THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
VOLUME 39 • NUMBER 2
SUMMER 1996

LAW QUADRANGLE NOTES

An Epilogue to the Age of Pound
Can Good Lawyers be Good Ethical Deliberators?
Arbitration: Back to the Future

UNIVERSITY OF MICHIGAN
LAW SCHOOL

Upcoming Events

Sept. 17	International Law Workshop (all ILW programs begin at 4 p.m. unless otherwise noted): Pierre-Marie Dupuy, University of Paris, "International Law on Protection of the Environment"
Sept. 19	Alumni Breakfast, Michigan State Bar, Grand Rapids
Sept. 20	Alumni Luncheon, Missouri State Bar, Kansas City
Sept. 20-22	Conference on Comparative Law in the United States, attendance by invitation
Sept. 24	ILW: Yozo Yokota, University of Tokyo Faculty of Law, "Economic Development and Human Rights — A Challenge to International Law"
	ABA Business Law Conference: Negotiated Acquisitions
Sept. 27-29	Reunions of Classes of 1941, 1951, 1956, 1961 and 1966
Oct. 1	ILW: Trevor Hartley, London School of Economics and Political Science, Department of Law, University of London, "Judicial Activism and the European Court of Justice"
Oct. 8	ILW: Richard Lauwaars, The Netherlands, "The Inter-Governmental Conference: Revision of the Maastricht Treaty on European Union"
Oct. 11	California State Bar Alumni Luncheon, Long Beach
Oct. 11-12	Symposium and Juan Tienda Banquet. "Latino Voices: Moving America Beyond the Black and White Binary"
Oct. 15	ILW: Ernst-Ulrich Petersmann, Institute of European and International Economic Law, Switzerland, "Constitutionalism, International Law and International Organizations"
Oct. 17-19	Committee of Visitors Weekend

Continued on inside back cover

Oct. 16-19, 1997 **International Reunion**
Ann Arbor

The Law School's 2nd International Reunion will bring together internatonal alumni who are residing and practicing either abroad or in the U.S. for a weekend of catching up with fellow graduates, the Law School faculty and programs, and Ann Arbor. American alumni who would also like to receive information about the reunion should contact:

Julie Levine, Development and Alumni Relations
721 Sourth State St.
Ann Arbor, MI 48104-3071
313.998.7969 ext. 218
jalevine@umich.edu

Cover —
the Lawyer's Club portico offers
a serene frame for this scene of a stroller
crossing the Law Quadrangle.

Have you moved lately?

If you are a Law School graduate, please send your change of address to:

LAW SCHOOL
Development and
Alumni Relations
721 S. State St.
Ann Arbor, MI 48104-3071

Non-alumni readers should write directly to:

LAW QUADRANGLE NOTES
919 Legal Research Building
Ann Arbor, MI 48109-1215

Address all other news to:

Editor
LAW QUADRANGLE NOTES
1045 Legal Research Building
Ann Arbor, MI 48109-1215

Telephone (313) 647-3589

Facsimile (313) 764-8309

trogers@umich.edu

CONTENTS

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL

VOLUME 39, NUMBER 2
SUMMER 1996

LAW QUADRANGLE NOTES

 Law Quadrangle Notes (USPS #144) is issued by the University of Michigan Law School. Postage paid at Ann Arbor, Michigan. Publication office: *Law Quadrangle Notes*, University of Michigan Law School, Ann Arbor, MI 48109-1215. Published three times a year.

POSTMASTER, send address changes to: Editor, *Law Quadrangle Notes*, University of Michigan Law School, 801 Monroe St., Ann Arbor, MI 48109-1215.

FACULTY ADVISORS:
Yale Kamisar and Kent Syverud

EXECUTIVE EDITOR:
Catherine Cureton

WRITER/EDITOR: Tom Rogers

DESIGN AND PRODUCTION:
Linda Liske

PHOTO CREDITS: All photos by Gregory Fox except in Alumni, Class Notes and where otherwise noted.

http://www.law.umich.edu/

MESSAGE FROM DEAN LEHMAN

This summer marks the beginning of my third year as your dean, and that means it is time for me to select a new theme from among the characteristics that define an outstanding lawyer. During my first year, I emphasized the commitment to continuous intellectual growth and renewal. This past year, I stressed integrity. During the 1996-97 academic year, I would like to concentrate on a theme suggested to me by Stephanie Smith, '80: the great lawyer's inclination to teach others about the law.

Social critics sometimes portray law's complex rituals and vocabulary as deliberately obscure, designed to maximize the value — social, economic and political — of lawyers' expertise. And we all have known lawyers who present themselves as the anointed guardians of a rare and inaccessible knowledge, people whose authority is to be accepted on faith, flowing appropriately from talent, training, and specialized experience. Indeed, at some time or other in our careers we have all yielded to the temptation to see ourselves that way.

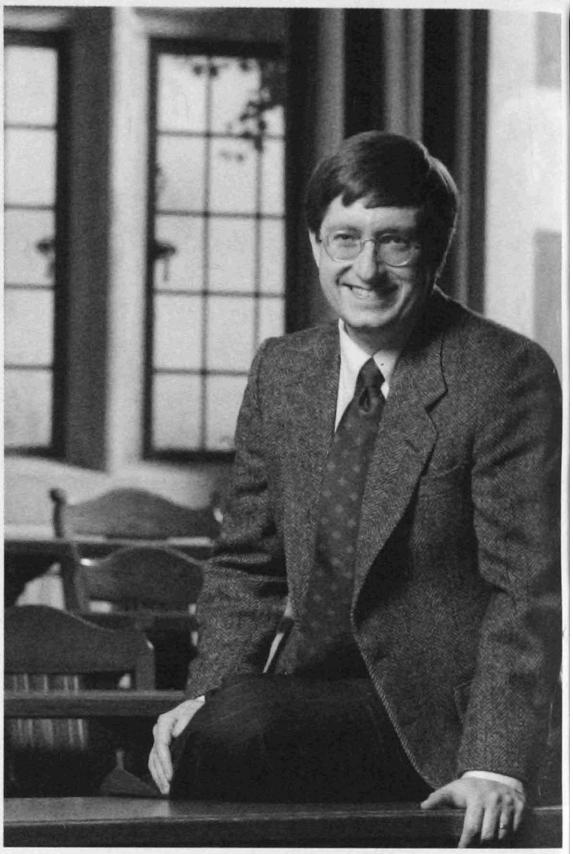
Yet the very best lawyers I have known have tended to view themselves rather differently. They do not insist on trust or deference to their authority. Instead, they are teachers in the very best sense of the role.

The contexts are many in which lawyers can go beyond simple pronouncements and try to teach. A litigator can show a judge or jury not only that the law and the evidence compel a particular outcome, but also that such a state of the world is (or would be) just and right. A counselor can show a client not only that the law prohibits a particular course of action, but also that there are intelligible (if not fully satisfying) reasons why that is so. A senior partner can teach a new colleague not only what steps are required to perform a particular service for a client, but also what more general intellectual habits and instincts give the lawyer confidence that those steps ensure quality service.

And there are more. Interactions with opposing counsel, with friends and acquaintances, with individuals and groups who are curious about the law. All give the lawyer an opportunity to teach about the domain of his or her expertise.

During the coming year I hope to have many different occasions on which to think about what it means for a lawyer to teach in these manifold settings. I would like to begin the exploration, however, by noting that "teaching" implies a certain kind of attitude toward the person one is speaking with. It implies a certain degree of intellectual solidarity. It implies a belief that one's "student" is engaged in the same enterprise, committed — just like the teacher — to understanding the world in a certain way. It implies a willingness to trust in the intelligence and sound motives of one's audience, and to display that trust through one's style of conversation.

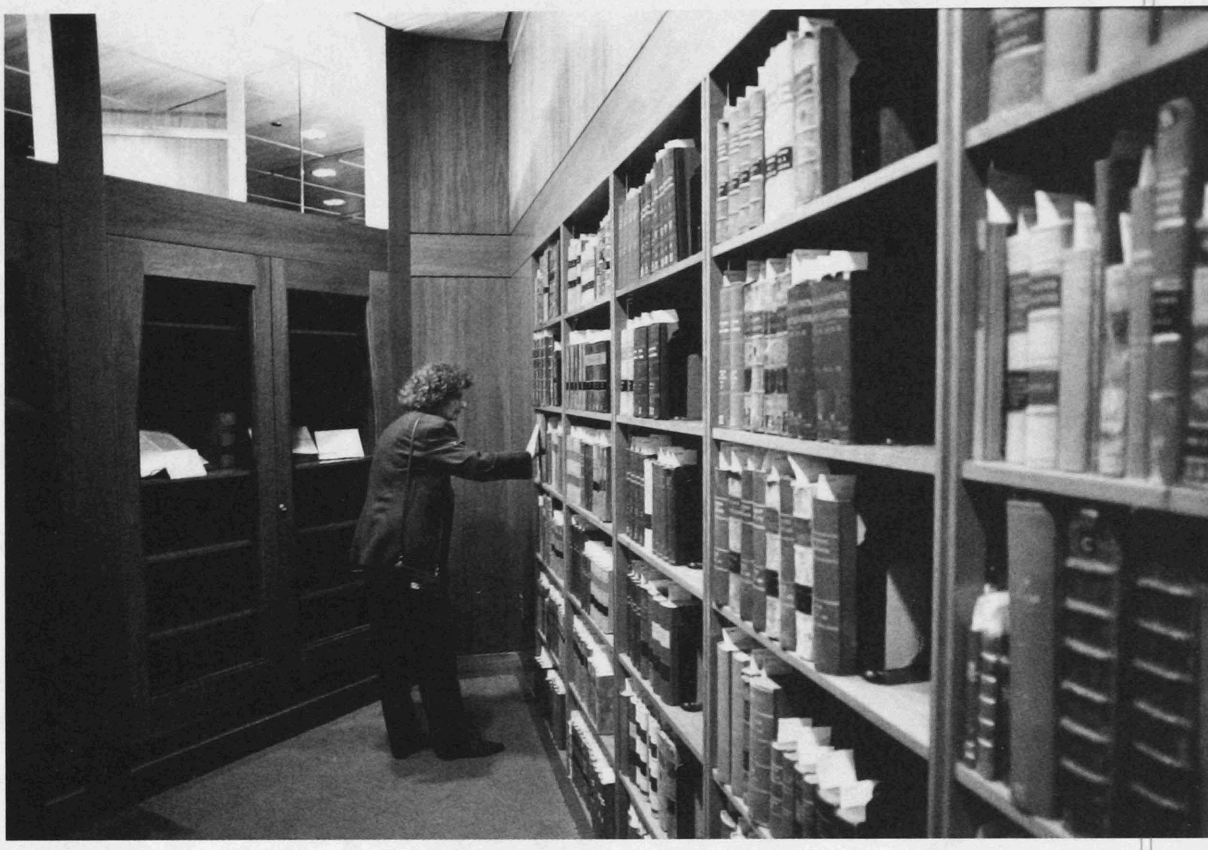
When I reflect on my days as a student at Michigan, I well recall the brilliance of some of my favorite teachers. But just as much, I recall their attitude toward us, their students. We may have lacked knowledge, but they told us every day, through Socratic dialogue, that we had just as much capacity for insight. They demonstrated through their classroom demeanor the kind of engagement with their students that I see the finest lawyers show with judges, clients, other lawyers, and the general public. They were teaching us about our future responsibilities, as lawyers, to teach.



"The very best lawyers I have known have tended to view themselves rather differently. They do not insist on trust or deference to their authority. Instead, they are teachers in the very best sense of the role."

— DEAN LEHMAN

The new Joseph and Edythe Jackier Rare Book Room includes open shelves, book space enclosed inside glass doors, and additional shelf and storage space outside the main study area. The interior is richly finished in stainless steel, Makoré wood and mahogany edging.



A permanent home for Law School's Rare Books

With at least 20,000 rare books — more than 60 of them dating from the dawn of printing — the Law Library has one of the country's enviable collections of irreplaceable books. And now it has a specially designed space to house them, the Joseph and Edythe Jackier Rare Book Room.

"Next to the spot where we display the most contemporary scholarship of our faculty, we respect the deepest roots of their research," Dean Jeffrey Lehman said at dedication ceremonies in April. The new Rare Book Room, within the Allan F. and Alene Smith Addition to the library, features a glassed-in exhibit area on either side of the entryway, 600 sq. feet of study space that has a leather-topped reading table as a centerpiece and is richly finished in stainless steel, red-brown Makoré veneers and solid mahogany edgings, and an additional 1200 sq. feet of stacks and storage space in separate rooms.

Law Library Director Margaret Leary says completion of the Rare Book Room means that the library's Rare Book Collection finally has a safe home. About 5,000 rare books already have been identified and will be moved to the new Rare Book Room from storage space in the basement of Hutchins Hall. Some of the library's estimated 15,000 additional rare volumes printed prior to 1850 also may go to the Jackier Rare Book Room. These books now are scattered throughout the Law Library's shelves.

Books produced prior to 1850, seldom printed in large numbers, usually used a rag-based paper that deteriorates very slowly. Their preservation typically involves safe storage and restricted use, as in the Rare Book Room.

After 1850, large press runs became common as publishers shifted to cheap, acid-based wood pulp paper. Although books became more widespread, their acid-based paper became brittle quickly and had a short useable lifespan. Safe storage alone cannot protect such books. Their preservation typically involves copying their contents onto microfilm or a similar medium before their pages disintegrate.

For dedication day, Charles F. and Edith H. Clyne Professor of Law A.W. Brian Simpson and Leary unveiled a special exhibit of some of the library's *incunabula*, books printed in the infancy of printing prior to 1500. Nearby, in an effort that reflects the ageless continuity of legal scholarship, library staff members keep up to date by

BRIEFS

Edythe Jackier stands at the entrance to the new Joseph and Edythe Jackier Rare Book Room prior to dedication ceremonies. Law Library Director Margaret Leary stands behind her. Dedication speakers included Dean Jeffrey Lehman; Lawrence Jackier, son of Joseph, J.D. '36, and Edythe Jackier (president of the Theodore and Mina Bargman Foundation and of the Stanley Imerman Memorial Foundation, and lead partner of Jackier, Gould, Bean, Upfal, Eizelman and Goldman in Bloomfield Hills), architect Gunnar Birkerts, a Fellow of the American Institute of Architects, designer of the new Rare Book Room, and designer of the Allan F. and Alene Smith Addition to the law library that houses the new rare book facility; Library Director Leary, whose expertise helped guide design of the new room; and Milton J. (Jack) Miller, J.D. '35, a Law School friend of Joseph Jackier who graduated a year ahead of him.

filling a wall-size display case with the books and other publications of current law school faculty.

Noting that the new rare book room lies "in the center of a library that flickers with screens and clicks with tapping on keyboards," Lehman told dedication goers that "the rare book room that we dedicate today embodies our institutional commitment to pursue the course of wise change, change that is fully engaged with the paradox of precedent.

"Here, in this most modern, even futuristic, of law libraries, we make a permanent space in which scholars may engage our oldest and, in some ways, most challenging, legacies."

"It could only happen because the Jackier Family, through the Theodore and Mina Bargman Foundation and the Stanley Imerman Foundation, were willing to invest in the long-term future of legal research," Lehman said. "Their devotion to the Law School and their sense of the importance of the project will redound to the benefit of generations of legal scholars to come."

Joseph Jackier graduated from the Law School in 1936, after election to the Order of the Coif and serving as an editor of the *Law Review*. He met his wife, Edythe, while he was studying at the Law School and she was an undergraduate at the University of Michigan. He died in 1987 after a distinguished career with the law firm of Friedman, Meyers and Keyes.

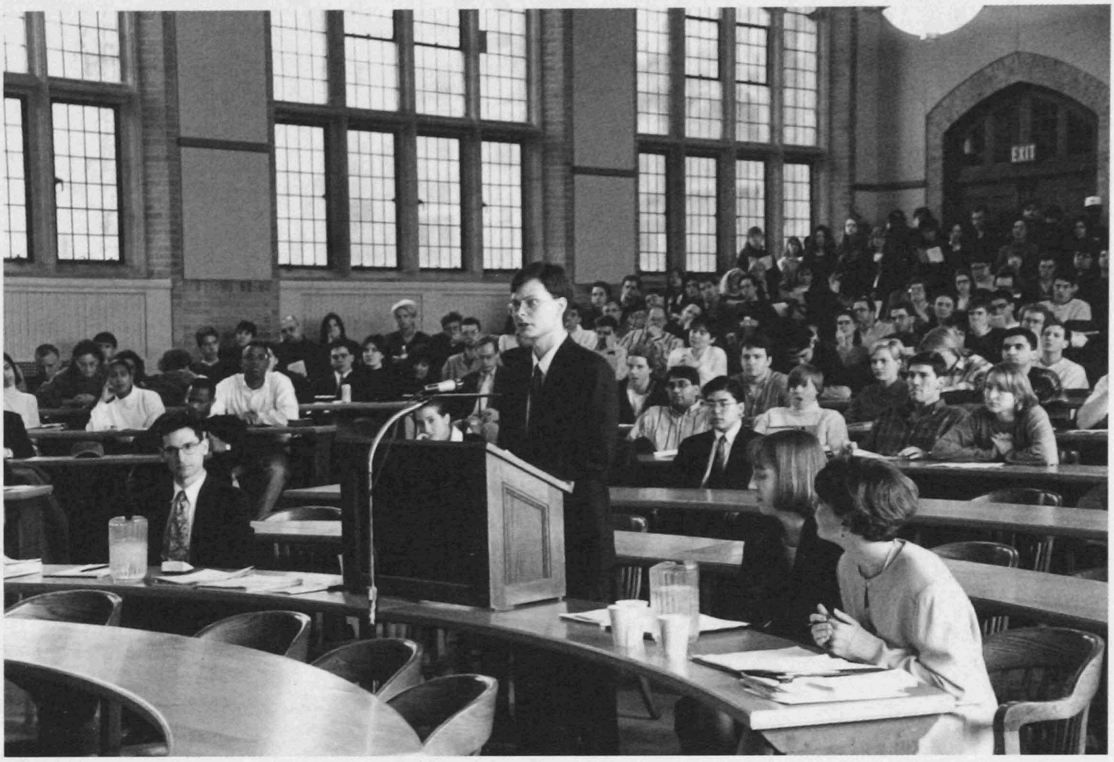
Edythe Jackier attended the dedication, along with one of her and her late husband's sons, Lawrence Jackier, lead partner at Jackier, Gould, Bean, Upfal, Eizelman and Goldman in Bloomfield Hills. Lawrence Jackier also serves as president of the Theodore and Mina Bargman Foundation and of the Stanley Imerman Memorial Foundation.

Like Lehman, Simpson took note of the connection between the ancient, rare books, and the modern, state-of-the-art study of law that goes on at the Law School. He explained in the catalog accompanying the dedicatory exhibit: "The invention of printing with moveable type had as dramatic an effect on Western European culture as the invention of the computer in our own time. . . Before the advent of printing, lawyers, like everyone else, had to rely on handwritten manuscripts; indeed, long after printed law books became commonplace lawyers continued to make extensive use of handwritten texts. But the printed book progressively supplanted the handwritten legal text."

Among the exhibit's books are an edition of *Statham's Abridgement* dating from 1490-91, its first, illuminated style letter left blank for later manual completion and decoration by a scribe; a *Yearbook* of cases from 1466, including "The Case of the Thorns," which still is used for teaching torts; and *The Lawes Resolutions of Womens Rights, or the Laws Provision for Woemen*, printed in 1622 and an example of the new ventures in legal writing that began to appear in the seventeenth century.

LQN

David Frazee, at lectern, delivers his part of the winning argument in Henry M. Campbell Moot Court Competition, while partner Joseph Lieber listens. At right are their opponents, Amy Burkoff, J.D. '97, and Jennifer Beyersdorf, J.D. '97. Frazee, J.D. '96, also worked on two books and served as captain of the national champion College Bowl team during his third year of law school.



Finals barely dent race to National College Bowl victory

With two books to his credit, and as captain of the University of Michigan academic competitions team that won the 1996 College Bowl National Championship Tournament, David Frazee gave in to his family's wishes and attended his own commencement from the U-M Law School.

His decision was a tough one: The same day as graduation he had the opportunity to referee his first professional soccer game of the year — he's been a soccer referee since he was 11, has been officiating for the NCAA since 1991, and has been making the calls for non-major league AAA- and AA-style professional games since 1992. (This fall he expects to become one of the fewer than 100 National Referees for the NCAA.) In the end, though, his family's wish to see him be graduated won out.

This is one of the rare times that Frazee has made such an either-or choice. Usually, it seems, he squeezes two activities into the same time. He's always run as hard as a student as he's had to run to pass the tough physical examinations required of soccer referees. "You can run up to seven or eight miles in a top college or professional game," he says in what could be a metaphor for his law school years.

Between law school classes and Monday evening academic competition practices, Frazee has been working on two books for Clark, Boardman, Callaghan of New York. One is *Violence Against Women: Law and Practice*, which he edited and co-authored with Ann Noel, Counsel for the California Fair Employment Housing Commission. Frazee, a specialist in civil rights law, calls the book "a treatise and litigation practice guide for the Violence Against Women Act of 1994," which he ranks with the Civil Rights Act of 1964 and the Americans with Disabilities Act as one of the "major changes in federal civil rights law in the last century." The book, out this year, is the first practice guide for the 1994 law (an excerpt appears on page 7).

The other book is his second update of Carol Lefcourt's decade-old classic, *Women and the Law,* which includes a chapter by U-M Professor of Law Catharine MacKinnon. The update, co-authored with Mary Dunlap, founder of the California law firm Equal Rights Advocates and a visiting professor at the Law School in 1994, "covers everything from Title IX suits for sexual harassment in schools to Eighth Amendment suits for women prisoners to more traditional subjects like employment discrimination," Frazee says. The first update appeared last year; the second revision will appear this fall.

In addition, the summer after his first year of law school he worked for Chief Judge Thelton Henderson of the Northern District of California; he was an associate editor and contributing editor of *Michigan Law Review;* and during his last year of law school he and partner Joseph Lieber won the Henry M. Campbell Moot Court competition. Frazee also has won a Dean's Scholarship and the West Publishing Award while at the Law School.

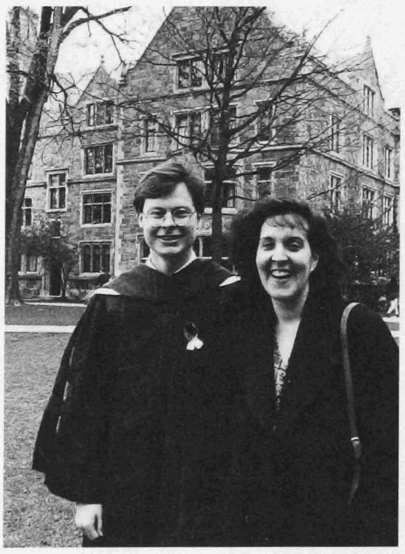
In 1995, Frazee also was captain of the University of Michigan's College Bowl team, which placed third in the nation. Earlier, while an undergraduate at Stanford University, he played bassoon and contra-bassoon in the Stanford Symphony, spent a year at the Free University-Berlin on an exchange scholarship, and was part of the second place team in the College Bowl National Championship Tournament in 1992. He graduated from Stanford with honors and with distinction in 1993.

"A prodigy," Professor of Law Peter K. Westen calls Frazee.

"I'm dazzled by his talents — he did very well in my class — but I'm basing this more on what I've come to know of his work outside of class," says Westen, the Frank G. Millard Professor of Law, who taught Frazee criminal law and American Indian law. "From an academic standpoint, I think the most remarkable thing about him is that he took on organizing an anthology of essays by people who are all his seniors, all professors and practicing civil rights lawyers, to create the first book on the Violence Against Women Act."

Frazee never slacked in his pace this year, even as final examinations and commencement approached. The weekend before finals began he and his Michigan Academic Competitions team were off to the University of Tennessee for the Academic Competitions Foundation (ACF) national championship — Michigan placed 10th. The following weekend, he and his four-student team won the national College Bowl championship by beating arch-rival University of Virginia in an at-the-buzzer finish.

Virginia toppled Michigan for the national championship in 1993 by winning on the last question as time expired. This time, however, it was Michigan's turn to beat the buzzer. Michigan easily won the first game of the best-of-three championship series, while Virginia made a dramatic comeback to win the second by five points as time expired. After trading leads throughout the third game, Virginia made a late push and held a 25-point lead with half a minute left. Michigan correctly answered the tossup question about film director Franco Zefferelli to pull within 15 points of Virginia. Frazee and his team had one last chance at victory.



David Ike Frazee, shown with his wife, Annie Roskin, took time out for commencement ceremonies. Even this was a tough choice: the same day he had the chance to referee his first professional soccer game of the year.

For 25 points: Its two biggest deals so far in the 1990s have been the acquisition of Motel 6 and Borden's. Those multi-billion dollar deals pale in comparison with its leveraged buyouts of the 1980s, capped by the $30.6 billion deal for RJR Nabisco. For 25 points, name this takeover specialist.

KKR, Frazee answered as the final buzzer sounded like Michigan's victory bell. Kohlberg, Kravis, Roberts and Co.

Final score: Michigan 260, Virginia 250.

Frazee, who plans to specialize in civil rights law, found some irony in winning by answering a question about corporate takeovers. "There actually was a question about the Age Discrimination in Employment Act in the finals, but it was earlier in the game. If only *that* could have been the winning question."

Earlier, after Michigan had dropped three preliminary competitions, the victory had seemed a long shot. Michigan had to win its last seven games to qualify for the finals.

"It's like losing the first three games of the World Series," Frazee says. "You have to win the next four. Effectively, we did that. What makes this more amazing is that we ended up wining the round-robin by going 12-3. Virginia finished second by going 11-4."

Frazee, a veteran of College Bowl-style competitions, says the weekly practices and frequent tournaments were hard on his academics, but the result was worth the effort. During the past academic year he and his team also competed in tournaments at the University of Wisconsin, Boston University, and Emory, Georgetown, and Western Michigan universities.

Early this year, Frazee's Michigan team toppled Harvard and the University of Maryland to win the University of Pennsylvania Tournament, which he says is "always the biggest and most competitive intercollegiate tournament in the country." The tournament is the first leg of academic competitions' "Triple Crown," he says.

"In the semifinals, Michigan played Harvard, the school that by wide margins had won the last two National Champion-

ship Tournaments, had won every major tournament for the last year, and was favored to win all three national titles in 1996," he says. "Harvard jumped out to a quick 80-point lead, but Michigan scored the next 250 points. The final score was Michigan 390 — Harvard 195. In the final, Michigan defeated Maryland 400-280 to win its first major national championship tournament in school history."

By winning the College Bowl Nationals and the Pennsylvania tournament, Michigan becomes only the third school — along with Harvard and the University of Chicago — to win two of the three "Triple Crown" tournaments in one season. No school ever has won all three.

Questions in the academic competitions can relate to any subject, and academic fields get heavy emphasis. ACF competitions are more specialized and emphasize classical learning.

"It's awe-inspiring sometimes, and it's a lot of fun," Frazee says of the competitions. "It's always fun to be good at something, and it's fun to see other people be good at something."

This summer Frazee began work as a clerk for Judge J. Dixon Phillips of the Federal Court of Appeals, Fourth Circuit, at Chapel Hill, NC. Frazee notes with a smile that Phillips' daughter played on the soccer team that won the first NCAA women's soccer championship in 1982. At Chapel Hill, Frazee says happily, the soccer season is much longer than at Michigan and he will be refereeing college and national professional games and working on the six-month release for his *Violence Against Women* treatise. "It never ends," he says.

In fact, it may be just beginning. Frazee and his wife, Annie Roskin, are expecting their first child this fall.

LQN

Violence Against Women must be "Gender Based" and a "Crime of Violence"

— BY DAVID FRAZEE, J.D. '96

The Violence Against Women Act (VAWA) contains two requirements for a Title III civil rights cause of action. These two requirements are briefly summarized below.

The first requirement that VAWA plaintiffs must meet for a Title III cause of action is that what occurred to them was a "crime of violence." "Crime of violence" refers to felonies that fall within the definition of "crime of violence" under 18 U.S.C. section 16. A VAWA plaintiff may demonstrate that a "crime of violence" occurred by three *independent* methods:

- the offense that the defendant committed contained as an *element* the use, attempted use, or threatened use of physical force against the person or property of another; or
- the *nature of the offense* itself involved a substantial risk that physical force against the person or property of another may be used in the course of committing the offense, whether or not actual force was used by the defendant; or
- the defendant *actually used, attempted to use, or threatened to use* physical force while committing the offense.

The second requirement that VAWA plaintiffs must meet under Title III is that what occurred to them was "motivated by gender." The VAWA defines a "crime of violence motivated by gender" as a crime of violence "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."

The language "motivated by gender" was not formally defined until the first version of S.15 was introduced. This version of the VAWA added the terms "because of gender or on the basis of gender." This formulation abandoned the Senate Judiciary Committee's earlier exclusive reliance on the Reconstruction civil rights statutes for substantive guidance, and explicity borrowed from Title VII. The Committee Report makes clear that the Violence Against Women Act's definition of gender-motivation is based on Title VII's prohibition in sex based discrimination:

The definition of gender-motivated crime is based onTitle VII, which prohibits discrimination in employment "because . . . of sex." Hence, Title III defines crimes motivated by gender to be crimes committed "because . . . of gender." The phraseology "motivated by," "because of," "on the basis of," or "based on" sex or gender is used interchangeably in case law discussion of Title VII. This body of case law will provide substantial guidance to the trier of fact in assessing whether the requisite discrimination was present.

To determine whether the "requisite discrimination" is present in VAWA cases, courts will need to follow Title VII sexual harassment and employment discrimination caselaw. One Title VII model of proof, however, is inappropriate for the VAWA: the disparate impact framework. Because of the "any part" animus standard, mere statistical impact alone cannot suffice to establish gender motivation under the VAWA, though it may provide persuasive circumstantial evidence. The VAWA only covers what under Title VII would be termed "intentional discrimination."

However, the bottom line is the same for VAWA cases as it is for Title VII sexual harassment and employment discrimination cases: "Judges and Juries will determine 'motivation' from the 'totality of circumstances' surrounding the event." Since the circumstances of violent felonies vary widely, courts must anticipate that plaintiffs will attempt to prove gender motivation in a wide variety of ways. Proof of gender motivation is inherently difficult. Especially in early litigation, courts should permit great leeway to attorneys.

As with all new laws, after years of litigation certain distinct classes of cases will develop, each with its own unique problems and structures of proof. Until appellate courts establish these broad classes of cases, attorneys and judges must remember that Congress enacted the VAWA to respond to the *reality of gender-motivated* violence. While analogies to other areas of law, such as race-based violence, might prove useful, the analogies might not work perfectly. Race-based violence, for example, may differ from gender-motivated violence in a variety of ways. Similarly gender-based employment discrimination might vary in important ways from gender-based violence in the home. Each plaintiff must prove that what happened to her was based on her gender, which involves comparison with the empirical reality of gender-motivated violence.

The reference point for all litigation must be the reality of gender-motivated violence. If courts are inflexible and demand that plaintiffs prove that gender-motivated violence resemble stereotypes of gender-motivated violence instead of the reality of the violence, or that it resemble other forms of violence, such as race-based violence, then the VAWA remedy will prove empty.

Kellogg fellows lead wave of children's law specialists

Law student Carl Soto, a Navy veteran, says he grew up in a rough neighborhood of New York City where being a youngster meant being tough and honing your survival skills. "There were a lot of fractured families, alcoholism, drugs," he says. "I was fortunate. I had a stable family life, and professionals encouraged me."

That encouragement has convinced him that his future career lies in helping children. So after finishing his first year of law school last spring he launched right into his summer as a Kellogg Child Law Fellow with the Child and Family Services Division of Montana's Department of Public Health and Human Services in Helena. He had worked in Montana before, as a Spanish translator for the U.S. District Court in Missoula, before coming to Michigan to attend the Law School.

"This is such an ideal way for me to give back," he says of his summer as a Kellogg Fellow and his eventual career as a children's law specialist. "When I was working as a translator, I was dealing with the end results. Those kids were going to jail. Their lives were about set."

He hopes that as a children's law specialist he can turn around some kids before they reach such an end. "I feel that if I can affect two kids, over and above my own kids, I think I'll have succeeded," says Soto, whose daughters are five and six years old.

The other three Kellogg Fellows from Michigan share similar dedication: Elleanor Chin, assigned to Michigan Law School's Child Advocacy Law Clinic, notes the "potential for change" of such work; Laura Mate, a veteran of the Teach for America program assigned to the Seattle public defender's office for the summer, talks of the "interconnection" between education and juvenile issues; and Kristen Schutjer, also assigned to Seattle, to the Society of Counsel Representing Accused Persons (SCRAP), calls the fellowship "a really thorough, comprehensive approach to children's issues."

These four Michigan Law School students, all of whom went into the Kellogg fellowship after their first year as law students, in many ways are typical of the 21 Fellows who fanned out across the United States last summer. Each already had worked with children — Chin, for example, had worked for two years as a children's mental health case manager in Detroit; Mate, a Minnesotan, had interned with the Hennepin County Attorney's Community and Family Services Division; and Schutjer had worked at a battered women's shelter and residential treatment center for emotionally disturbed children — and all share Kellogg Foundation officials' concern that children often are underserved by the law, underrepresented in the courts, and often wait too long for legal wheels to turn.

Clinical Law Professor Donald Duquette, who also directs the Law School's Child Advocacy Law Clinic, couldn't be more pleased with such outlooks and experience among the Kellogg Fellows. Half-way through his administration of the W.K. Kellogg Foundation's three-year, $1.5 million grant for the Families for Kids Initiative, he sees progress in each part of the far-reaching program to shorten decision-making time in children's cases and to improve the decisions that are made. "Our overall strategy is to enhance the legal profession and the legal institutions as they deal with children in foster care or facing foster care," he says.

Summer Fellows learn firsthand of the children's law field, return to school, and hopefully take jobs in children's law after graduation. They do their summer work at the 11 sites that the Kellogg Foundation has identified for its Families for Kids Initiative — in Arizona, Kansas, Massachusetts, Michigan, Mississippi, Montana, New York City, North Carolina, Ohio, South Carolina and Washington State.

