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LAW QUADRANGLE NOTES



*Closing the Circle: A Graduate
Returns to Teach*

A Footnote for Jack Dawson

*How well does the WTO
settle disputes?*

The University of Michigan Law School
Volume 46 • Number 1 • Spring 2003

**THE UNIVERSITY OF MICHIGAN
LAW SCHOOL**

**VOLUME 46, NUMBER 1
SPRING 2003**

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On the Cover:
The law quadrangle bursts into spring.

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EVAN H. CAMINKER RECOMMENDED AS DEAN OF THE LAW SCHOOL

Evan H. Caminker will be recommended to the Regents for appointment as dean of the University of Michigan Law School. U-M President Mary Sue Coleman and Provost Paul N. Courant made the announcement June 20. If approved by the Board of Regents, his appointment will be effective August 1.

Caminker joined the Law School faculty in 1999 and was appointed associate dean for academic affairs in 2001. (See his comment, page 4.) He is a scholar of American constitutional law whose writings, teaching, and professional activities focus on individual rights, federalism, and the nature of judicial decision-making.

"Professor Caminker has provided outstanding contributions to the University and the legal profession through his extensive research and his experience in the private and public sectors," Coleman said. "I am delighted that we have found a new dean with such a broad background in the practice of law and the academic study of law."

Courant said: "Evan Caminker is a superb legal scholar with valuable administrative experience. I worked closely with him in the University's defense of the *Grutter v. Bollinger* lawsuit. (See story on page 26.) He has a broad vision of the role of the Law School in the University and I have every confidence he will be an excellent dean."

Caminker came to Michigan from the University of California at Los Angeles School of Law, where he served on the faculty from 1991 to 1999.

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The new dean brings a broad array of legal experience from his practice in the academic, governmental, public interest, and private sectors. From May 2000 through January 2001, he served as deputy assistant attorney general in the Office of Legal Counsel, U.S. Department of Justice, while on leave from the U-M Law School. He clerked for Justice William J. Brennan Jr. of the U.S. Supreme Court and Judge William A. Norris of the Ninth Circuit of Court of Appeals. He practiced law at the Center for Law in the Public Interest in Los Angeles and with Wilmer, Cutler & Pickering in Washington, D.C.

He has published articles in the *Michigan Law Review*, *Yale Law Journal*, *Columbia Law Review*, *Stanford Law Review*, and the *Supreme Court Review*. His most recent work includes an inquiry into the nature of decision-making on multi-member courts. Caminker, who has taught in the fields of constitutional law, civil procedure, and federal courts, has received the ACLU Distinguished Professors Award for Civil Liberties Education.

"I am honored to have been selected as the new dean of this great Law School, and I look forward to working with students, faculty, and the administration to build upon the many strengths of this institution," Caminker said.

Caminker received his B.A. in political economy and environmental studies, *summa cum laude*, from the University of California at Los Angeles, and his J.D. from the Yale Law School, where he was a senior editor of the *Yale Law Journal* and a Coker Fellow, and was awarded the Benjamin Scharps Prize for Excellence in Legal Writing.

"I would like to take this opportunity to express my appreciation to [Professor of Law] Kyle D. Logue, who chaired the Search Advisory Committee, and to the members of the committee for their outstanding service," Courant said. "The President and I are delighted that Evan Caminker has accepted the deanship. We are confident that he will be a passionate advocate for the Law School and contributor to the University. His experience at the national level will be of enormous value to the School as it expands its research profile and continues its impressive educational and interdisciplinary activities."

(For more information, visit the Law School's Web site, www.law.umich.edu.)

LEHMAN:

"IT'S BEEN AN AMAZING JOY AND PRIVILEGE"

When he was named University of Michigan Law School dean at 37, Jeffrey S. Lehman, '81, became the youngest law school dean in America, and the youngest at Michigan since James Campbell was named our first dean in 1859. His near-decade at the helm has been accompanied by significant changes inside and outside of the Law School: The size and stature of the faculty has grown. The Law School's clinical programs have expanded immensely, and now are overseen by a full-time associate dean for clinical affairs. The Legal Practice Program has gained a national following and spawned many imitators. The Transnational Law course that is a graduation requirement has drawn widespread praise. The Law School now is looking ahead to a building expansion and renovation that will add 90,000 square feet to the Law Quad, ensuring that the space keeps pace with the demands of modern legal education. The Law School has been in the forefront of defending the value of racial and other diversity to the education of future lawyers, and as this issue was being prepared was awaiting the U.S. Supreme Court's decision in the case of a legal challenge to the Law School's admissions policies.

Lehman's youthful energy and enthusiasm have not dimmed since he became dean in 1994, and we expect that they will propel his progress as President of Cornell University just as they have propelled his progress here. His presence has influenced all aspects of Law School life.

The process of searching for Lehman's replacement began shortly after he announced last December that he would leave to become president of Cornell University (his other alma mater) on July 1, 2003. In the belief that to know the man himself is to gauge his impact, we present an edited version of the interview that editors John Fedynsky and Andy Daly of the law student publication *Res Gestae* conducted with Lehman earlier this year, coupled with additional questions that others have posed since then. The portions of the *Res Gestae* interview appear here with permission of that publication.

LQN: The Law School has been the center of your professional life. How will your experiences here contribute to your work at Cornell?

At the Law School I saw just how much a great institution can accomplish when a group of very talented teachers, students, alumni, and employees are committed to a common purpose and are willing to take chances to pursue it. And by trial and error I found out how a dean can support or inhibit that effort. At Cornell I expect to find the same fertile ground for collective achievement; I hope that many of the lessons I learned about how to be a good dean will carry forward into my new role.

RG: What have been some of the fun parts of the job that you think you'll miss — like being invited to be in the Law Revue [the law student talent show] every year, [or] being invited to be an auctioneer for the Student Funded Fellowships Auction. What sorts of experiences like that do you treasure the most and do you think might not be present for you at Cornell?



There are opportunities as a dean to be humiliated that are very special. I don't think that they're available to university presidents in the same way. I will miss the chance to pretend to be a member of the band Aerosmith, or to hawk goods at an auction for a good cause.

RG: If president of Cornell is one of the few positions that would've tempted you away from Ann Arbor, can you think of any sort of dream job that would tempt you away from Cornell?

It's really hard to imagine. I hope to be president of Cornell for a very long time. I think if someone were to offer me a seat on the Supreme Court, I'd be receptive. But shy of that I think this is the job I'm going to do my very best to hold onto.

RG: What challenges do you see for your successor and for the community at large?

The challenge that a school like Michigan always faces is to look far down the road and ask what we will need to be doing in 15 years and what we need to do now to be prepared for that. That question becomes harder to answer each year. The pace of change in the legal profession is widely understood to be accelerating. To remain alert to the changes that are going on around us and to be able to evolve in the ways we need to stay cutting edge is very hard work. It's important to do that because institutions like this are best when they evolve gradually; I don't think we're very good at lurching from one direction to another direction. I think that the nature of the legal profession will continue to become ever more international and interdisciplinary. What that means for what we teach is a hard question on which reasonable people will differ.

LQN: In many ways, you have been the person who has been the voice of the Law School to its graduates and supporters for many years now. Is there a message about this Law School that you have been conveying? Have some parts of the message changed, while others have remained the same?

I don't think the message has changed much. This Law School has played a special role in the world for almost 150 years. It is a shining example of how a committed group of devoted graduates can enable a public institution to have faculty, students, and programs of unsurpassed quality. Today's generation of faculty has the responsibility of ensuring that Michigan continues to lead in the century ahead.

RG: Do you have any pet projects that you are remiss to be leaving now — the sorts of things that you think you'll follow throughout your career just to see how they're going even if your not any longer personally involved?

There are a lot of things that this School does that are wonderful, special, and unique. Some of them were here long before I was dean and some of them started in the last decade. As both an alumnus and a former faculty

By Theodore J. St. Antoine, '54

*James E. and Sarah A. Degan Emeritus Professor of Law and dean of the Law School 1971 – 1978
Chairman of the Search Committee that recommended Jeffrey S. Lehman, '81, as dean*

After an elaborate search process for a new Law School dean in 1993 – 94, Jeff Lehman emerged as one of the faculty's clear favorites. The central administration's principal reservation was Jeff's relative youth. At the age of 37, he would shatter all modern records as our youngest dean. I first tried pointing out to the provost that William Pitt the Younger was only 24 years old when he became prime minister of England. That got nowhere. I then commented that my experience was that deans aged a year for each month in office. If Jeff took over in July, by Christmas he would be well into his 40s, psychologically speaking. That seemed to carry more weight. . . .

Meanwhile, the European alumni of the Law School invited me to report on the search process at a conference in Florence. But by the time the conference convened, Jeff had been selected. So he was invited down from Paris, where he had been lecturing at the University of Paris, to address the group in person. One of our French alumni had a conversation with Jeff in French, and afterwards came up to me almost breathless over Jeff's fluency: "Of course I would have known that your new dean was not a *Parisian*. But I would never have guessed he was an *American!*"

I like to think those two vignettes foreshadowed some of Jeff's most distinctive achievements as dean. His youthful energy and drive contributed to a whole series of intellectual initiatives, including faculty workshops on legal theory and freewheeling discussions of articles-in-progress, dubbed "Sow's Ear" sessions. His expansive worldview led to new emphasis on our overseas mission with the establishment of the Center for International and Comparative Law and the creation of Affiliated Overseas Faculty.

By Evan Caminker

University of Michigan Law School professor and
associate dean for academic affairs

Jeff's first decanal learning experience actually came as a first-year law student. On behalf of the students then residing in Lawyers Club Entryways O and P, Jeff went to then-Dean Ted St. Antoine and suggested that the students had legal grounds for complaining about noise pollution resulting from the construction of the underground library. The administration ended up negotiating a "settlement" of approximately \$100 per affected student. At the time, Jeff perceived this resolution as a resounding victory perhaps explaining why he never made his mark as a personal injury lawyer. Now, Jeff will candidly acknowledge that he was "totally had" by Ted in the process, in a voice reflecting grudging admiration rather than exasperation.

What goes around, comes around. Given this initial brush with decanal decisionmaking, it is no small irony that two of Jeff's greatest contributions to the Law School involve litigation and building expansion, though not quite so intertwined this time. On the litigation front, Jeff seized his being named as a defendant in the *Grutter* suit challenging the School's affirmative action admissions policy as an opportunity to influence the debate over higher education policy, to engage in reasoned and candid discussion of broader national values concerning race in America, and to shape through litigation strategy the conversation now occurring among the Justices of the Supreme Court. On the building front, Jeff quickly embraced Renzo Piano's visionary plans to re-conceptualize as well as augment the School's capacity to provide students with a vibrant and interactive educational experience though notably in a manner destined to yet again introduce his successor as dean to the residents of Entryways O and P.

It's been my pleasure and good fortune to work closely with Jeff on both projects, and to experience his passionate promotion of a vision of legal education that will best serve our students and our larger society. To paraphrase Jeff's former boss, Justice [John Paul] Stevens, Jeff's stewardship "has illuminated the character of an institution" — one committed to openness and intellectual vibrancy with respect to both the student body and the architectural space in which it thrives. Let's hope this legacy can be maintained in the future with a little less litigation. . . .

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member and dean, I know that I will always follow Michigan's continued growth and progress with a tremendous sense of pride and loyalty.

RG: Looking back on closure, have you picked something out as your proudest achievement as dean?

I haven't. When I think about exciting things that the Law School accomplished during the time I was dean, I think of receiving the Weightman Award from the ABA as public interest school of the year. I think of the recognition that the Transnational Law course requirement received. The fact that the Legal Practice Program was started and then other schools wanted to emulate it was very gratifying for me. I think that the growth and diversification of our clinical programs has been very satisfying to be a part of. Those are four things that are exciting.

RG: What about the litigation?

Nobody wants to get sued. But having said that, I would say that I am very proud of the way the School as a community has conducted itself in the defense of the litigation. There's a lot of stress that comes with being a defendant, and that stress can be divisive or silencing. I think we have defended ourselves aggressively, effectively, and in a way that people can be proud of for its quality and its integrity.

RG: Would you say it's been good or bad timing with the litigation and the construction plans going right into phase now? It seems like you're leaving at about the most interesting point.

I know there is never a good time to leave. This is neither a particularly good time nor a particularly bad time. On the one hand, the litigation should be done. [The U.S. Supreme Court heard oral arguments April 1 and at deadline time had not announced a decision.] On the other hand, the new building plan is far from complete. But a building project like this is invariably an 8-, 9-, 10-year project. It usually involves the work of many people and more than one dean. I suppose that in an ideal world I'd like to be a year farther along before I stepped away. Yet it is clear that we made a lot of progress in the last few years on the building. It's a very exciting project. It will be an important continuing effort for the School.

RG: Anything else?

The most important development at the Law School these past nine years wasn't a "project" at all — it was the development of the faculty. We have been able to recruit some just spectacular teachers and scholars. If you talk with fellow students or reflect on your own experience and think about who has been most meaningful for you during your time here, I suspect some of the people who have had the biggest impact were not here 10 years ago. That's a sign of a healthy school.



RG: The Class of 2005 is the last class you had the opportunity to give the welcoming speech to. This interview will be available to prospective students. What message do you have for somebody who's considering coming to Michigan, maybe even in light of this impending change at the top?

The choice of where to go to school is a very personal choice. At least when you're choosing among the handful of truly extraordinary law schools, the choice is really about "fit." What distinguishes Michigan within that group, what makes it such a great choice for so many students, what made it a great choice for me, what still makes it a great choice today, are a couple of things. One is the incredible faculty. The professors at Michigan are remarkable scholars and teachers, even among top law schools. A second is the quality of the student culture. That's something that varies more among the top schools than other aspects. The student culture here is exceptionally healthy. Students here take the study of law very seriously without taking themselves too seriously. Students here are competitive — people do not end up being admitted to this law school unless they push themselves to excel. But at Michigan that does not manifest itself in mutually destructive, cutthroat environment. This is a place where students are good to each other. They want each other to succeed. They at some level want to do better than each other, but only by virtue of their having done the best they've ever done, not by tearing down the person next to them.

LQN: What of the Law School's graduates? What is special about their attachment to Michigan, especially as their careers develop, they take on new responsibilities, and the years between their daily lives and their days at the Law School grow further apart?

The attachment our graduates feel to their *alma mater* is enormously gratifying to anyone who teaches here. Most alumni feel that their lives were transformed in a fundamental way during their three years in Ann Arbor; indeed, our international alumni tend to feel just as strongly even if they were here for only one year. And that sense of identity — that sense that they participated in something truly special — bonds our graduates to the School and to one another in a very powerful way. Whenever we see evidence of that bond — and we see it often — we on the faculty are reminded of our special responsibility to maintain that extraordinary tradition.

RG: Any last thoughts? How would you characterize the Lehman years?

It's been an amazing joy and privilege to be the dean of this Law School. I've gotten to know a lot of other law school deans, and a lot of schools are very hard on their deans. This school is incredibly kind to the dean. I'm very grateful for that. I hope that it will always be that way.

By Kent D. Syverud, '81

Dean, Vanderbilt University School of Law
University of Michigan Law School associate dean for
academic affairs 1995 – 1996

Jeffrey Lehman was my law school classmate, my *Law Review* editor, my faculty colleague, and my dean. He served in the latter role for the two years I was associate dean at Michigan in 1995 and 1996. During much of that time, Jeff was managing the University of Michigan's presidential search as well as leading the Michigan Law School.

I never saw Jeff lose his temper, despite somewhat frequent provocations. It is the nature of deaning that you stand for the institution, including both the blessings it has conferred (sometimes long ago) and the perceived wrongs it has done (sometimes long ago). Most deans love taking credit for the blessings, but have trouble stoically bearing the complaints about the wrongs. I am deeply grateful to Jeff for the hits he cheerfully took for the School, as well as for the leadership he gave it.

What were the hits? I plead associate dean privilege. Suffice it to say that when a tough decision had to be made — in admissions, in budget, in personnel — Jeff was not only willing to make it in the School's interest, but he was also there to take responsibility for the choice.

What was the leadership? Jeff took a massive capital campaign and saw it to a successful conclusion; he led a landmark struggle to vindicate diversity in law school admissions; and he kept the Michigan Law School on an even course, producing hundreds of wonderful lawyers every year. To have achieved this, under four presidents and even more provosts, required vision and a strong constitution. Both will serve Jeff well at Cornell, as they did at Michigan. I am very grateful for Jeff's leadership of my *alma mater* these last nine years.

By Christina B. Whitman, '74

*Francis A. Allen Collegiate Professor of Law and professor of women's studies
Associate dean for academic affairs, 1996 – 2001*

Jeff Lehman has enjoyed being dean of the Law School for almost a decade because it engages his intellect. He has an inexhaustible appetite for learning, and the position of dean has presented him with opportunities to master a surprising range of fields. First, of course, he has deepened his knowledge of people — how to motivate and support, how to evaluate talent, how to resolve conflict and stimulate collegiality. He has had many occasions to learn from people as well. Jeff loves to talk to our alumni about their lives and their expertise. He returns from reunions and from visits with them full of information about such matters as the latest developments in courtroom techniques, the structuring of business deals, building construction, computer advances, and the theater. His favorite students have been those who challenged him with good arguments, especially those who combined overlooked perspectives with realistic proposals for change. He likes a good argument, especially with a bright, committed 24-year-old. Jeff hires administrators who look for new techniques and keep pushing the School (and the faculty) forward. He considers it a major, and most enjoyable, obligation of the dean to read everything that the faculty has written every year.

It is fun to work with Jeff because he brings the rest of us along with him when he dives into a subject. He's a technological whiz, so we saw the latest gadgets for computers and distance communication. The cell phones became smaller and included more fancy features over the years. The Law School is now wireless and has facilities for teaching across continents. Our budgets are systematized and analyzed, accessible for planning purposes in ways that were not dreamed of before Jeff took control. The lawsuit over affirmative action engaged us in learning how to evaluate social science data, analyze courtroom technique, and even talk to the media as well as in developing constitutional doctrine. Plans for the new building have taught us about cooling systems and construction costs, as well as how architects and engineers think through models and drawings as much as words.

Governing a university with the breadth of Cornell is the obvious next step for Jeff. Now he can learn about astronomy and medicine and industrial relations and Russian and ornithology and hotel management and archeology. . .

FAREWELL

Laughter, praise, humor — and a stuffed cloth duck on crutches — were the order of the evening as friends and colleagues gathered to bid farewell to Dean Jeffrey S. Lehman, '81, as he ends nine years as dean of this Law School to become president of his other *alma mater*, Cornell University.

Acting as emcee for the evening, Richard D. Friedman, the Ralph W. Aigler Professor of Law, opened the evening by noting Lehman's "determined, resourceful, and intrepid leadership."

Lehman, who at age 37 became the Law School's dean nine years ago, leaves the School "more prosperous, more relevant, more cohesive, and more vibrant than when he came," Friedman told the 160 people who filled the Lawyers Club for the occasion. Taking a line from Lehman's regular talk to graduates at commencement, Friedman told the departing dean: "If you ever decide to return, our arms will be open to welcome you home."

For his part, Lehman reported that being dean "has been enormous fun for me."

"I can't really say enough individual thank yous," he said after listening and laughing through comments from a series of colleagues. Thank you "for your friendship, kindness — and discretion — tonight," he said.

Lehman singled out Peter K. Westen, the Frank G. Millard Professor of Law, and Douglas A. Kahn, the Paul G. Kauper Professor of Law, as "the teachers who made me want to teach law, the co-authors who put their own reputations at risk" to write with him.

He also expressed special thanks to former Law School deans Theodore J. St. Antoine, '54, and Terrance Sandalow, who were in attendance, and to Lee Bollinger, the former dean and former U-M president who now is president of Columbia University, for their "gentle and supportive thought." Lehman thanked



Departing Dean Lehman gets a standing ovation from colleagues and friends at his farewell dinner.

former U-M President and Law Professor Emeritus Robben Fleming and current Law School Campaign Chairman Bruce Bickner, '68, and extended his special appreciation to his former and present office assistants, Lillian Fritzler, Amy Flanagan, Rozona Kelemen, and Julie Rooney.

"In leaving the Law School, I recognize that I am leaving the most extraordinarily gifted group of scholars of its size anywhere in the world," Lehman said. "You really don't know how good you are."

Other speakers included former Associate Dean and now Francis A. Allen Collegiate Professor of Law Christina B. Whitman, '74; former Associate Dean for Clinical Affairs Suellyn Scarnecchia, '81, now dean of New Mexico State University Law School; Richard O. Lempert, '68, Eric Stein Distinguished University Professor of Law and Sociology and director of the University of Michigan's Life Sciences and Society Program; Law Library Director Margaret Leary; and Associate Dean for Academic Affairs Evan Caminker.

- "He babysat my kids when he was a student; their IQs went up 50 points," quipped Whitman, one of Lehman's teachers when he was a law student and later his associate dean for academic affairs for four and one-half years. "I really love working with Jeff," she said. "I spent nearly five years seeing him almost daily. . . . My affection and respect for him grew."
- Scarnecchia recounted how correct and sensitive Lehman had been in his response to the terrorist attacks of September 11, 2001. "We have to get over to the Lawyers Club and be with the students," he said then. "It

was a wonderful lesson to us as dean," Scarnecchia recalled. "Jeff's instinct was to be with the students. He moved us to go and provide the compassion that they needed at that moment."

- Lempert drew his initial remarks from his report on Lehman's review for tenure as a law professor more than a decade ago. It is "obvious that Jeff has and knows how to employ scholarly equipment," Lempert wrote then. "Overall, . . . Jeff is likely to become a significant scholar. . . . He has careful, accurate judgment" and "is the model of what an engaged academic should be." He concluded: "I think Jeff did spectacularly as a dean. . . . There are two schools Jeff loves. We've had him for a while, and now its time for the other [to have him]."
- Leary praised Lehman's "ability to build a strong, sustainable, and broad community at the Law School." She presented Lehman with a framed photo of the Cornell University insignia that makes up a panel of the windows in the Reading Room. It was one of several gifts from the Law School community that Lehman received at the banquet.
- "You have done so much for this institution," Caminker told Lehman after relating some side-splitting accounts of traveling with the dean.

At his farewell dinner, Lehman chats with Patricia Kennedy and Professor Emeritus Frank Kennedy.

The evening also brought announcement of the new Jeffrey Lehman Prize, to be given each year to the outstanding student in the Legal Practice Program. The program, required of all students, began during Lehman's tenure as dean and has been emulated at many law schools across the country. Taught by full-time clinical assistant professors, the Legal Practice Program includes training in a variety of legal writing styles — from client letters to court briefs and advocacy writing — as well as in court performance. The program replaces the former Case Clubs that had been taught by third-year law students.

Oh, yes, let's not forget the stuffed duck on crutches whose unwrapping opened the evening. The lame duck, that is. When he opened the package containing the lame duck, Lehman still had 56 official days left to his deanship.



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'A time to build'

INTEGRATED DESIGN

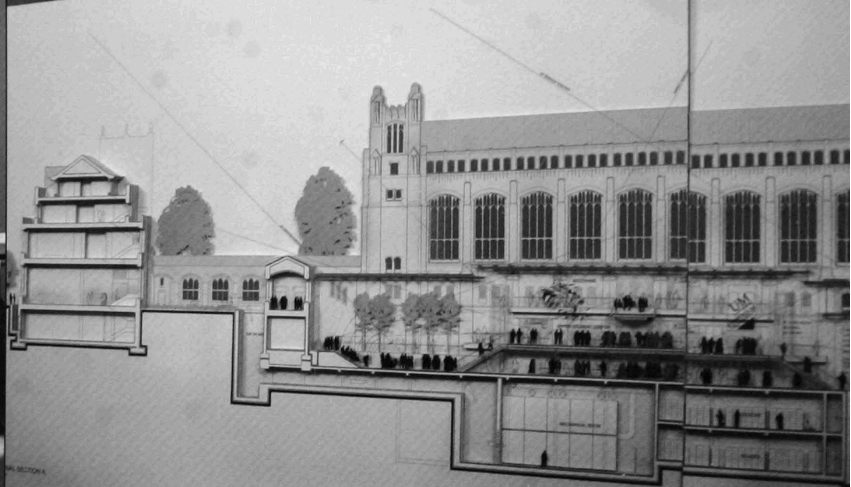
SOLUTIONS: THE HOME TEAM

The bright, airy, glass-roofed piazza that architect Renzo Piano plans as the new entryway to the Law School will be “the social and convivial space” that most likely will become the best-known feature of the Law School of the 21st century.

To those students, faculty members, guests, and others who come to know the Law School well and use it extensively, however, the renovated and expanded facility will become a working mosaic of cutting edge technology, boundary pushing pedagogical settings, and spaces for discussion, planning, and public lectures and other programs.

The 160,000 square foot expansion of the Law School, in other words, will meld unfettered vision with nuts-and-bolts rigor into a partnership of dream and detail. Construction is to include a 90,000 square foot center for student life and conference auditorium on Monroe Street and 70,000 square feet in a new building that completes the Law Quadrangle at the corner of Monroe and Tappan Streets. Net gain will be about 90,000 square feet because the entry/student life area is to replace the aluminum-clad building that now houses the above-ground library stacks. As part of the project, an additional 27,000 square feet of existing space in the basement of Hutchins Hall and the Legal Research Building will be renovated.

Enter Troy, Michigan, based Integrated Design Solutions (IDS), the “local” firm in the project. “Our role here is to coordinate the overall effort of all the design firms, all the engineering firms,” explained IDS President Paul A. Stachowiak. “The structural contractor on the project is from New York,” Stachowiak continued, “the mechanical/utilities contractor from Boston, the civil engineering firm from



Michigan. And there are a variety of other specialty consultants.”

“It’s like a Swiss watch” to synchronize all these players, and IDS’ “primary role” is one of coordination, Stachowiak explained. The firm also must ensure that contractors correctly apply local code requirements, and IDS will verify that contractors fully understand local climatic, soil, and other conditions specific to this site. IDS also will provide cost estimates at the conclusion of each design phase. In addition, according to Stachowiak, “we take the lead role in the contract document phase.”

Stachowiak added that as the contract documents stage gets underway, a member of the Renzo Piano Building Workshop will take up residence with IDS and remain here in Michigan for the duration of the project. His role, expected to begin next year, will be to ensure that the design intent is understood and to coordinate the efforts of the Genoa- and Paris-based Piano with IDS and the construction crews working on the site.

IDS works on projects at other universities — at more than 20 universities in Michigan, among them Central Michigan, Eastern Michigan, Michigan State, Wayne State, and Michigan Technological University — as well as at the University of Michigan, where the firm has been involved in projects at the U-M Hospitals and East Quad/Residential College.

With its blend of architectural and engineering expertise, IDS focuses on education, healthcare, commercial, and engineering projects, with a significant majority of its effort going into the intricately specialized field of education. *Crain’s*

ranked IDS as Southeast Michigan’s 15th largest architectural firm in 2002, based on 2001 revenues.

Founded as an engineering firm in 1963 and full service since 1976, IDS’ 77-person staff includes licensed architects and engineers whose blend of specialties offer expertise from concept to construction.

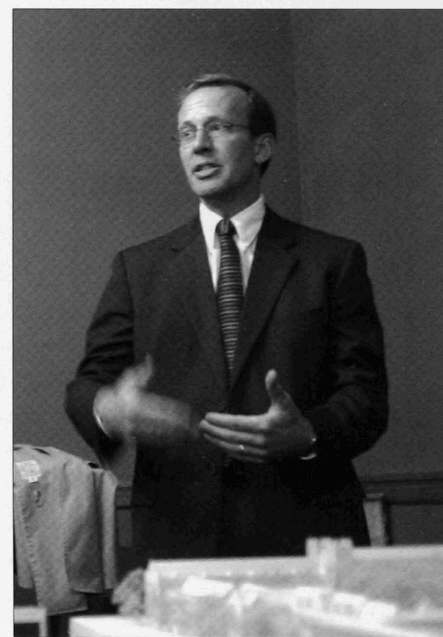
For example, five architects, two mechanical engineers, and two electrical engineers, have been involved in the development of the schematic design phase and cost estimating of the Law School project. In addition to Stachowiak, the architects include Chuck Lewis, David Battle, Larry Hamilton, and Marek Nowakowski.

For Stachowiak, working on the Law School expansion is a triple-plus assignment. A 1977 graduate of the U-M’s School of Architecture and a specialist in college/university projects, he’s enjoying the return to his *alma mater*. He’s pleased to be working on what he views as the U-M’s showcase structures. And he’s elated that IDS is teamed with Renzo Piano, one of the world’s foremost architects with a reverence for worthy existing architecture.

“When you think of the University of Michigan, you picture the Law Quad,” Stachowiak explained. “It’s that piece of architecture that symbolizes what the University is about. It’s an architectural styling that needs to be respected.

“I’ve seen a number of world-famous architects who just want to do their own thing. I think Renzo loves this site. The care of this building is very important to him. He’s a very talented person who cares about the architecture.”

Integrated Design Solutions President Paul A. Stachowiak, center, listens as architect Renzo Piano, right, makes a point during a recent visit to the Law School. At left is Renzo Piano Building Workshop architect Jeremy Boone. Below, Stachowiak discusses aspects of the project.



Doan, Sheehan win their Campbell case

Third-year law students Joshua A. Doan and Christopher M. Sheehan convinced the “Supreme Court” of the legal rightness of their case and captured top honors in the 79th annual Henry M. Campbell Moot Court Competition in the spring.

Arguing on behalf of the United States in the hypothetical case, Doan and Sheehan convinced the judges — Judge Harry T. Edwards, ’65, of the U.S. Court of Appeals for the D.C. Circuit; Judge Marsha Berzon, of the U.S. Court of Appeals for the Ninth Circuit; and the Hon. Guido Calabresi, of the U.S. Court of Appeals for the Second Circuit — that the “Stop Terrorism at Home Act” (STAHA) does not violate the Fifth Amendment’s equal protection guarantee because it falls under Congress’ broad power over immigration and naturalization.

Arguing on behalf of the fictional petition, law students Thomas E. Hogan and Nadia I. Shihata claimed that their client was impermissibly classified as “suspect” and that the act fails strict scrutiny. The three judges voted Hogan the prize for the mock trial’s winning oral argument.

“We’re looking for coherent theories,” Edwards told participants in the judges’ post-decision remarks. It’s also important that briefs be written meticulously because judges go over them before the trial, Edwards added. “We do a lot of preparation, and we have a pretty strong view of what the case is and how it ought to be decided.”

Judges Guido Calabresi, Harry T. Edwards, ’65, and Martha Berzon listen intently as arguments unfold in the final trial of the 79th annual Henry M. Campbell Moot Court Competition

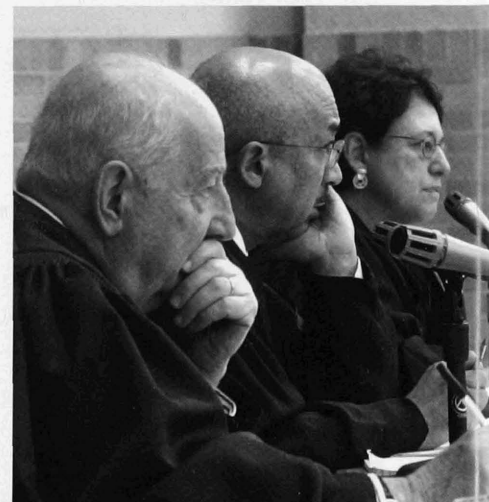
Berzon and Calabresi also offered advice:

- “One of the things that is most important is not to stick to your guns when your guns are pointing the wrong way,” Berzon explained. It’s important to “see where the argument is going sufficiently so you can stay with it.”
- Judges offer hints to the attorneys arguing in front of them, Calabresi noted. “Look for the softballs when the court is pitching them. Don’t assume that everything we say is trying to trap you.” He added, “Listen to the argument the court is making to the other side. If you see that the court is troubled with something on the other side and you can use it, that’s very important.”

Berzon and Calabresi’s schedules also permitted them enough time to do additional programs during their visit to the Law School. Earlier in the day, Berzon presented a program on clerkships, sponsored by the Office of Career Services, and Calabresi, in a program sponsored by the American Constitution Society, spoke on “Should Liberals be Egalitarian or Libertarian?”



Joshua A. Doan and Christopher M. Sheehan, seated at left, were the victors in this year’s Henry M. Campbell Moot Court Competition against the team of Thomas E. Hogan (standing) and Nadia I. Shihata.





The 2003 Fellows in Refugee and Asylum Law: From left are Erin Meek, Anthony Gill, Lisa Bagley, Niketa Kutkarni, Azudils Shahshaliani, and Ali Ahmad

REFUGEE AND ASYLUM FELLOWS

In conversations that mixed fond memories with excited anticipation, law students who have been named Refugee and Asylum Law Fellows for 2003 gathered for lunch and got acquainted with fellow students who had been fellows in 2002. Many of the new fellows will spend this summer in the same agencies as their 2002 predecessors, although one, Ali Ahmad, will work in a new placement in Auckland, New Zealand, with the Refugee Status Appeals Authority.

Other fellows will serve with Human Rights Watch in New York, the UN High Commissioner for Refugees in Washington, D.C., the European Council on Refugees and Exiles in Brussels, Human Rights Watch in New York, Amnesty International in London, and the Jesuit Refugee Service in Zambia.

The Law School's Refugee and Asylum Law Program and similar programs offer "important opportunities for our students to see important ways that you can contribute to the world," Assistant Dean for International Programs Virginia Gordan told the fellows.

"What you are doing is a way of giving thanks for what you've got," Gordan said.

"All of us have been given many gifts, and we're often not aware of that. Each of you has the gift of education that went

before the Law School, and also the gifts of good health, a good education, and a can-do attitude. I think it is very important that institutions like this one produce alumni who think, 'What kind of difference can I make in the world?'"

"It's an honor to have such extraordinary people who want to work in asylum and refugee law," said Professor James C. Hathaway, who directs the Law School's Refugee and Asylum Law Program.

In addition to Ahmad, the 2003 fellows and their assignments include:

- Lisa Bagley, European Council on Refugees and Exiles, Brussels.
- Anthony Gill, Jesuit Refugee Services, Lusaka, Zambia.
- Erin Meek, Human Rights Watch, New York City.
- Niketa Kutkarni, Amnesty International, London, England.
- Azadili Shahshaliani, UN High Commissioner for Refugees, Washington, D.C.

Each fellow is matched with a supervisor approved by the Refugee and Asylum Program. In many cases, fellows work with the same co-workers and supervisors as their predecessors, which provides for continuity and familiarity with the agency's policies, operations, and personnel.

Looking at immigration law

Practicing immigration and asylum law offers the opportunity to directly affect someone's life in "a very positive way," according to Troy-based practitioner David H. Paruch. Paruch described the satisfactions of his practice as part of a panel discussion on immigration law presented at the Law School last fall by the Student Network for Asylum and Refugee Law.

Immigration law is "one of those portable types of practices" in which your clients often go with you, Paruch explained. "I like what I do. And I (usually) like my clients."

The other panelists were Michael M. Benchieitrit, of the Troy, Michigan, office of Fragomen, Del Rey, Bernsen & Loewy PLLC, and David C. Keolsch of Freedom House, a refugee assistance agency in Detroit.

Canadian-born Benchieitrit said his frustrating experience with the slowness of getting his own work authorization was a major factor in his decision to practice immigration law. Fragomen, Del Rey, with 24 offices worldwide, specializes in corporate immigration law to assist companies in getting international workforces.

Keolsch came to Freedom House after clerking for an Alaskan court and doing corporate real estate law in Detroit for four years with Clark Hill. "I got the asylum bug in the clinics in law school in Washington, D.C.," he explained. During his time with Clark Hill he did five to six *pro bono* asylum cases annually "and eventually got on the board at Freedom House. When the opening [at Freedom House] came, I took a big pay cut and leaped into the unknown."

BLSA celebrates 25th annual Butch Carpenter gala

Johnnie L. Cochran Jr. looms large on the legal horizon — he has defended clients like Michael Jackson, Sean “Puffy” Combs, and O.J. Simpson — and he also has defended people whose names otherwise never would have risen above the horizon, like Haitian immigrant Abner Louima and Guinean immigrant Amadou Diallo.

“Service,” Cochran told the packed house at the 25th anniversary Alden J. “Butch” Carpenter Memorial Scholarship Banquet, “is the price you pay for the space you occupy.”



“You can change America and make it better than it is,” keynote speaker Johnnie L. Cochran Jr. explains.

Cochran was keynote speaker for the annual banquet, which commemorates the short life of Carpenter, who died before graduation from the Law School. Carpenter was known for his commitment to using his Law School education to help economically depressed communities, and each year since 1978 the Law School’s Black Law Students Alliance has awarded one or more scholarships to first-year law students whose goals reflect Carpenter’s.

“You don’t have to be rich and powerful to do great things in this society,” Cochran said, drawing on the evening’s theme. “Just heed the call to justice, as Butch did.”

Speaking less than two weeks before the Law School’s admissions suit was to be heard in the U.S. Supreme Court on April 1, Cochran praised the Law School and the University of Michigan for fighting to maintain a role for race in admissions decisions. “Why can’t we be a nation of racial cohesion and common destiny for all?” he asked. “To do this, affirmative action must remain intact or else the clock threatens to be turned back forever.”

Cochran has won many awards for his work on behalf of American society’s less fortunate people — among them the Civil Rights Lawyer of the Year Award from the Los Angeles Chapter of the NAACP Legal Defense Fund and the President’s Award from the California Attorneys for Criminal Justice, the latter for his work in winning the release of Black Panther Elmer “Geronimo” Pratt, who had served 27 years in prison for a crime he did not commit. Cochran’s concern was evident as he cataloged African Americans’ outsized representation in the prison system and their shortfalls in life expectancy, education, jobs, and wages.

“In the end, it comes down to one word — privilege,” he said. “On one side there is unearned privilege, on the other unearned suffering.”

“Whenever I wonder what is the right thing to do, I ask, ‘What would Thurgood do?’” he continued, referring to Thurgood Marshall, the civil rights legal activist who later became a U.S. Supreme Court justice. “He was always doing for the least of us.

“This is not a dress rehearsal. This is the real thing.

“If we are going to leave anything to our children, to those who come behind us, we must have the courage of our ancestors.”

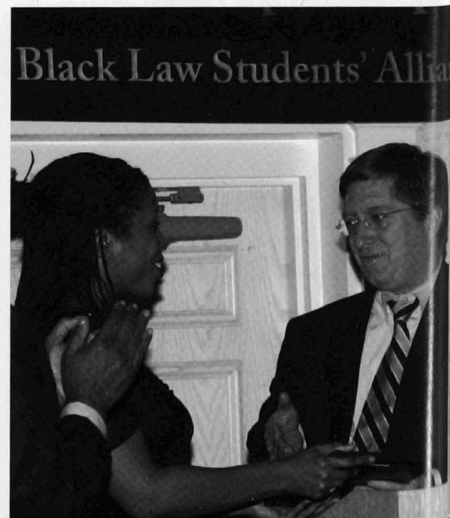
This year, three first-year law students received a total of \$20,000 in Butch

Carpenter scholarships through the Alden J. “Butch” Carpenter Memorial Fund. The recipients were Maureen “Chi-Chi” Onyabako, Wanda Joseph, and Ronald Falls.

The scholarships are given to students “who are victims of historical social discrimination, who have demonstrated a propensity to practice business law, who indicate an intent to apply their legal training in a manner which will assist in the development of an economically depressed area, and whose career paths, graduate training, community involvement, or personal drive may have contributed significantly to the decision to admit them into law school.”

Three special awards also were presented:

- To Dean Jeffrey S. Lehman, ’81, for his longstanding support of the Black Law Students Alliance and its goals and programs.
- To visiting professor Frank Wu, ’91, as “BLSA Faculty Member of the Year” for his “special dedication and commitment” to issues important to BLSA. Wu is a professor at Howard University Law School in Washington, D.C.
- To outgoing BLSA president Travis Townsend as “Member of the Year” during this “especially trying year.”



Dean Jeffrey S. Lehman, ’81, receives a special award for his longstanding support of BLSA and its programs.

Civil Liberties after 9/11: Rob Precht, left, assistant dean for public service, debates John Choon Yoo, deputy assistant U.S. attorney, who is on leave from Boalt Hall at UC-Berkeley to serve in the Justice Department's Office of Legal Counsel.



THE QUESTION OF PROSECUTING TERRORISTS

Are military commissions or civilian criminal courts the more appropriate for prosecuting suspects of terrorism?

Assistant Dean for Public Service Rob Precht and Deputy Assistant U.S. Attorney John Choon Yoo squared off on this question in a debate at the Law School late last fall. Civilian courts can handle such cases perfectly well, argued Precht, while, for Yoo, the idea of a military commission “makes sense” for use in the war against terrorism.

If you use a military tribunal, who decides who is charged with violating the rules of war? asked Precht. The president, he answered. “That means that on President Bush’s say-so any one of us can be arrested, charged, and held in detention without a lawyer.”

“It’s probably legal” to establish such a commission and have the president exercise such wartime power, Precht acknowledged. But “I submit to you that there is no chance at all that terrorists pose any threat whatsoever of defeating the United States militarily.”

Even during the height of the Cold War with the Soviet Union, when the U.S.S.R. had the weapons and power to challenge the United States, there was no demand for Ethel and Julius Rosenberg to be tried anywhere but in a civilian court. The Rosenbergs were convicted and executed.

Civilian trials also were used successfully in the case of the first World Trade Center bombing in 1993 (Precht was a public

defender at the time and represented one of accused bombers), the bombing of the Murrah Federal Building in Oklahoma City, and in other similar cases, according to Precht. “There is no showing whatsoever that the civilian system has been unable to deal with terrorism,” he noted.

