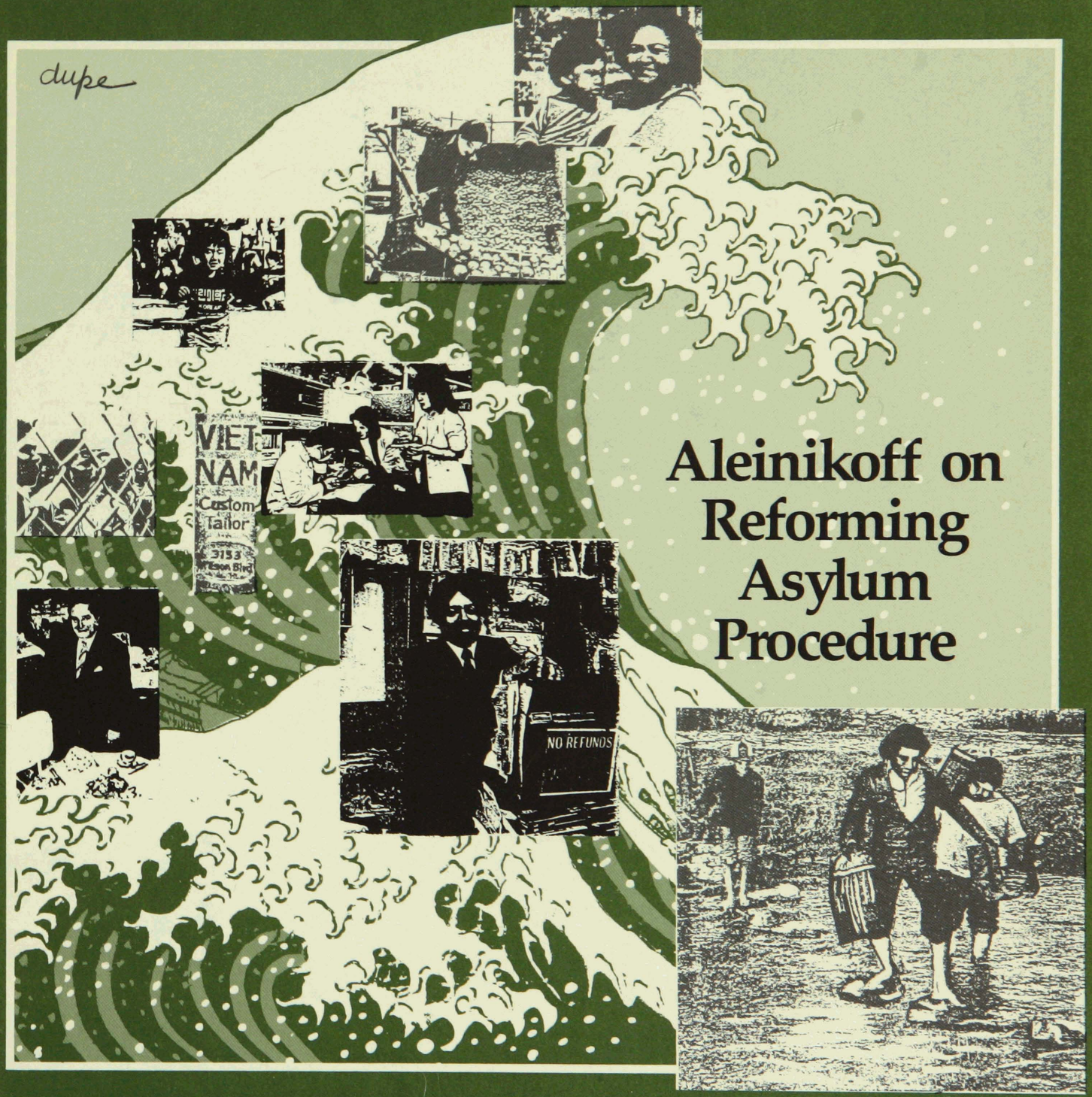
Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 29, NUMBER 1, FALL 1984



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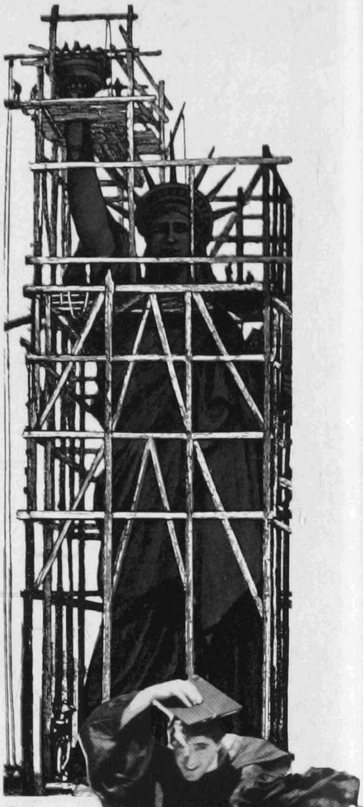

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Law Quadrangle Notes (USPS 893-460) is issued quarterly by the University of Michigan Law School. Second-class postage paid at Ann Arbor, Michigan. Office of publication: *Law Quadrangle Notes*, Law School, The University of Michigan, Ann Arbor, Michigan 48109-1215.

POSTMASTER, SEND FORM 3579 TO: *Editor, Law Quadrangle Notes*, Law School, The University of Michigan, Ann Arbor, Michigan 48109-1215.

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Production Editor: Carol Hellman, U-M Publications Office;
Credits: All photos by Gregory Fox, except photos on pages 13, 14 bottom, and 15 by Russell Smith; and photos on pages 3, 4, 7 (Daily Press-Times Herald, Newport News, Va.), 14 top (Paul Jaronski), and 18.

The Sword of Damocles

Can the exclusionary rule survive cost-benefit analysis?

by Yale Kamisar

Yale Kamisar: wondering when the sword will fall on the exclusionary rule.

Editor's Note: *This article by Yale Kamisar, Henry King Ransom Professor of Law, appeared in slightly abridged form on the Op-Ed page of the* New York Times, *July 11, 1984.*

On the last day of the 1983-84 Term, the Supreme Court finally carved out a so-called "good faith" exception (actually a "reasonable mistake" exception) to the 70-year-old exclusionary rule. That doctrine holds that evidence obtained by police in violation of the Fourth Amendment (which prohibits unreasonable searches and seizures) must be barred from a criminal trial. Henceforth, evidence obtained pursuant to a search warrant is admissible if the police had an "objectively reasonable belief" in the validity of the warrant even though, to put it bluntly, the evidence was obtained by violating the Fourth Amendment (but not by too much).

The Court's long-awaited pronouncement on the oft-proposed "good faith" modification of the exclusionary rule came in two search warrant cases: *United States* v. *Leon* (where the police had relied on a warrant subsequently invalidated because unsupported by "probable cause") and *Massachusetts* v. *Sheppard* (where the police did have ample grounds to carry out a search but the warrant at issue failed to satisfy the Fourth Amendment because it did not particularly describe the items to be seized). Although *Sheppard* was the much more publicized case, because it involved a brutal murder, and the constitutional violation struck many as quite "technical," *Leon* was the main case—and the one countless lawyers and law students will dissect for years to come.

Whether the new exception will be confined to search warrants is uncertain. I doubt that it will be. There is considerable language in *Leon* and *Sheppard* dwelling on the search warrant setting, but running through both opinions is a strong skepticism that "the extreme sanction of exclusion," as the Court twice called it, can "pay its way" as an effective deterrent *in any situation* unless the underlying Fourth Amendment violations are deliberate or at least substantial.

Do *Leon* and *Sheppard* take the pressure off the much-criticized and much-battered exclusionary rule or do these cases only render the rule more vulnerable to efforts to abolish it entirely? Some experts believe that the new exception will "prune" the rule, dampen widespread criticism of it and, in the long run, save it (or what is left of it) from complete destruction. I disagree. I believe the new exception makes the rule look still less like a constitutional rule and brings its ultimate demise one step closer.

Many of the rule's critics will never rest until they succeed in stamping it out completely. The new exception is only likely to embolden them (although perhaps only after a decent pause) to launch a final, all-out attack on the rule itself.

Although one would gain little inkling of this from recent Supreme Court opinions, the famous 1914 *Weeks* case, which first promulgated the exclusionary rule, rested it not on an empirical proposition (its supposed deterrent effect on the police), but on what might be called a "principled basis." The primary goals of the rule's framers were to avoid "sanctioning" or "ratifying" unconstitutional police conduct that produced the proferred evidence, to preserve the judicial process from contamination, and to prevent the government from profiting from its own wrongdoing. The framers of the exclusionary rule may have expected, or at least hoped, to affect police behavior, but there is no suggestion in any of the early

Going my way?

Court, professors split—in different directions—over "good faith" exception

In *United States* v. *Leon*, handed down the last day of the 1983-84 Supreme Court Term, a 6-3 majority adopted the so-called "good faith" exception to the exclusionary rule, at least in search warrant cases, concluding that the "marginal benefits" produced by suppressing evidence obtained when police act with objective good faith cannot justify the "substantial costs" of exclusion. Of the three U-M law professors who have addressed this issue, one (Jerold Israel) has supported the good faith exception, but two (Yale Kamisar and James Boyd White) have opposed such an exception and strongly criticized the present Court's "cost-benefit" approach to the exclusionary rule.

Justice Byron White, who wrote the opinion of the Court in *Leon*, quoted with approval from Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 Mich. L.Rev. 1319, 1412-13 (1977): "The key to the [exclusionary] rule's effectiveness as a deterrent lies [in] the impetus it has provided to police training programs that make officers aware of the limits imposed by the Fourth Amendment and emphasize the need to operate within those limits. [An objective good-faith exception] is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism [nor] encourage officers to pay less attention to what they are taught, as the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the possibility of illegality."

Justice Brennan, who dissented in *Leon*, relied, *inter alia*, on Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than on "Empirical Proposition"?*, 16 Creighton L.Rev. 565 (1983), and J. B. White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 Mich. L.Rev. 1273 (1983), for the view that the attempt to assess the "benefits" and "costs" of the exclusionary rule in various contexts is "a virtually impossible task for the judiciary to perform honestly or accurately" and thus, despite the rhetoric of deterrence, "the reality is that the Court's opinions represent inherently unstable compounds of intuition, hunches and occasional pieces of partial and often inconclusive data." Justice Brennan, also maintained, referring, *inter alia*, to Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 Iowa L.Rev. 551 (1984), that given "the relaxed standard" for assessing probable cause established by the Court the previous year, "it is virtually inconceivable that a reviewing Court...could first find that a warrant was invalid under [the new relaxed 'probable cause'] standard, but then, at the same time, find that a police officer's reliance on such an invalid warrant was nevertheless 'objectively reasonable' under the test announced today." ◘

cases that the rule's survival was to depend on proof that it deters police misconduct.

But ways of thinking about the exclusionary rule have changed. Deterrence and cost-benefit analysis have come to center stage.

For example, in the 1974 *Calandra* case, holding that a grand jury witness must answer questions based on the fruits of an unlawful search, the Court rejected the view that the rule is a "personal constitutional right." It called the rule merely a "judicially created remedy" designed to enforce the Fourth Amendment "through its deterrent effect." Thus *Calandra* was said to present a question "not of rights, but of remedies"—a question to be answered by weighing the costs of the rule against its potential benefits. The exclusionary rule lost—as it usually does when the question is presented this way—and as it did with *Leon* and *Sheppard*.

