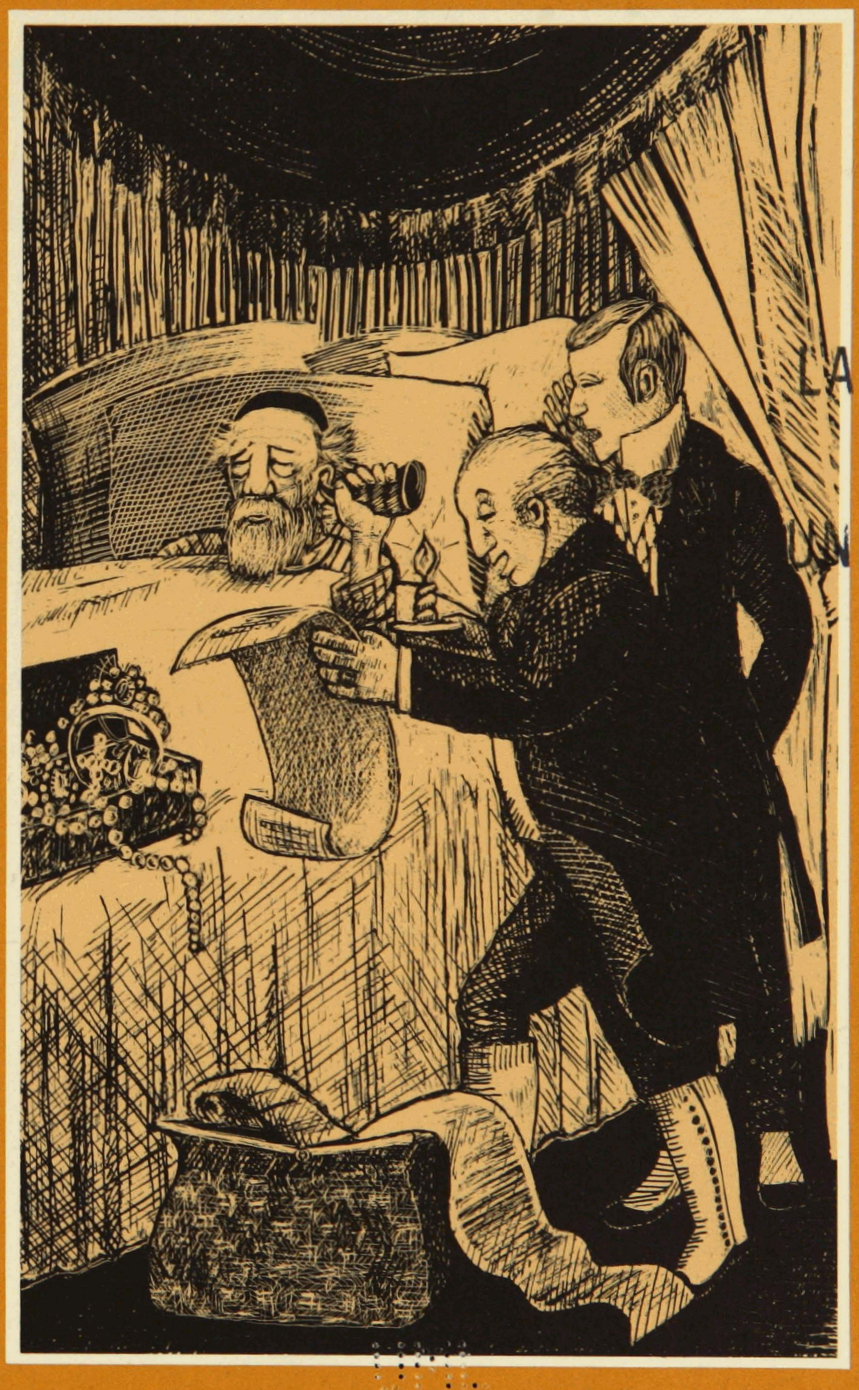
Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 28, NUMBER 1, FALL 1983



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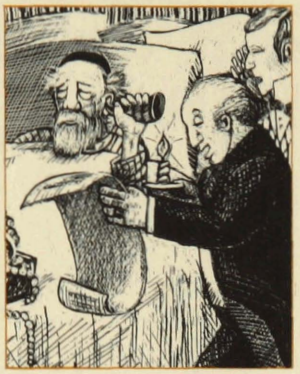

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The which hunt

An alert for scriveners

by Alfred F. Conard

The which hunt is on again. The tallyho has been uttered by William Safire, who now contributes to rhetoric the same certitude that he has long given to political punditry. He has recently promulgated an unconditional prohibition of *whiches* as subjects of defining clauses (*New York Times Magazine*, February 27, 1983, p. 20). One must not say, even if one believes it, "The proposed statute which would forbid abortion should be aborted." If that is what one believes, one must say, "The proposed statute *that* would forbid abortion should be aborted."

If we heed Safire, we will quickly distinguish our prose from that of authors whom we formerly considered distinguished. Oliver Wendell Holmes, Jr., notwithstanding his proper family background and Harvard education, persistently opened defining clauses with *which*. The following passages are from his greatest scholarly work, *The Common Law* (1881; emphasis supplied).

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices *which* judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. (Page 1).

> The Common Law has changed a good deal since the beginning of our series of reports, and the search after a theory *which* may now be said to prevail is very much a study of tendencies. (Page 2).

> Now let us turn for a moment to the Teutonic side. The Salic Law embodies usages *which* in all probability are of too early a date to have been influenced by Rome or the Old Testament. (Page 17).

But times have changed since 1881, when *The Common Law* was published. How would a modern judge, one who prides himself on colloquial directness, deal with *whiches*? I noted the following passages in William O. Douglas's *The Court Years* (1980).

> Finally, in 1968, the Court accepted the view *which* had been rejected in *Debs* . . . (Page 160).

> In 1970, for example, Congress defeated a law *which* would have increased the cutting of timber on public lands. (Page 167).

> The precise votes *which* Nixon made in the House favoring the group on tax laws, on housing, on maritime and air subsidies, and the like, were never revealed . . . (Page 344).

Whiches also haunt congressional pronouncements, even when preeminent academicians are looking over the shoulders of the draftsmen. The committee report that explained the law establishing the National Foundation for the Arts and Humanities wrote in these terms:

> Section 3. Definitions
>
> This section defines the following terms for the purposes of the act:
>
> "Humanities" includes, but is not limited to, the study of the following: Language, both modern and classic, and linguistics; literature, history, jurisprudence, and philosophy; archeology; the history, criticism, theory, and practice of the arts; and those aspects of the social sciences *which* have humanistic content and employ humanistic methods. . . .
>
> "Production" means plays (with or without music), ballet, dance and

choral performances, concerts, recitals, operas, exhibitions, readings, motion pictures, television, radio, and tape and sound recordings. It also includes any other artistic activity *which* meets standards approved by the National Endowment for the Arts (established by sec. 5).

1965 U.S. Code Cong. & Ad. News 3191.

The preference of legal scriveners for *which* is not entirely irrational. Legal discourse presents a number of situations in which *that* is confusing because one does not know until one has read further whether it is being used as a relative pronoun or as a conjunction. Consider the following sentences:

No sensible person can embrace the belief that Falwell is promoting.

Too many liberals are misled by the assertion that Riegle makes about foreign imports.

What we need is a law that anyone carrying a gun can rely on.

Each of these sentences would be less confusing if *that* were replaced by *which*.

This is not to say that the exorcism of *whiches* has no place. It is a good rule for freshman composition. Freshmen writing about their summer vacations should be blue-penciled if they write, "The homer which I hit won the games," or "I gave him a kiss which he won't forget." Naturally, students whose favorite *whiches* were exorcised from their freshman themes relish their next opportunity to exorcise a professor's *whiches* from a law review submission.

One way to meet the exorcists is match them on their own ground, technicality for technicality. A little research will reveal that the modern preference for *that* over *which* was promulgated by Henry Fowler, editor of the *Oxford English Dictionary* and author of *The King's English*. The latter source devotes two pages to exceptions to the normal preference (5th ed., 1931, pp. 93-94). Sheridan Baker of the Michigan English faculty is a contemporary advocate of the preference who also allows some deviations (*The Practical Stylist*, 5th ed., 1981, p. 75). A lawyer who has mastered circumvention of the hearsay rule should have no trouble fitting his sentence into an exception to the *that-which* preference.

Besides citing exceptions, one can argue that the preference for *that* is inapplicable. In nondefining ("descriptive") clauses, the exorcists reverse their preference. Safire would write (if he believed it), "The Helms amendment, which forbids abortions, should be aborted." (The clause, "which forbids abortions," is nondefining because it is not essential to the meaning. "Helms" identifies the amendment in question.) Since the preference for *that* applies only to defining clauses, an editor cannot tell whether to require *that* or *which* until after determining whether the clause is defining or nondefining. This may be a challenging question in itself.

One would be surprised if any considerable number of people who write to convey meaning, rather than to accommodate instructors and editors, would adhere to a preference so elaborately circumscribed. If we want to know what good writers do, in contrast to what tutors prescribe, we may turn to the *Dictionary of Contemporary American Usage* by Bergen and Cornelia Evans (1957, pages 505-506) and find the following:

It is sometimes claimed that the relative pronoun *that* must be used in a defining clause that is essential to the meaning of a statement, as in *he was a bold man that first ate an oyster*; and that *who* or *which* is required in a clause that is merely descriptive, as in *he was a strange man, who cared for nothing*. Clauses of the first kind are called defining, restrictive, or explanatory. Clauses of the second kind are called descriptive, additive, or resumptive.

The distinction between restrictive *that* and descriptive *which* or *who* is an invention of the grammarians and a very recent one. Fowler, who recommends it, says, "it would be idle to pretend that it is the practice either of most or of the best writers." What is not the practice of most, or of the best, is not part of our common language. In actual practice, *which* is not often used in a defining clause today, but it may be. In the King James Bible, the woman who lost a silver piece and then found it, says: *I have found the piece which I had lost*. Twentieth century translators altered this sentence but felt no need to change the defining *which* to *that*, and wrote *I have found the coin which I had lost. . . .*

Anyone who likes to do so may limit his own *that's* to defining clauses. But he must not read this distinction into other men's writing, and he must not expect his readers to recognize it in his own.

We should not reproach rhetoricians for trying to impose a rule upon the anarchy of *that-which* choices. Like OSHA administrators, they only want to save other humans from the burden of choice. By 1984, Orwell predicted, there will be no choices left. But let us, fellow scriveners, defend the last of our vestigial liberties, the freedom of whichcraft!

Professor Conard retired from active teaching duties last year. As this essay manifests, he continues his prodigious work as a scrivener.

Tallyho

The search for a perfect faculty room is complete

by Alice Marshall Williams

Elegant is one word for it; eclectic is another. The ambience of the new Faculty Common Room, completed in December of last year, cannot, however, be readily evoked in terms of decoration. It is an eminently civilized and uniquely comfortable gathering place that contributes to the ongoing intellectual life of the faculty, a room that personifies many of the special qualities of the Michigan Law School as an institution. It looks as if it might have been fitted out in 1933 with the rest of Hutchins Hall.

The design of the new room was dictated by the architecture, which meant that it was destined to be a most *un*-common room indeed. The space, which in the 1930s was built as the first faculty library, will be remembered by many alumni as Room 350 of Hutchins Hall, the Faculty/Law Review Library crammed with carrels and cluttered with tiers of metal bookstacks.

In 1980 the Capital Improvements Committee recognized that Room 350, with its one-and-a-half-story vaulted ceiling and dramatic Gothic windows, could become a room of exceptional character and distinction. There was no doubt that it would be more centrally located for the faculty, and definitely more uplifting, than the Faculty Lounge then in the basement of the old library in what had been a cloak room under the stairs. Private funds for restoration and refurbishing were available from the bequest of Julian A. Wolfson, LL.B '09, who firmly believed that the faculty's physical environment was critical to its self-image and its pride in the institution.

Mark Hampton, designer of the Faculty Common Room, relaxes in one of the chairs which passed muster.

The Common Room "round table": a place to chat with colleagues or peruse the morning newspapers.

It was a unique opportunity. "We thought it important to the life and vitality of the faculty," said one professor, "to create an appropriate place that would promote intellectual interchange, a sense of community and shared purpose, a room largely for conversation, but also for meetings and occasionally for receptions." Its purpose was "to pull the faculty together, affecting all of us and our successors, and leaving its imprint more on us than we on it."

But the blending of architecture and interior design into a room which would enhance camaraderie and good conversation was not achieved with a purchase order and a mere stroke of the pen. The Committee launched a

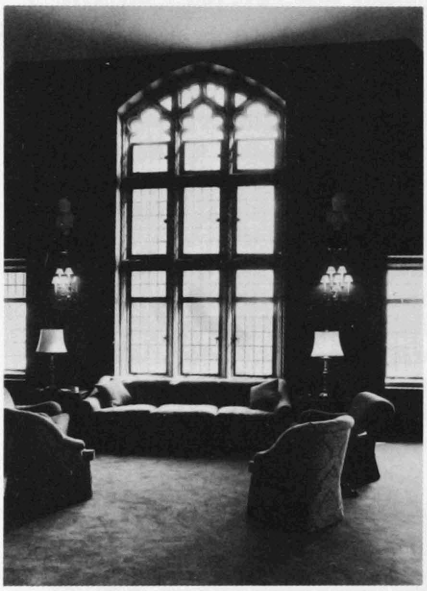
search for an outstanding decorator-architect. They finally selected Mark Hampton, a prominent New York interior designer whose impeccable taste had won him a wide reputation for doing historic decoration and traditional design with verve and style. Serendipitously, Hampton was one of the Law School's own; he attended the Michigan Law School in the early 1960s, at a point when he was not yet certain of his calling.

Hampton had fond memories of the Law School. "I sketched constantly during Torts and Property," he laughed, "filling all my notebooks with drawings, until at the end of the year my career direction was clear." He remembered the space well; he was intrigued by its possibilities; he understood intuitively that the design should have a flavor and style that would complement the original Law School complex; and he was willing to work in innovative and generous ways with the Committee and the University to limit the cost.

Hampton made a flying visit from New York to see the space and hear the Committee's tentative ideas. With a practiced eye and the ability to sketch while others talked, he drew rapidly as he looked and listened, then presented his ideas and drawings on the spot. The scheme was bold and ingenious in its simplicity: to create a symmetrical room by building a wall down one side, thus making a corridor to connect Hutchins to the Legal Research Library. Balanced ceiling vaults would be added to frame the big Gothic window. Furnishings, Hampton suggested, could transform this large space into a "cosy, pipe-smoking sort of room," even for those who don't smoke pipes.

The Committee was impressed—and relieved. Clearly Hampton was the man for the job. He understood this sort of commission; he would propose nothing that was theatrical, offer no fussy or expensive surprises. Happily, his proposal was the only one which came in under budget.