In addition, the Families for Kids Initiative supports Advanced Kellogg Fellows, professionals who already are working in children's law who come to Michigan Law School for a semester and then continue part-time child welfare law reform efforts after returning to their jobs.

Like the summer Fellows, the Advanced Kellogg Fellows enlarge the network that helps children's law colleagues find jobs and professional support. They also can directly aid the operation and advance the goals of the Families for Kids Initiative. For example, Dennis Ichikawa of SCRAP in Seattle, an Advanced Kellogg Fellow last year, supervised Summer Fellow Kristen Schutjer this summer. Another former Advanced Fellow, Julian D. Pinkham of Washington State, a Yakama Nation children's court judge, has developed a uniform children's code as a model to replace the separate codes used by different American Indian nations. Judge

Pinkham's work has been very well received. Preliminary talks with Indian leadership in Washington and Montana to implement the uniform code in Montana began last June.

In other parts of the Families for Kids Initiative:

● Duquette is helping to establish child advocacy law clinics in law schools at the Kellogg sites. The University of South Carolina already has established such a program, he reported last summer, and the universities of Arizona — where former Law School Professor Joel Seligman now is law school dean — and Washington should begin their child advocacy law clinics soon. Mississippi has a child advocacy law clinic in the planning stage.

● In the legal reform arena, Duquette says, South Carolina leaders brought together legal and political leaders for two days of discussions that led to an agenda for legal reform that participants from the state legislature vowed to support. A child welfare legal reform package passed the South Carolina legislature last June.

● Creation of the Child Welfare Law Resource Center at the Law School already has produced one training conference at Michigan for judges and attorneys who work in children's law. The Child Welfare Law Conference, May 28-30, and the Child Welfare Law Summer Fellowship Training, May 30-June 1, joined forces for a session to examine children's law issues from the consumer's point of view.

Says Duquette: "Our strategy is that we want to affect the individuals who will in turn affect the institutions. . . One of the basic difficulties is that there's not a career ladder in children's law. It's a field that's in an embryonic state. . .

"We'll know in another 12 months how many people in the first class [of Kellogg Fellows] have taken jobs in children's law. That's one of our measures of success, that they go from this rung in the career ladder to another."

"Our strategy is that we want to affect the individuals who will in turn affect the institutions. . . One of the basic difficulties is that there's not a career ladder in children's law. It's a field that's in an embryonic state. . .

— DONALD DUQUETTE

Law School students/Kellogg Summer Fellows Elleanor Chin, Carl Soto, Kristen Schutjer and Laura Mate share a break during their two-day training program in May before heading out for their summer placements.

Dores McCree retires

Dores Barker McCrary McCree, 75, retired in June from her position as student services associate. It is unlikely, however, that she will ever relinquish her niche as the school's "resident angel" and "radiant guide," just two of the honorifics awarded to her by students and colleagues.

Dores McCree

"I've just been another resource at the Law School," she says quietly. "I've learned to listen and sometimes to direct students to help. It's been a fun time and I've been blessed really."

Everyone else who has ever encountered her at the Law School believes the blessings have been theirs. A valued and trusted counselor; a sideline career as a job placement advisor seamlessly sandwiched into her working days; a calm, intelligent, kind voice in times of trouble and times of celebration — McCree has given her best self to the school and the word *irreplaceable* is that often linked with her name.

One of six children, she was born in rural Georgia and moved to Detroit at the age of three. She graduated from Ecorse High School and then-Wayne University, class of '42. McCree went on to receive a degree in library science from the Simmons College School of Library Science in Boston and to take post-graduate courses in library science at Columbia University.

A member of the staff since 1988, McCree really began her work for the Law School in 1981 when she moved to Ann Arbor with her husband Wade Hampton McCree, Jr., former Solicitor General and federal judge, who was appointed as a professor of law. "He loved teaching," she says of him. "But it was a surprise to me that he had made this agreement with Terry (Sandalow, then dean) to come to Michigan."

An accomplished and admired teacher for six years, he died in August of 1987. They had been married for 41 years and she had been his support throughout his legal career. At the Committee of Visitors meeting that fall, then Dean Lee Bollinger asked her to begin working at the Law School. "But I was reluctant to come — I didn't know what I could contribute." A mystifying sentiment in light of her extraordinary character and unique talents.

In spring of the following year, yet another former dean, Ted St. Antoine, was more direct in telling McCree that there was something quite useful she could do and that was to counsel students, including students of color. And so she began a new career at the age of 67. Helping students struggle through personal problems, using her extensive connections to help students find jobs and judicial clerkships, applying what she respectfully but smilingly calls "verbal valium."

McCree has had other careers. There are her life roles as wife and mother. She and Wade raised a family of three, daughters Kathleen (McCree Lewis '73) and Karen and son Wade. She was head librarian of two major hospital libraries in Wayne County and was a research technician in anesthesiology at the Massachusetts General Hospital. She was also a reference librarian in the Detroit Public Library, in the U-M Graduate Extension Library in Detroit, and at the Federal Trade Commission Library in Washington, D.C. She has served on many professional and civic boards, is a founding member of the Michigan Opera Theatre and holds a life membership in the NAACP.

And she has plans for a full future. She will help her son work on a campaign for a Detroit judgeship (36th District Court). She will use her library skills to do more archives work, in this case in her basement, appropriately sorting and assigning Judge McCree's long legacy of writings. She plans to work on a collection of his nonlegal writings — mostly sonnets and limericks — with hopes of publishing them. All the opera she can indulge in is high on her to do list, too.

McCree also has unfinished business at the Law School. She serves on the committee searching for her successor. And she finds herself facing some of the same challenges everyone is facing in a year marked by racial incidents and heightened focus on racial issues. "I have been extremely saddened to find a lot of things still going on that I thought we had put behind us." Saddened, she clarifies, but not slowed in her personal determination to see the Law School be a place where all members of the community are welcomed and respected. "What I have done is miniscule compared to what remains to be done by other people," she says.

It is for being her best and calling on others to be the same that she will long be remembered here. Multiple scrapbooks and decorated binders have been produced with notes and letters of personal reminscence and thanks. The voices of students and colleagues chorus deep appreciation for McCree's gifts of wisdom and inspiration.

One of hundreds of such expressions, from the dedication of the inaugural issue of the *Michigan Journal of Race & Law*, is representative. "Mrs. McCree has been a determined advocate, skilled teacher, compassionate mediator, gifted guide, insightful advisor, caring counselor, and a tremendous ally. What makes Dores McCree's efforts all the more notable is that she herself would not at all consider her deeds unusual or extraordinary. Indeed, this dedication will likely cause her some embarrassment because she seeks no adulation or awards; she simply did what she felt was right. This is why no number of superlatives can adequately describe her, nor any amount of praise sufficiently express our gratitude for this truly remarkable woman."

Law School launches externships in South Africa

Nine law students are spending the fall semester in South Africa working as externs in a variety of government and private agencies under a new program coordinated by David L. Chambers, Wade H. McCree, Jr., Collegiate Professor of Law.

Four students, Beverly Blank, Robyn Fass, Bryan Geon, and Emily McCarthy, are working for the human rights organization Lawyers for Human Rights; two, Lauren Frances and Jason Levian, are with the Johannesburg law firm of Nichols & Cambanis; Jacqueline Payne is working with former Law School graduate student Firoz Cachalia, a member of the Gauteng provincial legislature in Johannesburg; Ben Cohen is clerking for supreme court Judge Dwin Cameron and working at the AIDS Law Project at the Centre for Applied Legal Studies at the University of Witwatersrand; and Ronnetta Fagan is with the law firm Moseneke Partners, the largest black law firm in South Africa.

Each student will also do an independent research project as part of the externship.

"I plan to return to South Africa for about three weeks in November, during which I will visit with each of the students at their place of work," says Chambers. "All nine of the students will spend at least part of their time working in the Johannesburg area, and during the time I am there, we will gather for a series of seminars."

Chambers hopes that by placing students in a wide variety of settings the Law School can learn what works best for students and develop regular links to South Africa for the future.

Michael A. Heller, an assistant professor of law, says the South African program broadens students' legal perspectives and offers them opportunities for a sense of hands-on accomplishment.

"International externships are a wonderful way to have students learn of other paths in the law beyond our borders," says Heller, organizer of this fall's International Law Workshop. "By working in South Africa, the students have the opportunity to use their legal skills in helping South Africa make the transition to democracy."

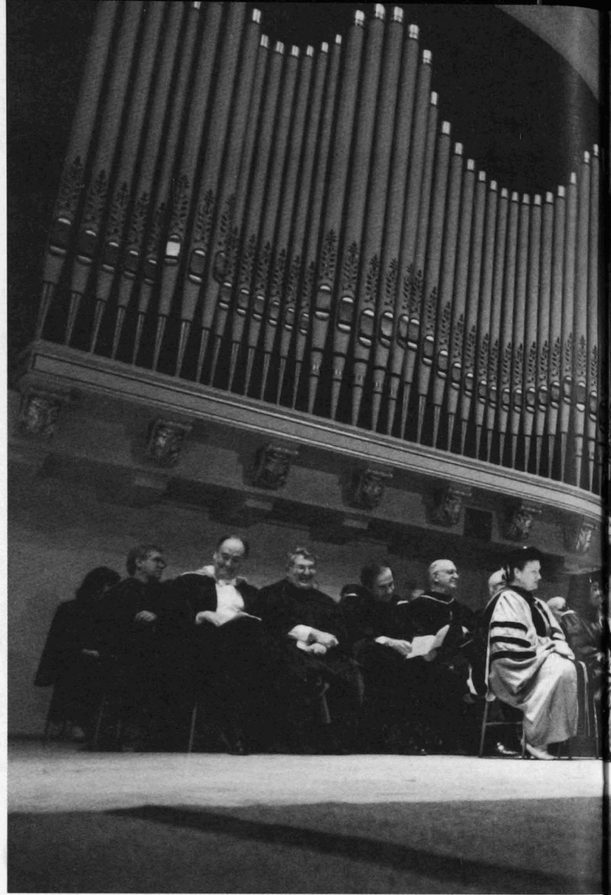
PHOTO COURTESY BLACK LAW STUDENTS ALLIANCE

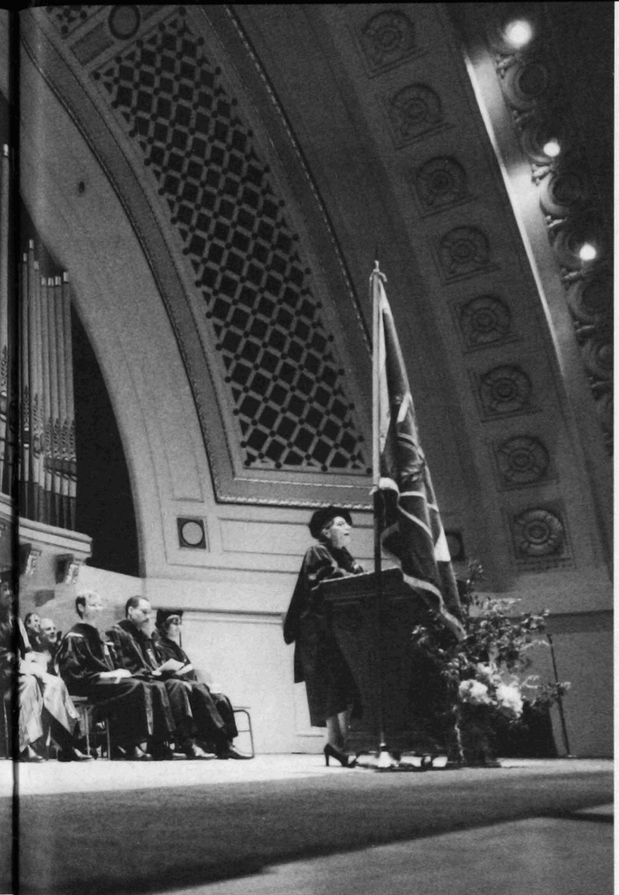
Honoree —

Dores McCree was honoree for the reception at the Eighteenth Annual Alden J. "Butch" Carpenter Memorial Scholarship Banquet reception in April. Theodore M. Shaw, on leave from the Law School to serve as associate director-counsel for the NAACP Legal Defense and Educational Fund, was keynote speaker. At the reception, it was announced that the Black Law Students Allliance and Michigan Black Law Alumni Society had raised nearly $50,000 to complete funding for the Wade H. McCree Jr. Collegiate Professorship in honor of Dores McCree's late husband.

The welfare of children —

The Hon. Connie Binsfeld, above left, Lt. Governor of Michigan, and the Hon. Elizabeth Weaver, above right, a justice of the Michigan Supreme Court, addressed the Michigan Child Welfare Law Resource Center conference on child welfare held in May. Binsfeld, speaking on "Children's Justice in Michigan," told the participating judges and attorneys that "we should not be focusing attention on the parent. We should instead protect the child." She added: "We must save them, because if we don't save them now, we will lock them up later" and "A beaten and battered wife would never be sent back to her abusive husband, but some defenseless children are ordered to return to parents who have beaten and abused them." Weaver, chairman of the Governor's Task Force on Children's Justice, outlined six demonstration projects that the Supreme Court proposed last year and said that good court reform demands that each county retain its own judge and that flexibility be retained on the local level so that expertise in the field can be kept available. "I believe that all trial judges should be paid the same," she said. The conference was an activity of the Child Welfare Law Resource Center, established at the Law School through a three-year $1.5 million grant from the W.K. Kellogg Foundation for its Families for Kids Initiative.





Best lawyers have lives filled with family, friends: Ramo

Be careful. Practicing law can become such an all-consuming career that you cut off the other parts of living — family, friends, spouse, children — the parts of life that will make you a better lawyer if you make time for them.

However, the profession also is filled with heroes, lawyers who do good for their country and their community and people who live full lives rich with service.

That was American Bar Association President Roberta Cooper Ramo's warning and promise to the law school's 342 graduates in May. The ABA's first woman president, Ramo also was the first woman to become president of the University of New Mexico Board of Regents during her six-year service on that board.

A partner in New Mexico's largest law firm, Modrall, Sperling, Roehl, Harris & Sisk, she received the Governor's Distinguished Public Service Award for community service in New Mexico in 1993. She also is a member of the Executive Committee of the Albuquerque Commmunity Foundation and has served as president of the New Mexico Symphony Orchestra Board.

In a commencement that saw many faculty, graduates and audience members wearing silver ribbons to show their support for diversity at the Law School, Ramo stressed the human side of legal practice in her Senior Day talk at Hill Auditorium.

"It turns out that some part of you is with the client every moment of every day," she said. "And it comes to you at some point that a real live person is putting their full faith in you.

"And during these moments it is too easy to forget that you also have a wife, husband, children. You will be a far better lawyer if you live a full and complete life."

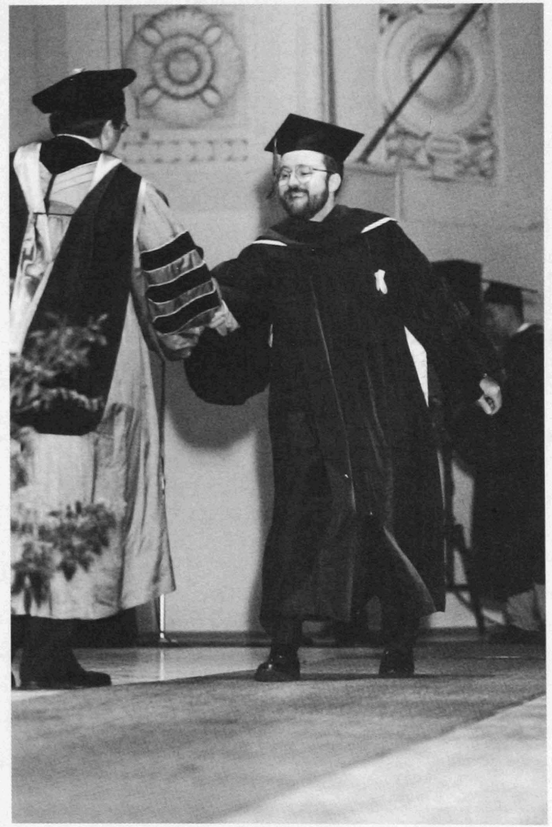
Lawyers often are heroes, although they also often do not get credit for their heroism, Ramo said. She listed six attorneys who, in her opinion, stand for the best in the legal profession:

- Nan Nolan, a criminal defense attorney in Chicago who spent three years to prove the wrongful convinction of a man on death row. Because of Nolan, "today Rolando Cruz walks free with his family," Ramo said.
- Carolyn Lamm, an international law specialist and the mother of two children, who heads the ABA's Federal Judiciary Committee and has been elected president of the Washington, D.C., bar association.
- Fred Kuperberg, a lawyer for The Walt Disney Co. who negotiates many of the firm's biggest contracts, but also spends alternating Wednesday

"It takes both a razor sharp intellect and a compassionate heart to be an effective lawyer."

— ROBERTA COOPER RAMO, ABA PRESIDENT

Left: Commencement speaker Roberta Cooper Ramo, president of the American Bar Association, addresses nearly 350 graduates and their families and friends. Remember your family and friends when you practice law, Ramo urged. "You will be a far better lawyer if you live a full and complete life."



Above: James Mitzelfeld, former Detroit News reporter who received a Pulitzer Prize after enrolling at the Law School, accepts graduation congratulations from Dean Lehman.

afternoons doing legal aid work.

• Dennis Archer, the mayor of Detroit, who gave up a law partnership and his seat on the Michigan Supreme Court "because he wanted to make sure his city, his Detroit, is again one of the glowing jewels among American cities."

• John Bush, a member of the ABA Board of Governors, who agreed to take on the case of a West Virginia woman who was sentenced to life imprisonment for killing the husband who had been abusing her for 15 years.

• Ramo's law partner Art Melendres, who, although a busy litigation lawyer, took his children to school daily until they were able to drive themselves.

Ramo also had some tips for young lawyers to become ranked among the best of American practitioners:

• "Your integrity must be beyond question. . . We have a special privilege because we have a special responsibility."

• You must have courage. . . including the courage to tell clients what you will not do."

• "Recognize that what makes American lawyers unique is their duty to be active in their community. . . We want lawyers in our legislatures, in our Congress, in our churches and synagogues and as volunteers in our schools. . . We lawyers are the foot soldiers of American democracy."

• "It takes both a razor sharp intellect and a compassionate heart to be an effective lawyer."

Allison Lowery, president of the Law School Student Senate, noted that the class of 1996 launched three new publications (*Journal of Race and Gender, Michigan Telecommunications and Technology Law Review* and *Michigan Law and Policy Review*), and was a strong supporter of clinical education for law students. "In the best sense we have truly learned to think like lawyers," she said.

Lowery drew enthusiastic applause when she thanked Dores McCree for the "wisdom, humor and unfailing support that encouraged us to work for what we truly believe." McCree, whose official title of student services associate does little to reflect the affection she has gained from students, faculty and staff at the Law School, retired at the end of June. (See story, page 10).

Lowery also noted what tremendous help students have given to each other during their law school years. "Please remain available to one another," she urged.

Dean Jeffrey Lehman, speaking to graduates as they prepare "to embark on lives of service to a society that desperately needs you," foreshadowed Ramo's talk by encouraging graduates to imbue their practice with integrity.

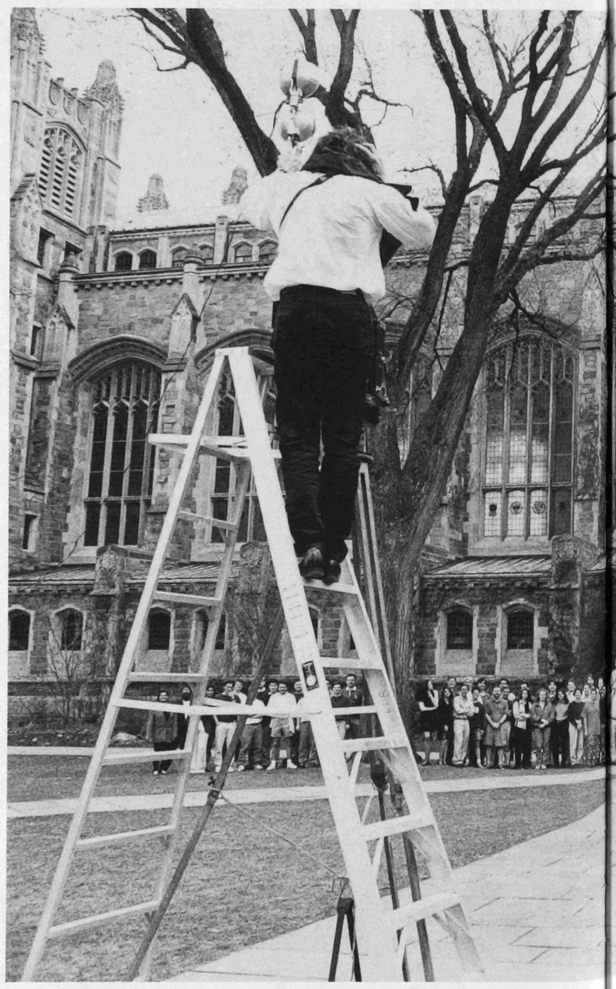
Lehman emphasized that integrity has both a "public face" and a "private face." With respect to the public side, the Dean suggested that graduates read William Sullivan's *Work and Integrity*, in which "Sullivan argues that professional integrity challenges us to act in ways that may inspire the society at large."

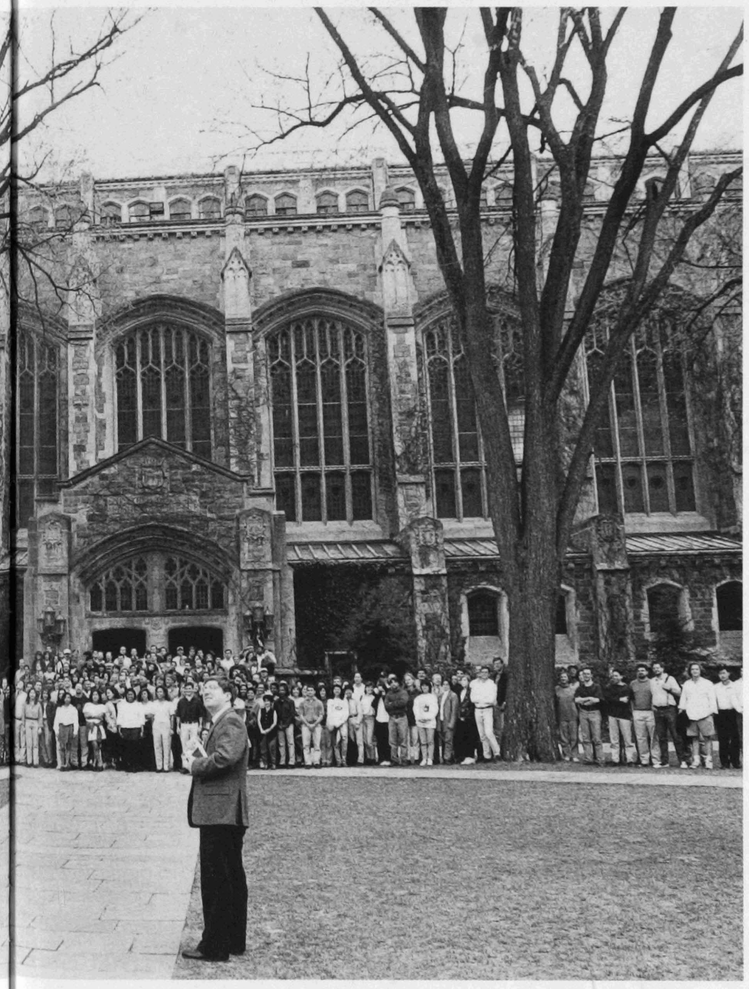
The private face of integrity, said Lehman, calls for lawyers to speak only what they truly believe, in good faith, even in their roles as advocates. On this point he urged the new graduates to read from *Newton's Sleep*, by Professor Joseph Vining. In developing the argument, Vining observes, "Unbelieved, judged to be unbelieved, a word or phrase withers as if its roots had been cut."

Typically, Lehman also leavened his remarks with humor, downplaying the importance of final grades to commencement and upgrading the Lawyers' Club cuisine beyond what most diners remember. LQN

The private face of integrity calls for lawyers to speak only what they truly believe, in good faith, even in their roles as advocates.

— DEAN JEFFREY LEHMAN





Say ch-e-e-e-se —
Dean Jeffrey Lehman relays messages to Law School graduates arrayed across the front of the Law Library reading room while Frank Talbot, atop the ladder, photographs them during Senior Celebration in May.

Not just desserts —
Senior Celebration both was a chance for graduating Law School students to get a free dinner and dessert — like Christina Chung and Emily Hough, left, picking up their dessert cake — and to get acquainted with alumni practicing in the areas where they are headed to work. Below, Rochelle Alpert, J.D. '75, of Morrison and Foerster in San Francisco, chats with graduating students Rob Lash and John Hutt. Each graduating student received a list of Law School alumni in the area in which he or she plans to work.

Conferences add spice, focus to Law School's academic year

Part of the spice of academic life at the University of Michigan Law School is made up of the conferences, symposiums and visits by special lecturers that pepper the calendar.

The schedule for the 1996-97 academic year will be no different, with special programs scheduled on subjects like international law, race theory, landmines, equal access to civil justice, Latino voices in the debate on race, Constitutional jurisprudence, and the legal profession itself.

Pierre-Marie Dupuy, of the University of Paris, will open the International Law Workshop's series of 10 lectures on Sept. 17 by discussing "International Law on Protection of the Environment."

Billed as "Hot Topics in International Law," the International Law Workshop lectures continue through November. Lectures begin at 4 p.m., last for about 30 minutes, and are followed by question/answer discussion periods. Among other speakers in the series are:

- Yozo Yokota, of the University of Tokyo Faculty of Law, "Economic Development and Human Rights — A Challenge to International Law," Sept. 24;
- Trevor Hartley of the London School of Economics and Political Science, Department of Law (University of London), "Judicial Activism and the European Court of Justice," Oct. 1;
- Richard Lauwaars, formerly of the Europa Institute at the University of Amsterdam in The Netherlands, "The Inter-Governmental Conference: Revision of the Maastricht Treaty on European Union," Oct. 8;
- Ernst-Ulrich Petersmann, of the Institute of European and International Economic Law at the University of St. Gallen in Switzerland, "Constitutionalism, International Law and International Organizations," Oct. 15;
- Guillermo Aguilar Alvarez, the Mexican government's principal legal counsel during the NAFTA, G-3, Costa Rica and Bolivia free trade agrement negotiations and now a partner in SAI, a Mexico City firm consulting in law and economics, "Regionalism and Multilateralism in International Trade," Oct. 22;
- Markus G. Schmidt of the United Nations Office at Geneva, Centre for Human Rights, "Protection or Prevention? Dealing (effectively) With Human Rights Violations in U.N. Fora," Nov. 5.

Other talks in the series are scheduled for Oct. 29, Nov. 12 and Nov. 19.

The series "provides a forum for students to be exposed to current issues and debates on international issues," says Assistant Professor of Law Michael A. Heller, the workshop's organizer. Each program includes a 30-minute talk followed by questions and discussion.

The non-credit series, open to all faculty, students, and others who are interested in international issues, is designed for non-specialists, according to Heller. First year law students will find the talks valuable for showing them how international scholars work and think, Heller says.

For more information on the International Law Workshop, call 313.763.1247, fax 313.764.8309, or e-mail gristow@umich.edu.

In the area of conferences and symposia, there will be something to pique any interest. Among conferences/symposia proposed for this academic year, two focus on racial and ethnic issues, one is a sequel to the highly successful conference on sustainable development held last spring and one tackles questions posed by the increasingly electronically "networked" world. Here are the conferences, based on sponsors' proposals, and the schedule as available at deadline time:

Latino Voices: Moving America Beyond the Black and White Binary, Oct. 11-12.

Latinos are expected to make up 25 percent of the U.S. population in the next century, but "discussions concerning race often gravitate toward a black and white binary, effectively silencing the voices of Latinos who also suffer from discrimination, disproportionate political and educational representation, and harmful stereotypes," says the Latino Law Students Association (LLSA), proposer of the conference.

Sustainable development and the developing world — *Left: Richard Jolly, right, special adviser to the administrator of the United Nations Development Program and editor of* Human Development Report, *makes a point during the International Symposium on Third World Development presented in March by the Law School and the Michigan Law and Development Society. Also shown are, from left, Kamal Ahmad, 3L, of the Michigan Law and Development Society, and Mark Malloch Brown, vice president of the World Bank. The three-day symposium, called "Making Development Work Without Forgetting the Poor: Rethinking Our Common Future," dealt with issues such as the functions of microenterprises, development and social movements, the effect on the poor of constitutional promises, electoral politics, development institutions and liberal education, American examples of grassroots economic empowerment and issues in Chiapas, Mexico. Below, Petrona de la Cruz Cruz, of Chiapas, reads Mayan poetry at the Law Library reading room during the Saturday evening program called "Songs of Struggle, Songs of Peace: An Evening of Poetry."*

"By focusing on topics such as education, business and the community, immigration, language rights, political access, gender issues, and media perception, participants will explore the role of Latinos in the landscape of America's future," LLSA says.

The conference also will commemorate the twentieth anniversary of the death of Juan Luis Tienda, a University of Michigan law student who died in an automobile accident in 1976 shortly after beginning his third year of law school. Each year scholarships in Tienda's name are given to Law School students "who mirror Mr. Tienda's commitment to service." Tienda, who won the Army Commendation Medal during his military service prior to attending the Law School, served as president of LLSA, then known as La Raza Law Students Association. He helped recruit

minority applicants, regularly visited inmates at Milan Federal Correction Center near Ann Arbor, and, during his summers away from law school, worked at the Michigan Migrant Legal Assistance Project.

For more information contact the Latino Law Students Association, 313.763.0285.

Symposium on the Legal Profession, Oct. 18.

Professor David Chambers will keynote the conference. He will discuss his 15-year-long research project on lawyer placement and job satisfaction. The conference will coincide with the fall meeting of the Committee of Visitors.

For more information call 313.763.2211.

Asian Pacific Americans and Critical Race Theory, Oct. 26.

A conference to "enrich current intellectual debates on race," says the organizer, the Asian Pacific American Law Students Association (APALSA). "Racialization of ethnicity has, for example, packed all Asian ethnic groups into the race-based category of 'Asian American/Pacific Islander,' regardless of whether a particular individual was a sixth-generation Japanese American, a professional who emigrated from Korea during the post-Korean War 'brain drain,' or a member of a politically persecuted ethnic sub-group from Cambodia," says APALSA.

The conference will "enrich the race debate by expanding beyond the black-white dichotomy to deal with other racial and ethnic groups," APALSA says.

For more information contact the Asian Pacific American Law Students Association, 313.763.7584.

Mediation Workshop/ Conference, Nov. 15-17.

Phyllis N. Segal, chairperson of the Federal Labor Relations Authority, will conduct this interactive workshop based on an hypothetical labor law problem. The conference is sponsored by the Law School's Office of Public Service. President Clinton named Segal to her post in 1994. A University of Michigan alumna who graduated from the Georgetown University Law Center in 1973, Segal previously was senior mediator and director of employment dispute resolution services at Endispute, Inc. (now JAMS/Endispute), a national dispute resolution firm. She also has served as Massachusetts' deputy attorney general, as general counsel for Massachusetts' Executive Office of Transportation and Construction and as legal director of the NOW Legal Defense and Education Fund.

For more information, contact the Office of Public Service, 313.647.3256.

Landmines and Development: Legislating for a Sustainable Future, Winter 1997.

A one-day followup to last spring's highly successful international development symposium "Making Development Work Without Forgetting the Poor: Re-Thinking Our Common Future." The one-day program will include a keynote speaker and panel discussion.

"Every twenty minutes, someone, somewhere steps on one of the more than 100 million landmines littering some 64 countries throughout the world," says the conference sponsor, the Michigan Law and Development Society (MLDS). "In one of the world's most heavily mined countries, Cambodia, landmines kill and maim 300 people each month. The impact of landmines and unexploded ordinance is felt most heavily in developing countries, where the risk of injury or death prevents fields from being reclaimed for farming and stalls the development process as resources are poured into the tedious and seemingly endless task of de-mining and the long-term expense of treating, rehabilitating and re-training the injured."

MLDS says the conference will explore "both the legal issues involved and the interests — business, military and humanitarian — behind them, as well as the impact of landmines on the economic development of those countries most affected by landmines."

For more information, contact the Michigan Law and Development Society, 313.761.7045, or e-mail to MLDA@umich.edu.

Civil right or sellout?

Panelists discuss "Same-Sex Marriage: Civil Right or Sellout?" during a forum on the subject held at the Law School last spring. From left are David Chambers, Wade H. McCree, Jr., Collegiate Professor of Law; Ann Arbor attorney Helen Gallagher; Russ Ballant; visiting scholar Gabor Halmai, Chief Counsel to the Constitutional Court of Hungary and a member of the faculty of law at the University of Budapest; and Adjunct Lecturer in Law Paula Ettelbrick, former Executive Director of the Lambda Legal Defense Fund.

Equal Access To Civil Justice: Looking for Feasible, Justifiable Reforms, Winter 1997.

"With an eye on the slow demise of the Legal Services Corporation," leaders of the *Michigan Journal of Law Reform* have fashioned a colloquy "to heighten awareness of the growing inequities in our present system of privately funded justice, to bring attention to the current political debate, and to present a dialogue on the status of, and the alternatives to, our present system of rationing representation."

The symposium is designed to interest law students and attorneys as well as students and specialists in the fields of public policy, public health, political science and sociology. "The budget cuts affecting the Legal Services Corporation generated a good deal of debate and controversy," note the conference organizers. "This debate was not limited to the legal profession."

For more information, contact the *University of Michigan Journal of Law Reform* 313.763.2195 or 313.747.4081.

Cyberspace and the Constitution, Winter 1997.

