would still the exception rather than the rule after a death sentence — and they would still be slow, costly and unpredictable.

My basic argument why little is likely to change has two parts.

First, support for the death penalty does not necessarily mean support for executions. Public attitudes on criminal sentencing are notoriously inconsistent. Several researchers have asked people about their attitudes toward perceived and actual sentences. The results show basic inconsistencies between what we say we want, and what we ourselves would actually do. In the context of the death penalty, many say they are for "mandatory" death sentences for certain crimes — killing a police officer, for example, or homicide in the course of a rape — but when given an actual sentencing decision, choose life imprisonment as the correct penalty in just such a case.[20] Hugo Bedau has argued that many of those who say they favor capital punishment may want "only the *legal threat* of the death penalty, coupled with the judicial ritual of trying, convicting, and occasionally sentencing a murderer to death, rather than *actual executions*."[21] Some people, I expect, support capital punishment in order to keep every possible weapon in the public arsenal; others favor the death penalty (with or without executions) simply because they do not believe that life imprisonment lasts for life.[22]

Second, and more important, even those who do want executions do not want many. Many Americans, perhaps a majority, want some executions to take place as public statements about crime and murder, but there is widespread aversion to the prospect of *numerous* executions. A single execution is not truly an act of revenge but it looks like one; it symbolizes our desire and our willingness to seek vengeance. When we single out one murderer we can focus on what he did to deserve death. But if we were to conduct a hundred executions in close order, we would lose any illusion of individual vengeance; all we would see is mass slaughter by the state. The symbolism would change; the issue would now be the nature of our society, our culture. At a minimum, it would be a humiliating comment on our failure to control violence by less bloody means; at worst it would provoke repulsive comparisons with Hitler and Stalin.

In short, appearances to the contrary notwithstanding, the death penalty we have is pretty much the death penalty we want. The costs of the process are mostly hidden from view. Politicians and judges grumble about the delays, but the system does produce what the public demands: a widely available death penalty that is rarely carried out.

LQN

[22] Ellsworth & Ross, 29 *Crime and Delinquency* at 151–52, (cited in note 11) (50 percent of sample agreed that "Even when a murderer gets a life sentence, he usually gets out on parole, so it is better to execute him," and 65% agreed that "One advantage of the death penalty is that it makes it impossible for convicted murderers to later go free on account of some legal technicality.")

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ART OF JUDGEMENT IN

Planned Parenthood v. Casey

— BY JAMES BOYD WHITE

This article was excerpted and abridged with permission from a chapter in Professor White's recent book Acts of Hope: Creating Authority in Literature, Law, and Politics. *In the book, he explores the nature of authority in verious cultural contexts. Here he examines the Joint Opinion in* Planned Parenthood v. Casey, *which has been been attacked both from the right, on the grounds that it tried to keep* Roe v. Wade *alive, and from the left, on the grounds that it significantly weakens the force of that case. Professor White, by contrast, admires it greatly, and in this chapter explains why.*

When the Supreme Court faces a precedent it disagrees with, the authority of the past becomes a real issue for us, not merely a theoretical one, for we must repeatedly ask to what weight the earlier decision is entitled. Is the present Court bound by a prior case, even if it thinks the judgment wrong or undesirable? Or is the prior case to be read simply as advisory: Here is what some people have thought, after putting their minds to the question; you should take it seriously so far as you respect the quality of their work, but no more seriously than any other thought on the subject by, say, a professor or journalist or a politician? On this view, precedent would simply be another source of information about ways to think about the case. Or is there a different view?

I want to explore this matter in connection with the abortion issue, which raises it in a stark and public form. One way to put the question is by asking whether *Roe v. Wade*, the 1973 case establishing a woman's constitutional right to decide whether to continue a pregnancy, should be regarded as authoritative and hence binding on the present Court, which, as I write in 1992, has a large majority that apparently would have voted the other way in *Roe*. It is not simply that these justices disapprove of abortion as a moral matter; they believe that *Roe* represented a serious misreading of the Constitution. What attitude should they then have towards *Roe v. Wade*? One cannot really begin to think about this question without thinking about the cases that precede *Roe*, with an eye both to their meaning and to their authority.