Hampton suggested that a huge pedimented dark oak bookcase that already stood in the room be a point of departure for the design. He and the Committee set about finding and refurbishing



A magnificent two-story Gothic window dominates the room.

other pieces of furniture and accessories that had been made for the original Law School buildings fifty years ago. Tables, desks, and brass lamps were brought to light from closets, anterooms, and faculty offices—and even diplomatically borrowed from the office of the Dean. Hampton's unerring eye recognized that a green-shaded desk lamp stored in a professor's closet was an Emeralite, now a collector's item, and he asked if there were others. Although every library carrel once was lit by an Emeralite, the Committee turned up only the two now on the writing desks along the wall of the Common Room.

As the plans evolved, Hampton set the tone, making confident decisions with broad brush strokes: dark red walls, large stuffed sofas, easy chairs. He relied on the judgment and follow-through of Professor Joseph Vining, chairman of the Capital Improvements Committee. Comfort was always their deciding factor, and together they sat in possible easy chairs in studios all over New York before ordering the furniture. Vining, in turn, leaned on Henrietta Slote, the Law School's versatile and unflappable administrative manager, who handled myriad details and ran interference with suppliers, craftspeople, and the University.

From the beginning, everyone involved caught the spirit of the venture, customizing their way of doing things. When the elevators and stairways proved difficult for transporting drywall, the engineers opted for doing the walls with blocks and plaster, hauling materials up through the Gothic windows with ropes—at no extra cost. Debris was trundled discreetly down in the elevators by the wheelbarrow-load. And time and again workmen chose to repair or reclaim existing fittings rather than destroy them and order something new.

As central to the design scheme as the Gothic window and vaulted ceiling is a large Brussels Game Park Tapestry from the 16th century, one of three given to the Law School by William W. Cook in the 1930s. The tapestry, stored away and badly in need of cleaning and repair, was a distinctive treasure which ought to be displayed.

Arranging for its transportation to New York and its restoration there took Henrietta Slote into the world of fabric conservateurs.

She rejected the approach of the "old school," a tapestry restorer who advocated treating it with rough affection, soap, and vacuum cleaners, in favor of the gloved approach of Rebecca Venable of the "curatorial school." The tapestry was rolled in acid-free paper; it was washed in distilled water in a "wet studio" in Brooklyn, and then its previous unstable repairs were painstakingly replaced in an atelier in Manhattan.

A Brussels Game Park Tapestry, donated by William Cook in the 1930s, has found an appropriate home in the room.

The huge tapestry, washed and blocked, its warps and wefts relaxed, now hangs on a wall above a long sofa. Its rusty reds, greens, and browns are echoed in the colors Hampton chose for the room. Its fanciful subject may even hold an oblique metaphor for the law faculty: a hyena and her cubs face down a snarling lynx with the markings of a peacock, while hunters on horseback and on foot race about in the background. One professor quipped, "I see it—and maybe old Cook did, too—as an allegory of legal scholarship. The hunters in the background are law professors, earnestly searching for Something. They can't seem to find it—possibly because it is so obvious, right there in front of them, larger than life."

While the tapestry is the decorative focus, the actual focus of the Faculty Common Room, and the symbol of its raison d'être, is a round table planted in the center of an alcove in front of a large window. It embodies an important tradition carried forward from the old faculty lounge, for it has been suggested that the supportiveness, commonality, and sense of community that characterize the Michigan law faculty coalesced at that first round table. Hampton devised a way of using a Gothic pedestal from one of the old Library Reading Room tables, cutting its long oak top into moon-shaped pieces, and fashioning it all into a new round table imbued with tradition.

Deciding the optimum size for the table was the kind of detail that Hampton wisely left to the faculty committee. Should the diameter be smaller so that groups would gather elsewhere in the room? Should it be larger to accommodate more colleagues? The lawyers approached the question cautiously, examined it pragmatically, and resolved it on the basis of precedent. After sitting around cardboard circles of different sizes, they reached consensus: the table was to be of exactly the same diameter as the previous one which had worked so well.

The faculty agrees, too, that the new Common Room, every corner of it, works well. Someone has compared it to a lovingly used tweed coat, one with a fit that moves with the wearer and a pattern that mellows and improves over time. Very much part of the collegial life of the faculty, the room conveys a sense of the Law School's long and lively history. Its distinctive quality seems to come from the congruence of many things: the vaulted space; the light that flows in through Gothic windows; the groupings of sofas and chairs, inviting in a way we never thought furniture could be again; the books and magazines; the round table conducive to conversation. It is a grand room put together with lasting taste and style, without pretentiousness. It revitalizes the Law School's heritage and provides a place and a context for the faculty to live in the present and look into the future as well.

Alice Marshall Williams is an Ann Arbor writer who has a close connection to the Law School.

Would Kingsfield approve?

Small sections make a comeback at the Law School

by Edward Cooper

This fall marked the revival of small section instruction for first-year students at the Law School. Small sections were offered for a few years in the past, but were abandoned more than a decade ago in face of staffing problems. Under the current program, every first-year student will take a single course for one semester in a group of 24. Their other courses will be taken in traditional sections of close to a hundred students. Constitutional law also has been restored to the first year, and the civil procedure course has been split into two separate offerings. These changes represent one more step in the evolution of a curriculum that continually changes in small ways, producing substantial growth in a fashion that is usually cumulative, seldom revolutionary.

The story of the new first-year program really begins with the report of a long-range curriculum committee chaired by Professor Joseph Sax several years ago. One of the recommendations to emerge from the committee was that we should study the possibility of identifying formal sequences of upperclass courses, to be capped by the development of new courses that would draw together and apply the lessons learned during the sequence. Traditional courses in procedure, evidence, and trial practice, for example, might be followed by an intensive advocacy course.

Succeeding curriculum committees examined this recommendation but concluded with regret that it was not practicable for the present. A meaningful program would have required the development of many new courses, regular offering of sequence courses that we have not always been able to staff, and even significant changes in the school calendar. The cost simply proved beyond our means. For the time being, the upper-level curriculum has been left to grow in the ordinary fashion, with new courses emerging in the areas of student and faculty interest and old courses changing to meet new needs.

Once it had been determined that we could not make dramatic changes in the second- and third-year curriculum, later committees turned to the first year. One change decided upon was the restoration of the introductory course in constitutional law to the first year. Ten years ago, constitutional law was a two-hour, first-year course. The instructors asked that it be expanded to three hours; at the time, there was no room for a three-hour course in the first year, and it was made an upper-level course. Eventually it grew to four hours. Many members of the faculty, however, have urged that it be restored to the first year.

At least two major arguments were advanced. One was that constitutional law, for better or worse, has become a fundamental building block of legal analysis in the same way that property, contract, and tort concepts have been for centuries. The other was that first-year students should spend more time on the broad public roles of the law. Room was made for constitutional law by reducing the civil procedure course to four hours, and adding a new three-hour, upper-level course in civil procedure. Between the two courses, civil procedure now has seven hours, where it had enjoyed but five or six.

The overall first-year curriculum has four courses each semester. In the fall, each section of the first-year class has a four-hour course in criminal law, another in torts, and a third in civil procedure. In addition, three hours are devoted to half of the introductory course in contracts or half of that in property. In the winter, each section completes three more hours of the contracts or property course commenced in the fall, devotes five hours to a complete course in either property or contracts, and has a four-hour course in constitutional law. The winter program also includes a single elective course, chosen from among a narrow range of topics that have been selected to add different perspectives to the first-year experience.

We have many hopes for the small section program that was added at the same time. Teachers will be able to experiment with teaching methods and materials that do not work in traditional sections of nearly a hundred. At times the result may be that course coverage is reduced, so that fewer or different topics can be studied in greater depth. At times the result will be that the same topics are studied from different perspectives. Some changes may arise from closer integration of the small section courses with the first-year writing program. For many years, the instructors in the writing program have been "senior judges" drawn from the third-year class. Each senior judge has been assigned to a case club of fifteen or sixteen students.

Associate Dean Edward Cooper leads a small section class on civil procedure, one of several subjects offered this way.

Beginning this fall, the case clubs will be reduced to groups of twelve; each small section will comprise two case clubs. We expect that case club assignments often will be integrated with the work of the small sections. Some teachers may choose to use the case clubs as vehicles for teaching subjects that are not covered in class at all; others may prefer to have students delve deeper into topics introduced in class.

Less tangible benefits also are expected from the small sections. Some students find it difficult to participate in discussion of challenging legal questions before an audience of a hundred gifted colleagues. For all students, opportunities to participate are limited by sheer numbers. Small groups will provide far more opportunities to become involved, and a more comfortable setting. Students who become engaged in active dialogue in this setting may carry the benefits through the balance of law school and even beyond. Prior experience suggests that the benefits of this experience will not be measured by examination performance but are very real.

For students in small sections there is a greater sense of dialogue and active participation.

The small section program is expensive. It costs twelve upper-level courses and seminars—the full teaching load that can be assumed by three faculty members—to make sixteen small sections flower where four large sections had grown. We must find more teachers who are willing to commit themselves to first-year subjects; for a while, it may be necessary to attract visitors to help staff our program. Other major schools have adopted small sections, however, and have concluded that the costs are warranted. Yale, Duke, and Berkeley are among the schools with well-developed programs; Harvard is beginning to provide small sections to part of its first-year class.

Time will be needed to define fully the course that small section instruction will follow at Michigan. The benefits will be hard to measure in any clear way. Yet if students prove as enthusiastic about the experience as we hope, there will be no doubt that their enthusiasm alone is proof enough. The other changes in the first year are of course temporary. Adjustments are made every few years and will continue to be made. Our goal is no more than to adopt the best program in light of current needs and capacities and to establish the best foundations for the next steps.

Professor Cooper is Associate Dean of the Law School and an authority on federal procedure. Many alumni will remember his father, Professor Frank Cooper, who was on the faculty from 1947 to 1968.

Pro bono publico

Michigan law students support each other

by H. Mark Stichel

Idealism and public spiritedness are important factors in many young people's decision to apply to law school. Too often, the financial obligations which students take on in the course of their legal education make it almost impossible for them to accept low-paying jobs in public interest law, either during the summer or immediately after graduation. Students often find, furthermore, that permanent public interest law jobs are scarce and often go only to applicants with significant relevant experience.

A successful program at the Law School testifies to student awareness of this problem and to the vitality of student idealism, even among those who plan to enter private practice. In 1978, a group of Michigan law students sought to provide fellow students interested in public service and public interest law with the opportunity to work for public interest organizations during the summer. They raised $3,095 in pledges from the law school community and subsidized five public interest jobs. The Student Funded Fellowship (SFF) program was born.

Michigan was one of the first law schools to have such a program. Today, Michigan's program is one of the most successful. Last spring SFF received $13,700 in pledges and subsidized twelve jobs.

SFF's founders had three broad goals for the organization: to complement the Law School's curriculum by giving students an opportunity to explore career options in public interest law, to assist the legal profession in its duties to make legal counsel available and improve the legal system, and to provide an example for others to follow. SFF has met these goals. Sixty students have received fellowships since the program was founded; several have pursued public interest law careers after graduation. Those sixty students have worked for fifty-one different organizations and agencies. These organizations and agencies run the gamut from public defenders' offices to prosecutors' offices, from legal services offices providing individual counseling to organizations solely engaged in structural litigation. Furthermore, several leading law schools have used Michigan's SFF program as a model in instituting similar programs.

The Student Funded Fellowship program is run by a student board. Any law student who is willing to work on the annual fund drive and is not going to apply for a fellowship is welcome on the board.

The annual SFF fund drive begins in February. Each law student who has a summer job is asked to pledge part of his or her summer income to SFF. This past year nearly 300 students pledged. Student pledges ranged from $5 to $300 and totalled $11,982; the average student pledge was $46.13. Since 1981 some recent alumni and friends of Professor David Chambers have also pledged to SFF. Their annual contributions have totaled approximately $2,500.

After the fund drive ends in March, the SFF Board solicits fellowship applications. The eligibility requirements for receiving a fellowship are as follows:

1. The applicant must be a first- or second-year University of Michigan law student.
2. The applicant must be willing to work full time for at least ten weeks for a public interest or public service organization during the summer.
3. The applicant's job must use his or her legal skills. SFF will not fund students who plan to engage in lobbying or political campaign work.
4. The applicant's income from all work-related sources other than SFF must not exceed $200 per week.

Each applicant is responsible for securing his or her own job. SFF's goal is to then raise the total income of every eligible applicant to $200 per week for a ten-week summer. For example, if a student has an offer of a public interest job that includes an $800 stipend for the entire summer, SFF treats the stipend as a weekly salary of $80. SFF's goal is to augment such a student's income by $120 per week, or by $1,200 for a ten-week summer.

This year thirty-one eligible students applied for fellowships. As in past years, the SFF Board was not able to fund every eligible applicant at the full level. Instead, the Board had to turn away nineteen deserving applicants. Furthermore, SFF was unable to raise any of the twelve successful applicants' total summer incomes to $200 per week.

SFF's inability to reach its funding goal was not the result of lack of support from the law school community. In fact, SFF had a record fundraising year. The inability was the product of a weak economy and severe government cutbacks. Almost every

privately funded public interest organization has seen its revenues decline during the last few years. Likewise, most publicly funded agencies and organizations, most notably those funded by the Legal Services Corporation, have suffered severe funding cutbacks. Most of these organizations have slashed or eliminated salaries for summer law clerks. Consequently, both the number of students applying for fellowships this year and the needs of individual applicants were greater than ever before.

This spring an ad hoc group of students came together to study ways to improve public interest placement opportunities for Michigan law students. They recognized that a student is often unable to find a permanent public interest job unless he or she has prior experience in the field, and that SFF has been successful in providing law students with the opportunity to gain such experience during the summer. However, the group also concluded that SFF must grow to meet present-day challenges. Therefore, the group has decided to ask law firms who interview Michigan law students to assist SFF. Contributions from individuals are also most welcome. They should be sent to SFF, The University of Michigan Law School, Ann Arbor, MI 48109.

Justice Harlan F. Stone, in his 1934 Law Quadrangle dedication address, stressed the role of law schools in strengthening "the public influence of the bar." Stone, a former law professor and dean at Columbia, urged law teachers to take the lead in "discharging the public duties which rest on the profession as a whole." Today, Michigan law students, in supporting SFF, are themselves taking the lead in this quest.