Precht decried the military commission’s lack of protection for impartiality — “an essential of basic justice.” He concluded: “Is this going to make our democracy safer? I think in terms of our long-term interest in our fight on terrorism [that] ultimately our ability to prosecute the war on terrorism is going to depend on our credibility abroad.”

For Yoo, the level of destruction and the more than 3,000 deaths from the terrorist attacks of 9/11 raised the action to the level of war. The attack was military in character — it was an effort to “decapitate” the country’s financial and military brain centers, he explained. What was new was that the attack was conducted by a private organization rather than a government.

Previous U.S. leaders like George Washington, Andrew Jackson, Abraham Lincoln, Franklin Delano Roosevelt, and Dwight D. Eisenhower used military commissions during wartime, said Yoo, who is on leave from the faculty of Boalt Hall law school at the University of California-Berkeley to serve in the Justice Department’s Office of Legal Counsel.

(He serves in the same position — and occupies the same office — that Associate

Dean for Academic Affairs Evan Caminker held during the closing year of the Clinton administration.) Yoo said there are two major reasons why a military commission is appropriate during the war on terrorism:

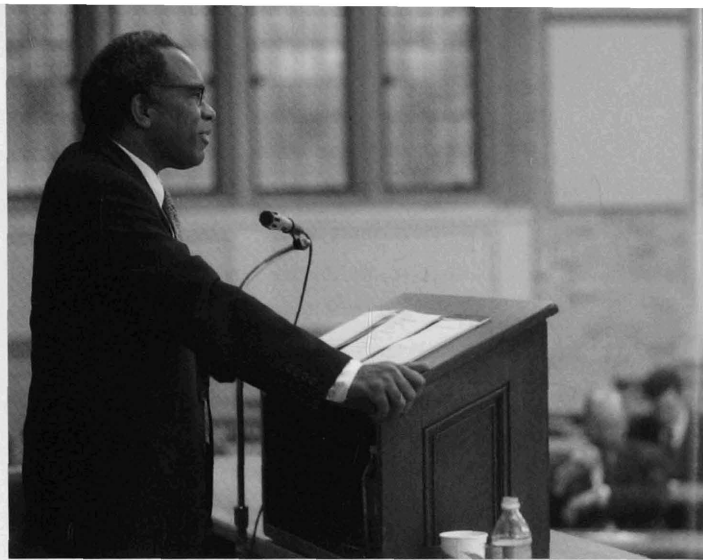
- The commission is a compromise between the needs of a justice system and the needs of fighting a war.
- “The need to collect and protect information is in some amount of tension with having an open trial. In that situation the military commission makes sense.”

He added that the White House has incorporated into the military commission’s rules civilian court safeguards like the rights to counsel, to remain silent, and to confront witnesses. He also noted that as of early November no military commission trials had been held.

Yoo used Al Qaeda leader Osama Bin Laden as an example of how the 9/11 attacks have changed anti-terrorism efforts from an anti-criminal footing to a war-like footing. A few years ago, he said, when Bill Clinton was president, U.S. intelligence had pinpointed the flight that was taking Osama Bin Laden from Sudan to his new base in Afghanistan. But U.S. officials did not seize Bin Laden because they felt they lacked probable cause to justify such action to a federal court. Had it been after 9/11, Yoo theorized, officials would have made a different decision.

The debate was presented by the Federalist Society.

Harvard Law School Professor Randall Kennedy delivers the 43rd series of Thomas M. Cooley Lectures at the Law School.



Cooley Lecture | REPARATIONS ARE WARRANTED

The United States government owes African Americans reparations for the burden of slavery and unequal treatment afterward, but the form of that *mea culpa* has yet to shape itself, according to Harvard Law Professor Randall Kennedy, who delivered the Thomas M. Cooley Lectures at the Law School last fall. The two lectures were delivered on consecutive days.

"I'm going to argue that the government of the United States of America ought to enact a program of reparations to address the wrongs committed by the government against African Americans," Kennedy began his second lecture. He devoted his first talk to the historical recurrence of voices seeking reparations.

A native of Columbia, South Carolina, Kennedy is the author of *Race, Crime, and the Law* (Pantheon Books, 1997), *Nigger: The Strange Career of a Troublesome Word* (Pantheon, 2002), and at the time of his talks was finishing *Interracial Intimacies: Sex, Marriage, Identity, and Adoption*, which appeared early this year.

Slavery, Jim Crow laws, and segregation all proved that "clearly the U.S. government has participated in racial wrongs against African Americans," said Kennedy, the Henry L. Shattuck Professor of Law at Harvard. And despite "notable and salutary improvement, especially since World War II, I urge that the United States expand on

the all too limited, all too timid means" it has taken to redress these wrongs.

Noting that his idea of reparations is "considerably more modest than many reparationists have in mind," Kennedy proposed a "program of symbolic apology, authentic apology to be sure, but symbolic apology. . . . The question is to craft a type of symbolic action that will show the people of the United States and the people of the world that the U.S. really means it when it offers an apology."

Such a policy may range from cash payments to affirmative action programs, according to Kennedy. He noted that each year U.S. Rep. John Conyers of Detroit proposes establishment of a *commission* to study and recommend a means of reparation.

Kennedy added that "any policy requiring rigorous racial policing is a policy I would eschew. . . . Any program that is dependent on racial identity lines immediately raises the specter of racial policing"

To the two major criticisms of reparations, Kennedy responded:

- The Pandora's Box already has been opened, most notably in 1988 when the United States apologized and paid money to survivors of the Japanese American internment camps where people of Japanese descent were held during World War II.

- The "I didn't do it and my people didn't do it" objection doesn't work because "it's the U.S. government that ought to offer an apology." And "if I want to be part of the American polity, I should with good grace accept the bitter with the sweet."

"American society has a deep reservoir of good will, decency, and desire to do right," Kennedy said. "I would go as far as necessary to make the U.S. government acknowledge racial wrongs. And this extends beyond *Brown v. Board of Education* and the Civil rights Acts of 1964 and 1968. . . . My notion of reparations is that there has to be an element of self-consciousness about it. I think for the soul of America, reparation, apology, and redress is needed."

The Cooley Lectures are named for Thomas M. Cooley, a member of the first law faculty at the University of Michigan in 1859, dean of the Law Department, and from 1864 – 1885 a member of the Supreme Court of Michigan. In 1887, Cooley was appointed the first chairman of the Interstate Commerce Commission.

Michigan Supreme Court justice: Use your dictionary

The meaning of a law lies in its words as lawmakers approved them, and “the responsible judge must subordinate his personal sense of justice to the public view of justice,” according to Michigan Supreme Court Justice Stephen Markman. “The role of the judge is not to do justice, but to do justice under the law,” Markman explained earlier this year during a talk at the Law School sponsored by the student chapter of the Federalist Society.

In a wide-ranging talk on “The Contemporary Judicial Debate,” Markman outlined his thoughts on what makes a responsible judge. The judge’s basic duty is to determine what lawmakers meant when they wrote the law, but this can become a complex and rigorous undertaking, he noted. One of the good judge’s most useful tools is a dictionary, he said.

Among his other points:

- “The role of the judge is to say what the law is, not what the law ought to be. . . . Saying what the law is involves deference to the lawmaker.”
- Don’t refer to “the spirit of the law” beyond its description. “In my opinion, the judge relying on the spirit of the law has moved beyond the law.”
- Asking questions like “Are the laws consistent with deeply held cultural values? Do they further the goals of society? Do they reflect the settled weight of considered opinion?”: is “a rejection of the belief in popular sovereignty” because the judge is employing an authority higher than the law itself.
- The “contemporary debate” of judicial restraint v. judicial activism is “not well-described.” The better description is one of “interpretism v. non-interpretism,” in which “the work of the judge is to let the chips of the law fall where they may by interpreting the words of the law as what they usually mean.”



The Foley & Lardner Room – Bill Abraham, '72, a partner in Foley & Lardner of Milwaukee, Wisconsin, and Dean Jeffrey S. Lehman, '81, prepare to unveil the plaque naming The Foley & Lardner Room in Hutchins Hall. Abraham and Larry Bonney, '88, headed a committee that raised more than \$500,000 from Foley & Lardner and its 50-plus Law School graduates to renovate the room into a state-of-the-art teaching space that continues to reflect its original lines and elegance:

- Out-of-sight connections beneath the tables provide hookups for electrical power, laptop computers, and Internet connectivity.
- New electrical panels and equipment provide for video and computer screen projection and audio-visual teaching tools. A hand-held control box allows the instructor to operate the electronic equipment while moving about the room.
- Raised ceiling wells and recessed lighting have replaced the former fluorescent lighting. Six hanging chandeliers provide modern lighting while retaining the traditional décor of the room.

In his dedicatory remarks, Lehman noted that “the classroom is the heart of a law school” and thanked Foley & Lardner for its generosity in helping Law School facilities meet the needs of today’s students. A plaque on the door designates the room, Hutchins Hall 220, as The Foley & Lardner Room. An additional plaque honors Foley & Lardner partner Michael W. Grebe, '70. Firm partner Jim Sprow, '67, used the Foley & Lardner Room the day before its dedication to present a program on computers and the law.



Kudos

Law School students involve themselves in a variety of competitions and win a multiplicity of honors each year. This academic year has followed suit, with students winning awards ranging from moot court competitions to working fellowships. Here is a sampling of honors that law students have won during the recently ended academic year.

Top National NALSA Chapter and Moot Court Winners: The Law School-based University of Michigan Chapter of the Native American Law Students Association has been named the National NALSA Chapter of the Year for 2002 – 2003. This is the highest honor that the national organization awards, and is given in recognition of a chapter's dedication to its local Native American community and the study of Indian law. The award was presented at the Federal Bar Association Indian Law Conference in the spring. Law student Beth Kronk is chair of the Law School chapter.

Teams from the Law School also won national honors in the National Native American Law Students association moot court competition at Columbia University earlier this year. A team composed of law students Matt Baumgartner and Kronk won first place national honors by beating out their nearest rival, a team from Columbia University, in the final round. The Baumgartner/Kronk team also won the award for best brief in the moot court trial.

A second team from the U-M Law School, made up of law students Brian McClatchey and Nicole Schechinger,

advanced past 30 other teams to make it into the top 16 teams in the competition.

(See page 51 for a story on this year's Indian Law Day program, sponsored by NALSA and the Environmental Law Society.)

Best-Written: Third-year law student Sonia Boutillon won the International Law Student Association's Francis Deak Award for the best student-written work published in a student-edited international law journal. She received the cash prize for her article "The Precautionary Principle: Development of an International Standard," that appeared at 23 *Michigan Journal of International Law* 429 (2002). The award was presented at the annual dinner of the American Society of International Law in the spring.

Jessup Moot Court: Law students Francis Franze, Anthony Gill, Paul Hood, and Una Kim were named one of the world's top 16 teams in Jessup Moot Court competition during the annual meeting of the Association for International Law in Washington, D.C., in April. Coached by Stacey Spain and Roger Stetson, the team reached the "sweet 16" after four days of competition involving nearly 80 teams from around the world. Along the way the Law School foursome met and bested teams from Taiwan, The Netherlands, and Northern Ohio.

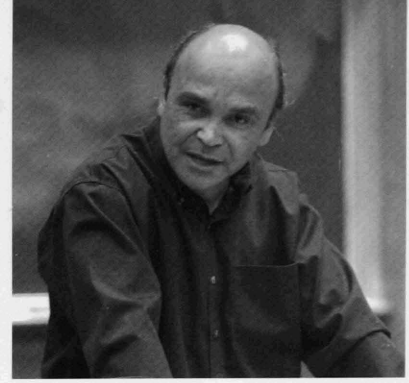
Jenny Runkles Award: Law student Jenny Runkles was known for her unquenchable verve, and when she died two years ago at age 23 in an automobile accident in Texas, her fellow students vowed that her enthusiasm for life would continue to be part of Law School life in the form of the Jenny Runkles Award.



Second-year law students Maren Norton and Ebony Howard savor the moment when they win the first annual Jenny Runkles Award scholarships.

"She had a very special gift, which was that rare ability to make every person with whom she interacted feel as though they were the most important person in the world," Assistant Dean of Students David H. Baum, '89, said of Runkles, who just had completed her second year of legal studies at the time of her death. Student organizations and individuals throughout the Law School raised some \$25,000 to establish the Jenny Runkles Award, a scholarship to be presented to a second-year law student or students who exhibit "a selfless commitment to improving the Law school community and society as a whole, through devotion to public interest and diversity." The first annual award was presented late last fall at the Law Student Senate Ball, renamed for the occasion the Jenny Runkles Fall Ball. The recipients were Ebony Howard and Maren Norton. Howard led the group that formed the Wolverine Street Law Organization, which provides legal information to community members in particular need, including pregnant and parenting teenage mothers, jailed youth, and homeless people. Norton is president of the Law School Student Senate and, in Baum's words, "has been an effective communicator who has demonstrated an ability to bring together students, administrators, and faculty, using both humor and superb interpersonal skills."

Indian law lacks coherence and instead is "a series of justifications," University of Minnesota professor David Wilkins tells a Law School audience in February.



Speaker: Supreme Court decisions erode Native American sovereignty

To David Wilkins, an associate professor of law, political science, and American Indian studies at the University of Minnesota, the federalism-enhancing decisions of Chief Justice William Rehnquist and the U.S. Supreme Court have used "linguistic, semantic, rhetorical, strategic, and other devices" in a "sustained and systematic curtailment of sovereignty" for Indian tribes in the United States.

The "alleged neutrality of the rule of law" has created "an axis of perpetual insecurity" for Native Americans and others without access to power, Wilkins asserted in a talk at the Law School in February. "Federal Indian law is not and never has been a coherent body of law. Rather, it is a series of justifications," said Wilkins, whose visit was sponsored by the Native American Law Student Association and the U-M's Program in Native American Studies, which is part of the Program in American Culture. A prolific writer, Wilkins is the author of *American Indian Sovereignty and the U.S. Supreme Court: A Masking of Justice* (University of Texas Press, 1997). He titled his talk "A Judicial Tsunami: The Rehnquist Court's Interpretation of Absolute Power Over Aboriginal Peoples."

The erosion of Indian sovereignty means that Indian nations are being reduced to municipalities "subject to states, and even in some cases counties," Wilkins said. Tribes can claim only four victories in the Supreme Court since 1991, he reported. "Rehnquist's strength is federalism," but "the more deferential the judge is to a state the more likely it is to vote against Indian causes.

"The Court's actions may be lawful, but there is no room for justice... absent a moral basis, the rule of law cannot indefinitely stand."

and Vaughn will ensure that children get the help they need.

Woodward will work with the National Center for Youth Law to provide education-related legal services to foster youth, homeless children, and students in alternative educational settings.

Established in 1988, the fellowship program awards 25 fellowships nationwide each year. Each fellowship provides salary and benefits for one year and usually is renewed for a second year. The fellowships help recipients work in positions to provide legal services to the poor, homeless, elderly, those deprived of human or civil rights, and others.

Many of the fellows and former fellows remain in contact with each other as well as with supervisors and employers. This network of Skadden Fellows and colleagues forms what supporters call a "public service law firm without walls" whose members support and assist each other in a variety of ways. Fourteen Law School students have won Skadden Fellowships since 1995.

Builders: A group of Law School students spent their spring break in February working on a Habitat for Humanity project on the Hawaiian island of Kauai. The group included: Andrew Frey, Tally George, Leah Goodman, Merrill Hodnefield, Elizabeth Husa, Ben Klein, Grace Lim, Molly Manning, Adam Silver, and Sara Sterken.

All-Big Ten: First-year law student Joe Sgroi, a long-snap specialist with the football Wolverines, was named to the fall Big Ten Academic All-Conference Team. Sgroi was one of 10 football Wolverines student athletes to win the honor, and one of a total of 42 winners from the University of Michigan. He was the only graduate student among the U-M honorees. A student-athlete must have at least a 3.0 grade-point average to be named to the All-Big Ten Team.

Tax Law Challenge: Second-year law students Erika L. Andersen and Jeremy S. Dardick won first place in the American Bar Association (ABA) Section of Taxation's second annual Law Student Tax Challenge in competition at San Antonio, Texas. They won the final victory by besting a team from Southern Methodist University. The Law School receives a plaque and a \$5,000 scholarship commemorating their victory.

More than 30 schools had teams in the competition, which required each team to resolve a transactional problem presented to them. Each team had to prepare a memorandum for a senior partner that analyzed the issue and proposed a solution, as well as a letter to the client explaining the problem and the solution.

On the basis of their performance in this first-stage work, four two-person teams were chosen to compete in the semi-finals, held at San Antonio in January in conjunction with the ABA's annual meeting. Semi-final competition involved undergoing an oral interrogation on their proposal. Judges included the chief counsel of the Internal Revenue Service and a high official of the U.S. Treasury Department.

Skadden Fellowships: Law students Christine Vaughn of Denver, Colorado, and Sara Woodward of Holland, Michigan, have been awarded Skadden Fellowships to provide legal services for those who cannot otherwise get them.

Both women, who graduated in May, begin their fellowship-supported work this year. Vaughn is working with the Washington Lawyers' Committee for Civil Rights and Urban Affairs to represent District of Columbia-area children with serious mental health needs. The resources for evaluation, treatment, and institutionalization, if necessary, are less than adequate,



FISKE FELLOWS HEAD INTO GOVERNMENT SERVICE

Robert B. Fiske, '55, is shown with the 2003 Fiske Fellowship winners: Tara Sarathy and Sarah Anne McKune, and, standing, from left, Christopher William Rawsthorne, George Matthew Torgun, and Wonkee Moon.

Five members of the Law School community have won Fiske Fellowships this year. This year's Fiske Fellowship award winners are headed for government posts in New York and Washington. The winners are:

Sarah Anne McKune, '02, who will be working in the Central Intelligence Agency's Office of General Counsel. "As an employee of the CIA Office of General Counsel, I would be responsible for testing the legality of intelligence operations and for developing national security law," McKune, who has done internships with the U.S. Department of State in Hong Kong and with the UN's International Law Commission in Geneva, noted in her application. "These endeavors would contribute to the foreign relations of the United States and the overall welfare of the American people, as I would hope to make a positive impact on the evolution of U.S. law in this area and ensure its legitimacy."

WonKee Moon, '02, who earned his B.A. at Occidental College, said his interest in government work was inspired by Adjunct Professor Mark Rosenbaum, legal director of the American Civil Liberties Union of Southern California, who taught his Fourteenth Amendment class. "Because of his dual role as professor and practitioner, he not only discussed principles of the law, but also discussed real world applications. His unique perspective opened my eyes to a career in which I could combine both my love

of the law and my commitment to public service," Moon wrote in his application. He added that "my commitment to public service has its foundations in my experiences as a minority growing up in the United States. During 2002 – 03, Moon clerked for the Hon. Mary J. Mullarkey of the Colorado State Supreme Court.

Christopher William Rawsthorne, a Northwestern University graduate who will be working as an Assistant U.S. Attorney in the New York County District Attorney's Office. "I attended law school because of the jobs that are considered 'public interest' or 'public service' jobs, though I did not even know they were referred to as that," Rawsthorne said in his application. "Since arriving at law school, my interest in public service has continued and I have chosen it as my career path."

Tara Sarathy, '02, who earned her bachelor's degree at Brown University, is clerking until August for the Hon. Stephen Glickman of the U.S. Court of Appeals for the District of Columbia Circuit. When her clerkship is completed, she will begin work in the Department of Justice Honors Program at the Immigration and Naturalization Service.

Gettysburg College graduate **George Matthew Torgun**, '02, will be working in the Office of Administrative Law Judges at the U.S. Environmental Protection Agency in Washington. "I believe that my skills and training are best devoted to making the world a better place to live, and public

service is the way to make that happen," he wrote in his application.

Now in its second year, the fellowship program provides a one-year stipend and three years of education debt repayment assistance to three new fellows each year. In addition, two alternate winners are named each year in case one of the winners for any reason does not work in a government position, as required by the fellowship program. At deadline time some winners and alternates remained unsure of their plans.

The fellowship program was established through a gift to the Law School from Robert B. Fiske, '55, of Davis, Polk & Wardwell in New York City. Fiske has dedicated much of his professional life to government service — he has served as an Assistant U.S. Attorney, U.S. Attorney, Independent Counsel, and on the commission that reviewed FBI security procedures in the wake of the Robert Hanssen spy case — and he has put his resources behind his commitment to ensure that today's Law School graduates have the same opportunity.

"It energizes you to move between the private and public spheres," according to Fiske. "There's a synergy between them — and this is something I talk about to law students all the time.

"The experiences I had in private practice made me do a better job in the government positions. Conversely, the experiences I had in public services significantly enhanced my private practice."

Cook Lecture | IF WE'RE NOT WINNING, SHOULD WE CHANGE?

Baltimore born and bred, Kurt L. Schmoke has watched the American war on drugs from the center of the arena — as a lawyer, part of President Carter's White House Domestic Policy Staff, as an assistant U.S. attorney and then State's Attorney in Baltimore, and three terms as Baltimore's mayor.

His observations slowly and inevitably converted him from favoring active criminal prosecution to his current position that marijuana use should be legalized and all cigarettes — that's *all* cigarettes, including marijuana cigarettes — should be regulated by the U.S. Food and Drug Administration.

Now dean of Howard Law School in Washington, D.C., Schmoke traced his conversion in his talk "Modern Nehemiahs Confront the Drug War: Seeking a New Path to Peace," which he delivered at the Law School in late March in the 41st series of William W. Cook Lectures on American Institutions.

At first, Schmoke recalled, he viewed the drug problem as a legal problem. "We had so many impounded cars that I was sometimes called the biggest used car dealer in Baltimore."

But "I was becoming increasingly concerned and skeptical about our war on drugs. . . . The more I saw, the more I saw a replay of our war on alcohol in the 1920s. The government spends more and more money to prevent [drug] use, which in turn makes their sale more profitable to the criminal element that sells them."

He quickly drew strong criticism when he called for decriminalizing drugs, he reported, so "I adopted a different approach:

"Do you think we've won the war on drugs?"

"Do you think we are winning?"

"Do you think that doing more of the same for the next decade will win the war on drugs?"

"If you can't answer yes, would you consider a different approach?"

"Slow change has begun to occur, but much more needs to happen," he reported.

He also acknowledged that decriminalizing drugs is politically impossible, so he instead has come to support decriminalizing only marijuana. "If we were fighting any other war with such limited results, we would not only get new generals, but a new strategy," he said.

Schmoke also recounted "two conversations that had a profound impact on me" and fed his concern for social issues. During the summer after his first year at Yale Law School, he worked in a Baltimore law firm, and a partner asked Schmoke about his plans for his future.

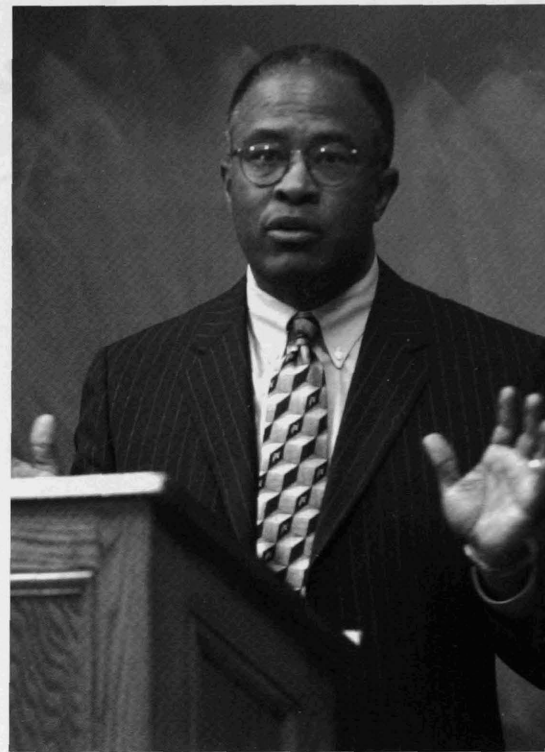
"I told him I would be a lawyer and might be mayor of Baltimore," lawyer-to-be Schmoke answered. "You only told me what you want to be," the partner responded. "You haven't said a word about what you want to do."

"He was right," Schmoke told his Law School audience. "I had been thinking of the symbols and not the substance."

In the second conversation, Schmoke and other law students were talking with a local clergyman about what they would do with their law degrees. "Have you thought of becoming a modern-day Nehemiah?" the pastor asked.

"You could have heard a pin drop," Schmoke recalled.

Nehemiah was a slave's son who became cup bearer to the king, the pastor explained. He forged separate contingents into a workforce with the common goal of rebuilding Jerusalem. One family worked on the wall, another on a gate, for



Howard Law School Dean Kurt L. Schmoke compares the current war on drugs to the war on alcohol of the 1920s as he delivers the William W. Cook Lecture on American Institutions.

example. "To the amazement of those who were watching, they rebuilt the walls of Jerusalem," the clergyman reported.

"The story helped me answer the question of what I wanted to do, not just what I wanted to be," Schmoke explained.

The William W. Cook Lectures on American Institutions are named for William Wilson Cook, who earned his undergraduate and law degrees at the University of Michigan and was a distinguished member of the New York Bar until his death in 1930. Cook's gifts to the U-M and the Law School include the Martha Cook Building (a women's residence hall across Tappan Street from the Law School) and the William W. Cook Law Quadrangle. Author of the two-volume *American Institutions and Their Preservation*, Cook established the William W. Cook Foundation and endowed it to present lectures on American institutions.

This year's Juan Tienda Scholarship winners: Linda Samples, Beatriz Biscardi, and Semma Cuellar.



TIENDA BANQUET KEYNOTER: 'THE DREAM IS POSSIBLE'

Federal District Court Judge Mary H. Murguia is the first Hispanic woman to serve on the U.S. District Court in Arizona, and with her brother Carlos, a federal judge in Kansas, is half of the first brother-sister pair ever to sit on the federal bench.

Two others of her parents' seven children are lawyers. She and her sister Janet both served in the Clinton White House. Her brother Ramon recently served as board chairman for the National Council of the Hispanic organization La Raza.

Not bad for the children of poor parents who had lived in the United States and left, but returned to the United States from Mexico in the 1940s with the belief that "in this country their children might have the opportunity to serve in some of these top service jobs."

But 1950s Kansas was no Shangri La for Hispanics, Murguia said in her keynote talk at the Juan Tienda Scholarship Banquet in February. "We lived dormitory style, with one bathroom for nine people. We did not

have a telephone until I was in the eighth grade." Going to the movie theater meant sitting in the separate section for non-whites. At her father's workplace in a local steel plant, he had to use the restroom for non-whites.

"Looking back, I think my parents saw these challenges as opportunities," Murguia explained. Five of the seven children in the family were attending college at the same time. Four became lawyers.

"It is obvious that education was very important to my parents and my brothers and sisters. I credit their successes in part to scholarships, the federal war on poverty, public schools, and the neighborhood library funded by Andrew Carnegie. . . .

"I submit they could only accomplish what they did because of a level playing field, which this country has supplied."

"I believe that ordinary people can do extraordinary things," she concluded. "As long as dreams outweigh doubts, anything is possible. The American dream is possible."

In other parts of the banquet program:

- University of Arizona Associate Professor of Law Ana Merico-Stephens, '95, received the J.T. Canales Distinguished Alumni Award for her work as a teacher, giving legal presentations throughout Latin America, service as counselor and mentor of Hispanic students at the University of Arizona's James E. Rogers College of Law, and other activities. The award commemo-

rates J.T. Canales (1877 – 1976), an 1899 graduate of the University of Michigan Law School who served in the Texas House of Representatives, where he was the only prominent local Democrat to call for investigation into the Texas Rangers' vigilante tactics toward Hispanics in the lower Rio Grande valley. He remained active in the Mexican-American civil rights movement after leaving state office.

- Three first-year law students — Beatriz Biscardi, Semma Cuellar, and Linda Samples — received separate Juan Tienda Scholarships. The \$10,500 in total scholarships is the most ever presented during the 18 years of the annual scholarship presentations, Scholarship Committee Chair Marty Castro, '88, noted as he presented the awards. Scholarship Committee member Ann Reyes Robbins, '98, a magistrate with the Family Relations Division of Allen Superior Court in Ft. Wayne, Indiana, assisted Castro with the presentations.

The scholarships and annual banquet commemorate Juan Luis Tienda, who was killed in an auto accident prior to beginning his third year at the Law School. Tienda worked during summers with the Migrant Legal Assistance Project in Michigan; he also was president of the predecessor organization to today's Latino Law Student Association, which sponsors the scholarships and banquet. Scholarship winners are "an emblem of Juan Luis Tienda," said Castro, a partner with Seyfarth Shaw in Chicago. "Never forget Juan Luis Tienda when you go back to your communities," he told the recipients. "Give something back."



"Ordinary people can do extraordinary things," keynote speaker Judge Mary H. Murguia, of the U.S. District Court of Arizona, tells listeners during the Juan Tienda Scholarship Banquet.

South African judge: Apartheid could not withstand international law

International law is deeply embedded in the daily legal life of modern South Africa, according to Judge Zakeria Yacoob of the country's Constitutional Court. South Africa's courts are required to incorporate a consideration of international law and treaties into their determination of how a clause of the constitution is to be interpreted.

The South African constitution protects "universally accepted fundamental human rights," Yacoob said. But "no right is absolute, [although] it only can be limited by a general law that is consistent with dignity, equality, and freedom."

Yacoob, a veteran anti-apartheid activist and a member of South Africa's Constitutional Court since 1998, visited the Law School in January to deliver a public talk, address a Transnational Law class, and meet with members of the Law School community.

Before 1994, South Africa was "what may be called an international pariah" whose "evil system of apartheid was propped up by a wholesale denial of individual rights," Yacoob told the Transnational Law class taught by visiting adjunct professor Joel Samuels, '99.

"The international community came to see the South African system as bad and largely because of the existence of international law it was impossible for South Africa to say 'We will do what we wish in our own country.' South Africa and apartheid became victims — and rightly so — of the norms and standards to which it had not bound itself — international law."

In his public talk, "The Process of Post-Apartheid Reconstruction," Yacoob explained that South Africa's new constitution, which mandates protection of "universally accepted fundamental human rights," is part of an effort "to recreate

South Africa. We are in the process of creating a new constitutional order in our country."

South Africa's system is one of constitutional supremacy, not parliamentary supremacy, he explained. The value system of the new order — "reflected essentially by the Bill of Rights and the Preamble to the Constitution" — incorporates "democratic values, equality, and fundamental human rights. . . . We move away from survival of the fittest. We move away from what I call the law of the jungle."

Thus, the Constitutional Court has outlawed the death penalty — "we respect life so much that the state must lead by example" — and ruled that the suspect in the bombing of U.S. embassies in Africa could not be extradited to the U.S. if he were to face the death penalty.

"What is occurring is a reconstruction of the hearts and minds of South Africans," Yacoob concluded.

Judge Zakeria Yacoob of the Constitutional Court of South Africa addresses a Law School class in Transnational Law. The Law School was the first major U.S. law school to require a course in transnational law in order to graduate.



Law students stage Lysistrata Project reading

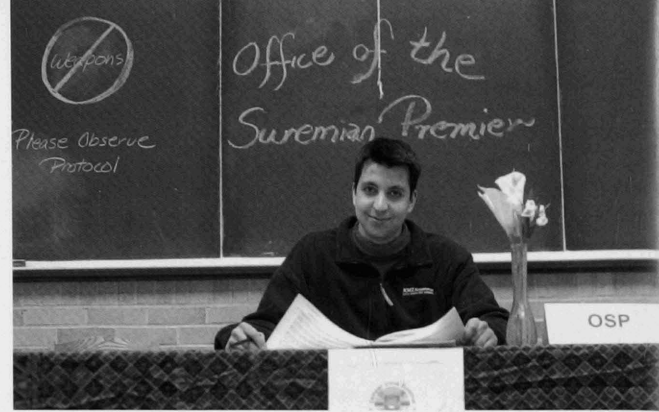
"In the name of Aphrodite, women shall be known as mighty." And they were just that in Aristophanes' bawdy comedy *Lysistrata*, in which women withhold work and sex from their spouses until the men agree to cease their warfare. The 2,400-year-old play took on very contemporary impact in March as a dozen Law School students used a revision scripted by Drue Robinson Hagan to protest possible military action against Iraq.

The Law School presentation, organized by third-year law students Kristina Juntunen and Anna-Rose Mathieson through the student organization Courtyard Players, was one of four held in Ann Arbor as part of more than 1,000 similar readings conducted the same day in nearly 60 countries. The readings were organized through the New York City-based *Lysistrata* Project, formed by two New York actresses early this year to voice opposition to a preemptive unilateral strike against Iraq.

Organizers of the Law School program made available a page of seven points for "Thinking about the war through *Lysistrata*" to use to extend consideration of the issue.

For example, here's one of the discussion points: "In the play, all of the eligible men are participants in the war, prompting the women's strike. If we have reached a post-draft era, does this undermine any analogy or lesson for our current times? Are there other parts of the women's claims that become more compelling in light of a professional army?"

Meet the “premier,” law student Omar N. Chaudhary. “In the beginning,” Chaudhary notes of his simulation role, “I didn’t have to be corrupt; there was plenty to go around.”



A SIMULATED REFUGEE EMERGENCY

One Saturday last February, more than 30 participants took on the roles of refugees, disaster relief workers, United Nations officials, and others in a simulated emergency refugee operation at the Law School.

The setting was fictional — the developing country of “Suremia,” mostly arid with mountains in the east, population 10 million. And the activities were simulated — 13,000 refugees, mostly from the neighboring countries of “Mardon” and “Tulera.” One of Suremia’s three refugee camps was in a restricted military zone, a designation complicated by the rumored discovery of gold within the zone.

But the purpose was real — to give participants the opportunity to simulate real-world use of the theories and principles they discuss in class, explained third-year law student David M. Burkoff, co-chairman of the Student Network for Asylum and Refugee Law (SNARL), which co-sponsored the program with support from the Office of Public Service and the Office of the Assistant Dean of Students.

“Knowing basic tenets of humanitarian law and refugee law only gets you so far,” explained Burkoff. “Every person affected by a given crisis must also understand how those bodies of law should influence his or her on-the-ground decisions. Part of what this simulation demonstrates is that it’s sometimes easy to miss the forest for the trees — to neglect consideration of rights and obligations in the face of more immediate, tangible concerns.”

The day-long program had four aims, according to Sheila Reed of InterWorks,

the Madison, Wisconsin, based organization that ran the exercise:

1. Simulate an actual refugee emergency situation.
2. Identify issues associated with a refugee relief operation.
3. Provide a concept of protection and emergency relief operations as a whole.
4. Raise awareness of the “management environment and the constraints on managers.”

Normally, you would expect 0.3 deaths per 10,000 people per day, Reed told participants. “One death daily moves you to emergency status, and two or more deaths per day per 10,000 people qualifies as an emergency out of control.”

InterWorks has conducted the simulation many times, for the United Nations High Commissioner for Refugees and other arms of the UN system; international groups and nongovernmental organizations like CARE, Church World Service, and Save the Children USA; U.S. government agencies; and other academic, military, and private clients. This time, however, was the first that the exercise included a roving human rights monitor, played by SNARL co-chair Megan P. McKnight, a third-year law student.

This was a day of role playing laced with realism. “When is the rainy season?” one student asked as the simulation was about to begin. “I think it’s in the fifth month, but anything can happen,” Reed answered ominously.

Using pictures of trucks, Monopoly-like money, and similar stand-ins for the



Participants receive materials for use in the refugee emergency simulation from Sheila Reed, who was an “administrator” for the day’s exercises.

real thing, participants scattered to several locations within Hutchins Hall and spent the rest of the day playing roles that in a real emergency would have been negotiated in the currency of life and death. Each hour simulated one month.

And, yes, “anything” did happen. The “rains” came early, and Suremia’s many unpaved roads became impassable. Soldiers were raping refugees at one camp. One camp stockpiled supplies, another faced imminent disaster. By the day-end wrap-up session, participants had coped with the loss of air and ground transportation, corrupt officials, internal divisions and suspicions, and many of the other frustrations that dog real-world refugee and emergency assistance work.

The pipeline for aid is long and slow-moving, and “when you ask for something it doesn’t happen right then,” noted first-year law student Dominic R. Ferullo, whose simulation role made him a resident of one of Suremia’s three refugee camps.

“That’s why countries have to do higher estimates,” responded Reed, who has worked in famine relief operations in Ethiopia.

“It seems the further away you are from people, the more they think you’re corrupt,” said law student DeWayne (Dawson) Williams, who played the role of

an official with “Suremian Community Aid and Development.” “My food income went way down, and my food needs went way up. I was more desperate than the refugees themselves.”

Many participants reported bogging down in paperwork, and several said they quit filling out forms. Others, frustrated or distrustful, bypassed intermediary agencies and tried to deliver aid directly to refugees.

“In the beginning, I didn’t have to be corrupt, there was plenty to go around” explained Suremian “Premier” Omar N. Chaudhary, a second-year law student. “But my duty is to take care of my own people first.”

“I didn’t know how to deal with him,” said McKnight, the roving human rights monitor. “I didn’t trust him.”

Neither did Paula Payton, assistant director of the Office of Public Service, who played the “major donor.” So she bribed him. In exchange for ensuring that food, medicine, and supplies got to refugees, she made sure that the “premier” got \$25,000 worth of similar provisions.

All these individual efforts have to dovetail with the overall aid delivery system, Reed explained. “Everybody has to kick the system. If everybody waits for one person, nothing happens. That’s how it is now. Everybody waits for the UN. . . .

“It’s always a system thing. As soon as you try to do something by yourself, something else will fall apart.”

InterWorks’ Sheila Reed sets the stage for a refugee emergency simulation that was conducted at the Law School during the winter term.

‘Still a long way to go,’ speaker says

U.S. women have made great strides in many areas — from 1970 – 2000 the number of women with a four-year college education jumped from 12 percent to 30 percent, for instance, and last fall “more women than ever before” ran for elective office — “but there’s still a long way to go,” a Law School graduate explained during a program on “Women’s Advocacy as a Profession.”

“One of the challenges we face in women’s advocacy is that many people mistakenly think that women have arrived,” reported Ikeita Monique Cantu Hinojosa, ’01. More women than men are poor, she said, women still lag behind men in educational achievement, and sexual harassment remains a problem for many women. A recent study of television’s Sunday political shows revealed that “the vast majority of guests are white and male,” she added.

Cantu Hinojosa, a joint J.D./M.S.W. graduate whose talk last fall was sponsored by the Law School’s Office of Career Services, was a researcher last summer for now-Michigan Gov. Jennifer Granholm and currently heads the National Womens Law Center’s Take Action program in Washington, D.C. Take Action: Get Your Prescription Contraceptives Covered, aims to expand health plan coverage of women’s prescription contraceptives. Cantu Hinojosa reported during her Law School visit that she recently had received a Ford Foundation grant to support Take Action.

“We really need women and women’s advocates in every profession — in medicine, police forces, in the military, in the classroom, courtroom, and the boardroom,” she said. “Don’t think you need to go to a women’s organization to have an impact.”





Professor Don Herzog pulls no punches during the "Whose Law Is It, Anyway?" fundraiser for Student Funded Fellowships. At left is Professor James Krier and at center Assistant Professor Richard Primus, who served as moderator.

Human Rights Declaration continues to evolve

The 53-year-old Universal Declaration of Human Rights, with which 44 nations have aligned themselves, always was intended to evolve as conditions changed. Nuala Mole, founder/director of the AIRE Center in London, England, explained to a Law School audience during a visit to Ann Arbor early in the winter term. This is why the European Court of Human Rights does not try to ferret out the meaning of the declaration's words as much as it uses the document to guide it to just decisions that fit the cases before it.

Mole made her comments during a talk on family and children's cases before the Court of Human Rights. She noted that the court's doctrine of "autonomous concepts" gives its rulings the authority to trump a nation's opposing or different law. For example, in the case *Pellegini v. Italy*, the court ruled that the defendant had been denied a fair trial when an Italian court, without due process, upheld the Vatican's annulment of a 25-year-long marriage. Similarly, in *Goodwin v. the United Kingdom* (2002), the court ruled that gay people must enjoy equal rights with all others.

The AIRE Center (Advice on Individual Rights in Europe), which works to ensure human rights enforcement throughout Europe, regularly accepts University of Michigan Law School students in summer positions. Mole visits the Law School frequently to describe the center's work and talk with prospective interns.

Whose law is it, anyway?

Where do you start when you're writing about a program called "Whose Law Is It, Anyway?"

Probably at the beginning. The beginning is Student Funded Fellowships (SFF). This is the student-run program that raises money and dispenses it to law students on a competitive basis so they can accept lower-paying summer placements, often in the public service sector.

Last year, SFF raised funds to provide a record 134 grants. But this year, like so many programs in higher education, SFF found itself facing a financial squeeze. By February 21 SFF leaders had learned that their federally funded work-study allocation would be significantly reduced; they also found themselves facing an early-season application kickoff day with 227 applications.

Enter "Whose Law Is It, Anyway?"

The anything-goes Q&A session put Professors James Krier and Don Herzog at the front of cavernous Room 100 in Hutchins Hall (aka Honigman Auditorium) to face any and all questions students threw at them.

Sure, there was a catch. Students had to pay \$10 each to attend, with proceeds going to SFF; the entry fee allowed each ticket holder to ask one question. Students flocked to the scene: Herzog and Krier, with moderator's leavening provided by Assistant Professor Richard Primus, gave as good as they got.

The first query went to Herzog.

"I yield," Herzog answered.