Marketplace of ideas or forum for folly or worse? The Internet and World Wide Web are substantially changing the way that we communicate and are raising new questions about some of our ancient rights. "The most contentious debates involve the constitutional freedoms of speech and press, freedom against unreasonable searches and seizures, privacy rights, and privilege against self-incrimination," says *Michigan Telecommunications and Technology Law Review* (MTTLR). "Underlying these debates is the extent to which the government should regulate the material streaming through the Internet. While these debates have raged in the popular media and on Internet bulletin boards, the courts and Congress are only now beginning to address the regulation of obscenity, hate speech, and threats made over the Internet; whether other forms of 'unprotected' speech should be prohibited; the tension between the marketplace of ideas and rights of exclusivity granted through copyright and trademark laws; and whether privacy rights protect e-mail and other electronic records from unreasonable searches and seizures."

Among panel topics for the symposium: intellectual property rights and the First Amendment, issues related to the search and seizure of electronic information, and evaluating legal and technological bars to undesirable content.

Articles from the conference will go online and MTTLR will put highlights of panel discussions on the Internet in transcript and "real audio" formats.

For more information, contact the *Michigan Telecommunications and Technology Law Review*, 313.764.4181.

Catch up by tuning in

Those interested who missed the Symposium on Women's International Human Rights last fall at the Law School can tune in and hear speakers like keynoter Donna Sullivan, of the Women and the Law Project, Jeff Meer of the U.S. State Department and Jane Olson of Human Rights Watch.

The conference is going into RealAudio, which you can call up on your computer via the Internet at the Law School's audio page, at http://www.law.umich.edu/audio/. Your computer must have access to the Internet, a World Wide Web browser such as Netscape, and RealAudio Player software. Your computer also must be able to "hear" sounds, i.e., have a sound card and speakers.

Conference topics include "The Beijing Conference in Perspective," "Violence Against Women," "Effects of War and Occupation Upon Women," "Confronting Female Genital Mutilation: Asylum as Remedy?" and "Economic and Political Empowerment of Women."

Jessica Neuwirth of Equality Now was opening speaker and Susan Davis of We Do was closing speaker. Professor Catharine A. MacKinnon of the Law School also was a speaker.

The program, held Nov. 4, 1995, was sponsored by the Women Law Students Association and the *Journal of Gender and Law* and addressed points raised at the Fourth World Conference on Women in China earlier last year.

Ethics and responsibility —

Bridge Week in March focused on ethics and professional responsibility, with programs and classes on topics like the lawyer-client relation, ethics of attorneys fees, ethics and defense counsel and conflicts of interest. Above, panelists prepare for a plenary session on adversary ethics. From left, panelists include: David Baum, J.D. '89, Special Assistant to the Associate Dean for Student Services and former Assistant U.S. Attorney in Washington, D.C.; Assistant Professor of Law Heidi Li Feldman; Kent Syverud, Associate Dean for Academic Affairs and Professor of Law; Assistant Professor of Law Peter Hammer; and Professor of Law David L. Chambers III. Sponsored by the Keck Foundation, the week's program was organized by Syverud, Steven Pepe, adjunct lecturer and Chief Magistrate of Washtenaw County, and Charles Silver, Professor of Law, University of Texas. A special part of the week was a negotiation/dispute resolution simulation made possible by alumnus Thomas Ford, J.D. '49.

Nancy Krieger will head alumni initiative

Nancy Krieger, longtime director of the Law School's placement and career services office, and a friend, mentor and job-hunting guru to generations of graduates, is turning her hand to working with alumni throughout the country.

Krieger has been named director of alumni programs, a new initiative of the Law School's development and alumni relations arm, and is beginning her duties by concentrating on forming Michigan Law Alumni Clubs in cities across the country.

"I'm excited about the chance to help form these groups — and to get re-acquainted with many of the now-practicing attorneys and others whom I knew as students," Krieger says.

"I well remember my days as a student, and the sense of nerves we all had around Room 200," recalls Dean Jeffrey Lehman. "Nancy's gentle, reassuring manner — her steady and sincere confidence that things were all going to be just fine for us — helped us to keep our sanity, and probably made us better job candidates as well."

"As I have traveled around the country, I have been overwhelmed by the depth of affection that our graduates hold for Nancy Krieger," Lehman says. "For these graduates, there could be no greater evidence of our commitment to revitalizing and expanding our alumni programs than Nancy's agreement to spearhead this effort."

Krieger began her new duties July 15. Eventually, she says, she expects to act as liaison between graduates and the Law School and to coordinate Law School support of a broad range of alumni activities and programs.

Susan Kalb Weinberg, J.D. '88, heads Career Services Office

Law School graduate Susan Kalb Weinberg, J.D. '88, has been appointed director of the Office of Career Services, replacing longtime placement director Nancy Krieger.

"Nancy Krieger, my predecessor, (who moved to Law School Alumni Relations this summer to concentrate on establishing Michigan Law Alumni clubs), spent a great deal of time with me during the spring to get me up to speed on past practices, many of which I recall from my own law student days," says Weinberg. "Now the members of the Career Services staff and I are busy implementing new programs and services for the fall. I hope to have a new full-time counselor here in the immediate future — and that is just the beginning.

"We are adding access to telephone, photocopying and fax for students right in the Career Services office. With e-mail and Internet access to the Law School's World Wide Web page, I hope that we can begin to increase our services to alumni. All of us are committed to working with Michigan law students and graduates throughout their careers."

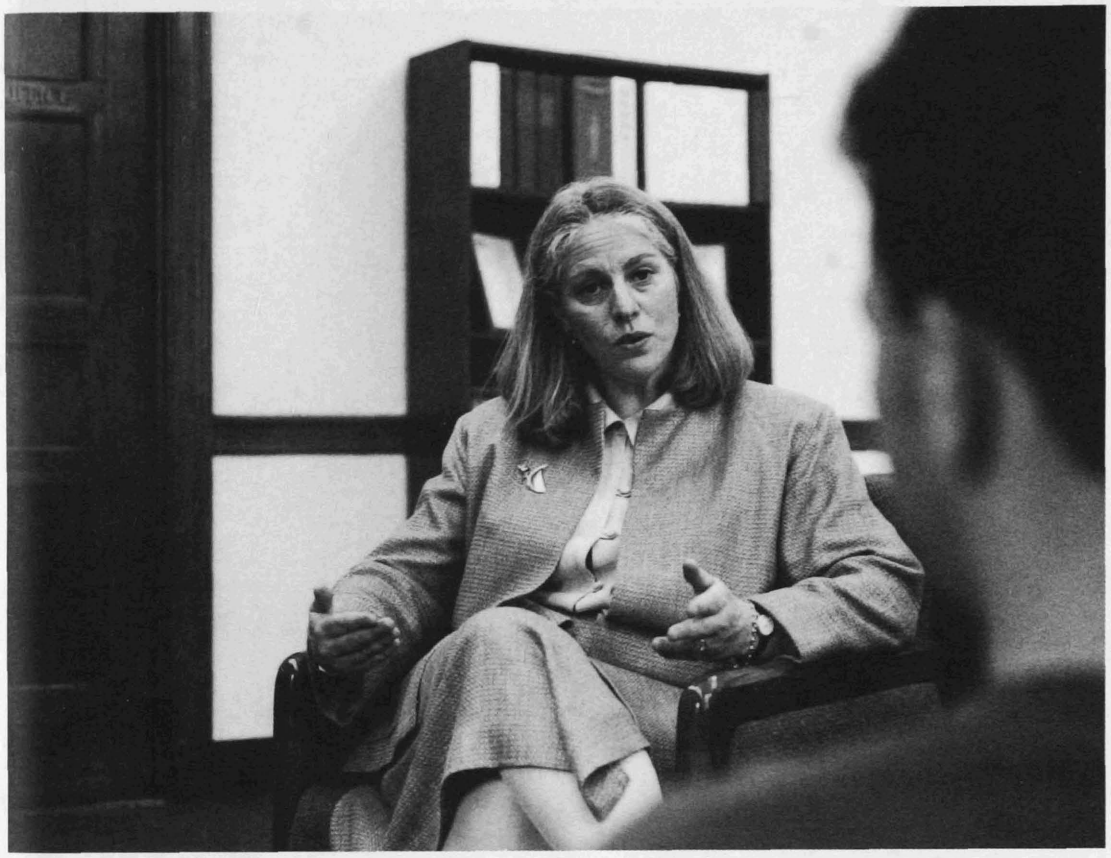
The reach isn't quite from cradle to grave, but the Law School is ready to help students and graduates with career decisions and job search strategies throughout their professional lives, Weinberg says. "Career Services is much more than 'placement' and arranging on-campus interviews and posting job openings," Weinberg says.

Career development "is really a life-long process," she says. You must know yourself well enough to make the choices that are right for you. That is important for a law student trying to land a position through an on-campus interview, as well as for an experienced attorney trying to move from one position to another within the working world.

At Wayne State University Law School, where Weinberg directed the career services program for nearly five years before coming to Michigan Law School, she launched student and alumni newsletters not only to publicize job openings, but also to acquaint students and graduates with market trends, assist them in developing their job search skills and to make them aware of internships, fellowships and special programs as well as to provide information about nontraditional or alternative careers. She also started a telephone jobs hotline and helped develop the law school's Web page as a career information resource.

Years ago, graduates used the "Placement Office" to be "placed" in what often was a career-long setting, Weinberg says. "Now there is much more movement from one position to another. Some of this is a natural byproduct of our more mobile society, as well as the large number of two-career

Susan Kalb Weinberg, J.D. '88
Director, Office of Career Services



OFFICE OF CAREER SERVICES

210 Hutchins Hall
University of Michigan
Law School
Ann Arbor, Michigan
48109-1215

Telephone: 313.764.0546
E-mail: lawcareers @umich.edu
Internet:
http//www.law.umich.edu/careers
Office Hours: 8 a.m.-5 p.m.

STAFF
Susan Kalb Weinberg, Director
skwjd@umich.edu

Carla Sally, Assistant Director
csally@umich.edu

Bonnie Kulp, Coordinator
bkulp@mich.edu

Lewander Davis, Advisor
lewander@umich.edu

Tammy Sindlinger, Assistant
sindling@umich.edu

couples and changes in the legal market. But other career changes result from individual unhappiness and discontent — I'm not certain how much of this is inherent in the type of work, or how much is because the students and graduates were not aware of what they were actually going to do 'when they grew up' and began working."

"I do think there has to be some more description, more reality, more real life brought into career planning," she says of students' preparation for their professional working lives. "As the Office of Career Services, not the Placement Office, we can be a tremendous resource to students and graduates not only by providing them with leads on jobs, but by helping them develop excellent job search skills and strategies and by helping them identify what it is they really want to do."

More than ever, Weinberg says, law students and graduates need to know themselves, their values, their strengths and weaknesses, as well as likes and dislikes beforehand, and not learn them (often to their dismay) on the job. The better the match between a graduating student and the position, the greater the chance that that lawyer will be happy with his or her choice.

How do students find out such things about themselves? "I hope to add a component of personal assessment and analysis," Weinberg answers. Instruments such as the Myers-Briggs Type Inventory and Kiersey Temperment Sorter can give students insight into themselves and the kinds of career opportunities that will be the most personally and professionally fulfilling for them. They also will learn how to be more successful law students.

As the spouse of a pediatrician and the mother of two — her younger son was born at the end of her second year of law school — Weinberg says "the two-career couple and family is something I'm really comfortable talking about with students." She also has worked as a French and Spanish teacher, art museum administrator and a practicing attorney —"so I am very interested in working with career changers."

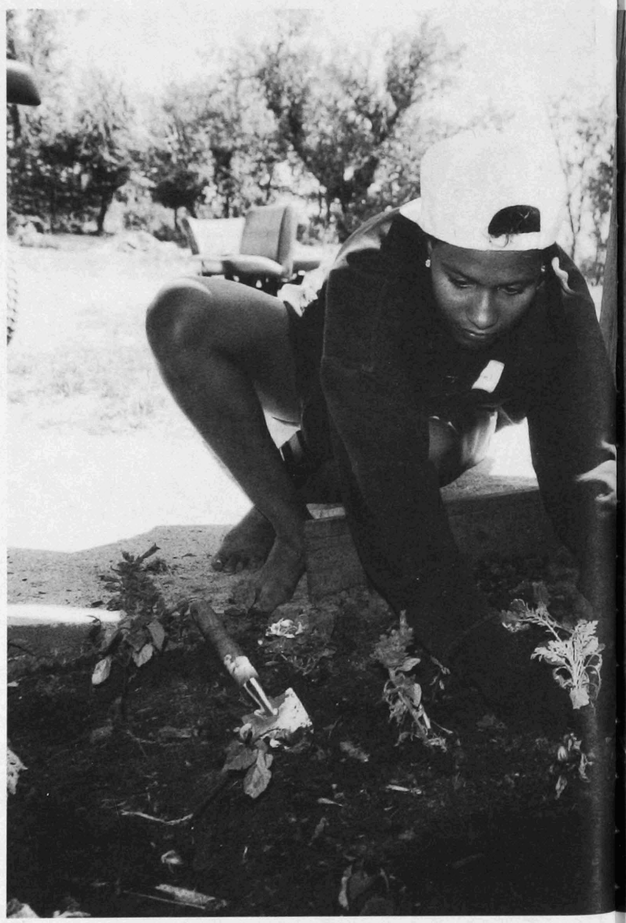
She's also sensitive to the discomfort and frustration that working lawyers may feel about job hunting from their offices, a problem that she hopes to ease by providing career services assistance via fax, e-mail and over the Internet through the Law School's Web page. She expects to be working with more Law School alumni in the future and says

that new electronic technology can be a boon to working job hunters.

"The Director of the Office of Career Services at the University of Michigan Law School is my dream job," says Weinberg. "The opportunity to assist our students and graduates in charting their career paths is incredibly challenging and exciting. I am certain that working in conjunction with Rob Precht and Susan Guindi of the Office of Public Service we can create wonderful new resources for Michigan students and graduates."

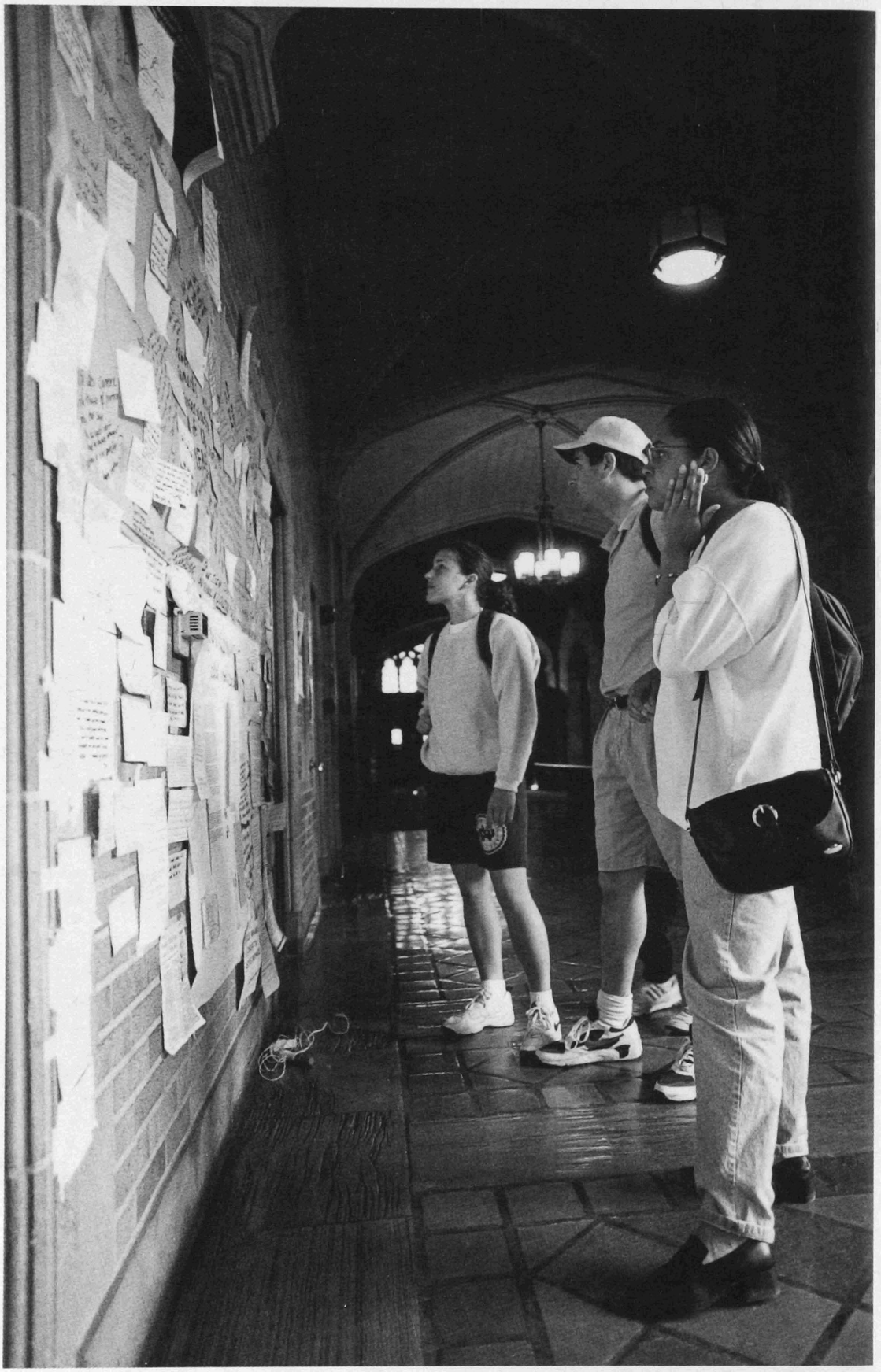
Weinberg's bachelor's degree in history of art and French with a secondary teaching certificate and master's degree in history of art and museum practices are also from the University of Michigan. She was an associate with Clark, Klein & Beaumont in Detroit, where she specialized in health law, intellectual property, and computer law. She is active in the National Association for Law Placement, currently serving as regional co-chair of the Electronic Communication Committee, the student services section of the Association of American Law Schools, and the ABA's Section of Legal Education and Admissions to the Bar. She is a member of the American Bar Association, State Bar of Michigan, Washtenaw County Bar Association, and Women Lawyers Association of Michigan.

Orienting for service —
Incoming law students turn volunteers to help with spring planting at Dawn Farm, a facility near Ann Arbor for substance abusers, during the service day portion of orientation for the Law School's 85 summer starter students.Right, Rachel Chatman and Megan Fitzpatrik help prepare the garden. Other incoming students did volunteer work at a senior housing facility, the Ronald McDonald House and a children's center. Top right, buffet dinner speaker Rob Precht, Director of the Law School's Office of Public Service, tells the summer starters about establishment of the Pro Bono Students America/Great Lakes program at the Law School. Precht also related how University students 36 years ago followed up on ideas that presidential candidate John F. Kennedy voiced in an impromptu 2 a.m. speech at the Michigan Union that led to formation of the Peace Corps, "the preeminent public service program of our century." Paraphrasing Kennedy, Precht asked: "How many of you are willing to spend time in a poverty law office working for justice? How many of you who are going to be associates in law firms are willing to spend a few hours of your time writing wills for poor AIDS patients. Corporate lawyers and public defenders, how many of you are willing to work in a foreign country to help it attain basic due process protections? How many of you are willing to take a stand and redouble your efforts working for an inclusive society when someone scrawls a racist message on the wall? On your willingness to do this will depend the answer whether we as a profession can survive."



Dean's Forum marks first anniversary —
John F. Nickoll, J.D. '60. president and co-CEO of The Foothill Group, a commercial lender, talks with Law School students and others during the 10th Dean's Forum. Listening, from left, are law students Marcus Williams, Tony Backos and Frederick Greco. The luncheon gatherings bring together invited students with Law School graduates who have succeeded in fields other than law. Nickoll's visit last April marked completion of the first year of the exchanges.

BRIEFS



Heeding The Wall —

Law students turned a wall in Hutchins Hall into a modern-day billboard for a wide-ranging airing of issues raised by the discussion of the educational climate at the Law School that was brought on by a racial epithet being placed near an African-American professor's office door last spring. "The Wall," as it became known, became a place of debate and reflection as students and others added their comments and passers by, like, from left, law students Mya Bronson, Scott Sonnenblick and Shari Shepard, stopped to read. Shortly after the incident occurred, Dean Jeffrey Lehman appointed a committee of faculty, students and staff members to examine the educational environment of the Law School. The 17-member committee, chaired by Professor of Law and Women's Studies Christina Whitman, says that this fall it will turn to "developing an ongoing mechanism for faculty-student communication, devising ways in which faculty can be encouraged to broaden the coverage in their courses to include perspectives now ignored or isolated for discussion, and assisting the personnel committee in achieving the goal of a more diverse faculty."

Young laywers-to-be learn to do it 'write'

PHOTO BY THOMAS TREUTER

Grace C. Tonner, Director

J.D. cum laude, Loyola Law School; B.A. magna cum laude California State University Long Beach

Former director of the legal writing program at Loyola Law School, Los Angeles; former partner Tonner and Matera

"By the time they get out of this course they should have the skills of a young lawyer."

"Every day in practice you're going to be writing letters, briefs, motions. Since oral argument is perfunctory in a lot of cases, it is more important than ever for lawyers to develop strong writing skills. We're really professional writers."

That's the core of practicing law according to Grace C. Tonner, director of the Law School's new Legal Practice Program for first year students. Writing, research, written argument, these all are part of what students will learn in the new program, which began this summer on a small scale and will blossom full flower this fall with nine new faculty members devoting fulltime to it.

The innovative two-semester course is required of all first year students. The Legal Practice Committee that proposed the program had several goals. First semester students "will learn to present written analysis of a legal problem to a client or to a fellow attorney. They will learn to write 'persuasively' in a context that involves the need to persuade an often uninformed reader that the analysis is complete and accurate. . . Students also will learn how to conduct legal research through class lectures, readings, demonstrations, and library exercises connected to the memoranda they will write. . . Although students will receive preliminary training in Lexis and Westlaw, the first semester will concentrate on traditional research methods."

"A goal of the second semster is to shift the students' focus from a neutral perspective to an advocacy perspective. Students will develop skills in advocacy and persuasive argument through instruction in pretrial procedures and pleadings and through the drafting of pretrial and trial motions. Finally, students will be introduced to oral advocacy"

In addition to Tonner, eight clinical assistant professors will teach the program's courses. Here is an introduction:

FACULTY

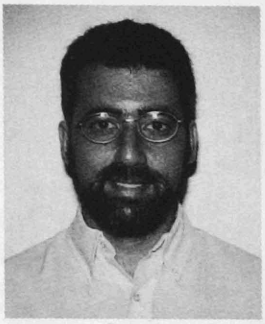
Carolyn R. Spencer,
Assistant Director

J.D. with honors, University of Connecticut School of Law; A.B., Brown University

Former legal skills instructor, Quinnipiac College School of Law, Connecticut

"I read a quote recently that I like, which said it is a compliment to be told that you think like a laywer, but not a compliment to be told that you write like a lawyer. People have the mistaken impression that writing like a lawyer means that your writing is difficult to understand, whereas clear thinking *and* clear writing are equally important in the legal field.

"The point is knowing who your audience is and what the purpose is. There's a difference between writing a letter to your client, who may not be a legal specialist, and a brief that you would write back to the court."



Eric Allan Bilsky

J.D. magna cum laude, Harvard Law School; M.A., University of California, Los Angeles; B.A. magna cum laude, Yale University

Former associate, Terris, Pravlik & Wagner, Washington, D.C.

"This is a wonderful opportunity to get involved with teaching and to make a difference in the legal education that the first-year University of Michigan Law School student will be receiving. In addition, I hope to be able to take advantage of the university's fine facilities and excellent faculty to do legal research and scholarhip in environmental law, the area in which I have been a practitioner."

Renee Birnbaum

J.D., University of Cincinnati College of Law; B.A. summa cum laude, Bowling Green State University, Ohio

Former partner, Shumaker, Loop & Kendrick, Toledo; adjunct faculty, Eastern Michigan University

"As a partner and civil litigator in a large law firm for many years, my practical experience and knowledge will provide our students with the necessary skills and insights to begin legal practice. The Legal Practice Program will expose our students to a variety of real life experiences and serve as a primer for their legal careers."

Howard Bromberg

Ph.D. (forthcoming) Stanford University; J.S.M., Stanford Law School; J.D. cum laude, Harvard Law School; B.A. magna cum laude, Harvard College

Former research fellow, Stanford Law School

"The subject matter is very satisfying because it deals with a whole range of legal subjects — legal research, writing, analysis — all of which are at the very heart of the law.

"It tends to be a very intensive course, which is one of the things I like about it. It allows the student and the teacher to get to know each other very well. It's intense, but also very satisfying, especially when you see students improve over the year."

Lorray S. C. Brown

J.D., University of Pittsburgh School of Law; B.A., University of Pennsylvania

Former legal writing professor, Villanova University School of Law, Pennsylvania

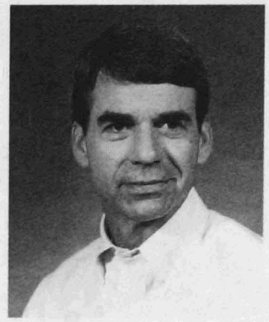
"I myself went through the mentoring kind of legal writing with third year students and felt I learned legal writing after I graduated and clerked with a judge. So I think it's a very valuable tool in legal education because after one graduates that's what you're expected to do — research and write. Those are the tools of a lawyer."

Larry J. Cohen

J.D. cum laude, Northwestern University; Ph.D. and M.A., Syracuse University; B.A., University of Massachusetts, Amherst

Former president, Cohen McGovern Shorall & Stevens; consults nationally in matters involving brain injury, neurological injury and psychological damages through Brain Injury Assessment. Also national speaker on issues involving trial advocacy, inter-professional relations and law and medicine.

"I have loved the practice of law over the past eleven years, including especially the daily challenge intrying to communicate effectively with judges, otherlawyers, clients, other lay people and partners and associates. The Legal Practice Program here at the University of Michigan Law School provides a unique opportunity to help aspiring lawyers learn not just how to think about legal issues but how, as a practical matter, to convey their ideas effectively. It has always amazed me how much difficulty lawyers have in practice with this most fundamental of lawyering skills."

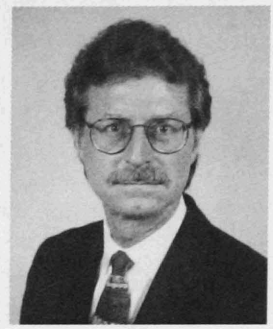


Philip M. Frost

J.D. '73 magna cum laude, University of Michigan; B.A., Yale University

Former partner, Dickinson, Wright, Moon, Van Dusen & Freeman

"I have an extensive practice background, and that's what I hope to bring to the program. I believe the program will have great value in giving first-year students insight into how to become lawyers and to learn what practicing law is all about. In particular, those of us who have been in commercial litigation practice in a private firm can give some insight into what it's like to work in a private firm or in the litigation system."



Thomas H. Seymour

J.D., Harvard Law School; M.A., Simon Fraser University (Canada); B.A., University of Nebraska

Former instructor, Suffolk University Law School and Boston College Law School, Massachusetts

"A legal practice course is the best vehicle that I have seen for learning legal analysis. This is sort of the secret side of legal research and writing programs.

"You do things that really sharpen your thinking as a lawyer. One is to take a bunch of cases, synthesize them and come up with what the law really is. That's really important. The other thing that's also really important that helps you think like a laywer, understand legal reasoning and do it on your own, is that in this course there is no casebook of cases. No editor has told you ahead of time that these are important cases and these are important parts of cases. This actually makes you do the kind of thinking and analysis of the law that a real laywer does when he gets out in the world and there are no casebooks. You have to go and do the research, know how to do it, know how to read 50 cases in that area of law and determine which ones matter."

Environmental Law Clinic founder takes helm of NATIONAL WILDLIFE FEDERATION

Mark Van Putten, J.D. '82, clinical professor of law and founder/director of the Law School's Enviromental Law Clinic, has become president and chief executive officer of the National Wildlife Federation. Van Putten, who graduated magna cum laude from the Law School, also was NWF's eastern regional director and taught environmental law at the Law School.

"As a lawyer and as a teacher of environmental law, I value very much the laws and the importance of having strong laws in protecting our environment," he told *Law Quadrangle Notes* shortly after being named NWF president in May. "But I've also learned that if you don't have a cadre of citizen activists who will scream foul when environmental protections are threatened, it is not worth having the laws. If you can't marry the laws on paper with citizen activism you're not going to achieve anything."

PHOTO COURTESY NATIONAL WILDLIFE FEDERATION

Mark Van Putten, J.D. '82

Faculty members must teach their students that strong laws "are at the heart of protecting the environment," he said.

Founded at the Law School in 1982, the Environmental Law Clinic gives 10-15 student interns the opportunity to work on cases with attorneys in NWF's Great Lakes Research Center.

"An excellent symbiotic relationship," says Professor of Law Samuel R. Gross of the cooperation between the Law School and the NWF regional center. Gross, outgoing chairman of the Clinic Advisory Committee, adds, "It has been a great boon to the Law School to have this association." Van Putten, who also taught environmental law, "has been a very valuable member of the faculty." The program "has helped establish our reputation and our standing as a center of environmental law nationally."

"I consider him one of the triumphs of my professional life," former U-M Law Professor Joseph Sax says of Van Putten. Sax, now counselor to U.S. Interior Secretary Bruce Babbitt and on leave from the University of California-Berkeley's Boalt Hall law school, taught Van Putten when he attended the Law School and was instrumental in establishing the Law School's Environmental Law Clinic with Van Putten as director.

"Mark was a wonderful student, very bright and competent. He was very knowledgeable about the Great Lakes area and committed to it. He was interested in doing environmental work, so it was a perfect fit," Sax says.

"Once again, Michigan was doing pioneering work" when it became one of the first U.S. Law Schools to establish an environmental law clinic, Sax said. "I was trying to develop an environmental law program at the Law School and to provide students with as much experience as possible. I believed that clinical opportunities were an important part of that. At the time you couldn't go out in the summer and work with someone and get experience. Environmental law practice just wasn't that readily available."

Since then, he said, "clinical education associated with law schools has proven its value."

Last year, Van Putten joined with federal and state officials to negotiate a $170 million settlement with owners of a Ludington, MI, power plant to include the value of fish killed by power production in power rates, use those funds to establish a $65 million Great Lakes fishery enhancement trust fund and to install fish protection devices at the plant. Van Putten also led the 10-year drive for development of region-wide standards for pollutants discharged into the Great Lakes and represented the NWF in litigation against the Environmental Protection Agency that led to court-ordered completion of the Great Lakes Water Quality Guidance Standards.

At NWF, he will oversee an annual budget of nearly $100 million and a staff of 400 in the Washington, D.C., area and eight natural resource centers around the country. Founded in 1936, NWF has four million members and 47 state affiliates.

"Today's conservationists need to move away from a federal focus toward a more on-the-ground, localized and community-oriented effort," said Tom Warren, chairman of the NWF Board. "As the nation's quintessentially successful leader of a field operation, Mark is the person best-suited to lead us in this new and critically important direction."

Van Putten said he will be pursuing "decentralization without balkanization" in emphasizing NWF's grassroots strengths. "While looking towards a future that emphasizes community involvement, we will also retain our issues leadership in Washington at a time when everything this country has accomplished to protect the enviroment in the last twenty-five years is threatened. We will work with reasonable people in both government and the private sector to find new and creative solutions to the problems we all face, but we will also confront and defeat the extremists who would sell or pollute our common heritage." LQN

Joseph Vining named to American Academy of Arts and Sciences

Joseph Vining, Harry Burns Hutchins Collegiate Professor of Law, has been elected a Fellow of the American Academy of Arts and Sciences. Founded in 1780, the Academy includes 3,300 Fellows and 600 Foreign Honorary Members. Headquartered at Cambridge, Massachusetts, it has regional centers in Chicago and Irvine, California.

"Your election recognizes distinguished contributions in your field and is the result of an extensive selection process involving the entire membership of the Academy," wrote Jaroslav Pelikan, president of the Academy. Pelikan, Sterling Professor of History at Yale, delivered the 1996 Jerome Lectures at the University of Michigan last winter.

Vining, who has taught at Michigan since 1969, is the sixth current Law School faculty member to be named an Academy Fellow. The others are: Bruce W. Frier, Henry King Ransom Professor of Law and professor of classics in the Department of Classical Studies of the College of Literature, Science, and the Arts; Richard O. Lempert, Francis A. Allen Collegiate Professor of Law, chairman of the University of Michigan Sociology Department, and professor of sociology; Edson R. Sunderland Professor of Law Terrance Sandalow, former dean of the Law School; A.W. Brian Simpson, Charles F. and Edith J. Clyne Professor of Law and Fellow of the British Academy; and James Boyd White, L. Hart Wright Collegiate Professor of Law and professor of English in the Department of English Language and Literature

Vining specializes in legal philosophy, administrative law, corporate law and criminal law, and is the author of *From Newton's Sleep* (1995), *The Authoritative and the Authoritarian* (1986), and *Legal Identity* (1978). He graduated from Yale University and Harvard Law School and holds a degree in history from Cambridge University. He has practiced in Washington, D.C., and served with the Department of Justice and with the President's Commission on Law Enforcement and the Administration of Justice. In 1982-83, he was a senior fellow of the National Endowment for the Humanities.

Vining is one of seven Fellows from the field of law named to the Academy this year and one of seven new Fellows from the University of Michigan. The Academy elected 159 Fellows and 26 Foreign Honorary Members this year.

Buchsbaum will teach environmental law

Andrew P. Buchsbaum, principal staff attorney for the midwest office of the National Environmental Law Center (NELC), has been named adjunct professor to teach the environmental law survey course formerly taught by Mark Van Putten, J.D. '82, who has become president of the National Wildlife Federation.

Buchsbaum, a graduate of Harvard College and the Boalt Hall School of Law at the University of California, Berkeley, has been principal staff attorney for NELC's midwest office in Ann Arbor since 1990. He has been lead attorney in 22 suits on behalf of organizations in Michigan, Ohio and Illinois. Most of his litigation has come under the federal Clean Water Act and Michigan's Environmental Response Act.

Since 1985 he also has been program and legal director for PIRGIM, the Public Interest Research Group in Michigan, with which NELC is associated.

"I have always been committed to working with students," says Buchsbaum, who worked in 1983-85 as staff attorney for a public interest law firm and teaching clinic affiliated with Georgetown University Law Center. Buchsbaum was a graduate fellow at Georgetown's Institute for Public Representation and earned his Master of Laws there in 1985.