H. Mark Stichel graduated from the Law School in 1982. He was Chairman of the Board of SFF in 1982-83.

The SFF record

During the past six years, 60 SFF recipients have held summer jobs with the following organizations:

ACLU Children's Rights Division, New York, NY
ACLU of Northern California, San Francisco, CA
ACLU of Washington, Seattle, WA
ACLU Reproductive Rights Project, New York, NY
ACLU Women's Rights Project, New York, NY
Alaska Legal Services, Anchorage, AK
Asociación Pro Servicios Sociales, Laredo, TX
Atlanta Urban Corps—ACLU, Atlanta, GA
Berrien County Prosecutor's Office, St. Joseph, MI
Brooklyn Legal Services, Brooklyn, NY
Centro de Servicios Legales Para Immigrantes, Chicago, IL
City of Cleveland Prosecutor's Office, Cleveland, OH
Connecticut Fund for the Environment, New Haven, CT
Connecticut Legal Services, New London, CT
Consumer Federation of America, Washington, DC
El Paso Legal Assistance Society, El Paso, TX
Environmental Defense Fund, Washington, DC
Family Law Project, Ann Arbor, MI
Farm Labor Organizing Committee (FLOC), Toledo, OH
Feminist Legal Services, Ann Arbor, MI
Gay Rights National Lobby, Washington, DC
Greater Boston Legal Services, Boston, MA
Houghton County Prosecutor's Office, Houghton, MI
Institute for Public Representation, Washington, DC
Kentucky Attorney General's Office, Consumer Protection Division, Frankfort, KY
Kings County District Attorney's Office, New York, NY
Legal Services for the Elderly Poor, New York, NY
Legal Services of Eastern Michigan, Flint, MI
Mexican-American Legal Defense Fund (MALDEF), San Antonio, TX
Michigan Indian Legal Services, Traverse City, MI
Michigan Legal Services, Detroit, MI
Michigan Protection and Advocacy for Disabled Children, Lansing, MI
NAACP Legal Defense Fund, New York, NY
NAACP Legal Defense Fund, Washington, DC
National Center for Youth Law, San Francisco, CA
New Guilford County Public Defender's Office, Greensboro, NC
New Hampshire Legal Assistance, Portsmouth, NH
New York Attorney General's Office, New York, NY
New York County District Attorney's Office, New York, NY
New York Department of Environmental Conservation, New York, NY
Northwest Labor and Employment Office, Seattle, WA
Philadelphia District Attorney's Office, Philadelphia, PA
Trial Lawyers for Public Justice, Washington, DC
United States Attorney for the District of Puerto Rico, San Juan, PR
Upper Peninsula Legal Services, Sault Ste. Marie, MI
Washtenaw County Juvenile Court, Ann Arbor, MI
Washtenaw County Public Defender's Office, Ann Arbor, MI
Western Michigan Environmental Action Council, Grand Rapids, MI
Women's Equity Action League, Washington, DC
Women's Justice Center, Washington, DC
Youth and Policy Law Center, Madison, WI

Faculty retirements

☐ **Luke K. Cooperrider,** Professor of Law, retired from active faculty status this spring after more than 30 years of dedicated service to the University and the Law School.

Professor Cooperrider earned a B.A. from Harvard College and a J.D. from The University of Michigan. He was a member of the class of 1948, which celebrated its thirty-fifth reunion this spring. Following his graduation from the Law School, he practiced law in Cleveland before joining the faculty of the Law School in 1952.

Professor Cooperrider was one among that small group of faculty members upon whom great universities depend, those who devote countless hours to ensuring the reality of faculty governance. Over the years, he served in the Senate Assembly and as a member of the Tenure Committee, the Research Policy Committee, and the Budget Priorities Committee. Perhaps most importantly, he served as Chairman of the Board in Control of Student Publications during the troubled years of the late 1960s and early 1970s. To each of these positions, and to a much larger number of assignments within the Law School, Professor Cooperrider brought an incisive mind, careful judgment, and a deep understanding of the values of academic life.

Professor Cooperrider earned the respect of his colleagues and students as a man learned in the law, one whose knowledge and understanding were far broader than the particular fields—torts, evidence, and restitution—that were his specialties. A dedicated teacher, he has devoted much of his time during the last years of his active career on the faculty to directing and significantly strengthening the School's vitally important Writing and Advocacy Program.

Luke Cooperrider

Eric Stein

Professor Cooperrider and his wife Virginia are now residing in Arizona.

☐ **Eric Stein,** Hessel E. Yntema Professor of Law, retired from active faculty status as of May 31, 1983. A scholar of international renown, Professor Stein has added great distinction to the Law School's program in international legal studies.

Professor Stein has taken as his province two of the grand themes of current international affairs—first, disarmament and weapons control, especially nuclear weapons control, and second, the law governing international business transactions. He authored or co-authored five major books on international law and has published scores of scholarly articles.

Professor Stein holds law degrees from Charles University in Prague and from The University of Michigan, as well as honorary doctoral degrees from the two free Universities of Brussels. He practiced law in Prague and later served on the staff of the Department of State in this country and on the United States delegation to the United Nations General Assembly. He has continued to serve in a number of advisory and consulting roles with the Department of State since joining the Law School faculty in 1955.

Professor Stein also served as a consultant to the United States Arms Control and Disarmament Agency. He is an associate member of the International Academy of Comparative Law in Paris, a member of the prestigious Council on Foreign Relations, the International Law Association, and numerous other professional associations in this country and abroad. Professor Stein has served on the Board of Editors of the *American Journal of International Law* and many other legal publications.

He has lectured widely in the United States and Europe. In 1971, he was the Carnegie Endowment Lecturer in International Law at the Hague Academy of International Law. Last year, he received the Alexander von Humboldt Stifting award and was a Visiting Research Scholar at the Max-Planck-Institutes in Hamburg and Heidelberg.

As scholar, teacher, professional, and co-director of the Law School's program in International Legal Studies, Professor Stein has displayed extraordinary scope and vision, fostering a truly global perspective in his students and the Law School community.

To be or not to be born

Moot court competitors debate "wrongful life"

This year's Campbell Competition raised two issues: 1) whether the state of Michigan should recognize a cause of action for "wrongful life" brought on behalf of a defective infant, or a cause of action for "wrongful birth" brought by the infant's parents; and 2) whether parents have the right to withhold treatment from a child with potentially fatal congenital defects.

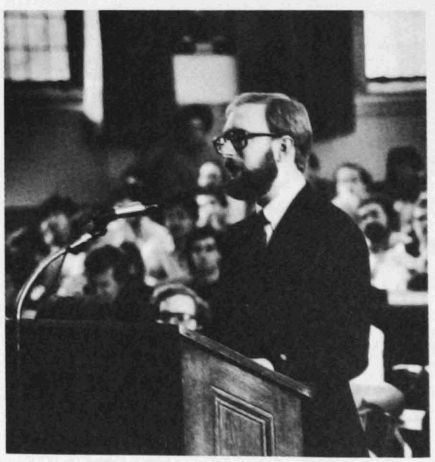
The hypothetical situation underlying the two cases argued by this year's competitors is tragic. Parents of a Down's syndrome child consulted a doctor to determine the probability of their bearing a second child who would be similarly afflicted. Assured that chances were slight, the couple did bear a second child. It was born with Down's syndrome and a congenital heart malformation that would require two operations in the near future. Subsequent chromosome analysis of the mother revealed that her chances of bearing a Down's syndrome child were one hundred per cent. The first case presented was a medical malpractice action in which the parents sought damages against the doctor on behalf of their infant child and in their own right. Counsel for the appellants were Michael B. Kelly and Stephen L. Marsh. Mr. Kelly made the oral argument for the team which won over the team of Lore A. Rogers and Judith Weisburgh representing the doctor.

The second case concerned the legality of the parents' decision to withhold consent for the heart operations which were necessary if the child was to live beyond a year. Dwight George Rabuse, counsel for the doctor, argued that the parents' failure to provide medical care necessary for the child's well-being constituted child neglect.

James F. Guerra, arguing for the parents, contended that withholding treatment was in the child's best interest since the operations posed a substantial risk and would deprive the child of the chance to experience the love and affection of family life. Mr. Rabuse, powerfully contending that a Down's syndrome child has the same right of access to care that a normal child would have, carried the day.

The two decisions, taken together, anomalously suggest that the child's life is "wrongful," yet must be preserved. Decisions in moot court are not, however, lasting judgments on the facts of a case but a measure of the skill of the contestants. The ingenuity and courage of all this year's finalists were strenuously tested by rigorous philosophical questions posed by all members of this year's court. They were: Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States; Honorable Bailey Brown, Senior Circuit Judge on the United States Court of Appeals for the Sixth Circuit; Honorable Dallin H. Oaks, Justice on the Supreme Court of the State of Utah; Dean Terrance Sandalow; and Professor Peter K. Westen.

The court asked challenging questions and gave tough attention to responses.



Michael B. Kelly led off arguments on the wrongful life issue as counsel for the appellants. He and partner Stephen L. Marsh were winners on that issue.

Perspectives on pornography

Law students launch informative conference

For three days last spring, the Law School was humming with discussion and debate on all aspects of the issue of pornography. A conference on pornography, censorship, and the First Amendment drew crowds of students to hear legal scholars and authorities in other fields who had been drawn to Ann Arbor from around the country for the event.

Although the conference was sponsored by a wide range of campus groups, up to and including the Office of the President of the University, it was conceived by law students who sought to enliven the intellectual debate in the Quadrangle by organizing a major event which would explore fully researched and thoroughly documented but clashing points of view. Frank Ballantine, a member of the Speaker's Committee of the Law School Student Senate, was one of the initiating students. "We wanted to make law students question the relationships between the legal reasoning they are learning in class and their emotional and political lives outside," he said.

Liza Yntema of the Women Law Students Association was another organizer. "My main interest in putting on the conference was to provide a forum for the injection of feminism into legal debate," she said. She also saw the conference as an opportunity to bring together many disciplines to discuss an intellectually and politically live topic. "This really put into practice the concept of a university and provided access to the Law School for the whole community," she said.

The conference opened with a slide presentation put on by Women against Pornography. It sought to persuade viewers of the link between sadistic pornographic materials and violence against women in society. The often disturbing presentation was followed by a showing of the film "Hardcore." The planners hoped to get audience members to recognize that pornography

Professor Frederick Schauer, Cutler Professor of Law at William and Mary Law School

is an emotional as well as an intellectual issue with this introduction.

They were determined, however, that the conference as a whole would present such a balance of perspectives that no listener could simply dismiss the issues raised. They planned a day of speeches by authorities from diverse disciplines and of opposing views. A philosopher, Dr. Helen Longino of Mills College, led off by considering alternative legal perspectives on pornography issues.

She was followed by the Chairman of the Board of the Playboy Foundation, Burton Joseph, who

Paula Webster

cautioned that any restrictions on pornography will risk impinging on freedom of speech. Edward Donnerstein, a professor of communications at the University of Wisconsin, reported on empirical studies which suggest that a new type of pornography portraying physical aggression against women, which has emerged in the past ten years, does tend to desensitize male observers to violence and to reinforce their faith in common myths about women, rape, and violence.

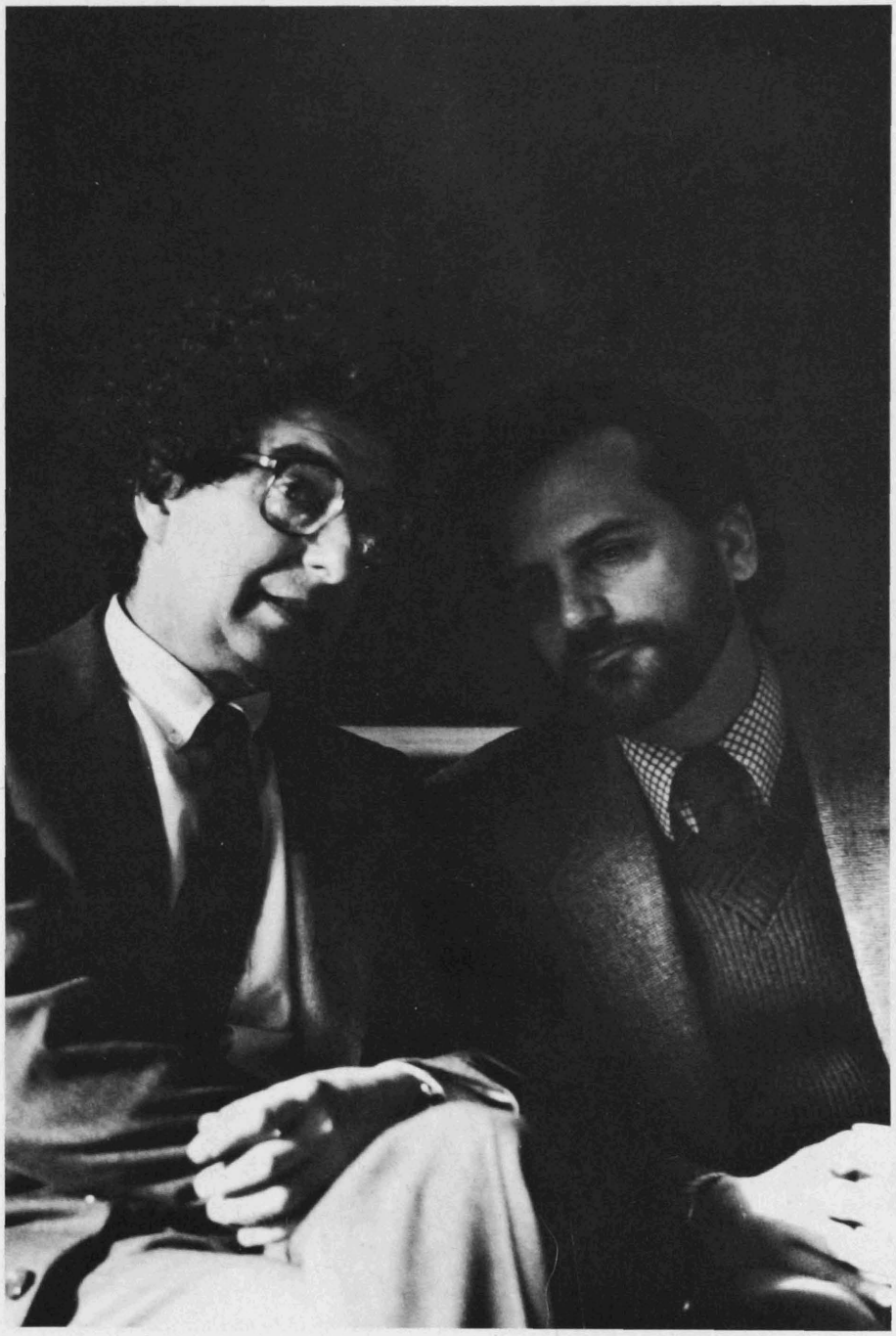
The final speaker that day was Paula Webster, who stressed that discussions of pornography by both men and women often seek to obscure the issue of sexual pleasure. "Women are potential victims in society," she said, "but also sexual actors." She accused presentations like the slide show of erring in permitting the audience to respond only with condemnation. Curiosity, fascination, or arousal are responses which must be repressed in such a context, she said.

Possible legal responses to pornography was the topic of the

final day of the conference. Professor Frederick Schauer, who is Cutler Professor of Law at William and Mary Law School, argued that the distinction the Supreme Court has drawn between materials designed as sexual aids and constitutionally protected speech is valid. However, materials which do not fall within this narrow category must be fully protected, he cautioned, even if they degrade women or portray distasteful violence.