Ever since the "deterrence" rationale and its concomitant "cost-benefit" analysis have come to the fore, the exclusionary rule has been sitting under a Sword of Damocles. There it will remain until it rests once again on a principled basis.

A cost-benefit approach strongly favors the exclusionary rule's critics. The costs of the rule—for example, the release of a "plainly guilty" heroin dealer—are immediately apparent, but the rule's benefits are only conjectural. It is never easy to prove a negative, and police compliance with the Constitution produces a non-event not directly observable—it consists of *not* carrying out an illegal search.

Moreover, if one must balance the competing interests, how does one do so without measuring imponderables and comparing incommensurables? How does one balance the rights of privacy or liberty against the interest in suppressing crime? Since these are *different kinds of interests*, how can they be balanced without injecting the policy values of those doing the balancing?

The rhetoric of cost-benefit analysis is scientific—it is an inquiry into those facts defining the costs and benefits that deter-

mines the result. But as my colleague James Boyd White has recently observed, "the inquiry can never be performed in an adequate way, and the reality thus is that the decision must rest not upon [scientific] grounds, but upon prior dispositions or unarticulated intuitions that are never justified."

Finally, if not even the direct victim of a Fourth Amendment violation has a "constitutional right" to exclude the evidence—if the use of unconstitutionally obtained evidence presents a question "not of rights, but of remedies"—why should *the courts* "balance" the costs and the benefits? If, as the Court has told us, the exclusionary rule's application turns on a "pragmatic analysis of its usefulness in a particular context," why not replace judicial with *legislative* pragmatism?

In recent years, cost-benefit analysis has led the Court to admit unconstitutionally obtained evidence in various peripheral or collateral settings, such as civil tax and grand jury proceedings. But the Court's recent decisions take a good-sized bite out of the exclusionary rule in its central application: the prosecutor's case-in-chief against the direct victim of a Fourth Amendment violation. And they fray the thread that holds the cost-benefit sword over the exclusionary rule itself. ◘

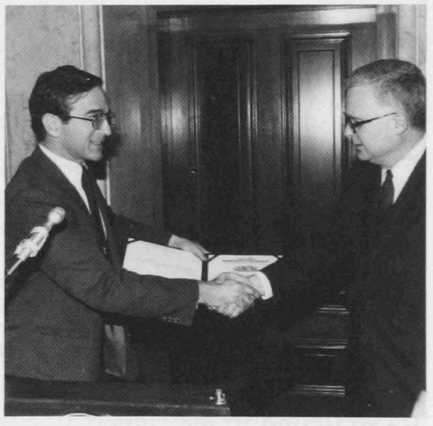
Training for traders

Jackson paints the big picture for government officials

In the fast-moving area of international trade and economic relations, where casebooks are outdated almost by the time they are published, government officials who oversee the day-to-day implementation of United States trade policy are often hard-pressed to keep up with developments in their own fields; a grasp of the "big picture" becomes a luxury few have the time for.

Recently, John Walker, assistant secretary of the United States Treasury and a Law School alumnus (J.D. '66), decided to make official time for just such an overview. To provide it, he called upon John Jackson, the Hessel E. Yntema Professor of Law, an internationally recognized authority on international trade law and one of the Law School's most admired teachers. At the end of the course, the first such Treasury Department venture, Jackson was presented with the Office of the Secretary Honor Award "for outstanding service to the government" that is expected to enhance governmental programs related to trade.

For three Thursdays and Fridays in May, Jackson commuted to Washington, where an audience of 100 awaited him in the newly refurbished Cash Room of the Treasury, once the site of Grant's inaugural ball. Originally, Jackson had thought that the 27-hour course would simply be a condensation of his Law School course in international trade law and economic relations. But the overall sophistication of the audience demanded an extensively revised course. The "students," 80 percent of whom were lawyers, included personnel from the Treasury Department, State Department, Department of Justice, Department of Commerce, the U.S. Trade Representative's Office, the International Trade Commission, and the President's Commission on Competitiveness. They ranged in rank from assistant secretaries to the career civil servants who handle the nitty-gritty detail of U.S. trade policy.



John Walker presents Jackson with his award.

"It was an enormous challenge," says Jackson of his teaching assignment. "At each session, there were people who knew a great deal about the subject and some who knew nothing. And usually, on any special topic, there was someone in the room who knew more than I did. It really kept me honest."

In a lecture-discussion format, Jackson covered the "complex and mystifying" legal structure of GATT (General Agreement on Tariffs and Trade); the U.S. international trade system—including the Trade Act of 1974, of which he was a major draftsman, and the

Trade Act of 1979, on which he consulted for the Senate; the antidumping and countervailing duties issues; the sticky question of government subsidies; and future trade policy issues. He also discussed the substantial international trade role delegated to U.S. courts. A product of the legislative branch's distrust of the executive—which colors all aspects of this country's international trade policies—the extensive use of judicial review is a distinctively American feature.

Jackson is the author of *World Trade and the Law of GATT* (1969), a classic tome that is extensively relied upon by government officials. His most recent book is *Implementing the Tokyo Round: National Constitutions and International Economic Rules* (University of Michigan Press, 1984), written with two other eminent authorities on international trade, Jean-Victor Louis (Belgium) and Mitsuo Matsushita (Japan). This work is unusual in its emphasis on the interplay between international economic agreements and domestic law. The book treats the implementation of the GATT-Tokyo Round in the United States, the European Economic Community, and Japan as a case study of the legal processes and constraints that influence international economic negotiations. Jackson and his colleagues found substantial differences not only in negotiation systems but in the degree to which international rules were—or could be—incorporated in domestic law.

Spurred by preparations for his Treasury Department course, Jackson has already begun work on his next book, on international trade law and policy. Michigan law students will also reap the benefits of Jackson's Washington service, in the form of a substantially revamped Law School course in international trade. ◘

Beloved Law School professor dies

University community mourns Marcus Plant

Marcus L. Plant, distinguished University of Michigan law professor and representative to the nation's top governing bodies in amateur sports, died suddenly at his Ann Arbor home Sunday, July 15, 1984. He was 72 years old.

Plant was a Law School faculty member for 36 years, during which time he worked and wrote in several fields, including workers' compensation and employment rights, torts, the law of medical practice, and medical-legal problems. He was the author of *Cases on the Law of Torts* (1953) and co-author of several editions (1962, 1974, 1980) of *Cases and Materials on Workers' Compensation and Employment Rights*. His exploration of the relationships between law and medicine resulted in *The Law of Medical Practice* (1959), which he co-authored with Burke Shartel. Plant continued to teach following his formal retirement in 1982 and was visiting professor at other law schools.

"Marc Plant was a warm personal colleague, but he was also the epitome of the scholar-teacher who makes our University a great one," said Law Professor Allan Smith, a long-time colleague and former Law School dean and U-M interim president. "He was thorough in his research, often anticipating developments in his field of expertise, and was devoted to his teaching career. He will be greatly missed."

Former students, Law School colleagues, and members of the U-M Athletics Department joined Plant's family and his many other friends at a memorial service at St. Francis of Assisi Catholic Church. Among the speakers to eulogize him was Law Professor John Reed, whose remarks appear on the following page.

As Reed noted, Plant's busy "other life" in athletics had no effect on his extraordinary commitment to the Law School. In 1978, Plant completed a 24-year tenure as the University's faculty representative to the National Collegiate Athletic Association (NCAA), the Big Ten athletic conference, and to related groups. During eight consecutive three-year terms, he also represented the U-M in the Western Collegiate Hockey Association and was a member of the U-M Board in Control of Intercollegiate Athletics. In addition to becoming the dean of Big Ten faculty representatives, he was president of the NCAA in 1967-68, served many years on NCAA policy-making committees, and from 1968 to 1972 represented the association on the board of directors and

Marcus L. Plant

executive committee of the U.S. Olympic Committee. Plant was the NCAA's president when it established its first committee concerned with increasing women's participation in intercollegiate sports.

Plant was born November 10, 1911, in New London, Wisconsin. He received a B.A. degree and a master's degree in economics from Lawrence College in Appleton, Wisconsin. After teaching high school for three years, he entered the U-M Law School, earning his degree in 1938. His legal career included private practice in Milwaukee and New York and service with the Office of Price Administration.

Plant is survived by his wife, Geraldine; three daughters, Mrs. Margaret Calestro of Columbus, Ohio, Mrs. Elizabeth Moore of Owen Sound, Ontario, and Nancy K. Plant of Ann Arbor; one son, Mark W. Plant of Los Angeles; a sister, Esther Shibley; and two grandchildren. Memorial contributions may be sent to the Law School Scholarship Fund or to the U-M Athletic Department Scholarship Fund. ◘

Memorial for Marcus L. Plant

by John W. Reed

Marc Plant came to the University of Michigan law faculty 38 years ago as one of the group of able young lawyers recruited to teach the flood of war veterans resuming their educations after World War II. That young mid-century faculty was the foundation on which the School's present excellence was built, and Marc was a central figure in it. He brought to the faculty a pragmatic perspective drawn from some eight years of practice in Milwaukee and New York and a brief turn in the Washington bureaucracy, but he also brought a deep concern that the law be fair and the legal profession humane.

Marc was a good colleague. Differences of opinion never became points of estrangement, and his gentlemanly response to disagreement encouraged free and creative discussions. Not all our conversations were professional, I hasten to add. He was a collector of jokes, some of which were truly atrocious. He and Hart Wright and I—and in an earlier day, Alan Polasky—would exchange the latest groaners almost every day. But there was among us the tacit understanding that the story would be immediately passed along the corridor to the rest of our colleagues. To have the fun of telling my own new story several times, I knew that I had to avoid telling it early to Marc, or Hart or Alan; and, of course, Marc lost exclusive rights to his stories once he had told them to one of us. I wish I had a file of them, although I admit that it might appeal only to a few of us with warped senses of humor.

No one, I think, took more seriously than he his role as a teacher. Prepared, thorough, sound—these elementary obligations of a teacher he discharged as a matter of course, as generations of students will attest. He was also clear and understandable—qualities that made him especially appreciated by students in the difficult, all-important first year.

But beyond these qualities were others less common, or, at least, ones not taken for granted. He cared about his students as individuals, and they knew this. All of us are asked by our students for letters of recommendation, but Marc much more than most, and he responded with unfailing generosity. Because of the large size of law school classes, the letters most of us write on behalf of our students are often rather impersonal. His letters about his students, in contrast, reveal personal knowledge of each student as an individual. The University and the Law School are the beneficiaries of the affection and good will Marc generated among more than 35 classes of our graduates. This keen interest in individuals continued to the very end, in his generous but unsung role as an adviser to the School's minority students. He cared about all his students, one by one, and they responded warmly to him.

In the Law School he taught a course in law and medicine, always oversubscribed. But he also taught such a course from time to time in the medical school, and in that role became one of those exceedingly rare lawyers held in esteem by doctors.

Marc understood that an educational enterprise is corporate as well as individual, and that the teacher must shoulder part of the administrative burdens. He carried at least his share of these. There is not much unusual in

(continued)

that. But what is unusual is the degree to which he discharged Law School and University assignments without complaint and without asking for reduced teaching loads or preferential class scheduling. Not even his "other life" in athletics led to any abatement of his commitment to the Law School. Much like the Alec Guinness character in "Captain's Paradise," he was able to keep it all going at once, modestly, unassumingly.