PRIOR LAW

As the Constitution was originally adopted, virtually no argument could have been made that it prohibited the states from adopting "anti-abortion" laws. The reason is that, with the exception of a small number of provisions in Articles I and IV, the Constitution did not limit the power of a state over its citizens at all. It was primarily meant to allocate governmental power among the three branches of the national government and between the national government on the one hand and the states on the other. The Bill of Rights, adopted in 1791, did not change this as far as the states were concerned, for its provisions and protections were limitations only on the federal government. The states were free to violate them as much as they wished, as indeed was necessary if some of them were to maintain the institition of human slavery.

Only after the Civil War was the Constitution amended to regulate the relation between the citizen and the state. The method chosen was not, however, simply to apply the Bill of Rights to the states; rather, the new amendments focused on the rights of the newly freed slaves and other African Americans. The Thirteenth Amendment prohibited slavery; the Fifteenth provided that the vote should not be withheld on the grounds of race; the Fourteenth, for our purposes the most important one, spoke in more general language, providing that no state should deprive any person of "life, liberty, or property without due process of law" or deny any person "equal protection of the laws." What is this language to mean? In answering this question, the Supreme Court created a jurisprudence deeply affecting many aspects of the relation between the citizen and the state.

LOCHNER

At first, this jurisprudence was fashioned by a conservative Court, hostile to social legislation and in particular to state laws regulating the economy. In a case that has become symbolic of the era, *Lochner v. New York* (1905), it struck down New York laws that prohibited bakers from working more than ten hours a day or sixty hours a week, on the grounds that this was an impermissible interference with liberty of the workmen to contract for their labor. Other welfare laws were invalidated for similar reasons. The idea of "due process" that these laws were held to violate was substantive, not merely procedural: however correct its processes of lawmaking, the state could not interfere with an economy working by the principles of the market without a clear need articulated on recognized grounds.

This position of the Court, of course, was gradually overturned. The legislative program of the New Deal was based on very different premises: that our economy and society were partly made by human beings, that they were properly subject to reform and transformation, and that the health of the economy required a prosperous working class to serve as its customers. Through changes of mind and personnel, the Court came to support legislation based on these views, at the state and national levels alike.

In the process, the authority of *Lochner* and its kin was thoroughly repudiated, the Court insisting that these decisions represented an inappropriate form of judicial legislation, involving the imposition of partisan political or economic values on the legislatures to whom our democratic system assigned authority for resolving those questions. The Court's task, it was said, was not to impose its view of the economy or society but to confine itself to interpreting the limitations found in the Constitution.

OLMSTEAD AND GRISWOLD

During the 1920s, while the conservatives were still in power, the Court decided a case of enormous significance for the future development of the law relating to abortion, though at first glance it would seem to have a wholly different subject. This case, *Olmstead v. United States* (1927), held that wiretapping by federal officials was not a "search" within the meaning of that word in the Fourth

IT IS NOT SIMPLY THE PAST THAT DECIDES.

Amendment, defining the term, as though it were obvious, in terms of a physical invasion or trespass.[1] The main significance of the case lay not in its holding, however, but in the dissents of Holmes and Brandeis, especially the latter, who thought the majority's view unduly narrow and technical.

Brandeis believed that the Constitution should be regarded not simply as a set of commands to be read in an unimaginative and literal way, but as a text meant to govern our polity for generations; its language should be read not restrictively but generously, whether one speaks of grants of power to legislatures or of definitions of the rights of citizens. A particular provision, such as the regulation of "searches," should accordingly be read not only in light of the particular kinds of abuse with which the framers were familiar, and which animated the provision in the first place, but in light of principles defining the abuse in its more general form. For Brandeis the basic principle of the amendment was the protection of privacy. It was adopted not to protect property, but to protect the right of people to be let alone. When that right is violated as effectively by technology unknown to the framers as it would be by a physical search, it should be held within the constitutional prohibition.[2]

In the 1950s and after, the Court became activist once more, but in quite a different way from the *Lochner* Court. Again the "due process" and "equal protection" language of the Fourteenth Amendment was read expansively, but this time mainly to protect not economic rights but civil rights and liberties. To a large extent the provisions of the Bill of Rights were read into the due process clause, or considered "incorporated" in it, especially those that protected the freedom of press and religion and those that governed the rights of those suspected of crime. The most important single case was *Brown v. Board of Education* (1954), holding state-enforced racial segregation in public schools to be a violation of the equal protection clause.

Much of this was opposed as shocking judicial activism, the conversion of neutral constitutional law into value-based politics, but often by those who would have supported *Lochner,* and defended, often in self righteous terms, by those who would have regarded *Lochner* as a low point of judicial irresponsibility, indeed as a subversion of the constitutional process. Insofar as these two sides were defined by their affiliation with one Court or another, both of them were presented with the same problem: how to disapprove of *Lochner* without also disapproving of the Warren Court, or vice versa.