Paul Bender, Professor of Law at the University of Pennsylvania Law School, was the final speaker. He questioned whether such a narrow category of materials can really be defined. He objected to many standard arguments for restricting pornography, arguing instead that material dealing with sex is just as important to have available as material on any other subject. He did suggest, however, that if research like Donnerstein's could really demonstrate that certain types of pornography pose a clear and present danger, then censorship of those types might be reconciled with First Amendment protections.

Over three hundred and fifty people attended the conference. Even previously uninterested students turned out to see what everyone else was talking about. "We accomplished some important goals," Ballantine said. "We raised feminist issues, but brought men into the discussion. We created a safe forum in which concerned women could inform themselves about pornography." Yntema concurred, "I think the conference was a smashing success. What topic shall we choose next year?"



Burton Joseph (left) and Dr. Edward I. Donnerstein (right)

The conference raised troubling issues and promoted sober reconsideration.

Get out your walking sticks

Spring reunions are back in style

In the good old days it was flowering trees, not pigskin, that turned alumni thoughts back toward Ann Arbor. Early in this century, all schools and colleges of the University held reunions around graduation time, celebrating with open-air band concerts and dances on the mall along with formal ceremonies and programs.

Sentiment for renewing that tradition has arisen around the University, but it is the Law School which has taken the lead in reenacting it. For the past four years, law alumni have come back for a weekend of receptions and gatherings in the spring. A Law Forum has been included on each occasion at which graduates can get a sense of the thought and style of today's faculty, while feeling again what it is to sit attentive for an hour on the Law School's very solid oak chairs.

Each year, attendance at the spring reunion has grown. In 1982, participants represented more than thirty different classes and convened from all over the country. This year, most reunion classes decided to hold their class gatherings on the all-class reunion weekend in May and brought a loyal following with them.

A faculty reception for alumni opened the festivities on Friday evening. The vast lounge of the Lawyers Club was full to capacity with graduates of all ages hallooing greetings to classmates and seeking out their former teachers.

Spring reunions were the occasion to show off boaters, white pants, and walking sticks when the class of 1894 met for its thirty-fifth in June of 1929.

Throughout the weekend, activities centered in the Law Quadrangle. Alumni and faculty moved from that first reception to a buffet supper served in the Club's chapel-like dining room. The dusky light added mystery to the room's lofty ceiling and highlighted its splendid chandeliers. Alumni hardy enough to be returning for fifty-fifth and sixtieth year reunions then had the special privilege of retiring to guest rooms in the Lawyers Club for the night. Members of other reunion-year classes were housed together in hotels around Ann Arbor.

Saturday morning began with coffee and welcoming remarks from Dean Terrance Sandalow. They were followed by the Law Forum. The topic selected for this year was: "Issues in the News: Public Image and the Realities of Criminal Justice." Members of the School's criminal law faculty called into question media characterizations of three of the most highly publicized issues in the field: the insanity defense, capital punishment, and the exclusionary rule.

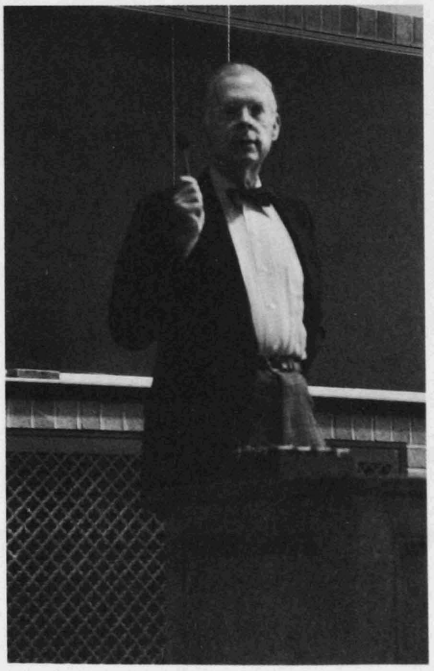
Speakers displayed an enthusiasm for their topics, as well as an erudition, which threatened to

Bettye S. Elkins, J.D. '70, addressed speakers at a special forum for women graduates.

Alumni gather for the tour of the library addition.

The formal program was not all heavy going for Carlton G. Champe of the 50th reunion class and his wife, Mary.

Balmy spring weather made strolls through the Quadrangle a pleasure for alumni.



At the Law Forum, moderator Francis A. Allen strictly limited his colleagues' volubility with a penetrating gong.

carry them well past the twenty minutes allotted for each formal presentation. Only the amusing but peremptory wielding of a most decisive gong by moderator Francis A. Allen kept the program on schedule and guaranteed the audience a chance for questions, expressions of views, and a timely arrival at the lunch tables.

At noon, everyone retired, without retiring the topics, to the all-class luncheon in the Lawyers Club. Optional afternoon activities included Beverley Pooley's celebrated tour of the Law Library addition and a special forum for women graduates.

Reunion classes held individual class dinners Saturday night. In addition, several classes put on afternoon receptions, evening bashes, or brunches on Sunday morning. Balmy spring weather made for outdoor receptions and leisurely strolls through the Quadrangle.

Planning for this year's reunion is already under way. It is to be held Friday, May 18 and Saturday, May 19. We hope to exactly reproduce the temperatures as well as the other attractions. All graduates should watch for a brochure describing the program and activities which will arrive in the new year. Those in reunion-year classes, which are those ending with a 4 or a 9, can also anticipate hearing from a class reunion coordinator.

Don't let the lawyers of an earlier day have all the panache. Get out your boaters, walking sticks, and wing-tipped shoes and join the crowd promenading in the Quadrangle this spring.

Please reserve these dates:
Michigan Law Alumni Reunion
May 18-19, 1984
Those who graduated in years ending with a 4 or a 9, take special note.

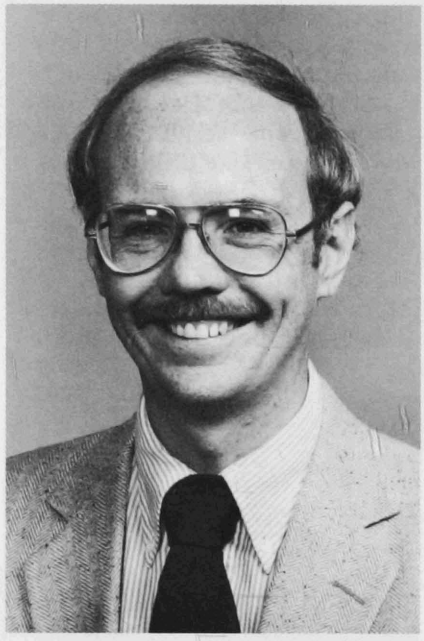
Ross prize strikes twice

For the past two years, the winner of the *American Bar Association Journal's* Ross Essay Contest has been a Michigan Law School graduate. This year's winner, Alfred W. Blumrosen, J.D. '53, is on the faculty at Newark Rutgers Law School. His prize-winning essay argued for the possibility of effective self-regulation.

James P. Hill, J.D. '75, who was last year's winner, is an assistant professor in the Department of Business, Public Affairs and Legal Studies at Central Michigan University. His essay was entitled "Ethics for the Unelected: Ethical Consideration for Congressional Staff Attorneys." Hill worked on Capitol Hill in a number of roles prior to joining the CMU business faculty in 1980.

He was an analyst for the Office of Budget, Planning and Program Evaluation of the U.S. Consumer Product Safety Commission in Bethesda, Md., from 1979 to 1980. In 1977-78, he worked as legislative director and legal advisor to U.S. Rep. Philip E. Ruppe and was legislative assistant and advisor to U.S. Sen. Robert P. Griffin from 1975 to 1977 and staff assistant to Griffin in 1973-74.

In his article, Hill argued that a congressional staff attorney faces daily political pressures that "sorely test the strengths of his or her ethics," and has almost no guidance on how to respond. "Many congressional staff attorneys are fresh out of law school and thrust into an arena that is a potential minefield of ethical misconduct," with political pressures and personal ambitions almost completely unrestrained by accountability, Hill said.



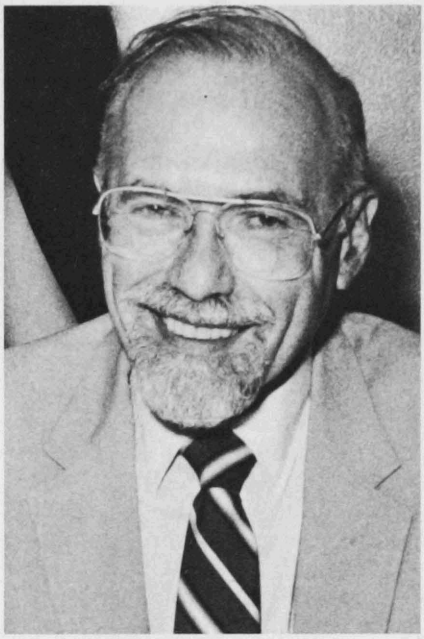
James P. Hill

Yet the issue of congressional staff attorney ethics "has largely been ignored or lumped together with the issues facing elected public officials," his winning essay says. Hill offered three potential remedies: liability for misconduct by staff attorneys in civil suits brought by injured persons, increased attention to these special ethical problems in the ABA's proposed Model Rules of Professional Conduct, and revised content in law school ethics classes.

His essay was published in the August, 1982 issue of the *ABA Journal*.

Professor Blumrosen's essay, which appeared in the *Journal* in September, 1983, outlines the six conditions required for meaningful self-regulation using examples from employment discrimination law, the field in which Professor Blumrosen is an acknowledged expert.

Professor Blumrosen wrote that "an effort to achieve social goals through self-regulation is worth-



Alfred W. Blumrosen

while . . . because ineptly implemented legislative standards have alienated both the regulated community and the intended beneficiaries by being overbearing to the one and non-productive to the other." But he prescribes caution in approaching self-regulation, which "industry has used to ignore the public interest, to engage in 'cosmetic compliance,' and to delay, if not avoid, satisfying public concerns."

His "six conditions" are:

1. the standard must be established by law;

2. a vigorous enforcement program must exist to provide incentives for self-regulation;

3. the results to be achieved must be measurable;

4. there may be residual liability to individuals. "As long as the standard statute creates individual rights, voluntary compliance . . . will not immunize the regulated institution," Professor Blumrosen states, and gives the example of a company which has a good "bottom line" in equal employment but can still be vulnerable because a particular supervisor "commits old-fashioned acts of discrimination";

5. administration and interpretation must support and encourage self-regulation; and,

6. there must be sufficient and organized public concern.

Professor Blumrosen is an expert in employment discrimination law and labor law. He was a key organizer of the Equal Employment Opportunity Commission in 1965 and its first chief of conciliation.

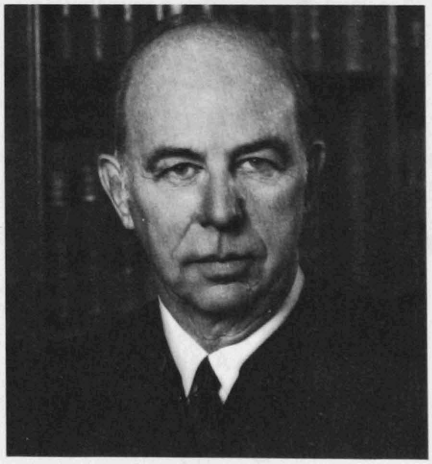
A consultant to EEOC from 1977 to 1979 with respect to agency reorganization, affirmative action guidelines, and selection guidelines, Professor Blumrosen has also advised federal, state, and local civil rights agencies. He takes an active role in employment discrimination matters, representing complainants, employers and unions.

The Ross Essay Contest has been conducted annually since 1934, under the provisions of the will of the late Erskine Mayo Ross, a federal judge in Los Angeles who died in 1928. The cash award, which this year was $8,000, derives from interest on the fund provided by Judge Ross. More important is the great prestige the award carries within the legal profession. It means national recognition for the recipient, whose work is seen by the 335,000 lawyers and law students who read the *ABA Journal*. The *Journal* is also read by judges who use it to help keep abreast of technical interpretations on specific issues, new trends, and original thought like that recognized by the Ross award in the essays of Professor Hill and Professor Blumrosen.

Alumni Notes

□ **Richard D. Simons,** a member of the Law School class of 1952, has been appointed to the New York Court of Appeals, which is that state's highest court. Another judge on the Court of Appeals said of Judge Simons, who had been serving as an associate justice of the appellate division of the State Supreme Court for the Fourth Department, "Because of his experience, we won't miss a beat." New York's Governor Cuomo seems to have been anxious to guarantee that. He is reported to have added a proviso to his offer of a seat on the court, the demand that Simons get to Albany to be sworn in the following morning. Within three hours of the announcement of his appointment, Judge Simons was hearing cases on the first day of the Court of Appeals' 1983 session.

Judge Simons, a Republican, has been under consideration for a seat on the Court of Appeals for ten years. In that time, he is the only candidate to have been judged well qualified by the Commission on Judicial Nomination four consecutive times. When a vacancy on the court was



Richard D. Simons

created at the end of 1982, this nominating panel presented the Democratic Governor Cuomo with four nominees. Mr. Cuomo, who had himself served as a clerk at the Court of Appeals when a young lawyer, asserted that appointments to the court would be one of his most important gubernatorial responsibilities.

In making his selection, Governor Cuomo is said to have read decisions by each of the nominees. The opinions which Judge Simons wrote while in the Appellate Division received attention and respect from members of the legal community for their precision, craftsmanship, and clarity, *The New York Times* has reported. "You read his decisions and you know you're reading a quality product," one Court of Appeals judge said. "Dick Simons is a judge totally committed to the consistency and predictability of the law," said the presiding justice of the Appellate Division, Fourth Department where he served.

Judge Simons, who graduated from Colgate University, entered politics in New York State after his graduation from the Law School. While in private practice in Rome, New York, he served part time as Assistant Corporation Counsel, then as Corporation Counsel. In 1958 he was elected chairman of the Oneida County Republican Party.

He was elected to the State Supreme Court in 1964 and re-elected in 1977. In 1971 he moved to the Appellate Division, first to the 3rd Department, then the 4th. He was previously nominated by the New York Commission on Judicial Nomination for Chief Judge of New York in 1978 and for Associate Judge of the Court of Appeals in 1979 and 1981.

This nominating panel was set up in 1978 when appointment replaced election as the mode of selection for judges on the Court of Appeals. The Committee for Modern Courts, a group which advocated the change, declared Judge Simons to be a "superb judge" and pointed to his appointment as validation of the effectiveness of the new selection procedure.