"In addition to my clinical work at Georgetown, I've taught students at NELC and PIRGIM," Buchsbaum says. "And through the work of my wife, Cathy Fleischer, a professor at Eastern Michigan University who teaches students and other teachers, I've learned that everyone should be committed to teaching in some way.

"I also believe that teaching is a learning opportunity. Whenever you share ideas with anyone, whenever you have a dialogue, you learn from it."

Dean Lehman leads University's presidential search advisory committee

Dean Jeffrey S. Lehman has spent much of the summer huddled with members of the Presidential Search Advisory Committee reviewing candidates to replace University of Michigan President James J. Duderstadt, who stepped down June 30. Former Vice President for Research Homer A. Neal is acting as interim president.

Last spring the Board of Regents, members constituting themselves as the Presidential Search Committee, tapped Lehman to chair the Presidential Search Advisory Committee, which is charged with compiling a list of presidential candidates and presenting the list and names of at least five unranked finalists to the regents by early this fall. The advisory committee works in closed session, but regents' interviews of the finalists will be held in public.

Provost J. Bernard Machen said he nominated Lehman to head the 12-member advisory committee because Lehman "has the total support of the academic leadership of the university. He is

recognized as one of the leaders [of the university]."

Machen added that Lehman "has the inside and outside vision that is needed" and "represents the future leadership of the university."

The advisory committee also includes six U-M faculty members, two staff members, a graduate student, an undergraduate student, and one alumnus.

In a progress report in May, Lehman told the regents that the advisory committee has been progressing on "several parallel tracks," including getting its office up and running smoothly, establishing working relations with search consultant Douglas McKay, doing outreach work like advertising in national publications, meeting with student leaders, focus groups, alumni and academic leaders at the university's Ann Arbor, Dearborn and Flint campuses, and asking faculty members for suggestions.

The advisory committee is developing a "robust and diverse list of prospects," Lehman said. Committee members have discussed what information they need from prospects and the "critical question of confidentiality" for committee deliberations, he said.

"We are looking forward to a busy summer," Lehman told the Presidential Search Committee. "We are still moving according to the timetable and I expect that you will have a busy fall."

LQN

Scarnecchia named Associate Dean for Clinical Affairs

Clinical Professor of Law Suellyn Scarnecchia, J.D. '81, has been named associate dean for clinical affairs for the Law School. Scarnecchia, who came to the Law School in 1987 to join the Child Advocacy Law Clinic, has been coordinator of clinical programs since 1994.

In her new post, Scarnecchia will oversee operations of the Law School's three clinics and other clinical education programs, trial workshops and related teaching activities. She also will plan for long-term funding and handle staffing matters for clinical education programs.

"This is really an effort to put the funding of clinics under one consolidated umbrella," Scarnecchia says. Previously, clinics have sought their own funding independently of each other.

"Over the course of the past decade, our clinical programs have expanded and assumed ever-greater importance—within our own curriculum and as models for clinical education around the nation," says Dean Jeffrey Lehman. "It is now time for us to vest responsibilities for coordinating this vital aspect of our school in the hands of a single faculty member."

Suellyn Scarnecchia, J.D. '81

"During her time on the faculty, Professor Scarnecchia has established herself as an outstanding teacher, a leader in clinical education, and a gifted administrator," Lehman says. "We are indeed fortunate that she has agreed to take on this important responsibility."

The Law School currently operates the general law clinic known as The Michigan Clinical Law Program, the Child Advocacy Law Clinic and the transactional clinic known as Legal Assistance for Urban Communities. The Law School also offers an appellate criminal defense clinic in cooperation with the State Appellate Defender's Office and the Environmental Law Clinic in association with the National Wildlife Federation's Great Lakes Natural Resources Law Center in Ann Arbor.

Scarnecchia takes over her new duties as clinical education is maturing at the Law School.

For the first time, clinical education planners will be able to look beyond the current academic year because nearly all clinical law professors will have three- or seven-year long-term contracts. There are five clinical law professors with long-term contracts now (Scarnecchia, Donald Duquette, Andrea Lyon, Paul Reingold and Nicholas Rine), and by the end of next year the Law School may have seven, Scarnecchia says. In addition, the Law School is adding seminars and granting credit for two clinic-style programs and shifting toward longer-term contracts for clinical faculty.

Seminars and trial workshops are being added to the Family Law Project of the Domestic Violence Project and the Asylum and Refugee Project. The Family Law seminar/trial workshop will be taught by Washtenaw County Bar Association President and Adjunct Professor Carol K. Hollenshead, J.D. '74, a partner in Reach and Hollenshead of Ann Arbor. The Asylum and Refugee Project seminar/trial workshop will be taught by adjunct professors Lori Cohen and Jeffrey Dillman. Cohen is legal director for the Archdiocese of Detroit's Office of Migration; Dillman, an Ann Arbor attorney, has been supervising attorney for the Asylum and Refugee Law Project for the past four years.

Plans also call for adding a seminar/trial workshop to the Environmental Law Clinic, which has not had them before.

The new combination of seminar and trial workshop gives greater numbers of students "an educational benefit that's hard to duplicate in the traditional classroom," Scarnecchia says.

LQN

IN PRINT

The rule of law: How healthy is it?

Francis A. Allen's concern for the health of the rule-of-law concept in contemporary America comes through as elegantly in his new book as it did in his series of Cooley Lectures at the Law School in 1994.

Allen, Edson R. Sunderland Professor Emeritus of Law and a former dean of the Law School, long has been concerned with the issues that he discusses in *The Habits of Legality: Criminal Justice and the Rule of Law* (Oxford University Press, 1996). Now a recently retired teacher at the University of Florida College of Law, Allen has wrestled with questions of the law's form, place and role in American life in four earlier books: *The Borderland of Criminal Justice: Essays in Law and Criminology; The Crimes of Politics: Political Dimensions of Criminal Justice; Law, Intellect, and Education;* and *The Decline of the Rehabilitative Ideal.*

This time, Allen says in his Preface, he is out "to contribute to a holistic view of criminal justice as it exists in late twentieth-century America, by measuring its institutional performance against the requirements of the rule-of-law concept."

Unfortunately, Allen's comparison leaves the rule-of-law concept wanting. "The array of forces and factors weakening the vitality of the rule of law in American criminal justice is surely formidable," he concludes. "Efforts to invigorate the habits of legality in these areas are not an undertaking for the purist or the faint of heart. It is a mark of maturity to recognize that political and social objectives are rarely fully realized and that gains achieved may be quickly lost for want of persistent and often unrewarding labor."

The Habits of Legality springs from and expands on Allen's Cooley Lectures on April 5, 6, 7, 1994 at the Law School. The Thomas M. Cooley Lectureship, devoted to presentation of scholarly discussion of timely professional topics, was established through the Law School's William W. Cook Endowment Fund. Cooley was the first dean of the Law School.

Law and Practice guide to white collar crime

Getting a handle on white collar crime can be a little like holding onto a handful of smoke. A child of the latter part of this century, it touches on so many parts of our laws and our lives that it is hard to confine.

Jerold H. Israel, Alene and Allan F. Smith Professor of Law, and his co-authors, Paul D. Borman and Ellen S. Podgor, have offered a major boon to teaching about white collar crime in their new book, *White Collar Crime: Law and Practice* (West Publishing Co., 1996). The book is part of West Publishing's American Casebook Series.

"Basically we are trying to integrate materials from many different courses to give students a perspective closer to that of the practitioner," says Israel. The book grew out of materials initially prepared for a Law School seminar that Israel taught with Borman, U.S. District Court Judge for the Eastern District of Michigan. Podgor, the third co-author, is associate professor of law at Georgia State University College of Law.

The seminar that Israel and Borman taught "was [designed] to take a narrow slice of criminal justice practice — the investigation and prosecution of white collar crime in the federal system — and apply to it what is commonly described as a 'transactional' analysis," the authors say in their Preface to *White Collar Crime*.

"We wanted the students to appreciate how the practice was impacted by the interaction of legal doctrines that traditionally were taught in a wide range of separate law school courses. In the field of white collar crime, they would see how the legal transactions involved in a single case often required consideration of substantive criminal law, criminal procedure, administrative procedure, corporate law, evidence, civil procedure, sentencing law, and even highly specialized regulatory law. We also wanted students to appreciate the influence of administrative policies (in particular, the Department of Justice's internal guidelines) and the influence of the basic 'culture' of white collar criminal practice."

The book includes 19 chapters in four parts devoted to general principles, white collar offenses, procedural issues and punishment. Aptly, it opens with sociologist Edwin Sutherland's coining of the term "white collar crime" in 1939 as "crime in relation to business." But readers also learn immediately that "in the years following this lecture, the nonlegal origins of this term evolved with varying sociological perspectives. The adaptation of this term by the legal community has resulted in ambiguity as to what is encompassed within the term 'white collar crime' and what impact the term should play in grading offenses, lawyer specialization, and prosecutorial priorities."

"The book provides a unique combination of traditional materials (cases and statutes) and not-so-traditional materials (e.g. newspaper articles, forms, and practice manuals)," says Bonnie G. Karlen of the Law School Division of West Publishing Corp. "For example, one can read newspaper articles, a letter of the Attorney General, and press releases comparing the government approach to incidents at Drexel, Hutton, Salomon, and PSI [Prudential Securities, Inc.]. Students can read the introductory material explaining the federal sentencing guidelines, and immediately apply the material through use of the guideline worksheets that are included in the sentencing chapter."

Israel, officially retired from the Law School as of Aug. 31, has not given up classroom teaching; he continues as an active faculty member at the University of Florida College of Law.

KUDOS

Professor of Law **Jose Alvarez** will co-chair the annual meeting of the American Society of International Law in April 1997. He spoke on "The United States' Financial Veto" and its impact on the United Nations at the society's 90th annual meeting last spring; his talk is being published in the proceedings of the meeting. In May, at the invitation of the American Society of International Law, Alvarez attended a workshop on Global Change and Compliance with Non-binding Legal Accords. In May, he delivered a paper on "Constitutional Interpretation in International Organizations" to the Department of Political Science at the University of California (Irvine); his paper has been included in the *Working Papers* series published by the UC-Irvine's Global Peace and Conflict Studies Institute. His article "Nuremberg Revisited: The Tadic Case," which examines the legitimacy of the recently established tribunal to judge war crimes in the former Yugoslavia, has been published in the *European Journal of International Law.*

Phoebe Ellsworth, Kirkland and Ellis Professor of Law, described her research on how cultural background affects emotional reactions at a symposium that was part of the annual meeting of the American Association for the Advancement of Science earlier this year. Ellsworth and University of Michigan graduate student Kaiping Peng studied how Chinese and American students' reactions to cartoons reflected their different cultural perspectives.

Assistant Professor **Heidi Li Feldman** delivered the opening address in May for DePaul University College of Law's symposium on "Tort Law and the Science of the 21st Century: Implications for Social Policy, Theory, and Practice." Her talk dealt with "the relationship between evidentiary standards announced in the Supreme Court decision *Daubert vs. Merrell-Dow Pharmaceuticals, Inc.*(1993), the practice of science, and mass toxic tort litigation." Symposium organizers asked her to make the opening address based on her article "Science and Uncertainty in Mass Exposure Litigation" in the *Texas Law Review* in November 1995. She also was an invited symposiast in June for the Westminster Institute for Ethics and Human Values' program on "Legal Professionalism: In Whose Interest? Public, Client or Lawyer?"

Professor of Law **Richard D. Friedman** presented his paper "Lawyers' Misconceptions about Bayesianism" at the Third International Conference on Frensix Statistics, Edinburgh, Scotland, last July and at the University of Michigan's Decision Behavior Research Consortium in May. In April he taught an advanced civil evidence seminar on hearsay for the U.S. Department of Justice's Jackson, MS, Office of Legal Education. In March, he presented his paper "Charles Evans Hughes and International Law" to the American Society of International Law at Washington, D.C.; the paper will be published as part of the society's *Proceedings*. Friedman also chairs the Evidence Section of the Association of American Law Schools.

Professor of Law **Samuel R. Gross** presented a paper, "The New York Death Penalty in Context," at the State University of New York at Buffalo School of Law in March. In February, he gave a presentation on "Justice for All? Racial Minorities, Crime Victims and the Local Community" at a Federal Society on Justice in the Criminal Justice Process symposium at Stanford Law School. In Unversity activities, Gross has been elected to a one-year term on the University-wide Senate Advisory Committee on University Affairs (SACUA), the executive arm of the U-M faculty's Senate Assembly.

Yale Kamisar, Clarence Darrow Distinguished University Professor of Law, testified in April before the Subcommittee on Constitutional Law of the House Committee on the Judiciary on the constitutional dimension of the right to die.

Frank R. Kennedy, Thomas M. Cooley Professor Emeritus of Law, has been awarded the American College of Bankruptcy's first Distinguished Service Award. The College recognizes and honors "bankruptcy professionals who have distinguished themselves both in their practice and contribution to the insolvency process." Kennedy, a member of the Law School faculty from 1961-1985, served as executive director of the First Commission on Bankruptcy Laws of the United States from 1971 to 1973. He currently is co-writing a treatise on bankruptcy and serving as reporter for the ABA's Committee on Partnerships in Bankruptcy. The College, whose 300 members are "bankruptcy professionals who have distinguished themselves both in their practice and contribution to the insolvency process," decided early this year to offer a Distinguished Service Award up to once a year. The recipient, among other requirements, shows "significant accomplishments in improving the administration of justice in the insolvency and bankruptcy field" and "the accomplishments must arise from voluntary activities rather than for services rendered to a client as a paid professional."

Earl Warren Delano Professor of Law **James E. Krier** held the George E. Allen Chair in Law, T.C. Williams School of Law, University of Richmond, March 4-10 and presented the George E. Allen Lecture, forthcoming in the *University of Richmond Law Review*. Krier also was a panelist in April at the College of William & Mary Law School program "Defining Takings: Private Property and the Fuure of Government Regulation"; his paper from the program will be forthcoming in the *William & Mary Law Review*.

Edson R. Sunderland Professor of Law **Terrance Sandalow** recently has delivered papers on constitutional law at Charles University in Prague, the University of Tokyo, Chuo University in Tokyo and Gakushuin University in Tokyo.

Grace C. Tonner, director of the Legal Practice Program, made a presentation on "Drafting Effective Writing

Problems" at the seventh biennial Legal Writing Institute Conference at Seattle University in July. Two other clinical assistant professors in the program also made presentations at the conference. **Lorray S. C. Brown** discussed "Lawyering Skills, Process Drills, and Teacher Thrills: Integrating Innovation Into a Legal Writing Program," and **Carolyn R. Spencer**, assistant director of the Legal Practice Program, discussed "Using Student and Teacher Portfolios."

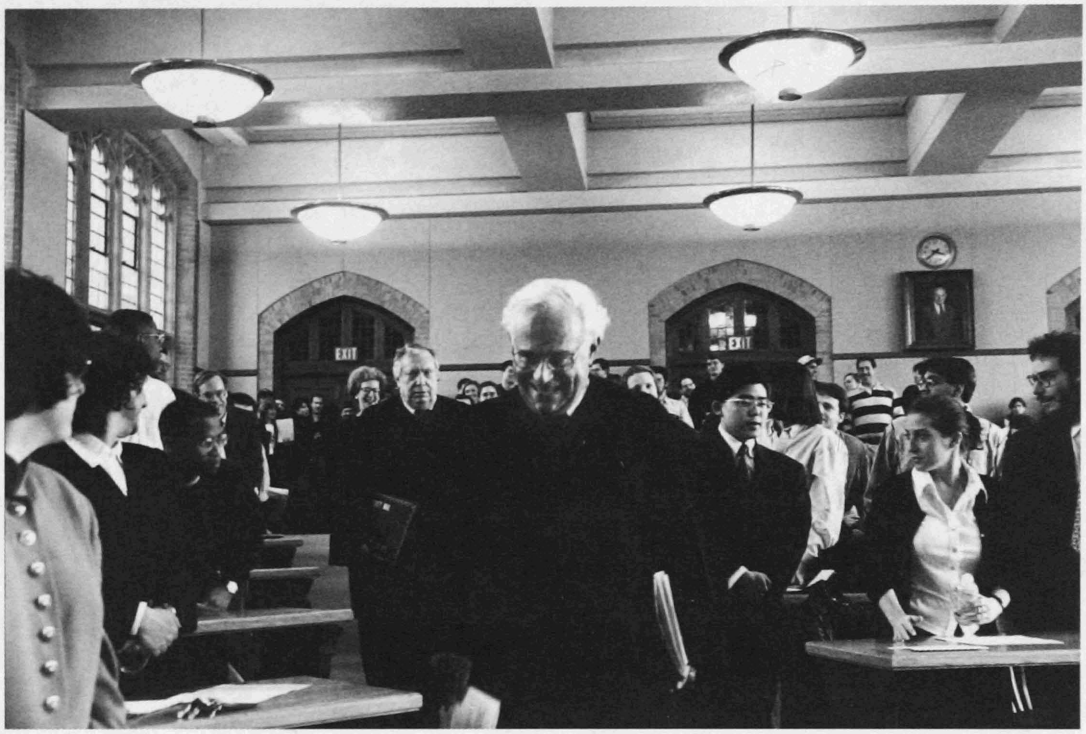
Joseph Vining, Harry Burns Hutchins Collegiate Professor of Law, was introductory speaker at the March symposium "The Moral Tradition of American Constitutionalism" at Notre Dame University.

Lewis M. Simes Professor of Law **Lawrence W. Waggoner** spoke on the Uniform Probate Code at the mid-year meeting of the Arkansas Bar in January. The same month he spoke on an intestacy statute for committed partners, a statute that he drafted, at the annual meeting of the Association of American Law Schools.

James J. White, Robert A. Sullivan Professor of Law, was a speaker for the seventh annual advanced American Law Institute-American Bar Association course of study on "The Emerged and Emerging New Uniform Commercial Code." Professor White also is the reporter for the National Conference of Commissioners on Uniform State Laws' work in revising Article 5 of the Uniform Commercial Code and is a member of the drafting committee for NCCUSL's revision of Article 2A of the Uniform Commercial Code.

Leading the way —

U.S. District Judge Avern Cohn, J.D. '49, leads fellow Justices Stephen Reinhardt, of the U.S. Court of Appeals, 9th Circuit, and Diana Motz, U.S. Court of Appeals for the Fourth Circuit, to the bench for the Henry M. Campbell Moot Court Competition last winter. The legal issue for the competition involved whether the operator of a computer bulletin board for militias could be compelled to reveal the identity of a user who posted national security secrets on the bulletin board.



Cohn, J.D. '49, will give freedom lecture

Frequent Law School visitor the Hon. Avern Cohn, J.D. '49, U.S. District Judge, Eastern District of Michigan, will deliver the annual Davis, Markert, Nickerson Lecture on Academic and Intellectual Freedom Oct. 21 at 7 p.m. at the Horace Rackham School of Graduate Studies.

Cohn will discuss "Academic Freedom: A Trial Judge's View."

A Detroit native, Cohn was appointed a U.S. District Judge in the Eastern District of Michigan in 1979 by President Jimmy Carter. Cohn served on the Michigan Social Welfare Commission in 1963; he was a member of the Michigan Civil Rights Commission from 1972-75 and chaired the commission in 1974-75; and he was a member of the Detroit Board of Police Commissioners from 1975-79 and served as chairman in 1979.

In recent years, Cohn has ruled in several cases involving First Amendment issues and the University of Michigan, including a case challenging an early version of the University's non-academic code of student behavior and another that dealt with a student who used the name of a fellow student in stories about kidnapping and torture that he posted on the Internet. Last March, Cohn served as one of three justices for the Law School's Henry M. Campbell Moot Court Competition.

"Judge Avern Cohn is one of the most scholarly judges on the federal bench and immensely popular with law students when he meets with them on his not infrequent visits to the University of Michigan," says Theodore J. St. Antoine, James E. and Sarah A. Degan Professor of Law.

St. Antoine serves on the advisory committee for the annual lecture, as does former Law School Dean Lee C. Bollinger. Now provost at Dartmouth College, Bollinger delivered the annual talk in 1992.

This year's lecture is sponsored by the Law School, the Academic Freedom Lecture Fund, the University of Michigan Chapter of the American Association of University Professors (AAUP) and the Senate Advisory Committee on University Affairs (SACUA).

Begun in 1991, the annual lecture is named for three University professors who in 1955 refused to give testimony to a group from the U.S. House Committee on Un-American Activities that visited Michigan. Professors H. Chandler Davis and Mark Nickerson, a tenured faculty member, were suspended and then terminated from the faculty. Professor Clement Markert was suspended but later reinstated.

The lectures were begun with backing from the AAUP and donations from U-M faculty, according to Peggie J. Hollingsworth, president of the Academic Freedom Lecture Fund and an assistant research scientist in the schools of medicine and public health.

Johnsons give $2 million to endow Law Library Fund

Thanks to the farsighted generosity of Kenneth T. and Marion Johnson, of Jamestown, N.Y., the Law Library will have some $100,000 each year forever "for the purpose of purchasing books, publications and other legal research materials."

The income from the endowment of more than $2 million that the Johnsons have willed to the Law School may be used for "the purchase of computers and computer related items for legal research" by University of Michigan Law School students, the Johnsons said in their will. It may not be used for "student tuition or support, faculty or library salaries or support, or the maintenance of the library facility."

Kenneth T. Johnson, LL.B. '37, died in 1991. His widow, Marion, died in 1995. They had no children.

"These kinds of gifts are increasingly important because inflation and the cost of materials for at least a decade have been greater than our appropriation and other sources of revenue," says Law Library Director Margaret Leary. For example, a subscription to the annotated codes for all states cost about $23,000 in 1993; the following year the cost jumped to $30,000, a 30 percent increase. The Law Library's subscription to Prentice-Hall's looseleaf service *Corporation* jumped 21 percent between 1992 and 1996, and the library's subscription to *Health Law Reporter* rose 16 percent between 1994-95 and 1996-97.

Leary and Ann Unbehaun, associate director of development and alumni relations for the Law School, say that gifts in the form of endowments are "particularly important" because they provide continuing, dependable income. Endowments like the Kenneth T. and Marion L. Johnson Law School Library Fund guarantee earnings that the Law School can count on despite fluctuations in annual or short term gift giving.

So far in the current fundraising campaign, the Law School has raised nearly $25 million toward its endowment goal of $45 million, Unbehaun says. "These are critically important dollars that pave the way for the future. They provide the ongoing support year after year that we need. The corpus of the money is protected and generates interest to keep programs going in perpetuity."

A founding partner of Johnson, Peterson, Tener and Anderson in Jamestown, Johnson was a member of the Board of Visitors of the U-M Law School, the American Bar Association, and the New York State and Jamestown, NY, bar associations. He was admitted to practice law in New York in 1938, before the U.S. Supreme Court in 1956 and before the U.S. Tax Court in 1961. He served on the President's Committee on Employment of the Handicapped from 1958-76 and on the (N.Y.) Governor's Committee on Employing the Physically Handicapped from 1957-74.

TOUCHDOWN BOUND

Michael Huyghue (pronounced Hewg), if he had had time, couldn't have helped but wonder at how the Florida hockey Panthers seemed to foreshadow the game plan of his own Jacksonville football Jaguars' third year: An expansion team in 1993-94, they surprised the hockey world by facing the Colorado Avalanche for the Stanley Cup national championship in 1996. Yes, the Avalanche, a veteran team in its first year at Denver after leaving Quebec, won the Stanley Cup by taking the first four games of the best-of-seven final series. But those gutsy Panthers didn't just pad away in forlorn defeat. Colorado and Florida finished the regulation play of their fourth game without any score by either side. Colorado's hard-fought victory, by a score of 1-0, came more than four minutes into the third overtime period.

Maybe there's something in the cousin-ship of panthers and jaguars. Huyghue, J.D. '87, expects to smile with satisfaction at the equal or better performance of his football Jaguars next season. As senior vice president of football operations for the expansion team, he's been saying right along that Jacksonville wants to be a contender by its third year on the field. Last season, the team's first, the Jaguars racked up a 4-12 record, which Huyghue notes proudly "beat the former record of three wins by any other expansion team, save the other 1995 expansion Carolina Panthers, in its first season."

To skeptics, all this may sound like major league hype. But those who know Huyghue nod their heads in recognition at the astounding roster of successes he already has achieved before he's 35:

- Wide receiver at Cornell University, where he did his undergraduate work.
- An internship with the National Football League Players Association during his Law School days that he nourished into a full-time position after his graduation.
- Three years as a lawyer for the association's nemesis, the NFL Management Council.
- General manager of the Birmingham Fire of the World League of American Football, which now operates solely in Europe.
- Assistant general manager with the Detroit Lions for nearly two years.
- Overall, a meteoric rise to becoming one of the highest-ranking black officials in the National Football League.

Not bad for a kid from Windsor, Conn., who grew up as one of the small minority of African-American children in his neighborhood. "Even if I wanted to forget the fact that

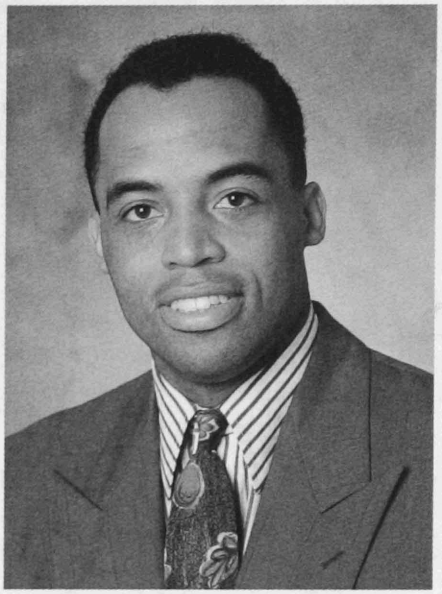


PHOTO COURTESY OF THE JACKSONVILLE JAGUARS

Michael Huyghue

I was black as a child, there were always people who would not let me forget," Huyghue once told the *New York Times*. "I didn't have hate for the way people made differences known. It just toughened me up. It made me want to beat them in everything. It just made me want to be superior in everything."

Huyghue's style is a wide receiver's style. He doesn't batter down opposition, like a lineman. He outmaneuvers it, runs around it, just plain works harder. "If the other guy is up at 7 a.m., Huyghue is up at 5," *Times* writer Thomas George said of Huyghue. "If the other guy leaves at 6 p.m., Huyghue stays until 8."

"He certainly was a go-getter from the word go," recalls Theodore J. St. Antoine, James E. and Sarah A. Degan Professor of Law and former dean of the Law School. "I find him very alert, very self-possessed, [but] without any arrogance. . .

"I have a very high regard for him. He is balanced, with a lot of energy. You just knew

Huyghue's style is a wide receiver's style. He doesn't batter down opposition, like a lineman. He outmaneuvers it, runs around it, just plain works harder. "If the other guy is up at 7 a.m., Huyghue is up at 5," *Times* writer Thomas George said of Huyghue. "If the other guy leaves at 6 p.m., Huyghue stays until 8."

that he was a guy who was going to go somewhere in a hurry."

Huyghue quickly acknowledges that he has his sights set on goals higher than being senior vice president of the Jaguars. Like being NFL commissioner some day. "The situation evolves and opportunity comes along," he says. "And at some point you decide that's for you."

For now, however, he says his dedication to the Jaguars is complete and he's got his usual laser-like focus on building a team that will challenge the best of pro football by the 1997-98 season.

Huyghue, Jaguars owner Wayne Weaver, and coach Tom Coughlin are building their team from the middle out. Unlike some expansion teams, they have chosen to avoid drafting big name, high priced, often older players for their name value and fan drawing power. The fans are there — the Jaguars' 73,000-seat stadium has been sold out for the first three seasons — so Huyghue instead has concentrated on adding younger, promising, if perhaps lesser known players to the roster. The college draft, free agency and expansion "all go hand in hand in recruitment," he says. "We're sticking to our strict age philosophy of 24, 25, 26 years of age."

"We believe the plan is still good," he says of the Jaguars' three-year strategy to develop from scratch into a national contender. "This will be a more telling year for us. I don't see any reason to do anything other than what we've been doing."

Last year Huyghue stunned the football world by signing all ten of his college draft choices en masse on June 1, a feat never before accomplished in the league. This year he and the Jaguars picked up 10 players in the college draft —"a grade of A was given to us by all of the national newspapers," Huyghue says. Among the recruits are outside linebacker Kevin Hardy from the University of Illinois and defensive end Tony Brackens from the University of Texas.

The Jaguars also picked up offensive tackle Leon Searcy from the Pittsburgh Steelers. Maybe Searcy just saw the light: two of the Jaguars' four victories last year were against the Steelers.

Then there's the Florida setting, which Huyghue credits with being a big draw for his players: "It's a big attraction. We play on natural grass. The area is easy to get to. There's no state income tax. There's exceptional weather, which I appreciate, coming most recently from Detroit myself."

"Frightenly stellar," *Financial World's* Jennifer Reingold wrote of Huyghue's reputation as a negotiator, "with everyone from his high school vice principal to his former bosses predicting he'll be running the NFL someday." Said Jack Donlan, former head of the NFL's management council: "He's like the swan. You always see him floating on the top, but he's pedaling like hell underneath."

Huyghue credits the Michigan Law School and courses like St. Antoine's in labor law and antitrust law for demanding the mental conditioning that he draws on in such negotiations. He makes no claim that he learned his amateur magician's skills at the Law School — he once eased a particularly taut negotiating session with a show of magic tricks — but that's another story.

The Law School was also where he met his wife, Kimberly Wyche, who graduated in 1987 and worked at the Office of Thrift Supervision for a time. They have two daughters, Kristen, 2, and Kathryn, who is nearing her first birthday.

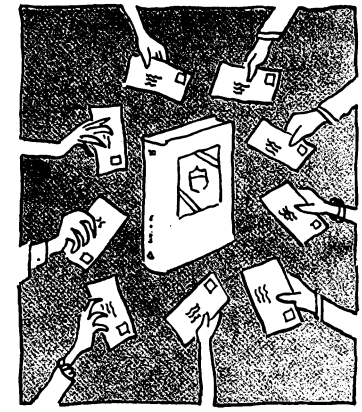
"I think the whole basis of my legal education, which is a major component of how I think, negotiate and react, is part of the training I got at the Law School," Huyghue says. "The Law School certainly prepares you for a particular way of thinking, arguing and persuading. The audience you work with prepares you for any walk of life.

"You don't have to have all the answers when you leave Law School. You need to learn the ability to see through issues, to challenge, to persuade. I rely on those skills every day."

And tomorrow?

"The playoffs, possibly the Super Bowl. You're only in this to win."

LON



Please complete, return questionnaire

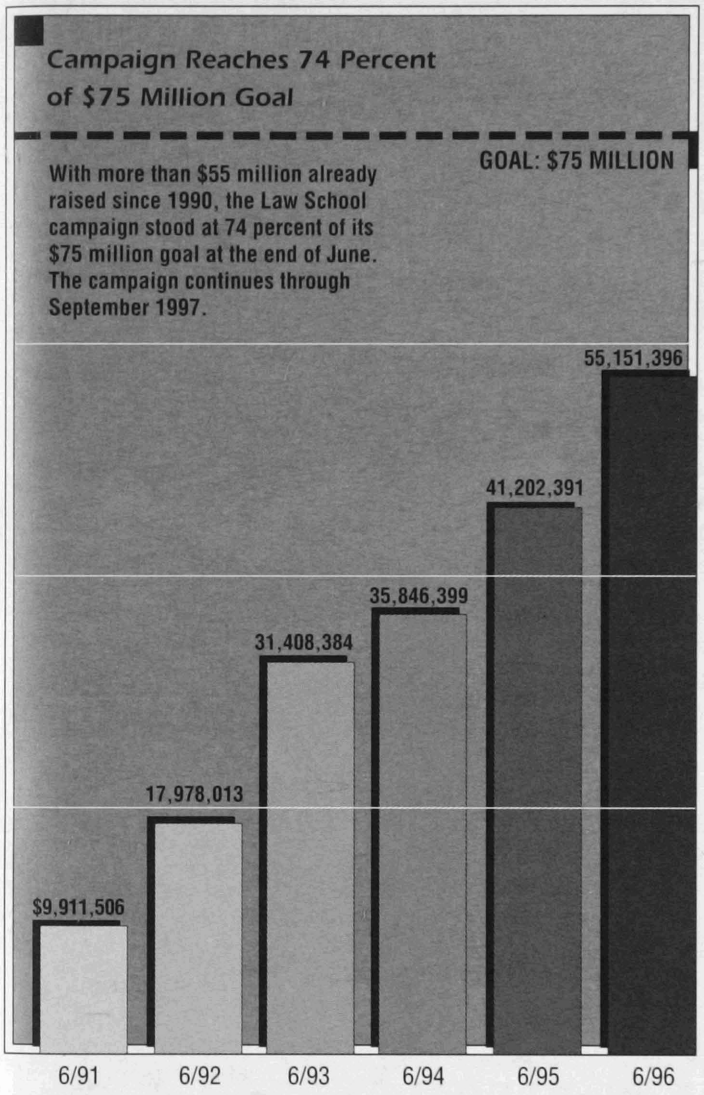
Law School graduates should have received a questionnaire for updating entries in the Law School Alumni Directory. The questionnaires were mailed in the spring.

You should also have recently received a postcared from Bernard C. Harris Publishing Company, the publisher of the directory, with a toll-free number (800.361.0221) so that you can call at your convenience with any changes. You can use the toll-free line to call in changes until Nov. 4.

You can expect a telephone call from Harris Publishing within the next few weeks to verify information you have sent.

If you have not yet received a questionnaire, contact Harris Publishing at the toll-free number above.

The new directory will include electronic addresses in addition to traditional address, telephone, FAX and professional information. The directory will be available in early 1997.



1940

John H. Pickering received the National Council on Aging's first "Outstanding Older American Award" for his work as chair of the American Bar Association's Commission on Legal Problems of the Elderly and as chair-elect of the Senior Lawyers Division of the ABA. He also was the guest speaker at the annual dinner of the Frank Murphy Honor Society of the University of Detroit Mercy School of Law. Named for former Supreme Court Justice Murphy, for whom Pickering clerked, the honor society annually inducts the top ten percent of the law school's graduating class.