"What trait have your children inherited that you most despise?" Primus asked Krier.

"That's a serious question?" Krier responded. "I'm speechless. I have no negative traits."

Question: Alcohol or pot? Which is the greater evil?

Krier: This is conjecture from me, but I think alcohol.

Herzog: I think I should yield to the judgment of the U.S. Congress on this.

Question: What superhero power would you want, and why?

Krier: I would like to have the power to make a stone I couldn't lift.

Herzog: I'd like to be able to predict Jim's behavior.

"Me, too," quipped Krier.

Question: How much is too much? And why?

Krier: The answer is yes, but the explanation would take a little bit of work.

Question: If you could cut one class out of the first year, which one would you cut?

Herzog: Property.

Krier: The student class.

Question: Should Mayor Bloomberg be able to ban smoking in bars in New York City?

Herzog: Yes, because it gives me asthma.

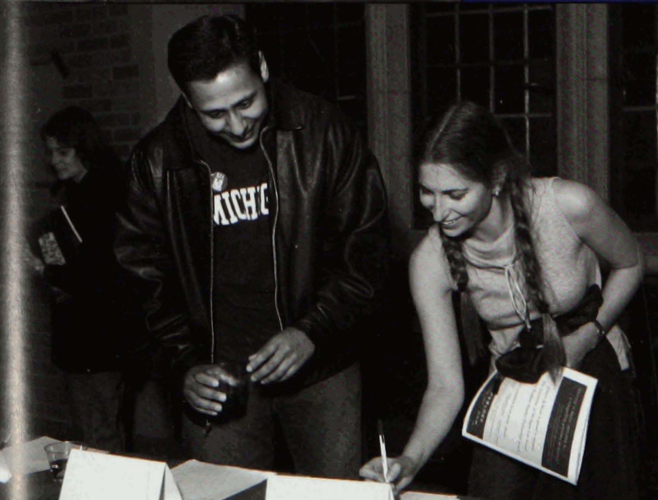
Krier: No, because it gives him asthma. And so it went.

STUDENT FUNDED FELLOWSHIPS AUCTION

An auction-goer looks over some of the items waiting to go to the highest bidder.

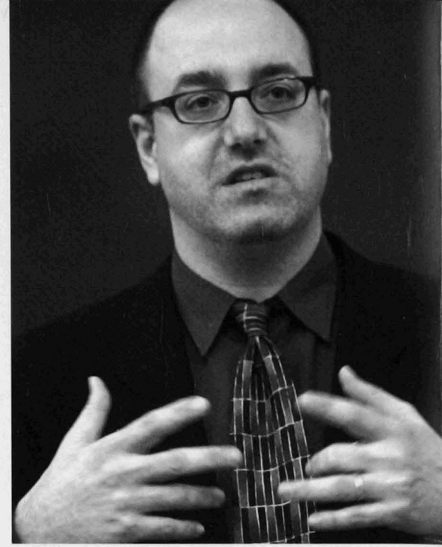


“What am I bid?” Associate Dean for Academic Affairs Evan Caminker takes on the auctioneer’s role for the annual auction to aid Student Funded Fellowships. Caminker was one of several faculty members and administrators who took a turn as auctioneer during the evening. The annual effort raised more than \$50,000 for the program, which awards stipends to help students take summer jobs with organizations that otherwise could not amply compensate them.



Auction-goers Shamir Pazel and Maara Sierchio peruse the lists of items ready to go to the highest bidder.

Americans cling to “the veneer of careful deliberation” by the U.S. Supreme Court, Larry Kramer explains during the Thomas M. Jorde Symposium at the Law School. The Court “has been forced to bureaucratize, like everybody else.”



U.S. Supreme Court: Admissions policies OK

The Supreme Court of the United States on June 23 upheld the University of Michigan Law School's admissions policies.

The decision was 5-4, with Justice Sandra Day O'Connor writing the majority opinion: “The Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”

The case, *Grutter v. Bollinger*, was filed in 1997. In 2002 the U.S. Court of Appeals for the Sixth Circuit upheld the Law School's admissions policy, reversing the trial court decision.

“We are pleased that the Court affirmed that the Law School's admissions policy is fully consistent with the requirements of federal constitutional and statutory law,” Dean Jeffrey S. Lehman, '81, and Dean Designate Evan H. Caminker said in a statement.

“In so doing, the Court endorsed our authority to recognize that all students benefit from attending a school that has a meaningful degree of racial integration and to consider race as one of many factors in selecting a broadly diverse and academically excellent student body.

“This ruling will enable the Law School and other institutions of higher education to continue serving as pathways to a more fully integrated society.”

For more information, see the Law School's Web site, www.law.umich.edu.

America's long-term question: Who makes law?

American history features a long-run seesaw between the preeminence of judicial review and the sovereignty of the people known as popular constitutionalism. And it's a seesaw that keeps recurring, with the current cycle being one of judicial supremacy soon to be challenged by popular constitutionalism.

That's the script drafted by Larry Kramer, associate dean and Samuel Tilden Professor of Law at New York University Law School, in his lecture for the Brennan Center Thomas M. Jorde Symposium at the Law School in April. Kramer called his talk “Popular Constitutionalism, Then & Now.”

Commentators were Frederick Schauer, the Frank Stanton Professor of the First Amendment at the John F. Kennedy School of Government at Harvard University, and Reva Siegel, the Nicholas D. Katzenbach Professor of Law at Yale Law School.

“American history is characterized by struggles and tensions between popular constitutionalism and judicial review,” Kramer said. “Popular constitutionalism is victorious each time, and then it starts over.”

Judicial supremacy's supporters base their position on historical/originalist readings of the U.S. Constitution, claim that judicial supremacy leads to more and better justice, and that society needs a final arbiter of legal debates in order to settle disagreements and avoid chaos.

“If there is a case for judicial supremacy, and I think there is, there is no reason to quell discussion to do this,” Kramer said. “The main criticism is that judges are like judges, not like philosophers. . . . Court deliberations are almost totally technical and legalistic.”

The issue of judicial supremacy can make for strange philosophical bedfellows, according to Kramer. The Warren Court drew criticism for being too activist. So has the Rehnquist Court. “A profound restraint of popular government is one thing — perhaps the only one — that the left and the right share,” Kramer explained.

In his response to Kramer's talk, Schauer noted that “the strongest argument for judicial supremacy is that it is not an issue of conservative and liberal.”

“Popular constitutionalism and judicial supremacy coexist in American history,” Siegel noted in her response. “We live under judicial supremacy — think about the abortion case [*Roe v. Wade*] or *Brown* [*Brown v. Board of Education*]. Certainly the force of *Brown* was shaped by popular willingness. . . . It took social activism and congressional action to make *Brown* law.”

A program of the Brennan Center for Justice at New York University School of Law, the Thomas M. Jorde Symposium is funded by and named for a professor at Boalt Hall Law School at the University of California at Berkeley. The symposium includes two programs each year, one in the fall at Berkeley, the other in the spring at another U.S. law school.

SEC enforcement director: More actions being brought

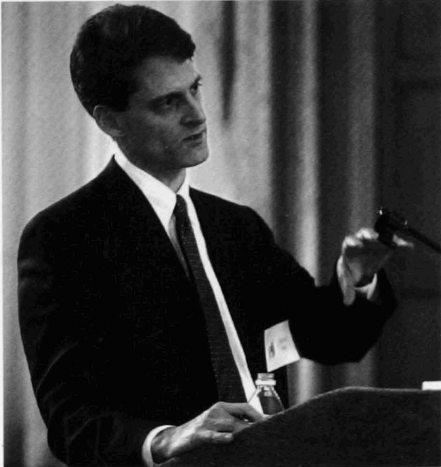
Attorneys' roles are "compromised" when law firms are paid in client companies' stocks, the enforcement director of the U.S. Securities and Exchange Commission (SEC) told Law School audiences last fall. Stephen M. Cutler also noted that it becomes difficult or impossible to uncover or stop corporate wrongdoing when corporate boards are made up of friends of company officials and members who received their posts as perks.

Such practices increased during the good economic times of the 1990s, but the SEC's law enforcement effort has remained "significantly underfunded" over the past 15 – 20 years, Cutler reported. SEC law enforcement staff numbers increased only 11 percent between 1992 – 2001, but "the caseload increased considerably." The SEC's enforcement staff totals 1,000 people, fewer than the single firm of Merrill Lynch has in its compliance division.

Despite this restriction, SEC had nearly 600 enforcement actions during the first 11 months of 2002, 100 more than in the previous year, Cutler reported. Enforcement targets have included major firms like Xerox, WorldCom, RiteAid, Tyco, Edison Schools, Microsoft, Amazon.com, and others.

There was an "irrational exuberance" during the 1990s, and many companies and senior managers "became increasingly focused on short-term gains," Cutler said. In the process, many "gatekeepers" succumbed to the pressures of the times and set aside their traditional guardians' duties:

- Accountants too often abandoned their traditional skepticism and became tools for appearing to do better.



Security and Exchange Commission Enforcement Director Stephen M. Cutler reports that the SEC's enforcement caseload has "increased considerably" while its enforcement staff only has increased 11 percent.

- Lawyers were well positioned to police clients, but law is "no longer the collegial and intellectual pursuit it may once have been." Law firms have become more business-like and competitive in their search for clients, and one-third of law firms that acted as corporate counselors held stock in those client companies.
- Board of trustees membership too often is seen as a perk rather than as a substantial job.
- Many analysts have been integrated into firms' finance departments, and this has diluted their ability to offer independent recommendations that are unaffected by the company's profit-loss statements.

Cutler addressed law students and others during a midday program, then spoke in the afternoon to a gathering of Law School graduates from the Ann Arbor area and southeast Michigan.

Why a treaty?

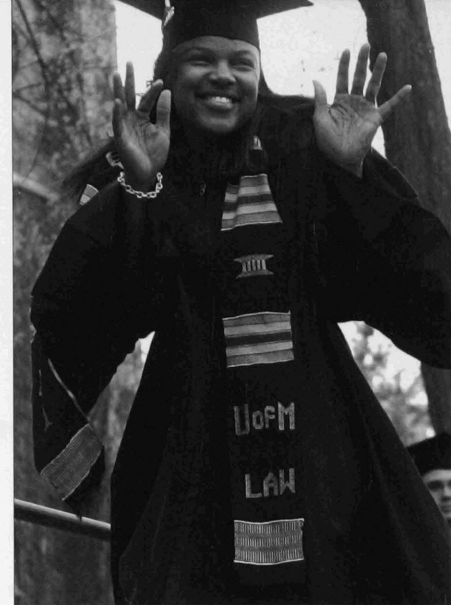
Why a treaty? asked Julia Ernst, '94, legislative counsel for the Center for Reproductive Law and Policy. Why should the United States ratify the Convention on Elimination of all Forms of Discrimination against Women (CEDAW)?

"It's been more than 20 years since the United Nations General Assembly approved it, some 70 countries around the world have approved it, and the United States is pretty much in compliance with the treaty," Ernst explained during a talk at the Law School last fall. At the time of her visit, ratification was awaiting action in the U.S. Senate.

"After 23 years, we're finally at the brink of getting this done," said Ernst, who also co-chairs the Women's Rights Committee of the American Bar Association's Section on Individual Rights and Responsibilities. Her talk at the Law School was sponsored by Law Students for Reproductive Choice with support from the American Constitution Society.

President Jimmy Carter signed CEDAW in 1980, but opponents blocked it in the Senate. Critics said it was not self-executing and that the United States would not interpret it to mean that women would be placed in all military combat situations, according to Ernst. CEDAW "sets out an international standard for eliminating discrimination against women," Ernst said, but "there are so many areas where women are still so horribly discriminated against, even in the United States."

U.S. ratification of CEDAW would send a treaty-legitimizing signal around the world, Ernst explained. For many countries, noting that the United States has not ratified CEDAW "gets them off the hook," she said.



A SPECIAL DAY

Law School graduates universally remember the aura of the Law Quadrangle — its ageless architecture and stone permanence a metaphor of the law itself — but until this spring their graduation ceremonies took place elsewhere.

Each May for many years, robed graduates have crossed the stage at Hill Auditorium, but with Hill undergoing renovation, this year graduates and their well wishers instead filed into the Law Quadrangle itself to celebrate commencement. With 4,000 chairs arrayed in east-to-west rows and a raised stage in front of the Reading Room entrance, Senior Day in May became a festive outdoor affair. As usual, the gods of Michigan weather waited as long as possible to commit themselves, but finally blessed the day with sunshine and comfortable temperatures after sending teasing precipitation for much of the preceding week.

It was a memorable day of celebration coupled with thought-provoking comment from Dean Jeffrey S. Lehman, '81, who was presiding over his last commencement before becoming president of Cornell University on July 1 (see stories beginning on page 2); Lehman's classmate and keynote speaker Kenneth Lee Salazar, '81, the Attorney General of Colorado; and student speakers Paul A. Hood and Maren R. Norton.

Lehman took note of the continuity of the setting, how today's students and graduates were using spaces used by legal students and graduates since 1933, how generations of students had studied in the Reading Room under the same leaded glass windows, how the setting linked the past and the present. Each student has undergone "a fundamental intellectual transformation" during the Law School years and all have become "even more deeply reflective people," he said.

Salazar, the twice-elected attorney general of Colorado and the first Hispanic elected to statewide office in that state, asked the graduates and audience to stand and applaud Lehman for his role as dean as well as his staunch support of policies that encourage diversity, including defense of admissions policies that seek to bring together students of differing backgrounds in each Law School class.

The University of Michigan Law School "took a chance on me," Salazar reported, and because of that he has been successful in a public career that included several state appointive offices before his first election as attorney general in 1998.

Salazar, a fifth generation Coloradan whose family's roots in New Mexico and Colorado reach back more than 250 years, noted that today's U.S. population exhibits more diversity than ever: more than 35

million Americans are Hispanic, 34 million are African American, some 10 million are Asian. And more than 65 million American women are in the workforce.

"That kind of diversity is what calls out to us" and demands that society continue to strive to spread mutual understanding and contact among the groups that make up this nation," he said. "It's for that reason that I am more proud today of this School than I was 22 years ago. It's done an incredible job."

Salazar, who spoke a month after the Law School's admissions policies case was argued before the U.S. Supreme Court but before any decision had been announced, stressed that efforts to bring people together and foster mutual understanding must not be allowed to languish. "No matter what the Supreme Court does, it is going to be very important to continue what the University of Michigan has done," he said.

"The age of diversity . . . is a relatively new age [that began] after *Brown v. Board of Education* and the Civil Rights Act," he noted. "We need to continue to make sure that the end goal, that we have an inclusive society, is something that we continue to embrace."

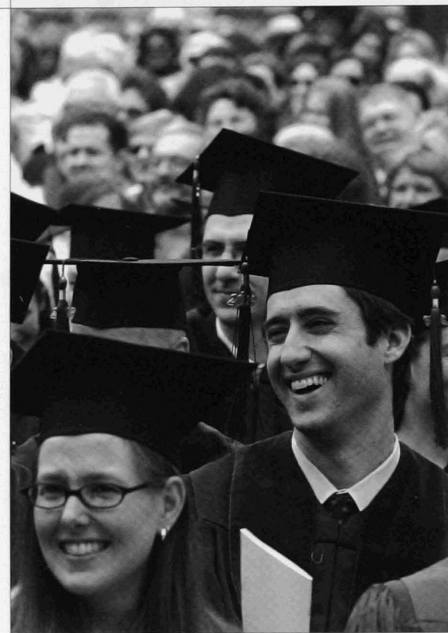
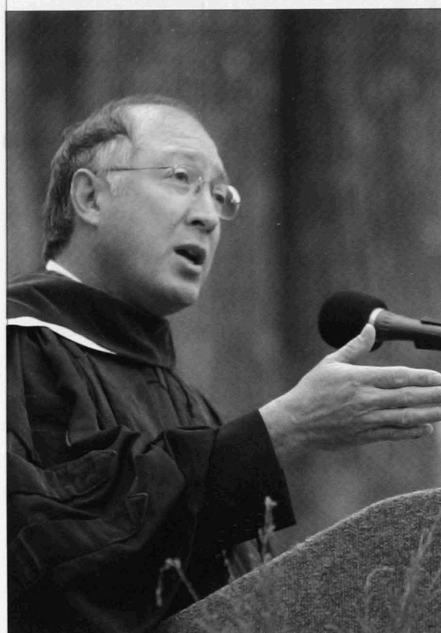
Graduate Paul C. Hood, chosen by his fellow graduates to address them, reminded listeners that embracing diversity



brings with it the probability of encountering ideas that offend. If you have people with different backgrounds, he said, you're sometimes going to hear things you don't like.

Law School Student Senate President Maren Norton, recently re-elected to serve her second term during her third year as a law student, noted that there were few of her fellow law students who had not had an impact on her life. "Whether you know it or not, each of you has truly left footprints on my life and the lives of so many others," she said. "Today I thank you, I personally thank you and do so on behalf of the entire Law School student body, for the countless footprints you've left on our community."

"Your days are short here," Norton said, quoting the late political activist Adelaide Stevenson. "This is the last of your springs. And now in the serenity and quiet of this lovely place, touch the depths of truth, feel the hem of heaven. You will go away with old, good friends. And don't forget when you leave, why you came."



Judge: Every lawyer deserves level playing field to represent client

U.S. District Court Judge Marilyn Hall Patel, of San Francisco, tells a disconcerting, inspiring story from her days as one of two women in her law school class at Fordham University:

A professor called on the other woman and asked, "Are you here to get a man?"

The woman slowly scanned the classroom's occupants.

"Hardly," she answered.

Audience members laugh in respect for the law student's presence of mind as well as the changes that have made such a question nearly unheard of in legal education today. Patel's story, however, also is a reminder that women still are a minority of the nation's lawyers, law firm partners, and judges.

Patel recounted the experience during a talk at the Law School this spring. Her program was sponsored by the Office of Career Services.

Appointed to a California state court by Gov. Jerry Brown, Patel is the first woman on the U.S. District Court for the Ninth Circuit. She had a child while on the state court, and "they hadn't dealt with maternity leave for judges then," she recalled.

She's been involved with the National Association of Women Judges program to get more women on the bench. The Ninth Circuit, of which she is a part, also is the first to study the effect of the treatment of women on the legal profession and jurors, she said, and the study "led to changes in rules of discipline for attorneys and judges that engage in discriminatory conduct."

"Nobody should have to start out on

anything other than a level playing field when they are representing their client," she explained.

On her district court, "the variety of cases we have is incredible," Patel reported: criminal, constitutional, employment and housing discrimination, property, patents (including the most cutting edge of biotechnology cases), civil rights, police abuse, and others. Serving as a federal district judge is "a great job," she concluded.

Helping Slovakia's elections succeed

Much of the 70 percent turnout in Slovakian elections last fall was the result of concentrated, coordinated efforts by nongovernment organizations (NGOs) that believe successful elections are a major step toward making their country democratic and politically successful.

That's the picture that NGO representatives drew during a program at the Law School late last fall sponsored by the International Law Society. Since Slovakia's previous elections in 1998, two-thirds of its people reported discontent with their government, explained Olga Gyarfasova of the Bratislava-based Institute for Public Affairs.

"It was clear to us that unless some positive changes were introduced the [voter] turnout would be very low" in fall 2002, added Vlado Talian, who worked on the nationwide voter education project that preceded last fall's elections.

Supported with funds from U.S.-based Freedom House, representatives of Slovakian NGOs met early last year to plan how to increase voter interest in the elections. Their get-out-the-vote effort



"We learn from each other," Chief Judge Marilyn Hall Patel, of the U.S. District Court in San Francisco, tells a Law School audience in a program earlier this year.



enlisted the aid of 20,000 sports figures, actors, and academics who did television spots encouraging interest in the campaign. The message also got a boost through concerts presented in the main squares of Slovakia's 15 largest cities.

The Media Institute offered its services to nonprofit organizations to work in the campaigns. The media-monitoring watchdog MEMO 98 developed "10 commandments for how a journalist should behave during the campaign," and political parties signed a code of conduct that also created an independent commission to monitor party performance and disburse the findings via radio and television.

"It's important that we become a modern, transparent country," explained journalist Zuzana Wienk of the Alliance for Support of Fair Play, which monitored party spending and campaign ethics. "We think that such a challenge needs a new political culture that understands this. If we want to reform our country, we must look at ourselves and become more transparent."

Law firms, minorities, and practice in Chicago

Yes, there are more minority lawyers in Chicago's large law firms than a decade ago, and professional life is better for them than it used to be, but there's room for improvement, members of the Chicago Committee on Minorities in Large Law Firms told their Law School audience early this year.

As Alexandra Rose, a second-year associate with Piper Rudnick, put it: If there were enough minorities in large law firms, we wouldn't be here.

The committee, which represents 37 of Chicago's largest law firms, encourages minority lawyers to join major firms, offers

support and mentoring for them, and provides a network of minority attorneys to offer assistance.

In addition to Rose, committee representatives included: Vineet Gauri, a sixth-year associate with Brinks Hofer Gilson & Lione; Brett J. Hart, a partner with Sonnenschein Nath & Rosenthal; and Daniel J. Hurtado, a partner with Jenner & Block. The speakers came from African American, Hispanic, and Indian American backgrounds.

Law firms, like other businesses, recognize the value of diversity among their lawyers because their clientele is diverse, the speakers explained. But "don't restrict yourself to only one group as mentors," Hurtado advised. "The whole idea of diversity is that we all interact together."

Much of the speakers' advice could apply to any law firm applicant, minority or not. "Be aware that this is not just a one-way street," said Hart. "We want to impress you as well."

"It's important to convey that you know something about that law firm — practice areas, a recent expansion. There's the feeling as our interview proceeds that I want to know you have done your homework."

Go beyond what the interviewer can read on your resume, added Rose. Suggest what you can add to the firm.

And why Chicago? It's a good place to live and practice, the speakers reported. Lawyers' incomes there are good, practice is sophisticated, and there are plenty of sports, arts, and entertainment available. In other words, they said, the city offers a successful work style that leaves room for a good lifestyle.

From left, Brett J. Hart, Alexandra Rose, Daniel J. Hurtado, and Vineet Gauri, members of the Chicago Committee on Minorities in Large Law Firms, discuss living and practicing law in the Windy City.



'A DREAM DEFERRED': LAW SCHOOL MARKS MLK DAY

Law Professor Adrien K. Wing draws strength from history's often little-known women: antilynching activist and National Association of Colored Women founder Mary Church Terrell; Mary McCloud Bethune, adviser to five U.S. presidents; NAACP field secretary Ella Baker; Fannie Lou Hamer of the Mississippi Freedom Democratic Party; and others, including Rosa Parks, leader of a women's voting movement before she became better known for refusing to move to the back of an Alabama bus.

"I draw strength from history," Wing, a law professor at the University of Iowa Law School and a frequent U-M Law School visitor, told a standing-room-only crowd gathered for the Law School's Martin Luther King Symposium program in January. "No one in this room is the first to face these issues."

Wing joined Law School Professor Deborah C. Malamud and visiting professor Frank Wu, '91, for discussion of "A Dream Deferred: The Intersection of Race, Class, and Gender in American Society." Law School Professor Sherman Clark moderated.

Wing outlined "10 lessons from Martin Luther King:"

- You must be committed to social justice to make progress.
- You must be fearless.
- Remember that opponents are "always looking to bring you down."
- Realize that no one, including yourself, is perfect.
- There is a role for nonviolence. In fact, filing *amicus* briefs and much of the work that lawyers do can be considered non-violent work for social change.
- Realize that economic empowerment is vital for people who lack it.
- "The crisis of leadership in the United States must be resolved by many women and men of all colors taking leadership roles."
- Remember that you may not have very long to accomplish your goals — Martin Luther King Jr. was only 39 years old when he was assassinated.

It was a full house in Honigman Auditorium for the Law School's Martin Luther King Day program, "A Dream Deferred: The Intersection of Race, Class, and Gender in American Society." Professor Sherman Clark moderated; panelists were Visiting Professor Frank Wu, '91; Adrien K. Wing, of the University of Iowa School of Law; and James E. and Sarah A. Degan Professor of Law Deborah C. Malamud.



Professor Sherman Clark fields questions for Professors Frank Wu, '91, Adrien K. Wing, and Deborah C. Malamud during the Martin Luther King Day program.

- Aspire to excellence.
- “The only way to succeed on issues of social change in the 21st century is in coalition” [with other groups].

The challenge to all of us is to ask, “What will we do as individuals and institutions to make good on the dream of Martin Luther King?” asked Wu.

Racial issues are neither actually or figuratively just issues of black v. white, said Wu, a Howard University law professor of Chinese descent who grew up in the Detroit/Ann Arbor area. It’s easy to condemn lynching and murders, but that may lead us to condone more subtle actions like those of the child who assumes a Kung Fu stance when he sees Wu or the woman with a small child who picks up her pace when she realizes a black man is walking behind them.

Malice may be completely absent in both cases, but these actions become self-fulfilling prophecies, Wu said. “These images play out again and again. They affect our lives.”

“We must be able to see all the hues and shades. . . . I would suggest that when we speak of race to speak inclusively — to, for, and about all of us.”

Malamud, the first speaker on the program, departed from her planned discussion of “African Americans, Affirmative Action, and the Changing Face of America” to discuss the just-issued Bush administration brief opposing University of Michigan and Law School admissions policies. The brief was submitted to the U.S. Supreme Court as the Court prepared to hear the admissions cases.

Malamud criticized the brief on factual, legal, and policy grounds. “You can’t erase race in this country by pretending that it’s not there,” she said.

Legal director outlines ACLU cases

The American Civil Liberties Union (ACLU) is a “big picture organization” that files and participates in cases it expects to make a significant legal impact, according to Michael J. Steinberg, legal director of the organization’s Michigan chapter.

“We try to push the law to expand civil liberties, and in some cases we work to protect what we have,” Steinberg explained during a talk at the Law School last fall. The visit by Steinberg, who oversees all ACLU litigation brought in Michigan, was sponsored by the ACLU’s Law School student chapter.

Steinberg demonstrated ACLU work by listing several of the areas and cases in which the Michigan chapter is involved:

- Representing U.S. Rep. John Conyers and several newspapers, the chapter won at the trial and appellate levels in a case to open immigration hearings to the public and the press. However, in a New Jersey case in the Third Circuit, a similar case resulted in the opposite decision. “This is a case that in the next term may go to the Supreme Court,” according to Steinberg.
- Representing 17 African American and Latino high school students who are intervenors in the case against the University of Michigan’s undergraduate admissions practices. The intervenors ask that the policies continue; the Washington, D.C., based Center for Individual Rights brought the case against what it considers to be race-based admissions practices.
- Asking the U.S. Court of Appeals for the Sixth Circuit for *en banc* consideration of its challenge of Michigan’s requirement that applicants and welfare recipients be tested for drug use. The trial court decided in favor of the ACLU, and a three-judge panel from the Appeals Court overturned that decision.

- Challenging the use of MEAP (Michigan Educational Assessment Program) scores to award scholarships. According to Steinberg, one of every three white students who take the tests get scholarships, but only one of every 15 African American students and one of every seven Latino students get scholarships. “The MEAP was never designed to measure merit . . . and has a tremendously disproportionate impact on students,” he said.
- Working in several free speech cases: On behalf of high school students who were suspended for five days for labeling an administrator a “sadistic tyrant” in their underground newspaper; on behalf of firefighters in a southeast Michigan township to allow them to speak about departmental needs without recriminations; and in cases that so far successfully have challenged a 19th century law that restricts speech in the presence of women.
- Using the new Religious Land Use and Institutionalized Persons Act to challenge the Michigan Department of Corrections’ requirement that members of the Melanic Islamic Palace of the Rising Sun, a religious group, renounce their religion or be placed in high security detention.
- Representing a woman who was beaten by her former boyfriend and then evicted from the apartment because the violence had occurred there, and representing a client with multiple sclerosis in his effort to use a tricycle with a small, quiet motor on Mackinac Island, where motor vehicles are banned.

A NEW VICTORY IN A 60-YEAR-OLD FIGHT

Paul E. Kerson took the case on faith that maybe, just maybe, he could help. Chances were slim: 60 years had passed since the crime was committed, it occurred in another country, and the German government already had agreed to a settlement.

A founding partner of Koppell, Leavitt, Kerson, Leffler & Duane in New York City, Kerson is used to tall odds: He's won several homicide cases and has spent a quarter century defending mostly blue collar clients. He's also based his career on the "justice first, legal fees second" principle.

So he took the case. Eight years later he reports that he and the estate of his late client have won much of what they were seeking. Kerson traced the events of the case during a program at the Law School in January that was sponsored by the Jewish Law Students Association and the Office of Career Services.

Here's his story:

During World War II Ignatz Nacher was forced by agents of the Dresdner Bank to sign over his interests in Engelhardt Breweries, Inc. Engelhardt was huge, Kerson explained, like the Marriott Corporation and Anheuser-Busch combined. The takeover forced Nacher to become an unwilling financial backer of Germany's war efforts.

Nacher family claims to the properties in West Germany were settled by a West Berlin court in 1956 (the court also made Ferdinand Nacher executor of the estate of his late uncle Ignatz Nacher), but claims to property in the former East Germany could not begin until the communist government there fell in 1989.

By 1994 Ferdinand Nacher is 94 years old and has failed in his many attempts to get satisfaction for what the Nazi regime and Dresdner Bank had taken from him and his family. Finally, his rabbi sent him to Marc Leavitt, Kerson's law partner.

"It's an unbelievable story," Kerson said. "What would you do with this story?" he asked his audience. The right bar exam answer is to say you can't help, he explained, and a good practical answer is to file the case in federal court.

So Kerson filed the claim in a New York State court in Queens under an obscure section of New York banking law that allows New York State citizens to sue a bank anywhere in the world. He argued that Dresdner Bank retained properties it had participated in stealing from Nacher.

"Dresdner Bank was, is, and remains an agent of the now-defunct Nazi government of Germany for the theft and continued criminal possession of stolen property and/or claims of violations of New York State Penal Law," Kerson argued in the complaint.

"Since the now-defunct Nazi government of Germany was utterly destroyed by the United States government and the governments of the United Kingdom and the Union of Soviet Socialist Republics in 1945, defendant Dresdner Bank continues to wrongfully hold and/or claim plaintiffs' property in the former East Germany as principal, rather than as agent."

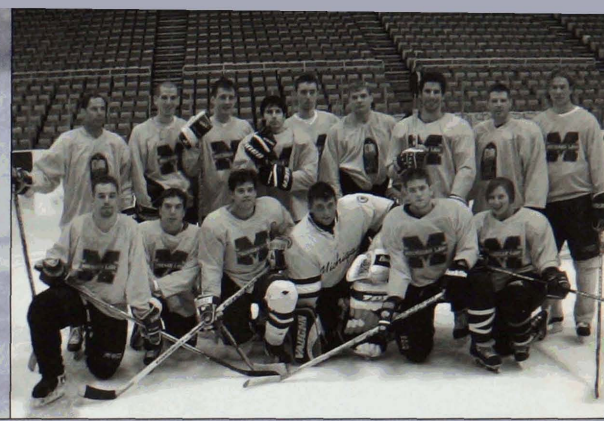
To insure continuation of the case, Kerson and his law firm wrote the suit into Nacher's will. "We promised Mr. Nacher that we would take the case until we died," Kerson said. "I think he appreciated that."

Nacher died shortly after the case began. Ronnie Mandowsky of Toronto continued the effort as executor of his estate and personal representative of Ignatz Nacher's heirs.

Although Kerson had filed the case in a state court, U.S. federal authorities involved themselves in the issue. The United States and Germany worked out a \$5 billion executive agreement that would pay each Holocaust survivor approximately \$7,000. Then, via telephone calls from the Deputy U.S. Treasury Secretary and a meeting with a former U.S. Attorney General, they tried to convince Kerson and Mandowsky to accept the agreement and drop their case. Kerson and Mandowsky refused.

Kerson and his colleagues also discovered that there is a government agency in Germany through which people with claims like theirs could seek restitution. They arranged with German attorney Sebastian Schütz to press Nacher's claims there. Schütz eventually was very successful, and last fall delivered checks for "a substantial portion of the properties" the Nacher estate had sought. Schütz, son of Germany's ambassador to Israel, is "a hero," Kerson said. With Schütz's success, Kerson and Mandowsky changed position, accepted the U.S.-German executive agreement, and will seek settlement before the panel the agreement establishes.

"I never believed it would happen," Kerson confessed of the victory. He also praised the U.S. federal system for providing him the opportunity to use a state court case to exert pressure on the federal government. "It's a beautiful system," he concluded.



Law students raise funds to help others

Law student organizations and individual students often go the extra mile to help others. The Women Law Students Association, for example, collects clothing for children each year, and the new Street Law Project offers legal counseling to those who need it but cannot afford it.

On the first weekend of April, there was no missing this kind of involvement and concern for others among law students. While most of us were savoring the idea of spring's eventual arrival (this is Michigan, after all), three law student organizations conducted significant and well-organized fundraisers to benefit others.

For the newly-formed Law School student hockey team, the weekend took them to Joe Louis Arena in Detroit, where four teams from different law schools competed to raise money for the Michigan State Bar's Access to Justice Program, which offers legal assistance for those who cannot afford it. The event raised some \$3,000 for the program, and organizers say they plan to hold the tournament again next year.

Michigan Supreme Court Justice Marilyn Kelly threw down the first puck and Michigan State Bar President Reginald Turner, '87, attended part of the festivities.

Tournament entries came from the U-M Law School, Michigan State University-Detroit College of Law, Wayne State University, and University of Detroit Mercy. Three players from Ave Maria Law School in Ann Arbor also participated, playing as part of the U-M Law School team.

The same Sunday morning in Ann Arbor, the unseasonable, 20-some-degree temperatures did not chill the spirits of those who came out for the Women Law Students Association's second annual *Race Ipsa Loquitur*. You could run, walk, skip, or otherwise make your way over the course in the U-M Arboretum, and more than 40 participants did just that. Their participation raised more than \$500 for Safe House, an Ann Arbor domestic violence shelter, and the U-M's Sexual Assault Prevention and Awareness Center.

And the day before, the Asian Pacific American Law Students Association hosted its fourth annual Charity Basketball Tournament at the U-M Intramural Building. More than 50 players and seven teams participated, raising \$350 for the Detroit chapter of United Way.

All told, it was a weekend of major successes, with law students showing their concern for people less fortunate than themselves.

Here is the Law School student hockey team that spearheaded the tournament that raised \$3,000 for the State Bar of Michigan's Access to Justice Program, which provides legal assistance for people who cannot afford it. The tournament, involving four law schools, was played in April at Joe Louis Arena in Detroit.

Face-off time for the Law School team. The game was part of the tournament the Law School student club team organized to benefit the State Bar of Michigan's Access to Justice Program.



IN DETAIL

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Professor Emeritus Marvin L. Niehuss, '30

Professor Emeritus Marvin L. Niehuss, '30, died in March in Ithaca, New York, at the age of 100.

He retired from the University of Michigan in 1973 after a half-century-long association with the U-M that began when he became a student here in 1920. He earned his B.A. at the University in 1925.

Niehuss' service to the U-M and the Law School was so significant that upon his retirement the Board of Regents took note that his "commitment and service to the University have been rarely matched" and that "few men in the history of the University have come to know it so well or have done more to help shape its destiny."

During the 1930s, Niehuss taught economics and law. As director of emergency training during World War II, he coordinated all of the Pentagon's programs on the U-M campus.

Niehuss moved to the U-M administration after World War II and remained there for a quarter century; he served as vice president responsible for appropriations from the state legislature; during the 1950s he was dean of faculties, a role in which he oversaw the University's academic life; and in 1962 he became executive vice president.

He returned to the Law School to teach in 1968.

Niehuss was born in Louisville, Kentucky, and earned his high school diploma at Greenville Military Academy in Greenville, Mississippi. Survivors include two children (Niehuss' son, John Marvin Niehuss, is a 1962 graduate of the Law School), three stepchildren, four grandchildren, and seven great-grandchildren.

The family held a memorial service for Niehuss in Ann Arbor in early May.

Rx for autonomy

Carl E. Schneider, '79, shies away from absolutes, especially when it comes to how people decide what they decide. For example, ask him to discuss "Autonomy and its Discontent: Should Patients Make Their Own Medical Decisions?" as he did in the first talk of the winter term lecture series sponsored by the University's Life Sciences, Values, and Society Program, and Schneider will lead you to understand that, for a variety of reasons, most seriously ill patients do not want to make their own medical decisions.

He'll also lead you to understand that, in the end, you are you and it's your call.

Schneider, the Chauncey Stillman Professor for Ethics, Morality, and the Practice of Law, has studied and written widely on the issues of bioethics and medical decision making. His research has led him to conclude that the doctrine of informed consent seldom works well, that physicians overestimate the problems of malpractice, and that living wills are failures because people seldom can predict what they want done at the end of their lives.

In fact, he told a questioner after his talk, "My experience is that what patients want from physicians is advice. Then they can ratify it."

The Sunday afternoon lectures are presented in Honigman Auditorium in Hutchins Hall.

Other speakers included:

- Sofia Merajver, of the U-M School of Medicine's Department of Internal Medicine, speaking on "Hereditary Breast and Ovarian Cancer Syndroms: Genetic Analysis and Cancer Risk Management."
- Sharon Kardia, of the U-M School of Public Health's Public Health Genetics Program, speaking on "Genetics of Hypertension."
- Gus Rosania, of the U-M College of Pharmacy, speaking on "Pharmacogenomics: Dilemmas and Challenges."

- Gil Omenn, of the School of Medicine's Department of Human Genetics, speaking on "New Perspectives on Human Cancers: Genomics and Proteomics."

The Life, Values, and Society Program is directed by Richard O. Lempert, '68, the Eric Stein Distinguished University Professor of Law and Sociology.

Schneider explained in his talk that decision-making autonomy in medical issues is of two kinds: mandatory, in which the patient has the authority *and* the duty to decide on his medical care; and optional, in which the patient can defer the decision to another, like a family member, or his physician.

Of the four arguments for mandatory autonomy that he outlined, the most significant is probably the moral one, Schneider explained. It comes from "a kind of muscular individualism," he said. "People's first moral obligation is to take responsibility for the kind of person



they are and to discover the person they are meant to be." In this light, medical decisions, which often involve life or death questions, are important.

Maybe. But "can we justify patients' refusal to accept the autonomy that law and bioethics put on them?" he asked.

Seriously ill people often lack the stamina for such decision making, don't want to face their illness, or cannot understand the probabilities that accompany most medical action. Although mandatory autonomy finds its equivalent in other aspects of American culture, Schneider said, "It seems that in the medical area, autonomy has been stretched beyond its reasonable limits."

"The saddest patients whose memoirs I read were the patients who tried to be autonomous," Schneider reported. "The happiest, and often, I thought, the best, were those who saw themselves as part of a family and a community, and who continued to be concerned [with their family and community] even as they approached death."

Taking a less than life-and-death example, Schneider recounted his own decision-making process in the case of having a root canal.

He got the information, and then asked "Do I need a root canal?"

"That's your decision," his dentist answered.

"If it were your tooth, what would you do?" Schneider asked.

"My values may be different," the D.D.S. answered. "So it's irrelevant."

"As far as I could tell," Schneider told his listeners, "he wanted me to have the root canal done. I had it. And the tooth hasn't bothered me since. Of course, its dead."



Bridget M. McCormack named associate dean for clinical affairs

Clinical Professor Bridget M. McCormack has been named associate dean for clinical affairs, replacing Suellyn Scarnecchia, '81, who has become dean of the New Mexico School of Law in Albuquerque. Scarnecchia was the Law School's first associate dean for clinical affairs.

The University of Michigan Board of Regents approved McCormack's appointment in the spring.

McCormack joined the Law School faculty in 1998 as a clinical assistant professor. She earned her B.A. with honors in political science and philosophy from Tinity College and her J.D. from the New York University School of Law. She has practiced with the Criminal Defense Division of the Legal Aid Society in New York and for the Office of the Appellate Defender. She also has been a fellow in clinical teaching at Yale Law School.

Currently co-chair of the Political Interference Group of the Association of American Law Schools Clinical Section, McCormack also is an active member of the National Board of Trial Advocacy, where she has served as board member, exam writer, and chair of the Social Security Expansion Committee.

"Professor McCormack is an extraordinarily gifted teacher who has earned the admiration and respect of students and colleagues alike," Dean Jeffrey S. Lehman, '81, said in his recommendation of McCormack to the regents. "She has a subtle and powerful mind, an astonishing work ethic, and an infectious commitment to her craft."

Pros and cons of affirmative action

Is affirmative action *really* constitutional? That question was growing monumental this year as the April 1 date neared for oral arguments on the issue before the U.S. Supreme Court. For Law School students, and some recently arrived faculty members, however, the issue had been joined well before they came to the Law School. The lawsuit challenging Law School admissions policies was filed in 1997, and by the winter of 2003 it had become familiar background to daily Law School life.

Familiarity, however, does not equal indifference, as demonstrated by the standing-room-only audience that packed into a Hutchins Hall classroom in February to hear Assistant Professor Richard Primus outline the issues, legal interpretations, and constitutional context that soon were to be considered by the U.S. Supreme Court.

Primus himself is a post-lawsuit arrival at the Law School, having joined the faculty in 2001. As a constitutional scholar, teacher of Constitutional Law, and former clerk to Supreme Court Justice Ruth Bader Ginsburg, however, he is steeped in the issue and has given a number of talks and interviews on it. In one talk, presented at the Law School this year, he began by outlining the legal framework of strict scrutiny that applies to legal consideration of affirmative action. Always noting the strengths and weaknesses of competing positions, he outlined arguments for and against affirmative action, considered the costs and benefits of the policy, and discussed the University of Michigan undergraduate and Law School admissions policies.