Finally, he did not neglect scholarship. He produced widely used texts in his fields of interest, all the while he was fulfilling his other responsibilities in and out of the Law School. And he continued his scholarly work in retirement; indeed, at his death he was preparing a revised edition of one of his books. That scholarship and intellectual curiosity made his teaching imaginative and forward-looking. He accurately prophesied many of the developments in the law of medical practice, in employment rights, and in his basic field of torts; and as a consequence his students became forward-looking lawyers who, unsurprised by change, are competent to practice in a constantly changing society.

In short, Marc Plant was the "compleat teacher." Thorough scholar, careful expositor, caring counselor, congenial colleague—all of these he was. For his having been among us, we are the richer—his school, his students, his colleagues, his friends, you and I. We shall miss him. But today we rejoice—rejoice in a life well and usefully lived—rejoice in a life that gave much to others. And, rejoicing, we thank God for him who was among us. ✠

Law Professor John Reed, a longtime colleague and friend of Marcus Plant's, delivered these affecting reminiscences at a memorial service held Wednesday, July 18, 1984, at St. Francis of Assisi Catholic Church in Ann Arbor.

Watching your language

Leading free speech scholar joins faculty

He came, he saw, he stayed. In July, Frederick Schauer, a visiting professor at the Law School during the 1983-84 academic year, joined the permanent faculty.

A prolific scholar who has established a reputation as one of the nation's leading students of constitutional law, Schauer came to Michigan from the College of William and Mary, where he was the Cutler Professor of Law. He holds A.B. and M.B.A. degrees from Dartmouth College and a J.D. from Harvard University. Before beginning his academic career at West Virginia University in 1974, he spent several years in private practice.

In an interview last summer, Professor Schauer discussed his research interests and the path that led him to academia. New faculty members Rebecca S. Eisenberg and Jessica D. Litman will be profiled in the next issue of the magazine.

Free speech expert Frederick Schauer is as easy with words as he is with the animated gestures that punctuate his conversation. Asked what motivated his move to Michigan, Schauer hesitates only a millisecond. "More than any place I've ever seen," he says, "the Law School is a community in which serious, committed scholarship is a respected activity."

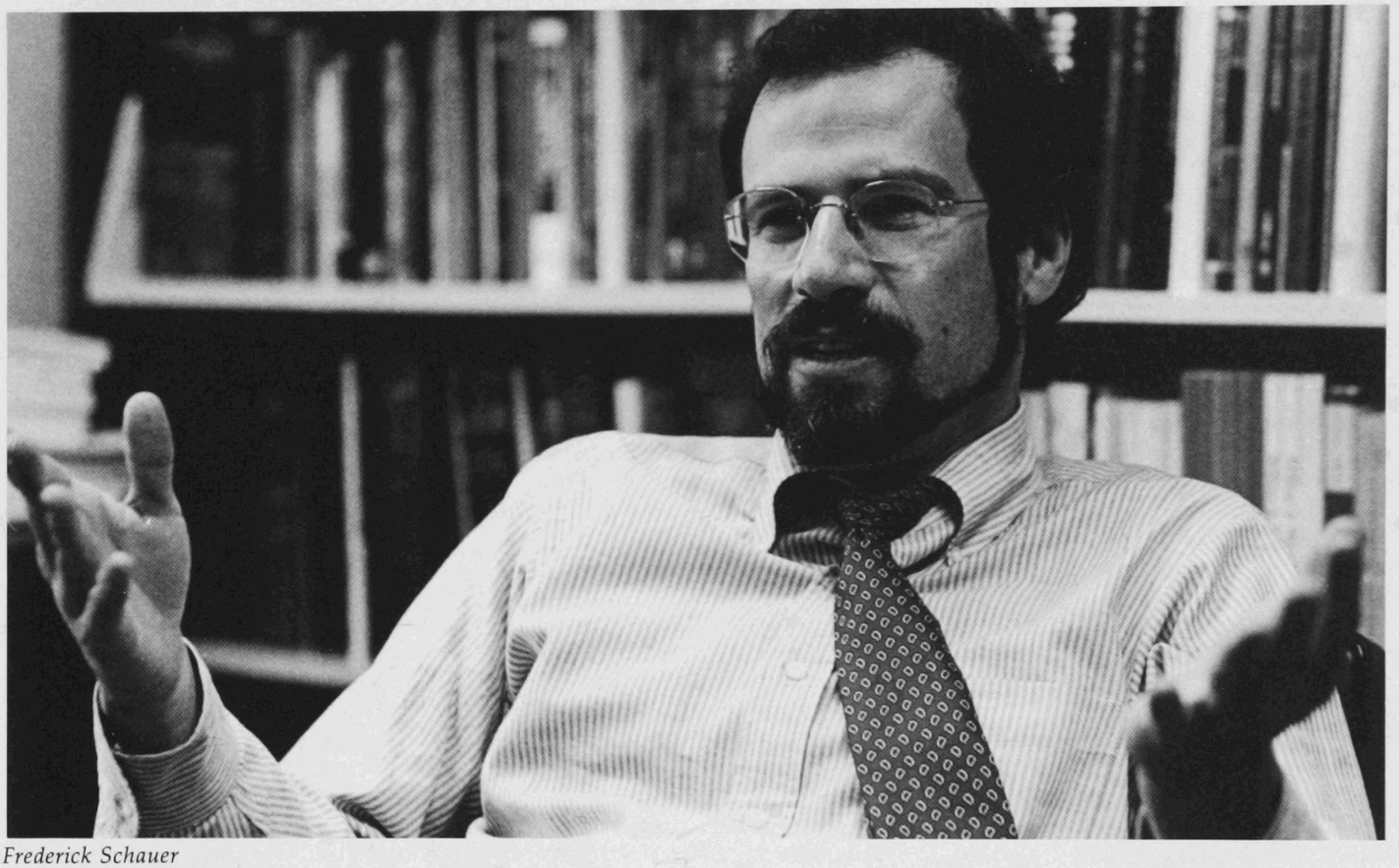
But had anyone suggested to him, upon his graduation from Harvard Law School in 1972, that he was destined for the faculty of one of the nation's preeminent law schools, words just might have failed him. Uninterested in an academic career, he also lacked the law school credits that, crowned with a clerkship, open ivy-covered doors.

He had not made law review; he wasn't number one in his class. In fact, during his first year at Harvard, he had hardly *gone* to class, expecting daily that Uncle Sam would make good on a September promise to draft him, thus saving him from final examinations. The army finally caught up with Schauer at the end of his second year, "rescuing" him not from first-year examinations but from the finals of Harvard's moot court competition.

After graduating from Harvard, Schauer practiced for two years with the Boston, Massachusetts, firm of Fine & Ambrogne. Within the relatively small firm, which at the time represented the Boston Celtics and a number of other clients in professional sports, he enjoyed "the type of practice my classmates would have killed for." His docket burgeoned with interesting, sophisticated cases for which he had significant responsibility: sports law cases, antitrust and securities law cases, and a fair amount of what he first euphemistically called "constitutional" litigation.

"I defended dirty movies," Schauer translates. "One of the firm's clients was in the movie business, and he discovered there was more money in dirty movies than in clean ones. So I became a constitutional lawyer."

Paradoxically, it was Schauer's intense interest in his constitutional law practice that caused his departure for academe. "There was never enough of my time or the client's money to pursue the issues in depth," he says. "The scholar



Frederick Schauer

in me began to come out."

Schauer joined the West Virginia University law faculty, bringing both the practitioner's experience and the scholar's curiosity to bear on the first subject he probed: obscenity law. The result was his highly regarded 1976 book, *The Law of Obscenity*. Indeed, most of Schauer's scholarship—distinguished, says Dean Terrance Sandalow, "by penetrating analysis and a willingness to question conventional wisdom"—has been concerned with problems of freedom of speech. His most recent book, *Free Speech: A Philosophical Enquiry*, emerged from his year as a senior scholar at Cambridge University and has been widely praised by both legal scholars and philosophers.

If the impetus for Schauer's interest in free speech came from his practice, his year at Cambridge joined to it a strong interest in philosophy of language and a belief that most traditional free speech thinkers underestimate the power of language.

"Many of my views about free speech—which are skeptical and far from universally accepted," he allows—"are premised on an understanding of what language can do. To me, it seems odd to consider speech 'harmless,' for speech can and does cause the kinds of consequences normally considered appropriate for governmental response. Speech can hurt people, and preventing hurts is the type of thing we expect the state to do.

"So, one of the questions I find myself asking is, 'Is there any reason for a distinct principle that relates to free speech?' In looking at that question, I'm skeptical. I find most of the arguments for free-speech-as-a-good-thing troubling or nonpersuasive. Speech is good, and important, but so are lots of other values, including many of the values, such as privacy, reputation, and security, often invoked as justifications for restricting speech. The question to be asked is why we should carve out a special principle for speech, and it is that question to which I have yet to discover a satisfactory answer."

Schauer's skepticism does not overflow its philosophical boundaries to dampen his enthusiasm for, and commitment to, constitutional text. A second facet of

Schauer's free speech explorations deals with the First Amendment: How can it best protect free speech at the core—governmental regulation of its critics? Here again, Schauer's views diverge from canon.

"The standard view," he explains, "is that more protection is better. I take a 'narrow but strong' view of the First Amendment, one that says we shouldn't protect tangential First Amendment concerns. When we allow First Amendment principles to protect advertising and unabashed hardcore pornography and that sort of thing, we run a serious risk of diluting the amendment's protection. First Amendment doctrine is like an oil spill: Its protection is likely to thin as it expands."

The counterintuitive nature of free speech principles makes it particularly easy to spread First Amendment protection too thin, Schauer contends. "If there were no U.S. Constitution," he theorizes, "we might say that if speech has harmful consequences, we should do something about the speech. One of the more interesting things about free speech is that despite 200 years of Fourth of July speeches praising it and 65 years of litigation defending it, there is little public support for the value. Most people think it's okay only if it takes place Somewhere Else. As soon as it comes near them, they want to suppress it."

A look at those 65 years of litigation makes clear why this should be so. "One of the significant things about free speech adjudication," notes Schauer, "is that the litigants are frequently despicable individuals with ridiculous or offensive things to say. It would do wonders for popular acceptance of free speech principles if the government were to prosecute the works of Lawrence Welk, Norman Rockwell, or some other publicly popular communicator." Until then, he points out, long-term protection of free speech will continue to hinge on the willingness of judges, juries, and the general public to recognize less savory litigants' claims—and on their ability to see that their own long-term rights are at stake. This, says Schauer, becomes more and more difficult when free speech principles are trivialized by the inclusion of tangential concerns.

Schauer also sees problems in the current trend, within First Amendment doctrine, toward the use of finer instruments calibrated to distinct categories of speech. "Implicit in the First Amendment," he says, "is the idea that we will protect short-term evil to ensure the long-term value. To do so, we must look at large values or categories rather than particular cases. Since many First Amendment claims are made on behalf of unattractive people espousing loathsome attitudes, looking at the value of the particular speech at issue in a particular case is likely to undervalue the long-term First Amendment concerns."