1941

55TH REUNION

The Class of 1941 Reunion will be Sept. 27-29.

1948

Albert T. Reddish of Alliance, Nebraska, received the Outstanding Legal Educator Award at the Nebraska State Bar Foundation's annual membership banquet. He also has been honored with the Nebraska State Bar Association's George H. Turner Award for his service to the profession.

1950

James C. Mordy was inducted into the American College of Bankruptcy's Seventh Class of Fellows. He is one of 23 attorneys and seven judges from across the country to be named a fellow this year. Mordy is a partner in the law firm Morrison & Hecker L.L.P., Kansas City, Missouri.

1951

45TH REUNION

The Class of 1951 Reunion will be Sept. 27-29.

1952

William Saxton of the Detroit law firm Butzel Long was awarded the Nathan B. Goodnow President's Award by the Detroit Bar Association. The annual award honors individuals whose lives and careers have exemplified the highest standards of the legal profession and who have had a significant impact on the law and

life of the community. Saxton is regarded as one of the preeminent labor and employment lawyers in Michigan and the midwest, having served for 43 years as a trial lawyer, negotiator and counselor for various employers and associations.

1953

Richard Pogue is senior vice president and newly-appointed regional manager of CB Commercial Real Estate Group for the Bay Area, where he has taken charge of the Oakland Office.

Four Michigan Law School graduates are shareholders in von Briesen, Purtell & Roper, s.c., a Milwaukee law firm resulting from the recent merger of von Briesen & Purtell, s.c., and Gibbs, Roper, Loots & Williams, s.c. They include **Gordon H. Smith, Jr.**, '53, **Clay R. Williams**, '60, **Terry E. Niles**, '77, and **Kenneth A. Hoogstra**, '90.

1954

Richard B. Baxter, a partner with the law firm Dykema Gossett, was named president of the International Academy of Trial Lawyers, which claims active membership in 39 countries, by invitation only. He also received the Grand Rapids Bar Association's Donald R. Worsfold Distinguished Service Award.

Stephen A. Bromberg and **Richard E. Rassel**, '66, were re-elected to second terms as directors and officers of the law firm Butzel Long. Bromberg continues his practice as a real estate and transactional attorney, specializing in real estate transactions and litigation. Rassel's practice focuses on media law and a variety of business-related claims, including anti-trust litigation, contract disputes, intellectual property litigation, and financial institution matters.

1955

Raymond Knape retired as chairman and CEO of Knape & Vogt, where he has been chair and CEO since 1985, having joined the firm 32 years ago. He will remain a member of the board of directors. Knape & Vogt manufactures shelving and other home furnishing items.

1956

40TH REUNION

The Class of 1956 Reunion will be Sept. 27-29.

Thomas R. Ricketts was honored by the Harvard Business School Club of Detroit as Business Statesman, an annual award recognizing individuals who have demonstrated superior leadership and management skills in their companies, business profession, and local community. Ricketts is chairman, president, and chief executive officer of Standard Federal Bancorporation, Inc.

1959

Paul K. Gaston was elected by shareholders to a three-year term as director of Kysor Industrial Corporation, a producer of refrigerated cases, commercial refrigerator systems and components for the medium- and heavy-duty commercial vehicle market.

1961

35TH REUNION

The Class of 1961 Reunion will be Sept. 27-29.

James N. Adler, a partner at the Los Angeles law firm Irell & Manella, was a discussant at the Kenneth M. Piper Lecture, "Privacy in the Workplace," held at Chicago-Kent College of Law.

Calvin A. ("Tink") Campbell, Jr., president and CEO of Goodman Equipment Corporation and chairman of Improved Blow Molding Equipment Company, Inc., was elected to a three-year term as a director at Eastman Chemical Company, where he has been a board member since the company spun off from Eastman Kodak Co. in 1994.

Irvine O. Hockaday, Jr., president and CEO of Hallmark Cards, was the target of a recent roast attended by 800 people. The charity affair raised $145,000 for the Kansas City Swope Parkway Health Center.

Rep. John Edward Porter is helping form a legislative caucus to promote democracy for Hong Kong. The group is circulating a letter asking Senate colleagues to join in an appeal to President Clinton to meet with Martin Lee, a Hong Kong politician and legislative leader who is attempting to drum up support for democracy for the colony when it reverts to China next year.

1962

The Honorable Joseph J. Simeone, S.J.D., a United States administrative law judge in St. Louis, Missouri, received a Distinguished Alumni Award from the Washington University School of Law.

1963

Kathryn D. Wriston, of New York City, was elected to the board of directors of The Stanley Works, which plans to utilize her knowledge and experience in legal and accounting matters and her extensive service on various corporate boards.

1966

30TH REUNION

The Class of 1966 Reunion will be Sept. 27-29.

Ronald L. Olson was elected by shareholders as a director of Pacific American Income Shares, Inc., a closed-end investment company which seeks a high level of income through investment in a diversified portfolio of debt securities.

1967

Cushman D. Anthony has opened a law office in Portland, Maine, focusing on mediation, arbitration, and dispute resolution services in commercial, real estate, probate, tort, and general litigation; mediation and arbitration of divorce and family law matters; and legal consultation and representation in divorce-related litigation. He will remain of counsel to the law firm Anthony, Howison, Landis & Arn.

James R. Cooke was named vice president of Opto-Electronics Components Products Business of Corning Incorporated, where he is business development and general manager. He previously served as division vice president for Advance Materials and Process Technology.

Richard D. McLellan, an attorney with Dykema Gossett P.L.L.C., visited the Republic of Ghana with the late United States Secretary of Commerce Ronald Brown in February. The focus of McLellan's efforts was the participation of Michigan companies in the National Electrification Scheme, which seeks to improve the access of Ghanians to electricity.

Ronald A. Rispo, of Brecksville, Ohio, was re-elected a director of the Defense Research Institute, the largest association of litigation defense lawyers in the United States. He is a partner in the Cleveland law firm Weston, Hurd, Fallon, Paisley & Howley, specializing in insurance, general negligence, medical malpractice, and product liability law.

Eli Segal, chairman of the Partnership for National Service and chief executive officer of the Corporation for National Service, headed up the final judging panel for the 1996 President's Service Awards, which were presented by Hillary Rodham Clinton at the end of National Volunteer Week. The awards are the highest honor given by the President for volunteer service.

1968

David L. Callies edited and introduced the book *Takings: Land Development Conditions and Regulatory Takings after* Dolan *and* Lucas, which was published by the American Bar Association. Callies is a professor at the William S. Richardson School of Law, University of Hawaii at Manoa, and is co-author of the article "Land Tenure, Alienation and Foreign Investment in the Pacific," which was published in Volume 4, Number 2 of the *Asia Pacific Law Review* (Winter 1995).

1971

25TH REUNION

The Class of 1971 Reunion will be Oct. 18-20.

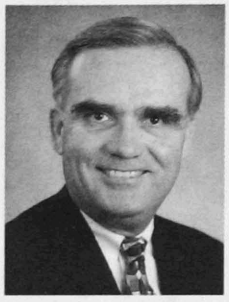
The Honorable Deanell Tacha delivered the spring commencement address to more than 500 Suffolk University law graduates. Judge Tacha, of the U.S. Court of Appeals, 10th Circuit in Lawrence, Kansas, was appointed by former President Ronald Reagan in 1985.

Douglas M. Tisdale, shareholder in the Denver office of the law firm Popham Haik Schnobrich & Kaufman, Ltd., has been selected to handle the real estate interests of Discovery Zone, which filed for Chapter 11 protection earlier this year. Tisdale will spearhead renegotiation and closure efforts in a seven-state area.

1972

John W. Allen was appointed secretary of the Out of State Practitioners Division of the Florida Bar, and he serves on that division's council. Allen is a partner with the Kalamazoo law firm Howard & Howard Attorneys, P.C., where he co-chairs the Commercial Litigation Practice Group and serves as the firm's general counsel.

Robert D. Brower, managing member of the Grand Rapids law firm Miller, Johnson, Snell & Cummiskey, P.L.C., was elected to the Opera Grand Rapids Board of Directors.



Eric Manterfield of Indianapolis has joined the Indianapolis law firm of Krieg DeVault Alexander & Capehart as a partner. His areas of practice will include estate planning and probate.

The American Jewish Committee, Detroit Chapter, presented **Barbara Rom** with the Institute of Human Relations Distinguished Community Service Award. She also was inducted as a Fellow in the American College of Bankruptcy. Rom is a partner in the Detroit office of Pepper, Hamilton & Scheetz, specializing in workouts, bankruptcy, insolvency matters, and commercial litigation.

John A. Yogis, LL.M., is co-author of the book *Sexual Orientation and Canadian Law: An Assessment of the Law Affecting Lesbian and Gay Persons*, published by Edmond Montgomery Publications Limited, Toronto, and funded through a Canadian Department of Justice grant. Yogis is associate dean of law at Dalhousie University, Halifax, Nova Scotia.

1973

The **Honorable Samuel Bufford** recently taught seminars for judges in Romania on the subject of bankruptcy law, especially reorganization under the Romanian bankruptcy law. The country's new law was heavily influenced by a seminar he taught two years ago in Bucharest. Judge Bufford also spent a week in Kiev advising the drafting committee that is revising the Ukraine bankruptcy law.

John Burkoff was appointed academic dean for the fall 1996 Voyage of Semester at Sea, a University of Pittsburgh undergraduate program in which more than 500 students sail around the world visiting 11 Third-World countries.

Robert L. Hetzler, president and CEO of Montor Sugar Co. in Bay City, Michigan, was named chairman of The Sugar Association, of which he has been vice president since 1994. The association is a non-profit organization that represents the United States sugar industry and funds scientific research.

1974

Jerome A. Atkinson of Montclair, New Jersey, was elected senior vice president, secretary, and general counsel of New York-based Fortis, Inc., an insurance and financial services holding company. He previously was senior vice president, secretary, and general counsel of the Fortis subsidiary, American Security Group, Atlanta, Georgia.

Class notes

Bruce F. Howell has joined the Dallas law firm Vial, Hamilton, Koch & Knox, L.L.P., as a partner. He chairs the Health Care Group, and focuses his practice in the areas of health care reimbursement and managed care.

Richard G. Moon, a partner in the law firm Moon, Moss, McGill & Bachelder, Portland, Maine, was named a founding fellow and governor of the College of Labor and Employment Lawyers, Inc., which was established to promote excellence in the practice.

Robert G. van Schoonenberg was promoted to senior vice president, general counsel, and secretary of Pasadena, California-based Avery Denison Corporation. In addition to his continuing responsibilities as secretary, he will now take a more active role in the company's overall business activities, including merger and acquisition activities, and he will serve as a member of the executive council.

1975

John L. Booth, a member of the Detroit Club's rebel bloc, the Millenium Committee, took over the Detroit Club on the heels of a two-to-one vote by the membership rejecting the Detroit Club's board's decision to shut down the facility. The Millenium Committee temporarily named a new board for the 114-year-old club, with Booth serving as co-chairman, while it takes steps to keep the club solvent .

1976

20th Reunion

The Class of 1976 Reunion will be Oct. 18-20.

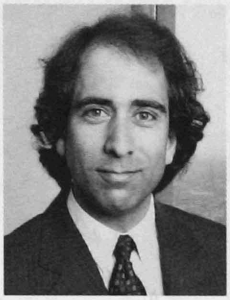
Andrew R. Grainger has left his position as general counsel of Recoll Management Corporation to rejoin the Boston-based law firm Peabody & Brown as a partner in its Corporate Banking Group. He will focus his practice in the field of commercial lending and corporate law.

1977

President Clinton appointed **Daniel K. Tarullo** to the post of deputy assistant to the President for economic policy. He previously served as assistant secretary of state for economic and business affairs, representing the State Department on international trade, finance, and international and domestic economic matters; and he served as the President's personal representative to the G-7 group of industrial nations.

Mark D. Willmarth is one of six founding partners of the new Detroit law firm Willmarth & Tanoury. The firm is concentrating its practice on the defense of medical malpractice claims, health care financial and liability risk management counseling, and general liability defense.

1979



Steven F. Pflaum, a partner with the law firm McDermott, Will & Emery, was named general counsel of the Chicago Bar Association. His law practice focuses on complex appellate and civil litigation, with a significant portion devoted to disputes regarding airport expansion projects and other controversial land uses, such as jails or landfills.

1981

15th Reunion

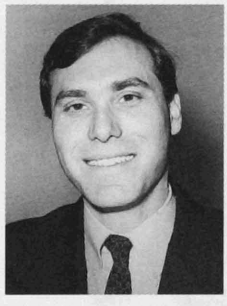
The Class of 1981 Reunion will be Oct. 18-20.

Herbert A. Glaser and **Steven J. Greene**, '87, formerly of the law firm King & Spalding, have joined the law firm of McDermott, Will & Emery. Glaser will continue to practice in Washington, D.C., and Greene will be based in the firm's New York office.

Valerie Jarrett, executive vice president of The Habitat Company, has joined the Chicago Museum of Science and Industry's Board of Trustees.

Stewart L. Mandell, a member of the law firm Dykema Gossett, P.L.L.C., was honored by the city of Detroit and the Detroit Skillman Parenting Program during Parenting Awareness Month (PAM), observed in March. Mandell founded PAM, which is designed to publicize the importance and availability of parenting programs offered in Michigan, and he currently chairs the PAM State Steering Committee. He specializes in tax controversy and corporate tax issues in Dykema Gossett's Detroit office.

Kenneth C. Mennemeier has joined Diepenbrock Law Firm, Sacramento, as a shareholder, after twelve years with Orrick, Herrington & Sutcliffe. In April, he completed the 100th running of the Boston Marathon.

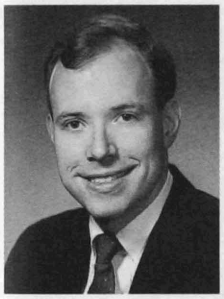


Lawrence A. Serlin has left his position as in-house counsel to Rollins Environmental Services to join the Philadelphia and Haddonfield law firm of Mesirov Gelman Jaffe Cramer & Jamieson as special counsel and chair of its Environmental Group. He has a broad civil litigation background and has represented businesses in

Superfund matters, Clean Water Act disputes, and insurance declaratory judgment actions seeking coverage for environmental liabilities. Serlin also recently served as a panelist on the topic "Resolution of Environmental Insurance Coverage Claims — Trying Environmental Coverage Cases."

1982

David L. Hartsell has become a partner in the Chicago office of Ross & Hardies, where he will continue his practice in the areas of business litigation and professional liability.



C. Daniel Motsinger has joined the Indianapolis law firm of Krieg DeVault Alexander & Capehart as a partner. Motsinger, whose areas of practice include creditors' rights and bankruptcy issues, will concentrate on the continued development of the firm's creditors' rights practice. He resides in Indianapolis with his wife, Deborah Kirkland Motsinger, and their children, Katie and David.

Lawrence E. Savell will be practicing in the field of health litigation in the New York office of Chadbourne & Parke, L.L.P.

Myint Zan, a lecturer in the School of Law, University of New England in Australia, has authored several recent works, including the article "*U.S. v. Alvarez-Machain* 'Kidnap' Case Revisited," (1996 March) 70 *Australian Law Journal*. Zan also published a review of Michigan Law School Professor James Boyd White's "Acts of Hope: Creating Authority in Literature, Law and Politics," in the inaugural issue of the *The University of New Castle Law Review* in Australia; and he authored the chapter, "UN Peacekeeping Efforts in the Context of International Law" in the book *United Nations Peacekeeping: Panacea or Pandora's Box?*, published in Malaysia.

1983

William Balderrama has started his own law firm, The Law Offices of William Balderrama, in Monterey Park, California. He continues to specialize in many areas of civil litigation, including professional liability, real estate and construction litigation, and civil rights cases relating to employment and housing. He previously worked for the law firm of Bodkin, McCarthy, Sargent and Smith in downtown Los Angeles for more than 10 years.

Justin H. Perl was reelected to the Governance Committee of the Minneapolis law firm Maslon Edelman Borman & Brand, P.L.L.P., where he is a litigation partner focusing his practice in the areas of general commercial litigation, complex transactional disputes, business torts, and family law. The committee is the firm's highest governing body.

1984

Howard A. Becker is new counsel to Kaye, Scholer, Fierman, Hays & Handler, L.L.P., and will practice in New York City.

George Lavdas, senior counsel in the Securities and Exchange Commission's Office of International Affairs in Washington, D.C., co-authored an article on international securities regulation. The article is Mann, Mari and Lavdas, "Developments in International Securities Law Enforcement and Regulation," *29 International Lawyer 729* (Winter 1995).

Kevin W. Saunders, professor of law at the University of Oklahoma, is the author of *Violence as Obscenity: Limiting the Media's First Amendment Protection*, which discusses whether or not the federal government should regulate media violence.

1985

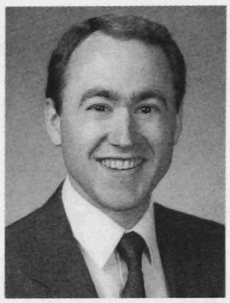
Emil Arca, a partner in the New York city office of the law firm Dewey Ballantine, authored the article "Cross Border Securitization," which was published as the February 14, 1996, issue of *The Review of Banking and Financial Services*. He also became a member of the National Practitioners Council of the Federalist Society for Law and Public Policy Studies, and was made vice chairman of the Federalist Society's Corporations, Securities and Antitrust Practice Group.

After three years in the Frankfurt, Germany, office and more than five years in the Berlin office of the law firm Bruckhaus Westrick Stegemann, **Hans-Michael Giesen** has transferred back the United States to head the firm's New York office as resident partner.

Dave Herring was named associate dean at the Pittsburgh School of Law, where he previously directed the clinical law program after serving as a clinical faculty member at the Michigan Law School.

Cristoforo Osti, LL.M., is the resident partner of the Rome office of Bonelli e Associati.

Randall Thomas, a professor at the University of Iowa College of Law and a visiting faculty member during spring 1996 term at the Michigan Law School, received an honorable mention for Michigan's L. Hart Wright Award for teaching excellence, presented by his students.



David C. Tryon was named a partner in the Cleveland office of the law firm Porter, Wright, Morris & Arthur, where he practices in the area of civil litigation and concentrates in commercial, contract, real estate, mechanic's lien, and construction disputes, as well as other corporate matters. He lives in Breckville, Ohio, with his wife, Sandy, and daughter, Lindsay.

1986

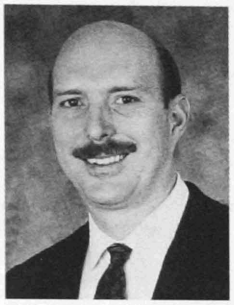
10TH REUNION

The Class of 1986 Reunion will be Oct. 18-20.

Robert C. Azarow and **Marla G. Berger** have become members of the law firm Thacher Proffitt & Wood, resident in the New York office. Azarow, who has practiced in the firm's Corporate Practice Group since 1986, has experience in all aspects of registered public offerings and other securities law matters, mergers and acquisitions and regulation of financial institutions. Berger, who has represented investment banks and institutional lenders since

Class notes

1986 as part of the Real Estate Practice Group, practices in the areas of real estate finance and securitization.



Rodney S. Edmonds was named director of the Defense Research Institute and Trial Lawyers Association, the largest association of civil litigation defense lawyers in the United States. He is an attorney with the San Diego law firm of Gray Cary Ware & Freidenrich, where he specializes in complex general civil litigation, business and technology litigation, licensing and product liability, and aviation. He also was named to the 1996 *International Who's Who of Professionals*.

1987

Steven R. Hunter has opened a new law office in Chicago.

R. Will Planert has joined the law firm Kaye, Scholer, Fierman, Hays & Handler, L.L.P., in Washington, D.C., in the firm's international trade arena.

Blaine Renfert was elected to partnership at Foley & Lardner. He practices in the firm's Madison, Wisconsin, office, concentrating primarily on corporate, real estate, finance, and acquisitions.

Giuseppe Scassellati-Sforzolini has become special counsel to the law firm Cleary, Gottlieb, Steen & Hamilton. He is resident in the firm's Brussels office.

1988

Gary W. Ballesteros and **James L. Thompson** have become partners of the Chicago-based law firm Jenner & Block.

Gail Harris was married to John Avran Finger. Harris is a lawyer with the American Medical Association in Chicago, and her new spouse is a corporate officer at the First National Bank of Chicago.

Richard S. Kuhl has become a director in the law firm Jackson & Campbell, P.C. He practices in the firm's Washington, D.C., office, where he specializes in complex insurance disputes involving environmental and toxic tort issues.

1989

Mark Boulding was named a partner in the law firm Fox, Bennett & Turner, where he practices in the areas of food and drug law, biotechnology, and computer law. He also is working with the ABA Business Section's Committee on the Law of Commerce in Cyberspace.

Jonathan Foot has left Covington & Burling, Washington, D.C., to accept a position with the United States Department of Justice, Civil Division.

Douglas J. Grier has opened his own law practice in Phoenix, Arizona, where he focuses on construction law and general civil litigation. He previously was a litigation associate in the Phoenix office of Fennemore Craig.

Donald J. Kula has become a principal in the law firm Riordan & McKinzie in Los Angeles, California. His practice focuses on complex business litigation.

Daniella Saltz, of West Bloomfield, Michigan, was made a member in the law firm of Jaffe, Raitt, Heuer & Weiss, P.C., where she has been an associate since 1989. She specializes in bankruptcy and commercial finance law.

Kenneth F. Sparks, formerly of Shea and Gardner in Washington, D.C., has become associated with Matkov, Salzman, Madoff & Gunn.

Karen Tomcala has joined the personal staff of Commissioner James Hoecker of the Federal Energy Regulatory Commission as a legal adviser on electric and hydropower matters. She previously served in the electric rates and corporate regulation section of the Office of the General Counsel.

1991

5th Reunion

The Class of 1991 Reunion will be Oct. 18-20.

Mary E. Fitzgibbons joined the Orlando office of Baker & Hostetler, where she will focus her litigation practice on business and commercial disputes.

1992

Douglas J. Cropsey has left an associate position with the Madison, Wisconsin, office of Foley & Lardner to become an attorney with Ford Motor Company, Dearborn. He practices securities law, commercial and business law, and general corporate law in the Corporate Practice Group of Ford's Office of the General Counsel.

Stephen Hardwick has left the law firm Bricker & Eckler to accept the position of assistant state public defender with the Death Penalty Appeals Section of the Ohio Public Defender's Office in Columbus.

Suzanne Pierce has become an associate of the law firm Foster Pepper & Shefelman, practicing in the Seattle office. She has joined the Litigation Practice Group.

Siniša Rodin, LL.M., defended his thesis, "Constitutional Aspects of European Union Membership," and earned a doctor of legal sciences (equivalent to the S.J.D.) degree from the University of Zagreb Law School in Croatia.

In memoriam

1994

Mark L. Newman joined the law firm Mantese and Mantese, P.L.L.C., in Troy, Michigan.

1995

Eric P. Blank has joined the Labor and Employment Group at the law firm of Graham & James/ Riddell Williams of Seattle.

Robert Greenspoon has become an associate at the patent boutique firm of Niro, Scavone, Haller & Niro, Chicago.

Jacquelyn L. Lane has joined the law firm Kemp, Klein, Umphry & Endelman as an associate. She will focus her practice on litigation, labor and employment law, personal injury, and probate.

Robbi L. Sackville, of Westland, joined the Detroit office of the law firm Miller, Canfield, Paddock and Stone, P.L.C. As an associate in the Labor Department, she will be involved in local and national employment litigation matters.

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

'20	Henry Whiting	September 1, 1987
'24	Fred G. Krivonos	February 25, 1996
'27	Paul B. Nichols	July 13, 1994
'28	Gabriel Cohn	February 29, 1996
'29	James I. Johnson	January 30, 1996
	Frank T. Zinn	February 9, 1996
'30	Harold E. Hunt	February 5, 1996
	John W. Scott	January 7, 1996
'31	J. Sherman Brimberg	February 16, 1996
	Robert E. Finch	March 18, 1996
'32	George D. Snell	
'34	John E. Dempsey	March 1, 1996
	Edward K. Ellsworth	December 24, 1995
'36	David P. Catsman	December 9, 1995
	Dickson C. Shaw III	January 20, 1993
'37	Kevin Kennedy	January 26, 1996
'38	Judge Keith P. Bondurant	May 28, 1993
	Burton M. Joseph, Jr.	February 1, 1996
'40	Hicks G. Griffiths	March 4, 1996
	Joseph E. Rinderknecht	May 25, 1994
'41	Herbert C. Houson	
'42	Henry D. Arkinson	February 7, 1996
	Kenneth E. Thompson	January 11, 1996
'43	John P. Boeschenstein	February 1, 1996
'45	Rev. Francis J. Powers	July 28, 1995
	Wendell R. Thompson	March 1, 1996
'48	F. Chalmers Houston, Jr.	January 18, 1996
	Henry A. Nikkel	July 24, 1995
	George A. Rinker	October 30, 1995
	George C. Willson III	April 13, 1996
	John B. Wilson	March 5, 1995
'49	Raymond S. Davis, Jr.	August 20, 1993
	Stanley J. Ellias	November 19, 1995
'50	Victor J. Perini, Jr.	January 20, 1996
'51	Robert L. Mowson, Jr.	January 27, 1996
	Charles W. White	March 15, 1996
	Harold L. White	January 15, 1995
'52	Robert J. Antrim	January 1, 1996
	John P. Ryan, Jr.	November 4, 1995
	James B. Ueberhorst	May 12, 1996
'53	Richard B. Barnett	December 16, 1995
'57	Nathan B. Driggers	March 15, 1996
	Hesper A. Jackson, Jr.	March 2, 1996
	Robert W. Steele	February 1, 1996
'58	Thomas B. Joseph	January 9, 1996
'59	Richard C. Darr	December 9, 1996
'61	Franz A. Burnier	
'63	Donald E. Vacin	January 20, 1996
	Robert E. Wagenfeld	April 18, 1996
'66	Charles H. Jehle	October 28, 1995
'68	Hubert Stratmeyer	April 11, 1996
'69	Peter H. Chester	June 1, 1986
'70	Douglas S. McDowell	May 1, 1996
'73	Herbert W. Booker	December 17, 1995
'77	Michael Benson Krzys	April 1, 1981
'78	John H. Spelman	February 12, 1996
'82	John K. Fairbank	September 14, 1991
'86	Wade W. Parrish	March 2, 1996
'90	Lloyd A. Sandy	December 27, 1995

Corrections and Addenda

Due to a records processing error, Emmet E. Tracy, Jr., '58, incorrectly was listed as deceased. Tracy informs Law Quadrangle Notes that he is alive and well.

Keep in touch

Take a moment to let your classmates know what you're up to. Send news to Class Notes, *Law Quadrangle Notes*, 1045 Legal Research, Ann Arbor, MI 48109-1215.

Send items by Internet e-mail to trogers@umich.edu

Freedom
and
Criminal Responsibility
in the
Age of Pound

An essay on criminal justice

EPILOGUE

This essay is adapted from the Epilogue of "Freedom and Criminal Responsiblity in the Age of Pound" which appeared in Michigan Law Review *in June, 1995. The occasion for original publication was the inauguration of the John Philip Dawson Collegiate Professorship of Law to commemorate Professor Dawson's years at the University of Michigan Law School* (1927-58). *Reprinted and edited with permission from* Michigan Law Review.

Doubts about the reality of criminal offenders' autonomy have sometimes played a role in the movement to abolish, or greatly reduce the reach of, the sanction of capital punishment.

AUTHOR'S NOTE: Although the Epilogue of "Freedom and Criminal Responsibility in the Age of Pound" speaks mainly from the perspective of the present, it carries forward some of the historical themes addressed earlier in the article. The "Age of Pound" in the title refers to the first three decades of this century, the period during which Roscoe Pound, perhaps the most prominent legal academic of the Progressive Era, produced his most important writings on criminal justice in America. The main section of "Freedom and Criminal Responsibility" traces Pound's attempt to come to terms with elements of the scientific positivism of his day, especially with his own acceptance of the critique of the concept of free will that the new sciences embodied. Pound remained optimistic that law and science would someday be brought together without sacrifice of the basic principles of either — save for the "irrational" free will requirement for criminal responsibility. Due process, firm but benevolent trial management by a sociologically-informed bench, and respect for the fundamental human spirit (including the consciousness of human freedom) would characterize future criminal justice; how to reach that advanced stage of civilization Pound left for his successors to work out.

Pound's optimism was not shared by all those who recognized the problems that the new sciences posed for the criminal law. The opening section of "Freedom and Criminal responsibility" examines several essays written at the turn of the century by a little-known New York City lawyer named Gino Speranza. Writing on the eve of the era that Pound came to dominate, Speranza launched a critique of the precedent-bound common-law generally and of the non-"scientific" criminal law in particular. But his enthusiasm for scientific positivism waned as he came to consider more fully its implications for criminal responsibility. Jurisprudence, he argued, was founded on the concept of free will and, mythic though it might be, that concept answered to deep human aspirations which science could not — and should not — displace. Speranza looked forward to a "Great Pacificator" who would define the terms of rapprochement between law and science. He perhaps looked forward also to a principled rationalization of the inevitable bifurcation of criminal process — that is, the increasing distance between the trial, wherein the traditional presumption of free will governed the ascription of criminal responsibility, and the sentencing process, which was coming to bear the influence of the deterministic premises of Progressive Era penology. Unlike Pound, who never gave up the hope that the domains of law and science would one day be unified, rather than forever remain parallel, Speranza conceded, in 1901, that ultimately law was not a science. It was, and must remain, "one of the humanities."

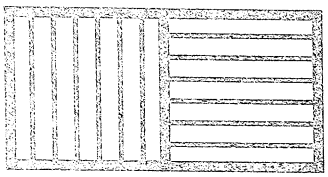
"Freedom and Criminal Responsibility" is both a study of Pound and a lengthy commentary on the vicissitudes of criminal justice in late nineteenth and early twentieth century America. It relates Pound's perspective to those of several legal academics and behavioral scientists of the mid-to-late 1920s and it suggests that Pound's intellectual odyssey foreshadows our own attempts to come to terms with the responsibility problem. It suggests also that the history of criminal justice can not be fully understood in isolation from the history of these struggles which daily plague our conscious and subconscious lives.

— By Thomas A. Green

We well know how central the problem that Speranza addressed in 1901 remains to our law — and, more generally, to our lives. For most of us, whether we are always or only occasionally conscious of it, the search for a "pacificator" goes on. Just as the bifurcation of the legal process persists, so also does the division within our minds between the competing urges to explain causally and to affix blame, in the strong sense of criminal responsibility. From the Progressive Era forward, the rhetoric of the social and psychological causes of crime have vied — in the law, in the media, in ourselves — with the rhetoric of, and ineradicable belief in human freedom. This ceaseless battle is only partly contained by the view that, though determining factors exist, they are typically not all encompassing: that we — and those whom we blame — have the wherewithal to resist, even if we lack the ability to draw the line between the resistible and the irresistible.

As has been the case for generations and perhaps centuries, we sometimes reflect these uncertainties in our tendency to soften the rigors of the sanctions to which we subject those whom we judge. Doubts about the reality of criminal offenders' autonomy have sometimes played a role in the movement to abolish, or greatly reduce the reach of, the sanction of capital punishment. Those to whom it seems equally irrational "merely" to incarcerate an offender on the basis of the traditional understanding of criminal responsibility may be partly appeased by the thought that the chief goal of imprisonment is rehabilitation. Punishment is then viewed as at least largely benign and responsive to the deterministic aspect of human life. This maintains the bifurcated regime of the criminal law but brings a needed peace of mind.

On the very long view, we have grown increasingly aware of the fragility of our own autonomy and increasingly concerned that punishment conjoin a good deal of care for "weakness" with a substantial degree of deterrence and decreasing attention to retribution. But up close, the path of ideas about criminal justice has hardly been linear. It has been, rather, either subject to brief moments of atavism or downright cyclical. We are, as I write, at an especially tense moment — and a lengthy one at that: for several decades now, the ideal of rehabilitation has been under significant pressure. To some extent we have responded to the observation that



In truth, the rhetoric of determinism is now so pervasive that we cannot fully understand the role of the jury without recognizing that we sometimes ask that institution to resolve an issue on which we are deeply divided, not only between groups but also within ourselves.

the indeterminate sentence does not work. Our calls for fixed sentences and our critique of rehabilitation are thus premised in part on the view that a return to older ways is fairer to those we hold responsible and even accords them a greater degree of human dignity. To some extent, too, we simply express our anger, and our natural fears of crime. Not least, however, we seem increasingly captured by the notion that we have gone too far in the direction of absolving one another of personal responsibility. It seems entirely plausible that the due-process and equal-protection based arguments for fixed sentences and for guidelines that ensure that such sentences will not vary from judge to judge reflect a desire to strain out, to a large degree, consideration of background "causal" factors that "led" to the crimes for which the fixed and fair sentences are imposed. If so, theories of will once again come to the fore; the recrudescence of pre-Progressive-Era ideas trades on an endorsement of the dignity of the individual and attention to personal responsibility, so that the resulting approach to sanctions owes nothing — apparently — to a modern version of the theory of incapacitation solely in the social defense.

Within the legal world of bench, bar, and academy, as in society at large, the traditional and fundamentally unstable view prevails. Nor have the values associated with the traditional view altered: political liberty, human dignity, and freedom of the will remain intertwined. Perhaps Professor Kadish has put the matter as well and wisely as anyone:

> *Much of our commitment to democratic values, to human dignity and self determination, to the value of the individual, turns on the pivot of a view of man as a responsible agent entitled to be praised or blamed depending upon his free choice of conduct. A view of men "merely as alterable, predictable, curable or manipulatable things" is the foundation of a very different social order indeed. The ancient notion of free will may, in substantial measure, be a myth. But even a convinced determinist should reject a governmental regime which is founded on anything less in its system of authoritative disposition of citizens. Whether the concept of man as responsible agent is fact or fancy is a very different question from whether we ought to insist that the government in its coercive dealings with individuals must act on that premise.* [Sanford H. Kadish, "The Decline of Innocence," 26 *Cambridge Law Journal* 273, 287 (1968) (quoting H.L.A. Hart, *Punishment and Responsibility*, 182 (1968).]