□At the investiture of **Edgardo J. Angara,** LL.M. '64, as president of the University of the Philippines, The University of Michigan was represented by Professor Roy Proffitt of the Law School. Professor Proffitt described his trip one fourth of the way around the world for the occasion as one in a long succession of evidences of close ties between his institution and President Angara's. In his speech at the investiture ceremony, which coincided with the seventy-fifth anniversary of the founding of the University of the Philippines, Professor Proffitt chronicled some of the past connections between the two schools, noting that George C. Malcolm, the founder of the College of Law of the University of the Philippines, was a Michigan Law graduate.

A long-time justice on the Supreme Court of the Philippines, the last Governor-General of the Philippines, and two United States Ambassadors to the Philippines all graduated from the University of Michigan Law School as well. Scholarships established by Clyde A. DeWitt of the Law class of 1908, which help students from the Philippines to attend the Michigan Law School, have also played an important role in fostering fruitful ties. President Angara was a DeWitt Scholar at the Law School, as was Irene Cortés, LL.M. '56, who is now vice president for academic affairs of the University of the Philippines.

President Angara came to Michigan after having completed an Associate of Arts and a Bachelor of Laws degree at the University of the Philippines. He returned to Manila where he practiced with the firm Ponce Envile Siguion Reyna Montecillo and Ongiako, becoming a partner in 1968. In 1972 he went on to found his own firm, Angara Abello Concepcion Regala and Cruz. It has since grown to be the largest law firm in the Philippines.

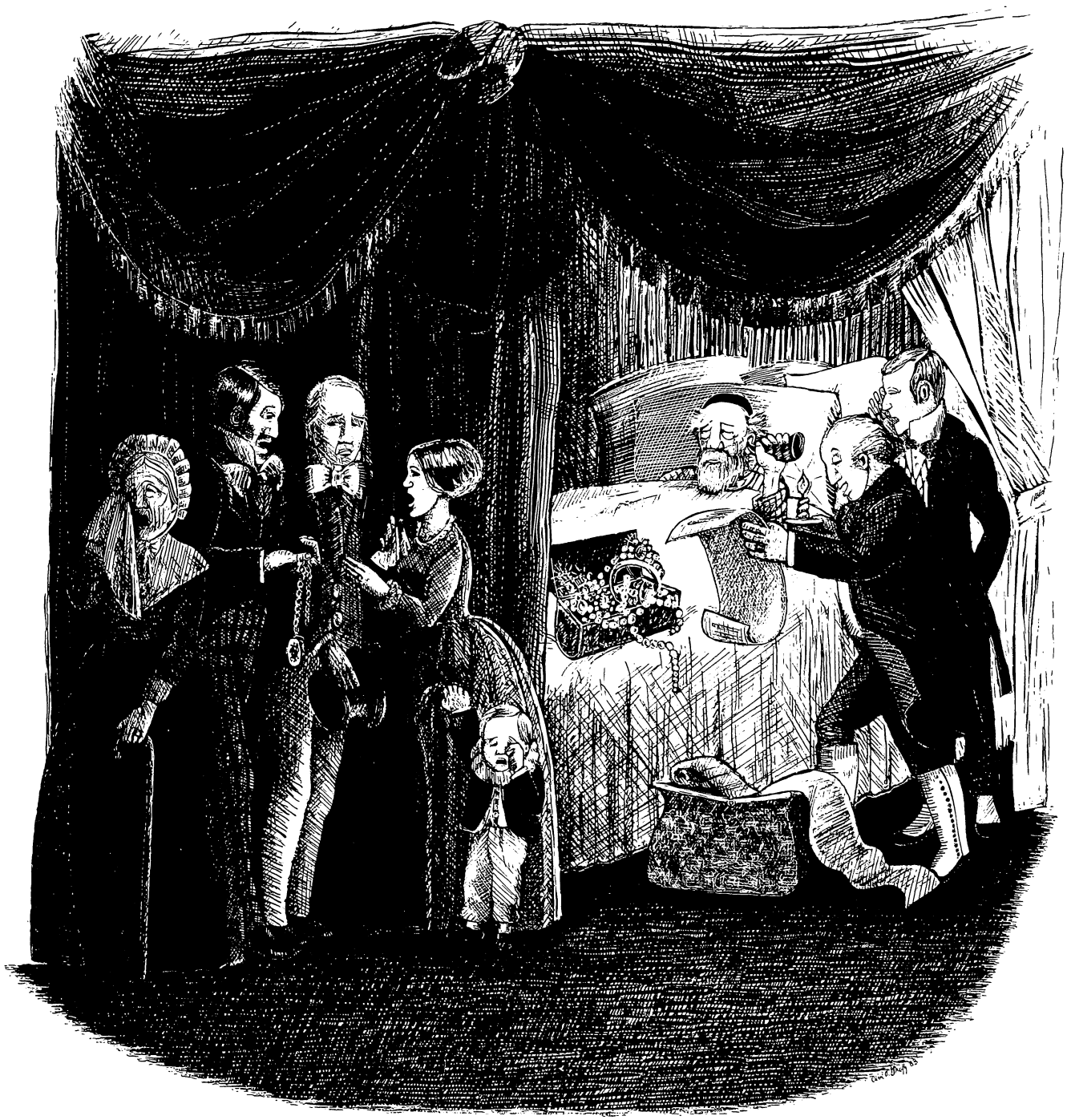
President Angara has served as President of the Integrated Bar of the Philippines. In that office, he initiated the comprehensive modernization of the judicial system and actively promoted legal aid services. He has also served as a delegate to the 1971 Constitutional Convention of the Philippines; he co-authored several sections of the constitution which was adopted in 1973.

He also envisioned and founded the ASEAN Law Association, of which he was the first president. He has served as president of the Philippine Bar Association and was a member of the Supreme Court Committee on Legal Education. In his new position as academic administrator, he has quickly gained a reputation for innovation and skillful management.

Edgardo Angara (left) with Roy Proffitt

The Emergence of a General Reformation Doctrine for Wills

by Lawrence W. Waggoner and John H. Langbein



Discrepancies in the Will

Although it has been axiomatic that our courts do not entertain suits to reform wills on the ground of mistake, appellate courts in New York, Michigan, New Jersey, and California have decided cases within the last several years that may presage the abandonment of the ancient "no-reformation" rule. (*In re Snide*, 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981); *Estate of Kremlick*, 331 N.W.2d 228 (Mich. 1983); *Engle v. Siegel*, 74 N.J. 287, 377 A.2d 892 (1977); and *Estate of Taff*, 63 Cal. App. 3d 319, 133 Cal.Rptr. 737 (1976).)

The new cases do not purport to make this fundamental doctrinal change, although the New York court did announce an explicit exception to the no-reformation rule and the other three courts did disclaim a related rule, sometimes called the "plain meaning" rule. That rule, which we will be calling the "no-extrinsic-evidence rule," prescribes that courts not receive evidence about the testator's intent apart from, or in opposition to, the legal effect of the language he uses in the will itself. The three courts said that they were consulting extrinsic evidence (in the California and New Jersey cases, primarily the testimony of the lawyers whose poor draftsmanship had led to the litigation) in order to engage in "construction" of supposedly ambiguous instruments.

In this article, which both summarizes and updates an extensively footnoted article published last year ("Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?" 130 *University of Pennsylvania Law Review* 521 (1982)), we report on this new case law and discuss the analytic framework that we think it suggests and requires.

The Recent Developments

We shall discuss the three purported construction cases first and then turn to the more candid New York precedent.

The will in the *Kremlick* case devised half the testator's residuary estate "to the Michigan Cancer Society." Although there was an organization of that name, the Michigan Supreme Court, in a brief opinion, allowed another organization (the American Cancer Society, Michigan Division) to have a trial on the question of which was actually the intended beneficiary. The issue on remand, therefore, will be whether to prefer extrinsic evidence of the testator's intent over the explicit language of his will.

In *Engle v. Siegel* the two testators, spouses, named their children as their residuary devisees; in the event the children predeceased them, each estate was to pass equally to the spouses' mothers. The spouses and children died in a hotel fire, predeceased, however, by one of the two spouses' mothers. Under the routine constructional law of the jurisdiction, the surviving mother would have taken the entirety of the two estates, since she was the sole surviving residuary devisee. The heirs of the predeceased mother contested and won. Extrinsic evidence of the spouses' deliberations with their lawyer at the time of the drafting of their wills showed that they had inclined to name their respective families as contingent residuary devisees, and that they had chosen to name the two mothers only after the lawyer had pointed out that the word "family" was imprecise. The New Jersey Supreme Court said:

> We have no difficulty in reaching the conclusion that the primary wish of each decedent, given the contingency that occurred, would have been to divide the property included in their residuary estates between the [families of the two mothers]. The designation of their respective mothers resulted solely from the scrivener's rejection of the word "family" as a term to describe the recipient of a testamentary benefaction. Each mother was obviously thought of as an appropriate representative of a "family."

Extrinsic evidence was thereby used to contradict the language of the wills.

The testatrix in *Taff* devised the residue of her estate to her sister Margaret, or if Margaret predeceased her (which was the contingency that in fact occurred), "to my heirs in accordance with the laws of intestate succession. . . ." Her residuary estate consisted of community property to which she had succeeded by virtue of its community character on the death of her husband. The California probate code provided that in the event such property passed by intestacy, it should descend in equal halves to the heirs of the predeceased spouse and of the decedent. Accordingly, the effect of the language in the will adopting the heirship definition of the intestacy statute would have been—if applied—to pass half of her property to the heirs of her late husband, and half to her natural heirs (who were at her death some nieces and a nephew). In the trial court, the testatrix's natural heirs claimed the entire estate, on the ground that she meant to designate only them. In order to prove her actual intent, her natural heirs offered the testimony of her lawyer, who testified that she had instructed him to draft her will so that the residue went "to her own family, her own blood relatives." The intermediate court of appeals followed the trial court and sustained the claim of the testatrix's natural heirs to take the entire estate.

As in the Michigan and New Jersey cases, the key departure in *Taff* was the court's expansive treatment of the purpose for which it would consider evidence contradicting the terms of the will. In a statement that significantly breaks from prior law while seeming to invoke it, the court declared: "Extrinsic

evidence was properly received both to create the ambiguity in the word 'heirs' and to resolve the ambiguity." This way of stating the matter obliterates the fundamental distinction between ambiguity and mistake. The disputed term in *Taff* that had been mistakenly employed was quite unambiguous. The effect of the decision in *Taff* was to substitute a phrase such as "my natural heirs" for the inapt phrase that the will had employed ("my heirs in accordance with the laws of intestate succession") in order to carry out what the court conceived to be the actual or subjective intent of the testatrix.

In each of these cases—*Kremlick, Engle v. Siegel* and *Taff*—the wills were utterly unambiguous. What each court actually did was to allow extrinsic evidence of the testator's intent to be preferred over the contrary but mistaken language in the will.

In the New York case, *In re Snide*, the New York Court of Appeals had to face one of the recurrent mistake situations: Husband and wife each signed a will prepared for the other, and only after the death of the husband was it discovered that he signed the wrong will. Harvey Snide signed the will prepared for his wife Rose, on account of the error of the lawyer-draftsman who supervised the joint execution ceremony. The first-instance court brushed aside the argument that strict compliance with the Wills Act prevented remedy for "a mistake so obvious." The court granted an application to reform the will, ordering that the words "Harvey," "Rose," and "wife" be substituted for "Rose," "Harvey," and "husband," respectively.

The first-instance court in *Snide* reached its result on general equitable principles, apparently without having understood that in the law of wills reformation has been refused even for "a mistake so obvious." The intermediate appellate court reversed in a memorandum opinion limited to pointing out that the judgment below ignored contrary New York appellate authority. In 1981, the New York Court of Appeals in turn reversed the appellate division and sustained the power of the first-instance court to reform the will. Unlike the courts in *Kremlick, Engle v. Siegel,* and *Taff,* the New York court admitted that it was granting reformation of a will, and it recognized how strongly that step contravened the former law. Nevertheless, the court advanced no significant justification for its departure. Its main concern was to limit its decision to this "very unusual case." The factors that the court mentioned in order to justify making the exception are factors that could (and in the view we develop below, should) be decisive in other cases of supposed mistake: (1) the high quality of the evidence of the mistake, and (2) the importance of serving the underlying policy of the Wills Act, which is to implement the testator's true intent.

We think that the "mere exception" rubric of *Snide* is ultimately no more defensible than the "mere construction" theory in *Kremlick, Engle v. Siegel,* and *Taff.* The *Snide* case is, however, a milestone on the path toward a general reformation doctrine, because an Anglo-American court has now expressly acted to grant reformation of a will on the ground of mistake.

The inclination of modern courts to prevent injustice despite a long tradition of refusing to remedy mistakes in wills is, in our view, laudable. We do not, however, believe that courts should continue to reach such results by doctrinal sleight-of-hand. Rather, we take the position that the time has come for forthright judicial reconsideration of the no-reformation rule. We believe that a reformation doctrine shaped and limited according to criteria that we identify below has the capacity to prevent much of the hardship associated with the former rule, while effectively dealing with the concerns that motivated the rule.

The Contrast with Nonprobate Transfers: The Evidentiary Policy

The no-reformation rule is peculiar to the law of wills. It does not apply to other modes of gratuitous transfer—the so-called nonprobate transfers—even though many are virtually indistinguishable from the will in function. Reformation lies routinely to correct mistakes, both of expression and of omission, in deeds of gift, inter vivos trusts, life insurance contracts, and other instruments that serve to transfer wealth to donees upon the transferor's death.

Courts have been willing to use their equity powers in these nonprobate situations, because a case of well-proven mistake necessarily invokes the fundamental principle of the law of restitution: preventing unjust enrichment. If the mistake is not corrected, the mistaken beneficiary is unjustly enriched at the expense of the intended beneficiary.

Judicial intervention to prevent unjust enrichment has such a manifestly compelling doctrinal basis that the puzzle is to explain why the courts have not been willing to act similarly when the document affected by the mistake is a will. Unjust enrichment is equally wrong whether the resulting error occurs in an inter vivos transfer or in a will. Both transfers are gratuitous, both unilateral. Accordingly, we emphasize as a starting point that the no-reformation rule for wills cannot rest on the notion that there is no wrong to remedy. Why, then, does equity refuse to remedy unjust enrichment in the case of a mistaken will?

The customary justification has to do with the nature of the evidence in cases of testation. Evidence suggesting that the document is affected by mistake—that the will is at variance with the testator's actual intent—must necessarily be presented when death has placed the testator beyond reply. The

testimony will typically involve statements allegedly made by the testator, so-called direct declarations of intent, which he can now neither corroborate nor deny. The testator's main protection against fabricated or mistaken evidence is the will itself. Therefore, it has been argued, evidence extrinsic to the will should be excluded; and if the extrinsic evidence is excluded, the court can not learn of the ground upon which the reformation claim rests.