(Separate suits were filed against the Law School and the University's College

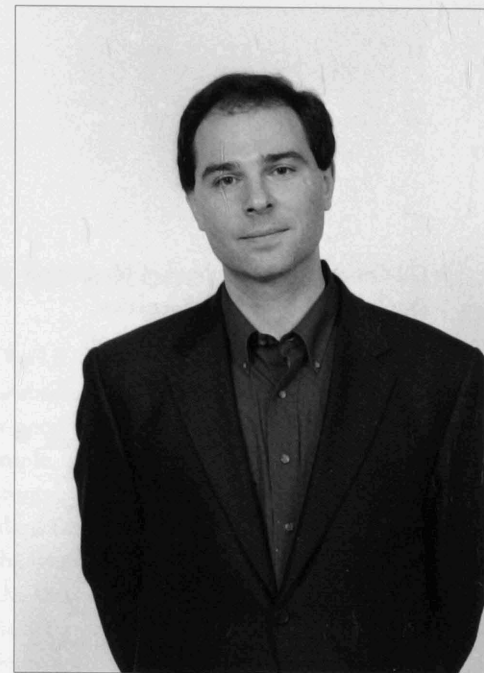
of Literature, Science, and the Arts, but the Supreme Court heard arguments on both challenges on April 1. In lower courts' action, the U.S. Appeals Court for the Sixth Circuit had upheld the Law School's admissions policy by overruling the trial court decision of the U.S. District Court. The same Appeals Court heard arguments on the undergraduate case but had not rendered a decision when the U.S. Supreme Court announced that it also would consider the undergraduate case; recent years' undergraduate admissions policy had been upheld at the trial level.)

The values of individualism and meritocracy, "in some ways the reason to be glad we live in the modern West," are important and make a strong argument against affirmative action, Primus explained. Arguments that affirmative action stigmatizes minority students and causes resentment among whites are weaker, he said, because *Washington v. Davis* holds that unintended consequences of an action cannot be a reason to apply strict scrutiny.

On the pro-affirmative action side, Primus continued, the stronger arguments claim that the policy is necessary to remedy the continuing ill effects of past discrimination and to provide enough diversity in educational settings for people to learn that all members of the same minority seldom share the same viewpoints. "This [internal diversity of minority groups] is a big point that most people miss," he noted.

Arguments that affirmative action is a good remedy for past and/or present discrimination are not as convincing as the previous two positions, he said.

If only motive is considered, as *Washington v. Davis* says should be the case, a cost/benefit analysis is unnecessary, according to Primus. But if you consider such an analysis, reducing the number of minority students in a class easily can



produce stereotyping because minority individuals come to be seen as representative of their group rather than as people with ideas and perceptions that may or may not be common within their racial or ethnic group.

Some argue that affirmative action compromises the value of individualist meritocracy, but so do admissions preferences based on parental alumni status, geographic location, athletic ability, and other factors. "This suggests that the real objection to affirmative action isn't the compromise of meritocracy, but the sense that race is an illegitimate consideration," Primus noted in his outline.

Still others argue that affirmative action promotes race consciousness that can lead to hostility and stigma. Similar arguments, however, also have been made against color-blind antidiscrimination rules.

The Supreme Court's decision is not an easy one. The justices may examine history and determine that "the well is poisoned." Or they can say that "once upon a time things were really horrible, but we've gotten past that and we now compete on a level playing field."

The Court "will choose one story over another," Primus predicted. "It is part of telling us who we are."

International law and Operation Iraqi Freedom

The complexity of issues swirling around last spring's war to topple Iraqi leader Saddam Hussein benefited from learned insights from faculty members in a panel discussion presented by the Law School's Center for International and Comparative Law.

Billed as an *agora* (an ancient Greek word for persons assembled to discuss a weighty public issue) and coinciding with the fall of Baghdad in April, the forum of five professors approached the issue from a variety of perspectives. Associate Dean for Academic Affairs Evan Caminker and Assistant Dean for International Programs Virginia Gordan served as moderators.

The lineup of speakers and their topics reflected the subject's complexity:

- A. W. Brian Simpson, the Charles F. and Edith J. Clyne Professor of Law and an expert on the development of the United Nations and human rights law, speaking on "The United States Hegemony and the Twenty-First Century."
- Professor of Law James C. Hathaway, director of the Law School's Refugee and Asylum Law Program, on "Operation Iraqi Freedom: Was the Cost to Collective Security Just Too High?"
- Professor of Law and international trade expert Robert L. Howse, on "The Legality of the Use of Force in Iraq: Is International Law Really on Saddam's Side?"
- Visiting Professor Dino Kritsiotis, Reader in Public International Law at the University of Nottingham in

England, speaking on "The Legal Chapter of the *Jus in Bello* of Operation Iraqi Freedom."

- Visiting Professor of Law Joel H. Samuels, '99, on "Regime Change and the Process of Governing a Post-War Iraq."

Howse, the only speaker to support the legality of the U.S.-led coalition's invasion of Iraq, cited Article 51 of the United Nations Charter, which preserves a country's inherent right of self-defense, and Security Council Resolution 678, passed in connection with Iraq's invasion of Kuwait, as justification for the attack. Resolution 637 authorizes the use of "all necessary means" to restore peace and order, he said.

"It became clear that sanctions were merely strengthening Saddam's hold on his people," Howse said. "Smart sanctions' help the humanitarian problems somewhat, but only the threat of force would make Saddam disarm, and everybody knew it."

France's threat to veto any UN Security Council resolution to use force against Iraq meant "any hope of continuing pressure through the Security Council died," Howse explained. With all other options closed, "at that point, and only that point, did war become legal."

Howse was the only panelist to take this position. Both Simpson and Hathaway criticized the damage they said the move did to the UN. "We need to get the UN going again," Simpson stressed. "It did not work badly in this case. It was just preempted."

Said Hathaway: "No UN document gives a nation the right to change the government of another," so "I think we have to start with the assumption that this invasion is an illegal act. [But] is this a case when the United States and Britain are legally wrong but ethically right? My answer is emphatically no."

In response to a listener's question, Hathaway and Howse agreed that international legal structures have no final arbiter to decide the legality or illegality of actions like Operation Iraqi Freedom. "International law is decentralized as an interpretative matter," Howse answered. "Even the International Court of Justice is not held up as a final arbiter. . . . There is no equivalent of the [U.S.] Supreme Court."

Panelists' remarks and listeners' questions also addressed issues of media coverage, post-war reconstruction and who should manage it, a post-war government, the fact that up to the time of this forum coalition forces had not confirmed finding any weapons of mass destruction, and future repercussions should another state take similar action against a sovereign state without UN approval.

Activities

Reuven S. Avi-Yonah, the Irwin I. Cohn Professor of Law, in May taught a course in international tax at Tsinghua Law School in Beijing. In April, Avi-Yonah organized and presented a paper at the conference on critical tax in Ann Arbor; in March, he presented a paper at a Columbia University conference on law and foreign direct investment; in February, he organized a conference to bring a comparative perspective to discussion of the future of the corporate tax, and presented a paper at the conference; and in January he chaired the panel on permanent establishments for the American Bar Association Tax Section's midyear meeting at San Antonio.

Professor **Omri Ben-Shahar** has made a number of presentations during the academic year: at the conference "The Law and Economics of Irrational Behavior" at George Mason Law School, and at Law and Economics Workshops at Northwestern University, University of Southern California-Los Angeles, and the American Law and Economics Association Annual Meeting. He also chaired the panel on "Teaching Law and Economics" at the annual meeting of the Association of American Law Schools in Washington, D.C.

Professor Evan Caminker, associate dean for academic affairs, earlier this year gave presentations on affirmative action to the College Board at its Midwestern Regional Meeting and at the Association of American Law Schools' annual meeting. He participated in debates on affirmative action at a program sponsored by the University of Chicago Law School's Federalist Society and at a conference sponsored by the National Association of Scholars.

Clinical Assistant Professor **Larry Connor**, '65, presented a lecture to students and faculty at Capital University of Economics and Business in Beijing, China, in December. His two-day presentation dealt with "Processes to Resolve Labor Disputes in the United States." He also spoke on the same subject to a group of journalists, arbitrators, and government officials at a presentation arranged by the U.S. Embassy in Beijing.

Rebecca S. Eisenberg, the Robert and Barbara Luciano Professor of Law and co-chair of the Law School's Building Committee, has won an award for distinguished service from the Berkeley Center for Law & Technology. This year, she has given faculty workshops at the University of Virginia and the University of North Carolina, and earlier in the academic year, presented the Levine Distinguished Lecture at Fordham University.

Professor **James C. Hathaway** traveled to Portugal in December, where he led the annual refugee law course sponsored by the European Council on Refugees and Exiles for some 100 lawyers and decision makers from across the continent. In the spring, Hathaway gave a lecture at Queen's University (Canada), jointly sponsored by the Faculty of Law and the Southern African Migration Project, on how refugee law rules should be adapted to situations of mass influx. He was also a panelist at a special seminar convened at Yale University's Center for International and Area Studies on "Refugee Policy in Canada and the U.S. Post-9/11."

Clarence Darrow Distinguished University Professor of Law **Yale Kamisar** participated in an all-day conference at Georgetown University Law Center in March marking the 40th anniversary

of *Gideon v. Wainwright*, the case that established that indigent criminal defendants have an unqualified right to assigned counsel in all serious criminal cases. Along with Anthony Lewis, author of *Gideon's Trumpet*, and Abe Krash, who joined Abe Fortas in writing the Supreme Court brief on behalf of Gideon, Kamisar took part in a panel discussion placing the *Gideon* case in historical perspective and deploring the failure to effectuate the *Gideon* principle in recent years.

Richard O. Lempert, '68, the Eric Stein Distinguished University Professor of Law and Sociology is on leave from the Law School to serve as division director for the Social and Economic Sciences Division of the National Science Foundation. While on leave, he continues to direct the University of Michigan's Life Science Values and Society Program (LSVSP) and serve on the State of Michigan Community Genetics Advisory Council. He returns to Ann Arbor several days each month for LSVSP activities. During this academic year he: presented the keynote address at the "Studying Islamic Publics" conference in Cairo, Egypt; spoke on "Researching Research Integrity" at a national conference sponsored by the Institute of Medicine; and gave a talk on "Evaluating Governmental Programs" at a conference held by the Performance Institute. Acting as an individual and not an NSF representative, he participated in drafting *amicus* briefs on behalf of the American Sociological Association and the University of Michigan's Black Alumni Association for the *Grutter v. Bollinger* case regarding Law School admissions policies and was interviewed by Korean television on the issue of affirmative action. Lempert also: presented a paper at a Wayne State University confer-

ence on scientific evidence; served as a panelist for the conference "Life Science, Technology, and the Law" at the U-M Law School in March (see story on page 49); spoke at a conference on Technology and Its Effects on Criminal Responsibility at Charleston, South Carolina, sponsored by the International Society for the Reform of Criminal Law; was one of the concluding commentators at the conference "Rights and Realities," sponsored by the American Bar Foundation and Stanford Law School; and was a presenter in a Cardozo Law School conference on "Culture and Inference."

Mathias W. Reimann, LL.M. '83, the Hessel E. Yntema Professor of Law, in April delivered a paper for a conference in Siessen, Germany, on "Common Law and European Legal History." At the annual meeting of the Association of American Law Schools, he chaired the Conflicts Section, where the program topic was "Conflicts in the Cyberage: Lessons from the Yahoo Case"; the papers will be published in the *Michigan Journal of International Law*. Last October, he lectured at the Max Planck Institute for International and Foreign Private Law in Hamburg, Germany, on "Comparative Law in the Past Half Century."

Theodore J. St. Antoine, '54, James E. and Sarah A. Degan Professor Emeritus of Law, in June is keynote speaker at the Nineteenth Annual Carl A. Warns Jr. Labor & Employment Law Institute of the Louis D. Brandeis School of Law, University of Louisville; his topic is "Two Transitional Decades of Labor and Employment Law."

A.W. Brian Simpson, the Charles F. and Edith J. Clyne Professor of Law, will receive honorary degrees this year from the

Dalhousie Law School in Canada and the University of Kent at Canterbury.

Philip Soper, the James V. Campbell Professor of Law, delivered his paper "Why Theories of Law Have Little or Nothing to do With Judicial Restraint" at the Tenth Ira C. Rothgerber Jr. Conference, called "Justice White and the Exercise of Judicial Power," at the University of Colorado in Boulder in January. The conference was sponsored by the Byron R. White Center for the Study of American Constitutional Law and the *University of Colorado Law Review*; its speakers all were former law clerks of Justice White. U.S. Supreme Court Associate Justice Ruth Bader Ginsburg's talk "Remembering Justice White" closed the conference. In November, Soper attended a memorial for Justice White at the Supreme Court in Washington, D.C.

James B. White, the L. Hart Wright Collegiate Professor of Law, delivered the inaugural Mellinkoff Lecture at UCLA in early April. His topic was "Free Speech and Valuable Speech: Silence, Dante, and the Marketplace of Ideas." David Mellinkoff, author of *The Language of the Law*, was a pioneer in examining law and language. In May, White addressed Canadian judges on the writing of judicial opinions and presented a paper at a conference on "Legal Language" at the University of Milan, Italy.

Visiting/Adjunct Faculty

David H. Getches, the Raphael J. Moses Professor of Natural Resources Law at the University of Colorado School of Law, was a panelist for the Indian Law Day conference at the Law School in March and earlier in the month presented a talk, sponsored by the Native American

Law Students Association, on Indian law decisions made by the Rehnquist Supreme Court. In January, he presented a paper on "Indigenous Water Rights under International Law" in Cochabamba, Bolivia; and in December presented a paper on "Water Transfers" at a meeting of U.S. and Iranian water experts held in Tunis, Tunisia, under sponsorship of the National Academy of Sciences; the same month he also did a Webcast for the American Bar Association from Georgetown Law Center on Supreme Court arguments in two just-argued Indian law cases. Getches visited the Law School this academic year to teach Indian Law and Natural Resources Law.

Margaret Leary, director of the U-M Law Library, gave a presentation on "The Librarian's Role in Space Planning: Been There, Changed That," at the American Bar Association Section of Legal Education and Admissions to the Bar Law School Facilities Committee's "Bricks, Bytes, and Continuous Renovation" workshop, held in March at Suffolk University Law School, Boston. She also served on the Institute for Continuing Legal Education Executive Committee.

Leonard Niehoff, '84, of Butzel Long in Ann Arbor, discussed "Common Evidence Problems" at a trial practice seminar in February sponsored by the Institute for Continuing Legal Education.

UNDER THE MICROSCOPE: PAST, PRESENT, FUTURE

From assaying 200 years of judicial review — Is it good? Is it constitutional? — to trying to peer through the haze of the future that the life sciences are leading us into, Law School conferences and symposia during this academic year challenged and stretched thinking well beyond the usual, daily intellectual exercise that is considered SOP here.

The following stories report on the winter term's five major conferences, four held at the Law School and one held at the University of Michigan Business School as a joint project of the Law School and the Business School. (The joint Law School/European Journal of International Law conference on terrorism was discussed in the Fall/Winter 2003 issue of Law Quadrangle Notes, beginning on page 10.) These extensively planned programs bring the resources of the Law School and the University to bear on major questions to provide deeper, more varied, and more thorough examination of the issues at hand. The conferences:

- Page 43 RESILIENT CAPITALISM MEETS 'TOUGH LOVE'
- Page 46 VIEWING **MARBURY** THROUGH THE PRISM OF 200 YEARS
- Page 49 PROBING AND EXPLORING THE NEW FRONTIER
- Page 51 A PARTNERSHIP OF INDIAN LAW AND ENVIRONMENTAL LAW
- Page 53 PEERING INTO THE FUTURE OF CORPORATE TAX

UNDER THE MICROSCOPE

RESILIENT CAPITALISM MEETS 'TOUGH LOVE'

Enron. WorldCom. Arthur Andersen. These and other business names recently have become synonymous with questionable accounting, lapses in professional ethics, and corporate wrongdoing that have led many people to doubt the integrity of modern business. The economic downturn that has accompanied this turnabout has deepened the gloom.

Yet capitalism, conditioned as it is to the ying and yang of supply and demand, is nothing if not resilient. Good times always have followed bad, and confidence always has replaced doubt. Each spin of the cycle, however, has generated a new debate over the appropriate ethical and legal responses to new challenges.

Deputy U.S. Attorney General Larry D. Thompson, '74, who heads the President's Corporate Fraud Task Force, put it this way:

These events, unfortunately, are not new. There were the savings and loan bankruptcies a decade ago, the insider trader scandals of two decades ago, earlier junk bond scandals, all the way back to "the real estate scams that mark the dawn of our republic."

But responding to such crises with zealous overregulation "can seriously stifle innovation," Thompson explained in remarks delivered at a Law School/Business School conference on capitalism earlier this year. The "hyper-regulatory nanny state" is not the antidote. Criminal fraud prosecution is a better antidote. The "tough love" response is better than becoming the "mommy and daddy state," he said.

"Our task at the Department of Justice is to convince people that the consequences of wrongdoing are severe and virtually certain," Thompson said. Corporate scandals "hurt Main Street as well as Wall Street."

Thompson reported that his task force's work has led to more than 130 investigations, the filing of more than 160 charges, and convictions of more than 50 people since it began its work in July last year.

Thompson made his remarks as keynote speaker for the Louis and Myrtle Moskowitz Symposium on Resilient Capitalism, held at the U-M Business School in February under joint sponsorship

with the Law School. Thompson stressed that his remarks reflected his personal thoughts and not U.S. Justice Department policy.

The Moskowitz Symposium, which brought together company and government officials and legal and business scholars, was "designed to provide a high-level perspective on issues of corporate culture, reporting, and monitoring, and seeks to address the current crisis of confidence in American business systems and the credibility of American business leadership," according to the official program.

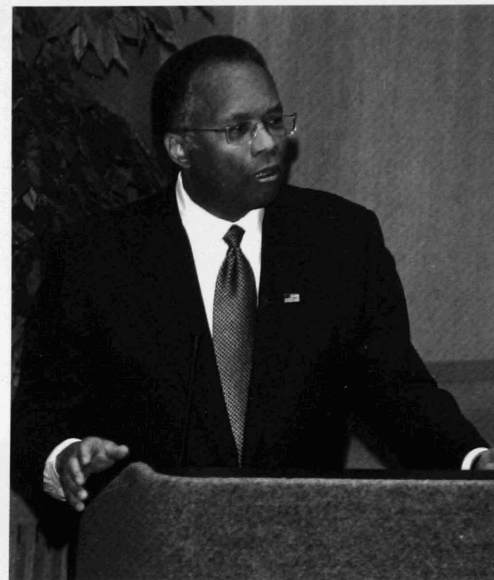
This is "a vital and important subject," B. Joseph White, former dean of the Business School and former interim U-M president, explained in his welcome talk. White said the mix of practical and academic experience that the conference assembled offered "a wonderful vantage point" for panels of discussants to consider the day's central issues: disclosure, corporate culture, and public and private monitoring.

Reform is underway, but it is not fast enough, White noted. And, he asked, "Do the reforms go far enough?"

(This was White's last day as the Business School's Wilbur K. Pierpoint Collegiate Professor of Leadership in Management Education. The next week he became managing director of the Fred Alger Management investment firm in New York City.)

On the issue of disclosure:

Most panelists favored greater responsibility and transparency in corporate activities, but some also felt new Securities and Exchange Commission rules make these changes difficult and require interpretation by specialists. "The goal of financial reporting, I believe, is visibility and transparency," said Robert L. Anthony, a partner in PricewaterhouseCoopers.



Deputy U.S. Attorney General Larry D. Thompson, '74, tells conference participants that overresponding to recent corporate scandals "can seriously stifle innovation." He also noted in his keynote talk that such scandals have occurred throughout U.S. history.



PricewaterhouseCoopers partner Robert L. Anthony, Lester Coleman, '68, recently retired executive vice president and chief legal officer of Halliburton Company, and Doug Skinner, KPG Professor of Accounting at the U-M Business School, listen intently to proceedings at the Louis and Myrtle Moskowitz Symposium on Resilient Capitalism. Rotating audit partners might improve the maintenance of professional distance between auditors and corporations, Coleman said.

of the general counsel," Coleman later answered a questioner, "I think you're going to see general counsel taking a more proactive role in what has got to be disclosed."

Panelists also included J. Michael Shepherd, '80, executive vice president and general counsel of the Bank of New York, and Michael Crooch, of the Financial Accounting Standards Board. Doug Skinner, KPMG Professor of Accounting and area chair of accounting at the U-M Business School, introduced panelists, and Merritt B. Fox, Alene and Allan F. Smith Professor of Law at the U-M Law School, moderated the subsequent discussion.

Lester Coleman, '68, the just-retired vice president and chief legal officer of Halliburton Company and one of the several Law School graduates on the day's panels, noted that he is "optimistic" that the Sarbanes-Oxley Act of 2002 and subsequent SEC regulations will be helpful. Quoting Justice Louis Brandeis, Coleman noted that "Sunshine is a very good disinfectant."

"I think you're going to see a fundamental change in the role

On the issue of corporate culture:

Steelcase Inc. CEO James Hackett noted that his predecessor and mentor "felt that leadership came through trust, and that trust is a function of integrity." Despite the cost, Steelcase went ahead with a \$50 million recall on moveable walls it had sold throughout the country when it discovered that the walls did not meet fire codes in some places, Hackett reported. Right after the replacements were installed in the Pentagon, the terrorist plane struck it on September 11, 2001, and the walls appear to have helped contain damage. "Doing the right thing counts," Hackett said.

Fellow panelist Richard Painter, a professor at the University of Illinois Law School and a visiting professor at the U-M Law School, criticized the American Bar Association for resisting efforts to require lawyers working with corporations to report wrongdoing to senior management. Last year, Painter explained, he wrote to the SEC recommending that lawyers be required to report misdeeds to a corporation's board of directors. "This should have been done at the ABA level and should have been dealt with responsibly," he said. "Now the SEC wants 'noisy withdrawl' by the lawyer if the board will not fix the problem."

Panelist Joshua Margolis of the Harvard Business School placed the blame for wrongdoing on individuals rather than systems of compensation, oversight, or governance. "We construe human beings as billiard balls buffeted about by forces beyond our power," he said. "Human beings are rational deliberators and intuitive crafters of action. Behavior is a product of creative endeavor in response to how one understands the field of action."

Reuven Avi-Yonah, Irwin I. Cohn Professor of Law at the Law School, and Tim Fort, assistant professor of business ethics and business law at the Business School, introduced panelists and moderated subsequent discussion. Avi-Yonah noted during the discussion that he sees signs that companies are increasing their community service roles and unyoking them from their bottom line; Fort, however, explained that such actions may not accurately reflect the overall culture of the corporation — Enron, he reported, had impressive points on the corporate responsibility scoreboard.

On the issue of public and private monitoring:

Robert Litan, vice president for economic studies of the Brookings Institution, argued that “enforcement was the problem” and the financial imbroglio came because of “violation of accounting 101.” Reported Elizabeth M. Murphy, chief of the SEC’s Office of Rulemaking, Division of Corporation Finance, “we’ve just come off the busiest stretch of rulemaking in SEC history.”

Michael Emen, senior vice president in charge of the NASDAQ listing qualification, proposed that stock option plans for executives be approved by shareholders and that the majority of a board of directors must be independent. No family members or relatives of top company officers should be on a board, he said. “If you have to ask the question, the person shouldn’t be on the board.”

Faculty members Michael Barr, an assistant professor at the Law School, and Jerry Davis, professor of organizational behavior at the Business School, assisted the panel. Other panelists included Connecticut Deputy Treasurer Meredith Miller, and Adam C. Pritchard, a professor at the Law School.



Steelcase CEO James Hackett tells participants that “doing the right thing counts.” Hackett described how his company completed a \$50 million recall of moveable walls at the Pentagon and elsewhere across the country to upgrade their fire retardation capabilities just before terrorists struck on September 11, 2001. The upgrade likely prevented fire from spreading at the Pentagon.

UNDER THE MICROSCOPE

MOSKOWITZ PROFESSORSHIP RECOGNIZES KINSHIP OF LAW, BUSINESS

The Louis and Myrtle Moskowitz Symposium on Resilient Capitalism (see adjoining story) owes its timeliness and vitality to the foresight of those who established a professorship at the University of Michigan that reflects the kinship of law and business.

Established in 1989 by Republic National Bank of New York (now HSBC Bank USA), the Louis and Myrtle Moskowitz Research Professorship, in alternate years, supports the work of a law professor and a business professor, and also supports a periodic conference on the collaborative efforts of law and business. The professorship honors former Republic National Bank Chairman Louis Moskowitz and the memory of his wife Myrtle Moskowitz.

Two Law School faculty members have held the Moskowitz Professorship: James J. White, '62, the Robert A. Sullivan Professor of Law; and Merritt B. Fox, the Alene and Allan F. Smith Professor of Law. Three Business School faculty members have held the professorship: Professor of Business Law Cindy Schipani; Professor of Business Economics and Public Policy Scott E. Masten; and Professor of Law Lynda J. Oswald, '85.

UNDER THE MICROSCOPE

VIEWING MARBURY THROUGH THE PRISM OF 200 YEARS

Renowned constitutional scholar William W. Van Alstyne, charged with summing up discussions of 200 years of judicial review, began by confessing “I’ve been writing different speeches as I’ve listened to different panels.”

“Judging Judicial Review: Marbury in the Modern Era” was that kind of symposium: full of content and opinion, history and philosophy, answers and questions. There were discussions of the history and extent of judicial review, alternatives to review, how it functions and relates to the growth of government, and its international role. Van Alstyne, the William R. and Thomas C. Perkins Professor of Law at Duke University Law School and a visiting professor at the University of Michigan Law School during the 2002 – 03 school year, had a rich lode to mine.

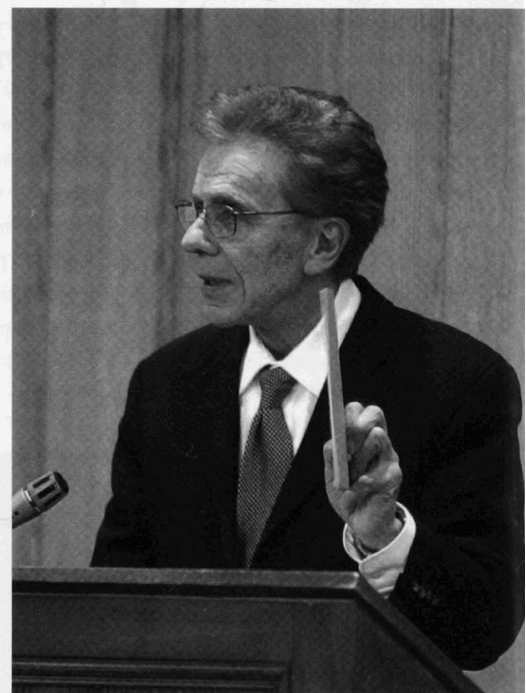
“How thin it is,” Van Alstyne noted as he held up a pocket copy of the U.S. Constitution. The document contains guidelines more than rules, he said. It’s very difficult to change, so it’s anti-majoritarian and anti-democratic. There’s a “negative synergy” to our Constitution, Van Alstyne said as he compared the Constitution’s small number of amendments to the steady increase of growth rings in the giant redwood trees of his native California. “Our Constitution is less living [than those trees]. It has fewer Cambrian rings.”

The Chinese constitution is majoritarian in its reliance on the legislature as the supreme source of government power and interpretation, he noted, but the Chinese legislature is a creature of the Communist Party. This is “a tragic and ironic twist on democracy.”

“There is nothing illegitimate about the Supreme Court looking at acts of Congress,” Van Alstyne said. And “if you want to know what the particular constitution is to do, it is not desirable to turn to history, it is inevitable.”

To illustrate, he told this story: While he was visiting Germany in 1976, he interviewed justices of the German Constitutional Court, which advises the Bundestag on the constitutionality of proposed legislation. During its consideration of a bill to decriminalize abortion — a debate that occurred a year and one-half after the U.S. Supreme Court legalized abortion in *Roe v. Wade* — and the Constitutional Court said the proposed law could not be passed because it would abrogate Germany’s concern for human life. “When I interviewed the judges, I asked, very obtusely, if this [decision] referred to the Holocaust,” Van Alstyne reported.

“Of course,” they answered.



“How small it is,” constitutional scholar William W. Van Alstyne explains as he holds up a copy of the U.S. Constitution. “If you want to know what the particular constitution is to do, it is not desirable to turn to history, it is inevitable,” he noted. Van Alstyne, a professor at Duke University Law School, was a visiting professor at the U-M Law School this year.



Law Professor Roderick Hills Jr. and Michigan Law Review symposium coordinator Anna-Rose Mathieson confer at right. Panelists Barry Friedman and Mark Tushnet chat at left.

It's been 200 years since Chief Justice John Marshall enshrined judicial review in *Marbury v. Madison*. "It is emphatically the province and duty of the judicial department to say what the law is," Marshall wrote.

"Thus," according to Marshall, "the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."

Like so many legal ideas, however, judicial review is not so clear. Are there alternatives? Did Marshall invent the idea, or just use *Marbury* to institutionalize it? How has judicial review fared in the face of government growth? Does judicial review work on the international front? Should it?

These and other questions provided the raw material for the *Michigan Law Review's* symposium "Judging Judicial Review: *Marbury* in the Modern Era," held at the Law School in February. With Law School faculty members as moderators, panels of experts assayed judicial review from many perspectives after keynote speaker John T. Noonan Jr., senior judge of the United States Court of Appeals for the Ninth Circuit, laid out the good, bad, and ugly of judicial review and challenged participants "to investigate and illuminate" the issues he raised.

Judicial review is a high profile power, but the U.S. Supreme Court only has exercised it 146 times, Noonan explained: Only once from 1803 – 66, and only a total of 26 times during the 19th century. From 1900 – 2002, there were 120 cases of judicial review, Noonan continued, and 36 of them have occurred since William H. Rehnquist became chief justice in 1986. "The Rehnquist Court has been the most judicially active in our history," Noonan said.

Calling his talk "Judicial Review: A Silk Purse?," Noonan noted that many times judicial review has made little difference, as in *Clinton v. New York* in 1998, when the Court ruled that the president cannot exercise a line item veto, or in 1906, when the Court ruled that Congress cannot block the sale of alcohol to Native Americans. (The latter decision was overturned a decade

later.) Other instances of judicial review were just bad decisions, like the *Dredd Scott* ruling and *Bailey v. Drexler Furniture Company*, in which the Court overruled an attempt to outlaw requiring 14-year-olds to work more than eight-hour days and six-day weeks.

"What is the balance?" Noonan asked. "Is Marshall's wonderful machine worth celebrating?" Noonan said his judicial review scorecard produces 63 cases where the ruling was unnecessary, 17 in which it was harmful, and three that were necessary and beneficial. "It looks as though only five percent of the time has the power been truly necessary and useful. Is the power too deep to be cut back in any way? These are the questions for you to investigate and illuminate."

Three sets of panelists set out to do so:

Rethinking Review: Assessing Alternatives to Our Current System. Moderated by Professor Roderick Hills Jr.

The power to conduct judicial review does not lie solely in the judicial branch of government, argued Michael Stokes Paulsen, the Briggs & Morgan Professor of Law at the University of Minnesota Law School. *Marbury* is "the classic opinion that everybody praises but nobody reads," said Paulsen, who added that each branch of government, executive, legislative, and judicial, and even the states, is empowered to question a law's constitutionality.

Alexander Hamilton envisioned constitutional review in the *Federalist Papers* No. 78, "of which *Marbury* is an act of shameless plagiarism," Paulsen explained.

No, he said, such a system would not lead to chaos or anarchy. It would be "a check and balance system, exactly what the separation of powers was designed by the framers to do." It would be "a divided and shared power just like any other power that is too important to be in single hands."

Co-panelist Barry Friedman, a professor of law at New York University Law School, reported that the idea that judicial review is inconsistent with democracy has been gaining support among scholars. And he noted that judges need popular opinion to be on their side if their decisions are to be enforced.



The U.S. Supreme Court has exercised judicial review much more often in recent years than throughout its earlier history, Judge John T. Noonan Jr., senior judge of the United States Court of Appeals for the Ninth Circuit, explains in his keynote talk.

Over the last two decades, the United States has moved toward a strong form of judicial review whose decisions cannot be reversed through the normal legislative process, said panelist Mark V. Tushnet, the Carmack Waterhouse Professor of Constitutional Law at Georgetown University Law Center.

Extending *Marbury*: Judicial Review and the Growth of Government. Moderated by Assistant Professor Richard Primus.

“Marshall’s genius in *Marbury v. Madison* was to establish judicial review in a case that could not be lost,” according to Georgetown University Law Center Professor David D. Cole. By ruling that *Marbury* should have been given his appointment as a justice of the peace, and then declaring the Judiciary Act of 1789 that authorized the appointment to be unconstitutional, Marshall was able to chide his political opponents in the executive branch without having to face their refusal to accept his ruling, Cole said.

Cole also noted that judicial review seldom is exercised in times of war or security threats — he cited the wartime *Dennis and Korematsu* cases among other examples — and “those [who are] targeted in these emergencies usually are the most vulnerable.” Once peace is restored, he continued, the Court often will strike down such actions.

“We’ve been under one kind of emergency or another since 1933,” said NYU Law School’s Friedman. “If you can’t go to the Court to preserve your constitutional rights, where can you go?”

Judicial review is good and should continue, Cole said, but “as with all ideals, we do not live up them, but that should not be reason to abandon them.”

Panelist Walter Dellinger, Douglas B. Maggs Professor of Law at Duke University and former acting solicitor general of the United States, decried “the super-*Marburyism* of the present” and the resulting erosion of congressional authority. The Supreme Court’s exercise of judicial review in recent years “threatens to cripple genuine national power,” he claimed.

“We have the least deferential Court, in my view, in history,” Dellinger continued. “Judicial supremacy has reached its apogee in a Court that treats Congress like a District Court.”

But in the *Chevron* case in 1984, the Court decided in favor of deference to the rule-making power and expertise of an agency interpretation of statutes, noted University of Chicago Professor of Law Elizabeth Garrett. Sometimes called “the counter-*Marbury*” decision, the *Chevron* case reflects the growth of administrative government and Congress’ choice of where to vest interpretative authority.

Global Justice: Judicial Review on the International Scene. Moderated by Assistant Professor Daniel Halberstam, founding director of the University’s European Union Center who now serves on the advisory board.

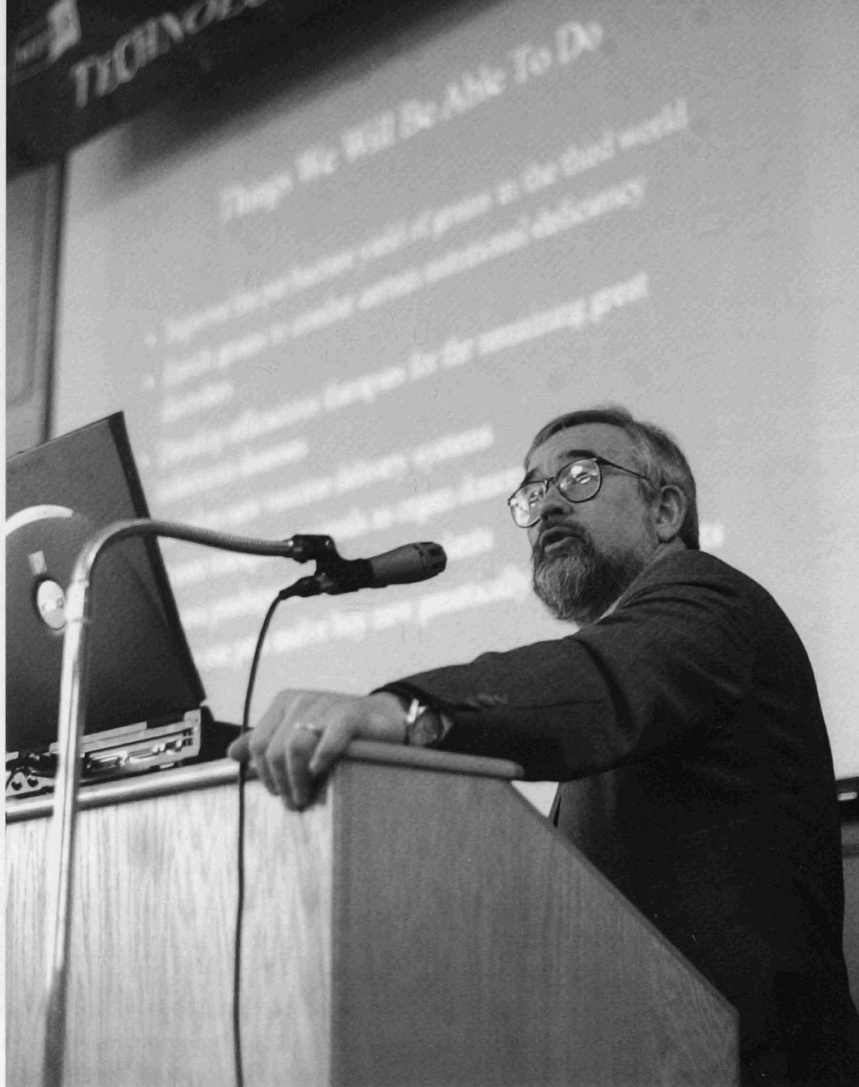
“The ‘Rule of Law’ is shorthand for a cultural practice. The American ‘Rule of Law’ is embedded in a larger cultural tradition,” noted Paul W. Kahn, Robert W. Winner Professor of Law at Yale Law School. While most of the world looks increasingly toward comparative and transnational law, U.S. jurisprudence looks increasingly to original intent. Neither approach necessarily is better than the other, said Kahn. “We’re just different.”

Calling his remarks “Why Europe Rejected American Judicial Review and Why It May Not Matter,” Alex Stone Sweet, Official Fellow in Politics and Chair in Comparative Government at Nuffield College, Oxford, noted that most European countries use constitutional courts to review laws before they are passed and to guide other courts.

The European system uses advice, is centralized, and deals with an abstract rather than actual or concrete issue, he explained. In contrast, the U.S. system begins with a specific conflict, the process is diffuse, and the decision is concrete.

“European constitutional courts were designed as relatively pure oracles of the constitution,” Sweet explained. However, constitutional courts’ activities are getting “more and more concrete,” he reported. “Constitutional courts are acting more like appellate courts [and] reaching deeply into judicial proceedings.”

Lorraine Weinrib, professor of law and political science at the University of Toronto, reported that modern constitutions, like those of Canada, Israel, and South Africa, incorporate many of the results of judicial review by enumerating rights and provisions for restricting them. “It’s important to note that the new constitutions follow the American model in judicial review,” she said.



Keynote Speaker Philip R. Reilly

UNDER THE MICROSCOPE

PROBING AND EXPLORING THE NEW FRONTIER

There's little doubt that the "magic of our understanding of DNA," as *Abraham Lincoln's DNA and Other Adventures in Genetics* author Philip R. Reilly puts it, has moved the molecular, spaghetti-like ribbons that make up the genetic legacy of life center stage. "What other symbol has become as iconic, as emblematic, as the double helix," Reilly asked rhetorically of faculty, students, and others who gathered to hear his keynote address for the conference "Life Sciences, Technology, and the Law."

Held at the Law School in March, the symposium was an "interdisciplinary inquiry into the role of law in a world increasingly changed by the life sciences," organizers told participants in their welcome letter. The conference was presented by the *Michigan Telecommunications and Technology Law Review*.

Panelists focused on three targets during the day's discussions: The Life Sciences in Court; The Regulation of Life Sciences; and The Evolving Role of Technology Transfer. It was a day punctu-

ated by questions more than answers, a reflection of the uncharted geography of ethics, values, law, and culture that accelerating life science discoveries demand that we explore.

Reilly — a physician/lawyer, CEO of Interleukin Genetics Inc., president of the American Society of Law, Medicine, and Ethics, and former executive director of the Eunice Kennedy Shriver Center for Mental Retardation Inc. — supports genetic and biotechnological advances in science, healthcare, and other fields. "DNA teaches us wonderful things, like that we are 99.9 percent alike," he said. "Maybe someday someone will use the fact that we are 99.9 percent alike to break down 19th century stereotypes" of race and other human divisions, he said.

He listed "things we will be able to do": assess reproductive risks for disease; expand newborn assessment and predictions/intervention regarding later onset disease; choose therapies and

nutritional supplements based on a person's genotype; use stem cells to treat currently untreatable diseases; and create transgenic animals "as pharmaceutical factories."

The challenge is how lawyers, ethicists, and elected officials will deal with what the scientists are crafting, he said. Take the field of criminal law, for example: Will DNA analysis suggest a phenotype, measure competence, or come to bear in parole hearings?

- In civil law: What is the impact on paternity litigation? "Full genetic analysis should be part of the defense of all malpractice cases involving childbirth," but "Will the proliferation of genetic risk assessment tests trigger an explosive growth in malpractice lawsuits?"
- States' rights: Will there be routine DNA testing as part of a public safety doctrine? Will DNA sampling be done universally of every arrestee, every traveler entering the United States, every newborn?
- Regulatory changes: How will the Food and Drug Administration deal with the explosion of pharmacogenetics? How adequately will the Agriculture Department deal with pre-market safety evaluations of genetically engineered crops? How will regulations handle human subject research in the area of gene therapy? How will the EPA measure the environmental impact of genetically engineered plants? For OSHA, what will constitute a safe workplace in the genomics era? And then there are "the great questions":
- What will be the consumer-driven neo-eugenics protocol for the right to privacy?
- Will universal DNA banking be imposed?
- What impact will "Quixotic dreams of perfectability" have on people with disabilities?
- What impact will genetic enhancement technology have on capitalist societies with economic disparities?
- Is there a Genomics Divide between rich and poor?