If indeed we "ought to insist . . . ," we ought also to expect that tensions within the law, and within ourselves as we act out the law's imperatives, will be with us to the end.

In the academy, to be sure, neo-realist analyses and critiques have exploded long-standing orthodoxy: the legal designations of "free" and "unfree," hence guilty or innocent under the criminal law, have been portrayed as conclusions determined by political, social, or psychological circumstances, much in the same way that findings of proximate cause, duty, or a meeting of the minds were portrayed by the realists three-quarters of a century ago. Moreover, the very distinction that legal scholars typically draw between free will and determinism has sometimes been derided as a false dichotomy between "denatured choices." The law, some seem to suggest, should instead look to the role of culture — to prevailing standards of behavior, and to the beliefs that surround behavior, and, especially, to the interaction of "self" and culture — in establishing appropriate guidelines for the attribution of criminal responsibility. It is not always easy to decipher the perspective on the freedom issue that accompanies this approach. One is tempted at times to think that, here, yet another form of determinism appears as one of the innumerable forms of compatibilism that the mind has constructed in its determined search for a place to stand and to judge. However that may be, it is important to note that the new academic stances — neo-realist, critical-legal, or postmodern — remain largely theoretical accounts of the nature of law and of human behavior. Their application in practice might be evidenced at the margins as they come to influence the minds of some judges, lawyers, and penologists. But given their inevitable distance from our current politics, they are even more foreign to society at large than were the ideas of *fin de siècle* criminal anthropologists and interwar realists, especially with regard to the core issue of personal responsibility — the assessment of criminal guilt.

For the most part, as we well know, academic concern with the mysteries of human free will remains just that: academic. In our more public capacities, if not always in our teaching and theorizing in print, we mainly indulge the presumption that underpins the law. As a group, we may express more skepticism about free will than other elements of the legal caste, and so might, like some of our predecessors, endorse, inter alia, broader definitions of legal insanity, but — perhaps out of allegiance to the consciousness of human freedom — when we act in the real world we are, most of us, not so very far from society at large. Like Pound, we leave the working out of the most difficult problems to the future. We play a role defined for us by our culture and our psychology, as generations of legal academics have before us and as those that follow probably will as well. This is a particularly influential role. To be sure, it is only one of many guideposts for our culture at large, and, no doubt, politicians and religious leaders, among many others, send signals that have greater impact

upon greater numbers, so far as the affirmation of human freedom is concerned But as perceived guardians of the rules and underlying theories of the law, we hold a special place. If we are a relatively small part of the legions whose destiny it is to reinforce faith in human freedom — political liberty as well as free will, I ought to add — the work of our particular cadre is nonetheless relatively significant.

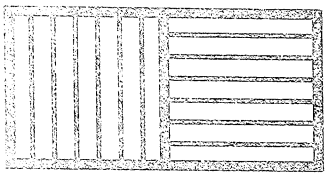
The current widespread obsession with personal responsibility, it should be noted, reflects a reaction not only against this century's increasingly deterministic rhetoric regarding the causes of criminal behavior, but also against what are taken to be the deterministic assumptions that pervade the welfare state generally. These assumptions relate both to noncriminal and criminal concerns, as government initiatives affect existing concepts of just deserts in distributive justice, regarding, inter alia, property and contract, as well as in retributive justice, the traditional domain of the criminal law. Progressivism is carried forward, but it is also under profound attack across the spectrum of political and social thought. In this, our politics have produced a macrocosmic reflection of the microcosmic experience within each of us.

But who is "us"? Society as a whole is deeply divided between the heirs to Progressivism and those who have now rejected, or who never accepted, its message for criminal justice. Disagreements on responsibility not only track, in the large, religious, social and other alignments, but are also, of course, internal to those and other perspectives, including the recent movements along racial, ethnic, and gender lines. This is not the place for a rehearsal of the multifaceted role of the free-will-determinism issue in modern American society. Nor — even if it were — am I well suited to undertake such a task. I want only to say that the issue is still very much with us and that, with respect to criminal justice, we are more conflicted than ever. Conflicted to the point that our attitudes defy generalization. The main direction of our present thought and behavior depends entirely on the eye of the beholder. If we tend to speak with greater confidence about main directions in the past, that may well be due to the increased perspective that a historical view affords. Which is to say that we know very little about the past and too much about the present.

About the inscrutable present we might nonetheless venture some final commentary along the lines marked out by our discussion of Speranza and Pound. Speranza was an American lawyer, but at the start of his career he looked at American law from the outside, with ties to, and an understanding of, the continental tradition, and with the sympathies of the scientist. Pound was well inside the common law tradition, albeit — early on — among its more progressive spirits and trenchant critics. Pound's brand of Progressivism propelled him to the forefront of the academy, but it also set limits to his worldview and to his understanding of the relationship of law to behavioral science. It engendered a certain confidence and even complacency as it focused his gaze on overall social functionalism rather than on specific human motivations. I have illustrated that tendency in Pound partly in terms of the evolution in his understanding of the role of the jury. In 1909 he saw ad hoc jury law-finding as at least in part a useful and progressive antidote to the rigidity and old-fashionedness of the law; by 1920, he mainly saw it not only as anachronistic, but also as dysfunctional in a society that had, across the Progressive years, indulged in the rhetoric of rational decision-making and institutional coordination.

From our own perspective, the optimism of the Progressive Era and of Pound's majestic account seems a mite naive. And the irreducible problem of human freedom thus looms all the larger. The story of the post-1930 period — as yet untold — has an ending with which we are familiar. On the most fundamental issue, that of human accountability, we have made little progress. This is reflected as much as anywhere in our own thinking about the jury, which is, to be sure, more complex than was Pound's. We are still to great extent history-bound, although for us history includes the rights revolution of the post-World-War-II era and the dramatic developments in participation on juries of women, and blacks, and of many ethnic groups that formerly were not represented. But our perspective on the jury is also characterized by our awareness of the impact, subconscious or otherwise, of some of the newest forms of "science" on those who serve. As a result, our instincts about what jurors may appropriately take into account reveal conflict about long-settled, formal divisions of power. In truth, the rhetoric of determinism is now so pervasive that we cannot fully understand the role of the jury without recognizing that we sometimes ask that institution to resolve an issue on which we are deeply divided, not only between groups but also within ourselves. We alternately condone or condemn a particular jury that at least seems to have applied some notion of mitigated responsibility to which the law does not formally give recognition. Sometimes we recognize how contradictory we are in this regard; sometimes we do not.

In thinking about the relationship between the criminal trial jury and the duality of our responses to those whose actions displease us — our tendencies to blame or to explain away — we ought to recall that the jury is both constrained by legal rules and a plaything of social forces. That relationship has, therefore, taken a variety of forms: At times the jury has been relatively resistant to expression of doubts about human freedom; at others it has allowed their expression fairly freely. Even when jurors or



Among even these last there may be some who nonetheless believe that an appropriate balance between the "religion" of free will and the "science" of determinism is struck in the rituals by which we now live.

members of society at large have expressed such doubts, they have usually done so in the spirit of recognizing in a particular case an exception to what they perceive in general as valid rules regarding responsibility. Thus, when the jury has gone outside the rule of law, it has often fortified the presumption of human freedom by providing a release point where otherwise that presumption might have been called into doubt. In this fashion, the jury has at times functioned as a legitimator at the trial stage, just as some substantive doctrines have done against the background of the unprovable premise that underlies our traditional theory of criminal responsibility. That has not necessarily been anyone's intention, any more than we are necessarily selfconscious about the manner in which we — in our private lives — shore up our own blaming instinct by giving way in particular instances where insistence upon blame might lead us to suspect, rightly or wrongly, that there is always something rationally indefensible about that insistence.

The legal constraints within which juries operate can, of course, be understood as reflections of the interests of authorities in husbanding the power to withhold or to grant release from the rules of criminal responsibility on their own terms. But that does not do full justice to the long history of the jury's power to find, or to nullify, the law. The English bench has at times encouraged juries to play that very role, at times sought to set distinct but far from total limits on that practice, and at times attempted to eliminate it altogether. On the American side, the story has been — and remains — equally complex. From yet another perspective, limitations upon the jury have often reflected attention to the rule of law as a general matter and have been only incidentally related to, though they may have had significant impact upon, the tensions regarding responsibility that I have been discussing.

Finally, jury nullification in cases involving the issue of human autonomy bears an important relationship to jury nullification in so-called political cases. In the latter, the jury is often in the position of affirming human freedom: even where the jury is mainly registering opposition to a particular law, the defendant who is thereby treated mercifully is sometimes thought to have challenged that law on the basis of deep moral beliefs, of his or her own free will. This is the tradition of jury latitude that was long the backbone of the jury law-finding doctrine and it remains central to the modern jury nullification debate. Social and legal recognition of the legitimacy of this form of jury behavior— or even mere toleration of its occasional manifestation — cannot help but fortify jury nullification where the jury disaffirms human freedom: most notoriously, in some cases where the defendant has raised a legal insanity defense, but also, more generally, in routine criminal cases, where juries have sometimes responded intuitively to what might be termed commonplace social constraints upon freedom of thought and action. There has never been, in the Anglo-American tradition, an effective separation between arguments for jury-based law-finding in these very different kinds of cases. The age old practice of freedom-disaffirmance, in its most general forms, has traded on the longstanding tradition of freedom-affirmance in cases raising the question of political liberty, and vice versa.

I have, on another occasion, alluded to an important aspect of the relationship among the English criminal trial jury, law reform, and the problem of responsibility that we do well to keep in mind as we attempt to situate Pound in relation to our own time and place. The reform of sanctions in the early Victorian era may have been undertaken in part as a reaction to the tendency of jurors to give weight to the social conditions that produced crime as they searched for reasons to nullify the capital sanction for what they viewed as less than the most heinous of offenses. Here, the interests of political and legal authorities in maintaining the integrity of the orthodox theory of responsibility mixed with their interests in deterrence and in simple humanitarianism. The reform of sanctions then combined with ongoing property qualifications for jury service and with the development of a culture of deference to the bench to produce over time a self-restrained English criminal trial jury. Some early-twentieth century American critics of the criminal trial jury, including Pound, drew lessons from the English experience and sought to make over the American trial in the image of its English counterpart. But not all such critics shared the same agenda. Among the common lawyers, Pound was, if not unique, something of an odd man out.

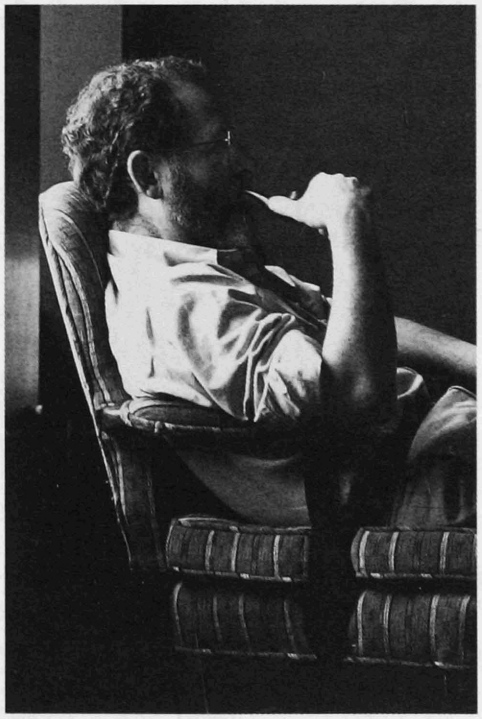
Pound wrote about the sources of the extensive powers of the American jury at some length. For the most part, he situated the jury within the history of political liberty. With respect to human autonomy, he stressed, as we have seen, jury-based acceptance of the frontier urges of vindication of honor—the assertion of individual liberty—rather than jury-based recognition of the social and psychological constraints upon human freedom. Pound favored a more limited role for the jury, but not in order to shore up the orthodox common-law theory of criminal responsibility. Rather, he deemed jury-based law-finding dysfunctional precisely because, whether it was progressive or retrogressive, it was relative to a theory of responsibility that he thought irrational. Pound sought to husband for the bench the powers that the positivists sought to reserve for scientific experts, and like the positivists, he did so in the name of substituting a new theory of responsibility for the orthodox free-will-based theory of common law criminal jurisprudence.

Pound's hopes for a true melding of law, science, and morals came to naught; even he could not squarely confront the implications of the sermon he preached. The positivist program relative to a new applied theory of criminal responsibility has largely collapsed. Orthodoxy has prevailed, albeit amidst the heightened tensions produced by the rhetoric regarding the causes of criminal behavior that the positivists boldly set in motion and the Progressives furthered in their own more tentative fashion. This is the situation in which modern American society, including the institution of the criminal trial jury, now finds itself.

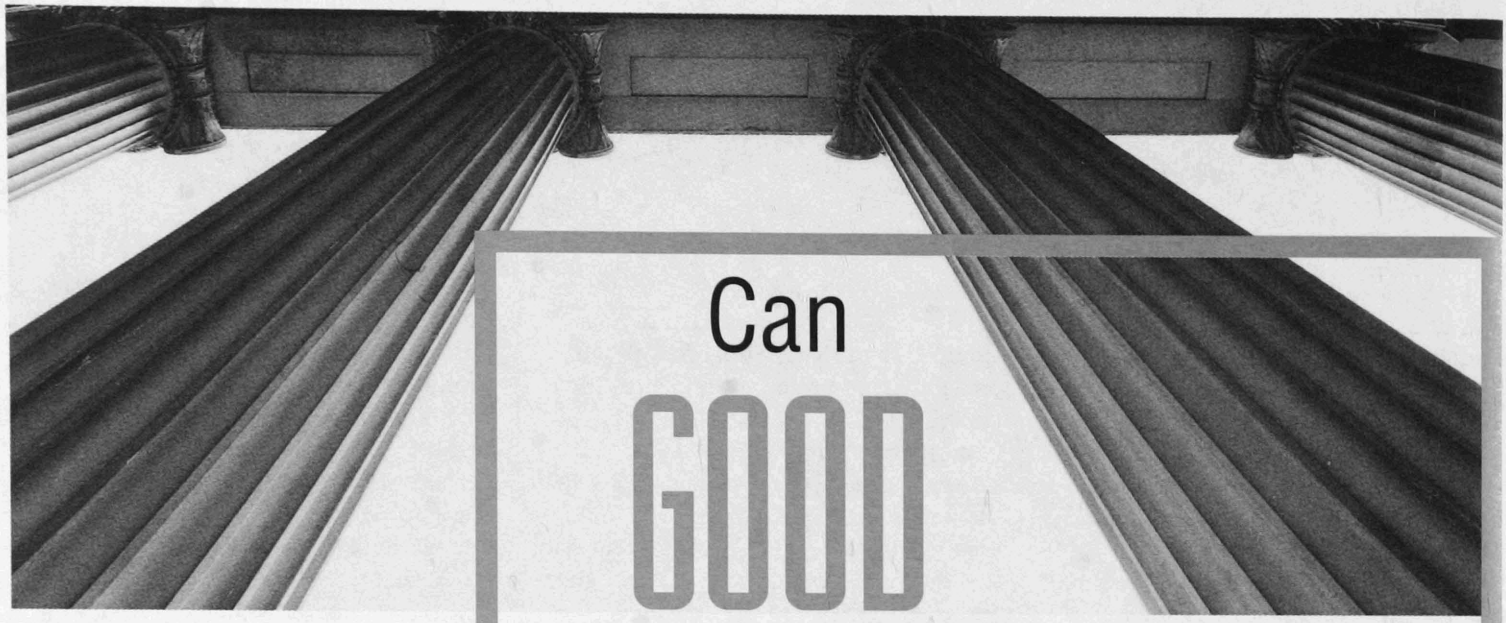
We are confronted daily with evidence that seems to confirm Pound's insistence upon a particular form of American exceptionalism (our "frontier attitude") regarding the intensity of our attraction to individual rights, the frequency of our recourse to violent self-help, and the depths of our suspicion of the state. What Pound deemed an unhealthy, "held over" attachment to will theory probably strikes some as Americans' ongoing embrace of the deepest truth, others as recourse to a useful belief (conducive both to the preservation of political liberty and the cultivation of a sense of personal well-being), and still others as too great a rejection of what — like it or not — we already know about the nature of ourselves. Among even these last there may be some who nonetheless believe that an appropriate balance between the "religion" of free will and the "science" of determinism is struck in the rituals by which we now live. And among these rituals are the practical and symbolic aspects of jury-based determination of guilt — in some cases, of punishment— in accordance neither with pure legal abstraction nor with supposed scientific precept, but, as we are wont to say, with the "common sense" and the "conscience" of the community.

Perhaps as testimony to this perspective, the phenomenon of bifurcation of the criminal process has developed increasing prominence. In capital cases, to take a leading, though admittedly exotic, example, the sentencing stage in most states is left in the hands of the jury, so that the same persons first assess guilt on the basis of the limiting terms of the law of evidence and then, if they convict of capital murder, sometimes reassess it (de facto) in the context of affixing punishment in light of information that, had it been before them at the trial stage, might have led them to a different result. The ad hoc aspect of lay decisionmaking has been harnessed to the process at sentencing — the potentially more "scientific" stage — a turn of events that would have appalled Pound even as it might have pleased the Speranza of 1901. Decisions must not only be made, they must also be lived with. So, too, must incoherence be lived with, and — evidently — its lessons allowed to temper our judgment as we, case by case, see fit. Not only with respect to the marketplace wherein Professor Dawson traced the history of economic duress, but in the domain of criminal justice administration as well. Perhaps there more than anywhere. For it is one thing to observe academically that we can't prove beyond a reasonable doubt that the defendant was a free agent; it is another actually to have to pass judgment upon persons who society has agreed must be held responsible — indeed, who are said to have a right both with respect to human dignity and as against overweening political authority to be conceived of as personally responsible. The resulting tension can be very great, and the ritual of judgment is sometimes no less than an act of faith. One feels a certain truth — shall we say, a certain consolation? — in the observation that, after all (let Speranza's words be my last): "Law is one of the Humanities."

LQN



Thomas A. Green *is the John Philip Dawson Collegiate Professor of Law and a professor of history in the College of Literature, Science and the Arts. Professor Green is the author of* Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800 *(1985) and co-editor of* On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne *(1981) and* Twelve Good Men and True: The Criminal Trial Jury, 1200-1800 *(1988.) He is currently working on a history of the American criminal trial jury and ideas regarding criminal responsibility. Professor Green received a J.D. from Harvard Law School and a Ph.D. in history from Harvard University. He has taught at Michigan since 1972.*



Can GOOD LAWYERS be

By Heidi Li Feldman

This essay is abridged, with permission, from an article that appeared in the Southern California Law Review, March, 1996. A complete version is available by contacting the author.

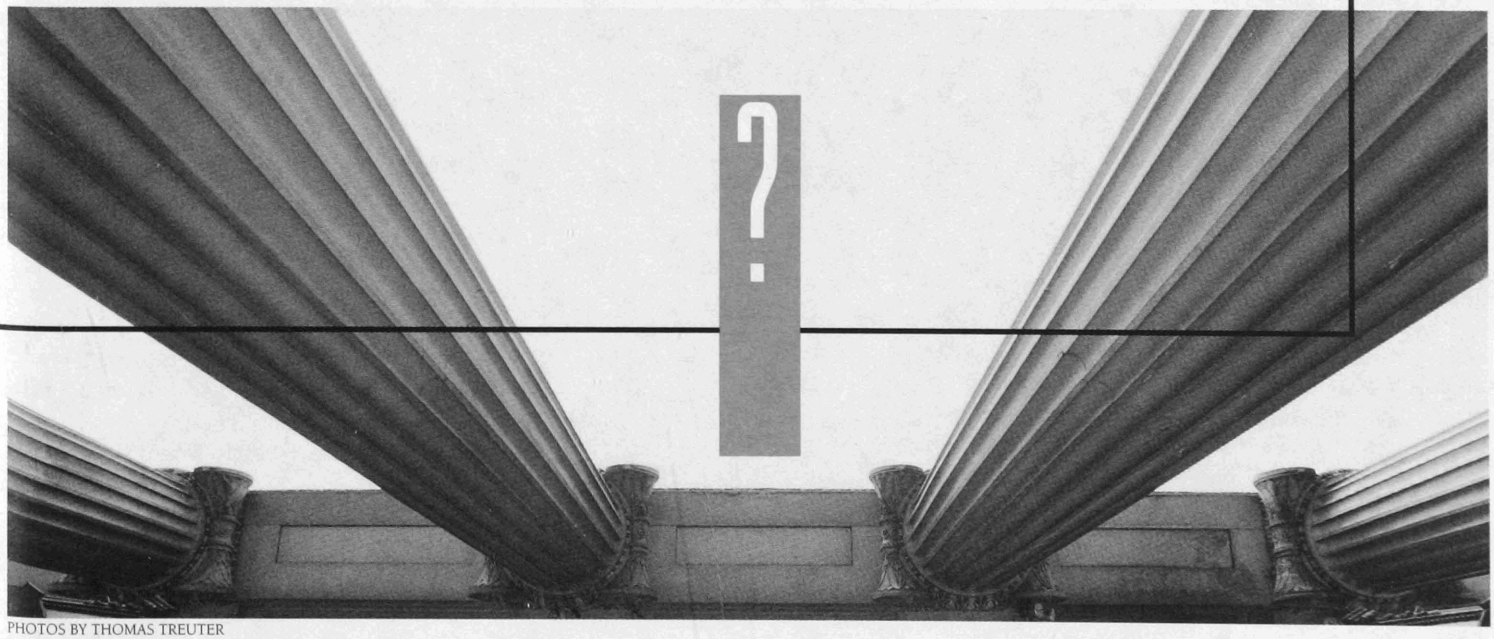
Regardless of its specific content, any black letter statutory codification regulating lawyers' conduct will be flawed as an instrument of ethics for lawyers.This is the central thesis of this article. It is motivated by the idea that typical statutory prohibitions and permissions are likely to stunt sentimental responsiveness, a key feature of good ethical deliberation. Additionally, a certain technocratic mode of legal analysis heightens this tendency.

The technocratic lawyer is a kind of legal minimalist. She aims essentially for instrumental efficacy in accomplishing goals set by her client. A more honorable lawyer seeks, at minimum, to ensure that goals explicitly adopted by the client serve the client's genuine best interests. If one believes that good lawyering practically always demands good ethical deliberation, then it follows that the honorable mode of legal analysis should practically always dominate the technocratic one.

In this article I argue that to the extent that sound lawyering calls for healthy ethical deliberation, the technocratic style interferes. I also argue that statutory codes of lawyers' ethics elicit the technocratic style rather than the honorable one. Finally, I suggest that a common law approach would at least tend to reverse this effect.

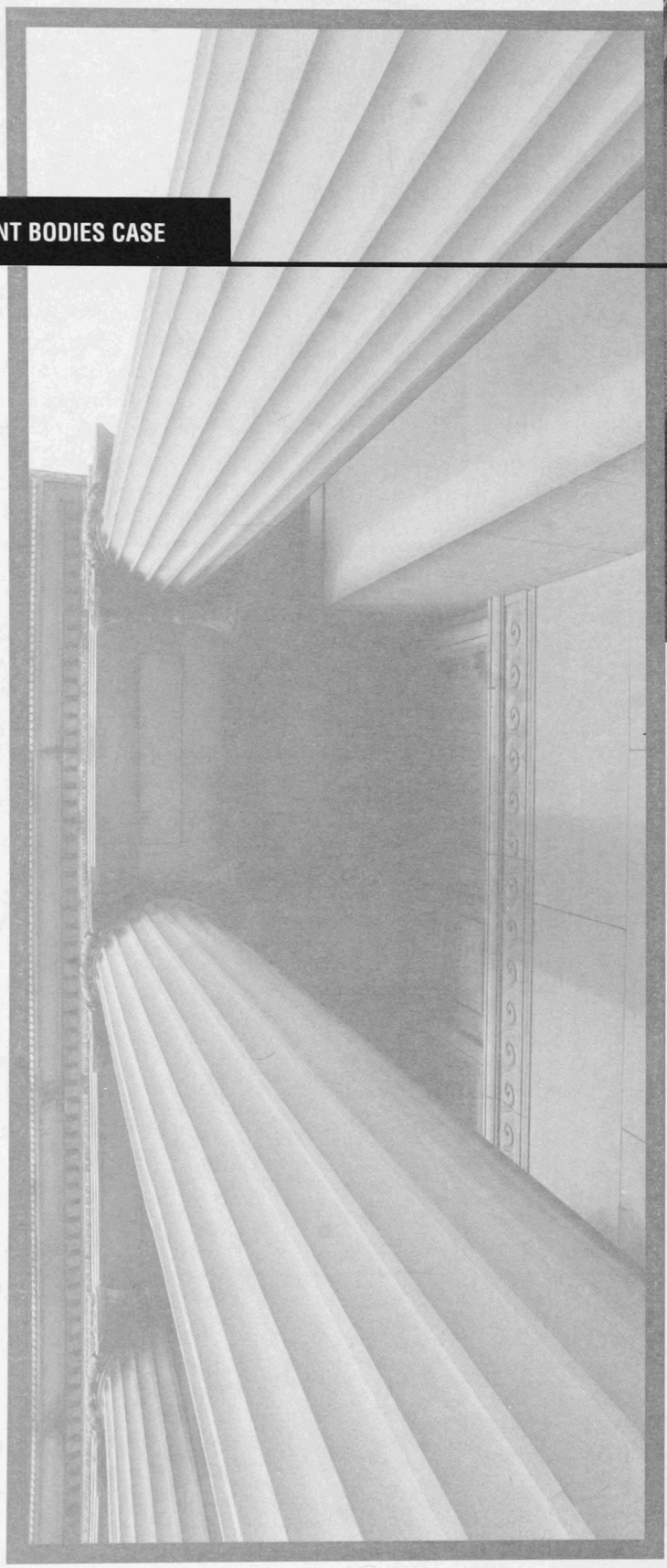
The Model Rules of Professional Conduct, adopted in 1983, represent the American Bar Association's most recent codification of lawyers' ethics. Unlike earlier ABA regulations, the Model Rules self-consciously emulate the style, structure and language of modern civil and criminal statutory codes. To date, thirty-six states pattern statutes governing lawyers' conduct after the Model Rules.

GOOD ETHICAL DELIBERATORS?



PHOTOS BY THOMAS TREUTER

THE LAKE PLEASANT BODIES CASE



Black letter legal ethics can create the impression that it rules out the possibility of dilemma or tragedy. If the rules license or require two practically incompatible courses of action, a lawyer will not see herself as facing a dilemma. Instead, she will regard both options as potentially justifiable and will select one or the other on some external ground. If the matter goes to litigation, the court will rule out one of the options: Leaving matters (legally) tragic is not a judicially appropriate outcome.

The Model Rules strive to be black letter legal rules. To see this, consider how a lawyer faced with a famous ethical problem might well analyze the situation according to the Rules. The situation, sometimes called "The Lake Pleasant Bodies Case," is a chestnut of the academic literature on legal ethics. On Sunday, July 29, 1973, Robert Garrow fatally stabbed Phillip Domblewski, an eighteen-year-old student from Schenectady, while Domblewski was on a camping trip in the Adirondacks. About ten days later, after the largest manhunt in the history of the state of New York, police captured Garrow. Police suspected that Garrow had been involved in several crimes beyond the Domblewski murder. They had recently found the body of Daniel Porter, whose death seemed similar to Domblewski's, about fifty miles from the place where Domblewski was killed. In addition, Porter's camping companion, Susan Petz, had disappeared "without a trace." Police later came to suspect that Garrow was also involved in the disappearance of Alicia Hauck, a sixteen-year-old high school student, who had been missing since July 11, 1973.

Shortly after police caught Garrow, the judge appointed Frank Armani as Garrow's

public defender. Armani had never tried a murder case, but he had represented Garrow in several other matters. Armani recruited his friend, Francis Belge, a noted trial lawyer from the area, to help him. Armani and Belge began to prepare an insanity defense for Garrow.

At the end of August 1973, Garrow confided to his lawyers that he had killed Daniel Porter and raped and killed Susan Petz and Alicia Hauck. Armani and Belge verified Garrow's claims; shortly after Garrow's confession, the lawyers found the bodies of Hauck and Petz, and photographed them. They found Petz's body in an abandoned mine shaft, and Hauck's body in a cemetery. In order to fit all of Hauck's remains in the photo, Belge had to move her skull. The attorneys did not disclose their find to anyone, even though authorities were still searching for the bodies.

On Sept, 7, 1973, the lawyers met with the District Attorney to discuss plea bargaining. While exactly what the lawyers said is disputed, they at least suggested they could help police find the bodies of Petz and Hauck in exchange for favorable treatment for Garrow. Prosecutors rejected their offer. About the same time, Armani was approached by Petz's father for information, but Armani refused to tell him anything about his daughter.

Students accidentally discovered the bodies of Petz and Hauck later that year. Even after locating the bodies, law enforcement officials were unable to connect Garrow to their demise until his trial in June 1974. There, as part of his insanity defense, Garrow testified in court to killing Phillip Domblewski, Daniel Porter, Susan Petz and Alicia Hauck, and to committing several rapes. Armani and Belge held a press conference on June 20, during which they admitted they had known of Garrow's other crimes, and of the locations of the bodies, for more than six months.

Garrow was found guilty of Domblewski's murder and sentenced to twenty-five years to life. On Sept. 8, 1978, Garrow escaped from jail. He was shot and killed by authorities on Sept. 11.

Upon learning the location of the women's bodies from Garrow, Frank Armani, Garrow's lawyer, had to decide whether to keep this information secret or disclose it to the authorities, the women's families, or both. Let us examine a partial reconstruction of an analysis of this question under the Model Rules. Three Model Rules pertain directly to Armani's situation. Rule 1.6 ("Confidentiality of Information") states that "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." The Rule includes several exceptions. It allows the revelation of information the lawyer believes reasonably necessary to prevent the client from committing a crime likely to lead to "imminent death or substantial bodily harm"; the disclosure of matters necessary to resolve a controversy between the lawyer and client; and the revelation of information necessary to a lawyer's defense against any criminal charge or civil claim based on the client's conduct or the attorney's defense against any allegations made in a proceeding regarding the legal representation of the client. Rule 8.4 ("Misconduct") deems it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" or to "engage in conduct that is prejudicial to the administration of justice." The Comment to Rule 8.4 emphasizes that criminal offenses involving dishonesty or serious interference with the administration of justice indicate lack of fitness to practice law. In addition, Rule 3.4 of the Model Rules prohibits a lawyer from "unlawfully . . . conceal[ing] . . . material having potential evidentiary value" or from assisting another in doing so.

On the basis of these Rules, a technocratic lawyer could develop defensible arguments for or against disclosure, and for or against using information about the corpses' location to plea bargain.

In fact, the state of New York prosecuted Francis Belge, Armani's co-counsel in the Lake Pleasant Bodies case, charging him with violations of several health laws, including one mandating that a dead body receive a "decent burial" and one requiring that "anyone knowing of the death of a person without medical attendance report the [death] to the proper authorities." The court found that the case presented an easy question, requiring the court to balance "the Fifth Amendment right, derived from the constitution, on the one hand . . . against the trivia of a pseudo-criminal statute on the other, which has seldom been brought into play." The court stated, however, that Belge's behavior hindered the prosecution's ability to apprehend Garrow, and that if Belge had been charged with obstruction of justice, the court would have faced a real challenge:

> *There is no question but that Attorney Belge's failure to bring to the attention of the authorities the whereabouts of Alicia Hauck when he first verified it, prevented bringing Garrow to the immediate bar of justice for this particular murder. This was in a sense, obstruction of justice. This duty, I am sure, loomed large in the mind of Attorney Belge. However, against this was the Fifth Amendment right of his client, Garrow, not to incriminate himself. If the Grand Jury had returned an indictment charging Mr. Belge with obstruction of justice under a proper statute, the work of this Court would have been much more difficult than it is.*

In affirming the county court's decision, the appellate division also noted the larger legal and ethical issues lurking beneath the narrow issue presented:

> *We write to emphasize our serious concern regarding the consequences which emanate from a claim of an absolute attorney-client privilege. Because the only question presented, briefed and argued on this appeal was a legal one with respect to the sufficiency of the indictments, we limit our determination to that issue and do not reach the ethical questions underlying this case.*

Consider Frank Armani's own actual reflections — recorded in a television interview — on his deliberations about whether to withhold the information he had received from Garrow. At first, Armani suggests it was a simple issue: "All we went by at the time was our oath of office to keep inviolate the secrets of our clients." Later, Armani also describes the issue as involving a question of "which is the higher moral good." On the one hand, Armani felt that his duty to defend Garrow required him to keep silent. "It's a question of the Constitution, a question of whether a bastard like [Garrow] having a proper defense, having adequate representation, being able to trust his lawyer as to what he says . . . ." On the other hand, Armani knew that the information he held could ease the pain of the grieving family. Armani balanced his duty to defend Garrow "against the breaking hearts of a parent." In the end, Armani judged that the families' suffering did not outweigh his duty to Garrow: "Their suffering was not worth jeopardizing my sworn duty or my oath of office or the Constitution." The extent to which Armani felt a moral conflict is suggested by a later segment of the interview in which he discusses his inability to answer a letter from one of Garrow's victims' sister. Armani states,

"I caused them pain . . . What do you say? Nothing I could say would justify it in their minds. You couldn't justify it to me."

While Armani did not see the situation as a close call under the prevailing code of ethics, neither did he think the code solved his ethical problem. In fact, the code *created* ethical conflict by assigning Armani a professional duty that conflicted with other ethical values, particularly the good of alleviating innocent suffering. Armani's remarks reveal his deeply emotional and empathic response to the situation, demonstrated by his awareness of "the breaking hearts of a parent," the pain he caused the victims' families and the evident anger and revulsion he felt toward Garrow. Armani also comprehended the situation's tragedy. He could not fulfill his duty to Garrow and completely justify his behavior.

Black letter legal ethics can create the impression that it rules out the possibility of dilemma or tragedy. If the rules license or require two practically incompatible courses of action, a lawyer will not see herself as facing a dilemma. Instead, she will regard both options as potentially justifiable and will select one or the other on some external ground. If the matter goes to litigation, the court will rule out one of the options: Leaving matters (legally) tragic is not a judicially appropriate outcome.