The idea of more finely calibrated instruments is not totally without merit, Schauer acknowledges, and he does not object to some line drawing within the First Amendment. "There are intuitively correct differences," he notes, "between the principles we should apply to political argument and pure commercial advertising, for example. But it's too easy for lawyers to ignore fundamental differences in favor of worrying excessively about how to draw lines at the edges. Ask a lawyer about the difference between day and night and you'll get a discourse on dusk. It's the lawyer's disease."

Limiting the disease's incursions—or at least describing its manifestations—also ranks high on Schauer's research agenda. "Both in the areas of constitutional adjudication and legal theory," he says, "I'm concerned about legal categories and line drawing, and how these relate to the conceptual categories we use. Too many people take the inability to draw a precise line as conclusive evidence that you can't make a distinction. That's just invalid. We can't spend all our time nibbling around the edges. We must deal with fundamental differences.

"I'm concerned with the way law operates outside the narrow range of legal life that is of concern to lawyers. It is too easy for lawyers to generalize from the part of the law that they see to the nature of law itself."

Lawyers, Schauer notes, deal in close cases—the ones that are worthy of litigating. As a scholar, he finds himself equally, if not more, interested in easy cases, and in how the Constitution operates, beyond close cases, to constitute American society.

As a constitutional theorist, what distinguishes Schauer from his colleagues is his close attention to text and his view that constitutional rhetoric rules out wrong answers rather than pointing out right ones. Hand in hand with his belief in the power of language goes pragmatic recognition of its limits.

"If we expect too much from language then we will give up on it too easily," he insists. "If we have a more modest, realistic expectation of how language operates, including an understanding of the uncertainty and imprecision inherent in both language and life, then we will not be attracted to the nihilism that afflicts the disappointed seeker of absolute precision." ◘

A dean called Sue

Students love her, administrators promote her

Susan M. Eklund, a Law School assistant dean since 1976, has been promoted to associate dean for student affairs and operations.

Announcing the appointment last spring, Dean Terrance Sandalow cited both the broad range of Dean Eklund's responsibilities and her exceptional skill in discharging them. "It would be an understatement to say merely that Dean Eklund has performed superbly in her years at the Law School," he said. "Her performance has been notable for unusual initiative, imagination, and sound judgment.

"Dean Eklund's current responsibilities are very broad," he added, "extending to all areas of student life except admissions and curriculum. In addition, she serves as secretary of the faculty and has begun taking on special projects. As associate dean, she will undoubtedly take on additional special projects as the need arises."

Eklund received her B.A. degree in 1970 and her J.D. degree in 1973 from the U-M. Upon graduation, she spent two years as a legal services staff attorney on a Navajo Indian reservation in Arizona. Before assuming her Law School position in 1976, she was associated with the Research Group, Inc., an Ann Arbor firm that provided research services to the legal profession. ⊠

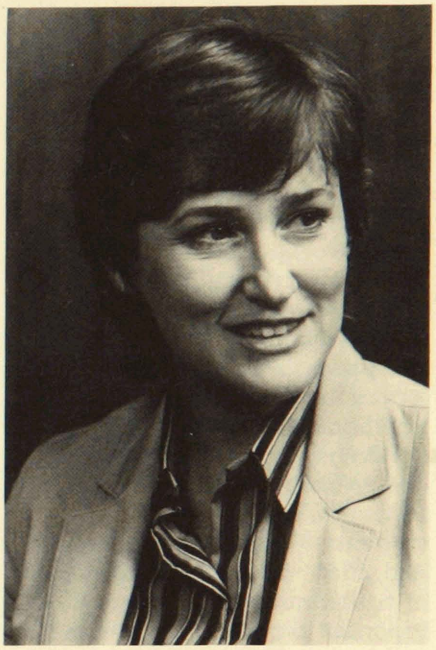
As the faculty began its recessional at Senior Day ceremonies this spring, law students—now officially *former* law students—threw their caps in the air and gave their mentors a round of applause. They reserved a special last hurrah for Law School Associate Dean Susan Eklund, who exited to heartfelt cries of "Yeah, Dean Sue!" impromptu thank you's for aiding and abetting their law school careers.

"Dean Sue" earns bouquets from students and colleagues alike. Described in one prelaw handbook as "the nicest law school dean in the country," Eklund occupies a position that receives serious attention at very few law schools. As dean for student services, her most important product is a student's successful progress through law school; to that end, she is counselor and mother confessor as much as administrator.

Eklund's reputation for accessibility (and for bending the rules when the case merits and setting limits with warmth when it does not) is one she tends carefully. "We do a lot of advertising," the 36-year-old dean says quite simply.

Example: Although Eklund greets all new students during orientation, she makes a point of renewing the acquaintance by meeting with every first-year case club later in the academic year. The setting—Dominick's—is as informal as the business conducted.

"We discuss mundane sorts of things," she says. "How the water is warm in the drinking fountains; how professor so-and-so is only one-quarter of the way through the syllabus—I assure them he'll get through and that they'd better, too—and then I approach more difficult topics—how law school is competitive and what the job alternatives are. Always, after one of those meetings, I increase business.



Susan M. Eklund

"I think the contact with the students tends to give the job its purpose," she reflects. "Discussing drop-add deadlines is not particularly sustaining in the long term, but it gives you a chance to get to know the students—and to see them grow. There's a lot of satisfaction in helping people discover how to be a student and a lawyer.

"Our students are quite mature, but many times they have real-life problems that encroach on their studies—part-time jobs or family difficulties. People say it's a lot easier to be a student than to be in practice, but in practice, you set your own timetable to a greater extent than we sometimes assert. Students can't do that."

For Eklund, smoothing students' paths through law school may mean agreeing to reschedule an exam (students often want the date pushed forward rather than back) or making financial aid arrangements for a student who temporarily is not enrolled but is working on an incomplete. It also involves taking what Eklund terms a "systems approach" to the student services enterprise, an approach that, she says, lends a measure of excitement to routine administrative duties.

When Eklund first assumed her deanship, many of the Law School offices that work with students—offices like Financial Aid, Placement, and Records, all of which now report to her—reported to other people. The result was that when students made inquiries or suggestions, she had no clear authority to take action. "At the same time," she says, "no one else was responsible for evaluating the way in which the many pieces of a law student's life—classes, extracurricular interests, career planning, finances, personal circumstances—fit together, or worse yet, didn't fit together.

"The operations of the Law School offices that serve students are all interrelated," she continues. "If a student is scared about finding a summer job, in part because of concern about financial aid, that student can't go to the Records Office in the middle of the placement season to be told, in an unfriendly tone, that a transcript won't be ready for two weeks. It's making this type of connection that interests me."

In her student days, Eklund had quite different interests. A political science major and Spanish minor as a U-M undergraduate, Eklund had as her life goal the transformation of Latin American dictatorships into great democracies. The radical 60s, she says, modified her ambitions: "I decided that the best thing we could do for South America was to leave it alone. I changed my goal to merely saving the United States. I went to law school with that in mind."

Counseling students is a vital part of Associate Dean Susan M. Eklund's job.

After completing law school at the U-M, Eklund spent two years as a legal services attorney on a Navajo Indian reservation in Arizona, working primarily in the areas of consumer protection, students' rights, and welfare. The people for whom she worked were poor, and few spoke English; her home was a tiny town "100 miles from the nearest stoplight in all directions." Says Eklund: "It was as much like the Peace Corps as it could be and still be in this country."

Eklund enjoyed legal services work, but not the aggressiveness that litigating demanded. When she returned to Ann Arbor with her husband, Stephen, a dentist who worked for the Indian Health Service, it was with an eye toward university administration and to a one-year job with the Research Group, Inc.

Shortly after her return, Eklund participated in the Law School's first alumnae conference, never thinking the appearance would land her a job. But when the assistant deanship, then held by Rhonda Rivera, came open a few months later, Eklund received a call from Dean Theodore St. Antoine.

"I was startled when Ted called," Eklund remembers. "I was sure he had discovered some unpaid tuition or that my degree was being rescinded." But no, the dean wanted to know if she was interested in Rivera's job. She was indeed. Just a few days earlier she had read about the opening, lamenting to her spouse that she was too young for the job and that she wished the Law School knew how good she'd be for the position.

That Eklund had only one skill she considered relevant to the job at the time—her years as an orientation leader—proved an advantage, she feels: "I was a blank slate. I was not astute about the power structure, and I had no preconceptions about the job. I had no other approach than what would be logical. And maybe, being a woman, I wasn't

fearful of asking questions. A lot of men would not have gone to the faculty and said: 'Tell me what you'd like to teach.' But I did, and the result was that some of our very best teachers revealed a desire to teach first-year courses."

Asked if being a woman is an advantage in her position, Eklund responds that it may be. "I think I'm more willing to express sympathy," she allows. "When a student makes a request to which many males' first reaction would be, 'That's outrageous!' my first inclination is to say, 'That's a terrible situation. Let's discuss all the options and their consequences.' In the end, though, I may handle the request in the same way my colleagues would."

Since she assumed the deanship, Eklund has had two children, and portraits of the Law School staff, sketched by her 6-year-old son, David, give her Law School quarters the comfortable ambience of a pediatrician's office. "I don't think it hurts to have had a couple of kids since I came," she offers. "It makes it visible that I do some nurturing elsewhere—so maybe I could do some here, too. Nobody knows what men do at home."

There may be a certain constancy to the questions students bring to Eklund as they peruse David's newest artistic creations. The dean, however, finds herself seeking new, improved answers to their questions as she grapples with the issue of financial indebtedness—as elsewhere, the average student loan debt upon graduation exceeds $20,000—and ponders low-cost solutions to integrating skills training into the curriculum without sacrificing its intellectual core. "There's also more we need to do to help students make sensible placement choices," Eklund says.

Eleven years after completing law school, Eklund is content to leave the saving of these United States to someone else. "If one person can help make life a bit better for a fair number of people, that's worth a lot," she philosophizes.

"Our grads assume powerful positions, and I like to think that I've helped to teach them that there can be a humanity without sacrificing standards and quality. The students who come to me with budgets for student activities invariably overstate their needs. I say, 'Now tell me what you really need.' It's a revelation to them that they could make an honest request and have it dealt with honestly. I'd like to think they'll remember that during negotiations for a merger or a divorce settlement." ◘

Deans and directors

Old friends assume new positions

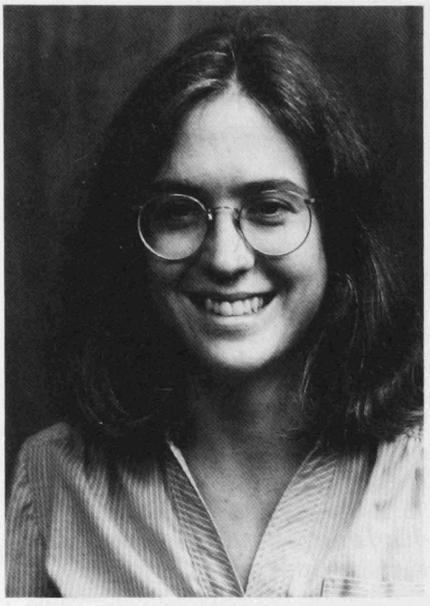
Last July, Dean Terrance Sandalow announced three new administrative appointments in the Law School. Beginning September 1, Professor Beverley J. Pooley became associate dean for the Law Library for a five-year term. Margaret Leary succeeded him as Law Library director. Also effective September 1, Virginia B. Gordan became assistant dean for a three-year term.