In courts, the explosion of life sciences information is having significant impact. For example, "I'm really worried that people cannot understand the DNA statistics," noted Jonathan J. Koehler, Associate Professor of Behavioral Decision Making and University Distinguished Teaching Professor at the McCombs School of Business and School of Law, University of Texas at Austin.

Maybe so, but "DNA has cast an interesting light on our justice system and had a great impact," according to Richard O. Lempert, '68, the Eric Stein Distinguished University Professor of Law and Sociology and director of the U-M's Life Science Values and Society Program.

DNA findings' "great impact" on the justice system has shown the fallibility of eyewitnesses and raised questions about coerced confessions because of the number of people who have confessed to a crime, been convicted, and later have been shown through DNA evidence to be innocent.

"We have this light on the system that we should take to heart, but the system resists taking this to heart," Lempert said. He added that the DNA-testing laboratories are raising standards in response to increased use and challenges to their findings.

Nor are DNA analyses' impacts limited to the courts, Lempert added. DNA information may come to be used in adoptions, to determine which immigrants are relatives of people in the United States, and in genetic counseling. In response to a question, he also noted, "If we ever go to a national DNA database we'll not be able to give anonymous DNA samples to researchers."

David H. Kaye, Regents Professor at Arizona State University College of Law, also was on the panel with Lempert and Koehler. Richard D. Friedman, the Ralph W. Aigler College Professor of Law, served as moderator.

- Panelists for discussion of "The Regulations of Life Sciences" included: Rebecca S. Eisenberg, the Robert and Barbara Luciano Professor of Law; Rosemary Quigley, '00, Assistant Professor of Medical Ethics and Health Policy at Baylor College of Medicine, Houston; and the Rev. Clayton L. Thomason, Assistant Professor for Spirituality and Ethics in the Department of Family Practice and Center for Ethics and Humanities in the Life Sciences, College of Human Medicine of Michigan State University and adjunct professor at Michigan State University-Detroit College of Law. Panel moderator was Joel D. Howell, Victor Vaughan Collegiate Professor of the History of Medicine, professor of internal medicine, history, and health management and policy, co-director of the RWJ Clinical Scholars Program, and director of the University of Michigan's Program in Society and Medicine. Among panelists' concerns were questions of research participants' ownership of fluids, DNA samples, and their other contributions to the research; the tension between proprietary and public findings; trade secrets; and ownership of new discoveries.
- Discussion of "The Evolving Role of Technology Transfer" included: Carl Gulbrandsen, managing director of the Wisconsin Alumni Research Foundation; Mel Kronick, chief scientist for the BioResearch Solutions Unit of Agilent Technologies, Palo Alto, California; and Ken Nisbet, executive director of the University of Michigan's Office of Technology Transfer. Rebecca S. Eisenberg of the Law School was moderator. Panelists noted the expense of developing new products and the small percentage of patented items that succeed; the question of sharing research; and other subjects. "I have a basic assumption that a university patent facilitates research," Gulbrandsen reported. "If a university owns the patent, the university controls research. If industry owns the patent, industry controls research. It's as simple as that."



UNDER THE MICROSCOPE

A PARTNERSHIP OF INDIAN LAW AND ENVIRONMENTAL LAW

Ojibwe elder George Martin begins the ceremony to open Indian Law Day discussions by burning a blend of tobacco, sweet grass, cedar, and sage.

This will “cleanse the area where we are going to do the teachings, bring good feelings in, clear your minds,” Ojibwe elder George Martin explained as the aromatic scent of the four sacred herbs began to make its way through the room.

Tobacco from the east, cedar from the south, sage from the west, sweet grass from the north — mixed and lighted into a smudge that Martin took to everyone in the room who wished to draw the smoke over and around himself to prepare for the discussions to follow.

“We know we are not the only ones he has placed on this Mother Earth . . . so we don’t push our ways on others,” Martin explained as he began to move through the rows of seats. “Just raise your hand and you will be bypassed with no hard feelings. We know that all religions were sent down here by our creator, and we respect them all.”

“We pray for *all* warriors,” Martin, a 10-year veteran of the U.S. Air Force, said, noting that soldiers on all sides of the then-recently begun war in Iraq have families and loved ones. He prayed for “the elders who are not able to be here,” and asked that the creator “look down on our Mother Earth, who is awakening now, for the tremendous job that she has to do, to care for all of us.”

So began the activities of American Indian Law Day 2003, co-hosted by the Native American Law Students Association

and the Environmental Law Society, with support from the Law School Student Senate, Office of Academic Services, University of Michigan School of Natural Resources and Environment, and the Student Activities Programming Council. This year’s program explored the relationship of Indian law and environmental law.

“Native issues are ghettoized as if they are a separate issue,” complained keynote speaker Winona LaDuke, an Ojibwe from Minnesota, a graduate of Harvard and Antioch, and Ralph Nader’s vice presidential running mate on the Green Party ticket in 1996 and 2000. The reality is that the 5,000 indigenous nations scattered around the globe are not separate from the environmental problems that may harm everyone, she said in her talk, “Globalization, the Environment, and Native People.”

Looking ahead, she expressed fear that “biocolonialism” will replace earlier forms of land takeovers as pharmaceutical companies and others follow where the genetic revolution takes them in search of raw materials. About 90 percent of current biodiversity exists in indigenous communities, but 97 percent of the patents in the world are held by industrial countries. And “the vast majority of the materials [for those patents] come from indigenous lands.”

Native Americans must function within “the legal institutions of a settler society that has imposed itself on us,” LaDuke said. She noted that wilderness areas, national forests, and other areas have

UNDER THE MICROSCOPE

Environmental/activist Winona LaDuke, American Indian Law Day's keynote speaker, decries the "ghettoization" of issues that affect Native Americans.



been carved from Indian reservations, and that there is "a tension between Native Americans and environmentalists over such lands. "We have sought the return of these lands, the return of publicly held lands to Indian hands," she explained.

There are health advisories for eating fish from lakes on her Minnesota reservation because of pollutants carried to them from far away, she said. "I have to fight coal-powered power plants in Montana and North Dakota to protect my lakes."

And California desert farmers producing "wild" rice on irrigated fields "with water they shouldn't have" are devastating the traditional wild rice economy of northern Minnesota, she added. Three-fourths of "wild rice" now is grown in California and "it has gutted our economy. We cannot compete with a combine in California."

Indians have a saying about this paddy-grown "wild" rice, she noted: Throw a stone into the pot with the rice. When the stone is soft, the rice is done."

The symposium also included a panel discussion of "The Intersection of Environmental Law and Indian Law," moderated by Riyaz Kanji, a partner with the Indian law specialty firm of Kanji & Katzen PLLC in Ann Arbor. Panelists included: David H. Getches, the Raphael J. Moses Professor of Natural Resources Law at the University of Colorado School of Law and a visiting professor at the U-M Law School this year; Shana Greenberg, of the Toxics and Pesticides Enforcement Division of the U.S. Environmental Protection Agency; and Rebecca Tsosie, Lincoln Professor of Native American Law at Arizona State University College of Law.

Having a land base is critical to American Indian nations, Getches explained. "Tribes have and live a philosophy of permanence, that is to say, 'We are here and plan to stay,'" he said. Land is important to tribes as a basis for their culture, a source of economic sustenance, and a basis of sovereignty.

Getches advised Native American groups to acquire land, assert their water rights and apply them to flowing water, bargain hard and wisely in their leases, exercise their sovereignty, and get involved in the decisionmaking regarding public lands that are important to them.

Greenberg, noting that she spoke as an individual and a Native American, not as an EPA representative, explained that EPA will approve appropriate environmental protection plans that Indian nations develop and give the tribe virtually a free hand in enforcing them. "We are responsible for our own environment," she said. "We cannot rely on government to do it for us, because it isn't going to happen. EPA lacks the resources to enforce environmental laws on reservations."

Tsosie criticized fashioning environmental policies without consideration for and input from indigenous people.

Panelists Shana Greenberg, Rebecca Tsosie, and David H. Getches listen intently as Winona LaDuke delivers the conference's keynote address.



Kenote speaker Carola Maggiulli explains that the European Union must deal with minimizing revenue loss to individual countries while progressing toward taxation unity within the EU. Maggiulli is principal administrator for the Coordination of Tax Matters Unit, Directorate General for Taxation and Customs Union, European Commission.



UNDER THE MICROSCOPE

PEERING INTO THE FUTURE OF CORPORATE TAX

Taxes, we all know, are necessary for a state to conduct its affairs and fulfill its obligations. If you're dealing with taxes and the European Union (EU), however, the issues get more complicated if the EU is to continue on its long-run road to unity.

For the near future, EU priorities are two-pronged:

- Focus on preserving member states' ability to generate excellent tax revenues through cooperative behavior that ensures the integrity of their tax bases.
- Address the EU's internal market to ensure a level playing field that is conducive to cross-border business activity.

Carola Maggiulli, principal administrator for the Coordination of Tax Matters Unit, Directorate General for Taxation and Customs Union, European Commission, outlined these and other initiatives in her keynote talk opening a conference on corporate tax held at the Law School earlier this year.

There are separate member state systems now, but the goal is "to provide a consolidated system," said Maggiulli, a fellow in European Union studies this year at Yale University's Center for International and Areas Studies. Her talk, "Recent Developments in the EU Direct Taxation Policy and Perspectives for the Future," opened the conference "The Future of Corporate Tax: A Comparative Perspective," sponsored by the Law School's Center for International and Comparative Law.

The European Community has a Community-wide policy on capital taxation, but there is no similar Community-wide policy on income tax, Maggiulli explained. Planners are concerned about the impact that tax competition may have on overall governments' revenues as well as the structure of tax systems.

Current EU practice dates from 1996 and is designed to stop the erosion of certain tax revenues and to protect employment, she explained. Planners have drafted directives on taxation of savings and on royalties between companies, as well as a Code of Conduct for business taxation. The code seeks to coordinate national tax policies and considers tax measures to be potentially harmful if they are not practiced generally throughout the Community.

This does not mean, however, that all preferential tax regimes are considered harmful, Maggiulli added. Only 66 of the approxi-

mately 270 actions cited in a 1999 report are seen as potentially harmful, she explained.

The conference, organized by Irwin I. Cohn Professor of Law Reuven S. Avi-Yonah, focused on these corporate tax issues:

- Will there be a corporate tax in the 21st century?
- If so, what changes are likely?
- Particularly, will most countries adopt an integrated corporate tax regime?
- If so, what form will the integrated regime take?

Scholars presented papers focusing on several issues:

- Avi-Yonah: "Back to the 1930s? The Shaky Case for Exempting Dividends."
- Slijbren Cnossen, professor of economics, Maastricht University, "Coordinating Corporation Taxes in the European Union."
- Clemens Fuest, professor, Department of Economics, Center for Public Finance, University of Cologne, "Corporate Tax Coordination in the European Internal Market and the Problem of 'Harmful' Tax Competition."
- Jack Mintz, president and chief executive officer, C.D. Howe Institute, Toronto, "Cashing Out Profits: Approaches to Dividend Taxation."
- "Appendix: The End of Imputation in European Countries," by Yoram Keinan, S.J.D. '02, an associate at Shearman & Sterling in Washington, D.C., provided a summary of recent corporate tax reformation in England, France, and Germany.

Other conference participants were: Assistant Professor of Law David M. Hasen, Paul G. Kauper Professor of Law Douglas A. Kahn, and Professor of Law Kyle D. Logue, all of the University of Michigan Law School; Professor of Business Economics James R. Hines, Office of Tax Policy Research, University of Michigan Business School; Joel B. Slemrod, Paul W. McCracken Collegiate Professor of Business Economics and Public Policy, professor of economics, and director of the Office of Tax Policy Research, University of Michigan Business School; and Challis Professor of Law Richard J. Vann, Faculty of Law, University of Sydney.

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Influences

The Hon. Avern Cohn, '49, of the U.S. District Court for the Eastern District of Michigan, chats with audience members before speaking on the subject "Judging and Judaism: The Influence of a Judge's Jewish Background and Jewish Values on the Adjudicative Process" in a program at the Law School earlier this year. At left is law student Aaron Cutler, of the Jewish Law Students Association, which sponsored Cohn's talk.

Women trade professional perspectives

Women lawyers still are a minority of legal practitioners and still encounter discrimination and patronization. Women also have come a very long way in the profession and their presence and impact continues to grow.

The progress was evident, for example, as women graduates discussed their professional perspectives at the day-long Women's Professional Development Symposium, held in April under sponsorship of the Law School and the Women Law Students Association.

"You've got to be your primary advocate," advised panelist Trina Jones, '91, a professor at Duke Law School. "Figure out how the system works. Be open to support from the most unlikely sources."

"It is extremely important to enjoy going to work each day," reported Kimberly Cahill, '85, of Schoenherr & Cahill PC in Center Line, Michigan. "You are a part of the community. You have a talent to sell — your skill as a lawyer — but you also have your reputation."

Noting that her undergraduate class was the fourth at Dartmouth to include women, the Hon. Shelia Johnson, '84, recently elected as the first African American judge on Michigan's 46th District Court, reported that at the U-M Law School "you have the opportunity to meet people of all walks of life, and you won't realize how important this is until you are in practice. Get out in the community. That will help your practice."

Sally Katzen, '67, who served in the White House during the Carter and Clinton administrations, recalled her risky move as a young lawyer to join Carter's staff as "the best decision I ever made" and her nearly eight years in the Clinton White House as "the best run I have ever experienced."

"The pressure [in] the fishbowl was enormous," she said. "So were the rewards. One person can make a difference."



Panelist Trina Jones, '91, of Duke Law School, gestures as she offers this advice:

- "Always be ready to take care of yourself."
- "Live a life that is beneficial. You have an obligation to history."
- "Never forget who you are and where you came from."

"I felt better about myself every single day, because I had helped something happen or prevented something stupid from happening. . . . I was not building a resumé, but I was building a reputation."

There were drawbacks. "I was 5 foot 12," she joked. "There were no 6 foot women then." (But "keep the chip off your shoulder," she advised later in response to a questioner. "You have to live in the world. Change it when you can. Accept it when you have to.")

And "I got married. It's the best thing I ever did. My son celebrates his 21st birthday this year."

"I want to continue giving," said Katzen, a cancer survivor and now a lecturer at the University of Pennsylvania Law School. "I have had the most wonderful life. . . . I have a vast network of friends who are really important to me. Take time for them, take time to give back to them."

(Katzen will be a visiting professor at the Law School during the 2003 – 2004 academic year.)

Featured speaker Mary Snapp, '84, vice president and deputy general counsel of Microsoft Corporation, stayed much in the same vein. Sure, she acknowledged, many years ago during serious negotiations away from Microsoft she was furious at the "nice dress" compliment from a colleague who was used to seeing her in the sweats-and-running-shoes Microsoft setting. She said nothing then, and the man now has become a friend and mentor who confidently sends her on the toughest assignments and has backed her on the occasions when others have questioned having a woman handle such work.

"Hard work does pay off — always, always," she said. "But it is not enough to be happy or successful."

Among her other points:

- When Microsoft was launching MSN there were many thorny legal questions to answer and the firm chose the lawyer most knowledgeable in the field, a young woman who recently had joined the corporation. "It didn't matter that she was a woman, or young," Snapp reported.
- "Make some educated guesses, take some risks. Typically, when you look back there was not as much risk as you had thought."
- "You never know enough. I have to remind myself, 'Am I trying to solve this the way I did five years ago?' If I am, it's probably the wrong way."
- "Pay attention to yourself. . . . You have to go along the path that will make you happy and matches your skill sets."
- "Ask for help. There are many kinds of mentors, and you should be able to recognize that."
- "Find the balance that works for you. . . . Always, it's a question of balancing your career and the things that are important to you. It's okay to be the No. 2 lawyer. (Of course, it's okay to be the No. 1 lawyer, too.) It's okay if you want to take five years out and raise a family."

The afternoon panel on "Women Helping Women" included Julia Ernst, '94, of the Center for Reproductive Rights; Carol Hackett Garagiola, '80, of Michigan Domestic Violence Prevention; Ann Arbor attorney Jean Ledwith King, '68, whose work on behalf of women's athletics has become legendary; and Heather Martinez Zona, '94, of Heller Ehrman White & McAuliffe LLP and president of the New York Women's Bar Association.

Francis A. Allen Collegiate Professor of Law Christina B. Whitman, '74, opened the symposium and greeted participants. Bridget McCormack, newly named associate dean for clinical affairs (see story on page 37) provided closing remarks.

Following the symposium, the Women Law Students Association presented its outstanding faculty award to Whitman. In the future the award will be known as the Christina B. Whitman Award. WLSA also presented its Judge Cornelia Kennedy Awards (named for the Hon. Cornelia Kennedy, '47, of the U.S. Court of Appeals for the Sixth Circuit) to WLSA President Elizabeth Find and Penny Skuster. One Kennedy Award is given to the outstanding WLSA member, the other to a law student active in women's issues.



"Hard work does pay off," speaker Mary Snapp, '84, vice president and deputy general counsel of Microsoft Corporation, tells participants in the Women's Professional Development Symposium.

"If it were not for you, I would not be here" first-year law student Tasheika Hinson-Coleman tells scholarship donors.



Scholarship donor: 'I wanted to give something back'

Ben Quigg, '44, never has forgot the great good luck that brought him to the Law School in June 1942. William Clark Mason, head of the law firm where the young Quigg had begun as an office boy, then learned typing and shorthand to win promotion to the position of secretary (which raised his salary from \$12 to \$18 per week) knew University of Michigan Law School Dean Eli Staples and wrote him on behalf of Quigg. Next stop for Quigg was Ann Arbor, where "I was awed when I saw the Law Quadrangle and saw the magnificent buildings. I had never seen anything like it before."

Quigg detailed his story at the annual Law School dinner for scholarship donors and recipients. For Quigg, a child of the depression who went to school at night for five and one-half years to get his bachelors degree from then-Temple College in Philadelphia, his law degree from Michigan opened the way to a successful, satisfying life. That, in turn, led him and his wife, Patricia, to establish the Benjamin and Patricia Quigg Scholarship to ensure that others could have similar accomplishments.

"The Ann Arbor years were good to me," Quigg explained. "The Ann Arbor years and Michigan Law School helped me achieve a career and life's dream I could not have imagined when I was growing up in a blue collar neighborhood in Philadelphia."

Quigg served in the U.S. Navy after law school, then rejoined the Philadelphia firm he had worked with earlier, eventually rising to senior partner. That firm today has grown into Morgan, Lewis & Brockius LLP, Philadelphia's largest law firm, with

more than 1,200 lawyers in 14 offices around the world.

"I grew up in an atomosphere of giving back," Quigg explained of his reason for establishing the scholarship. "Recognizing that I received so much from the Law School, I wanted to give something back."

Quigg noted that one of the Quigg Scholarship recipients, Eric Olson, '00, is a clerk to U.S. Supreme Court Justice John Paul Stevens. The current Quigg Scholarship recipient, Brigham Young University graduate Jacob Hill, listened from his dining table seat next to Patricia Quigg. The annual dinner seats scholarship donors and recipients together, so that they can become acquainted with each other.

Speaking on behalf of scholarship recipients, first-year law student Tashika Hinson-Coleman, a Temple University graduate who was seated next to Quigg during dinner, thanked generous people like the Quiggs for making it possible for people like herself to attend the Law School.

"I was a high school dropout," she explained. "I was working fulltime at 14, supporting my brother. . . . Somehow I got through Temple."

Now, "I'm here. I have two young children, and I'm making it through.

"Very simply put, if it were not for you I would not be here, and if it were not for you, students at each of your tables would not be here."

Dean Jeffrey S. Lehman, '81, opened the evening's program by noting that, despite rising tuition costs, donors' generosity continues to make it possible for qualified students of all financial capacities to study law here.

The Law School has more than 150 funds from donors, which enable the Law School "to attract the students regardless of their ability to meet today's high cost of legal education," according to the evening's printed program. The program announced five new scholarships, awarded for the first time during the 2002 - 2003 academic year: Barry A. Adelman Scholarship; Jackson Lewis Scholarship; Hilda Manko-Ann Cohen Scholarship; Yvonne S. Quinn and Ronald S. Rolfe Scholarship; and Kathryn D. Wriston Scholarship.

Ben Quigg, '44, recounts how his rise from Depression-era youngster to senior partner of Philadelphia's largest law firm led him and his wife, Patricia, to establish the Benjamin and Patricia Quigg Scholarship at the Law School. "Recognizing that I received so much from the Law School, I wanted to give something back," he said.



Sam Silver, '89, and team win death row case

For Sam Silver, '89, determination and endurance may be the key. At least they played critical parts in the victory that his Philadelphia, Pennsylvania-based legal team won earlier this year for an inmate who had been on death row since 1984.

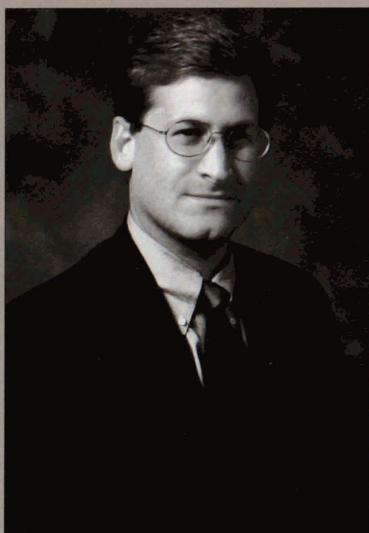
Last May, a Pennsylvania jury ruled that the commonwealth had not proved the existence of any aggravating circumstance when it sentenced Florencio Rolan to death for shooting a man in Philadelphia in May 1983. In the re-trial, the jury also found in favor of three mitigating circumstances urged by Rolan's defense, thereby emphasizing that Rolan should not have been sentenced to death.

"This is in stark contrast to Mr. Rolan's original trial 19 years ago, where the jury found one aggravator and no mitigators, resulting in an automatic death sentence," explained Silver, a partner with Schnader Harrison Segal & Lewis LLP in Philadelphia.

Silver leads the Schnader team that has represented Rolan *pro bono* since 1994. In summer 1996, a Philadelphia County judge vacated the original death sentence, and the case went back for a new sentencing trial, which began last April.

Rolan was sentenced to life imprisonment in that second trial, and the Schnader team now is challenging the propriety of Rolan's conviction in the federal courts. Rolan has long maintained that he acted in self-defense, but that his trial counsel in 1984 never presented that version of the facts to the jury.

"It is rare to be able to turn a case around like this," said Schnader Chairman Ralph G. Wellington. "The Rolan case marks the second time that Schnader has done it in recent years. [In January 2000, a team led by Silver won re-sentencing for death row inmate Simon Pirela.] In both



cases, our lawyers committed years of time and effort to the cause, and both times their dedication resulted in unanimous decisions by Philadelphia juries."

Silver, co-chair of Schnader's Product Liability and Mass Tort Practice Group, is a veteran of capital punishment litigation. He has handled cases at trial and appellate levels, and for several years has been a coordinator of the Prisoner Civil Rights Panel for the U.S. District Court for the Eastern District of Pennsylvania.

At the court's request, he participated in the Third Circuit's Task Force on Counsel for Indigent Litigants in Civil Cases.

Silver is an officer of the Public Interest Civil Litigation Fund, a nonprofit organization that provides funds to attorneys in court-appointment cases for indigent litigants, and a member of the board of the Cherry Hill United Soccer Association for youth soccer.

The Public Interest Section of the Philadelphia Bar Association recognized Silver for his *pro bono* work in 2001 and he won the Earl G. Harrison Pro Bono Award in 2000.

Jeffrey F. Liss, '75, wins Learned Hand Award

Jeffrey F. Liss, '75, nationwide chief operating officer and partner of Piper Rudnick and a visiting adjunct professor at the Law School last fall, has received the American Jewish Committee's Judge Learned Hand Award.

The award is presented by the committee's Washington Chapter each year to a leader of the legal profession who "demonstrates high principles in the tradition of the legendary Judge Learned Hand," the late senior judge of the U.S. Court of Appeals for the Second Circuit. Liss was nominated for the award by previous award recipients for his contributions in the areas of law and community service, including *pro bono* work. The award was presented in late April at a luncheon at the Ritz Carlton Hotel in Washington, D.C.

Liss, who earned his bachelors, master's, and J.D. degrees at the University of Michigan, recently co-chaired the American Bar Association's Presidential Commission on Billable Hours. (His report of the commission's findings and recommendations appears on page 12 of the Fall/Winter 2003 issue of *Law Quadrangle Notes*, 45.3.)

Liss joined Piper and Marbury in 1985 and became the firm's first COO in 1997. Following Piper's merger with Rudnick & Wolfe in 1998, he became COO of the merged firm and guided development of the firm's *pro bono* program. Piper Rudnick was named the D.C. Bar's 2002 Pro Bono Firm of the Year and Liss won the Maryland State Bar Association's Pro Bono Service Award in 1999.

In other activities, Liss serves on the executive committee of the Baltimore Symphony Orchestra, on the Law's School's Committee of Visitors, and on the board of the D.C. Circuit Historical Society.

YOUNG GRADUATES CHART 'INSPIRING PATHS'

Winter term's *Inspiring Paths* series had a decidedly youthful edge: 1995 was the earliest any of the three speakers graduated from the Law School; the other two earned their J.D. degrees in 2001.

Rob Precht, assistant dean for public service, explained that he designed the term's series to illustrate his belief that public service work need not wait until a new attorney has established a solid practice, gained standing and experience, and paid off education loans.

Precht characterizes the *Inspiring Paths* series, which the Office of Public Service co-sponsors with the Office of Career Services, as "a showcase for lawyers who are role models for us all in terms of the creative ways in which we can be lawyers." The winter term lineup neatly filled that role: Indicorps co-founder Roopal Shah, '95; Freedom Now founder and President Jared Genser, '01; and Skadden Fellowship winner Vivek Sankaran, '01, an attorney with the Children's Law Center in Washington, D.C.

Shah, whom Precht introduced as having "the restless energy to engage the world," opened the series by tracing her path from Washington, D.C., litigator, to assistant U.S. attorney in San Diego, to, a few days after her talk at the Law School, Indicorps service program manager in India. The same zest for service animated the series' later talks by Genser and Sankaran.

Roopal Shah, '95

To Shah, a Texan who served two years as president of the Law School Student Senate, the Law School is "home," so it was natural that she stop by on her way to India.

That's right, India. She left within a few days of speaking to Law School students in February. After a federal court clerkship in Hawaii, two-years as a litigator with a law firm in Washington, D.C., and four years as a prosecutor with the U.S. Attorney's office in San Diego, Shah bought a one-way ticket to India and has gone to the subcontinent to manage Indicorps (www.indicorps.org), a Peace Corps-styled service organization that she founded with her sister and brother last year. (A story on the founding of Indicorps appeared at 45.1 *Law Quadrangle Notes* 45 [Spring 2002].) Indicorps' first 10 Indian American fellows began their year of residence in India last September and are working on projects ranging from agriculture and watershed development to tribal education and drama with street kids.

In her talk, which included a DVD presentation on Indicorps, Shah stressed the value of the skills you acquire and the friends you make during Law School and afterward, and noted that she had telephoned Dean Jeffrey S. Lehman, '81, to discuss her pending move to Indicorps. She and other Indicorps founders also drew on the experience of Think Detroit co-founder Daniel Varner, '94. Tung Chan, '98, who practices with Cleary Gottlieb Steen & Hamilton in New York City,



that accompany conviction for easy-money schemes that involve breaking drug laws.

Her move to Indicorps is “my new adventure,” she said. It is designed “to have Indian Americans give back to the community by going to India to do a year’s fellowship.”

Indicorps works in tandem with local Indian organizations to improve existing programs and develop new ones. Soon, for example, Indicorps hopes to provide education for sugarcane-harvesting migrant children by developing a standardized school that can travel with the migrant families as they move.

Jared Genser, '01

Human rights work recently has come full circle for Genser. He became attracted to the work while a student at Harvard University’s Kennedy School of Government, where in 1997 he organized a demonstration against the visit of then-Chinese President Jiang Zemin. At the time, Genser worked with Yang Jianli, an advocate for Chinese democracy who fled to the United States after the brutal government response to the Tiannenman Square protests.

Today Genser is working with Jianli again — this time to free him from the prison where he has been held incommunicado since shortly after returning to China in 2002. Genser is the founder/president of Freedom Now (www.freedom-now.org), a Maryland-based organization that works to free prisoners of conscience. He explained that his attraction to human rights work began when he worked with Yianli at Harvard, and the road that led him to establish Freedom Now began when he was a law student doing an externship at the AIRE Center in England. That’s when he began work on the case of Briton James Mawdsley, who had been sentenced by Myanmar’s military government to 17

years in solitary confinement for distributing pro-democracy leaflets.

Genser continued to work on Mawdsley’s case after returning to Ann Arbor, and in spring 2001 he celebrated Mawdsley’s release by flying to England to meet him when he came home after his release. “You saved my life,” Mawdsley told the law student. (A report of Genser’s work appeared at 44.1 *Law Quadrangle Notes* 60 [Spring 2001].)

After his Law School graduation, Genser returned to the Washington, D.C., area and founded the nonprofit Freedom Now to continue the kind of work he had begun with Mawdsley. In short order he was working on the case of then-31-year-old Pakistani Christian Ayub



Maseemi, who had been condemned to death for disparaging Islam.

Using a more strategic version of the tactics he developed with Mawdsley, Genser worked through the UN and Congress to pressure Pakistan to release Maseemi. The combination of UN condemnation of the lack of safeguards,

serves as Indicorps’ legal advisor.

“I’m a great fan of clerkships,” continued Shah, who spent a year as clerk to Chief Judge David A. Ezra of the U.S. District Court for the District of Hawaii. You learn a great deal as a clerk — she concentrated on Hawaiian sovereignty issues — and often the judge becomes a friend and mentor, she explained. In fact, she reported, she also talked with Ezra before making her shift to Indicorps.

Shah also noted that a lawyer’s public service need not be fulltime, nor even in the legal arena. She said she had little time to take on *pro bono* cases while she was working as a litigator in Washington, but she did other kinds of public service by working with Habitat for Humanity.

Even her prosecutor’s duties in San Diego led her into public service: Seeing firsthand how minor drug law convictions led to major sentences, she did talks to high school and other youth audiences advising young people of the high costs

evidence, and due process in the trial, and strategic congressional signatures on a similarly critical letter convinced Pakistan to free Maseemi, who now lives in the United States.

Now, Genser's work has come full circle with his efforts on behalf of his one-time co-organizer Jianli. "The struggle definitely continues," he said. "This is a reminder that lots of challenges lie ahead."

His Law School background and contacts will help meet those challenges. Heeding what he now advises students, Genser got to know his law professors and mentors — four of them comprise Freedom Now's advisory board: Karima Bennoune, '94, a visiting faculty member when Genser was a law student and now an assistant professor of law at Rutgers; U-M Law School Affiliated Overseas Faculty member J. Christopher McCrudden, professor of human rights law at the University of Oxford in England and a fellow of Lincoln College, Oxford; Nuala Mole, founding director of the AIRE Center in London, England, where Genser did a summer externship as a law student; and A. W. Brian Simpson, the Charles F. and Edith J. Clyne Professor of Law.

Vivek Sankaran, '01

"The opportunities are endless," Sankaran explained of his child advocacy work, which has included litigating five court cases since he joined the Washington, D.C., based Child Advocacy Center in 2001.

"First and foremost, I'm a lawyer. . . . I represent the child." He has, for example, successfully represented children seeking to remain with a grandparent who had cared for them for eight years but did not wish to adopt them; he has represented children inappropriately placed in an orphanage when their grandparents were nearby and willing to take them; and he recently began

representing the non-biological parent in a custody dispute with the biological parent.

"This area of law gives you opportunities to go beyond the law," he continued: he sometimes acts as a social worker to find placements or furnishings for clients; sometimes he acts as a mediator who brings disputing parents and others to the table to seek a solution before legal action begins; and sometimes he's a mentor to the children he represents. He also has conducted training sessions for Washington, D.C., area judges who want to learn more of child advocacy law and practice.

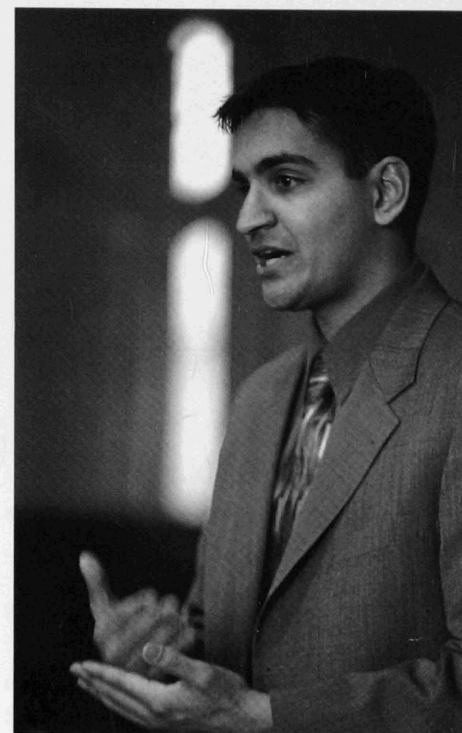
"The law has so much power over a family's life," Sankaran explained, but "the child welfare system is broken." Social workers are overworked and underpaid, and lawyers lack training and certification. (The Law School is involved in new efforts to develop certification standards and practices for child advocacy legal work. See story on page 36 of 45.3 *Law Quadrangle Notes* [Fall/Winter 2003].)

"It is important that we get young people from great schools like Michigan to get some energy into the system," Sankaran explained. "Going to a school like Michigan gives you all the training you need to make changes. . . ."

"In family law, there's a general feeling that it is not intellectually satisfying. That's completely untrue." True, most lawyers in the field don't cite cases and submit detailed briefs, but "just because they don't do it is no reason not to do it."

Sankaran's attention to such detail in fact has won him a quick and wide following in the Washington, D.C., area. For students, he had these tips:

- Take clinical law courses. "It's the best thing I did. I wouldn't be doing what I'm doing today if it hadn't been for the clinics."



- Take a broad range of courses: "My kids deserve the best lawyer they can get."
- Look into fellowships very early in your Law School career. Competition for them is stiffening.
- As a law student, do things that make you uncomfortable. "Test yourself." Sankaran, for example, worked at a prison.
- Don't forget the ideals that brought you to law school. The Law School's Loan Forgiveness Program is one of the country's best. Use it.

"In going to Michigan, you have the opportunity and the resources. I encourage you to take advantage of them."

During their visits, each of the speakers also served as "Mentor for a Day," meeting with students individually to discuss public service practices and opportunities.

In addition, **Ikeita Cantu Hinojosa, '01**, the 2002 – 03 Women's Law and Public Policy Fellow at the National Women's Law Center in Washington, D.C., visited the Law School in November to deliver a talk and serve as mentor for a day. New York City-based attorney Martin Stoler, who spoke at the Law School on his cases involving immigration detentions, also served as mentor for a day during his visit to the Law School late last fall.

Commercial aviation visionary

L. Welch Pogue, '26

Lloyd Welch Pogue, '26, who helped fashion the rules that guided commercial aviation from 1938 until deregulation in 1978, died May 10 at the age of 103 in Baltimore.

Pogue's name is "synonymous with the pioneering giants who played a pivotal role in transforming international civil aviation . . . into the cohesive global force that it is today," James Parry reported in *100 Years of Flight*, which was commissioned by the Montreal-based International Civil Aviation Organization for publication earlier this year.

Pogue joined the new Civil Aeronautics Board (CAB) in 1938 and President Franklin D. Roosevelt named him chairman in 1942, a post he held until he left the CAB in 1946. He represented the United States at the International Civil Aviation Conference in Chicago in 1944, when more than 55 countries joined an agreement to govern the world's commercial aviation in the post-World War II era.

"Few of the millions of passengers who fly the world each year have even heard of the Chicago Convention, but it is one of the post war's most enduring agreements, opening the skies of most of the world to peaceful passage of aircraft and setting up rules for air traffic control and the formation of aviation treaties between nations," Pogue said in a speech when he was 100 years old.

A native of Grant, Iowa, Pogue was president of the student body at the University of Nebraska and earned his S.J.D. at Harvard Law School after receiving his J.D. from the University of Michigan Law School. He practiced with law firms in Boston, Paris, and New York. After leaving the CAB in 1946, he established the law firm Pogue & Neal in

Washington, D.C., which merged with a Cleveland-based firm in 1967 to become Jones, Day, Reavis & Pogue. His son, Richard W. Pogue, '53, was managing director of the firm from 1984 – 1992. L. Welch Pogue continued to practice law in Washington, D.C., until 1981, and then in semi-retirement in Chevy Chase, Maryland.

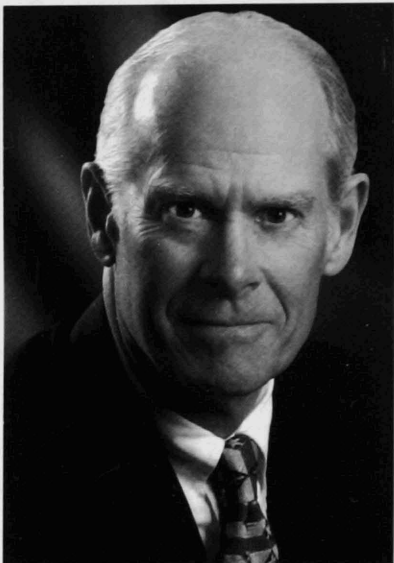
For 20 years following his retirement, according to his family, L. Welch Pogue remained very active, writing, speaking, and traveling the world — including Australia and New Zealand at age 99. He personally drove round-trip from Washington to St. Augustine, Florida, in 2001 at age 101, and continued to enjoy driving until the week of his death.

Matt Meyer, '02, named Jefferson Award winner

Matthew Meyer, '02, has been named winner of the Samuel S. Beard Award for "Greatest Public Service by an Individual Under 35." The award is one of The American Institute for Public Service Jefferson Awards, which were founded in 1972 by Jacqueline Kennedy Onassis, Sen. Howard Taft, and Sam Beard "to establish a nationally recognized award for outstanding community and public service."

Further details were not available at deadline time. Formal announcement of the awards and the presentation ceremony are June 18 in Washington, D.C. Previous winners of this award include Lance Armstrong and Faith Hill.

Meyer and two fellow law students developed a company to manufacture and market sandals made in a poor Kenyan village out of recycled motor vehicle tires. The project provided work and income to poor residents of the area. (A story on the project appeared at 44.3 *Law Quadrangle Notes* 94 [Fall/Winter 2001].)



John Porter, '61, wins Carter Humanitarian Award

Former Illinois Congressman John Edward Porter, '61, has been awarded the Jimmy and Rosalyn Carter Award for Humanitarian Contributions to the Health of Humankind. The award was presented at the 2003 National Foundation for Infectious Diseases Awards Dinner in March in Washington, D.C. Porter practices with Hogan & Hartson in Washington.

Porter, a 21-year veteran of Congress, was honored for his work in securing unprecedented funding increases for biomedical research and for his strong support for public health. The award honors "those individuals whose outstanding humanitarian efforts and achievements have contributed significantly to improving the health of mankind."

Past recipients include former President Carter and former First Lady Rosalyn Carter; General (now Secretary of State) Colin Powell; David Satcher; Robert Edward "Ted" Turner III; Senator John D. Rockefeller IV; and William "Bill" Gates III and his wife, Melinda F. Gates.

William Dance, '49, wins McCree Award

The State Bar of Michigan has announced that William Dance, '49, is one of four people to win the 29th annual Wade H. McCree Award for the Advancement of Justice. The awards were presented in April at the Michigan Journalism Hall of Fame Induction



Ceremony at the Kellogg Center in East Lansing.

Dance is a partner in the Troy, Michigan, office of the worldwide law firm Fragomen, Del Rey, Bernsen & Loewy PC, which practices

exclusively in the areas of global immigration and nationality law for the corporate sector.

The award is named for the late Wade H. McCree, who served as solicitor general of the United States and taught at the Law School.

The annual McCree Awards are presented to outstanding journalists for their work in promoting greater understanding of the legal system to the general public. Dance was honored for his bi-weekly column, "Immigration Insights," in the *Detroit Legal News*. Dance uses the column to discuss current issues and to emphasize the rule of law. He also is the author of numerous articles on immigration law and a speaker at many immigration seminars.

The other winners of this year's McCree Award were *Detroit Free Press* reporters Jack Kresnack, David Zeman, and Ben Schmitt.

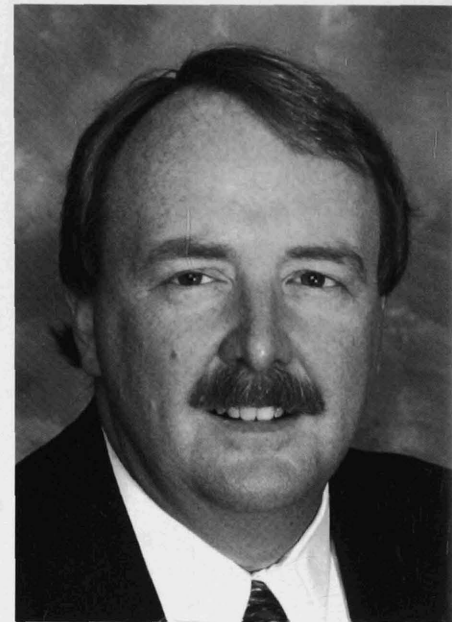
This is Dance's second major award in less than a year. Last September, the American Immigration Law Foundation presented him with its 2002 Honorary Fellow Award. The award recognizes life-long service and dedication to advancing the administration of justice and respect for human rights in the field of immigration and nationality law.