I believe that the Lake Pleasant Bodies case does present a genuine ethical dilemma. There are good ethical reasons in favor of Armani keeping Garrow's confidence, and there are good ethical reasons in favor of disclosure. In a case like this, there is no fully satisfactory solution to the question of the lawyer's conduct. What is noteworthy about Armani is not only his appreciation of this sad state, but his realization of the gap between an ethical justification and a technocratic legal one. Armani recognizes that a fully satisfactory ethical justification applies more universally than a narrow technocratic legal one.

But statutory language is distinctly unsentimental, particularly in the black letter format. Black letter statutes are written in terms of imperatives — and, sometimes, permissions — combined with descriptive language depicting what is required or forbidden.

The lawyer consulting the Rules starts by reviewing them to decide which ones bear on her situation based on the fit between the facts of her circumstances and the scope of the various rules. She checks for the applicability of any of the exceptions to the confidentiality Rule; she parses the terms of the Rules pertaining to misconduct and concealing evidence; she analyzes the penal code prohibitions on hindering a prosecution. None of this activity calls upon her to consult her sentimental responses to the situation of Garrow, the missing corpses, the mourning families and the frustration of law enforcement authorities.

LAWYERLY VIRTUES AND THE O.P.M. AFFAIR

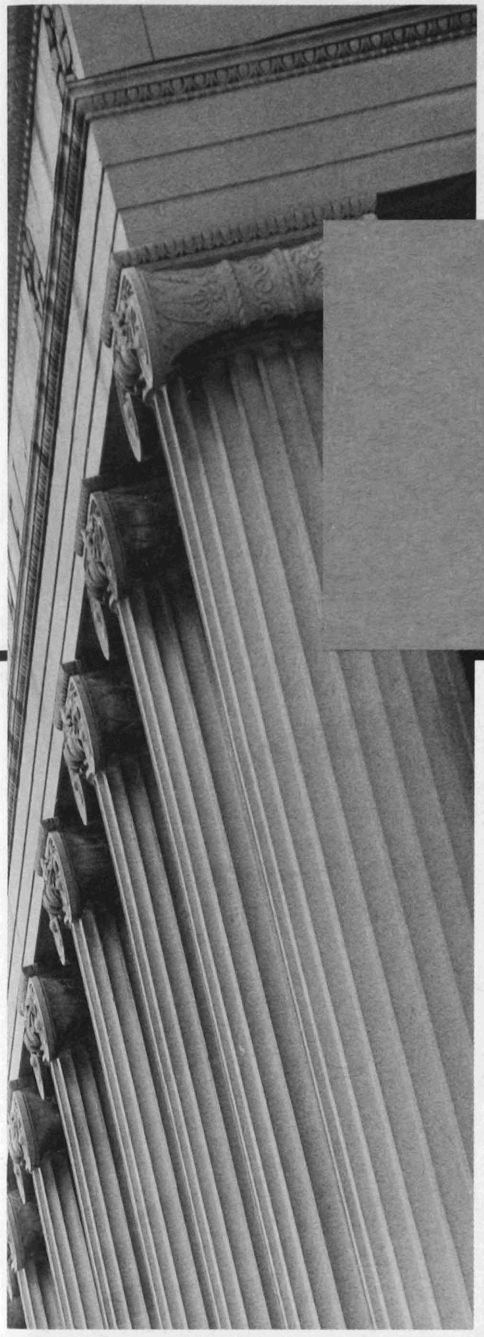
The O.P.M. affair is more complicated, if less lurid, then the Lake Pleasant Bodies case. Two dimensions of the O.P.M. affair are significant: the underlying factual situation, including O.P.M.'s frauds and the various attorneys' reactions to them; and the personal and professional relationships between O.P.M.'s owners, between these owners and the attorneys and among the various attorneys.

O.P.M. Leasing Services, one of the nation's largest computer leasing companies, fraudulently obtained about $225 million from lending institutions before it collapsed into bankruptcy in early 1981. O.P.M. operated by buying computers and other business equipment with borrowed money and leasing the equipment out, using the equipment and the leases as collateral for the loans. Since its founding in 1970, O.P.M. attracted customers by offering extremely low rates — rates so low that it lost money. As early as 1972, the company's founders and sole owners, Myron Goodman and Mordecai Weissman, began defrauding investors to keep O.P.M. afloat. They began by using leases as collateral for more than one loan, and later used fictitious leases to get financing for computers that did not exist. They also altered actual leases, inflating the value of the equipment or changing key terms in order to borrow larger amounts of money.

Until the late 1970s, Goodman pushed the company toward ever bigger loans, dramatically expanding the size of the company. However, in late 1978, the company's financial situation became desperate, and, to avoid bankruptcy, Goodman began to engage in fraud on a much larger scale. Goodman and several accomplices used forged and altered leases with Rockwell International to defraud lenders of more than $188 million. These new loans went to meet payments on old loans until the company ended up in bankruptcy in March 1981. In the following year, Goodman, Weissman and their O.P.M. accomplices pleaded guilty to charges of fraud.

The law firm of Singer Hutner Levine and Seeman handled O.P.M.'s legal work from the time of O.P.M.'s inception. Goodman selected the firm because his childhood friend, Andrew Reinhard, worked there. Singer Hutner handled O.P.M.'s legal work for the entire decade, closing loans and writing the legal opinions that lenders relied on as to O.P.M.'s title to computers and as to the legality of O.P.M. leases. Singer Hutner also handled the personal legal affairs of the O.P.M. owners, Goodman and Weissman. Reinhard became a director of O.P.M., and several other Singer Hutner lawyers were company officers. From 1976 through 1980, sixty to seventy percent of Singer Hutner's total income came from O.P.M. work.

According to Singer Hutner lawyers, they first realized the possibility of O.P.M.'s wrongdoing in June of 1980. On June 12, 1980, a troubled Myron Goodman went to



The O.P.M. affair became something of a cause celebre, in both the popular press and among legal ethics experts. In the affair's aftermath, Hutner claimed that he "would have been much happier protecting the other lawyers, and in particular [his] close personal friend, Peter Fishbein, from getting in bed with a criminal."

see Joseph Hutner, a senior partner in the law firm. Goodman told Hutner that he (Goodman) had done something wrong in his stewardship of the company, something he could not fix because it involved millions of dollars. However, Goodman refused to provide any details because Hutner could not promise to keep the information secret. Hutner could not make such a promise because the firm represented O.P.M. itself and he thus might have to inform Weissman, the other owner.

Goodman's visit to Hutner was prompted, at least in part, by the actions of O.P.M.'s chief in-house accountant, John Clifton. Clifton had told Goodman that he had discovered evidence of the Rockwell lease fraud, and that he was sending the information to Reinhard in a letter. After consulting with his own lawyer, Clifton had decided to turn the information over to Singer Hutner and then resign, leaving it to Singer Hutner to decide whether to blow the whistle on O.P.M.

While Goodman was still in Hutner's office, Clifton's letter was delivered to Reinhard's office down the hall. Goodman was thus able to retrieve the letter from Reinhard's office. Goodman took the Clifton letter when he left Singer Hutner that day, still refusing to explain what he had done wrong but insisting it was all in the past. Goodman, however, urged Hutner to speak with Clifton's lawyer, William J. Davis.

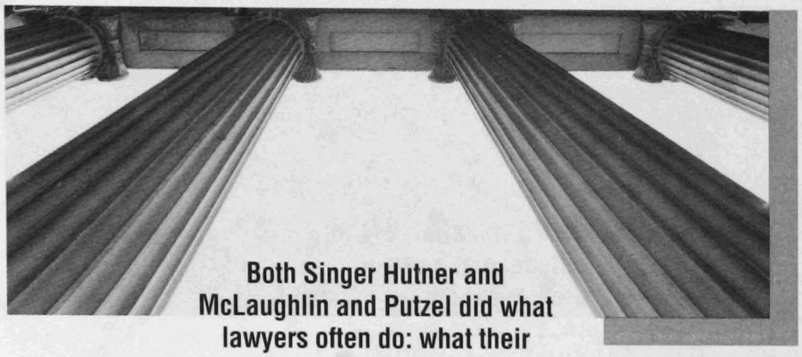
Hutner did go to Davis. Davis later stated that he had been prepared to give Hutner a copy of Clifton's letter and tell Hutner everything he wanted to know, but that Hutner seemed intent on trying to persuade Davis that Clifton should keep silent and take back his letter. According to Davis, Hutner seemed anxious to preserve a "smoke screen" of deniability.

Singer Hutner thus became aware that it might be deeply involved in a huge fraud. The Singer Hutner lawyers decided to obtain outside legal advice to determine what their obligations were. On June 25, and a few days following, they consulted two lawyers, Joseph M. McLaughlin, then dean of Fordham Law School and an expert on attorney-client privilege, and Henry Putzel III, a former federal prosecutor who had taught professional responsibility at Fordham.

McLaughlin and Putzel told the Singer Hutner lawyers that they could ethically continue to represent O.P.M., closing new loans and so forth, because Goodman had assured them there was no ongoing fraud. They advised the firm to try to discover the details of Goodman's past wrongdoing to help them guard against any continuing fraud, but not to push Goodman too hard until he obtained a lawyer — the firm's obligations to O.P.M. might be inconsistent with Goodman's best interests. In addition, Singer Hutner was required to keep everything it had already learned secret, except from Weissman. Putzel also advised the firm that it had no legal duty to withdraw the possibly fraudulently-based opinion letters that it had provided to banks for O.P.M.; according to Putzel, leaving past victims of fraud uninformed of what happened did not constitute an ongoing fraud.

On McLaughlin and Putzel's advice, the firm did implement some prophylactic efforts to deal with the possibility of new attempts to commit fraud. They required O.P.M. to certify in writing the legitimacy of each new transaction. However, this proved to be an insignificant barrier for Goodman, who simply signed certifications he knew to be false.

Goodman put off giving Singer Hutner detailed information of his "past" wrongdoing, and Goodman's new lawyer, Andrew Lawler, assured Putzel that he knew of no ongoing fraud. Lawler's assurances are unsurprising: All of his information came from Goodman, to whom Hutner had previously explained the scope of the attorney-client privilege.



Both Singer Hutner and McLaughlin and Putzel did what lawyers often do: what their clients want.

Goodman thus knew that disclosures to Lawler would only be protected insofar as they did not indicate an ongoing fraud.

Although there were signs of O.P.M.'s continuing fraud — bills of sale for computers that O.P.M. did not have the money to buy, different bills of sale containing identical serial numbers, the sudden resignation of an outside accounting firm — Singer Hutner accepted O.P.M.'s explanations. Singer Hutner continued closing loans for O.P.M. despite these occurrences and despite Goodman's continuing refusal to disclose the details of his wrongdoing. Leases securing loans of $22 million in June, $17 million in July and $22 million in August later proved to be fraudulent.

In the first week of September, Goodman finally told Hutner some of the details of the fraud. Although he still believed that the fraud had ended by June, Hutner decided that the firm ought to withdraw from representation. Singer Hutner voted formally to resign as O.P.M.'s general counsel; pursuant to Putzel's advice that withdrawal had to be accomplished in the manner least likely to injure the client, the firm withdrew gradually, completing the process in December of 1980.

Singer Hutner decided not to disclose any information about O.P.M.'s fraud. Based on Goodman's continued assurances that the fraud had ceased, Putzel advised that Goodman's secrets were protected by the attorney-client privilege. Singer Hutner accepted this view, even after discovering that Goodman had used Singer Hutner to close fraudulent loans from June through September.

On Putzel's advice, the law firm responded to inquiries from lenders by stating that Singer Hutner and O.P.M. had mutually agreed to part ways. Singer Hutner said nothing of the fraud to the O.P.M. in-house counsel who was preparing to handle new loan closings, but instead sent a memorandum suggesting verification procedures that should be used for all O.P.M. financings. Goodman was able to edit the memorandum to remove any signals of problems with the Rockwell leases. Singer Hutner lawyers refused to answer direct questions from the in-house counsel as to the propriety of certain transactions.

Singer Hutner dealt with the law firm that ultimately replaced them, Kaye, Scholer, Fierman, Hays & Handler, in the same manner. Although Hutner wanted to warn Peter Fishbein, an old friend and a partner at Kaye Scholer, to stay away from O.P.M., Putzel advised him he could not do so. Fishbein phoned Hutner in October 1980 and asked "if there was anything he should be aware of" in considering becoming O.P.M.'s counsel. Fishbein said, "Look, Joe, you and I have been friends for 20 years. I will assume that if there are problems, you will say, 'Think twice.'" Hutner's only response was that "the decision to terminate was mutual and that there was mutual agreement that the circumstances of termination would not be discussed." Kaye Scholer assumed that O.P.M., which seemed to be a healthy company, had simply grown too big for Singer Hutner.

Singer Hutner's silence allowed Goodman to continue to obtain fraudulent loans. In December 1980 and early 1981, Goodman used Kaye Scholer to close more than $15 million in loans secured by bogus leases.

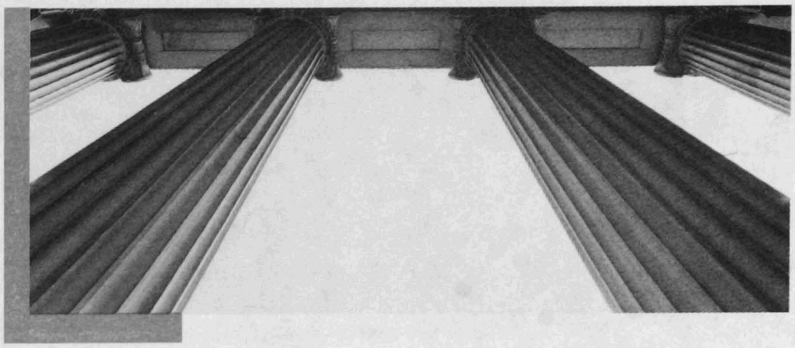
The fraud finally came to an end in February 1981, when a routine inquiry from a bank lawyer led a Rockwell official to discover that the signatures of a Rockwell executive on two leases were forgeries. Federal prosecutors charged Goodman, Weissman and five accomplices with fraud, and O.P.M. went into bankruptcy. Lenders sued Singer Hutner, Rockwell and several other codefendants as accomplices in O.P.M.'s fraud. The defendants settled the suits for $65 million. None of the Singer Hutner lawyers was charged with any crime.

The O.P.M. affair became something of a cause celebre, in both the popular press and among legal ethics experts. In the affair's aftermath, Hutner claimed that he "would have been much happier protecting the other lawyers, and in particular [his] close personal friend, Peter Fishbein, from getting in bed with a criminal." Based on Putzel's counsel, Hutner maintained that the prevailing statutory code of lawyers' ethics prevented him from doing this. Yet Geoffrey Hazard, a leading legal ethics expert hired by Fishbein, insisted that Putzel had misinterpreted the prevailing code, despite some language that seemingly warranted Putzel's reading.

The relevant Model Code provision, Disciplinary Rule 7-102(B)(1), as modified when incorporated into New York law, stated:

> *A lawyer who receives information clearly establishing that . . . [his] client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal except when the information is protected as a confidence or secret.*

According to Hazard, the confidentiality exception provided some basis for Putzel's advice to Singer Hutner, but a further exception — to the confidentiality rule itself — trumps. This further exception excludes from confidence any communications in furtherance of the client's wrongdoing during the course of the representation. Since Goodman continued to rely on Singer Hutner's work products while revealing to Singer Hutner his fraudulent transactions, Hazard argued, Singer Hutner could have fully disclosed O.P.M.'s wrongdoing. At minimum, according to Hazard, Hutner could have alerted Fishbein to problems with the transactions that involved Singer Hutner.



Hazard stated that an interpretation of the Code that found Singer Hutner lawyers neither obligated nor permitted to disclose at least that information to Kaye Scholer was "conceivable, but wrong."

In the O.P.M. affair, Singer Hutner, McLaughlin and Putzel and Hazard all engaged in technocratic lawyering: They focused on mere compliance with the black letter ethics codes.

Without doubt, in defrauding their investors and customers, Goodman and Weissman acted both illegally and unethically. More interesting is the situation Goodman created for Singer Hutner by continuously deceiving them about O.P.M.'s condition and the nature of its dealings. As the relationship between O.P.M. and Singer Hutner progressed, the law firm had various opportunities to discover or plumb the depths of O.P.M.'s problems and wrongdoing, but the firm consistently chose not to.

As the O.P.M. fraud scheme developed, it became ever more important for Goodman to hide his doings from Singer Hutner. The Singer Hutner lawyers, in turn, allowed this so as not to have to take legally required action on the basis of knowledge of an ongoing fraud. By superficially cooperating with O.P.M.'s scheme, Singer Hutner made it difficult for itself to effectively represent O.P.M., because Singer Hutner never had a realistic or full awareness of O.P.M.'s operations. More vividly, Singer Hutner's financial interests in continuing to represent O.P.M. put the firm in the position of not wanting to fully understand O.P.M.'s transactions, and this presumably interfered with its ability to represent O.P.M. Had O.P.M. come clean with Singer Hutner earlier, Singer Hutner might have been able to discourage criminal activity, ultimately reducing or eliminating criminal penalties imposed on Goodman and Weissman.

McLaughlin and Putzel helped Singer Hutner develop an approach and a legal justification for continuing to represent O.P.M. Singer Hutner's continuing silence about O.P.M.'s wrongdoing lay at the center of this plan. In essence, McLaughlin and Putzel advised Singer Hutner to require repeated assurances from Goodman that he was no longer defrauding investors and customers. Goodman repeatedly supplied these pledges, and Singer Hutner repeatedly accepted them — despite the obvious reasons for doubting Goodman's credibility and independent evidence of more fraud, such as bills of sale for computers O.P.M. could not afford, suspicious lease documents and the abrupt resignation of an independent accounting firm.

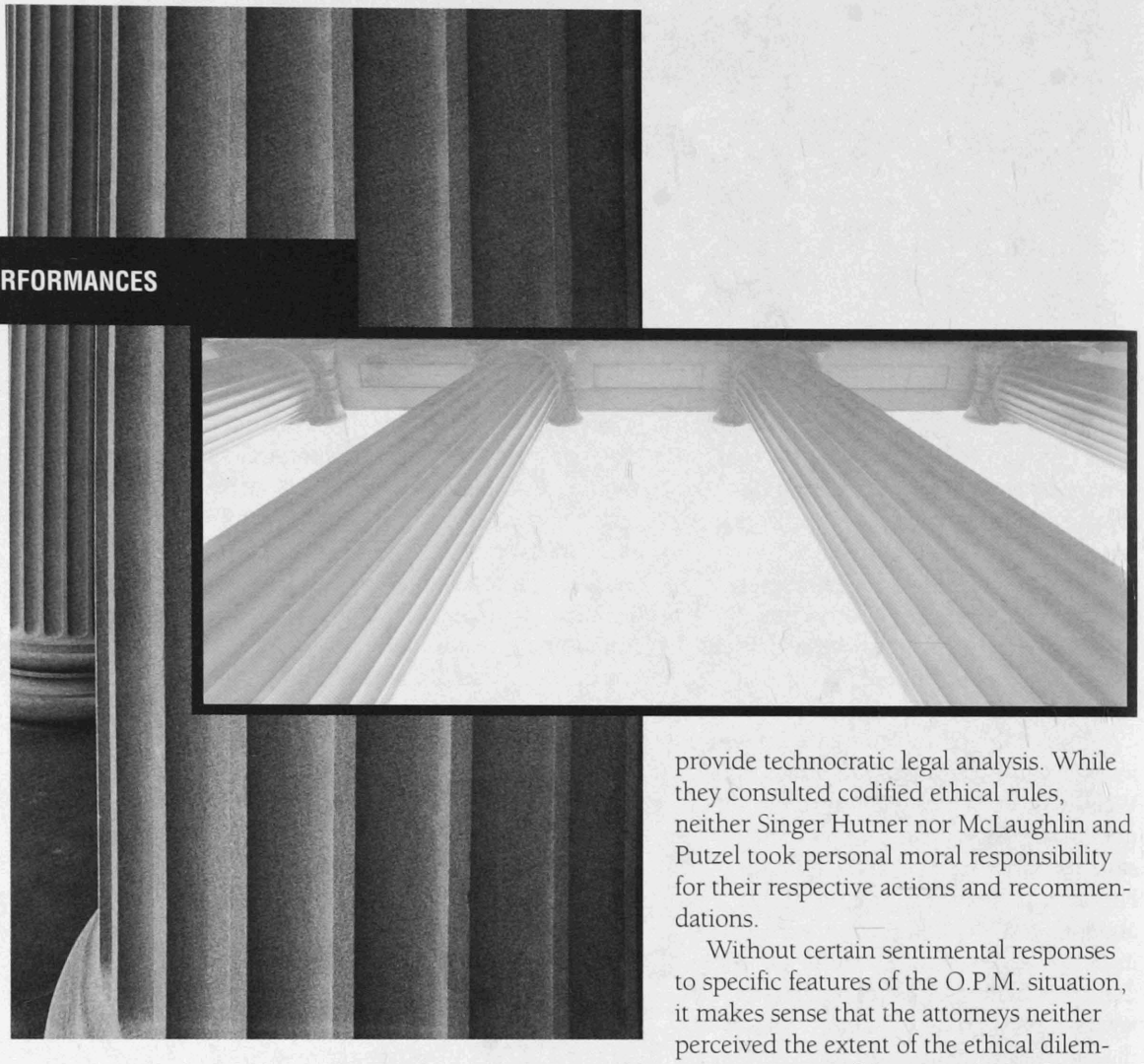
Both Singer Hutner and McLaughlin and Putzel did what lawyers often do: what their clients want. Goodman wanted to continue O.P.M.'s operations; he wanted Singer Hutner to facilitate this; Singer Hutner did. For a time, Singer Hutner wanted to continue to represent O.P.M. as long as it could do so lawfully; McLaughlin and Putzel devised an arguable legal justification and approach to permit this. Acting in their technocratic capacities, both Singer Hutner and McLaughlin and Putzel served their clients. McLaughlin and Putzel, however, were better technocrats than Singer Hutner.

Singer Hutner consistently made choices about cooperation and competition that actually undermined the firm's ability to serve its client's best interests, let alone accommodate anybody else's. Even if we consider how Singer Hutner's choices may have furthered its own short-term financial interests, the firm did a poor job of considering its own long-term interests, particularly in preserving its reputation. Whatever their success or failure as ethical deliberators, the Singer Hutner attorneys performed poorly as technocratic lawyers.

Not so, however, with McLaughlin and Putzel. While they could perhaps have done a better job, their lawyering had at least some technocratic merit. At the time Singer Hutner consulted McLaughlin and Putzel, the law firm's position was already dicey. While not actively aware of ongoing fraud, Singer Hutner had reason to suspect trouble, based on Goodman's vague confession. Working with the presumption of continued representation, McLaughlin and Putzel had to develop a strategy that would legitimate Singer Hutner's competing legal obligations under New York law. Singer Hutner had to keep its client's confidences and avoid aiding ongoing fraud.

McLaughlin and Putzel did not achieve technocratic perfection. Following their advice kept Singer Hutner in the dark about O.P.M.'s actual operations. It also may have created the appearance that Singer Hutner had always known more than it ever acknowledged, and that the firm's circumspection about the reasons for withdrawal was more narrowly self-protective than I have suggested. Nonetheless, given Singer Hutner's difficult position and the prevailing statutory code of ethics, McLaughlin and Putzel provided somewhat competent technocratic legal advice.

Of course, even competent lawyering can be criticized on lawyerly grounds. Geoffrey Hazard disputed Putzel's interpretation of then-current New York law, arguing that better legal advice would have permitted — perhaps even have dictated — disclosure of O.P.M.'s wrongdoing, at least to Kaye Scholer. Hazard's objections are grounded in a rival interpretation of the relevant statutory text, focusing on the meaning of terms such as "confidence" and "ongoing fraud" and the relationship between one statutory provision and another. Putzel's argument depended on the same sort of skillful technocratic analysis.



Unlike the Lake Pleasant Bodies example, which included Frank Armani's post hoc reflections, in the O.P.M. case we have little direct information about the various attorneys' thoughts and feelings as they deliberated Singer Hutner's behavior. Still, we can reconstruct the lawyers' deliberative experiences well enough, I think, to see how closely they captured the essence of ethical deliberation and to ascertain the role of the statutory code.

Relying upon virtue ethics theory and Armani's example, I have argued that the good ethical deliberator possesses at least three features: willingness to consider but question established moral precepts; willingness and ability to recognize ethical dilemmas; and capacity to respond to specific features with warranted sentiments and to be guided by these sentiments in making ethical judgments. Neither Hutner nor McLaughlin and Putzel seem to have displayed these qualities. In fact, by consistently exercising technocratic legal analysis to determine how the black letter code could be construed so as to permit their preferred outcomes, it appears the lawyers stifled these trademark qualities.

When Singer Hutner consulted outside legal counsel, they did not seek McLaughlin and Putzel's advice as to what the firm should do, regardless of the law's dictates. There is no evidence that this was because either Singer Hutner or McLaughlin and Putzel reflectively equated ethical conduct with legally acceptable behavior. In fact, the data suggest otherwise. Hutner experienced pangs of conscience over his deception of his old friend Peter Fishbein, the Kaye Scholer partner. Hutner explained his behavior by saying he was just doing as the law required — giving no sign that he ever stopped to consider whether the law's commands, as he understood them, were ethically appropriate. Nor is there any evidence that McLaughlin and Putzel, the so-called ethics experts, did more than provide technocratic legal analysis. While they consulted codified ethical rules, neither Singer Hutner nor McLaughlin and Putzel took personal moral responsibility for their respective actions and recommendations.

Without certain sentimental responses to specific features of the O.P.M. situation, it makes sense that the attorneys neither perceived the extent of the ethical dilemmas present nor felt personal moral responsibility for their actions. As we saw with Frank Armani, emotional engagement of the appropriate kind is at least part of what makes an ethical deliberator sensitive both to ethical dilemmas and to his own ethical responsibility in the circumstances.

Note that the clash between good ethical deliberation and technocratic legal analysis occurs regardless of the quality of the lawyering. McLaughlin and Putzel, who provided relatively good technocratic services, fared no better as ethical deliberators than Singer Hutner, whose technocratic advice was rather poor.

THE VALUE OF RULES? THE VALUE OF LAWYERS?

Statutory codes of professional ethics seem to trigger in lawyers dispositions that, at worst, run counter to ethical dispositions, and, at best, make them appear superfluous. Here, I address two arguments against concern.

The first is an argument from the general value of rules. In broad form, this argument maintains that rule-based decisionmaking has various advantages. Rules can save time, eliminate arbitrariness and maximize correct results over numerous judgments. My own critique of statutory, codified lawyers' ethics is not a general attack on rules or rule-based decisionmaking. Yet I do maintain that whatever advantages codified black letter rules offer in other settings, they do not obtain when it comes to fostering ethical deliberation in lawyers.

Proponents of codified ethics rules for lawyers might defend them in the interest of achieving uniformity and predictability of lawyers' conduct or in the name of preventing lawyers from acting as moral individualists, deciding ethically difficult situations however they please. But as demonstrated by the technocratic fight between Hazard and McLaughlin and Putzel and the competing technocratic analyses available to Armani, codified ethics rules can provide technocratically able lawyers with justification for opposite courses of action. Skillful technocratic analysis will often leave lawyers with at least colorable arguments in favor of a variety of actions in an ethically difficult situation. At this point the attorney will have to rely upon uncodified principles to decide what to do. Not only will she be free to exercise moral individualism, she will have to.

The second argument against worrying over the antiethical tendencies promoted by codified lawyers' ethics bites the bullet: It does not praise statutory ethics, it defends lawyers' reactions to them and, more generally, lawyers' typical responses to ethically difficult situations. Philosopher Bernard Williams, for example, says that current society may well need people to perform the functions lawyers do, and this performance may well necessitate somewhat different dispositions in lawyers than in laypeople. Under these conditions, nonlawyers might well accept the necessity of the lawyerly dispositions and actions, even though the general public will be disposed to regard these as distasteful or repugnant.

Recall that, in my opinion, Frank Armani confronted a genuine ethical dilemma: Whether he kept or disclosed Garrow's confidence, he would be making a tragic choice. Not everybody shares my view of the situation. Some think it clear that Armani had an authentic, overriding ethical obligation to keep mum; others think that he was straightforwardly ethically required to reveal the location of the corpses. This schism implicates some large issues, particularly the merits of an adversary system of legal justice and, within it, the peculiar position of the criminal defense lawyer. Without delving deeply into these matters, let me stress that whatever one's opinion on the disclosure question, Armani still deserves praise for the character of his ethical deliberation.

Despite this defense of the intrinsic merits of good ethical deliberation, those who are positive that Armani should have informed the police and the victims' parents may object that Armani ultimately acted no differently from the highly zealous criminal defense attorney, who is, in this view, an unethical cad. These objectors might even argue that Armani is less ethically worthy than the zealot, who at least may have deep — if mistaken — ethical convictions in favor of keeping repugnant clients' confidences. In contrast, Armani simply acted hypocritically, abiding by prevailing norms of client confidentiality despite serious ethical qualms about them.

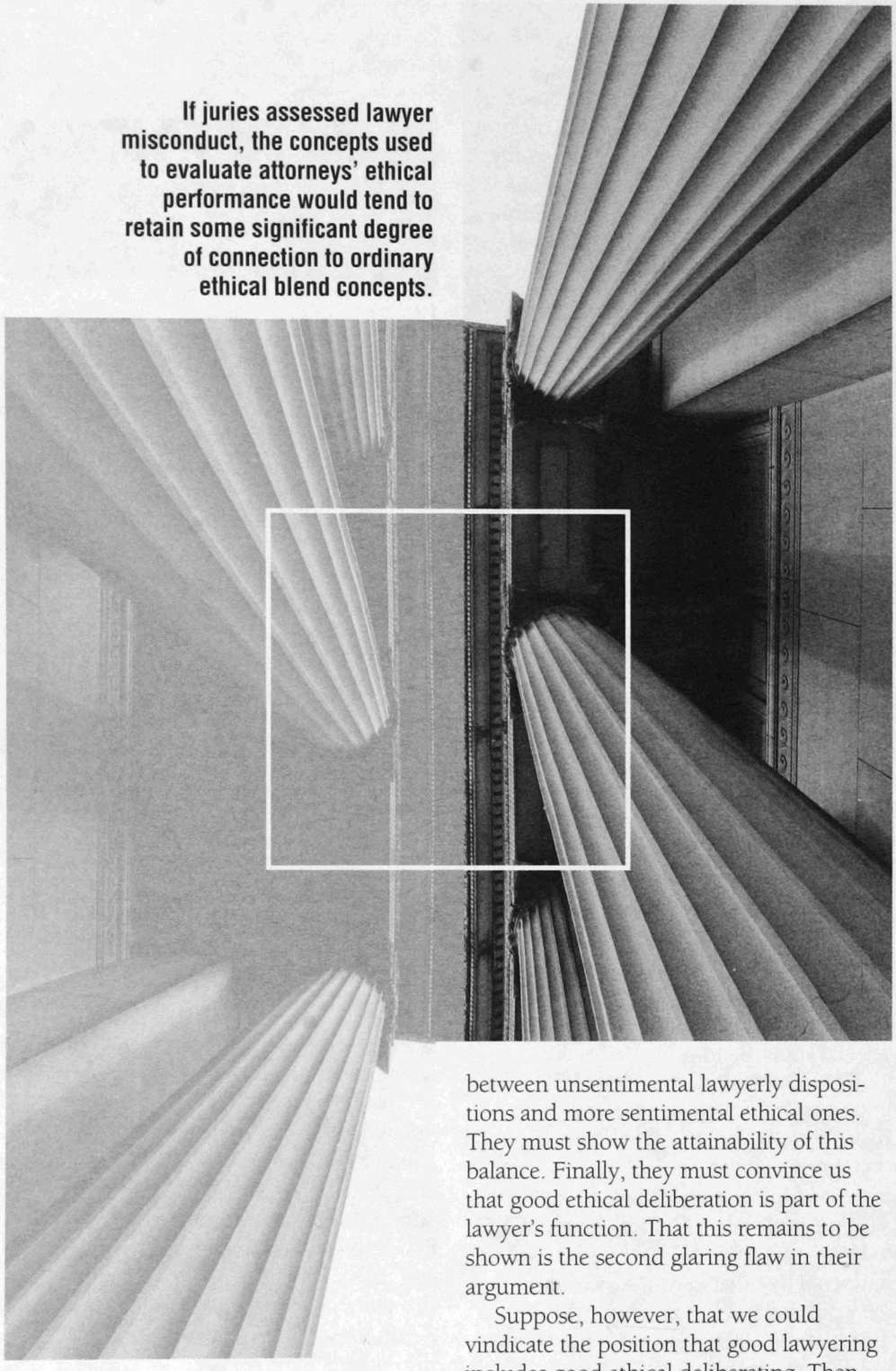
This line of criticism is flawed. It is important not to equate or confuse the zealot with the technocrat. Whatever one's opinion of zealous criminal defense, the zealous criminal lawyer may or may not be a technocratic attorney: Her commitment to her clients could be at least somewhat tempered by other concerns, without disqualifying her as a zealous advocate. To act as the zealous lawyer is not thereby to behave technocratically.

TOWARDS RECONCILIATION: LAWYERS AS ETHICAL DELIBERATORS

In conclusion, think of the relationship between technocratic lawyering and good ethical deliberation as a tradeoff: The better somebody is at one, the worse she is at the other. Nobody can do well at both. This oversimplifies, but it captures the essence of what I have said earlier. In response, someone might argue that I have overlooked at least part of what good lawyering entails. I have claimed that it requires facility with distinctively unsentimental legal analysis, at the expense of more sentimental ethical deliberation. My interlocutor might claim, however, that a lawyer's function includes providing good ethical deliberation. A genuinely fine attorney would not possess traits so antithetical to good ethical deliberation; at least, he would not hone such traits to the point where they crowd out more ethical dispositions. He would strike a balance between technocratic and ethical dispositions, and he would therefore be able to practice lawably — perhaps somewhat less easily — while retaining the traits and skills needed for good ethical deliberation. In short, he would be an honorable lawyer.