Another of the crucial cases of this era, from the point of view of theory and consequence alike, was *Griswold v. Connecticut* (1965), which held unconstitutional a Connecticut law prohibiting the use of birth control devices, even by married couples. This was obviously, to most of the Court, an undesirable, bad, even "silly" law — but how was it unconstitutional? Speaking for the majority, Justice Douglas explicitly refused to be guided by the analogy to *Lochner,* a case he loathed, but instead looked to the Bill of Rights, most of which had by now been incorporated in the Fourteenth Amendment. None of these provisions, it is true, spoke of birth control or reproductive freedom, or of privacy, but many of them, taken together, could be seen to serve the fundamental value of human privacy. This is an extension of the kind of reading Brandeis gave the Fourth Amendment in *Olmstead.* To make up for the want of helpful language, Douglas spoke of "penumbras" formed by "emanations" from these provisions, for which he was widely ridiculed.

Others, notably Justice Harlan, found in the due process clause itself an injunction to the Court to insist upon the protection of those rights that have been fundamental to our society.[3] To determine these, it is not enough to look within the self, at one's own values; one must look without, at our history and culture. The Constitution chose to protect these rights under such vague language because in the nature of things they cannot be spelled out more precisely. Their definition and elaboration is entrusted to the Court because the way the Court works — by the decision of particular cases, carefully argued on both sides; by the refusal to decide more than is actually before it; by the resulting particularity of the judgment, informed as it is by the ways in which conflicting values present themselves in real cases — entitles it to a trust and an authority that a more political or less disciplined branch of government would not deserve.

Like Brandeis, Harlan rejected the idea that the Constitution should be regarded as simply speaking in plain English, saying just what it means, and for much the same reason: that the Constitution is meant to serve the highest purposes of government and collective life and that these cannot be reduced to a code. Instead, the Court must accept responsibility for judgment, which for Harlan means a responsibility to educate itself at the hands of its own past. As Harlan sees it, the extraordinary duty and privilege of the judge is to reconstitute this source of authority in his own prose. The line between self and world is in this way blurred, as the mind of the judge is partly made by the very material it transforms.

But this was only his view. There were six judges in the majority in *Griswold,* each of them writing a separate opinion, on a different theory, leaving the law, to say the least, unsettled.

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1 For an extended discussion of this case, see my *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), chapter 6.

2 For a proposed analysis of this case that is neither so literal minded as the majority nor so expansive as Brandeis, see Clark Cunningham, "A Linguistic Analysis of 'Search' in the Fourth Amendment: A Search for Common Sense," 73 *Iowa Law Review* 541 (1988).

ROE

Such, in extremely reduced outline, was the state of affairs at the time *Roe v. Wade* was decided in 1973. As everyone knows, this case held that a woman has the right to terminate her pregnancy during its early stages. But the opinion of the Court, written by Justice Blackmun, focused less on the nature of her right than on the nature of the interests that the state asserted as the ground for limiting it. In this, it was reminiscent of *Lochner* itself, for the idea of both is that state interference with individual freedoms is invalid unless based on good reasons (expressed in terms of public health, safety, and morals in *Lochner*, and of legitimate, substantial, or compelling state interests in *Roe*).

In *Roe* the Court held that during the first trimester, before the fetus quickened, the decision about abortion was solely for the woman and her doctor. After that the state had a sufficient interest to justify regulation to protect the woman's health, for now abortion presented greater dangers to the woman than childbirth did. In the third trimester, when the fetus became independently viable, the state could act to protect that future human life by prohibiting abortion, except in the case of danger to the woman's life or health.

This opinion was widely criticized, not only by those who simply opposed abortion but on institutional grounds. *Roe* was felt by many to be an unwarranted interference with the rights of the people of the states to decide such questions for themselves through the political process. While the Court can invalidate state legislation that is inconsistent with the Constitution, here there is no constitutional language justifying such action — nothing about "abortion" or "privacy" — and no earlier precedent supporting it, except maybe *Griswold,* which was felt to be an unwarranted piece of judicial activism, and one or two cases building upon it. Nor is *Roe* supported by the prior practice of the states, which was nearly uniformly to regard abortion as subject to their prohibition or regulation, at least in recent decades.