Pooley joined the law faculty in 1962 and has been director of the Law Library since 1965. His new administrative appointment "recognizes a realignment of responsibilities between him and Margaret Leary, who will become director of the Law Library," Dean Sandalow said. "Professor Pooley will be concerned mainly with major budgetary and policy issues confronting the Library and with assuring its continuing responsiveness to educational and research objectives determined by the faculty."

Pooley holds an LL.B. degree from the University of Cambridge in England and earned LL.M. and S.J.D. degrees from the U-M. One of the Law School's most spirited and popular teachers, he has written on the subject of land use controls in the United States

Beverley J. Pooley

Margaret A. Leary



Virginia B. Gordan

and is presently interested in contracts and in African law. Before coming to the Law School, he taught at the University of Ghana.

Leary, who was previously the Law Library's associate director, joined the Law School staff as assistant director of the Law Library in 1973. From 1968 to 1970, when she began law school, Leary was chief cataloger at the University of Minnesota Law Library. She holds a B.A. from Cornell University, an M.A. degree in library science from the University of Minnesota, and a J.D. from William Mitchell College of Law in St. Paul. In addition to her duties at the Law Library, she also serves as a lecturer in the U-M School of Library Science.

Gordan joined the Law School staff in 1981 as coordinator of academic programs. "Ms. Gordan's duties at the School have grown to include a broad range of activities," Dean Sandalow said. "She is immediately responsible for administration of the School's graduate program and of its Minority Academic Advancement Program. In addition, she shares responsibility for academic and personal counseling of all J.D. candidates."

Gordan holds an A.B. degree from Brown University and a J.D. degree from the University of Pennsylvania. Before coming to Michigan, she was associate director of the Legal Research and Writing Program at the University of Virginia Law School and practiced law in Washington, D.C. and Philadelphia. ◘

Ross accepts government tax post

In July, Professor **Dennis Ross** began a two-year leave of absence from the Law School during which he will serve the federal government as deputy tax legislative counsel in the United States Treasury Department.

The Office of the Tax Legislative Counsel, which reports to the Treasury Department's assistant secretary for tax policy, is the executive branch's tax advocate with the Congress. Its responsibilities include formulating the administration's tax proposals and shepherding such proposals through the Congress. It also has oversight responsibilities for tax rulings and regulations originating with the Internal Revenue Service. One of Ross's first tasks will be the development of interpretive regulations for the Deficit Reduction Act of 1984.

Ross, who is a Law School alumnus (J.D. '78), joined the Law School faculty in 1982 after clerking for the Honorable J. Edward Lumbard of the Federal Court of Appeals in New York City and practicing with the firm of Davis Polk & Wardell, where he specialized in tax law. Tax law has continued to be the major focus of his scholarly work, and his new government job places him in a key tax policy position at a time when major tax reform is likely. "Whoever is elected as president in November," he predicted, "is almost certain to rethink tax policy in a rather wholesale fashion. The major decisions will be made at various levels, but I hope to have some influence on the form they take." ◘

Information, please

Conference examines controversial Reagan administration policies

In August, 1983, the Reagan administration unveiled plans to institute a system of "prepublication review," designed to limit information leaks and protect national security by subjecting government employees with access to high-level classified information to lifetime government censorship. The plan, which was withdrawn after a storm of protest, was the catalyst for increased public and media scrutiny of other administration information policies instituted in the name of national security.

In the pages of the *Nation*, the *New York Times*, and the *New York Times Magazine*, worried critics declared that the proposed prepublication review requirement, the exclusion of the press from Grenada, the denial of visas to foreigners invited to speak in the U.S., increases in CIA and FBI authority and new limitations on the Freedom of Information Act represented an unprecedented threat to the people's "right to know" and clashed with the principles of free speech, press, and association embodied in the First Amendment.

Last spring, critics and defenders of the administration's information policies gathered at the U-M's Rackham Auditorium to debate, before a total audience of over 1,400, the nature and extent of the harm—and, indeed, to ponder whether harm there be. The two-day forum on the "Reagan Administration and the First Amendment" brought together a remarkable group of 23 professionals—a journalist, a historian, a scientist, lawyers and law professors, former and current government officials—all eminently qualified to speak to the issues at hand.

Just as remarkable was the group that organized this major academic conference. Spurred to action by an influential *New York Times Magazine* article, "The New Effort to Control Information," by Floyd Abrams (September 25, 1983), more than 150 University of Michigan students, half from the Law School, pooled their time and talents to develop the event, whose major sponsors were the U-M chapter of the National Lawyers' Guild and the Washtenaw County chapter of the American Civil Liberties Union. Said moderator and then Visiting Law Professor Frederick Schauer, who singled out the contributions of law students Ned Miltenberg, Jim Jacobson, and Peter Levine: "The students committed themselves to demonstrating—successfully—that students can be interested enough

Former Michigan Law Professor Vincent Blasi returned from Columbia University to voice his moral indignation about the Reagan administration's information policies.

and competent enough to carry off a conference like this."

In his opening remarks, Schauer warned the audience not to equate the harshly critical views of many of the conference's student organizers with those of all panelists. He noted that both the conference's academic auspices and "an open marketplace of ideas" mandated a balance between critics and supporters on each of its four panels. That balance was achieved, but without the presence of an official Reagan administration spokesperson. Panelists like FCC General Counsel Bruce Fein had administration connections and sometimes voiced administration views, but the student organizers found no takers for the 45 invitations extended to "official administration representatives."

Schauer also suggested that listeners be skeptical of speakers' claims of First Amendment violations, urging the audience to distinguish between unconstitutionality and speakers' personal antipathies. "Things can be wrong, misguided, or just plain dumb without being unconstitutional," he reminded the audience. "It would be a mistake to assume that we are only talking about the First Amendment rather than about information and the flow of information."

Indeed, it was the flow of information—and the purported shutdown at the tap—that dominated discussion. Bruce Fein presented his views on government regulation of the broadcast media; UCLA Law Professor Richard Delgado offered a learned and fascinating discourse on how the government utilizes language to shape public opinion about the nuclear arms race. In the opening session, Anna Nelson, a professor of history at George Washington University, outlined the difficulties created for historians by Executive Order 12356 on National Security Information. The 1982 order, Nelson explained, upgraded the classification of government documents—which must now be classified at the highest possible level of secrecy—and reversed a 30-year trend toward fewer secrets and the earliest possible declassification of documents.

The rationale offered for Executive Order 12356 and other Reagan administration information policies has been the protection of national security and the prevention of information leaks. James Zirkle, Professor of Law at William and Mary and an occasional consultant to the CIA's general counsel, reminded the audience that "terrorism has become an instrument of state policy that is used, unfortunately, more and more often." New limitations on the Freedom of Information Act (FOIA) received praise from Michael McDonald, director and general counsel of the conservative American Legal Foundation, who defended them as necessary "to prevent the act's misuse by organized crime, terrorist groups, and enemy agents." John Shenefield, associate attorney general under President Carter, agreed there was need to reform FOIA in the national security area. "The concern for national security is not an empty one," he said.

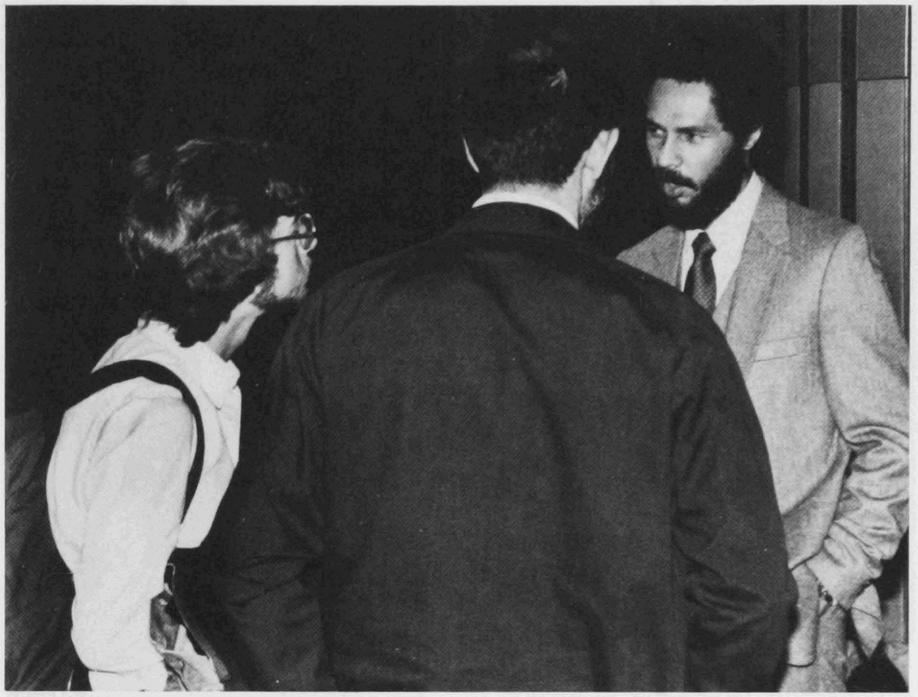
Some panelists were alarmed, however, by the motives they perceived for the administration's information policies. City University of New York Law Professor Victor Goode was among them. The administration, Goode said, has "a stunted view of the public it is sworn to serve. It assumes that the people, including Congress, have neither the right nor the ability to process the complex information now in the hands of government agencies." Goode's

An influential New York Times Magazine *article by speaker Floyd Abrams was the impetus for the conference.*

Well-known civil liberties lawyer Arthur Kinoy was the conference's most passionate speaker.

view received a second from an unexpected quarter: Cindy Levy, national security aide to Senator Orrin Hatch (R-Utah). Even her office, she said, has trouble obtaining information from the administration. Why? "The administration simply doesn't believe that Congress or citizens can assimilate information."

Others who agreed with Levy and Goode's analysis were apprehensive about the national security–free speech battles they see looming. "When the administration purports to strike a balance between national security and free speech, there is no balance at all," said Floyd Abrams, partner in the New York law firm of Cahill, Gordon & Reindel and



Discussion did not end with the panelists' departure from the dais. Here, CUNY Law Professor Victor Goode makes a point for an audience of two.

one of the nation's most prominent litigators on behalf of the media. "For them, a claim of national security—no matter how frail—overcomes all claims of freedom of expression and the public's right to know. They view that right as First Amendment rhetoric, kneejerk liberalism not to be taken seriously."

Rutgers University Law Professor Arthur Kinoy, an active combatant in many of the most important civil liberties disputes of modern times (*Dombrowski* v. *Pfister, Powell* v. *McCormack, United States* v. *United States District Court*), shared Abrams' view that the Reagan administration's information policies pose a genuine threat to the First Amendment. "I'm here tonight," he declared at the beginning of an impassioned speech, "because I feel that we are at a moment of total crisis in the life and history of our country."

Former Law School Professor Vincent Blasi, now at Columbia University, expressed a similar sense of outrage. "Usually," he said, "I'm an insipid voice of moderation. Here, I feel a great deal of moral indignation about what the administration is doing, particularly about the denial of visas and the prepublication review scheme, which fly in the face of basic First Amendment principles." Although there are risks, governmental protectionism in the area of national security demands an antidote of open debate, he said. "Precisely because the government will be biased in this area," Blasi explained, "self-government is most important."