Robert Jerry, '77, named University of Florida Law Dean

Robert Jerry, '77, *cum laude*, becomes dean of the University of Florida's Frederic G. Levin College of Law July 1. He succeeds Jon Mills, who will remain on the law faculty and with the college's Center for Governmental Responsibility, which he directs.

Jerry, currently the Floyd R. Gibson Missouri Endowed Professor of Law at the University of Missouri-Columbia School of Law, where he has taught since 1998, said he is excited about his new post and eager to begin his new responsibilities.

"The college has tremendous quality — a strong faculty, a talented and diverse student body, wise administrative leadership, enthusiastic alumni support, and wonderful traditions in serving the state and the nation in many different ways," Jerry said. "All of this has created a strong foundation that gives the college the opportunity to move into the nation's highest tier of public law schools. That's what we're going to work hard to do during these next few years."



"We are very fortunate to have Professor Robert Jerry taking the helm at the Levin College of Law," University of Florida Provost David Colburn said. "He is a leading scholar in his field, widely respected nationally, and former dean at the University of Kansas.

"He also practiced law for three years before joining the academy. It is this combination of private-sector experience and national standing as an administrator and scholar that attracted us to Professor Jerry.

"We believe he offers the Levin College of Law great leadership for the future."

Jerry held the Herff chair at the University of Memphis School of Law from 1994 to 1998. He taught at the University of Kansas School of Law from 1981 to 1994, and served as dean from 1989 to 1994.

Alumni Directory error

The Law School apologizes to our graduates whose degrees are incorrectly reported in the 2002 edition of the *University of Michigan Law School Alumni Directory*. Certain alumni are listed incorrectly as holding an LL.B. rather than J.D. degree.

This error resulted from a change in the database of which we were not aware until the 2002 directory was distributed by the publisher. We sincerely regret the concern created for those affected by this error. Please contact Gerti Arnold, Director of Alumni Relations, at 734.615.4511 or glarnold@umich.edu if you have further questions.

Nine-term Congresswoman Martha Wright Griffiths, '40, a champion of women's rights and a legend in Democratic circles in Michigan, died in April at the age of 91 at her home in Amanda, Michigan. Her husband and sometime law partner, Hicks G. Griffiths, '40, had preceded her in death in 1996. The couple married in 1933 and in 1940 became the first husband-wife pair to graduate from the University of Michigan Law School.

The first Democratic woman elected to Congress from Michigan, Griffiths was considered one of the most effective civil rights legislators of her time. She served in the U.S. House from 1956 – 74, when she chose not to seek a 10th term. Griffiths served as Michigan Lieutenant Governor for both of Gov. James J. Blanchard's terms in the 1980s. Blanchard dropped her from the ticket for his unsuccessful campaign against John Engler in 1990.

Griffiths was instrumental in U.S. House of Representatives passage of the Equal Rights Amendment to the Constitution in 1970. The amendment also passed the U.S. Senate but eventually failed to muster approval of 38 states that was required to add it to the Constitution.

Earlier, she had led the successful drive to include women among those specifically protected by the Civil Rights Act. "I am tired of paying into a pension fund to support your widow but not my widower," she told her colleagues on the Ways and Means Committee at one point. She was the first woman to serve on the committee.

Several years ago, Griffiths asked Law Library Director Margaret Leary to arrange a meeting with Law School faculty member Catharine A. MacKinnon, a world-renowned champion of sex equality under the law. MacKinnon, the Elizabeth A. Long Professor of Law, asked Griffiths about the view of many that her comments supporting adding "sex" to Title VII had neglected women of color. Griffiths explained that without protection from sex discrimination, black women would be unprotected from workplace discrimination on any basis, partly because sex discrimination would be used to cover up race discrimination.

"I remember her as scrappy, sharp, direct, vigorous, aware of controversies past and present, and fully in possession of every faculty," MacKinnon recalled.

POLICING

HATRED

Law Enforcement, Civil Rights, and Hate Crime

JEANNINE BELL

GRADUATE LOOKS INSIDE HATE CRIME ENFORCEMENT

Police and prosecutors have a great deal of discretion in determining if an action is a hate crime or not. For example, when James Byrd was dragged to death behind a truck in Texas in 1998, there was little doubt that the crime was a hate crime. But when G.P. Johnson was burned to death and his body beheaded in Virginia the year before, authorities ruled the action was not a hate crime because the perpetrator and Johnson were friends.

This kind of gray area is the focus of *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime* (New York University Press, July 2002), by Law School graduate Jeanine Bell, '99. Bell is an associate professor of law at Indiana University School of Law at Bloomington.

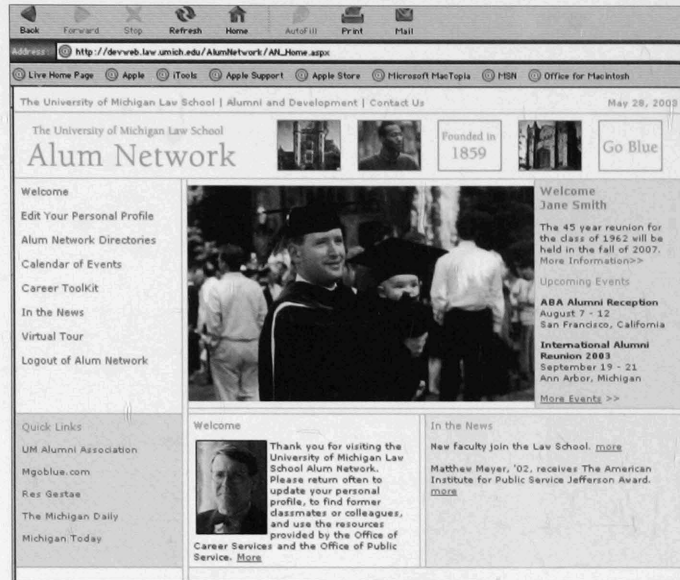
In preparing the book, Bell had unprecedented access to a police crime unit, traveling and talking with its members over several months. "Up until this point,

scholars have ignored the extraordinary power of police to classify incidents as particular types of crimes," she writes in her Introduction. "Police officers have the power to decide whether, and in which circumstances, the criminal law will be used."

"This book does what scholarly treatments of hate crime law have not done up to this point," she continues. "It analyzes in depth how hate crime law works in a large city, based on extensive interviews with those who must enforce hate crime law.

"For several months, I was a participant observer of a specialized hate crime unit in a metropolitan city and enjoyed access to detectives, their case files spanning two decades, and most of their records."

Welcome



Welcome to the revamped Law School Alum Network Web site, which includes a host of new features that make it more attractive, easier to use, and chock full of services and links to make it more useful to you. At deadline time, the new Web site was expected to go into use shortly. Among its features:



- Revamped look incorporates the Law school Web color pallet, adds rotating color photographs, and includes global navigation to each page of the site.
- The homepage has been transformed into a Web portal offering access to edit your personal profile and Alum Network directories; to use debt management services; and to view the calendar of events and notice of upcoming events. The site also offers quick links to the Alumni Association of the University of Michigan, MgoBLUE.com (U-M Athletic Web site), *Res Gestae*, *The Michigan Daily*, and *Michigan Today*, as well as the Career Services job postings, the Public Service JobNet, and information on judicial clerkships.
- Direct update of your Alum Network profile. You can update your home and/or work address simply by clicking the U of M Alumni records link on the "Edit Your Personal Profile" page. You also can choose to display or withhold information about your home/work address, legal practice area, and/or e-mail address in the Alum Network public directory.
- Alumni Directory search. You can search the Alum Network by name, geographic location, practice area, and/or class year.
- Logging into the Alum Network. To access the Law School Alum Network, you need the University of Michigan username and password that was issued to you when you were a student. If you have forgotten this information you must contact the University of Michigan Information Technology (IT) Accounts Office at 734.764.8000 for assistance. Verification will require a faxed copy of your driver's license, your telephone number, and your Social Security number. The IT Accounts Office will contact you within three days by phone with your username and password. If you graduated prior to 1994, you must visit the University's Alumni Association Web page at: www.alumni.umich.edu/home/username.php to request a username and password. Once you have a username, please login to www.law.umich.edu/alumnianddevelopment/AlumNetwork to update your personal profile, get reacquainted with old classmates, or check out our Career Toolkit.



From left, Cyril Moscow, '57; Mark Shaevsky, '59; Rocque E. Lipford, '64; Eric V. Brown Jr., '65; Douglas J. Rasmussen, '65.

1953

50TH REUNION

The Class of 1953 reunion will be September 5-7

Co-Chairs: William K. Davenport; E. James Gamble; and John Gordon Hayward

Fundraising Chair:

Richard W. Pogue

Fundraising Committee: Joseph L. Hardig Jr.; Dean E. Richardson; and Walter H. Weiner

Committee: William A. Bain Jr.; Robert S. Beach; Martin L. Boyle; John B. Bruff; Thomas Friot Chenot; Harvey R. Dean; Richard M. Donaldson; Paul V. Gadola; Robert S. Gilbert; J. Kirby Hendee; Clarence Lee Hudson; Ernest E. Johnson; William A. Joselyn Sr.; Ward Lee Koehler; Richard P. Matsch; William T. Means; Donald J. Miller; George D. Miller Jr.; Thomas A. Roach; Richard M. Shuster; John S. Slavens; Gordon Harry Smith Jr.; Arthur L. Stashower; Richard C. Stavoe; Warren K. Urbom; and Carl R. Withers

J.G. Castel, Distinguished Research Professor Emeritus and Senior Scholar, Osgoode Hall Law School, York University, Toronto, Canada, has just published the fourth edition of his *Introduction to Conflict of Laws* and the fifth edition of his looseleaf *Canadian Conflict of Laws*, as well as a major contribution to the 2001 volume of the *Canadian Yearbook of International Law*, "The Internet in Light of Public and Private International Law Principles and Rules Applied in Canada." In addition, he has joined the Toronto firm Shibley Righton LLP as counsel and co-chair of the firm's international commercial and alternative dispute resolution programs.

1957

Cyril Moscow, partner in the Corporate Law Department of Detroit-based Honigman Miller Schwartz and Cohn has been named in the tenth edition (2003 – 2004) of *The Best Lawyers in America*. Moscow has been recognized in every edition since the book was first published. He is listed as a top practitioner in both corporate and banking law.

1958

45TH REUNION

The Class of 1958 reunion will be September 5-7

Committee: F. Loyal Bemiller; Eugene Hartwig; Ronald L. Dalman Sr.; and Theodore M. Utchen

John C. Tucker of California has published his second book, titled *Trial and Error*. A pre-publication review service called it "an impeccably detailed memoir" that is "an eminently instructive guide for law students, and for general readers an authentic version of a world they normally see only through the meretricious lens of TV courtroom dramas." Tucker's first book was *May God Have Mercy*.

1959

Mark Shaevsky, of counsel in the Corporate Law Department of Detroit, Michigan, based Honigman Miller Schwartz and

Cohn LLP, has been named in the tenth edition of *The Best Lawyers in America*, 2003 – 2004. He has been recognized in the last four published editions as a top practitioner in the area of corporate law.

1963

40TH REUNION

The Class of 1963 reunion will be September 5-7

Co-Chairs: John W. Galanis and Herbert Kohn

Committee: Edward M. Dolson; Murray J. Feiwell; Robert L. Harmon; J. William Holland; Ira J. Jaffe; D. Michael Kratchman; Alan I. Rothenberg; Lawrence K. Snider; Philip Sotiroff; Stefan F. Tucker; Thomas W. VanDyke; A. Paul Victor; and Lawrence W. Waggoner

1964

Rocque E. Lipford, a principal and resident director in Miller, Canfield, Paddock and Stone PLC's Monroe office, has been listed in the category "Corporate, M&A, & Securities" in *The Best Lawyers in America*, 2003 – 2004. A member of the firm's Business and Finance Group, he practices corporate law with an emphasis on business organizations, unfair trade, and antitrust. He is also a member of the firm's Automotive Industry Group and Corporate Compliance Group.

1965

Eric V. Brown Jr., principal in the Kalamazoo, Michigan, office

of Miller, Canfield, Paddock and Stone PLC, is listed in *The Best Lawyers in America*, 2003 – 2004. Brown is the leader of the West Michigan Practice Group. A broad-based business counselor, his practice focuses on mergers and acquisitions, business combinations, joint ventures, corporate governance, and corporate finance. Brown is active in the American Bar Association and is currently working with task forces that will revise the Model Stock Purchase Agreement and will prepare a manual on Acquisition Practice and Process.

Clark Hill PLC member **Douglas J. Rasmussen** has been honored with the 2002 Outstanding Volunteer Award for the State of Michigan by the American Red Cross. He serves as a member emeritus of the Board of the Southeast Michigan Chapter. Rasmussen has also been named a Paul Harris Fellow by the International Rotary Foundation of Rotary International in recognition of his exceptional community service. His other community activities include serving on the Executive Committees of the Detroit Symphony Orchestra, the Friends of the Detroit Public Library, YMCA of Metropolitan Detroit, and the Community Foundation for Southeastern Michigan. In addition, he is a director of the Detroit Economic Club and a trustee of the Holley Foundation.



From left, I. William Cohen, '66
Erik H. Serr, '66
Joel S. Adelman, '67
Thomas F. Sweeney, '68
Donald F. Tucker, '71
Saul A. Green, '72
Michael B. Shapiro, '72
Don L. Keskey, '73

1966

I. William Cohen, chairman of Pepper Hamilton LLP's Bankruptcy and Reorganization Practice Group, has been re-elected to the Executive Committee of the firm. Cohen is a partner in the firm's Detroit, Michigan, office. He has argued cases through the state and federal court systems, including the United States Supreme Court. Cohen is a fellow of the American College of Bankruptcy and a member of its Board of Regents; he also has been listed in all editions of *The Best Lawyers in America* since its inception.

Miller, Canfield, Paddock and Stone PLC has announced that **Erik H. Serr**, a principal in the Ann Arbor, Michigan, office and a former member of the firm's Management Committee, is listed in *The Best Lawyers in America*, 2003 – 2004. Serr is active in many civic and professional associations, including the University Musical Society, St. Joseph Mercy Health System, Catholic Social Services, American Bar Association, State Bar of Michigan, and Washtenaw County Bar Association.

1967

Joel S. Adelman, a partner in the Real Estate Law Department and vice-chairman of Detroit, Michigan, based Honigman Miller Schwartz and Cohn LLP,

has been named in *The Best Lawyers in America*, 2003 – 2004. He has been recognized in the last four published editions as a top practitioner in the area of real estate law.

Philip A. Nicely of Bose McKinney & Evans LLP, Indianapolis, Indiana, is listed in *The Best Lawyers in America*, 2003 – 2004. Nicely joined Bose in 1967. He is a member of the American College of Real Estate Lawyers and the Urban Land Institute. Nicely served on Indiana Bar Association committees that re-wrote the Horizontal Property Law in Indiana and codified the zoning and planning laws for the state.

Shook, Hardy & Bacon LLP's **Stanley P. Weiner**, partner in the Business and Regulatory Division of the Kansas City, Missouri, office, is listed in the "Tax Law Section" of *The Best Lawyers in America*, 2003 – 2004. He has been listed every year since the publication's inception. Weiner has practiced primarily in the federal tax area handling business planning matters, tax controversies, estate planning matters, and negotiating with and litigating against the Internal Revenue Service. His 34-year career has been distinguished by exemplary service to national, state, and local professional organizations.

1968

35TH REUNION

The Class of 1968 reunion will be September 5-7

Chair: Edward J. Heiser Jr.
Committee: William F. Bavinger III; Scott B. Crooks; Stephen B. Diamond; Peter C. Flintoft; A. Patrick Giles; Walter W. Kurczewski; and Daniel Van Dyke

Edward B. Goldman, Office of the General Counsel, Health System Legal Office of the University of Michigan, was honored by the American Association of Blood Banks (AABB) with the W. Quinn Jordan Memorial Award and Lectureship at their national meeting. The award is for services to the organization in education, publication, and policy development. Goldman also serves on the American College of Medical Genetics National Institute of Health Task Force, which is charged with setting a national standard for newborn screening. Finally, he has been appointed by the National Institute for Neurological Diseases and Stroke to serve on a national consensus development conference to establish best practices for use of Tpa for stroke patients. In this role, he is acting as the attorney/ethicist on standard of care issues.

Clark Hill PLC, Detroit, Michigan, member **Thomas F. Sweeney** has been re-elected president of the Baldwin Public Library in Birmingham. He also

serves on the library's Finance Committee. Sweeney is active in the Oakland County Bar Association, the American Bar Association, and the Michigan Bar Association. Sweeney concentrates his practice in taxation, including estate and gift taxation, fiduciary and individual income taxation, and telecommunication entity taxation, as well as the issues involved in planning and administration of trusts and estates. He is listed in the 2003 – 2004 edition of *The Best Lawyers in America*. In addition, he has served on many community boards over the past 25 years.

1969

Charles Oleszycki has completed a five-year assignment as U.S. Alternate Representative to the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organization in Vienna, Austria. He has returned to the Department of State and is now with the Office of International Claims and Investment Disputes in the Office of the Legal Adviser, U.S. Department of State.

1971

The firm of Maddin, Hauser, Wartel, Roth & Heller, Southfield, Michigan, has announced that **John E. Jacobs** has become a shareholder of the firm.

Robert T. Joseph, a partner in the Chicago, Illinois, office of Sonnenschein Nath & Rosenthal, is serving as chair of the American Bar Association Section of Antitrust Law. His antitrust experience has involved cases and counseling in a full range of antitrust topics. Joseph joined Sonnenschein after serving as a staff attorney with the Federal Trade Commission's Bureau of Competition from 1971 – 76.

Donald F. Tucker, a senior shareholder at Howard & Howard Attorneys PC in Bloomfield Hills, Michigan, was re-elected for a third term as chair of the Swedish American Chamber of Commerce (SACC) Detroit Chapter. The SACC provides a forum for American and Swedish business executives to address common interests and needs, and to develop and promote bilateral trade, commerce, and investments between Sweden and the United States. In addition, Tucker is president of the Oakland County Bar Association. His practice at Howard & Howard focuses on complex litigation, real estate, corporate health care, and government relations.

1972

Miller, Canfield, Paddock and Stone PLC has announced that **Saul A. Green** of the Detroit, Michigan, office has been elected principal. Green directs the Minority Business

Practice Group and is a member of the Business and Finance Group, Corporate Compliance and Criminal Defense Group, and Litigation and Dispute Resolution Practice Group, with specialties in alternative dispute resolution, white collar crime, and high profile litigation. In addition, Green has been appointed by U.S. District Judge Susan Dlott to oversee reforms in police-community relations in Cincinnati, Ohio, as the city works to recover from race riots in 2001. Prior to joining Miller, Canfield, Green served as U.S. attorney for the Eastern District of Michigan, appointed by former President William J. Clinton. Green has also held the positions of Wayne County Corporation Counsel; chief counsel, U.S. Department of Housing and Urban Development, Detroit Field Office; and assistant U.S. attorney.

Gary J. McRay, a member of Foster Swift Collins & Smith in Lansing, Michigan, was one of three shareholders to participate in the ninth Annual Michigan Health Law Institute. McRay has practiced in the area of health law for three decades, acquiring a reputation in the areas of health and hospital law and corporate transactions. He has been listed in *The Best Lawyers in America* since 1993. In addition, he is an active member of the American Bar Association on its Forum Committee on Health Law and Tax Committee

on Exempt Organizations. He is a Michigan State Bar Foundation Fellow, serves as chair of the Health Law Section, and serves on the sections on Taxation, Real Estate, and on Corporation, Finance, and Business Law. McRay is also a member of the American Health Lawyers Association and its Tax and Managed Care Committees, a former board member of the Michigan Society of Hospital Lawyers, and currently serves as a commercial mediator for the Ingham County Circuit Court.

Indianapolis, Indiana, based Bose McKinney & Evans has announced that long-time partner **Theodore J. Nowacki** has been named Indiana state editor for *HouseLaw*, a monthly legal reporting service for the mortgage and home equity lending industry. Nowacki concentrates his practice in consumer credit regulations and compliance, lender liability, inter-creditor arrangements, loans and lien enforcement, and environmental matters, including defense of class action lawsuits.

Michael B. Shapiro, a partner and chair of the Real Estate Tax Appeals Department of Detroit, Michigan, based Honigman Miller Schwartz and Cohn LLP, has been named in the tenth edition of *The Best Lawyers in America*, 2003 – 2004. He has been recognized in the last four published editions as a top practitioner in the area of real estate law.

1973

30TH REUNION

The Class of 1973 reunion will be September 5-7

Co-chairs: Steven F. Greenwald and George D. Ruttinger
Committee: Denis B. Binder; Samuel L. Bufford; Carlyle H. Chapman Jr.; Kathleen McCree Lewis; Quinn W. Martin; Mark F. Mehlman; Lawrence R. Moelmann; Eric A. Oesterle; Jeffrey M. Petrush; Leo H. Phillips Jr.; James Cotter Ruh; Frederick C. Schafrick; and Henk Weinmans

Clark Hill PLC announced that **Don L. Keskey** has joined its Lansing, Michigan, office. He practices in the areas of telecommunications, energy and utilities, administrative, transportation, and environmental law. Keskey has litigated before the Michigan Public Service Commission, the Federal Energy Regulatory Commission, and the Federal Communications Commission, as well as all levels of state and federal courts, including the Michigan Supreme Court and the United States Supreme Court. Prior to joining Clark Hill, Keskey served as assistant attorney general for the state of Michigan for 25 years.

1974

Robert A. Armitage has been promoted to senior vice president and general counsel of Eli Lilly and Company, Indianapolis, Indiana. In this



From left, Stuart M. Lockman, '74
Thomas S. Nowinski, '74
Cameron H. Piggott, '74
Joseph M. Polito, '75
Amanda Van Dusen, '79
David Foltyn, '80
Michael P. Coakley, '82
Mary Jo Larson, '82

position, Armitage joined the company's Policy Committee. He previously served as vice president and general patent counsel for Lilly Research Laboratories. Prior to joining Lilly in 1999, Armitage was a partner in the law firm Vinson & Elkins LLP, where he headed the firm's intellectual law practice in Washington, D.C.

Detroit, Michigan, based Honigman Miller Schwartz and Cohn LLP partner **Stuart M. Lockman** has been named in the tenth edition of *The Best Lawyers in America*, 2003 – 2004. He has been recognized in the last seven editions as a top practitioner in the area of health care law.

Paul L.B. McKenney, a partner at Raymond & Prokop PC, in Southfield, Michigan, chaired the program "Financial Products: Taxation of Prepaid Forward Contracts (a/k/a STRYPES, DECS, PEPS, etc.," at the American Bar Association (ABA) Taxation Section meeting in January. He also spoke on Section 121 issues at the ABA Taxation Section's conference in May in Washington, D.C.

Thomas S. Nowinski, member of Clark Hill PLC, located in Detroit, Michigan, has received the Steven H. Tobocman Award for Outstanding Volunteerism. The award, which is named after a 1997 Law School graduate, is given annually to recognize one

individual's tireless efforts on behalf of nonprofit organizations in working to build and sustain economic resources in low-income communities. Nowinski is a tax specialist with a background in counseling business and individuals in tax and financial matters. He is a member of the Institute for Professionals in Taxation, a participant in the state and local Taxation Committee of the State Bar of Michigan's Section on Taxation, and is active in both professional and community activities.

Minneapolis, Minnesota, law firm Faegre & Benson partner **Brian B. O'Neill** has been appointed a regent of the American College of Trial Lawyers, one of the premier legal associations in America. His territory of responsibility includes the states and provinces of Iowa, Manitoba, Minnesota, Missouri, Nebraska, North Dakota, Saskatchewan, and South Dakota. O'Neill was inducted as a Fellow of the College in 1994, and had previously served as the chair of the Minnesota State Committee of the College.

Cameron H. Piggott has rejoined Dykema Gossett PLLC as a member of the Real Estate Practice Group in the Detroit and Bloomfield Hills offices. Piggott previously was president and vice chairman of Victor International Corporation, a developer of lifestyle communities like Bay Harbor in northern

Michigan and The Parks at Stonewood in Clarksston. At Dykema Gossett, his practice focuses on general real estate law, with an emphasis on commercial and residential development, master planned communities, leasing, and construction.

1975

Joseph M. Polito, a partner and chair of the Environmental Law Department of the Detroit-based Honigman Miller Schwartz and Cohn LLP, has been named to the 10th edition of *The Best Lawyers in America* 2003 – 2004. He was listed as a top practitioner in both environmental and natural resources law.

1976

Alan M. Share has joined the PrivateBank and Trust Company in Chicago, Illinois, as associate managing director. PrivateBank and Trust is a unit of PrivateBancorp Inc. Share is helping manage client relationships primarily from the Lake Forest location. Prior to joining PrivateBank and Trust, Share was senior vice president and trust officer at the First Commercial Bank, also in Chicago.

James R. Young has joined the firm of O'Melveny & Myers LLP as a partner in the Washington, D.C., office and as a member of the firm's

Telecommunications Practice. Prior to joining O'Melveny, Young was of counsel at a prominent law firm's McLean, Virginia, office.

1978

25TH REUNION

The Class of 1978 reunion will be October 24-26

Chair: Dennis Kearn Egan
Committee: Debra A. Armbruster; John H. Beisner; Arthur R. Block; Barbara Bruno; Elizabeth Ann Campbell; Marcia K. Fujimoto; Jeffrey J. Jones; George Kimball; Donn A. Randall; Gregory La'Monte Reid; Miguel Angel Rodriguez; and S. Thomas Wierner

Dennis W. Flieman in February began serving as president of the Capital Region Community Foundation in Lansing, Michigan. Prior to joining the Community Foundation, Flieman served as director of development at Concordia University in Ann Arbor, Michigan. Flieman, his wife Linda, and their two children live in East Lansing.

Governor Janet Napolitano in April named **Maurice (Mo) Portley** to fill one of two vacancies on the Arizona Court of Appeals. Portley had served on the Superior Court since 1991.

1979

Steve Fetter has formed Regulation UnFettered, an energy advisory firm, and has

been elected to the Board of Directors of CH Energy Group in Poughkeepsie, New York. Fetter has also established the Simon and Jeannette Fetter Memorial Scholarship to honor a well-rounded graduating senior at Rumson-Fair Haven High School in New Jersey. The scholarship, which provides \$1,000 towards higher education costs, rises to \$1,500 if the recipient attends the University of Michigan.

Miller, Canfield, Paddock and Stone PLC principal **Amanda Van Dusen** is listed as a new inductee under the categories "Public Finance Law" and "Banking Law" in *The Best Lawyers in America*, 2003 – 2004. Van Dusen also has been named to serve a two-year term as managing director of her firm. She practices governmental law, including public and private sector finance, traditional municipal and school finance, resource recovery, airport, and private activity bonds, and represents issuers, underwriters, and trustees in the Detroit, Michigan, office. In March 2002, she was honored by *Crain's Detroit Business* as one of the Detroit area's "100 Most Influential Women."

1980

David Foltyn, partner in the Corporate Law Department of Detroit, Michigan, based Honigman Miller Schwartz and

Cohn LLP, has been named in *The Best Lawyers in America*, 2003 – 2004. Foltyn has been recognized in the last four published editions as a top practitioner in the area of corporate law.

Ronald I. Heller, a director and shareholder of the Torkildson Katz law firm in Honolulu, Hawaii, is listed in *The Best Lawyers In America* in two categories: "Tax Law" and "Business Litigation." Heller represents taxpayers in disputes at the federal, state, and local level.

1981

The fifth book for children by **Debbie Levy** is *Lyndon B. Johnson* (Lerner Publications, 2003), for readers in grades 6 – 12. The book uses amusing and poignant details, anecdotes, and explanations of historical context to introduce readers to LBJ, a complicated man whose life was filled with tremendous achievement as well as failure.

Kenneth Lee Salazar last fall was re-elected attorney general of Colorado. Salazar, a fifth generation Coloradan, became Colorado's first Hispanic attorney general when he was elected to his first term in 1998. Salazar was the speaker for the U-M Law School's commencement ceremonies in May. (See story on page 28.)

1982

Mart T. Boonstra, a principal in the Ann Arbor office of Miller, Canfield, Paddock and Stone PLC, has been elected the 2003 vice-chair of the Washtenaw County Economic Club, where he also is a director. Boonstra specializes in commercial litigation.

Michael P. Coakley, principal in the Detroit office of Miller, Canfield, Paddock and Stone PLC and a deputy practice group leader for the firm's Litigation and Dispute Resolution Group, has been recognized by the City of Bloomfield Hills for five years of volunteer service on its Zoning Board of Appeals. Coakley's practice focuses on commercial litigation.

Mary Jo Larson, partner in the Employee Benefits Law Department of Detroit, Michigan, based Honigman Miller Schwartz and Cohn LLP, has been named in *The Best Lawyers in America*, 2003 – 2004, as well as in the past two published editions, as the top practitioner in the area of employee benefits law. Larson serves as chair of the Employee Benefits Committee of the Taxation Section of the State Bar of Michigan and is the treasurer of the Michigan Employee Benefits Conference.

1983

20TH REUNION

The Class of 1983 reunion will be October 24-26

Co-Chairs: Thomas R. Fox and Patricia Lee Refo; **Honorary Co-Chair:** Barton R. Peterson
Committee: Walter S. Calhoun; Mark S. Demorest; Claudia Roberts Ellmann; Katherine A. Erwin; Victor P. Filippini Jr.; Stacy Lyn Fox; Michael J. Hainer; Peter A. Jackson; Broderick D. Johnson; Jodie W. King; Thomas R. Lotterman; Erica Anne Munzel; Barton R. Peterson; John C. Petrovski; David A. Rubenstein; H. Mark Stichel; Howard S. Suskin; and Carl A. Valenstein

Mark L. Kowalsky has been reelected chair of the greater West Bloomfield Cable Advisory Board, which oversees implementation of the cable television franchise in West Bloomfield, Orchard Lake, Keego Harbor, and Sylvan Lake, Michigan. Kowalsky has been a member of the board since 1986. A partner in the Bloomfield Hills law firm of Hertz, Schram & Saretsky PC, Kowalsky's law practice concentrates on commercial litigation and arbitration and securities law.

1984

Criminal defense lawyer **Luis Aguilar** has been elected judge of the 120th District Court in El Paso, Texas. Each district court in the country has jurisdiction over criminal and civil cases.



From left, Marie R. Deveney, '84
Charles M. Greenberg, '85
John Hern, '86
Megan P. Norris, '86
Andrew C. Richner, '86
Reginald M. Turner, '87
Wade M. Kennedy, '89
Anthony J. Mavrinnac, '93

The *American Lawyer* has named **Kirk Davenport**, head of the Corporate Finance Practice of Latham & Watkins and co-chair of the Corporate Department for the firm's New York office, one the 45 "highest-performing members of the private bar under the age of 45." The list appeared in the periodical's January 2003 edition. An expert on high-yield debt and bridge lending, Davenport has been active in the field since the mid-80s. Since the junk bond market imploded in 1990, he has been a leader in creating and handling the bridge commitment letters that have become standard in institutional clients' transactions.

Marie R. Deveney, of the Taxation and Estates Practice Group of Dykema Gossett PLLC in Ann Arbor, has been elected to the American College of Trust and Estate Counsel. To be elected, an attorney must have specialized in estate planning for at least 10 years, contributed significantly to professional education by regular and substantive writing and speaking in professional contexts, and be sponsored by a member of the college. Deveney lives in Ann Arbor and taught at the Law School from 1987 - 91.

1985

Charles M. Greenberg has been named president and CEO of PlayMaker Sports Advisors LLC, a newly formed,

wholly-owned, Pittsburgh, Pennsylvania, based subsidiary of Pepper Hamilton LLP. PlayMaker, which also has offices in Philadelphia, Washington, D.C., and Palm Beach, Florida, offers a variety of services to the sports industry. Greenberg continues to be a partner in Pepper Hamilton and to head the firm's Sports Industry Practice Group. He also is president and managing partner of the Altoona Curve, the Class AA affiliate of the Pittsburgh Pirates.

1986

Steven G. Brody has been appointed practice group leader of King & Spaulding LLP's New York Business Litigation Practice Group. He is located in the firm's New York City office. Prior to joining King & Spaulding in 1991, Brody was a partner at Cadwalader, Wickersham & Taft.

The members of Clark Hill PLC, Detroit, Michigan, have re-elected **John Hern** as the chief executive officer of the firm. In his law practice, Hern advises corporations of all sizes, public and private, on a wide range of issues such as incorporation, financing, leasing, contracting, mergers, acquisitions, and leveraged buyouts. He has extensive experience interacting with the Securities and Exchange Commission. His international law practice includes antitrust

issues and the application of U.S. and European Economic Community antitrust laws in a variety of contexts. Hern has also developed expertise in the area of trade secrets, confidentiality agreements, ownership and transfer of proprietary information and developments, and related legal fields.

Megan P. Norris, principal in the Detroit, Michigan, office of Miller, Canfield, Paddock and Stone PLC, is a new inductee under the category "Labor & Employment Law" in *The Best Lawyers in America*, 2003 - 2004. Norris practices in the areas of employment litigation defense. She is also the author of several articles on employment law and has been a frequent speaker on employment issues such as the Americans with Disability Act, the Family and Medical Leave Act, sexual harassment, wrongful discharge, and discrimination. Norris is an active participant in professional and community organizations.

Former State Representative **Andrew C. Richner** has joined Clark Hill PLC, Detroit, Michigan, as a member of the firm's new Government Policy and Practice Group. He will focus his practice on providing advice and advocacy for clients on matters of public policy. Prior to his election to the State Legislature, Richner served as commissioner on the Wayne County Board of Commissioners representing Detroit, the Grosse

Pointes, and Harper Woods. In 2002, he was elected to an eight-year term as a member of the Board of Regents of the University of Michigan.

1987

Reginald M. Turner has been elected to serve on the Clark Hill PLC (Detroit, Michigan) Executive Committee. Turner is president of the State Bar of Michigan and a vice president of the National Bar Association. He has extensive experience in labor and employment law and governmental relations, is named in *The Best Lawyers in America*, and is a fellow of the American Bar Foundation. Turner is a member of the State Bar of Michigan's Labor and Employment Section Council, and is a member of the labor and employment sections of the American Bar Association, the National Bar Association, and the Detroit Metropolitan Bar Association. He is chairman of the City of Detroit Board of Ethics, a vice chairman of the board of the Detroit Institute of Arts, a director of United Way Community Services, and the Greater Downtown Partnership Inc.

1988

15TH REUNION

The Class of 1988 reunion will be October 24-26

Committee: Elizabeth M. Barry; Bruce A. Courtade; Michael H. Cramer; Scott W. Fowkes; Douglas A. Graham; Charlotte Hawkins Johnson; Krista D. Kauper; Nicholas J. Stasevich; A. David Strandberg III; Aidan J. Synnott; and Maryelena Zaccardelli

1989

Wade M. Kennedy has joined the Charlotte, North Carolina, office of McGuireWoods LLP as a partner in the Financial Services Department. He focuses his practice on bank finance and commercial lending. Prior to joining McGuireWoods, Kennedy was a partner at Helms Mulliss & Wicker PLLC, also in Charlotte.

Victor I. King is the new general counsel of California State University, Los Angeles. He was previously partner at Lewis Brisbois Bisgaard & Smith LLP, in Los Angeles, specializing in business and professional liability litigation.

Jonathan L. Marks has joined the Chicago, Illinois, office of Katten Muchin Zavis Rosenman as a partner in the national Litigation Practice. He previously served as an assistant U.S. attorney for the Northern District of Indiana handling matters including public corruption, tax evasion, RICO, money laundering, bank fraud, insurance fraud, and embezzlement and fraud of employee pension and benefit funds. He headed the Northwest Public Corruption Task Force, an interagency group targeting public corruption in Indiana. In October 2002, Marks received the Director's Award for Superior Performance as an assistant U.S. attorney.

1990

Anthony Ettore has been awarded a University Fellowship by Florida State University for the 2003 - 2004 academic year to continue research begun with the support of a Presidential University Research Fellowship for 2002 - 2003. The research funds will allow him to continue his research in Costa Rica this summer. His end goal is a Ph.D. in Environmental History. Ettore practiced environmental law with Holland & Knight in Washington, D.C., and Florida after graduating from the Law School. He has spent most of the last five years as senior assistant general counsel for the Enforcement Section of the Florida Department of Environmental Protection in Tallahassee.

1991

Rutter Hobbs & Davidoff, Los Angeles, California, announced that **William R. Burford** has joined the firm's Estates and Trusts Practice. Burford advises clients on revocable and irrevocable trusts, wills, powers of attorney, charitable giving, tax-exempt organizations, fiduciary/beneficiary conflicts, and estate tax controversies. Prior to joining Rutter Hobbs, he was a litigator for two other California law firms: O'Melveny & Myers, and Morrison & Foerester.

Julia Goatley has been appointed as director of compliance and associate general counsel for the Jackson National Life Insurance Company Legal Department, Lansing, Michigan. Goatley supervises Jackson National's Market Conduct Unit and market conduct-related issues, and project management for compliance initiatives. She previously worked in the Lansing office of Dykema Gossett PLLC and practiced in the Government Policy and Practice Group in the areas of insurance regulation and legislation, municipal finance, federal lending, and corporate issues.

1992

Fish & Neave has recently named **James E. Hopensfeld** partner in the Washington, D.C., office. Hopensfeld previously worked in the Palo Alto office. He specializes in litigation, focusing on trade secrets and patents.

Neil Riemann has left his North Carolina-based firm to co-found Penry Riemann PLLC in Raleigh, North Carolina. The firm tries, arbitrates, and appeals a variety of commercial cases for general contractors, securities, investor, policyholders, brokers, and other companies.

Installation ceremonies for Michigan Sixth Circuit Court Judge **Michael Warren** were held in March at the Oakland County Commissioner's audi-

torium. Judge Warren replaced Judge Alice Gilbert, who retired in December. He previously worked with The New Common School Foundation, and was a member of the State Board of Education from 1999 - 2002.

1993

10TH REUNION

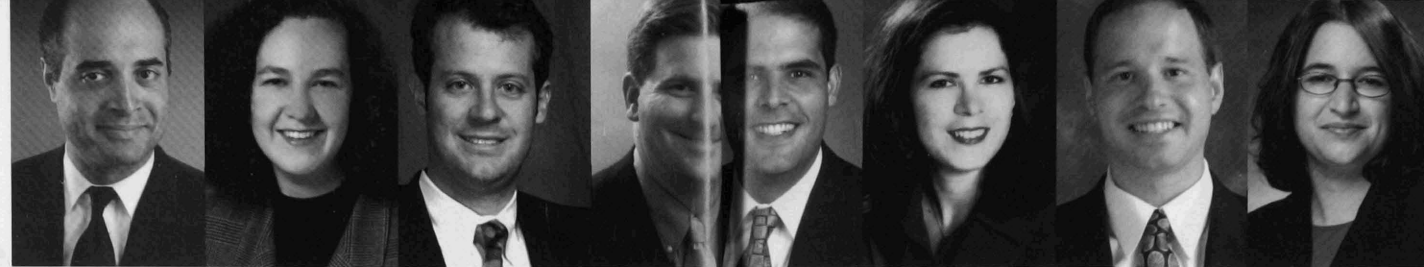
The Class of 1993 reunion will be October 24-26

Co-Chairs: Kimberly S. Alcantara; Oscar L. Alcantara; Colleen Barney; Daniel M. Israel; and Timothy L. Williams
Committee: Jonathan Barney; Bruce R. Byrd; Mark Malven; and Robert A. Mandel

Anthony J. Mavrinnac has been elected a principal of Miller, Canfield, Paddock and Stone PLC. Mavrinnac practices in the Detroit, Michigan, office's Financial Institutions and Transactions Group. Since joining the firm in 1995, he has specialized in syndicated, real estate, construction, and equipment financing. He also represents financial institutions in connection with liquidity facilities and letters of credit in support of tax-exempt bonds, U.S. Export-Import Bank guaranteed loan facilities, and loan work-out matters.

1994

David C. D Alessandro, who works in the Dallas, Texas, office of Vinson & Elkins, has been elected to partnership.



From left, Adam W. Perry, '94
Deborah L. McKenney, '95
Bryan W. Metcalf, '95
Greg Stanton, '95
Salvador M. Llach, '96
Deborah I. Ondersma, '96
Michael J. Willis, '00
Christine E. Gale, '02

D Alessandro is a member of the firm's employee benefits and executive compensation (ERISA) practice area with experience in compensation and benefits matters. He has been active in implementing and administering various forms of retirement plans and welfare plans, as well as designing and maintaining executive compensation programs.

David A. Breach has moved (along with 1995 alumnus Eric R. Lamison) to San Francisco, California, to open Kirkland & Ellis's office in the Bay area. Breach is a corporate partner.

Douglas Choi has published *The Tao of Yao*, his first book and the first published in the United States on basketball star Yao Ming. A version in Chinese also is being published in China. Choi is living in Seattle with his wife, Janet, and son, Soren. He is a part-time attorney with F5 Network and is working toward his degree in psychotherapy.

Andrew S. Cohen has been elected to partnership in the San Antonio, Texas, firm Akin Gump Strauss Hauer & Feld LLP. A member of the Real Estate and Finance Practice Group, Cohen focuses on commercial real estate, with a concentration in representing clients involved in all aspects of development, financing, leasing, and sale of retail properties.