Finally — for some most importantly — the form of the opinion was legislative rather than judicial. It consisted not of the decision of a particular case under general constitutional standards, but the decision of an abstract issue by the articulation of a regulatory code of the sort we normally associate with legislation. Whatever the Constitution may be thought to say about the principles of privacy or reproductive rights, it is ludicrous to think that it speaks in terms of trimesters. To make rules of this sort, the argument goes, is peculiarly the task of the legislature, because by their nature such rules work as approximations that rest on estimates of factual probability which the legislature is in a far better position than the judiciary to make. My own judgment at the time, for what it is worth, was that the Court was wrong as a matter of constitutional law, though on the underlying moral issue of abortion I was unsure what was right.

More can of course be said about *Roe,* but for our purposes this is enough to suggest that the situation of the Court in 1992, faced with a challenge to that case, was a complex and difficult one. *Roe* established both a general principle, that the right to control reproduction lay within the right to privacy, and a set of quasi-legislative rules, which may be entitled to significantly less authority than its central holding. And the status of the principle itself can be questioned, to say the least: the case was controversial when it was decided, on institutional as well as substantive grounds; it depended on *Griswold,* itself a case that many people felt to be wrong in principle and method alike. To what, then, should authority be given in deciding *Casey*, and why?

CASEY

On both substantive and procedural grounds, *Roe* has been controversial from the day it was decided. It was the object of excoriation by the Republican party in particular, with both Presidents Reagan and Bush seeking to appoint justices who would overrule it. Of those on the *Roe* Court only Blackmun, who wrote the opinion, and White and Rehnquist, who dissented, were left on the Court at the time of *Casey*. All but White had been appointed by Republican presidents, four of them by Reagan or Bush. In a series of inconclusive cases, the Court had avoided either reaffirming or overruling *Roe*, though Rehnquist and Scalia repeatedly called for its rejection.[4] *Casey* presented the issue of *Roe*'s continued vitality not so much because its facts required the judgment as because the recent appointment of Clarence Thomas was thought to give the overrulers the majority they needed. It was widely believed that the Court would face and resolve it, but no one could confidently predict how the Court would vote, largely because it was uncertain what Justices O'Connor and Souter would do.

The legislature in *Casey* did not attempt to prohibit abortion entirely but instead regulated it, with a series of requirements: that the doctor give the woman certain information about abortion itself and about the availability of adoption agencies and others who would support a decision to carry the

[3] His views are best expressed in his famous opinion in an earlier stage of the Griswold case, *Poe v. Ullman* (1961).