To Blasi, the Reagan administration's claim of unprecedented threats to national security is standard issue stuff. "Every time there has been a frontal assault on First Amendment principles," he said, "there has been this claim, *never before, new threat.*" Well founded or not, such claims breed an atmosphere within government of overreaction and overclassification, insisted Law Professor Lillian BeVier of the University of Virginia.

Law Professor Yale Kamisar cited Attorney General William French Smith's guidelines on FBI domestic surveillance as a good example of such overreaction. He characterized them as "so overbroad they pick up not only the terrorist but the housewife who's against nuclear weapons."

Yet many participants refused to share Kamisar's concern or Blasi's outrage. Georgetown University Law Professor Mark Tushnet discerned what he called a "Chicken Little" position on the Reagan administration's information policies. He, for one, could not see the sky falling. Neither could John Shenefield, who dismissed the notion of a concerted administration effort to "subvert our civil liberties." Panelists of diverse political stripe agreed that the Reagan administration was far from solely responsible for the current situation.

Surprisingly, the brightest view of the future came not from an administration defender, but from a self-admitted fence-sitter, skeptical of claims made by either camp.

"I believe in the system," said the University of Virginia's BeVier. "When you get this kind of overreaction, you get people like Floyd Abrams bringing the issue to debate. I'm an optimist. If we can talk about the fact that the government keeps things secret, maybe we'll end up better off in the long run." ⊠

Alumni Jim Jacobson, Peter Levine, Ned Miltenberg, and Gregoria Vega-Byrnes contributed to this Law Quadrangle Notes *report.*

April showers, May reunions

Law alumni convene to celebrate old times, explore the new

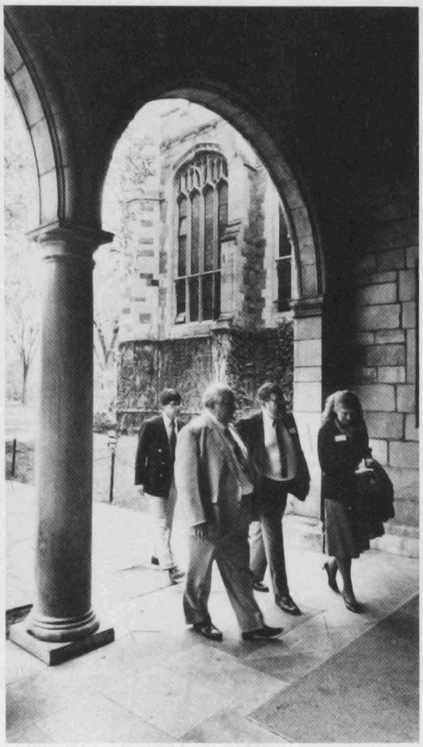
Any enumeration of the Law School's distinguished faculty would certainly include the name of William W. Bishop, Jr., now professor emeritus of law. But when he joined the festive crowd of alumni assembling at the Lawyers Club one warm Friday evening last spring, it was not as professor but as distinguished alumnus, Law Class of 1931—a graduation date that truly made him *primus inter pares* among the nearly 150 alumni attending the fifth annual Law Alumni Reunion and Law Forum (LARLF), May 18 and 19, 1984.

From all across the country, from 41 graduating classes, including the class of 1983, alumni returned: to stroll the Quadrangle's well-worn flagstone paths and delight in tender shoots of ivy climbing massive, sun-warmed walls; to sit once again in solid, oaken chairs under jurists' watchful eyes; to reminisce with old friends and chat with former teachers who have become friends; and to discover what the good *new* days have brought to the Law School since they last turned a key in the lock of a Lawyers Club room.

The fare was elegant at the Friday evening faculty reception and buffet supper, held at the Lawyers Club. All agreed that it surpassed memories (good and bad) of meals taken there in former times. The conversation abounded in warmth and liveliness as classmates rediscovered the pleasure of each others' company, introduced spouses who had not met before, and chatted with the many faculty members in attendance. Five classes—'34, '43, '44, '45, and '74—had made arrangements to hold their reunions during the all-class reunion weekend, and there was much animated calling back and forth as yet another reunion-class member entered the Lawyers Club lounge.

As in past years, the weekend's activities were prospective as well as retrospective in nature, academic as well as social. On Saturday morning, alumni gathered in Hutchins Hall for a short talk from Dean Terrance Sandalow and to hear three distinguished alumni—the Honorable Prudence Beatty Abram (J.D. '68) of the United States Bankruptcy Court for the Southern District of New York, Myron M. Sheinfeld (J.D. '54) of the Houston, Texas, firm of Sheinfeld, Maley & Kay, and U-M Law Professor James J. White, (J.D. '62)—discuss the impact of changing bankruptcy law concepts on areas as diverse as consumer credit, collective bargaining, and the structure of the federal judiciary. As in their student days, alumni took copious notes and posed demanding questions.

Then, after a fine noontime repast in the Lawyers Club dining room, many alumni took one of the town's least well-known and most entertaining tours: Professor Beverley Pooley's learned and witty sojourn through the old and new law libraries of which he was director and is now dean (see story, page 11). Those with energy still to burn before a final round of evening dinners and class receptions swung onto a U-M bus for a look at the University's parklike North Campus and a glimpse of the construction-in-progress on the $285 million U-M Replacement Hospital.



At mealtime, faculty and alumni repaired to the Lawyers Club. In the foreground: Professor William Pierce. Alumnus Theodore Lauer (S.J.D. '58) is at his right.

Planning for next year's reunion, slated for May 17 and 18, 1985, is already underway, and a forum topic—tax law—has been selected. Early in 1985, all graduates will receive a brochure describing the reunion weekend; those in reunion-year classes ('35 and '60) will also hear from class reunion coordinators. We encourage other classes to hold their reunions during LARLF (for information, contact Jonathan D. Lowe, Director, Law School Relations, U-M Law School, Ann Arbor, MI, 48109-1215); and we cordially invite all of our alumni back to the Law School for a glorious spring weekend attending LARLF. ⊠

Nineteen thirty-four graduate Richard Perkins (right) shares a confidence with classmate Cornelius Van Valkenburg.

Beverley Pooley's tour of the new Law Library was a highlight of Saturday's program.

The forum drew on the expertise of three distinguished alumni: Prudence Beatty Abram, James J. White, and Myron M. Sheinfeld.

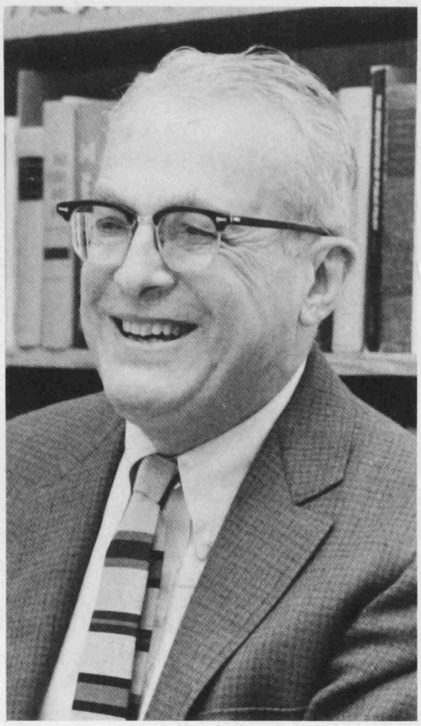
Frank Kennedy, left, principal architect of the recently enacted Bankruptcy Act, attended the Saturday forum. At far right, fellow Professor Emeritus William W. Bishop.

Expert alumni panelists drew smiles from the law forum audience.

The Friday faculty reception offered a fine chance to catch up with old friends.

Alumni Notes

David C. Miller



John W. Lederle

□ On April 23, 1984, **David Charles Miller, Jr.,** J.D. '67, was sworn in as United States ambassador to Zimbabwe. A former assistant to the Assistant Secretary for African Affairs, Miller was ambassador to Tanzania from 1981 until his appointment to the Zimbabwe post.

A native of Ohio, Miller received his undergraduate degree from Harvard in 1964. After graduating from our Law School, he was a research associate with the Simulmatics Corporation, an advanced research projects agency, in Vietnam. From 1969 to 1970, he was special assistant to the Attorney General, and from 1970 to 1971, he was director of the White House Fellows Commission.

From 1971 to 1981, Miller was an executive with the Westinghouse Electric Corporation. During his career at Westinghouse, he was assistant to the executive vice president for defense and public systems; director of planning, Westinghouse World Regions, Pittsburgh; director of corporate international relations; general manager of the TCOM Corporation, a Westinghouse subsidiary in Lagos, Nigeria; Westinghouse country manager for Nigeria; and deputy for international business operations, Westinghouse Defense Group, Baltimore.

Miller is a member of the White House Fellows Association and the Harvard Club.

□ With all the awards and honors amassed by distinguished Law School alumni, it is still an unusual event when a building is named for one of our graduates. Last October, the University of Massachusetts conferred just such an honor upon **John W. Lederle,** LL.B. '36, when the university's Graduate Research Center was named for him.

Lederle, who also earned his A.B., M.A., and Ph.D. degrees at the University of Michigan, was president of the University of Massachusetts from 1960 to 1970, a decade of tremendous change for that institution. He took charge of a struggling, little-known university with fewer than 6,000 students and oversaw its transformation into a major center of research and advanced study. During his tenure as the University of Massachusetts' fifteenth president, enrollment tripled and the number of faculty, total operating budget, and books in the library quadrupled. Faculty salaries and the number of advanced degree programs doubled; graduate student enrollment went up almost 300 percent. Nearly 50 major buildings were begun or completed. The Graduate Research Center, which now bears Lederle's name, was planned during his tenure and constructed between 1971 and 1973.

Upon graduating from the Law School, Lederle practiced law in Detroit and taught political science at Brown University, where he became an assistant dean. He returned to Michigan in 1944 as a member of the political science faculty. With the exception of two years as Controller of the state of Michigan, he remained at the U-M until 1960, serving for 10 years as director of the Institute for Administration, of which he was a founder. The recipient of numerous honorary degrees, he has also served the public as a consultant to special Senate committees and as a member of various advisory boards. ■

Alumni news notes

'50 **Everett M. Scranton** has been named director of investor relations in Chrysler Corporation's public affairs office.

'51 **George A. Leonard** is serving as chairman of the 1984 United Appeal Campaign in Cincinnati, Ohio.

'54 **Robert B. Dornhaffer,** a Meadville, Pa., attorney, has been elected a zone governor of the Pennsylvania Bar Association.

'59 **Malcolm H. Fromberg** was elected mayor of the City of Miami Beach, Florida. He also serves as senior vice president of B'nai B'rith International.

'62 **Paul D. Borman** is president of the Federal Bar Association in Detroit for 1984-85.

Peter D. Byrnes has established a new firm in Seattle, Wash., under the name of Byrnes & Keller.

'72 **Kevin D. Slakas** has become general counsel to the New York Convention Center Operating Corporation and the New York Convention Center Development Corporation.

'78 **Barbara J. Bruno** has joined the teaching staff at the University of Illinois College of Law in Champaign, Ill.

'79 **Robert L.Wynn,** formerly of Madison, Wis., has been named assistant to the president of Guilford College, Greensboro, N.C.