Two flaws in this reasoning emerge immediately. First, one person's balance is another's uneasy compromise. That is, the lawyer who tries to maintain lawyerly and ethical dispositions simultaneously might find himself delivering poor legal advice and defective ethical deliberation. Even if this worst-case scenario is unlikely — a matter for empirical investigation — proponents of the view that a lawyer's function includes ethical deliberation need to define specifically the desirable balance

If juries assessed lawyer misconduct, the concepts used to evaluate attorneys' ethical performance would tend to retain some significant degree of connection to ordinary ethical blend concepts.



between unsentimental lawyerly dispositions and more sentimental ethical ones. They must show the attainability of this balance. Finally, they must convince us that good ethical deliberation is part of the lawyer's function. That this remains to be shown is the second glaring flaw in their argument.

Suppose, however, that we could vindicate the position that good lawyering includes good ethical deliberating. Then we would have to figure out how to create lawyers suited to this function. It is hard to imagine that statutory codes of ethics would have much of a role, for the reasons I have already given.

To stand a chance of triggering ethical dispositions, statutes would have to be written in terms that tend to elicit appropriate sentimental responses. For example, if we want lawyers to disregard confidentiality when innocents are suffering unnecessarily, we would have to write codes referring to "innocence," "suffering" and "sorrow," as well as "loyalty." However worded, they would certainly be contentious, precisely because they would be meant to call forth specific emotional responses to ethically challenging situations, where we typically lack consensus on what these responses should be. Moreover, if virtue ethicists are correct about the uncodifiability of ethical judgment, it will not matter how we word our statutes: They will always be too general to be of assistance in highly contextual ethical decisionmaking, especially in hard cases. Finally, if we present lawyers with statutory ethical codes, these may trigger the antiethical lawyerly dispositions, no matter what their wording or structure. Lawyers' training may incline them to respond to statutes with technocratic analysis rather than ethical deliberation even when the statute is written in unusually sentimental language. Attorneys may read and respond to statutory text technocratically, no matter what its vernacular.

Many who lament the current state of attorneys' conduct associate the problem with twentieth-century changes in the nature of law practice, especially in elite firms. These firms, supposedly the pilots of the bar, no longer possess or provide the stability they once did. Clients parcel out their legal business per service, using different firms for different jobs. Partners and associates change firms fairly frequently, voluntarily or otherwise.

To end on a speculative note, let me suggest that this sort of flux would be likely to erode any sort of informal "common law" of lawyers' ethics that may once have held greater sway. If such an informal common law ever existed, it may well have been dominated by idiomatic blend concepts, tailored to lawyers' ethical lives. For example, within a firm, all attorneys might have developed a shared sense of what counted as unprofessional or rotten conduct, and they may have been able to educate long-term clients about these understandings. Such an informal common law might also have made use of nonspecialized ethical blend concepts, invoking concepts like pity, mercy or loyalty.

With the erosion of the conditions necessary for its maintenance, this sort of informal common law would disintegrate. It would not be surprising if black letter codes emerged in response, attempting to substitute crisp imperatives and permissions for the lost informal common law. It would be wiser to develop a new, more formal, more institutionalized common law of lawyers' ethics. Instead of elliptical bar disciplinary reports and the very occasional prosecution for attorney misconduct, courts, lawyers and legislatures should expand the opportunities for traditional adjudication of lawyers' ethical conduct. If juries assessed lawyer misconduct, the concepts used to evaluate attorneys' ethical performance would tend to retain some significant degree of connection to ordinary ethical blend concepts. Just as the legal concept negligence retains a tie to the ordinary concept of carelessness, case law could develop ethico-legal concepts with links to ordinary ethical concepts. Serious litigation of attorneys' ethical performances would generate a body of case law, like other such bodies, replete with the sort of contextual engagement with specific factual situations that makes for good ethical deliberation. Opinions in these cases could apply and explain traditional ethical blend concepts and, possibly, generate new ones, tailored to the special circumstances of attorneys attempting to act ethically within the confines of law practice.

I would advocate creating civil causes of action, available to those allegedly injured by an attorney's ethical misconduct, allowing plaintiffs to recover both pecuniary and nonpecuniary damages. A civil suit does not carry the same degree of stigma as a criminal prosecution. This should increase judges' and fellow attorneys' willingness to litigate lawyers' ethical misconduct. At the same time a lively civil cause of action for attorney ethical misconduct would reintroduce shame as a deterrent. The prospect of public jury trials and potential verdicts against them may discourage lawyers from exercising technocratic skills at the expense of robust ethical deliberation. Just as physicians view a judgment of malpractice as an embarrassment to be avoided, lawyers might come to be ashamed of conduct considered unethical by a jury.

Even if we grant that the initial litigation over attorney ethics will be somewhat unpredictable, the more robust the common law in the area becomes the more predictable the outcomes of lawsuits will be. This should produce a pattern of lawful conduct, settlement and litigation similar to other areas policed through civil causes of action. Attorneys should be no more vulnerable to or protected from the vagaries of civil enforcement than any other group.

In sum, common law can inspire lawyerly responses antithetical to unsentimental technocratic analysis and can make it difficult to formulate technocratic arguments in specific factual settings. Active civil litigation and a serious body of case law concerning lawyers' ethics might well trigger more honorable lawyering, a legal style more consistent with — perhaps even conducive to — authentic ethical deliberation.

LQN

Assistant Law Professor Heidi Li Feldman, J.D. '90, *did her undergraduate work at Brown University and Jesus College, Cambridge, and received her Ph.D. in philosophy from the University of Michigan in 1993. Her research interests include tort law, legal theory, ethics, and political philosophy. During law school, she served as associate editor and then articles editor of the* Michigan Law Review. *She is a member of the Order of the Coif. Professor Feldman joined the Law School faculty in 1991; she teaches torts, advanced torts, and seminars in legal theory.*

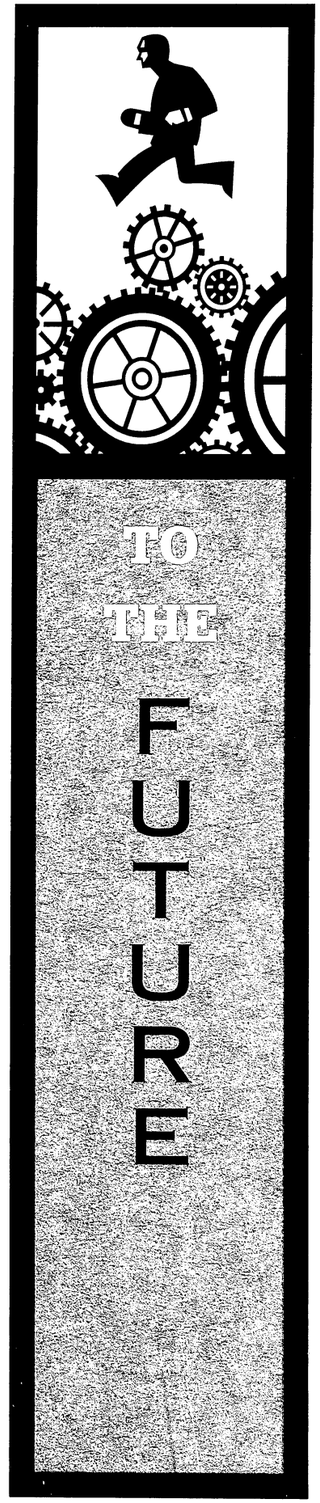
By Theodore J. St. Antoine

These remarks were delivered as the keynote address for the Federal Mediation and Conciliation Service's Third Biennial Midwest Arbitration Symposium at Minneapolis, April 12, 1996. Most reference citations have been deleted. For a copy of this article with full citations please contact the LQN *editor.*

Arbitration.

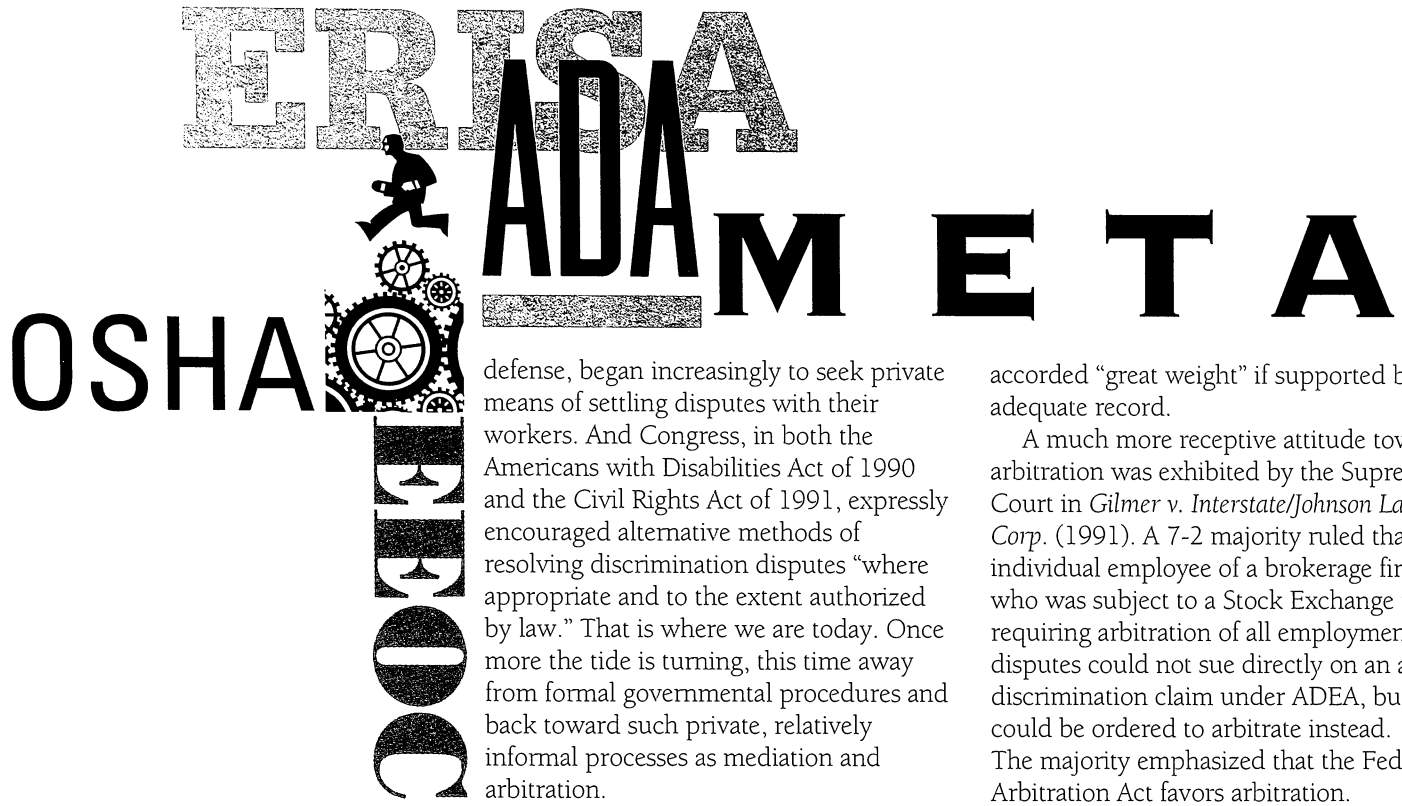
A strong new ideological current is sweeping through much of the Western World. At one extreme it manifests itself as a deep distrust of big government. In more modest form, it is a sense of skepticism or disillusionment about the capacity of big government to deal effectively with the problems confronting our society. In continental Europe today there is much talk of the principle of "subsidiarity," the notion that social and economic ills should be treated at the lowest level feasible, usually the level closest to the people directly affected. In the United States there is much talk of "privatization," the transfer or subcontracting of many traditional governmental functions to private industry.

These ideas have their counterpart in our own field of labor and employment law. In some respects there is nothing new about all this. In the earlier part of this century labor unions, bruised as they were by many encounters with a strike-stopping, injunction-wielding judiciary, looked upon law and government as more foe than friend. Unions responded warmly to the laissez-faire philosophy embodied in the Norris-LaGuardia Act of the early 1930s. Management as well as labor came to regard government involvement as intrusive; both espoused the private settlement of union-employer disputes through collective bargaining and voluntary arbitration. Even when the federal government began to intervene more actively, through the Wagner and Taft-Hartley acts, Congress directed the newly reorganized Federal Mediation and Conciliation Service to "make its ... services available in the settlement of ... grievance disputes only as a last resort and in exceptional cases." Indeed, so ardent a champion of collective bargaining and grievance arbitration as Dean Harry Shulman decried the very concept of court litigation over labor agreements.



In the mid-1960s and continuing thereafter, the preeminence of collective bargaining in the governance of the American workplace began to erode. Certain ancient problems, like race and gender discrimination, workplace safety, and pension and benefit guarantees, proved intractable. At the same time union density and bargaining power were declining. Government had to step in. And it did so through the whole series of laws with which we have become so familiar — the Equal Pay Act (EPA), Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Occupational Safety and Health Act (OSHA), the Employee Retirement Income Security Act (ERISA), the Americans with Disabilities Act (ADA), and all the rest. To add to the onslaught of governmental regulation, some 45 states during the 1980s seized upon one legal theory or another to ameliorate the worst rigors of the traditional American doctrine of employment at will.

Then came the counterrevolution. The taxpayers rebelled, Newt Gingrich rode into Washington, and the underfunded federal and state judiciaries and administrative agencies began to buckle under the avalanche of employee complaints. The Equal Employment Opportunity Commission alone was receiving about 100,000 charges of discrimination a year and its backlog soared past that figure. Employers, dismayed by seven-figure jury verdicts in wrongful discharge actions and the $100,000 costs of even a successful



defense, began increasingly to seek private means of settling disputes with their workers. And Congress, in both the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, expressly encouraged alternative methods of resolving discrimination disputes "where appropriate and to the extent authorized by law." That is where we are today. Once more the tide is turning, this time away from formal governmental procedures and back toward such private, relatively informal processes as mediation and arbitration.

The courts and arbitration

Initially, the courts had been rather unreceptive to arbitrators' handling of employment discrimination cases. Thus, in *Alexander v. Gardner-Denver Co.* (1974) the Supreme Court held that an arbitral award finding "just cause" for a termination under a collective bargaining agreement did *not* prevent the discharged employee from seeking a *de novo* trial in federal court of his claim of racial discrimination in violation of Title VII. The stated rationale was that the arbitrator only applied the contract, not the statute, and that Title VII supplements and does not supplant other rights, leaving the employee free to pursue both claims. The Court seemed untroubled by *Spielberg Mfg. Co.* (1955), under which the National Labor Relations Board will "recognize" or "honor" an arbitral award in an unfair labor practice case, as long as certain safeguards are met, even though there too the arbitrator is technically only dealing with contract rights and the Board is dealing with the employee's statutory right under the National Labor Relations Act to be free of antiunion discrimination or coercion. Even under *Alexander*, however, the Court acknowledged in the now-famous footnote 21 that the arbitral award could be admitted in the court suit and could be accorded "great weight" if supported by an adequate record.

A much more receptive attitude toward arbitration was exhibited by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.* (1991). A 7-2 majority ruled that an individual employee of a brokerage firm who was subject to a Stock Exchange rule requiring arbitration of all employment disputes could not sue directly on an age discrimination claim under ADEA, but could be ordered to arbitrate instead. The majority emphasized that the Federal Arbitration Act favors arbitration. *Alexander* was distinguished on the grounds the arbitrator there was only authorized to apply the contract, while the Stock Exchange rules empowered arbitrators to resolve statutory claims as well. Technically, the holding in *Gilmer* could be treated as just an exhaustion-of-remedies requirement, a requirement that one go to arbitration before seeking a judicial remedy, but the language of the opinion is much broader in its endorsement of arbitration and the finality of arbitration. The Court stressed that the broker was not losing a statutory right; he was merely being required to use a different forum for the enforcement of that right. As a practical matter, the Court was also affected by the fact that the employee in *Gilmer* executed the arbitration agreement himself, while *Alexander* involved "collective representation" and the possible conflicts that might present.

In my opinion, *Alexander* should be modified and *Gilmer* extended to authorize the final and binding arbitration of statutory claims when that is provided for in either a collective bargaining agreement or an individual employee-employer contract. There would of course be need, especially in the individual case, for close scrutiny to prevent any possible coercion, surprise, or other overreaching by a more powerful employer. There would also have to be procedural safeguards, as I shall discuss shortly, to ensure the fairness and integrity of the process.

My views on the desirabilty of an increasing resort to private arbitration for the resolution of statutory disputes, including civil rights issues, find support in the words of such distinguished federal appellate judges as Alvin Rubin of the Fifth Circuit, Betty Fletcher of the Ninth Circuit, and Harry T. Edwards of the D.C. Circuit. Judge Rubin suggested that "some problems can best be resolved by giving a wider hand to collective bargaining and to resolution of disputes in arbitration." Even more pointedly, Judge Fletcher declared that "arbitration . . . is the best forum for the grievant. ... [A]rbitrators have it within their power and their grasp to improve the process in order to accomplish the goals of Title VII."

Perhaps most noteworthy of all are the observations of Judge Harry Edwards, because he was an active practitioner in labor law and an eminent labor scholar at both Michigan and Harvard before ascending the bench, and because he formerly expressed "grave reservations about arbitrators deciding public law issues." On the basis of his experience on the court, Judge Edwards changed his mind. Said he: "I believe that arbitration should be explored as a mechanism for the resolution of individual claims of discrimination in *unorganized*, as well as unionized, sectors of the employment market." Like Judges Rubin and Fletcher, Judge Edwards stressed the speed and cost savings of arbitration as advantages over litigation in the resolving of disputes. The greater informality of arbitration can also be conducive to a lessening of employer-employee hostility, which is especially desirable in the event reinstatement is ultimately ordered.

Guaranteeing due process

If private procedures like arbitration, agreed to by the employer and the employee, are to supersede the administrative or judicial procedures prescribed by a statute, there should be guarantees that customary "due process" standards are applicable. Two prestigious groups have recently set forth their precriptions for the required procedural safeguards. Those were the Dunlop Commission on the Future of Worker-Management Relations and a task force convened by the American Bar Association, consisting of representatives of the ABA Labor and Employment Law Section, the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the National Employment Lawyers Association, and the Society of Professionals in Dispute Resolution.

The Dunlop Commission strongly recommended the development of private arbitration procedures for handling workplace disputes, including statutory issues. To ensure that the public law rights of individual employees would not be jeopardized, the Commission proposed several "quality standards":

1. a neutral arbitrator who knows the law, jointly selected by the parties;
2. fair and simple procedures, including discovery;
3. cost-sharing to help ensure arbitral impartiality;
4. independent representation if the employee wants it;
5. remedies equal to those provided by statutue;
6. a written arbitral opinion giving the rationale; and
7. judicial review to ensure compliance with governing law, but limited with respect to the arbitrator's findings of fact.

The ABA-convened task force, composed of persons from highly diverse organizations, did not reach consensus on a number of issues, although in some respects its recommendations were even more detailed than the Dunlop Commission's, with special emphasis on the need for the training of arbitrators about statutory law. In any event, the major standards for due process contained in the task force's "protocol" closely paralleled the Commission's:

1. an impartial arbitrator with knowledge of the statutory issues at stake, jointly selected by the parties;
2. adequate but limited pre-hearing discovery;
3. cost-sharing to help ensure arbitral impartiality;
4. the right to representation by a person of the employee's own choosing;
5. whatever relief would be available under the law;
6. an opinion and an award, including a statement of the issues resolved and the statutory claims disposed of; and
7. a final and binding award subject to limited review.

Arbitration: A condition of employment?

There is one important issue on which the Dunlop Commission takes a stand, and which the Task Force sidesteps. May an employer make an employee's agreeing to arbitration a condition of employment? The Commission flatly says "No," at least not "at this time." The Commission declares that "any choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract." Although it does not say this in so many words, the Commission would apparently allow an employee to contract for binding arbitration only after a dispute has arisen. At least in a discharge case, the employee would then have little or nothing

The result of this sophisticated scheme is a sensible tradeoff. Employees are guaranteed certain irreducible substantive rights. In return employers are relieved of the risk of crushing legal liability. Both sides are provided procedures that should be simpler, faster, and cheaper than the current jury system.

to lose if he or she offends the employer by refusing to agree to arbitration. I detect a hint of ambivalence within the Commission on this issue, however; it goes on to remark that if private arbitration systems prove themselves in enforcing public rights, then the nation could decide "whether employers should be allowed to require their employees to use them as a condition of employment."

The Task Force reflected its hybrid composition in announcing that it "takes no position on the timing of agreements to arbitrate statutory employment disputes, though it agrees that such agreements be *knowingly* made" (emphasis supplied). The Equal Employment Opportunity Commission, in a policy statement of July 1995 concerning alternative dispute programs to be developed under Commission auspices, insisted that "parties must knowingly, *willingly* and *voluntarily* enter into an ADR proceeding" (emphasis supplied). Moreover, the Commission would permit an employee to opt out of a proceeding at any time before its resolution and to go ahead and file a lawsuit instead.

I don't think this issue is as easy as it may seem to some. We can start with the comfortable premise that no employee should have to give up a statutory right to a particular forum as the price for a job. But there is respectable employer testimony that businesses will often be unwilling to agree to arbitration *after* a dispute has arisen. At that point in a particular case they may have more to gain by just sitting back and awaiting the lawsuit that in many instances will never materialize.

Thus, as a practical matter, the real choice may be between allowing the employee to agree to arbitration in advance, as Mr. Gilmer did, or greatly diminishing the likelihood that arbitration will ever be used. What does the employee actually lose if required to arbitrate? Statutory forums and jury trial rights sound all very fine in theory, but what good are they if the EEOC is so burdened by a case backlog that it must resort to triage, as it now does with its "A," "B," and "C" classifications of cases, tossing out many charges wholesale after the briefest of investigations? And what good are the statutory rights if the courts are so far behind schedule that the employee must wait three or four years for an enforceable judgment? It seems to me at least arguable that many employees would be much better off with arbitration, even as a condition of employment, as long as there was guaranteed the type of procedural safeguards called for by the Dunlop Commission and the ABA-convened task force. At any rate, I think this is a question that deserves to be fully debated, with less emphasis on abstract theory and more on pragmatic considerations of the sort I have described. So far, incidentally, a court of appeals has simply held that an employee must "knowingly" agree to arbitrate a Title VII claim before forgoing statutory procedures. At most a "knowing" agreement is all I can see in the Supreme Court's *Gilmer* case.

Deferring to arbitration

The birthpains we are witnessing as the courts and the agencies seek a viable system of arbitrating statutory civil rights claims had earlier parallels in the judicial and administrative treatment of other statutory disputes. As I mentioned previously, the National Labor Relations Board, in its *Spielberg/Olin* line of cases (1955 and 1984), held that it would "honor" or "defer to" an arbitral award in a subsequent unfair labor practice case if certain standards had been met. The arbitration proceedings had to be fair and regular; all parties had to agree to be bound; the decision must not have been "clearly repugnant" to the policies of the act; the contract issue before the arbitrator had to be "factually parallel" to the unfair labor practice issue before the board; and the arbitrator had to be "presented generally" with the facts relevant to

resolving the ULP issue. In *Alexander v. Gardner-Denver*, the Supreme Court explicitly declined to apply the *Spielberg* doctrine to Title VII cases, but it did not question the validity of *Spielberg* in the NLRA context.

Later, and more controversially, the NLRB extended the deferral doctrine to situations where the ULP charge had been filed before there was any arbitral award. In *Collyer Insulated Wire* (1971), the board held that it would defer to the arbitration procedure in those cirumstances also, provided the employer's action being challenged did not undermine the union, the employer's action was based on a "substantial claim" under the contract, and the arbitral interpretation of the contract would likely resolve the ULP issue as well. *Collyer* itself involved a charge against an employer for allegedly refusing to bargain by taking certain unilateral action in violation of the collective bargaining agreement. Subsequently, and still more controversially, the board extended the *Collyer* doctrine to *individual* cases of alleged discrimination. While *Collyer* dealt with contract issues that might seem peculiarly appropriate for arbitral resolution, *United Technologies* dealt with an individual's statutory rights against antiunion discrimination, which some might deem as sensitive as the civil rights at stake in *Alexander* and *Gilmer*. Yet the courts have generally gone along.

Finally, I should mention *Barrentine v. Arkansas-Best Freight Sys.* (1981). There the Supreme Court held, in a 7-2 decision, that employees were not barred from suing on wage claims under the Fair Labor Standards Act by an adverse arbitration award under the collective bargaining agreement. The majority reasoned that statutory rights under the FLSA, like Title VII rights, are individual rights, not collective rights, and are not waivable by a union. Putting *Alexander*, *Barrentine*, and *Gilmer* together, it does appear that the Supreme Court may give individual employees greater power to waive statutory rights and commit to binding arbitration than is accorded their union representatives under collective bargaining agreements. That makes sense if one is skeptical about a union's capabilities and zeal in safeguarding the rights of the employees it represents; it makes far less sense if one focuses on the relative bargaining power of employers, unions, and individual workers. In addition to the whole range of statutory rights which now seems to be opening up as a new arbitral domain, there is another large area looming on the horizon which may become a fertile source of arbitration practice. It is a further example of the widespread trend in society, of which I spoke at the outset, to seek solutions for its problems outside the formalized processes of government. Beginning in the 1960s, and accelerating rapidly during the 1980s, there was a movement in the state courts of some 45 jurisdictions to modify the once universal principle of employment at will. As bluntly expressed by one nineteenth century American court, that meant employers could "dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong." Workers could be fired for refusing to engage in illegal price fixing or even for refusing to commit perjury at the behest of the employer.

Benefitting both employers and employees

At-will employment remains a substantial problem today. Professor Jack Stieber of Michigan State University calculates that there are roughly 60 million at-will employees in the United States, of whom about two million are fired annually. Of these, Stieber believes 150,000 or more would have valid causes of action if they had the same "just cause" rights afforded nearly all the union workers under collective bargaining agreements.

The state courts have used three principal theories to modify employment at will. Each has serious deficiencies for employees and employers alike. The first is the public policy exception. But that takes an egregious violation, such as discharging an employee for refusing to commit a crime. Relatively few employees will find that modification useful.

Second is the contract exception. An employer may be held liable for an arbitrary dismissal if it has included a guarantee of no discipline except for good cause in an employee handbook. But an employer can avoid that restriction by simply refraining from any such assurances, or even by excising any existing protections from personnel manuals with adequate advance notice.

The third and potentially most expansive theory, the notion that every contract contains an implied covenant of good faith and fair dealing that forbids an unjust discharge, has doctrinal infirmities and has been accepted by only a handful of states.

Finally, the employees who win in court are rarely rank-and-file workers. Only professional and managerial employees are likely to have large enough claims to attract the attention of lawyers operating on the basis of contingent fees.

On the other hand, when an employer becomes enmeshed in a common-law wrongful discharge action, the results can be a heavy financial blow. Several studies of California cases showed that a plaintiff employee who can get to a jury will win about 75 percent of the time, with the average award around $450,000. Multimillion dollar verdicts for single individuals are not uncommon across the country.

Even the successful defense of a jury case may cost $100,000 to $200,000. And two years ago a RAND study estimated that the "hidden costs" of the common-law regime — for example, keeping on inefficient employees out of a fear of expensive lawsuits — amount to 100 times as much as the court judgments and other legal expenses.

Alternative dispute resolution procedures are needed for the benefit of everyone, employers as well as employees. In August 1991 the prestigious National Conference of Commissioners on Uniform State Laws adopted, by the resounding vote of 39 state delegations to 11, the Model Employment Termination Act (META). META prohibits the dismissal of most full-time employees after one year of service unless there is "good cause." The preferred method of enforcing META is through the use of professional arbitrators. The remedies are similar to those under the NLRA, the original Title VII, and the usual labor contract, namely, reinstatement with or without back pay. General compensatory and punitive damages are expressly excluded.

The result of this sophisticated scheme is a sensible tradeoff. Employees are guaranteed certain irreducible substantive rights. In return employers are relieved of the risk of crushing legal liability. Both sides are provided procedures that should be simpler, faster, and cheaper than the current jury system.

META has been introduced in over a dozen state legislatures. Despite its overwhelming endorsement by the Uniform Law Commissioners, however, its prospects for early enactment anywhere are bleak in the current political climate.
In the longer term, I have high hopes. The United States is the last major industrial democracy in the world without legal protections for workers' jobs, and I cannot believe we shall remain such an outcast indefinitely. When we do see the light — some time in the next millenium — it will mean, directly or indirectly, a dramatic expansion in arbitration practice. The most thorough study to date found that in the mid-80s arbitrators were handling approximately 65,000 union grievances in a year. With less than 15 percent of the American work force currently organized, one could anticipate at least a four- or five-fold increase in employee coverage if laws like META became universal. Even if we assume that only a third or so of the existing arbitration caseload consists of the kind of discharge or disciplinary issues that would be subject to legislative protections, the result could still be some 100,000 new arbitration cases annually.

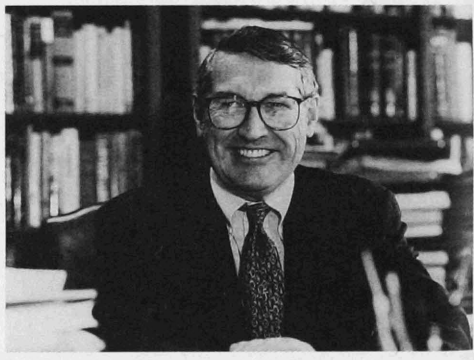
In the meantime, many employers across the country, deeply disturbed by the large jury verdicts returned in wrongful discharge actions, have instituted their own private programs for the arbitration of disputes with their employees. In some respects this development is highly salutary; at least it may recognize some modification in at-will employment and the existence of some worker rights in their jobs. But in other respects it can be a cause for concern. Employers, for example, may exercise excessive control over the choice of the arbitrator. Subconsciously, arbitrators may be influenced, or they may be perceived to be influenced, by the fact the employer is a "repeat player" in unilaterally established plans and the one often paying the bill. Some arbitrators may be deterred from participating in these plans because of fear they may be used as union-avoidance devices. For all these reasons employer-promulgated arbitration systems call for special scrutiny and the erection of due-process safeguards to ensure the fair treatment of employees. Yet on balance, with appropriate shields in place, I consider them better than nothing. Some employees who are unfairly fired *will* get their jobs back, and I think that is worth the extra trouble on the part of arbitrators operating under these novel arrangements. In 1986 arbitrators handled about 2000 non-union grievances during the year — about 3 percent of the total.

Court-sponsored arbitration

A final phenomenon of recent times, and a final example of the "privatization" that has been an underlying theme of this paper, is the referral of employer-employee disputes to an arbitrator by a court. I do not know how widespread this practice is, or how much jawboning by a judge it takes to get the parties to go along. But it represents one more way in which the venerable instrument of union-management arbitration is undergoing transformation to meet a new set of needs in society.

Two decades ago that peerless labor lawyer and scholar, David Feller, spoke poignantly of the passing of what he called the "golden age of arbitration." By that he meant a time when the parties' system was essentially autonomous, concerned primarily with contract self-enforcement, and unsullied by a preoccupation with external law. Being somewhat younger then than I am now, I had the temerity to take issue with David on the ending of the golden age. Today I have a better sense of what David was driving at. There *was* a purity, an appealing simplicity about arbitration in the two or three decades following World War II, when unions and employers were pretty much unchallenged lords of their own process. Ours is a much more untidy world, where arbitrators must often look over their shoulders to see whether their work is squaring with the dictates of "the law." Yet I still do not feel quite the same sense of loss as Professor Feller. There are golden ages and there are golden ages. Simplicity has its attractions; so does complexity. In David Feller's cherised era, private parties ruled both the substance and the procedure of employment regulation. Then government took over a large swath of the two areas. Today private parties are regaining a significant share of the procedure, but substantive legal regulation remains intact. Arbitrating in this complex new milieu should be seen as an exciting challenge rather than as a dispiriting letdown. As I said twenty years ago, if it is true in any sense that we have lost a golden age of arbitration, it may just be akin to leaving behind the simple nobility of ancient Greece, and moving on to the sophisticated glories of the High Renaissance.

LQN



Theodore J. St. Antoine, *James E. and Sarah A. Degan Professor of Law, is known for his writing in the field of labor relations and has engaged in arbitration. He began his academic career at the University of Michigan Law School in 1965 and served as its Dean from 1971 to 1978. He has also taught as a visitor at Cambridge, Duke and George Washington, and in Salzburg.*

UNIVERSITY OF MICHIGAN
LAW SCHOOL

Upcoming Events

Oct. 18	Symposium on the Legal Profession; keynote address by David L. Chambers III, Wade H. McCree, Jr., Collegiate Professor of Law
Oct. 18-20	Reunions of Classes of 1971, 1976, 1981, 1986 and 1991
Oct. 21	"Academic Freedom: A Trial Judge's View," Davis, Markert, Nickerson Lecture on Academic and Intellectual Freedom, by The Hon. Avern Cohn, J.D. '49, U.S. District Judge, Eastern District of Michigan, Amphiteater, Horace Rackham School of Graduate Studies, 7 p.m.
Oct. 22	ILW: Guillermo Aguilar Alvarez, Mexico, "Regionalism and Multilateralism in International Trade"
Oct. 26	Symposium: Asian Pacific Americans and Critical Race Theory
Nov. 15-17	Mediation Workshop
Nov. 18	Alumni Dinner, London, England
Dec. 7	December Senior Day/Commencement
Jan. 24, 1997	Alumni Luncheon, New York City
Jan. 24, 1997	Alumni Luncheon, Wisconsin State Bar, Milwaukee
Winter 1997	Conference: "Landmines and Development: Legislating for a Sustainable Future"
	Colloquy: "Equal Access to Civil Justice: Looking for Feasible, Justifiable Reforms"
	Symposium: "Cyberspace and the Constitution"
	(Ed. Note: Dates for the preceding three programs were unavailable at deadline time.)
May 10	Senior Day/Commencement

Note: This calendar is correct at printing deadline time and may be subject to change.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
1045 LEGAL RESEARCH BUILDING
ANN ARBOR, MICHIGAN
48109-1215

NON-PROFIT
ORGANIZATION
U.S. POSTAGE PAID
ANN ARBOR, MI
PERMIT #144

LAW QUADRANGLE NOTES

ADDRESS CORRECTION REQUESTED