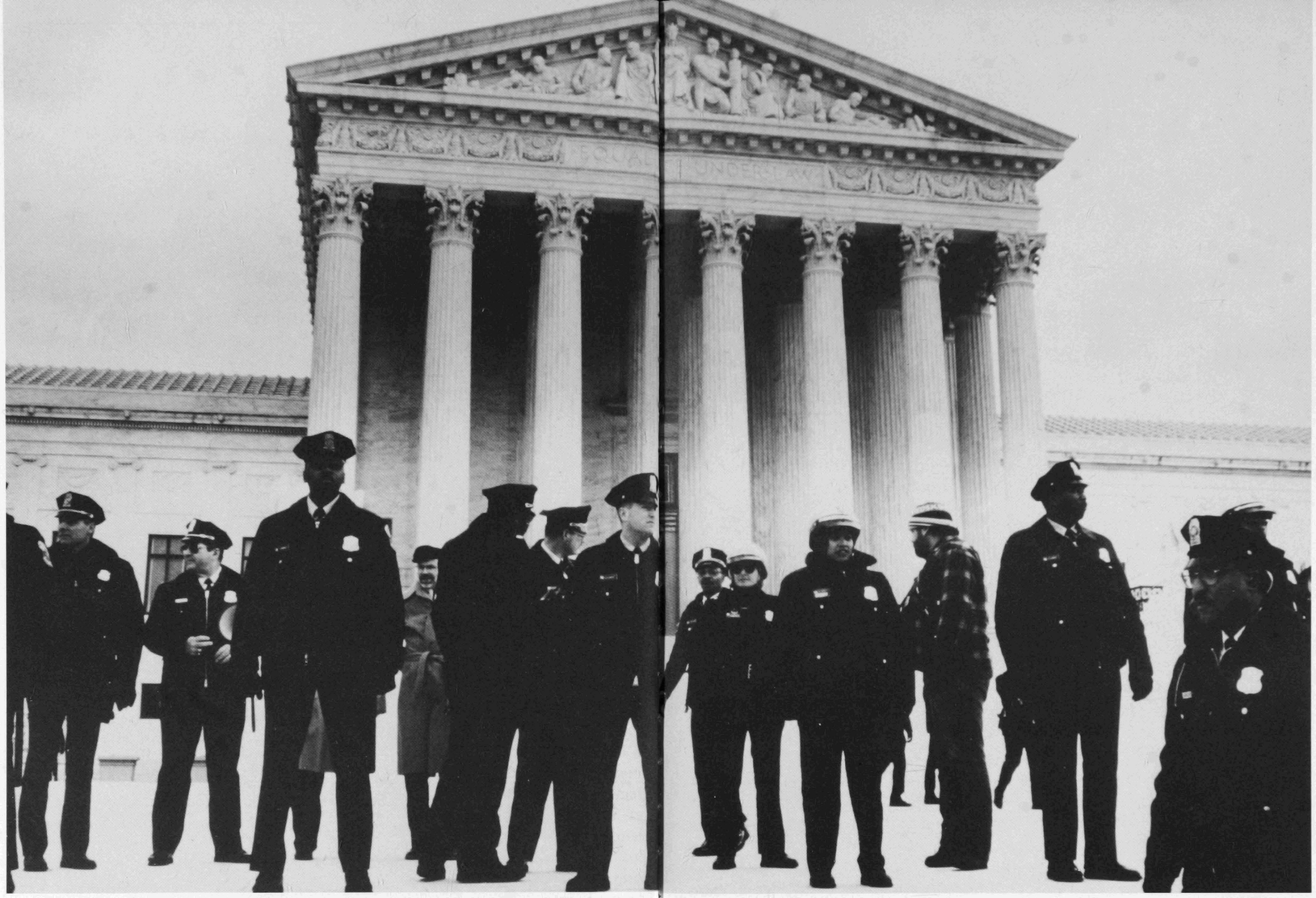
[4] See, for example, *Webster v. Reproductive Health Services*, 492 U. S. 490 (1989); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U. S. 747 (1986); *Akron v. Akron Center for Reproductive Health*, 462 U. S. 416 (1983); *Maher v. Roe*,432 U S. 464 (1977); *Planned Parenthood of Central Mo. v. Danforth*, 428 U S. 52 (1976); *Doe v. Bolton*, 410 U S. 179 (1973).

THE COURT MUST ACCEPT RESPONSIBILITY FOR JUDGMENT

fetus to term; that minors obtain the consent of their parents, except in certain cases; that a woman wait twenty-four hours after first coming to the clinic or hospital before actually having the abortion; and that a married woman inform her husband of her plans to have an abortion. It would have been possible to determine the validity of the regulations, especially in their favor, without addressing the underlying issue, whether *Roe* was still good law. But no one on the Court favored that; all wanted to face the central question.

There are two relatively easy ways to think about it: that *Roe* was right and therefore still is the law, and that it was wrong, and therefore is not. Justice Blackmun, and to some degree Stevens, adopted the first approach, while Justices Scalia and Rehnquist, with Thomas and White voting with them, took the second. Justices Kennedy, O'Connor, and Souter wrote an opinion that takes a different approach, and one that is remarkable in several respects. It was jointly written and signed, a rare event in the history of the Court.[5] It was largely written, I think, by the justices themselves and not by their clerks. It was without a single footnote. Most important, it addressed not just the "rightness" or "wrongness" of *Roe* abstractly considered, but the kind of weight and respect it should be accorded under the doctrine of *stare decisis*, even by those who disagree with it.

[5] This happened also in *Cooper v. Aaron*, 358 U.S. 1 (1958) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).



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THE AUTHORITY OF THE PAST

In *Casey* the Court reaffirms what it calls the "essential holding" of *Roe* — that prior to viability it is the woman alone who should decide whether to terminate the pregnancy. Other parts of the holding viewed as less essential are discarded: the idea that the state has no interest at all in protecting the future of a fetus before quickening, for example, and the rigid trimester structure. Rather, for the authors of the Joint Opinion, the critical line is viability: prior to that point the state may regulate abortion, but it may not take away the woman's right to choose nor may it subject that choice to "undue burdens." In this way they reaffirm the central core of *Roe*. But they do so less because they personally agree with *Roe* as an original proposition than because they believe that respect for the Court's own past requires it.