'81 **Yves P. Quintin,** of Cleveland, Ohio, has recently published articles in the *Journal of World Trade Law* and the *Vanderbilt Journal of Transnational Law.*

'84 **Michael Craig** has been appointed a full-time instructor in the Legal Writing Program at IIT Chicago–Kent College of Law.

Deaths

'10 **Harry W. Morgan, Sr.,** July 8, 1984

'12 **Erston Leland Marshall,** January 10, 1983, in Atlanta, Ga.

'13 **Carl H. Reynolds,** July 13, 1984

'16 **Leon D. Metzger,** April 14, 1984

'17 **Theron W. Atwood,** August 1981; **Ferris H. Fitch,** July 13, 1984; **Peter O. Phillips,** February 24, 1984, in Napa, Calif.

'21 **Herman A. August,** March 28, 1984, in Detroit, Mich.

'24 **Abe Hurwich,** March 25, 1984, in Scottsdale, Ariz.; **Donald L. Lawrence,** May 16, 1984

'25 **Willard B. Gaskins,** June 6, 1984; **Milton M. Maddin,** March 10, 1984; **Kenneth G. Prettie,** February 13, 1984; **Maurice P. Rhodes,** March 5, 1984, in Detroit Mich.; **Henry P. Rosin; Fred H. Sims**

'26 **Lou L. Landman,** March 29, 1984, in Muskegon, Mich.

'29 **Samuel W. Leib,** March 24, 1984, in West Palm Beach, Fla.

'30 **Herbert R. Freeman,** March 6, 1984; **William H. Stockwell,** May 10, 1984, in Fort Wayne, Ind.

'31 **John W. Bannasch, Sr.,** June 12, 1984, in Clark Lake, Mich.; **Reuben Segall,** April 21, 1984

'32 **Florence N. Kremer,** February 20, 1984, in Sarasota, Fla.; **Roden J. Rodgers,** May 9, 1984, in Denver, Colo.

'33 **Thomas H. Jolls, Sr.,** March 2, 1984, in Williamsburg, Va.; **George A. Spater,** June 14, 1984, in White River Junction, Vt.

'34 **Ralph S. Zahm**

'35 **Howard Gould,** March 27, 1984, in Cincinnati, Ohio

'36 **Henry M. Myers**

'37 **Herbert J. Beck; William J. Isaacson,** May 27, 1984, in Danbury, Conn.

'38 **Marcus L. Plant,** July 15, 1984, in Ann Arbor, Mich.

'40 **Edward J. Greenwald,** April 16, 1984; **James L. Eberly,** July 11, 1984, in Hilton Head, S.C.; **Clarence E. Eldridge, Jr.,** August 3, 1984, in Ann Arbor, Mich.

'41 **Frederick A. Kepka,** March 29, 1984, in Long Beach, Calif.; **Basil A. Latty,** August 18, 1984

'42 **Ford Kennedy,** April 15, 1984; **Jerrold R. Richards**

'43 **Frank H. Miltner,** June 26, 1984

'47 **Ralph J. Lowe,** April 3, 1984

'48 **Ralph W. Harbert, Jr.,** April 29, 1984, in Battle Creek, Mich.; **Frederick H. Loomis, Jr.,** May 24, 1984

'50 **Allison W. Brown, Jr.,** April 8, 1984; **Richard W. Rogge,** September 26, 1983; **Hamilton Smith,** April 18, 1984

'52 **Robert H. Burford,** March 24, 1984, in Summerton, S.C.; **Leo J. Hinch,** February 11, 1984, in Troy, Mich.; **David L. Howe,** March 11, 1984, in Mesa, Ariz.

'56 **H. Davison Osgood, Jr.,** May 7, 1984

'61 **John M. Elliott; Harry L. Kitzinger,** June 1978; **Christopher A. Moen, Jr.,** April 13, 1984, in Portland, Maine

'66 **Harry B. Cummins,** April 26, 1984, in Lansing, Mich.

'67 **David J. Wynne,** June 12, 1984

'69 **Frank D. Guthrie,** September, 1984

'79 **Dennis M. Brynaert,** August 5, 1984, in Owosso, Mich.

'80 **Reginald L. Tucker,** July 3, 1984, in Chicago, Ill.; **John D. Watkins Schrashun,** August 5, 1984, in Owosso, Mich.

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Time for Reform

The statutory asylum process created by the Refugee Act of 1980 has been swamped by an unexpected wave of over 120,000 asylum applications, most of which are still pending. T. Alexander Aleinikoff examines current procedure and asks whether it might not be:

by T. Alexander Aleinikoff

Editor's note: *This article is adapted from Professor Aleinikoff's* Journal of Law Reform *(17:2) article, "Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States." The* Law Quadrangle Notes *version omits the original article's in-depth discussion of the French and West German asylum systems. (Single back issues of the* Journal *are available for $5; reprints of individual articles cost $2.50. Both may be ordered through: The University of Michigan,* Journal of Law Reform, *Business Manager, S-324 Legal Research, Ann Arbor, MI 48109-2195.) Aleinikoff's study of the asylum problem was funded by the German Marshall Fund of the United States, with additional support from the Law School's Cook Legal Research Fund.*

For three decades following the end of World War II, American refugee "policy" was a collage of ad hoc programs responding to the compelling needs of displaced, homeless, or politically oppressed persons. The Refugee Act of 1980 was enacted to create order out of the legislative chaos. The Act established a systematic procedure for determining the number of refugees to be admitted each year, and brought United States law into conformity with the Geneva Convention and Protocol relating to the Status of Refugees. Drafted from the perspective of the United States as a country of "second asylum," the Act contemplated the orderly selection of persons overseas.

Almost as an afterthought, the legislators added a section to the Act that, for the first time, established a statutory basis for the granting of asylum to aliens *in* the United States. Under the new provision, section 208 of the Immigration and Nationality Act (INA), the Attorney General may grant asylum to an alien "physically present in the United States or at a land border or port of entry" if the Attorney General determines that the alien meets the statute's definition of "refugee"—that is, a person who has a well-founded fear that, if returned home, he or she will be persecuted on account of race, religion, nationality, membership in a social group, or political opinion.

It was not anticipated that a great number of aliens would apply for asylum under the new section. Only a few thousand aliens a year had sought asylum in previous years under procedures established by Immigration and Naturalization Service (INS) regulations. In the few years since passage of the Refugee Act, however, more than 120,000 asylum applications have been filed; and the vast majority are still pending before administrative authorities. Asylum has thus appropiately been described (by Professor David Martin) as the "wild card in the immigration deck."

This extraordinary increase in the number of pending asylum claims is cause for concern. First, such an increase may seriously tax procedures established for a far smaller flow. The overburdening of the process may result in substantial delays and proceedings that threaten the accuracy of the determinations.

Second, the dramatic increase may indicate that the process is being used (or abused) by aliens who file frivolous claims to forestall return to their home countries. The high rate of denials, asserts the government, substantiates the view that many applicants are "economic migrants," not refugees. Adjudicating frivolous claims takes time and money and causes delays which actually may spark the filing of additional claims.

Advocates of asylum applicants contest the government's view. Their criticisms represent a third concern about the present system: the accuracy and fairness of the decision-making process. The critics maintain that the government, by labeling certain classes of aliens "economic migrants," has essentially prejudged the validity of their applications and that the prejudgment is a product of political considerations that look more to the foreign policy objectives of the United States than to the merits of the particular application. They further object to proposals to reduce procedural protections for asylum applicants.

The recent flood of asylum claims, and the concerns it engenders, are not peculiar to the United States. Western Euorpean nations such as France and the Federal Republic of Germany have witnessed similar increases in asylum applications over the past decade, and institutions charged with adjudicating claims have become severely overburdened. French and West German officials believe that aliens with "frivolous" claims of persecution are "abusing" the asylum process in order to circumvent strict restrictions on the immigration of workers. West Germany has recently enacted major changes in its asylum procedures and has adopted far tougher policies regarding benefits available to applicants. France may be on the brink of doing so. To appreciate whether the German and French experiences are salient to the American situation, it is first necessary to review in greater detail the asylum process in this country.

Asylum in the United States

The Numbers

The number of asylum claims filed in INS district offices, as reported by the INS, is indicated in the accompanying table. Each year, case filings have substantially exceeded case closings; and there are presently pending before the INS probably about 160,000 cases. To some extent this is a misleading figure, because it includes approximately 120,000 cases that the government does not intend to adjudicate—primarily undocumented Cubans and Haitians who are likely to be given lawful status under legislation presently pending before Congress. Although this fact undercuts the dire picture usually painted by the executive and legislative branches of government, a backlog of over 40,000 cases before the INS cannot be dismissed as insignificant. Moreover, a substantial number of new claims arrive each month, and it is likely that thousands of additional claims could surface if INS enforcement activities inside the United States were stepped up.

The Procedures

The large increase in asylum claims would not necessarily be cause for alarm if adequate procedures existed to adjudicate them. Unfortunately, this is not the case.

Formally, asylum claims are filed either with an INS district office or, if the alien is subject to an exclusion or deportation hearing, with an immigration judge. In the district office, the alien is usually called in for an interview; if the claim is made to an immigration judge, the alien is entitled to a hearing. The alien's application is sent by the district office or the immigration judge to the State Department's Bureau of Human Rights and Humanitarian Affairs for an "advisory opinion" on the conditions in the alien's homeland. If the district office denies an application for asylum, there is no administrative review; the alien may, however, reassert the claim before an immigration judge in a subsequent exclusion or deportation hearing. A denial by an immigration judge may be appealed to the Board of Immigration Appeals (BIA) and to a federal court.

1. Delay—This structure raises obvious opportunities for delay, and administrative practices virtually ensure it. Claims filed with district offices are not handled in a uniform or centralized manner. Some offices have thousands of claims while others have only a few. Within the district offices, asylum claims are viewed as difficult, unrewarding cases and are often assigned to junior INS officers. Until recently, the bureaucracy put no special emphasis on processing asylum claims, and simply left thousands of claims at the bottom of the work pile. Aliens and their lawyers often put no pressure on officials to process claims, particularly where claims are filed primarily to forestall deportation. An INS study estimates that 40 to 80 percent of the applicants do not appear for scheduled interviews. It attributes the high no-show rate to the alien's desire, in some cases, not to be located, and the INS's failure to process change of address forms.

Recent efforts by the INS have made some headway in clearing the backlog out of district offices. But this has merely shifted some of the burden up the decision-making chain to the 55 immigration judges. New filings before immigration judges are averaging between 300 and 500 a month, and only one case is adjudicated for every two filed. The best estimate of the total number of asylum cases presently before immigration judges is between 8,000 and 10,000. When one adds to these cases the more than 100,000 deportation and exclusion cases filed before immigration judges in fiscal year 1983, it is apparent that many pending asylum claims will not be adjudicated for quite some time. Further delay, of course, will be occasioned by review of the immigration judges' decisions at the BIA and in the courts.

The current procedural and practical delays are troubling for several reasons. First, the delay caused by multiple levels of review is costly, and asylum proceedings take time and resources from other immigration and judicial work. We may be willing to bear this cost for humanitarian reasons; but it is clear that the total cost of the current process is not one that Congress consciously opted for when it passed the Refugee Act.