Frantz Ward LLP in Cleveland,

Ohio, has announced the election of **Brian J. Kelly** as a partner. Kelly focuses his practice on representing management in labor and employment law cases before federal and state courts and administrative agencies. He also extensively advises employers on human resources management and litigation prevention.

Adam W. Perry has been elected partner in Hodgson Russ Attorneys LLP. He is resident in the Buffalo, New York, office. Perry is a member of the firm's Business Litigation Practice Group, practicing in the areas of employment and general litigation. In 2000, he received Business First's Forty under Forty Award.

1995

Laurie Callahan Endsley has been named chief operating officer at PricewaterhouseCoopers in Russia. She has lived and worked in Russia for six years, and formerly was director of operations and general counsel at PricewaterhouseCoopers there. She also is a member of the American Chamber of Commerce in Russia and has been completing her MBA at the University of Chicago.

LaShonda Hunt has joined the United States Attorney's Office in the Northern District of Illinois as an assistant U.S. attorney in the Civil Division. She previously had clerked for the Hon. William J. Hibbler of

the U.S. District Court for the Northern District of Illinois.

Eric R. Lamison has moved (along with 1994 alumnus David A. Breach) to San Francisco, California, to open a Kirkland & Ellis office in the Bay area. The new address is Kirkland & Ellis, 333 Bush Street, 26th Floor, San Francisco, California 94104. Lamison is an intellectual property partner.

The University of North Carolina Press has published *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois*, by **Gerald Leonard**. This reinterpretive history depicts Jacksonian party-builders as drawing on 18th century constitutional theory to distinguish between "the aristocracy" and "the democracy," rather than as anticipators of 20th century political ideas. Leonard is an associate professor at the Boston University School of Law.

Deborah L. McKenney has become a shareholder of Blanco Tackabery Combs & Matamoros PA, located in Winston Salem, North Carolina. McKenney practices in the business transactions area including commercial real estate, corporate transactions, and general business law, concentrating on low-income housing tax credit transactions and historic tax credit transactions. Prior to joining Blanco Tackabery, McKenney

was associate counsel with Alexander Hamilton Life Insurance Company of America and an attorney with the Legal Department of Jefferson-Pilot Life Insurance Company.

The Nashville, Tennessee, law firm Bass, Berry & Sims PLC has named **Bryan W. Metcalf** as a member of the firm. Metcalf concentrates his practice in the tax practice area and has a broad range of experience in corporate and partnership taxation, state and local taxation, and estate and gift taxation.

Greg Stanton has joined the Phoenix, Arizona, office of Gust Rosenfeld PLC to practice labor and employment and education law. Stanton focuses on counseling clients on employment-related issues, including discrimination, harassment, wage and hour issues, workers' compensation, and unemployment. He also advises school district clients regarding student discipline, employee discipline, special education law, and procurement issues. In addition, he serves as a Phoenix city councilman, volunteers as a Big Brother, and was named the 2002 Big Brother of the Year.

1996

Thomas B. Cochrane has become director of the Labor Relations Section of the Ohio Nurses Association. He previously was general counsel to the Great Lakes Council

of the United Brotherhood of Carpenters and Joiners of America. He lives in Columbus, Ohio, with his wife, the Rev. Dr. Sigrid Rother, and their son, Peter.

Salvador M. Llach has been elected junior partner of the Boston, Massachusetts, law firm Nutter McClennen & Fish LLP. His practice focuses on commercial litigation with an emphasis on antitrust counseling and litigation, and disputes among shareholders in closely held corporations. Llach has written on litigation issues for Massachusetts Continuing Legal Education Inc., and speaks on commercial litigation topics. He and his wife, Nora, reside in Boston.

John Millspaugh, an attorney with the Indianapolis, Indiana, based firm of Bose McKinney & Evans LLP, has been elected to serve on the boards for the Indiana Leadership Forum, a political education and development service association, and The Humane Society of Hamilton County, a nonprofit community organization. Millspaugh is an associate in the Business Services Group at Bose, where he chairs the sci-tech section. He focuses his practice areas on mergers and acquisitions, general business and corporate law, venture capital, and entrepreneurial services.

Deborah I. Ondersma has been elected partner at Varnum, Riddering, Schmidt & Howlett LLP, Grand Rapids, Michigan. A trial attorney with a concentration on tax litigation, commercial business contract disputes, and construction litigation, she is also serving as the vice-chair of the Pathfinder Resources Board of Directors.

1997

George M. Strander has been hired as the probate court administrator and probate register for the Ingham County Probate Court (Michigan). Probate courts in Michigan handle matters involving decedent estate administration, trusts, guardianships and conservatorships, and mental health commitments. Before being hired by Ingham County, Strander served as an analyst for the Michigan Supreme Court's State Court Administrative Office. Strander also is a member of the Albion City Council and serves as an attorney referee in the Family Division of Ingham County's 30th Circuit Court.

Michigan State Representative **Steven H. Tobocman** of Detroit spoke on "Dealing with Crises Today: Important New Roles for Nonprofit Organizations" this spring in a program presented by the University of Michigan's Nonprofit and Public Management Center. Tobocman is the former executive director of Community Legal Services in Detroit.

1998

5TH REUNION

The Class of 1998 reunion will be October 24-26

Committee: Marcia A. Bruggeman; Tung-Ming Chan; David S. Gingold; Erica D. Klein; Robert J. Maguire; James E. Myers Jr.; Mercedes Kelley Tunstall; and Gillian C. Wood

2000

Marla S. Carew has been appointed to the Council of the State Bar of Michigan Computer Bar Section. She is with Raymond & Prokop PC in Southfield, Michigan, and practices with the Business Services Group. She also is a member of the firm's Technology Industry Group.

Dana C. Jewell has joined the Dallas, Texas, office of Fulbright & Jaworski LLP, where she focuses her practice on intellectual property matters in the areas of trademarks, copyrights, and Internet law. She has assisted clients with securing intellectual property rights in the United States and abroad and her practice includes protecting clients' rights via civil litigation and proceedings before the Trademark Trial and Appeal Board.

Michael J. Willis has joined Varnum, Riddering, Schmidt & Howlett LLP's Kalamazoo, Michigan, office as a corporate and estate planning attorney specializing in formations,

mergers and acquisitions, shareholder relations, and probate and estate planning. Prior to joining Varnum, Willis practiced law with a large Detroit-based firm.

2001

Beryl Goldsweig writes that she has been working as a clerk to the Hon. Howard H. Dana Jr. of the Maine Supreme Judicial Court in Portland. Her clerkship term is August 2002 – July 2003. She was prompted to write because her name and clerkship position did not appear in the clerkship list that appeared in the previous issue of *Law Quadrangle Notes*. The Law School relies on clerks to notify it of their positions because it has no way independently to track graduates who accept clerkships.

2002

Jennifer A. Buckley has joined the national law firm of Baker & Hostetler LLP's Cleveland, Ohio, office. While earning her J.D., Buckley was associate editor and contributing editor of the *University of Michigan Journal of Law Reform*, participated in the Child Advocacy Law Clinic, and was a clerk in the U.S. Attorney's Office, Northern District of Ohio.

Christine E. Gale has joined the Detroit, Michigan, office of Warner Norcross & Judd LLP



From left, Matthew D. Johnson, '02, Marina E. Lamps, '02, James L. Larson, '02, Timothy J. Lundgren, '02, and Matthew P. Misiak, '02

as an associate. Gale earned her J.D., *cum laude*, participated in the Campbell Moot Court, and was an associate editor of the *Michigan Journal of International Law*.

Matthew D. Johnson has joined the Grand Rapids, Michigan, office of Warner Norcross & Judd LLP as an associate. While earning his J.D., he served as executive articles editor of the *Michigan Telecommunications and Technology Law Review*. A resident of Rockford, Johnson has served as a volunteer firefighter with the Algoma Township Fire Department since 1993.

Warner Norcross & Judd LLP has announced that **Marina E. Lamps** has joined its Grand Rapids, Michigan, office as an associate. While earning her J.D., Lamps co-founded the Catholic Law Club and was secretary of the Criminal Law Society.

James L. Larson has joined the Grand Rapids, Michigan, office of Warner Norcross & Judd LLP as an associate. Prior to joining WN&J, Larson spent three years at Kmart's International Headquarters in Troy, Michigan, where he was a merchandise planner and merchandise logistics analyst.

Timothy J. Lundgren has joined Varnum, Riddering, Schmidt & Howlett LLP's Grand Rapids, Michigan, office as an associate in the Environmental Practice Group.

Matthew P. Misiak has joined the Detroit, Michigan, office of Warner Norcross & Judd LLP as an associate. Prior to joining the firm, Misiak clerked for the Appalachian Research and Defense Fund of Kentucky.

Lora M. Reece and **Aaron J. Rupert** have joined the national law firm of Baker & Hostetler LLP's Cleveland, Ohio, office. Reece earned her bachelor's degree, *summa cum laude*, from North Carolina State University, where she was a member of the Phi Kappa Phi Honor Society. Rupert earned his law degree, *cum laude*, and earned his bachelor's degree, *cum laude*, from the College of Wooster.

Warner Norcross & Judd LLP has announced that **Todd W. Simpson** has joined the Grand Rapids, Michigan, office as an associate. Simpson earned his J.D., *magna cum laude*, he also worked for the National City Bank in Kalamazoo for four years, primarily as an estate settlement specialist, where he was responsible for overseeing the settlement of estates in Indiana and southwest Michigan.

Brittan Strangways has joined Varnum, Riddering, Schmidt & Howlett LLP's Grand Rapids, Michigan, office as an associate in the Environmental Practice Group.

Andrew Toftey writes that he is clerking for the Hon. Gerald W. Heaney of the U.S. Court of Appeals for the Eighth Circuit. He was prompted to write because his name and clerkship position did not appear in the clerkship list that was printed in the previous issue of *Law Quadrangle Notes*. The Law School relies on clerks to notify it of their positions because it has no way independently to track graduates who accept clerkships.

IN MEMORIAM

'20	Peter Mitchell		'46	John T. Ryan	11/10/2002
'26	L. Welch Pogue	5/10/2003	'48	Russell W. Baker Sr.	12/14/2002
'27	Lyman B. Avery	2/3/2002		Raymond M. Crossman Jr.	10/8/2002
'29	Ralph M. Besse	10/25/2002		Roger H. Muzzall	11/18/2002
'30	Marvin L. Niehuss	3/3/2002		Keith K. Nicolls	11/6/2002
	Joel Kell Riley	1/7/2003		Robert John Salvesen	10/10/2002
'31	Harold M. Karls	9/19/2001		James J. Wilson	6/30/2002
	Gordon C. Reeves	5/11/2002	'49	John R. Dellenback	12/7/2002
'32	Herman H. Copelon	11/1/2001		John Carlton Elam	12/26/2002
'33	Katherine Kempfer Doran	5/19/2000		James R. Fredrickson	9/29/2002
	Michael Gimbel	7/30/2000		John W. Gorn	12/13/2002
	Evan J. Reed	12/1/2000		Roger Elliot Hammer	12/19/2000
'34	Fred W. Albertson	11/13/2000		Robert M. Waer	4/9/2002
	Aaron Beser	9/19/2001	'50	Paul W. Cook	10/21/2002
	Leonard J. Weiner	6/26/2002		Hugh B. Muir	7/25/2002
<i>(Mr. Weiner's name was misspelled in the preceding issue of Law Quadrangle Notes. We apologize for the error.)</i>			'52	Russell W. DeForest	10/24/2002
'35	Thomas C. Egan Jr.	6/18/2002		William B. Lynch Jr.	10/21/2002
	Birney M. Vanbenschoten	9/26/2002		Robert M. Sheldon	12/8/2001
'36	William R. Bagby	12/28/2002	'53	Van E. Blanchard	7/29/2000
'38	Julian A. Gregory	9/16/2002		Larry A. Eskilsen	11/3/2000
	Frank Scott Kennedy	10/17/2000	'54	Robert C. Free	3/18/2002
	Reino S. Koivunen			David P. Wood	10/15/2002
	Michael R. Spaniolo	12/15/2002	'56	John R. Potter	1/3/2002
'39	Thomas D. Baldwin	2/20/2002	'57	John K. Cannon	12/15/2002
	Arthur A. Greene Jr.	10/10/2002		William C. Todia	10/14/2002
	Fred C. Newman	11/30/2002	'58	J. Martin Cornell	12/12/2002
	James W. Stoudt	10/10/2002		Erwin A. Elias (LL.M.)	11/21/2002
'40	Martha Wright Griffiths	4/22/2003		James E. Wilson	11/2/2002
	William Lee Howland	7/27/2000	'60	Thomas H. Adams Jr.	9/12/2002
	Morton Jacobs	10/3/2002	'61	David P. Truax	7/26/2002
'41	John W. Cummiskey	11/11/2002	'63	Renato L. Delafuenta (LL.M.)	10/18/2002
	Edward P. Frohlich	11/30/2002	'67	Arthur W. Dulemba Jr.	9/11/2002
	Robert L. Gillis	6/25/2002		Peter E. Nygh	7/17/2002
	Samuel Krugliak	4/6/2003	'74	Timothy A. Patalan	11/4/2002
	Everett Prosser	11/26/2002	'82	Christine Marie Anderson	12/23/2002
'42	John K. McIntyre	12/18/2002			
	Douglas B. Remmers	1/7/2001			



closing the

A Circle: Graduate returns to teach

By Frank H. Wu

More than a decade after graduating from the University of Michigan Law School, I was invited to return as a visiting professor. Having grown up just outside Ann Arbor, I looked forward to coming home. As someone who had loved the first year of law school, I resolved to make as much as possible of the opportunities on the other side of the podium. In that endeavor, I discovered how a teacher must be a student to be effective.

The moment I set foot into the Reading Room again, I was reminded of my introduction to the law. The Reading Room remains much the same. It still impresses with its high ceiling, the stained glass windows displaying university seals, old-fashioned cork flooring, massive wooden tables, the faint scent of old books, and the hush of study however large the crowd. There have been a few changes, though. The renovations have included turning the hidden alcoves around the perimeter into wonderful offices that resemble monks' cells, installing power outlets for every seat, and adding wireless high-speed Internet access.

Whatever the surroundings, I was not the same person. Since graduating, never anticipating I'd find myself back in the library seminar room where my study group convened to cram, I had clerked for a federal judge in Cleveland, practiced law in San Francisco, and spent seven years as a faculty member at another school, in Washington, D.C. Although I have been able to whistle the Wolverines fight song, "Hail to the Victors," as long as I have been able to whistle, I am not the young man who opened the pages of a civil procedure casebook to discover the possibilities of a life of the mind.

Before I moved, my friends asked me whether it would be strange to have former professors as colleagues. To the contrary, it felt comfortable, completing the circle. Yale Kamisar, J.B. White, J.J. White, and Christina Whitman, among others, may have remembered me vaguely as a student. Even so, they welcomed me to the faculty lounge. They set an example as well. I hoped they would treat me as an equal, which in turn obligated me to regard my own students as future equals.

Because I was standing at the front of the same room where I once sat in the rear, it was easy enough to recognize that any apparent superiority over the current students was purely the product of timing. I have been poring over the same basic texts for many years, but if I did my job they would surpass me quickly once they started practice.

I was ambitious for them. In Civil Procedure, I wished to inspire my students to think about more than the mechanical rules, the strategies for winning cases on behalf of clients, and obtaining good grades. I wanted to challenge them to consider the ethics of their chosen profession, the best methods for our culture to resolve its many disputes, and the ends and means of engaging with a diverse democracy.

Civil Procedure is a notoriously difficult course. Just the semester before, I'd read a spirited e-mail exchange on the Civil Procedure faculty listserv discussing whether our specialty was the most hated course in the first-year curriculum. It may not surprise

their students that those who posted messages appeared to take pride in the distinction.

As the editor of the casebook I was using for the first time, UCLA professor Stephen Yeazell, pointed out in the introductory chapter, almost all students have had experience with subjects such as contracts and torts and exposure through television even to criminal law. But unless they have had the misfortune of being involved in litigation, virtually none have had any contact with civil procedure.

Furthermore, students have trouble separating substance from procedure. Many of them assume that the substance of any case can be established without any need for set procedures. The emphasis on appellate cases leads them to accept facts as given.

An attorney of course is motivated by specific substantive reasons to fight about procedure. She may predict that a jury would be more likely than a judge to prefer her to her opponent. She is not usually bothered with abstractions such as the public interest. She may seek victory through a dispositive motion or an advantage through various maneuvers. However, a student who is convinced at the outset of the substantive claims made by one party rather than those of the other party does herself a disservice in perceiving how those claims were formed through advocacy. Hence she cannot see how a motion to dismiss ought to function.

Students also are misled by the very rules of procedure. Some of them suppose that following the rules will produce desirable outcomes automatically. So they try to memorize the rules. And they are alarmed that an attorney who complies with each provision of every relevant rule may nonetheless receive an adverse ruling, because of the substantive law that is controlling, the facts that must be conceded, opposing counsel's even stronger rhetoric, or extrinsic factors beyond her control. They are sure that if an attorney has failed, she must be incompetent or her cause frivolous.

Thus, I offered the students analogies to games, though the comparison itself is imperfect. A chess master or a baseball player must know the rules at a minimum, but she must be able to do much more than recite those rules. Despite being good, she can lose.

Students also are uncomfortable with the adversary system. More than a few of them refuse to accept the usefulness of counsel competing to determine the merits. They are disgusted by normal attorney conduct. The art of distinguishing cases looks like so much sophistry. Most non-lawyers may share these sentiments, but lawyers must comprehend the procedural mechanisms that apply the substantive law — especially if they are to reform the system.

Confident of the abilities of Michigan students, I experimented with pedagogy. At any law school, students are likely to find the first year to be very frustrating. Students often suspect, with reason, that they are expected to already have mastered the very subject they are supposed to be learning. In that context, the lecturer's use of Socratic method seems perverse, as if he is asking, "What is it I'm thinking?" Avoiding the real issues, students become indoctrinated into inquiring, "What is it you're looking for?"

closing the circle

I sought to do better. I explained that the most important question, perhaps the only worthwhile question, was simply: “Why?” Whatever their beliefs, I would require them to articulate an answer to this question.

I told them that I would not accept even the most eloquent statement of personal feelings, but would instead help them transform assertions into arguments. While contemporary society has made tremendous gains in instilling respect for different opinions, we also as a side effect tend to treat everything as a matter of mere opinion, to each her own. Regrettably, we lose the possibility of persuasion, that more than tolerate your outlook, I might come around to your viewpoint.

In my class, then, we would cultivate critical thinking. The test for an argument was whether an open-minded person would find it compelling on its own terms and without coercion. Such arguments would be creative within the distinct style of legal reasoning and using its sources of authority. They would not likely be either mathematical proofs or political appeals, but they might incorporate both logic and policy.

In classroom discussion, I preferred role-playing scenarios that would develop analytic and narrative skills. Students were assigned to be counsel, presenting the best argument for their side, while refuting the best arguments for the other side. Many simulations tested ethical limits, with no clear norms. Students had to deliberate, for example, whether they would turn over documents requested under Rule 34 that were damaging or if they would interpose objections that had a technical basis but arguably subverted the value of discovery. To ensure students covered black-letter doctrine, I gave a multiple-choice midterm exam. It included questions on such niceties as motions for judgment on the pleadings, impleader, and the right to jury trials.

To expand the scope of the course and alleviate students’ anxiety about a high-stakes final exam, I also assigned short papers: one practical, one policy-oriented, and one theoretical. I asked students to attend any civil proceeding, writing up their observations. I asked them to propose any change to the Federal Rules, identifying the goal of their reform and explaining how it would be an improvement over the present system. I also asked them to watch any of the Shakespeare tragedies, using the play to discuss the concept of justice.

I also taught Immigration in the fall and Asian Americans and the Law in the winter. Immigration, a complex course that blends substance and procedure, plus policy, international and administrative components, was even more complicated because of the governmental reorganization prompted by national security concerns. I was as busy as my students keeping up with the latest

controversies. Asian Americans and the Law, a new offering, was a survey of historic cases that often are glossed over without their context: Asian immigrants and their American-born progeny were at the center of cases that established, among other things, congressional plenary authority over immigration, as-applied constitutional causes of action, birthright citizenship, and judicial strict scrutiny review. I designed the course to be innovative in content but surpass conventional standards of academic quality.

My students at Michigan were extraordinary. I was impressed with them collectively and individually. They prompted me to reflect on the lives of teachers and students, respectively, and the relationships among them. Ours is a joint enterprise. In a professional school, unlike a graduate program, the faculty are scholars training practitioners. The faculty may value their research, but we must also appreciate the educational endeavor. Otherwise, our research will become isolated, bereft of tangible benefits to anyone but ourselves.

As a teacher, I realized that I would enjoy the tasks of instruction only if I always demanded of myself both that I learn the material anew and that I communicate insights so a novice could understand them. I had to give appropriate positive feedback, and I had to be open to receiving even negative feedback.

Taking advantage of the available resources, I asked the staff of the Center for Research on Learning and Teaching to sit in on my classes and make suggestions. I struggled to come up with a sensitive approach to issues of race, including use of African American vernacular English, and to remedy inequities of gender, such as the tendency proven in experiments of teachers to favor males. I also compensated for my own potential prejudices, encouraging students to take positions unpopular with their peers and discouraging them from worrying about my ideas.

As I prepared to resume my usual life, I felt I’d been given the chance to redo the past. I made up as a teacher for what I had not accomplished as a student. I attended as many of the numerous talks as I could schedule, ranging from endowed lectures open to the public to informal lunches in the faculty dining room, in addition to giving seven talks at the Law School and several more around campus. I attempted to meet every member of the faculty on a one-on-one basis to learn about his or her work. I took in as much culture as I could, from watching the Royal Shakespeare Company at the Power Center and the football team in the Big House to visiting the art museum and the Arboretum. I made an effort to meet every student of mine outside of class to interact with him or her in a meaningful manner.

Yet these activities were only part of the fulfillment of duties. I embraced those duties. I was a member of a community, albeit

Because I was standing at the front of the same room where I once sat in the rear, it was easy enough to recognize that any apparent superiority over the current students was purely the product of timing. I have been poring over the same basic texts for many years, but if I did my job they would surpass me quickly once they started practice.

Frank H. Wu,

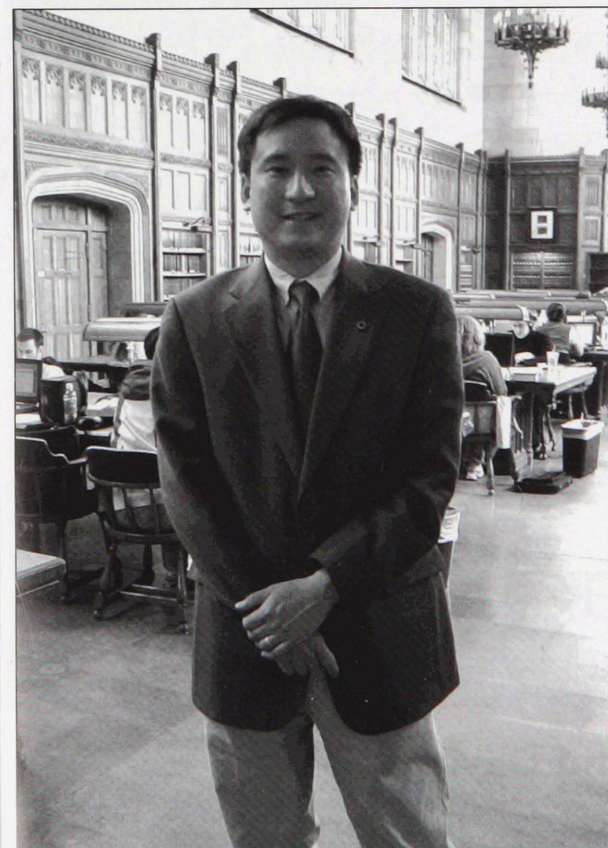
'91, a visiting professor at the Law School during the 2002 – 03 academic year, joined the faculty of the Howard University School of Law in Washington, D.C., in 1995 and served as clinic director from 2000 – 02. Professor Wu's *Yellow: Race in America Beyond Black and White* was published by Basic Books in January 2002. His co-authored textbook, *Race, Rights and Reparation: Law and the Japanese American Internment*, was published in 2001. His more than 200 articles have appeared in periodicals such as the *Washington Post*, *L.A. Times*, *Chicago Tribune*, *Toronto Star*, *Atlanta Journal & Constitution*, *Chronicle of Higher Education*, *National Law Journal*, *Legal Times*, *The Nation*, and *Progressive* magazines. Wu is a member of the Board of Trustees of Gallaudet University, founded to serve the deaf and hard of hearing. He also is a hearing committee chair for the D.C. Bar Board of Professional Responsibility, which adjudicates attorney discipline matters. He was chair of the D.C. Human Rights Commission in 2001 – 02. He has been a Scholar in Residence at Deep Springs College, a highly-selective all-male full-scholarship school located on a student-run cattle ranch in rural California, and he delivered the 1998 James A. Thomas Lecture at Yale Law School. Before beginning his academic career, Wu held a clerkship with the late U.S. District Court Judge Frank J. Battisti in Cleveland, Ohio, and then joined the Civil Litigation Practice Group at Morrison & Foerster in San Francisco, California. While there, he devoted a quarter of his time to representing indigents. He received his B.S. from Johns Hopkins University and his J.D. from the University of Michigan Law School. Wu also served as a Teaching Fellow at Stanford University Law School in Palo Alto, California, in 1994 – 95. Here at the Law School, he won the Outstanding Faculty Member award for the academic year 2002 – 03 from the Black Law Students Alliance.

temporarily. I had a responsibility to participate in that community, which I had taken for granted before. My professional achievements and personal satisfaction could not come about without that sense of community, which was fragile and not easy to sustain, and its support, which depended on mutual contributions.

From my office window, I had a direct view of the archway leading onto the Law Quadrangle. Every day, I would take a moment to look out at a great law school.

It was an especially exciting time to be present. Imbued with an ideal of community, the design of the new buildings will enhance the public life of the institution. The steel and glass piazza to be added on the south side and the completion of a wing for the missing corner of the Quad look spectacular in the sketches and models. They will make the School even better.

Inside the structure and behind the facade, it is the people — faculty, staff, students, and alumni — who constitute the community. I was privileged to have been invited to join them as a student; I was honored to have been invited to visit them as faculty.





The following article, reprinted here with permission, appeared in the special Centennial Issue of Michigan Law Review (Vol. 100, No. 7, June 2002). This special edition includes articles by seven Law School professors: Edward H. Cooper (“Simplified Rules of Federal Procedure?”), Yale Kamisar (“The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule”), Thomas E. Kauper, ’60 (“The Report of the Attorney General’s National Committee to Study the Antitrust Laws: A Retrospective”), Theodore J. St. Antoine, ’54 (“Justice Frank Murphy and American Labor Law”), James Boyd White (“What’s Wrong with Our Talk About Race? On History, Particularity, and Affirmative Action”), James J. White, ’62 [with David Peters] (“A Footnote for Jack Dawson”), and Christina B. Whitman, ’74 (“Looking Back on Planned Parenthood v. Casey”). Then-Dean Jeffrey S. Lehman, ’81, noted in his Foreword that each contributor wrote of an issue “at the core of the past century’s legacy to contemporary society.” In the jointly-authored selection below, “I” refers to Professor James J. White and “we” refers to White and co-author David A. Peters.

A Footnote for Jack Dawson

By James J. White and David A. Peters

Jack Dawson, known to many at Michigan as Black Jack, taught at the Law School from 1927 to 1958. Much of his work was published in the *Michigan Law Review*, where he served as a student editor during the 1923-24 academic year. We revisit his work and provide a footnote to his elegant writing on mistake and supervening events.

In Part I, we talk a little about Jack the man. In Part II, we recite the nature and significance of his scholarly work. Part III deals briefly with the cases decided in the last 20 years by American courts on impracticability, impossibility, mistake, and frustration of purpose. We focus particularly on the afterlife of the notorious *Alcoa* case that was the subject of Jack's last articles. Part IV concludes with some speculation on the reasons for the different responses of German and American courts to claims of mistake or supervening events.

A splendid piece of work

As a Contracts student, I first met Jack Dawson vicariously in the fall of 1959. We studied contracts from Dawson and Harvey in mimeograph. That Contracts casebook first brought remedies to the front of contracts books and to the early weeks in contract courses. It so asserted that remedies were at least as important as any other part of contract doctrine and more important than most.

I did not meet Jack in the flesh until almost 15 years later when I was a visiting professor at Harvard. Having taught for well over a decade at Harvard, Jack was teaching at Boston University in 1973. On a snowy Sunday morning, I was in my office at Harvard when Jack Dawson invited me next door and, with a sly grin, pulled out a bottle of whisky and two glasses. I think that was the most extraordinary offer of a drink that I have ever had. It confirmed my fantasies about Jack and made plausible all of the stories about his delightful eccentricities. What stories could not be true of one who offers Scotch neat at nine on Sunday morning?

Jack came to the faculty in 1927 and served on the faculty until 1958. Stories have it that he was offered a salary of something like \$3,000 when he was hired in 1927, but the Dean shortly told him that the school could pay only \$2,000. He came anyway. Jack's normal fare was equity and contracts, but he also taught legal history and comparative law.

Many legends attend Jack's time on the faculty here. One can imagine that a Sunday morning offeror of whisky might have his notions about school rules. Evidently,

Jack's attire once deviated so far from the acceptable that the dean spoke to him about it (he may have neglected to wear a suit coat to class on a warm day). In the next class Jack showed up in a white tie and tails. I suspect that this is merely representative of Jack's attitude toward rules he thought to be foolish.

As a Democrat on a staunchly Republican faculty, Jack was even more deviant than a Republican is today. And Jack was not merely a Democrat. He was a candidate for the House of Representatives on the Democratic ticket in 1950 and 1952. It must have rankled him that some of his colleagues signed a newspaper advertisement opposing his election. Ann Arbor was then as Republican as it is now Democrat, and he was never elected to office.

His closest approach to elective office was by appointment. In the spring of 1951, Senator Arthur Vandenberg of Grand Rapids was on his deathbed. Governor G. Mennen "Soapy" Williams, a student and friend of Jack's, allegedly proposed to appoint Jack as Vandenberg's replacement, but told Jack that it could be done only if it were done quickly and before the influential people in the Democratic party insisted otherwise. Supposedly, Jack told the dean and bought a blue suit appropriate for a swearing in after speaking to Soapy. It never happened. Whether others intervened or Soapy changed his mind cannot be confirmed.

He later declined an opportunity to be appointed to the Michigan Supreme Court. Though Jack had served admirably as both chief of the Middle East Division of the Foreign Economic Administration during World War II and later as an advisor to the Greek government as a representative of the Foreign Trade Administration, "to him, there was nothing like the classroom," as the *Harvard Law School Bulletin* put it in a memorial article about Dawson in 1986.

Jack was early and always a serious scholar. His first publication in the *Review* must have been the product of his research in England, where he studied as a Rhodes Scholar. Even in his post-retirement service at Boston University, he continued to write. By today's standards, and even more by the standards of the time, he was prolific. By any standards, his writing and thinking were powerful. Jack's writing was always felicitous and, as his writing about *Alcoa* shows, it was informed by a passion.

Jack Dawson was not only a fine and rigorous teacher and scholar, he was also a politician, a teaching innovator, a fine colleague, and, best of all, a judge of fine whisky.

Jack Dawson the scholar

As a scholar, Jack Dawson was a man ahead of his times. A Rhodes Scholar after he graduated from Michigan Law School, he earned his D.Phil. from Oxford before returning to Michigan to teach. These days, elite law faculties overflow with multiple degrees, but in 1931 a law professor with a doctorate was a rare bird. His interest in the law did not end at the water's edge, nor did he limit himself to the legal world of the English-speaking peoples; from the very first, his articles reflected a knowledge of both German and French law. Dawson was also willing to travel into the past to explore the roots of modern doctrine and draw on history to provide lessons for contemporary law. In an era when professors might publish only a few articles during a career, the quantity of Jack Dawson's publications is all the more impressive. In many of these articles, with their historical depth and transnational breadth, an underlying question recurs: when and to what extent should judges do more than award damages in contract disputes?

Answering this question took Jack into a number of different areas in the law. In an early work, he explored estoppel and its relation to statutes of limitation. He maintained that though the law could allow parties to contract away their rights under statutes of limitations, it should be willing to step in when one of the parties sought to abuse its rights under the contract. The courts should step in to help parties whose good faith attempts to resolve disputes amicably were repaid by knavery. From estoppel he moved on to mistake, arguing that rescission or reform of a contract for mistake was the "enforcement of an intention defectively expressed." He noted that while courts need not necessarily enforce statutes of limitations to bar remedies for mistake, the longer an agreement continues (or the longer the period since value changed hands), the more a claim of mistake begins to look like a case of buyer's remorse.

Dawson's interest in remedies was a product of his focus on the various ways in which parties sought the upper hand in contracting through the exertion of economic power. The mid-1930s was not too far removed from the heyday of doctrinal freedom of contract made so infamous in *Lochner*. For Dawson (and many of his peers), the question became how best to move from a "world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond to reality," as he put it in a *Tulane Law Review* article in 1937, towards a realm of contract law that could control the worst abuses of economic power. As any first-year contract students learns, duress emerged from the Roman conception of *laesio enormis*, and Dawson followed the development of that idea from Rome through medieval

Christendom to its fruition in modern French and German law in the early 19th century. He rooted his understanding of modern duress in Christian condemnation of usury but noted that usury, with its blanket condemnation of interest, was an easier standard to apply than judicial investigation of the discrete circumstances of a single inequitable bargain. His comparative study of French and German doctrine introduced not only the historical antecedents of the doctrine, but offered a comparative analysis of the pitfalls of too broad a vision of duress.

Moving from the European to the American context, after World War II Dawson wrote a body of seminal work on duress in the United States, all published in the *Michigan Law Review*. In the first piece, he traced the historical evolution of the concept of duress, observing that what had come to be considered a full-fledged doctrine was in reality a reflection of "the convergence of several lines of growth. . . . [The result of which] has certainly not been a coherent body of doctrine, unified around some central proposition; on the contrary, the conflict and confusion in results of decided cases seem greater than ever before."

He sought to instill order into a morass of doctrine by distilling from it, in the style of American Legal Realism, some core notion open to broad application. Looking into the tort roots of duress, Dawson found that contemporary economic duress focused upon "situations in which an unequal exchange of values has been coerced by taking advantage of a superior bargaining position." This insight permitted him to assert that a more expansive notion of duress was consonant with the policing function of the courts, providing judges a legitimate way to intervene in private bargains to shore up the foundations of a market society.

This vision of state as impartial policeman led him to discuss litigation as a form of duress. Although Dawson recognized the right of parties to seek redress in court, he also observed that "[t]he sanctions of civil procedure constitute a system of state-organized coercion, supplied to private individuals for the specific purpose of enabling them to effectuate their demands." Though in mid-century American criminal law there was no longer a legitimate means of encouraging recalcitrant debtors to pay up, Dawson was troubled by the ability of parties to use the threat of civil litigation as a tool for obtaining more in private settlement than they would otherwise realize in the courts. This concern with duress was in part motivated by a genuine fear of the ability of parties with superior bargaining power to shift the burdens of risk and uncertainty onto the weak. Jack found the idea that the state as neutral policeman should intervene to grant the strong the benefit of unforeseen circumstances too much to stomach.

The solicitude for the weak and desire to ferret out the true basis of every bargain informed the other major strand of Dawson's research. From the first, he was interested in the impact of inflation upon the law of contracts. As a Rhodes Scholar in the mid-1920s, he had a ringside seat for the hyperinflation that destroyed the German middle class and set the stage for the rise of Hitler. His very first publications in the *Michigan Law Review* investigated judicial attempts to reform contracts in the face of inflation.

Looking at the German courts in the period from 1915-24, he concluded that they had done everything in their power to ameliorate the impact of inflation, failing only when the German economic system finally collapsed completely. Moreover, he noted that the judicial experiments in stemming inflation helped guide legislative responses to the crisis. He also studied American history during the Civil War period in an effort to glean from it some insight into the proper judicial role in curbing the impact of inflation on contracting parties. Distinguishing the hyperinflation of the Confederate and Weimar periods from less dramatic instances of monetary depreciation, he recognized the importance of inflation as a policy tool that could be used as a means of debt relief (a significant issue if you consider that he was writing in 1935). Thus, judicial intervention that might be warranted in a period of excessive inflation might, if inflation were moderate, be an impediment to effective legislative or administrative policy. Because judicial remedies for inflation undermine the "security of transaction" necessary to the legitimacy of the contract system, judges should refrain from intervening unless "the influence on prices of purely monetary factors [emerges] as a factor independent of ordinary influences of supply and demand."

Jack's work did not end with his exploration of the substantive law, however. He was also keenly interested in the craft of judging and the development of the role of the judge over time. His *History of Lay Judges* investigates the (to the contemporary observer) curious tradition of lay judges in Western legal systems. In pre-modern societies, lacking a clearly expressed vision of separation of powers, "it was common to fuse with dispute-settlement some rule-making and executive functions." The overlapping functions of those entrusted with settling social disputes meant that there was less demand for officials whose sole function was the definition and application of the law. Though increasingly complex societies demand greater specialization, a residual interest in ensuring the legitimacy of law through popular participation in part explains the continued vitality of lay participation in the judicial process. That lay participation also permits the court to draw on the expertise of others in making its decisions,

based on "an assumption that law is better administered if it draws on the good sense and practical wisdom of persons in which these qualities have not been severely warped by excessive exposure to the law." The warping effects of a legal education aside, Jack pointed out that the essence of judging lies in the legitimacy of the process as well as the efficiency of the decisions that emerge from it.

Though much of Jack's work was groundbreaking, his *magnum opus* was *Oracles of the Law*. Turning his attention from lay judges to the history of the professional judiciary and its role in the case law system, he emphasized the "creative role of adjudication." While the primary role of judicial process, particularly in earlier periods, was the peaceful resolution of social conflict "conflict itself, though potentially dangerous, is a major source of growth and change." For Jack, an increased separation of judicial from administrative and legislative functions still "requires the legal order to take account of new values and human needs that in society as in our private lives conflict can be creative." This creativity, however, had its limits; turning his comparativist's eye on France, Jack argued that when the French courts exceeded their powers (even in the cause of opposition to authoritarianism) they provoked a political reaction that sought to rein in the power of the judges.

If for Jack judges could undermine themselves by being on the one hand too timid to apply their creative powers to new situations and on the other too bold in the incursions upon the realm of the political, where did the happy medium lie? Ultimately, he found it in Rome.

He wrote in *The Oracles of Law*: "The extraordinary achievement of the Roman jurists owed much, it seems, to their own self-imposed limitations. They were conservatives and traditionalists, with profound respect for the inherited tools of their craft. Through the conflicts of opinion that were numerous among them they perfected these tools and used them with increasing precision Most of their attention was directed, not to theoretical synthesis, but to the consistent and orderly treatment of individual cases. . . . Their assumptions were fixed, the main purposes of the social and political order were not to be called in question, the system of legal ideas was too well known to require much discussion. They were problem-solvers, working within this system and not called upon to solve the ultimate problems of mankind's needs and destiny. They work case by case, with patience and acumen and profound respect for inherited tradition. Despite the long centuries that have intervened, despite our vastly different hopes for mankind and its future, we in the 20th century can still profit from their work. Those who should feel the strongest affinity for them are persons trained in American case law."

Taking nothing away from the wisdom and intelligence of modern judges, Jack recognized that they stand on the shoulders of giants. Moreover, the range of issues they have to deal with include matters far outside their ken; better to defer to tradition, precedent, and the knowledge of experts.

In his last major scholarly publication, Jack revisited the question of inflation and frustration of contract, this time in the context of the *Alcoa* case (*Aluminum Company of America v. Essex Group Inc.*, 499 F. Supp. 53 [W.D. Pennsylvania, 1980]); he brought to bear both his knowledge of substantive law and his vision of the proper role of the judge in rebuking the judge for overstepping the bounds of prudence and the law.

The facts of *Alcoa* are, for the 1970s, not particularly unusual. In the mid-1960s, Essex Wire decided to increase its production of aluminum wire products. In the spring of 1967, Alcoa and Essex Wire entered into a contract that provided for Essex Wire to supply Alcoa with alumina, which Alcoa would then smelt into [aluminum]. The price clauses of the contract included an escalator clause providing for changes in price based on both the Wholesale Price Index (WPI) and the average labor wages of Alcoa employees at the plant in which the smelting was done. (Alcoa developed its indexing system with the aid of now-Federal Reserve Chairman Alan Greenspan.) As a result of the 1973 OPEC oil embargo, however, the price of oil-fired electricity (the single largest non-labor cost factor in aluminum conversion) rose dramatically and, “[a]s a result, [Alcoa’s] production costs rose greatly and unforeseeably beyond the indexed increase in the contract price. In the face of this inflation and a loss on the contract in 1978 (the last year of performance before the suit) of over \$8 million, Alcoa sought reformation of the contract on the grounds of mistake, frustration, and impracticability.

Finding in favor of Alcoa, Judge Teitelbaum reasoned that the parties had in fact made a mutual mistake of fact by agreeing that the WPI indexing formula would prove suitable to meet their expectations. On the same facts, the court held that Alcoa had also proved its case with regard to frustration and impracticability. In fashioning a remedy, however, the judge threw caution to the wind. Reasoning that “[t]his case is novel,” the court was willing to impose its remedy out of fear that parties might otherwise refuse to enter into a long-term contract. The court rejected “the hoary maxim that the courts will not make a contract for the parties.” Reasoning that “in this dispute the court has information from hindsight far superior to that which the parties had when they made their contract,” Judge Teitelbaum concluded that “the parties may both be better served by an informed judicial decision based on the known

circumstances than by a decision wrenched from words of the contract which were not chosen with a provision of today’s circumstances.” His later observation that “[t]he court gladly concedes that the parties might today evolve a better working arrangement by negotiation than the court can impose,” provided far more prescient; Alcoa and Essex Wire settled before the case was heard on appeal.