In this they are not simply knuckling under to what they regard as an unavoidable command, as cogs in an authoritarian intellectual machine, but acting out of a complex conception both of this case and of the Court, which they strive in this opinion to make real and comprehensible to their audience. This is not a reluctant or joyless opinion; its writers find in their understanding of their role and situation under our Constitution a way of thinking and talking about this issue that, in my view at least, dignifies both it and them. Indeed, it is partly because they would not originally have voted for *Roe* that the conception they have both of themselves and of that case, which leads them to affirm it, has such force and gravity.

To start with the merits of *Roe*, the authors describe this case in a way that does not commit them to the view that, taking everything into account, it was "right" when decided; rather, they explain why, on the merits, the case is entitled to a high degree of respect. They define *Roe*, that is, not as an unjustified or bizarre decision which they might be entitled to disregard, but as an important effort by the Court to speak to a crucial issue that is entitled to real respect — certainly not deserving the derisory sneers of the chief justice and of Justice Scalia. Here is what they say:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Services International*, 431 U. S., at 685. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U. S. 438, at 453 [emphasis in original]. Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

This is idealistic language, and it exposes its authors to the contempt of those who cannot stand that way of talking. However, it catches an essential point: that for the state to prohibit abortion is to take a position on an essentially religious topic, the nature of human life, which it is the aim of our Constitution to leave in private hands. Not that an anti-abortion law is a full-fledged establishment of religion in violation of the First Amendment, but it has overtones of that kind, for its effect is to preclude an individual woman from addressing this essentially religious issue on her own. The effect of this in turn is to dwarf or limit her capacity for matura-

THE COURT TURNS ITS MIND TO THE WAY CITIZENS RESPOND TO ITS DECISIONS, ESPECIALLY TO THOSE THEY DISAGREE WITH.

tion and responsibility as a full human being. On this view, it is natural to see the issue as the Court frames it, not in terms of a specific right to abortion but as an aspect of the "liberty" explicitly protected by the Fourteenth Amendment. The point of liberty, so conceived, is not simply freedom from constraint, but the creation of conditions in which the possibilities for human life can be most fully achieved.

To conceive of what a legislature intrudes upon when it prohibits abortion not as a "right" but as an aspect of "liberty" not only ties the holding more firmly to the language of the Constitution, but it connects its two aspects, the affirmance of *Roe* on the merits and the institutional obligation to protect the liberties defined by the Constitution, in a consistent and coherent way. As the first sentence of the opinion, in a sense organizing the whole, puts it: "Liberty finds no refuge in a jurisprudence of doubt." This sentence calls on the Court to determine whether liberty includes a woman's right to make her own decisions with respect to abortion, not in the abstract, as if the issue were wholly new, but in light of their obligation as a Court to preserve the liberties established by prior decisions.

This in turn calls for a process of "reasoned judgment," a phrase that the Court will define for us in the rest of what it says. What it tells us now, in the first sentence, is that it will not proceed in the quasiscientific manner that characterizes so much legal analysis, as though the issues before it could be separated into wholly discrete entities, but with the acknowledgment that for them the judgment on *Roe* is necessarily at the same time a judgment about the authority of the past. These issues are interdependent; the Court thus establishes a mode of proceeding that is comprehensive and integrative in character, rather than linear and abstract.

LIBERTY

For the writers of the Joint Opinion, the central modern text is not the majority opinion in *Griswold,* upon which *Roe* is usually thought to depend, but Harlan's earlier opinion in *Poe v. Ullman* (1961), in which he urged that the Court strike down the same Connecticut statute. This opinion is perhaps the classic definition of a certain view of "due process": Harlan refused to reduce it to a code or to specific rules or practices of the past — for the essence of liberty cannot be protected that way — yet at the same time refused to see it simply as the imposition of contemporary or evolving political values. The task of the judge, as Harlan defined it, is to engage with the traditions of the law and of our country in a responsive and responsible way; to defer in all reasonable ways to the judgments of others; to educate, and thus transform, his own mind by full consideration of what others have said and done; and, in a case which calls for it, to make his judgment whether the state has interfered with a liberty defined by that tradition. He sees that an essential part of the tradition lies in its principles of self-transformation. Conservation requires change.