The law of nonprobate transfers supplies two persuasive answers. First, although the living donor under an inter vivos instrument can take the stand and testify about his true intent, this testimony does not have automatic reliability. The donor's testimony doubtless reflects his current intent, but the matter in issue is his intent at the time the instrument was executed. The instrument may have stated this intent accurately; he may since have changed his mind and now be lying or deceiving himself, or he may be mistaken about what he originally intended. Consequently, even the donor's own testimony is properly regarded as inherently suspect, which is why even such testimony is put to the clear-and-convincing-evidence test.

Second, and still more telling, reformation of documents effecting gratuitous inter vivos transfers is routinely granted even after the death of the donor. In these cases the extrinsic evidence is inherently suspect for exactly the reason that evidence of a testator's intent is suspect when offered against a will. Nevertheless, in nonprobate transfers when the clear-and-convincing-evidence standard has been satisfied, clauses omitted by mistake have been inserted. The courts have corrected mistaken designations of the beneficiaries, of the property intended to have been the subject matter of the gift, and of the extent of the interest intended to have been granted to the beneficiary. Documents drafted by lawyers (or others) have not been distinguished from self-drawn documents; enrichment of an unintended donee at the expense of the intended donee is unjust whether the mistake has been made by the donor or by his lawyer. The essential safeguard in these cases has been the clear-and-convincing-evidence standard, which appellate courts have policed rigorously.

Accordingly, we believe that the evidentiary problem, although important, does not in fact explain or justify the no-reformation rule in matters of testamentary mistake. If the courts had not been deeply worried about another policy, namely, compliance with Wills Act formality, we think that they would long ago have followed the evidentiary practice of nonprobate transfers for dealing with claims of mistake regarding wills. Instead of excluding the evidence, and thereby foreclosing any chance of proving the mistake, the courts would have dealt with the potential unreliability of the evidence by admitting it and testing it against the higher-than-ordinary standard of proof that has worked so well in the law of nonprobate transfers.

Understanding the No-Reformation Rule: The Unattested Language Problem

The great obstacle to reformation in the law of wills has been remedial rather than evidentiary. The real problem has not been proving the mistake with adequate certainty, but remedying it in a fashion consistent with the requirements of Wills Act formality. When the particular mistake that has affected a will is one that would require a court to supply an omitted term or to substitute language outside the will in place of a mistaken term, the objection arises that the language to be supplied was not written, signed, and attested as required by the Wills Act. Reformation would appear to have the courts interpolating unattested language into will.

In our article in the *University of Pennsylvania Law Review*, we have pointed to a variety of settings where practice in the traditional law of testamentary mistake shows that the courts are less serious about the evidentiary problem than they are about the problem of technical Wills Act compliance. When a mistake can be corrected by means of a theory that does not appear to conflict with the Wills Act, existing doctrines permit the extrinsic evidence to be admitted in order to prove the mistake. The courts purport to fear the potential unreliability of extrinsic evidence when they exclude it, yet they admit extrinsic evidence in the contexts in which it is equally unreliable. Where the courts have been able to remedy mistakes, they have manipulated notions of construction in two ways: primarily by refusing effect to mistaken but attested language, but occasionally by conferring the imprimatur of attestation upon unattested language, that is, language not contained in the will.

It is essential to understand that the unattested language problem raises a technical or formal rather than a purposive question. The purpose of having all the terms of a will attested is evidentiary, which is why it is so important that the courts have shown themselves able to deal effectively with the concern about the quality of the proofs in the fraction of mistake cases that are now remediable. Accordingly, we believe that the primary impediment to the adoption of a general reformation doctrine for wills has been the seeming need for technical adherence to the Wills Act, rather than any judgment that it would offend the underlying purpose of the Wills Act to remedy well-proven mistakes. That, in turn, throws light on why the no-reformation rule has produced results so harsh. In countless cases of palpable mistake, the courts have felt obliged to enforce the Wills Act literally even though it is manifest that to do so defeats the basic goal of the Wills Act, which is to implement the testator's intent.

As indicated above, the primary way that courts manipulate notions of construction to correct a mis-

take without appearing to conflict with the Wills Act is by refusing effect to mistaken but attested language. This maneuver is possible in cases of ambiguity. Situations involving ambiguous expression constitute a significant fraction of the mistakes that occur in wills, and even under traditional law, mistakes of this type are remediable in will construction suits. Ironically, therefore, the availability of remedy for this kind of mistake has played a role in keeping the no-reformation rule in force by reducing the pressure to reexamine it.

The ambiguity doctrine has two basic elements: (1) where the will contains an ambiguity, extrinsic evidence is admissible to clarify it; and (2) if necessary, mistaken parts of a will may be disregarded in order to give effect to intention proved by extrinsic evidence. The leading American decision enunciating these principles is *Patch v. White,* 117 U.S. 210 (1886), decided by a sharply divided United States Supreme Court in 1886. The testator's will devised to his brother a parcel of land described as "lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging—being a lot which belongs to me, and not specifically devised to any other person in this my will." Extrinsic evidence revealed a latent ambiguity: There was a conflict between the description contained in the will and the subject matter of the gift. Although there was a square 403, and it contained a lot number 6, the testator did not (and never did) own that lot and there were no improvements on it. The Court then repeated a maxim that still appears in the decisions. "It is settled doctrine," the Court said, "that as a latent ambiguity is only disclosed by extrinsic evidence it may be removed by extrinsic evidence." The extrinsic evidence showed that the testator did own lot number 3, in square 406, and that this lot had not been specifically devised and was improved with a dwelling house. The Court found that the testator intended to devise this lot 3 to his brother, and that his intent could be given effect by "striking out the false description." In effect, the Court treated the testator's will as though it devised "lot number [blank], in square four hundred and [blank]. . . ." The Court the found that other evidence sufficed to establish the correct lot and square numbers: Lot 3 in square 406 was the only one the testator owned in a square whose number commenced with four hundred and that was not otherwise specifically disposed of in his will. The Court analogized this process of construction to the construction of words "blurred by accident so as to be illegible"; cases in which words have been judicially striken or disregarded because of mistake, the Court concluded, should be resolved in the same way.

The process employed in *Patch v. White* has been routinely applied to descriptions of devisees as well as property. At present, therefore, if an ambiguity is found to exist, courts are prepared to admit just that sort of extrinsic evidence of the testator's intent (including his direct declarations) that would have to be admitted if a general reformation doctrine for wills were to be adopted.

Why is it that the admissibility of such evidence is conditioned on the appearance of a so-called ambiguity? We infer that it is not the quality of the evidence but the availability of a theory of remedy that explains the courts' willingness to correct mistakes that can be characterized as resulting in ambiguity. The great attraction of the ambiguity label is that it virtually assures that a court can effect a remedy within the confines of the Wills Act. Ambiguity invokes the theory of construction rather than of reformation. When a court "construes" attested language, it "discovers" what the "ambiguous" words of the will "really" mean, whereas when a court reforms an instrument, it forthrightly supplies language from without. Although in truth the court in *Patch v. White* supplied omitted lot and section numbers, the ambiguity rubric permitted it to say that it was construing words within the will.

Courts do not openly discuss why the Wills Act is seen as allowing attested language to be stricken while not allowing unattested language to be inserted. We suspect that the underlying notion is that attested but mistaken language lacks testamentary intent. It is well accepted that a will executed wholly by mistake is invalid, on the ground that it lacks testamentary intent. In *Patch v. White,* when "lot 6 of square 403" was effectively rendered as "lot [blank] of square [blank]," the court was determining that the misdescriptions lacked testamentary intent and could be disregarded. In effect, *Patch v. White* involved partial denial of probate for want of testamentary intent. If the courts were not so frightened of the Wills Act, they would not meander in cases like *Patch v. White.* The device of striking out and then construing the resulting blanks is sufficiently awkward (by comparison with reformation) that it leaves little room for doubt about why it is done: It gives the appearance of Wills Act compliance. There are a variety of other doctrines in which reformation-like results are achieved by construction tricks. These include the dependent relative revocation rule, which corrects mistakes by implying remedies as conditions, and the personal usage doctrine, which saves some instruments containing seeming misnomers.

In addition to the ambiguity–striking out cases, courts have found other ways to correct mistakes without appearing to conflict with the Wills Act. Occasionally, the courts confer the imprimatur of attestation upon unattested language, for example, by the technique of implying future interests. Among the recurrent situations that have given rise to an implied future interest is the dispositive plan "To A for life, then to B if A dies without issue." If A dies with issue, a remainder in favor of such issue has been implied on the ground that the import of the condition attached to B's remainder makes it highly probable that the testator's primary objective was

to benefit A's issue if A left any. In this and other appropriate situations, courts "construct" omitted provisions out of the so-called general dispositive plan of the testator; the idea that words can be inserted into a will in this way is widely accepted. The Wills Act is not seen as posing an obstacle to this process because the inserted words are deemed to be constructed out of, or implied from, the attested words. The inserted words are thus seen as having the imprimatur of attestation.

Finally, we may point out that there are special types of mistakes that some courts have been willing to correct by openly reforming wills. An early decision of the Supreme Court of New Hampshire adopted a reformation doctrine for perpetuity violations, and this has been followed by the Supreme Courts of Hawaii, Mississippi, and West Virginia. See generally, Waggoner, "Perpetuity Reform," 81 Mich. L.Rev. 1718, 1755-1759 (1983). These courts were preoccupied with the problems of perpetuity law, and did not explain how their results could be squared with the no-reformation rule in the law of wills. Courts have also openly reformed wills in one type of tax case, a recent example of which is *Estate of Burdon-Miller*, 456 A.2d 1266 (Me. 1983). The Internal Revenue Code, section 2055(e)(3), grants an estate tax charitable deduction for certain charitable remainder trusts, if they have been created by wills that were executed prior to a certain date and if, after the testator's death, they were "amended or conformed" to the charitable remainder trust requirements as a result of judicial proceedings begun prior to a certain date. The state courts seem to have taken this federal statutory provision as somehow overriding the state Wills Act, so as to authorize the insertion of unattested language into wills. Elsewhere in the tax cases we find instances in which courts, mainly through doctrinal sleight-of-hand, have in effect reformed wills—without conceding that they were doing so—in order to conform testamentary provisions with such tax requirements as those applicable to the marital deduction.

Overcoming the Problem of Unattested Language

The no-reformation rule rests on the view that the courts cannot supply missing language, because the language to be supplied has not been written down, signed, and attested as required by the Wills Act. Reformation would require the validation of unattested language. The recent cases, described earlier, sidestepped the unattested language problem by manipulating the construction process or, in the case of *Snide*, by establishing an "exception" deemed by the court to be too narrow to call the underlying no-reformation rule into question.

We propose to dispute the argument that the Wills Act attestation requirements dictate the no-reformation rule. In the following section we point the way to a theory that would allow reformation to confer the imprimatur of compliance upon language that must be supplied in order to remedy a mistaken omission or to correct a mistaken term in a will that has been otherwise executed in compliance with the formal requirements of the Wills Act. This compliance-type theory is derived from the practice of the courts in the most analogous area of private law, namely, cases in which language has been mistakenly omitted from or mistakenly rendered in an instrument that must comply with the formal requirements of the Statute of Frauds.

We then discuss a second theory, also with an ample common law pedigree, that could be employed in many mistake cases in order to overcome the unattested language problem. We call this theory "remedying wrongdoing"; we derive it from the quite similar notion that has been developed in constructive trust cases. Where the mistake that has affected the will has been the product of a wrong, for example the negligence of the lawyer-draftsman, the constructive trust cases provide by way of analogy an independent basis for reformation: preventing harm to the innocent victim of third-party wrongdoing.

Compliance Theory: Analogizing from Practice under the Statute of Frauds

The no-reformation rule has been justified on the ground that a contrary practice would allow oral wills in violation of the Wills Act attestation requirements. So also the so-called "oral contract" argument has been made respecting the Statute of Frauds. The statute is argued to be violated when oral evidence is adduced to show that an instrument subject to the Statute contains a mistaken term or lacks a term that was intended.

In his notable article, "Reformation and the Statute of Frauds," 65 Mich. L.Rev. 421 (1967), George Palmer showed why the "oral contract" argument was fallacious and not a barrier to reforming the instrument. The parties' attempt to express their transaction in writing is also an attempt to express in writing the deficient or omitted term. From the standpoint of the purposes of the formal requirements of the Statute of Frauds, there is a considerable difference between noncompliance and defective compliance. The cautionary and evidentiary purposes of the Statute of Frauds are largely achieved in the attempt at due execution. The object of reformation in these cases is not to enforce an oral transaction but to make a written transaction conform to the true understanding of the parties. "To say that reformation amounts to enforcement of the oral agreement,"

Palmer argued, "overlooks the significance of . . . the act of the parties by which they sought to turn the oral understanding into a legally enforceable agreement through expression in the writing. In the view of most judges, equity performs a proper role when it corrects the consequences of mistake so as to make the situation correspond, not merely to what the parties intended, but to what they also attempted to effectuate."

The safeguard that prevents reformation from being abused, for example, by being employed to interpolate a spurious term, is the ancient requirement of an exceptionally high standard of proof in reformation cases. Palmer's conclusion, for which he adduces considerable support in the case law, is that the Statute of Frauds "should not prevent reformation in any case in which it is found by clear and convincing evidence that through mistake a writing fails to express the terms [that] the parties to an agreement intended to express in the writing."

In a companion article, "Reformation and the Parol Evidence Rule," 65 Mich. L.Rev. 833 (1967), Palmer demonstrated that the parol evidence rule, properly understood, does not hinder the trier from consulting extrinsic evidence in these cases. Following Wigmore, Corbin, and much modern authority, Palmer showed that the so-called integration doctrine limits application of the parol evidence rule to cases in which "the writing was intended to be a complete and accurate embodiment of the agreement." Hence, "[t]he parol evidence rule of itself is never an obstacle to reformation, provided there is satisfactory evidence of a mistake in integration." Once again, it is the heavy burden of proof according to a clear-and-convincing-evidence requirement that is the real safeguard against fraud and other abuse, rather than the categorical denial of relief.

We think that Palmer's analysis applies with full cogency to the Wills Act. Transposed to the setting of the Wills Act, Palmer's analysis highlights the difference between an oral will and the use of oral or other extrinsic evidence in order to correct or to supply a term in a duly executed will. Whereas an oral will instances total noncompliance with the Wills Act formalities, a duly executed will with a mistakenly rendered term involves high levels of compliance with both the letter and the purpose of the Wills Act formalities. To the extent that a mistake case risks impairing any policy of the Wills Act, it is the evidentiary policy that is in question. But, as Palmer points out, the decisive feature of the law of reformation in the inter vivos transfer cases has been its alternative evidentiary safeguard, the requirement of an exceptionally high standard of proof. A modern reformation doctrine for the law of wills will certainly adhere to this clear-and-convincing-evidence standard.