In analyzing *Alcoa*, Jack drew on his comparative study of the German legal system, this time as an example of what not to do in providing a remedy. He claimed that the *Alcoa* court, in trying to solve the contract problem posed by the inflation of the mid-1970s, had violated three basic precepts of contract. First, the judge intervened not to provide a remedy for past injustice, but to impose a prospective solution upon the parties that failed to give form to their original intent. Second, the judge, in fashioning this relief, gave the parties a club with which to bash one another until they came to terms on their own. Third, such drastic judicial intervention in the contracting process both undermines public faith in the legal system and absolves the parties of any responsibility to negotiate over risks that are predictable but the exact impact of which is unforeseeable. In Dawson’s view, parties should be forced to take account of all but the most extreme inflation, and even in those cases, remedies should be limited to returning the injured party to the status of *ex ante facto*.

After Alcoa

In his article about the postwar German experience with impracticability, frustration, mistake, and the like, Jack criticizes the German courts for so freely rewriting contracts that had failed because of mistake or changed circumstances. In his first Boston article he traces the German courts’ reaction to the contract dislocations that attended the astronomical inflation suffered by the Germans after World War I. He notes how the German courts, behaving like extremely naughty common law courts, began to free parties from contracts because of supervening causes, despite the conscious and severe restrictions in the German Code of 1900 on freeing parties from their contracts on such grounds.

In one of the early German cases, a seller had contracted in 1921 to sell iron bars and to deliver half of them in 1922. When the seller failed to deliver, the buyer sued for specific performance in return for his payment of the original contract price in marks. By the time the case came before the appellate court in 1924, the buyer’s entire payment would have been worth less than a penny. Accordingly, the court ordered the contract “revalorized” (*i.e.*, ordered the lower court to require the buyer to pay something that was roughly equivalent to the value of the

iron at the time of delivery). This case and many more like it were still fresh in the minds of judges and lawyers after World War II.

The same kind of inflation that followed the First did not follow the Second World War; instead, Anglo-American bombing, the Allied conquest, and the sticky fingers of the Russians nearly ruined the German economy. Jack tells of an early postwar case that set the tone for contract revisions. In that case, two buyers had made down payments on Volkswagens in 1938 or 1939. Urged on by one of Hitler's dream, they and more than 300,000 other Germans had paid more than 250 million marks to the company that was to manufacture the peoples' car. Part of that money had been used to build a plant to manufacture the Volkswagen. The factory was taken over for the war effort, mostly destroyed by American bombing, and the Russians expropriated the trust account that contained all of the down payments that had been used to build the plant. When it became clear that a postwar Volkswagen would cost 4,400 marks, not the contracted 990, and that the remaining down payments had been expropriated and the plant destroyed, one might have expected the court to turn the plaintiffs away. It did not. The high court agreed with both parties that the "foundations" of these contracts had been "destroyed," but instead of voiding the contracts the court sent the case back to the lower court to determine how many of the 300,000 potential plaintiffs could still pay or wanted Volkswagens and what they should now pay — in addition to their down payments. Despite the multiple problems associated with 300,000 different potential plaintiffs (some of whom wanted a car and some who did not), the need to set a new price for the contracts and to apportion the loss of the trust funds, the lower was to rewrite and then enforce the rewritten contracts.

Following the Volkswagen case, it must have seemed child's play to rewrite other contracts that had only two parties and called merely for setting proper mortgage payments or adjusting sales prices. Shortly, German judges and litigants accepted revision of contracts as a conventional remedy. Jack concludes his summary of the German experience with this dismal description:

"[I]t seems plain that from every point of view, court-ordered 'adjustment' of frustrated contracts, as it has now been established in Germany, is a major impairment of freedom of contract, carried into areas for which, by hypothesis, the contracting parties did *not* provide and in which uninhibited freedom is more than usually needed."

Jack commends one German scholar's "rear guard action" against an enemy when the "main battle was lost more than 50 years ago." The Germans remembered

all too well their appropriate rewriting of contracts in response to the inflation of the 1920s and applied [the same approach] too readily to the different issues of the 1950s.

Alcoa

Jack's discussion of *Alcoa* is even sharper. He notes that the parties had negotiated an elaborate escalation clause and that the case was hardly one of mistake — despite the judge's assenting to the contrary. But he was most offended by the judge's claim to have the power and knowledge not merely to avoid the contract but to draft a new and elaborate contract for the remaining seven years of the Essex-Alcoa deal. The professorial advocates of *Alcoa's* approach get a small share of Jack's anger.

His unhappiness with *Alcoa* arises from the fear that other courts, encouraged by such a prominent decision and by the professors' indorsement, would not only enlarge the grounds for avoidance of contracts but also embrace Judge Teitelbaum's claim that courts can and should fashion new contract terms for the remaining periods in contracts that had not yet expired when suit was filed. Undoubtedly, Jack's fears were fed by his knowledge of the German cases which he had studied in the 1930s and again in the 1980s. If the intellectual German judges, trained in a civil law system and members of a society famous for its strict obedience to rules, could ignore the directions of their Code and so easily slip down the slope of contract revision, surely the Americans who cared less for rules and were not bound by a Code would slip quicker and farther.

He was wrong. Americans have not only refused to rewrite contracts, they appear to have held the line at avoiding them. The decisions of the last 20 years show Jack's fears to have been ill founded.

American cases after Alcoa

Since *Alcoa*, there have been several disruptions of commodity markets that have given the courts hundreds of opportunities to hear parties' pleas to be freed from contract obligations because of mistake or supervening causes. *Alcoa* itself arose out of an increase in electricity rates that was caused by the rise in oil process [costs] after the Arab oil embargo. It was preceded by the Uranium bubble that was ended by the accident at Three Mile Island and followed by disruptions in the markets for natural gas, coal, and electricity.

The disruption in the natural gas markets was a direct result of government regulation of that market. In 1970, the Congress passed the Economic Stabilization Act. That Act fixes prices for gas sold in the interstate market. Because the fixed prices did not justify exploration for and development of sufficient gas reserved to satisfy demand,

the control shortly led to shortages, and, in some cases, to threats by public officials in the Midwest and East to punish the gas pipelines if they did not provide enough natural gas to heat hospitals and schools. The market was also distorted by the fact that intrastate gas was not controlled, so it was in the interest of producers to sell at free market prices into the local market.

When the gas controls were lifted over a phased period by new legislation, pipeline buyers agreed to buy gas in long-term contracts at what proved to be improvidently high prices. When the market escaped entirely from the price controls and particularly when the Federal Energy Regulatory Commission (FERC) released utility buyers from their long-term contracts, the pipelines had long-term high cost contracts to purchase gas but no long-term buyers for the high priced gas so purchased. Those circumstances caused Columbia Gas to file bankruptcy in order to escape more than 4,000 long-term gas purchase contracts at prices that far exceeded the free market price. These circumstances also caused many buyers to breach their "take or pay" obligations and resulted in lawsuits all over the West.

The abrupt end to the licensing of new nuclear plants, the shortage of natural gas, and the rise in oil prices made utilities turn back to coal for generating electricity. The environmental risks from soft eastern coal made utilities use low sulfur western coal. Now well aware of the risks of under-pricing a commodity in a long-term contract, coal sellers seem to have achieved escalation clauses that caused the price of western coal in those contracts to rise well above the short-term market price. This caused buyers to make a series of fruitless challenges to their contracts.

The contracts for the long-term sale of electricity that were made by California, and perhaps by other western buyers, in the summer of 2001 have yet to yield their judicial fruit, but one can be sure that the fruit is in the bud. In the fall of 2001 California was reported to be selling electricity on the spot market at as little as \$1 per megawatt-hour that it had bought in long-term contracts for an average of \$290 per megawatt-hour. With that kind of discrepancy between long-term prices and spot prices, litigation cannot be far behind.

Added to the cases from contracts between buyers and sellers of commodities in long-term contracts are the mine-run real estate lease cases. These, of course, have been around for more than a century, but they too offer possibilities for a court to free one of the parties from his lease because of unexpected circumstances.

So, have the courts gone soft, as Jack feared? We do not think they have. Of course, the legal doctrines have hardly changed at all. We received the doctrines of mistake,

impossibility, and frustration long ago from 19th century English law. The Restatement, Article 2 of the Uniform Commercial Code (UCC), and our case law have expanded impossibility into impracticability, but there has been little other change in the *law as written*.

Of course, the law written is seldom the law applied. And any reader of a few cases on mistake or supervening causes appreciates how sloppy the standards on what is a sufficient mistake, an adequate frustration, or a large enough impracticability to void a contract really are. One man's frustration is another's hard bargain. Without a more extensive reading of the cases than we had had time to do, one cannot be sure that the practice is the same as before *Alcoa*, but we see no evidence of any general willingness to void contracts that would have been enforced before *Alcoa*.

In the take or pay cases, almost every court held buyers to their contracts. Witness the desperate act of the Columbia Gas Pipeline that threw itself into Chapter 11 because it could find no other way to avoid several thousand losing contracts to buy gas at above market prices. Buyers of coal fared no better than the buyers of gas, they too were made to pay above market prices when their sellers' clever contracts caused the contract prices to rise far above spot prices. The same holds true for leases and other miscellaneous contracts.

There is no evidence in the cases of the last two decades that the courts have become more receptive to pleas of mistake or supervening changes. If anything, the lessons of the game theorists may be sinking in. We now appreciate more than before that parties at the time of contracting and later will respond to the events considered here. The manifold shocks to the commodities market since 1960 are now known to every negotiator of a long-term commodity contract. That the courts have not welcomed pleas for avoidance must also be known to these negotiators. With this knowledge any sensible negotiator should reexamine his behavior. Some may eschew long-term contracts in the gas market, but it is only the long-term that makes price diversions large and unbearable. Others may be more careful or not as greedy in negotiating escalation clauses. And, of course, careful students of the cases might even learn about the kinds of clauses that work and those that do not.

Judges' familiarity with the waves of volatility that first roiled the uranium, then the oil, and later the gas, coal, and electricity markets, in order has made them progressively more skeptical about parties' claims of cataclysm. Better than before, the courts appreciate that any judicial outcome — whether it is avoidance or refusal to avoid — is more likely to be followed by renegotiation of the

contract than by ruin or bankruptcy. If the contract still makes sense for the parties, they are likely to continue even after a court rules for one or the other. That ruling will affect the form of the renegotiation (with the winner in court getting a larger share of the surplus from the contract), but judicial modification of the contract is not necessary for the parties to carry on.

In these cases we see just a hint that the courts are getting harder, not softer, that they are more, not less, likely to leave the parties in their contract than formerly. Whether this phenomenon is because of the writing of people like Jack Dawson, because the most prominent cases have led the way, or because the courts believe the economists, we don't know, but we see no weakening of the judicial spine.

Jack, of course, was concerned principally with the court's remedy in *Alcoa*, not with that or any other court's conclusion about the presence of mistake, impracticability, or the like. But the issues are inseparable; since no offending remedy can be imposed without a find of mistake, impracticability or the like, the courts' attitude about the latter are bound to the former. No impracticability, mistake or frustration — no basis to rewrite the contract.

Modifying contracts

Whatever the wisdom of letting *Alcoa* escape the letter of its contract and whatever the propriety of using "mistake" as the theory, the revolutionary part of the *Alcoa* decision was Judge Teitelbaum's rewriting the contract price formula to give *Alcoa* a small profit per pound. That was the act that made Jack apoplectic, that attracted the academic writers, and that put *Alcoa* into most of the contracts casebooks.

We have no case that follows *Alcoa*. Two judges, one concurring in a West Virginia Supreme Court case and one a federal magistrate judge in New Jersey, embrace the rule. In *Unihealth v. U.S. Healthcare* (1998), Magistrate Judge Pisano had to resolve a contract dispute between a hospital and an HMO that had agreed to send its members to the hospital in return for a reduction in the hospital's normal fees. Normally, the hospital charged patients according to a flat fee that corresponded to the patient's condition, the patient's "Diagnostic Group" (DRG). The DRG provided a flat rate for a service whether the patient required a longer or a shorter stay in the hospital than average or whether the patient required more or less service than the average person with that particular condition or need for treatment. Instead of DRG payments, the HMO bargained for *per diem* payments. Both the hospital and the HMO believed the *per diem* payments would be smaller

than the DRG billing would be. To protect against an excessive reduction in the payments that it would receive, the hospital bargained for a restriction on the discount that would be enjoyed by the HMO. That clause read as follows: "If the overall discount for all inpatients exceeds 40 percent . . . U.S. Healthcare will reimburse [hospital] monies beyond the 40 percent discount. . . ."

The parties interpreted the "discount" to mean the difference between the DRG charge and the *per diem* charge for the same service that was provided in the contract. In 1993 New Jersey abolished the DRG system; that left the discount formula without a minuend from which to subtract the actual *per diem* charge of the HMO. Using its "normal revenue" charge, in lieu of the DRG charges for 1993, the hospital claimed the HMO owed an adjustment of more than \$500,000 because the "discount" had exceeded 40 percent by that amount. Of course, the higher the normal charges or revenues, the larger the excess of 40 percent.

Finding that the circumstances fit within Section 265 of the Second Restatement of Contracts on Supervening Frustration, the court concludes that "neither party should be subject to the harsh results proposed by the other party, since neither assumed the risk of the repeal [of the DRGs]." Seeking a remedy, the court cites Judge Tietelbaum's holding that "the appropriate remedy in a case involving a frustrated contract was to modify the contractual price term." Magistrate Pisano also asserts that his case falls "snugly within the ambit of Sections 204 and 272 of the Restatement."

The court then exhorts the parties to negotiate a settlement and appoints a master to determine the reasonable value of the hospital's service in 1993 to be used if the parties fail to agree on a number for that year.

Despite this warm embrace of *Alcoa*, this is not in any sense an *Alcoa* case. First, as the court notes, the case would be perfect for applying Section 2-305 of the UCC by analogy. That section directs a court to apply a "reasonable price" where "the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded." This is only the familiar case of a failed formula. Indeed the court's finding of frustration is unnecessary to the conclusion that the price should now be a reasonable price.

The case differs from *Alcoa* in a second important way. Here the parties had performed and the plaintiff was merely asking for an interpretation of the contract that the defendant owed \$500,000. Since the contract had expired, neither party needed rules to govern continued future performance of the contract.

The needless commentary on frustration and *Alcoa* removed, *Unihealth* is a thoroughly conventional case where a judge must decide what a contract means and whether the plaintiff has proved its case. For these reasons, it does not bear *Alcoa*'s genes.

Like *Unihealth*, *McGinnis v. Clayton* (312 S.E.2d 765, 780 [W. Virginia 1984]) has a lot of *Alcoa* talk, but no *Alcoa* holding. In *McGinnis*, the plaintiffs were the successors to a West Virginia landowner who leased his oil and gas in 1893. The lease required the lessee to pay a one-eighth royalty on oil but gave the lessee the right to gas for \$100 per year, which in 1893 had no commercial value. When a deepened well began to produce commercial quantities of gas in 1978, the lessor's successors sued to void the lease on the ground that it was no longer "commercially reasonable." The lower court dismissed and the Supreme Court reversed.

Noting the possibility that the plaintiffs might bring themselves within the rule of a 19th century case that avoided a 99-year lease for timber and coal because the parties had been mutually mistaken about the presence of mineable coal on the property, the majority reversed the lower court's dismissal. The higher court was particularly careful to make no finding about the continued vitality of the mutual mistake doctrine in such a case and took pains to explain that it was merely giving the plaintiffs a chance to establish a "record."

The indorsement of *Alcoa* comes from concurring Justice Harshbarger. Criticizing the "limited scope" of the majority opinion, Justice Harshbarger ranges widely over commercial impracticability, supervening events, unjust enrichment, and even unconscionability. Citing articles by Professors Macneil and Speidel, Justice Harshbarger suggests that *Alcoa* is merely a form of "equitable adjustment [that] is itself an evolved form of 'reformation.'" At least implying that he would use the *Alcoa* theory to change the gas royalty, the justice reasons that *Alcoa*'s "rationale is useful when applied to a contract such as the *McGuinnises*."

Notwithstanding its elegance and wide range, Justice Harshbarger's opinion remains only a concurring opinion. Moreover, it concurs with a majority opinion that is far from encouraging for the plaintiffs. The majority offers only the smallest hope to the plaintiff:

"[A]n appellate court's decision to overturn the granting of a [motion for summary judgment] does not reflect an opinion on the ultimate merits of the case. The majority even casts doubt on the court's own 19th century opinion on which the plaintiffs rely.

"Although appellants are entitled to a hearing, to prevail they must establish mutual mistake as a legally sufficient

ground for rescission or reformation of the contract. It is true that in *Bluestone Coal*, *supra* [18 S.E. 493 [1893], we stated that, 'Nothing is more clear than the doctrine that a contract founded in a mutual mistake of the facts constituting the very basis or essence of it will avoid it.' . . . Nevertheless, this court has not had occasion to address the mutual mistake question in some time, and we note that the doctrine has been applied in disparate ways in other jurisdictions. . . we content ourselves with ruling that appellant's allegations raise a potentially meritorious argument. . . ."

A careful listener to the majority opinion might hear the court saying: "Dismissal is the right outcome, but you have to give the fellow a hearing first."

Some of the judicial critics of *Alcoa* have been explicit about their disagreement. In *Printing Industries Association v. International Printing and Graphic Communications Union* (584 F. Suppl. 990 [N.D. Ohio 1984]), Judge Battisti states that he is "at odds with the reasoning and result in *Alcoa*. . . . The willingness of courts to reform contracts on the basis of subsequent knowledge may undermine the policy of finality which is so essential and revered in the contract law."

In *Wabash v. Avnet* (516 F. Supp. 995 [N.D. Ill. 1981]), Judge Shadur speaks to Jack Dawson's concern: "[u]nder the logical consequences of that case there would be no predictability or certainty for contracting parties who selected a future variable to measure their contract liability. Whichever way the variable fluctuated, the disappointed party would be free to assert frustrated expectations and seek relief via reformation." A handful of other cases content themselves with distinguishing *Alcoa*. Most of those do not address the rewriting; they deal with the finding of mistake.

After only seven years one writer found that *Alcoa* had "virtually faded into obscurity. . . ." I suspect that the only thing that keeps *Alcoa* on stage is its presence in some of the current casebooks. It remains a favorite of contracts casebook writers; in casebooks the embers often linger long after the fire has subsided elsewhere.

Conclusion

Jack Dawson's worry that *Alcoa* was the first of many steps down the path followed by the Germans was wrong, but why? Why have the American courts not followed the Germans? Our judiciary is a conservative institution — but surely not more so than the German judiciary. Let us try two hypotheses.

First the Germans may be the victims of listening too well to Santayana. Remember, "[t]hose who cannot remember the past are condemned to repeat it." One corollary to that rule is that those who remember the past too well may become its prisoners. As Jack pointed out in

Oracles of the Law, judicial creativity is a necessity if the law is to retain its vitality; judges must recognize and respond to changing circumstances. Just as armies fight the previous war, central banks sometimes do what worked in the previous recession, and businesses revert to strategies that worked the last time. In retrospect, these calls on history are often found to be misguided because the later circumstances differ from the earlier.

That might also be true of the German judiciary, many of whom must have had personal recollections of the 1920s and 1930s. German courts' revalorizing and other modification of contracts with and without legislative authority during the hyperinflation after the First War was a living precedent. Even Jack Dawson acknowledged that behavior in those circumstances to have been necessary and appropriate. But the courts of the 1950s ignored the corollary; they applied the lesson of yesterday (1924) to the present (1950) and, at least according to Jack, made a bad mistake.

The American courts have been saved from violating Santayana's corollary not because they are smarter or more insightful students of history than the Germans, but because of their ignorance of and remoteness from comparable American social and legal history. As Dawson's very first publication in this *Review* shows, both Southern and Northern courts revalorized land and otherwise rewrote contracts immediately after the Civil War when contracts made in Confederate currency had to be adjusted first for the decline in that currency's value and then for its abolition. Even if the post-Civil War history were well known, it would not have had as powerful an effect on the American courts as the much more recent experience had on the Germans. So perhaps we have been saved from the Germans' fate both by our disregard for history and by the remoteness of events.

There is a second hypothesis that might explain American courts' refusal to rewrite contracts in cases where the Germans would do so. Perhaps our shocks — shortages of oil, gas, and the like — are of a different magnitude than those that hit Europe in the 20th century. Commodity shortages are one thing, fighting across one's soil as the French, Russians, Germans, and others did, and suffering the bombing that was experienced by the British and much of Europe, is something else. If either of the world wars had been fought on American soil, the stress on our economy would have far exceeded that imposed by rising oil prices. Having been spared from fighting on our own soil since 1865, we should be slow to claim superiority for our legal doctrine. Had either of the wars been fought here, we too might have had a recent precedent for appropriate contract rewriting that our courts might have extended to inappropriate cases.

For the time being, the threat to freedom of contract that Jack saw in *Alcoa* has receded. No courts have followed its holding and only a few judges have embraced its reasoning. Even in the law schools it may be losing its hold. Though ignorance may on occasion save us from mechanical application of the lessons of history, it does not excuse willful ignorance of our legal heritage. If we choose, despite Jack's admonitions, to ignore the lesson of *Alcoa*, we cannot be too confident that future, stronger shocks might not resurrect it.

This article ventures some of our tentative hypotheses about the development of the law of frustration in the United States. Were Jack Dawson still with us, he undoubtedly could bring to bear his legal expertise, depth of historical knowledge, and insight into the vagaries of the human condition. His writing is a testament to hard work and wisdom born of experience over a six-decade career. If these hypotheses need further refinement, we can imagine no better way to start the process than talking to Jack Dawson over a drink of whisky on a Sunday morning.

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WTO

HOW WELL DOES
THE WTO SETTLE DISPUTES?

By

SUSAN ESSERMAN

AND

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The following essay appeared in 82.1 Foreign Affairs magazine (January/February 2003) as "The WTO on Trial." It is reprinted here by permission of Foreign Affairs (82.1, January/February 2003). Copyright 2002 by the Council on Foreign Relations Inc. At the time of original publication early this year, World Trade Organization (WTO) member nations were analyzing WTO's dispute-settling machinery and preparing to propose change by the May deadline this year. As Law Quadrangle Notes was going to press, WTO officials were expected to extend the deadline for proposals.

Last fall, a judicial panel of the World Trade Organization (WTO) issued a controversial ruling in a high-stakes corporate tax dispute between the United States and the European Union. Paying scant attention to the complexities of the case, the panel authorized Brussels to implement retaliatory sanction of \$4 billion — an unprecedented sum — against Washington. Notably, around the same time the United States and its European allies were also making headlines with another fierce legal battle: over the authority of the International Criminal Court to prosecute American soldiers for alleged misdeeds committed abroad.

In the 19th century, Clausewitz famously wrote that war is politics conducted by other means. Today, as these examples illustrate, the same could be said for the law. Many disputes that used to be settled by negotiations or even by force of arms now end up before a proliferating range of international courts, tribunals, and arbitral panels. Legal briefs are replacing diplomatic notes, and judicial decrees are displacing political compromises.

Less often considered is whether this ascendant legalism is good or bad for global prosperity and stability. In most cases, it turns out, it is still too early to say. There is one exception, however: the WTO. Nowhere else has international conflict resolution by judges emerged more forcefully or developed more rapidly. As in a domestic court — but unlike in most international bodies — WTO dispute settlement is both compulsory and binding. Member states have no choice but to submit to it and must accept the consequences of the WTO's ruling.

But what, exactly, does the WTO's record reveal about how it has used its unprecedented powers? The question is a pressing one, for negotiators have only until a May 2003 deadline to take stock of the dispute settlement system and decide whether, or how, it needs to change. [Ed. Note: As *Law Quadrangle Notes* was preparing for publication the deadline was expected to be extended.] Will the dramatic judicialization of international trade be reversed? So far, trade experts have revealed deep ambivalence about the WTO's experiment with binding adjudication, and there is little clear sense of where the system should go from here.

At the WTO's inception in 1995, the organization's provisions for legal dispute settlement were touted as state of the art and the crown jewels of the WTO system. Today, however, even some of the organization's original architects and supporters complain that the process has gotten out of hand. Critics accuse the WTO's appellate tribunal of improper judicial activism, much as conservative American jurists lambasted the U.S. Supreme Court in the 1960s and 1970s. Developing countries, meanwhile, complain that not all states are equal in their ability to use the WTO's laws to advance their own interests. Litigation, they argue, draws on different skills, resources, and even cultural attitudes than does diplomacy, placing certain nations at a real disadvantage. An accurate assessment of the WTO's judicial record finds that the system has indeed reduced the role of international diplomacy, while strengthening the rule of law. At the same time, a number of measures, described below, should be implemented to strengthen the rule of law still further while also providing incentives for resolving trade disputes through negotiated solutions — a more prudent approach when the rules are unsettled and political and cultural differences are a large part of the problem.

ON THE RECORD

When the WTO was established in the mid-1990s at the end of the Uruguay Round of global trade negotiations, the fact that it included a new and improved dispute settlement system was regarded as a signal achievement. Under the preceding regime, the General Agreement on Tariffs and Trade (GATT), dispute resolution worked only if the countries involved voluntarily accepted both the jurisdiction of the arbitral panel and its ultimate ruling. Such rulings would take years to obtain, and the defending party could block the process from moving forward.

In the WTO system, however, parties can no longer block the process at any point. Panels must render their decisions within established time frames, and an Appellate Body has been established



to review the initial decisions of the arbitral panels. Rulings by this higher court are final and automatically binding.

The institution of the Appellate Body is the most radical aspect of the new WTO system, and a most remarkable aspect of the Appellate Body is the independence of the jurists who compose it. Members of the Appellate Body do not act as advocates for the national interests of their home countries; in fact, the judges have displayed levels of integrity and independence that rival those found in the best domestic court systems. As a result, disputes at the WTO are now settled largely on the basis of the rule of law rather than simple power politics. Each member country has equal rights within the system, and each also has an equal obligation to accept the rules. Although developing countries have not yet fully reaped the benefits of the system, using the dispute settlement mechanism is crucial to full participation in the WTO. Binding adjudication, moreover, has increased the certainty that trade agreements, once negotiated, will be adhered to and enforced.

In fact, in a majority of cases over the last seven years where the complaining country won a WTO dispute, the losing state removed or revised the offending trade barriers. This positive track record may be surprising to some observers, since the cases that have attracted the most media attention were those few, difficult instances in which the losing party was either unable or unwilling to comply with the ruling.

Despite this largely positive record, WTO dispute settlement has attracted strident criticism. Some of the critiques have been ill-founded and self-serving, reflecting vested interests in specific issues or results. Other arguments, however, point to legitimate problems with the WTO system and highlight the need to refine it.

MAKING THE LAW?

The sharpest and most pervasive critique leveled at the WTO's Appellate Body has been the charge of judicial activism. Ironically, this accusation has come from two usually antagonistic camps: antiglobalization advocates and doctrinaire free traders. Each side has found evidence of judicial activism in those rulings with which it disagrees. But an open-minded look at the record shows that, in most areas, the appellate body has acted with due respect for state sovereignty and the letter of the law

Take, for example, the beef hormones case, a favorite target of the antiglobalization movement. In that dispute, the Appellate Body upheld a panel ruling against an EU [European Union] ban on U.S. and Canadian beef injected with growth hormones. Antiglobalization activists attacked the decision, claiming that the ban was a response to genuine consumer anxiety and should have been upheld. Given the scientific uncertainty that remains about the safety of hormones, the advocates argued, the Appellate Body should have deferred to the will of the EU's citizens.

The EU's own lawyers, however, refused to involve the WTO rule that allows for temporary precautions (including import bans) in situations where scientific evidence of a risk has yet to be confirmed. Instead, the Europeans preferred to go for broke, pushing for a permanent ban. The Appellate Body therefore had little choice but to strike down Brussels' restriction, since it lacked the scientific justification required by WTO rules. But far from being a case of judicial activism as critics have charged, the ruling actually reflected respect for Europe's sovereignty, emphasizing as it did that the requirement of scientific evidence could be flexible and admit "non-mainstream" science.

Hard-core free traders, meanwhile, have taken aim at a different ruling, known as shrimp-turtle. In that case, Washington had banned the import of shrimp from countries that did not mandate the use of fishing techniques that were safe for endangered sea turtles. The Appellate Body found that the ban could have been justified under an environmental provision in the WTO agreement except that in this case it had been applied in a discriminatory manner. The United States subsequently made changes to address these concerns, and the WTO tribunal approved the new measures in a later decision.

Critics have charged that this ruling, like the beef hormones case, was an instance of judicial activism, in part because it was inconsistent with an older GATT decision condemning a ban on tuna imports from countries that did not protect dolphins. The critics' complaint, however, reflects a belief that the WTO should not sanction any trade measures that are meant to address environmental concerns. But the problem with this argument is that the WTO treaty does not actually prohibit conservation-minded measures, so long as such measures are not merely a pretext for protectionism or unjustifiably discriminatory. Nor is there any rule

There is no rule in international law that prohibits the use of economic pressure on other countries for environmental ends.

in international law that prohibits the use of economic pressure on other countries for environmental ends. In fact, the preamble to the WTO agreement actually promotes the objective of sustainable development. Thus, the Appellate Body's ruling was hardly radical, as its critics have charged; noting the commitment to sustainable development and the absence of any law banning measures such as the one at hand, the Appellate Body simply deferred to the sovereignty of the United States.

Another issue that has attracted charges of judicial activism is the Appellate Body's willingness to accept *amicus curiae* briefs from nongovernmental actors. Critics complain that the Appellate Body made this decision despite the fact that it has no explicit authorization in the WTO agreement to do so. But the WTO agreement is also not explicit about the right of governments to provide submissions in their own cases. Clearly, the drafters of the agreement left certain procedural matters to be resolved by the judges and their own sense of due process.

Other critics have suggested that the decision to accept *amicus curiae* briefs reflected a developed-country agenda hostile to the interests and legal culture of the developing world. Yet this argument is similarly flawed. The judges of the Inter-American Court of Human Rights — all of whom hail from developing countries — also allow *amicus curiae* briefs in their courts, as do other international tribunals as diverse as the African Human Rights Commission and the World Bank's Inspection Panel. It was also sometimes objected that accepting briefs from nongovernmental actors would give them more rights than those of WTO member governments that weren't party to the dispute but the Appellate Body has recently ruled that, in addition to private persons and groups, such states may also submit *amicus* briefs.

MORE OF A GOOD THING

The sweeping criticisms of judicial activism leveled at the WTO do not, therefore, withstand scrutiny. The appellate body can, however learn a lesson from these attacks: namely, that a measure of judicial caution is essential in all international dispute settlement. This is true especially in contexts such as the WTO, where rulings are automatically binding. Moreover, international courts offer little room for redress. The rulings of domestic courts

on most matters can be corrected by a single domestic legislature. But practically speaking, the decisions of the Appellate Body of the WTO can be corrected only by a consensus decision of the organization's 144 members. For this and other reasons, international law principles, which the Appellate Body is directed to follow, incorporate judicial caution: when a treaty text is ambiguous and the negotiating history is nonexistent or unhelpful, judges should adopt the interpretation most deferential to state sovereignty. Generally speaking, the Appellate Body has followed this cautious approach. There is one exception, however. In cases that involved domestic trade laws such as antidumping rules, the Appellate Body has tended to be intrusive in its interpretations of the WTO's rules, even when the treaty is ambiguous. This tendency is especially troubling in the antidumping context, where judges have failed to apply the deferential standard of review negotiated into the Uruguay Round agreement. Free traders have not objected to most of these rulings since they believe that the domestic measures in question have often smacked of protectionism. But the fact is that trade remedies remain legal under the WTO and can be important safety valves that release political and economic pressures that might otherwise threaten WTO members' basic commitment to free trade.

Part of the problem is that the Appellate Body has too often made it difficult for domestic agencies to administer trade remedies in an expeditious and cost-effective fashion. National decisions on technical and procedural matters were not meant to be micromanaged by WTO panels. Doing so will ultimately have an inequitable effect on developing countries, which are newcomers to the use of trade remedies, have the least experience with them, and have the fewest resources to respond to WTO demands. The WTO's rules are often unclear on their face — another reason for the Appellate Body to exercise restraint. Compiling a more comprehensive history of WTO negotiations would therefore be a useful way to guide the Appellate Body's approach to ambiguous treaty texts.

In addition, there are a number of other important systemic problems in the WTO regime that need to be addressed. Careful analysis of the past seven years suggests that several changes could safeguard and even enhance the judicial character of WTO dispute resolution while improving and augmenting alternatives to litigation. Such alternatives are important because in every legal system,

The current rules should thus be amended to require mediation before a matter goes to full dispute settlement.

whether domestic or international, there are cases that cannot be solved simply through applying the law as it is written. The facts may raise novel issues, or the political questions that are raised may be too sensitive for government to leave to judges. In these situations, the use of judicial dispute settlement is neither constructive nor likely to promote a country's goals.

Although the WTO systems makes it easy to litigate a dispute and secure a legal ruling, it unfortunately does not provide a structured way to achieve negotiated settlements. Such an alternative is sorely needed, and the WTO negotiations now under way provide an ideal opportunity to make such midcourse corrections.

The WTO's current rules require consultations before litigation, with the objective of encouraging settlement. These consultations, however, have all too often proven perfunctory and ineffectual. Negotiations would become far more meaningful if the parties were assisted by an independent, professionally trained facilitator. Mediation already exists as a concept in the WTO, but only in the form of *ad hoc* intervention by the secretariat. It does not exist as a pre-hearing process conducted by independent experts schooled in alternative dispute resolution. The current rules should thus be amended to require mediation before a matter goes to full dispute settlement. Should the talks fail, the results of the mediation would remain confidential and not be provided to the WTO dispute settlement panel. Further, the panel could require a return to mediation at any state of the dispute, provided that this did not lengthen the litigation.

When the panel does render decisions, its standard remedy is to recommend that the losing country change its laws or practices. A losing state, however, might have understandable domestic political reasons why it is not able, for example, to overhaul a complex scheme of legislation in the short or medium term. A distinctive feature of the WTO's system is that if the loser fails to comply with a ruling, an arbitral panel may award the winner the right to retaliate through trade restrictions.

Addressing noncompliance through retaliation, however, can be both ineffective and inequitable. Such trade restrictions may not be enough to induce powerful WTO members such as the United States or the EU to get into line. On the other hand, for small or poorer countries, such sanctions can be unfairly devastating. Retaliation also has the perverse effect of creating further distur-

tions of trade through the re-imposition of import barriers and thus may actually do harm to the interests of the winning party. Consider the recent \$4 billion ruling against the United States; had the EU imposed the full measure of sanctions (as it was entitled to), it could not easily have avoided damaging its own industries, which have extensive commercial ties with the United States and may import many of the same American products targeted for retaliation.

Alternatives to retaliation should be available in cases where the losing party does not comply with a panel ruling. In a recent dispute between the EU and the United States over music copyrights, monetary payments were used to resolve the matter. This precedent should be generalized by explicitly amending the WTO treaty to allow the winner in a dispute to request monetary damages or increased trade concessions from the losing party as an alternative to retaliation. Although retaliation should remain available as a right of last resort, the winning party should have the flexibility to request less restrictive alternative penalties.

Meanwhile, although some developing countries, such as India and Brazil, have the capacity to participate fully in the WTO's dispute settlement proceedings, many others lack the resources. The WTO's Law Advisory Center is meant to deal with this problem, but with only a handful of lawyers, most of whom are quite junior, it provides minimal assistance. Additional measures should therefore be considered. One possibility would be to implement cost rules — that is, to require that when a developed country loses a case against one of the least-developed ones, it is required to pay at least a portion of the winner's legal costs.

Although legal aid for poor developing countries is important, it is not a long-term solution to the current imbalance in power and resources. Legal education and training in WTO law and dispute settlement must therefore be improved within developing countries. The measures should be undertaken in partnership with universities and aid agencies. At present, despite the plentiful rhetoric about the need for "capacity building," meaningful support for such efforts is still scarce. For example, the World Trade Institute in Switzerland, which offers an advanced degree in WTO law and economics, may lose applicants because it is unable to provide scholarships.



The WTO's arbitral system also needs to improve its transparency and due process. The rulings of WTO judges affect the public interest in the broadest sense, as is especially evident in cases related to health and the environment. Yet the WTO's hearings and submissions remain secret, an unacceptable vestige of the old days of cloak-and-dagger diplomacy. Conducting hearings and appeals in secret undermines the legitimacy of the WTO and gives rise to unwarranted suspicions. Moreover, such secrecy is unnecessary; there is no good reason why WTO hearings should not be open to the public. Public input would also be enhanced by reaffirming the Appellate Body's decision to permit *amicus curiae* submissions.

The manner in which the WTO's panelists are chosen also needs to change. At present, selection is *ad hoc* and often not based on expertise in trade law. As long as that remains the norm, the Appellate Body will continue to revise extensively the rulings of the lower panels, all but ensuring that the Appellate Body continues to be accused of inappropriate activism. The WTO therefore should create a professional corps of judicial panelists, as the European Commission has proposed. Using full-time panelists who are experts in the law and properly compensated would enhance the quality of their decisions and reduce the tendency of the Appellate Body to substantially revise them. Reliance on a professional corps of panelists also might help prevent rulings that disregard international law and WTO precedent.

Finally, though in most cases the WTO's panels focus on treaty wording when interpreting the law — as they should — and read the treaties as part of international law as a whole, certain situations still arise when WTO judges end up ruling on ambiguous provisions. Such situations create a real risk that the resulting decision will exceed the limited consensus that framed the original agreement. Some WTO provisions on delicate matters, for example, such as the rules on dumping and subsidies, represent compromises that were heavily bargained and carefully scrutinized by domestic legislators. General international law permits adjudicators to examine the negotiating history of treaties when otherwise unable to resolve ambiguities. But to properly interpret these documents, a detailed public record of the negotiating process is

needed. And yet, during the last round of WTO negotiations, such a detailed record was not kept. This oversight must be corrected so that future panels are not deprived of this important interpretive aid.

ROLE MODEL, RULE MODEL

The WTO's seven years of judicial dispute settlement have been a success overall, notwithstanding the objections of the system's critics. The very range of issues that have been submitted to the WTO's panels shows how much confidence member states now have in the system, and the experience has taught the world a great deal about the challenges inherent in judicializing an international organization.

As other international forums move in a similar direction, they should draw a number of lessons from the WTO's experience.

First, the WTO's panels have shown that international tribunals can indeed function independently, with judges basing their rulings on the principled interpretation of the law, not on national affiliation.

Second, the WTO has shown that when rulings directly affect the interests of citizens, the legitimacy of those rulings and the system as a whole depends on the transparency of the judicial process; secrecy and insulation from public input will no longer be tolerated.

Third, the WTO's experience shows that once created, an effective international judicial system based on compulsory jurisdiction is likely to be used extensively and intensively.

As the \$4 billion award in the EU-U.S. tax case illustrates, the stakes in such disputes can be very high indeed. Ensuring adequate resources, equitable access, and the fair treatment of politically sensitive cases is therefore essential and must be thought through early on, ideally when the tribunal and its procedures are first being designed. Of course, no judicial system, no matter how well run, can avoid the inevitable messiness of politics, and no system will ever replace diplomacy. Nor should it. States must avoid the temptation to go to court in situations where political or diplomatic channels would offer a better, more equitable solution. The WTO must therefore also figure out how to improve its mechanisms for negotiated solutions, and not automatically resort to its judges.

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She also served as the decision maker in literally hundreds of anti-dumping and countervailing duty cases as assistant secretary of commerce for Import Administration. In addition, she played a lead role in developing comprehensive antidumping and countervailing duty trade legislation and regulations implementing the WTO Uruguay Round Agreement. As acting general counsel of Commerce, Esserman counseled the secretary of Commerce and senior department heads on a wide range of issues, including trade laws, regulatory reform, litigation strategy, ethics, Freedom of

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Howse is a frequent consultant or adviser to government agencies and international organizations such as the OECD, and has undertaken studies for, among others, the Ontario Law Reform Commission and the Law Commission of Canada. His academic awards include the Thomas Henderson Wood Scholarship in Philosophy, the Laskin Prize in Constitutional Law, the Borden and Elliot Prize for Academic Excellence, the Provost's Award, and a variety of fellowships. While completing his LL.M., he served as a research assistant to Laurence Tribe on a project advising the Civic Forum of Czechoslovakia on constitutional reform, and as a research assistant to Paul Weiler on a project involving tort law reform and public policy. He has also held a variety of posts with the Canadian Department of External Affairs and the Canadian Embassy in Belgrade.

Howse's research has concerned a wide range of issues in international law, and legal and political philosophy, but his emphasis has been on international trade and related regulatory issues. He is the author, co-author, or editor of five books, including *Trade and Transitions*; *Economic Union, Social Justice, and Constitutional Reform*; *The Regulation of International Trade*; *Yugoslavia the Former and Future*; and *The World Trading System*; he is also the co-translator of Alexander Kojève's *Outline for a Phenomenology of Right*. He has published many scholarly articles and book chapters, on topics as disparate as NAFTA, whistle-blowing, industrial policy, food inspection, income tax harmonization, and ethnic accommodation.