The very fact that the power the Constitution has given the Court cannot be reduced to rules, but rests on principles and understandings necessarily broad and indeterminate, means that great restraint is essential to its exercise and continued existence. Such power will be tolerated in unelected officials only when used sparingly and well. Likewise, the act of judgment must be reasoned, and in this sense justify itself: it is not simply the past that decides, as if you could take any modern issue and see how others dealt with it, nor simply the present, as if the meaning of the case could adequately be cast in terms of contemporary political debate. The task of the judge is to educate himself, to modify his own sensibilities by engagement with our tradition, so that in the end it is neither he alone, nor the past alone, that decides, but he as formed and educated by engagement with the past. The Court's term for this is "reasoned judgment." The idea of tradition with which Justice Harlan works is not as a set of discrete decisions that are entitled to authority, but as a process of development and change, to which it is the judge's task to contribute in an intelligent and responsible way. In invoking the shade of Harlan as their guide, the writers of the Joint Opinion ask to be tested by his standards of intelligence, responsibility, and humility. What sort of education in the law, and our own traditions, does this text reflect? What sort of education does it offer its reader?

They begin by describing the kind of "liberty" that the abortion laws invade, but in so doing they are careful not to speak as though it could be abstracted from the context in which they in fact face it — the context defined by the existence of *Roe* itself. It is not the case for them, as it is for more abstract thinkers, that legal questions should be decided as questions of theory, out of time and place as it were, but the opposite of that: the case before them cannot be separated into the "merits of *Roe*" and the "obligation to follow the law." Both aspects are before them, and they interact: "The reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*." This insistence upon the actual context and upon the interrelatedness of the decisions before them, like their earlier invocation of Justice Harlan at his greatest, enacts a kind of conservatism very different from radical dogmatism of our era. It is a cultural conservatism, of which an important element is the location of authority outside one's own dispositions, and outside one's own ratiocinations, in the culture, as this is reconstituted by an attentive mind.

STARE DECISIS

Their explicit discussion of *stare decisis*, to which they next turn, proceeds from the double assumption that some obligation to follow the past is necessary both to the idea of law and to the legitimacy of the Court, yet that the past cannot be followed slavishly. The Court thus explicitly resists the temptation to collapse a complicated inquiry into a slogan, but recognizes that the twin necessities they describe define a field for what they have called "reasoned judgment" which they will now undertake to exemplify.

They begin their performance by looking to the other cases in which the Court has been faced with the issue of *stare decisis*. In considering the degree of authority to be given the past, that is, they proceed by first considering the past itself. What they claim to discover is that this judgment has been guided by several factors: whether the case in question has proved unworkable; whether its continuance is supported by reliance that would make its overruling especially burdensome or inequitable; whether doctrine in related fields has developed to such a degree that the case in question is merely a "remnant" of an abandoned view; and whether the factual perceptions that supported the original decision have changed in such a way as to undermine it. Asking of *Roe* the questions these criteria suggest, they not unsurprisingly find that it has not proven unworkable, that doctrine has not developed in such a way as to leave it behind — quite the reverse in fact — and that while the factual context has changed owing to medical advances, it has done so in ways that affect only the trimester scheme of *Roe*, not its essential holding.

With respect to reliance, their argument is more complex, difficult, and important. First, they acknowledge that this is not a case in which people have advanced sums of money in reliance upon a rule of property or contract in such a way as to make it unfair to change it on them. But this should not exhaust the meaning of reliance:

> To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, e.g., R. Petchesky, Abortion and Woman's Choice 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

This passage connects the issue of reliance, which bears on the issue of stare decisis, with a larger sense of the nature and importance of a judicial decision of this character. Such an opinion becomes a part of the culture, they say: it affects the ways in which people conceive of themselves and their possibilities for life. Insofar as it is not to be repudiated on one of the grounds suggested, this is a large and deep reason for its continuance.[6] In Burke's terms, the significant decisions of the Supreme Court help shape our "prejudices," the attitudes and feelings, the ways of imagining our world and affiliating ourselves with it, that makes us what we are.

OVERRULINGS

The Court could stop here, but it goes on to consider the two instances of overruling that cut most powerfully against what it has said: the rejection of *Lochner* in the 1930s and the repudiation of the "separate but equal" doctrine in *Brown v. Board of Education*.

With respect to the Lochner tradition, the key case was *West Coast Hotel v. Parish* (1937), overruling *Adkins v. Children's Hospital of D.C.* (1923), which had struck down a statute requiring employers to pay adult women a minimum wage. This case was properly overruled, the Court says, and on the grounds that do not reach *Roe*, for Adkins unlike *Roe* rested on "fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimum levels of human welfare." Even if one does not oneself believe these assumptions false, that does not blunt the force of the Court's point: to the overruling Court in *West Coast Hotel* the assumptions were plainly false in a way for which there is no analogue in *Roe*.