A substantially identical analysis appeared in 1973 in a report to the Lord Chancellor by England's official Law Reform Committee. The Committee found itself unable to identify tenable reasons "why the equitable doctrine of rectification [the English term for reformation] does not apply to wills." It dismissed the unattested language argument on the ground that "in the case of other documents the doctrine of rectification applies even though statute requires them to be in a particular form, for example, under seal; and evidence of what words a will was intended to contain may fall far short of general evidence of the testator's dispositive intention." In other words, relief against mistake does not augur the enforcement of oral wills. Courts do and should distinguish between noncompliance with formal requirements and the extensive compliance characteristic of mistake cases. The Committee also echoed Palmer in trusting for safeguard to the higher standard of proof already developed in the law of rectification for inter vivos instuments.

Remedying Wrongdoing: Enforcing Unattested Intention in Open Disregard of the Wills Act.

In mistake cases, the testator has typically sought out, paid for, and relied upon the work of counsel. To frustrate the wishes of a testator who had the prudence to follow counsel's direction seems especially offensive if it is avoidable. Since testators cannot be expected to discover their lawyers' mistakes, the question is whether to charge them with such mistakes when the evidence clearly establishes what was really wanted. We think it palpable that in these circumstances the testator's intent should be implemented if it can be proved with appropriate certainty.

It is well established that when a devisee or an heir commits a wrong—by fraud, undue influence, or duress—in procuring his devise or in preventing disinheritance, a court of equity will prevent the wrongdoer from benefiting. Further, when the act of wrongdoing deprives an intended beneficiary of a devise or an inheritance, the court can impose a constructive trust in his favor.

The willingness of the courts to intervene in these cases invites comparison with the two policies on which the general no-reformation rule rests: the potential unreliability of the extrinsic evidence and the need for adherence to Wills Act formality.

When a will is alleged to have been affected by wrongdoing, both the fact of the wrongful act and the identity of the wrongfully deprived beneficiary must be proved by extrinsic evidence. This evidence is of the same character and inherent untrustworthiness as the evidence that would be required under a general reformation doctrine of the sort we advocate.

When a constructive trust is imposed on a wrongdoer, and when it is imposed in favor of the intended and wrongfully deprived beneficiary, the courts are ordering that the decedent's property be

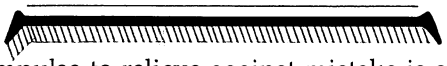
transferred to a person who was not designated to take it in a validly executed will. In order to appreciate the significance of this, it is important to observe that the policy against preventing a wrongdoer from profiting by his own wrong could be served in a more limited way that would be much more faithful to the supposed virtue of Wills Act obeisance. Rather than impose the constructive trust for the benefit of the intended beneficiary who was not named in the will, the courts could impose the constructive trust for the benefit of the testator's estate, coupled with the direction that the estate pass as though the wrongdoer had predeceased the testator and the wrongdoer's interest in the estate had lapsed. Under such a decree, the estate would pass entirely to the remaining beneficiaries (the innocent devisees named in the will, or in the event of partial or total intestacy, the innocent heirs). The court's only tampering with the attested instrument would be by way of deletion, on the familiar ground that a nominal devise tainted by wrongdoer's conduct lacks testamentary intent.

Why have the courts not followed this less adventurous path, which we might call the "mere deletion" approach? The answer, which is well understood in the case law and the literature, is that mere deletion would still leave unjust enrichment unremedied. Although it would effectively deny the wrongdoer his spoils, it would allow his wrongful act to result in a benefit for the remaining innocent beneficiaries at the expense of the intended beneficiary. The courts have preferred the rule that a constructive trust action lies even against innocent beneficiaries, in order that they not be unjustly enriched at the expense of the intended beneficiary on account of the wrongdoer's conduct.

Accordingly, it is safe to say that in the constructive trust cases the courts have determined that the policy of correcting unjust enrichment resulting from wrongdoing prevails against the policy of literal adherence to Wills Act formality. If this principle were extended from the cases of intentional wrongdoing, where it is now entrenched, to cases of negligent wrongdoing, it could supply the theory for relief in many of the most egregious mistake cases that under traditional law go unremedied.

We think that the "remedying-wrongdoing" rationale in the constructive trust cases should apply to those mistake cases in which the mistake results from the poor draftsmanship of a lawyer (or other scrivener), as in cases like *Taff* and *Engle v. Siegel*; or from negligent supervision of clerical work, or of the execution process as in cases like *Snide*. The courts have shown themselves able to overcome the evidentiary difficulties in the constructive trust cases. If the lawyer's wrong in a mistake case is not corrected, an unintended beneficiary is unjustly enriched at the expense of the intended taker. To be sure, the constructive trust cases that arise in circumstances of fraud and force can be distinguished, because the lawyer's wrongful conduct in the mistake case is negligent rather than intentional; but the distinction between intentional and negligent wrongdoing seems misplaced as a ground for denying relief in these mistake cases. A wrong is a wrong; and in the mistake cases the testator's claim is more worthy of relief than in most of the cases where remedy is now granted, because the testator sought out and followed the advice of counsel.

The Reformation Doctrine



The impulse to relieve against mistake is strongly felt in modern courts, as the *Kremlick, Taff, Engle v. Siegel,* and *Snide* cases illustrate. Yet because the black letter law has seemed so hostile, courts have often given remedy in specious or unreasoned theories of decision. We think that, with the no-extrinsic-evidence rule now undergoing abrogation and with the Wills Act formal requirements understood to be not an obstacle, a principled reformation doctrine can be formulated that will strike the proper balance between the concerns that underlie the old no-reformation rule and the factors that have made that rule ever more unpalatable.

The reformation doctrine will exhibit considerable simplicity. The three elements of the doctrine, already to be observed in the reformation doctrine for non-probate transfers, we label the (1) materiality, (2) particularity, and (3) burden-of-proof requirements. Each is directly responsive to the evidentiary concerns that were so prominent in discussions of the old no-reformation rule.

The materiality and particularity elements will require that the error be shown to have affected specific terms in the will and that the mistake claim be sufficiently circumscribed to be susceptible of proof. The contention that "if only my aunt had understood how much I loved her, she'd have left me more," will not suffice to transform disappointment into mistake.

The essential safeguard for a reformation doctrine in the law of wills is a standard of proof effective to deal with the evidentiary concerns to which the former no-reformation rule was addressed. Although that rule has been found too harsh, it did respond to the danger of false contentions that a testator now dead made a mistake in his duly executed will. We have said that a modern reformation doctrine for wills must follow the law of nonprobate transfers by placing upon the proponent of a mistake claim the burden of proving it by evidence of exceptional quality. The clear-and-convincing-evidence standard is pitched above the ordinary preponderance-of-the-evidence test characteristic of most civil litigation, but

below the beyond-reasonable-doubt rule of the criminal law.

In *Kremlick*, *Taff*, and *Engle v. Siegel*, where the no-reformation rule was avoided by pretending that they were "mere construction" cases, the appropriate clear-and-convincing-evidence standard was not articulated. One of the advantages of recognizing an explicit reformation doctrine is that the pressure to conceal reformation as mere construction should largely vanish. When mistake cases can be admitted for what they are, they can be held to the higher standard of proof appropriate to them. Paradoxically, therefore, abandonment of the no-reformation rule will sometimes result in greater fidelity to those evidentiary concerns that prompted the no-reformation rule. Experience suggests that the evidentiary policies of the no-reformation rule would be better served under the opposite rule.

Testation is a field in which planning values are quite rightly viewed as paramount. Since the will comes into effect when the testator is powerless to change it, certainty and predictability are at least as important here as in any field of law. If the development of a mistake doctrine were to jeopardize well-drafted instruments, the gain would surely not be worth the cost.

Would a reformation doctrine open every estate to the depredation of potential contestants claiming to take under a mistakenly rendered or mistakenly omitted term? There are many reasons for thinking not. As the recent cases discussed earlier illustrate, the real sphere for relief against mistake has been in cases of deficient lawyering. The *Taff* case could not have arisen if counsel had worded the will to speak of "my natural heirs." In *Engle v. Siegel*, routine good drafting would have provided a further disposition for the contingency that one of the testators' mothers predeceased them. In *Snide*, all that the lawyer had to do in order to prevent the mistake was to read the first line of the document that he gave his client to execute.

The existence of relief in these cases will not work as a magnet for groundless claims against well-drafted wills. Existing reformation practice in contract and conveyancing has disclosed no such problem, and the reason seems obvious. The clear-and-convincing-evidence standard would impose too onerous a burden of proof upon the proponent of a spurious claim. Indeed, as we argued, the recognition of a reformation doctrine would serve to increase the level of safeguard in cases like *Kremlick*, *Taff*, and *Engle v. Siegel* that are now treated as "mere construction" cases without attention to the clear-and-convincing-evidence standard. It is far better to operate an honest reformation doctrine that relieves the pressure for subterfuge and sets an appropriate test for relief.

We should emphasize that, not only will the reformation doctrine have negligible effect upon well-drafted instruments, it will also not encourage draftsmen to become slovenly. Precisely because the reformation doctrine is a rule of litigation, no draftsman would plan to rely on it when proper drafting can spare the expense and hazard of litigation. Every incentive to good drafting would remain.

A special characteristic of the proofs in the typical mistake case is that the testimony of the scrivener who made the mistake is frequently the predominant piece of evidence. On first impression this is a disturbing factor. We can imagine a duplicitous draftsman conniving with an interested contestant after the testator's death and testifying to a supposed mistake of which the draftsman has sole knowledge.

Reflection will show why this danger is remote and why it has not figured in those areas of the law where analogous mistakes have been remedied—the "mere construction" cases in testation and the reformation cases in contract and conveyance that involve instruments uttered by persons now deceased. A lawyer-draftsman has strong disincentives to plead his own slovenliness: It is not exactly a business-getter, it is costly in professional esteem, it may give rise to malpractice liability, and in extreme cases it can lead to professional discipline. Normally, therefore, the opposite danger is the serious one—that the lawyer will conceal his blunder.

Malpractice Liability

Because the error in many mistake cases is sufficiently egregious that a victim might be able to invoke the malpractice liability of the lawyer-draftsman if relief for mistake were denied, the argument can be made that the malpractice remedy makes relief for mistake unnecessary. We think that there are a variety of responses to this contention.

Initially, we note that there is a range of mistake cases that fall outside the scope of malpractice relief, including homedrawn wills and those lawyer-drafted wills where for whatever reason the mistake does not rise to the level of malpractice. Furthermore, in a considerable fraction of lawyer malpractice cases, the draftsman may be wholly or partially judgment-proof, as when he is long since deceased, or when he is uninsured or underinsured.

More fundamentally, the change in theory from devise to tort raises a serious problem of unjust enrichment. Whereas most forms of malpractice inflict deadweight loss that can only be put right by compensation, in these testamentary mistake cases a benefit is being transferred from the intended beneficiary to a mistaken devisee. That devisee is a volunteer lacking any claim of entitlement or justified reliance. The malpractice solution would leave the benefit where it fortuitously fell, thereby creating a

needless loss to be charged against the draftsman (or his insurer). So long as the draftsman's error was innocent (which is what distinguishes mistake from fraud), there is no reason to exaggerate his liability in this way. If, on the other hand, the lawyer were charged with the malpractice but subrogated to the tort plaintiff's mistake claim, the reformation doctrine would simply be recognized in a circular and more litigious fashion.

We do not mean to say that negligent draftsmen will be immune from malpractice liability in testamentary mistake cases. When the malpractice causes true loss, that loss should be compensable. One such item of compensable loss may be the reasonable litigation expenses of the parties to the reformation (or other) proceeding occasioned by the mistake. We can also imagine circumstances in which a mistake might come to light after distribution and dissipation of the mistakenly devised property; here the change of position of the mistaken devisee would constitute justified reliance and require that the intended beneficiary be remitted to his malpractice remedy.

Conclusion

So long as it is human to err, instances of mistaken terms in wills are inevitable. The impulse to remedy these errors in order to prevent unjust enrichment is also deeply rooted in our sense of justice, which is why the simplistic rule forbidding relief against mistake is dissolving. With the barriers to the receipt of extrinsic evidence coming down, and with theories now developed for overcoming the unattested language problem, courts will be presented with mistake cases ever more persistently.

To be sure, business as usual can continue. The courts can go on manipulating supposed rules of construction, and they can make more exceptions. We think that a principled reformation doctrine has all the advantages over the patchwork of inconsistency and injustice that characterize the present law. The purposes of the discredited no-reformation rule will be better served under an explicit reformation doctrine that puts mistake cases to the test of an appropriate standard of proof.

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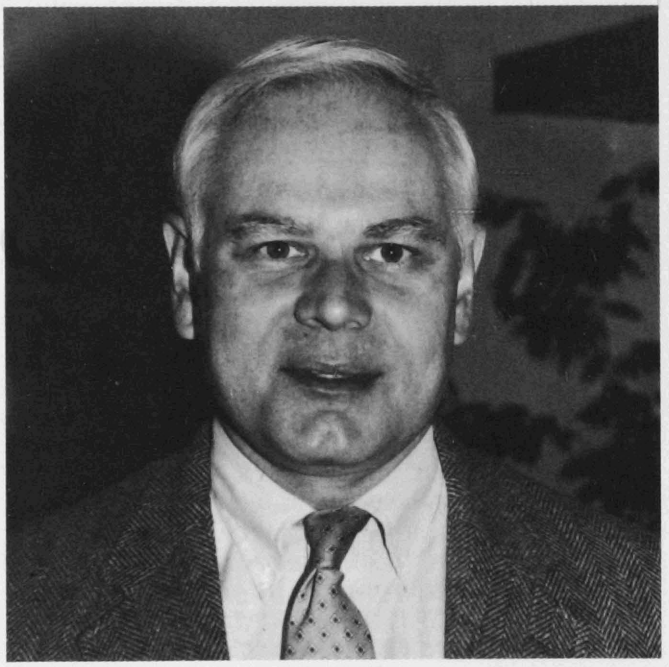
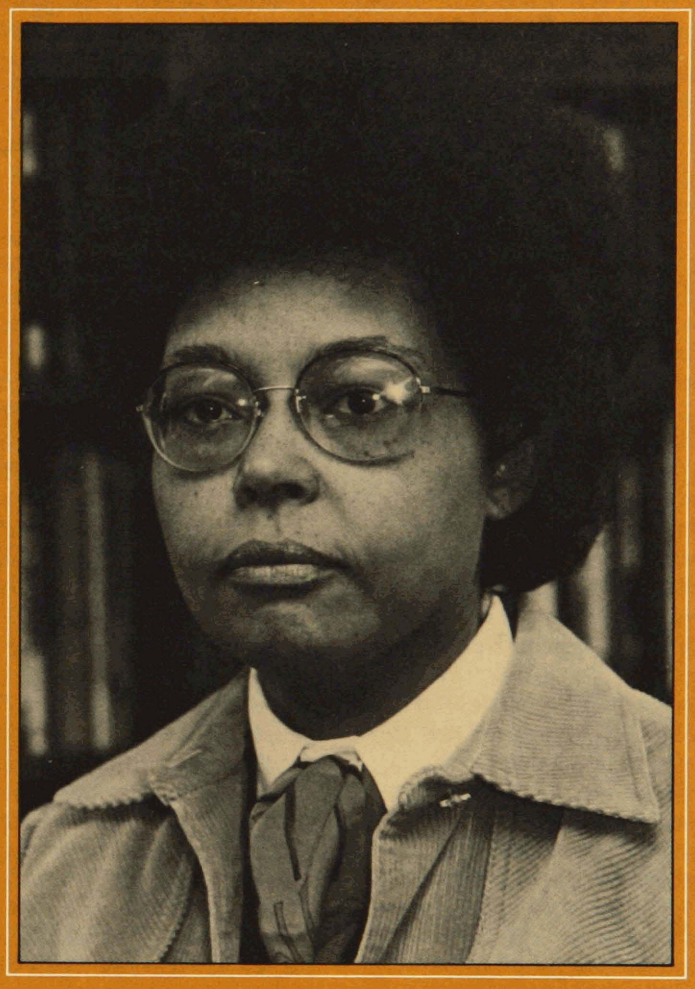
Adapted with permission from Langbein & Waggoner, "Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?" 130 U. Pa. L. Rev. 521 (1982).