Assimilating *Brown* to the model of *West Coast Hotel*, the Court in *Casey* focuses on language in *Plessy v. Ferguson* (1896) which denies, as a factual matter, that the mere separation of the races, in this case on trains, stamps one race with inferiority. Admitting that the justices may not in fact have believed this — How could they? — the Court says that it is nonetheless the "stated justification" for their opinion, and by the time of Brown this factual assumption was seen as plainly wrong.

In a final section of its opinion, before reaching the particular provisions of the Pennsylvania statute before it, the Court expands on what it thinks is at stake in its decision: the legitimacy of the Court

[6] Compare the famous remark of Brandeis in *Olmstead v. United States*, 277 U.S. 438, 485 (1927), that "the Government is the potent, the omnipresent teacher."

itself, and its capacity to perform its essential and unique role in our democracy. To discharge its responsibilities and maintain its position, the Court must seek to decide cases on the ground of principle, or what it earlier called "reasoned judgment." "The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." Essential to this goal is respect for the decisions of the past; frequent overruling of its own decisions would be a statement by the Court itself that they were not entitled to respect.

Where, as here, the Court decides a matter intensely divisive of our polity, it is especially important to respect the choices that have been made by the past. "Only the most convincing justifications" could demonstrate that an overruling in such a case was "anything but a surrender to political pressure." Once the decision is made, it is essential to live with it unless it is plainly wrong. This is the point where the Court comes closest to acknowledging the existence of the enormous forces at work in our country on abortion, making it a focus of opposition that has some of the characteristics of a civil war itself. The extraordinary character of the issue makes principled judgment and adherence to prior authority all the more important. To reverse oneself under pressure will give the impression, perhaps correctly, that the Court is nothing but another vehicle for political life — and that (though they do not say this) the appointment of new justices can properly rest on purely political and result-oriented judgments rather than on qualities of mind and character traditionally thought essential to the judicial role.

There follows now an extraordinary moment in the history of American law. The Court turns its mind to the way citizens respond to its decisions, especially to those they disagree with. Of course it is easy to support the Court when it comes out your way, and of course many people who disagree respond with simple and continuing opposition or resistance. It is not with either of these groups that the Court concerns itself, but with those who disagree with the result, yet "struggle to accept it, because they respect the rule of law." To them the Court must keep its promise; for if it does not, but reverses itself too easily, in the end "a price [will] be paid for nothing."

The Court does not explicate this point further, but what they mean, I think, is this: they are imagining the moral drama that occurs when a person is opposed to a law yet respects it, a drama in ordinary life that parallels the one they are experiencing as judges. This drama is seen as a painful but also as a good thing. It is good because only at such moments is the commitment to the rule of law a meaningful one: when you agree with the law, there is no problem; when you resist and oppose, you are refusing to accord the law respect. Only when you disagree on an important matter are you given the opportunity to engage in the moral practice of respecting it. Such a moment is a stage in the development of an essential ingredient of civic character; it is a part of an education, not purely practical or intellectual or a matter of training but an education of the whole self. In this it would be recognizable by Plato and Aristotle, both of whom saw education as the development of the character through testing and the development of habit. A person who has been through the struggle the Court describes will know, as no one else really can, the importance of the rule of law itself; and having respected it against his own inclination, he will be in a position to insist that others respect it against theirs.

On such a view of civic life in general, and of the activity of the Court as well, the Court is resisting many tendencies of our culture: the attitude stimulated by our consumer economy, and given theoretical standing by certain schools of economics, that reduces all choices to preferences and treats them all as equal; the comparable view in the political arena that democracy means the collective preference of the majority, however uneducated or biased it may be; the way in which certain political candidates address the voting public by trying to stimulate whatever feelings will move it to vote for them, often in impossibly simplistic language, and the view that the Court is really just another political agency, to be staffed by those who will carry out the president's political agenda, and that all its opinions are really just the rationalization of the exercise of power. The Joint Opinion resists all of those assumptions, seeing in the citizen a capacity for responsible tension and growth, and seeing in the process of law — especially in the work of the Court — a source of education for itself and the polity. It defines the life of the citizen as an ethical drama, and its own life as one, too, providing a basis on which one can find possibilities for meaning in our shared life that are worthy of humanity. So read, this opinion enhances the dignity of the Court and the nation alike.

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