Lawrence Waggoner

ADMINISTRATIVE LAW:

WHAT IS IT, AND WHAT IS IT DOING IN OUR LAW SCHOOL?



by Sallyanne Payton

The community of administrative law teachers and scholars seems to be in perpetual doubt over how "administrative law" should be approached as a branch of legal doctrine, and, indeed, whether the subject exists at all. At its core, "administrative law" is a collection of abstract, even pithy, principles that purport to describe and predict the bases on which judges review agency action. For example, agency decisions are to be supported by "substantial evidence" or are not to be "abitrary and capricious" and are to have "a reasonable basis in law"; agencies must accord "due process" when they inflict deprivations of life, liberty, or property, and so on. Any experienced lawyer knows, however, that the actual content of these principles cannot be comprehended except by observing how they are applied to particular actions by particular agencies. Administrative law can only be understood in its native disorderly profusion; doctrinal synthesis and rationalization, the mainstays of traditional legal scholarship, may be not only futile in this area but actually misleading, an observation that has led observers to question whether there really is an encompassing subject known as "administrative law."

These observations are now commonplace. It is widely acknowledged that the principles of administrative law are distinguished for their malleability and that the actual outcomes of cases involving challenges to agency action depend on, among other

Ever since the flowering of government regulation during the New Deal, it has been apparent that judicial review alone, or even in combination with legislative oversight, is inadequate to curb abuses of administrative discretion.

things, the nature of the government activity under review, the professional reputation of particular agencies and even of particular administrators and administrative law judges, the apparent soundness of the agencies' own decisional process, courts' willingness to grapple with the substance of the agencies' work, and their taste for reviewing agency records, which are frequently voluminous.

Consequently, some agencies tend to be reviewed more stiffly than others; and some subjects—notably major rulemaking activity in the areas of health and safety regulation and environmental protection—tend to stimulate a higher degree of judicial interest than does the routine activity.

Because of the close relationship between the nature of an agency's activity and the nature of the judicial review to which it is likely to be subjected, administrative law scholarship must have one foot in public policy. Indeed, it is nearly impossible to appreciate the interplay of politics, government, and law in the administrative state without specializing in some substantive area of public law in which policy and legal principles are shaped by an agency. This means that administrative law teaching and scholarship mainly focus away from the judicial system, not on it. Even the continuing controversies respecting the institutional role of the courts in overseeing the work of the agencies tend to focus on the agencies themselves, since it is their peculiar role in making law that gives rise to judicial deference or disquiet. Administrative law is mainly about agencies, not mainly about courts.

There is a good practical reason for centering the discipline on the work of the agencies. Ever since the flowering of government regulation during the New Deal, it has been apparent that judicial review alone, or even in combination with legislative oversight, is inadequate to discipline administrative discretion. These oversight mechanisms operate episodically and largely consist of review or criticism after the fact. If the agencies are to be influenced decisively, they must be affected directly and prospectively—that is, through statute and regulation. The federal government and nearly all the states have general administrative procedure acts; and legislatures tinker periodically with procedures affecting particular programs. A very large proportion of administrative law scholarly activity is now devoted to the study and improvement of administrative procedure, particularly at the federal level.

Much of the writing on administrative law, mired as it is in disputation over the details of administrative procedure, lacks dash. The general reader can hardly be expected to appreciate the intensity of conflict over such issues as, to take a current example, the certification of contract claims brought against the federal government; but the tedium is deceptive. Procedures are power; they may assist or hinder the agencies in accomplishing their missions, may force agencies to redefine their missions or their constituencies, may provide visibility into decision-making processes and thus facilitate political accountability, and so on.

Once the relationship between procedure and power is appreciated, the political content of even the most apparently boring administrative law scholarship becomes manifest. Preferences for one type of decision maker or process over another are at base political preferences, which regularly escape the bounds of technical legalistic argumentation and become the subject of explicit ideological conflict. In recent years, for example, Presidents Carter and Reagan have both brought administrative procedural reform to the level of presidential politics.

Administrative law and procedure are thus unabashedly associated with politics and government, which helps to account for their awkward posture within a legal system that finds it generally useful to camouflage the relationship between law and political authority. In administrative law, political ideas are on the surface of, as well as at the heart of, the law. In this regard, administrative law is kin to constitutional law, a similarly politicized subject. In fact, administrative law can best be thought of as the collection of principles of which the idea of government under law, an idea older and more basic than the written American constitution itself, is effectuated in practice.

Administrative law attempts to reconcile the practical realities of the administrative state with two central propositions on which the government itself is founded: *first*, that the laws of a free people are anchored in the consent of the governed as expressed by its elected representatives; and *second*, that no matter how legitimate its short-term political authority the government must act in accordance with the higher and more enduring requirements of the rule of law, which preserves the individual liberty that makes democratic self-governance conceivable.

Thus, administrative law concentrates on ensuring that government officials act only within the scope of their lawful authority and adhere to minimum standards of fairness and rationality in dealing with those subject to their power. Since the government is an active force, administrative law tends to reflect

current political controversies. The development of administrative law can fairly be characterized as a collective scramble by the judiciary to keep up with what the government is doing and to civilize executive branch officials who are inclined to tear the fabric of fundamental law in their pursuit of immediate programmatic or political gains.

The consequence of judicial review of agency action is that in administrative law, as in constitutional law, the behavior of the courts is openly political, whether they help government along by moderating and legitimizing the exercise of managerial discretion or whether they obstruct and delegitimize it. In both constitutional and administrative law, the politically independent judiciary has the capacity to retard or reject the work of the politically accountable branches in the name of political values that transcend the daily exigencies of representative government.

Administrative law scholarship is perforce obsessed with the big issues. For example, imposing legalistic requirements on agencies tends to inhibit their managerial discretion, to impair their effectiveness in carrying out their programs, and to reduce their political responsiveness. One cannot make an intelligent argument for or against requiring agencies to abide by legally enforceable procedural or intellectual standards without having general views on the propriety of judicial oversight of administration, on the appropriate balance between meticulousness and effectiveness in the work of the particular agency, and on the proper role of the agencies in the political system.

Reforms designed to enhance citizen participation in the administrative process, to force agencies to disclose information in their possession, to advertise their intended rules and to allow adversary challenge to them, to engage in procedures that preserve the appearance of care and impartiality, are all to be measured for their net contribution to responsible and rational governance, as are contrary reforms designed to eliminate such requirements in the name of reducing government bureaucracy and regulation. If there are any themes that cut across discrete regulatory areas and can be considered as the true subject of general "administrative law," they are these large problems of achieving the proper mix of legality, political legitimacy, accountability and effectiveness in the administrative process. One backs inexorably into the large issues, no matter how tiny the topic with which one began.

While the big issues are implicit in administrative law controversies, not all good administrative law scholarship deals with them at a high level of abstraction. The grand problems of administrative legitimacy and authority can only be appreciated in the context of particular regulatory morasses. The problems of the National Park Service bear virtually no resemblance to the problems of the Social Security Administration, even though both agencies are governed ostensibly by the same body of "administrative law."

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Consequently, administrative law does not lend itself to broad precocious theorizing. Being an aspect of the art of governing, it represents a union of experience, insight, and theory, and requires mastery of whopping amounts of factual information about particular government activities. Because the subject matter itself unites theory and practice, the best administrative law theory climbs out of empiricism. Professor Jerry Mashaw's interesting theoretical models of due process in administrative adjudication, for example, are informed thoroughly by his decade-long involvement with the particular problem of deciding Social Security disability claims.[1]

This comes out to be a paradox. Administrative law involves some of the most interesting theoretical problems of governance; yet the actual development of the law occurs in the context of specific issues arising under complicated regulatory schemes. To the reader of the case reports, it may seem that there is no middle ground between the courts' articulation of meaninglessly abstract principles of judicial review and their dive into particularistic examination of the facts and reasoning supporting the agency decisions under review. Intermediate doctrinal analysis, the usual mainstay of judicial reasoning, is virtually absent in administrative law opinions.

Even if the courts are trapped in the format of individual case analysis, however, administrative law scholarship is not so confined. Where administrative law scholarship seems to be headed is toward a better understanding of the craft of governing.

Increasingly in recent years the community of administrative law scholars has taken its obligatory focus on the agencies as a reason for pride. Materials on judicial review have been moved to the backs of the casebooks; the agencies' own procedures are being showcased and their decision-making processes examined. Some administrative law scholarship is reaching for closer ties with political theory, sociology, organization theory, and, in accordance with the trends of the time, economics, in an effort to achieve insight into agency behavior. Perhaps out of a need to compensate for the limited opportunities for mid-level doctrinal analysis in administrative law, some younger scholars are turning toward model building as a technique of

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generating conceptual insights that cut across discrete regulatory schemes. Jerry Mashaw's models of due process have already been mentioned. Colin Diver of Boston University has blended doctrinal analysis with organizational theory, inferring from judicial opinions the models of administrative decision making that seem to reside in the minds of judges.[2]

These intellectual currents may over time push administrative law scholarship even further away from traditional doctrinal analysis into the arms of social science and political theory; but the movement is enriching. Administrative law purports to be based on insight into the nature of government; if the pragmatic insight of experienced lawyers and judges can be made more accurate by the infusion of more systematic learning from other disciplines, then surely the law will be made more intelligently.

There is little or no danger, however, that administrative law will be taken over by the organizational theorists (as the economists are attempting to claim the whole of regulatory policy). For so long as judges continue to review agency action, administrative law and procedure will continue to be the special province of lawyers, whose comparative advantage over other students of public policy lies in their appreciation of the relationship between procedure and power.

Nor is legal doctrine, or the traditional role of legal scholarship in describing, synthesizing, and rationalizing the law, yet dead or irrelevant. The administrative law community still has need of thoughtful traditional scholarship, particularly work that alerts that practitioners to generally applicable principles that may be developing in areas removed from their own. While the competence of the practicing administrative law bar is awesome, administrative law being the meat and potatoes of the Washington legal establishment, extreme specialization means that many lawyers confine their attention to narrow areas and may not appreciate the intellectual currents blowing in the general legal community.

In addition, broadly descriptive doctrinal analysis and criticism that focuses explicitly on political ideology may be due for a revival. The conservatives of the Burger Court have resurrected old-fashioned liberal and populist objections to the administrative state and have revived the non-delegation doctrine. Their turn toward literalism in statutory construction has eroded the tradition of judicial deference toward agencies' interpretation of their own statutes. The tenor of the conservatives' opinions suggests that they would reduce the influence of the federal courts on the agencies and would force Congress to control them more closely through legislation.

This development is occurring in the context of a general resurgence of interest in federalism issues. As governmental power shifts toward state and local governments and private voluntary organizations, the attention of administrative lawyers must follow.

Administrative law scholarship thus has new fields to plow.These are times that recall administrative law to its original task, midway between law and politics, of civilizing the exercise of power. It is a fertile time for administrative law scholars.

Professor Payton, who teaches administrative law and regulatory policy at Michigan, serves as a public member of the Administrative Conference of the United States. This article was written for Law Quadrangle Notes.

NOTES

1. *See* F. Mashaw, BUREAUCRATIC JUSTICE (1983); Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 BOSTON U. L. REV. 885 (1981).

2. *See* Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV L. REV. 393 (1981).

Correcting the record

Lewis M. Simes (inset photo) was named the Floyd Russell Mechem University Professor of Law by the Regents in 1947. A 1959 faculty photo shows the author of this letter, Allan F. Smith (left end of back row), Professor Simes (below Smith on the right), and the Law School's other former Distinguished University Professor, William W. Bishop, Jr. (below Smith on the left).

To the Editor:

Not often do I find error in the *Law Quadrangle Notes*, but history has a way of being lost, and the splendid story in the last issue concerning the naming of Professor Joseph Sax as Distinguished University Professor contained a slight error. The story asserted that only one other Law School professor had been so honored—Professor William Bishop. In fact, an earlier appointment was given to the late Professor Lewis M. Simes.

The creation of Distinguished University Professorships was approved by the Regents in 1947, and they authorized nine such appointments. Professor Simes was one of the original group chosen from the University faculty, and his distinction is part of Michigan's heritage. My personal association is of long standing, and I am so far in his debt that I want to correct the record. It so happens that he was the chairman of my doctoral committee when I was a graduate student at Michigan in 1940, and I can attest to both his demanding standards of scholarship, and his warm encouragement of newcomers to the field. Later, in the 1950s, I had the privilege of working with him as co-author of a treatise on the law of Future Interests. Those who are familiar with the subsequent efforts of both of us will properly conclude that the hand of Simes was the guiding hand of the manuscript, and the mind of Simes was the creator of the project.

Professor Simes was one of the last of the great legal scholars who sought to encompass an entire subject in their writings. Williston, Powell, McCormick, Corbin, Scott, and more recently George Palmer, are illustrative authors whose vision and powers of research and analysis permitted them to prepare comprehensive treatises, widely recognized as the best authoritative sources for guidance in the particular subject matter. We are more likely today to find treatises prepared by multiple authors or the staff of a publishing house. I do not know whether it is a common characteristic of those just named, but one of the great strengths of Lewis Simes was his prodigious memory. He was renowned for his capacity to recall a particular case, the state in which it was decided, and often the year and volume of publication. This memory, coupled with his meticulous attention to detail, helped produce his lucid and carefully crafted writings. Generations of law students owe him a debt of gratitude for bringing clarity to an obscure area of the law.

The career of Professor Simes did not end with his retirement from Michigan Law School. He joined the famous Sixty-Five Club at Hastings College of the Law in San Francisco, and taught for a number of years until his death in 1974.

So may we let the record show that Professor Sax is the third (not second) member of the law faculty to bear the title Distinguished University Professor, and add Lewis M. Simes to the distinguished group.

-Allan F. Smith, Professor of Law

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