Second, the crush of applications and ensuing delay may lead administrative agencies to adopt programs that sacrifice fair adjudication for an expedited processing of claims. This in fact occurred in 1978 when the INS decided it was time to clear up a backlog of Haitian claims that had accumulated over several years. The result was disastrous. Haitians were run through a process that was grossly unfair and one that, ironically, left the government no better off than it had been before the program: a federal court, appalled at the conduct, ordered the government to adjudicate the claims again.

Finally, the long delays now extant in the process may spark the filing of additional claims. Obvious incentives are created if aliens know that they will not be deported until all avenues of review are exhausted. This potential reward to an alien with a frivolous asylum claim may quickly lead to a vicious circle: the greater the number of frivolous claims, the greater the backlog; the greater the backlog, the greater the delay in adjudications; the greater the delay, the greater the incentive to file frivolous claims.

ASYLUM CLAIMS FILED IN INS DISTRICT OFFICES, 1978-1984

Fiscal Year	*Number*
1978	3,702
1979	5,801
1980	15,955
1981	61,568
1982	33,246
1983	26,091
Oct. 1983-Mar. 1984	13,419

Whether such a vicious circle now exists is a matter of dispute. The government has asserted that much of the huge increase in filings is due to abuse of the system by "economic migrants" who take advantage of the current delays to further their stay in the United States. Without specific empirical evidence (which, to my knowledge, does not yet exist), it is difficult to evaluate this claim. However, several factors cast doubt upon the government's position.

First is the fact that the vast bulk of pending claims are filed by aliens from countries where persecution is a realistic possibility. Over 90 percent of the claims involve aliens from Cuba, Iran, El Salvador, Nicaragua, Poland, Afghanistan, the People's Republic of China, Ethiopia, Haiti, Iraq, and Lebanon. These, excepting El Salvador, are not the primary countries of origin of undocumented workers in the United States. Of course, these data do not disprove that many of those who have filed claims are "economic migrants." It is possible that aliens use the asylum process as a delaying tactic only if their home countries are within the category of those from which claims have been accepted in the past. It is not obvious, however, why aliens bent on holding off their departure would not take advantage of the general delay involved in processing all asylum claims. The United States has no procedure for a quick and final denial of even a patently frivolous application. A claim from Canada is entitled to the same procedures (and delays) as one from Kampuchea.

Rather than pointing to "economic migrants" as the primary source of increased asylum claims, these considerations suggest that the increase is due in part (perhaps even in large part) to aliens who have some reason to fear returning to their home countries. The cost to an alien of applying for asylum is negligible (indeed, the alien benefits in the short term by remaining in this country), and the long-term gain is potentially enormous: lawful permanent residence in the United States.

Other factors also undercut the government's claim that the increase in applications is primarily a product of abuse of the system. First, a large number of the claims in the current backlog were filed by aliens advised to do so by the INS. Second, several lawsuits have halted the adjudication of claims. This in turn has inflated the number of pending claims and has contributed to the perception that the system is being overwhelmed by frivolous claims. Finally, increased worldwide concern with human rights issues and the passage of the Refugee Act may have made aliens (and their lawyers) more aware of the possibility of being granted asylum.

2. *The appearance of political intervention*—As noted above, INS district offices or immigration judges forward asylum claims to the State Department's Bureau on Human Rights and Humanitarian Affairs (BHRHA) for an "advisory" opinion on the merits of the claim. Most INS district officials and immigration judges have neither the information, experience, nor training to evaluate allegations regarding political conditions in the alien's home country. A study of the asylum process in New York found "a certain discomfort with asylum cases" among the immigration judges:

> They understand they will be making possible life-or-death decisions on the basis of subjective impressions and with minimum evidence. Several noted the presence of political factors and pressures in asylum cases, especially with regard to the larger, more controversial groups, *e.g.* Salvadorans, Haitians, and Poles. None would elaborate on the nature of these political factors, and all asserted their independence of judgment, but some did express the feeling that they were being obliged to make judicial decisions which were more properly made in the political arena, and on political grounds. For the immigration judges, as for the examinations officers, political judgments are seen as the domain of the Department of State. Judges do not dispute State Department country expertise, even if they may differ with advisory opinion letters on specific cases.

It is thus not surprising that in almost every case the State Department's advice is deemed conclusive.

This situation is disturbing. First, the alien is not able to make her case to the State Department nor is

she able to question State Department sources. In effect, the main event in an asylum proceeding occurs wholly outside the hearing. Equally troubling is the internal procedure of the State Department. Assistant Secretary for Human Rights and Humanitarian Affairs, Elliot Abrams, has described it as follows:

> Each application is reviewed individually by an officer in the Office of Asylum Affairs of [BHRHA] and then is sent to the appropriate country desk officer in the Department. If appropriate, [BHRHA] may request an opinion from the Office of the Legal Adviser or information from the U.S. Embassy in the applicant's country of nationality, or, if appropriate, in a third country. *After agreement is reached between the asylum officer in [BHRHA] and the desk officer on the proposed recommendation to INS,* the draft advisory opinion and application file are reviewed by the Director of the Office of Asylum Affairs in [BHRHA], and in some cases by the geographic officer in [BHRHA] or by the Deputy Assistant Secretary for Asylum and Humanitarian Affairs. It is rare for individual cases to rise to more senior levels. The proposed recommendation then is signed by the Director of the Office of Asylum Affairs and sent to INS. (Emphasis added.)

The presentation of every asylum case to the country desk allows the intrusion of political factors into asylum decisions since country desk officers may have strong views about the effect that recognizing or not recognizing claims could have on the achievement of American foreign policy objectives. Again, there has been no empirical test of this proposition, but the data seem to create at least an appearance of political distortion: aliens seeking asylum from countries friendly to the United States are less likely to be granted asylum than those from countries unfriendly to the United States. Other explanations may also be consistent with these figures; yet the appearance of disparate treatment lingers and is supported by other circumstantial evidence.

Lessons for the United States

Comparison of Responses and Results

In France and West Germany, as in the United States, world events, improved transportation and communication, generous asylum policies, high standards of living, and limits on legal immigration have produced a huge rise in the number of asylum claims. The rapid increases have overwhelmed existing adjudicatory institutions, causing long delays which themselves may well have stimulated more filings.

The responses of the three countries, which have varied considerably, have been directed at two aims: expediting the adjudication of claims and deterring the filing of new claims. Germany has moved vigorously on both fronts. It has enacted measures that streamline the adjudication process by bringing more judges into the process and restricting appeals. To deter the filing of claims, Germany has cut benefits, restricted work authorization, required visas and instituted communal housing arrangements for asylum applicants. These new policies have dramatically reduced the number of asylum claims filed. France, so far, has hardly altered its adjudication process and has done little to deter the filing of claims.

The United States, under the Reagan Administration, has focused primarily on programs designed to deter additional asylum claims.[1] These measures have been part of a broader initiative to "regain control of our borders." In the summer of 1981, the INS instituted a new policy of detaining aliens who arrive at the border without documentation or a colorable right to enter. The government also sought to stop the flow of Haitian boat people into southern Florida. President Reagan issued an Executive Order authorizing the Coast Guard to stop and return vessels believed to be transporting aliens to the United States in violation of the immigration laws. By exchange of notes, the government also entered into an agreement with Haiti that permits American authorities to return ships to Haiti in order to enforce "appropriate Haitian laws." Under this interdiction program, the United States has stopped and returned to Haiti some 56 vessels carrying 1,367 Haitians. Furthermore, the government adopted a regulation restricting opportunities for asylum applicants to work pending adjudication of their claims. Under the new rule, an INS district director may grant employment authorization only upon a determination that the asylum claim is "non-frivolous."

Legal actions have stymied some of these deterrent measures. A federal district court invalidated the detention policy; and a panel of the Eleventh Circuit affirmed, holding that the policy had been promulgated in violation of the Administrative Procedure Act and applied to Haitian applicants in a discriminatory manner. Although the panel's decision was recently overturned on other grounds by the Eleventh Circuit sitting en banc, most of the Haitian detainees had been released by order of the district court. In the Southwest, two lawsuits have successfully challenged border patrol practices that persuaded

Salvadorans to leave the United States without filing asylum claims. An action brought by a Haitian refugee group in the United States challenging the legality of the interdiction program was dismissed for lack of standing—although the government has never asserted a satisfactory moral or legal basis for the policy.[2]

The second goal—expedition of asylum adjudications—has been the subject of several governmental initiatives. Legislation supported by the administration and passed twice by the Senate would assign asylum claims to administrative law judges trained in refugee and international law, and would limit opportunities for judicial review. The government has also taken part in a program to train members of the bar to handle asylum cases and has made action on asylum claims a priority in INS district offices and at the State Department.

The deterrent and procedural measures adopted to date have not been as successful as the German programs in stemming the influx of asylum seekers. The number of applicants from Haiti—while never a substantial portion of the total number of claimants—has dropped to a trickle under the interdiction program. But increases from other countries have kept the backlog of asylum claims steadily rising. Furthermore, although greater devotion of resources has begun to reduce the backlogs in INS offices, over 40,000 claims (not including Cuban applications) remain to be adjudicated. Some 8,000 to 10,000 additional applications are pending before immigration judges, and two cases are being docketed for every one decided.

It is clear that additional proposals for change are necessary. Such proposals must begin with identification and exploration of the fundamental goals of asylum policy.

The Goals of American Asylum Policy

At the foundation of American asylum policy is our legal and moral obligation not to return persons to countries in which there is a reasonable likelihood that they will be persecuted. It is important to notice what this statement does not say. First, it does not require the United States to grant asylum—effectively, permanent resident status—to all aliens who come within the definition of "refugee"; it simply prohibits *the return* of a bona fide refugee (*non-refoulement*). This distinction is important because we may wish to limit the number of aliens to whom we grant asylum in light of broader immigration decisions regarding the number of aliens the nation is prepared to absorb each year.[3] Such a decision may not violate legal or moral norms if we can find other nations that would welcome aliens eligible for asylum. Second, the mere statement of the principle of non-return says nothing about the obvious trade-off between the cost of adjudicating claims and the degree of certainty of our decisions on the merits of claims. Concern about the terrible consequences of wrongly denying asylum may argue in favor of the fullest kind of investigation of claims. But arriving at certainty about the likelihood of persecution could be an extraordinarily expensive enterprise (assuming such certainty is attainable at all). The alternatives, however, are no less troublesome: tolerating a lower level of certainty in decision making may either spark the filing of marginal claims (if the standard of proof is too lenient) or may run the risk of violating our obligation not to return refugees (if the standard of proof is too strict). Taking these factors into consideration, a more refined statement of the basic American goal may be *to devise a set of policies and procedures that identify, with an acceptable degree of certainty, an acceptable number of aliens who are likely to be persecuted if returned home, provided that the policies and procedures do not stimulate the filing of a large number of non–bona fide claims that threaten both the accuracy of decisions and public support for the program as a whole.*

If this is an accurate statement of what the American goal should be, then the present system falls alarmingly short of achieving it. A critical observer of current policies and institutions would be led to conclude that we are pursuing two rather different goals: first, the deterrence of all asylum claims from aliens whose countries of origin are friendly to the United States (particularly Haiti and El Salvador); and second, effective control of decisions by the State Department, which can inject political considerations into the process in the guise of aiding inefficient and undertrained immigration officials. In beginning to rethink how American practices and institutions ought to be restructured, there are several lessons that can be drawn from the German and French experiences.

Deterring the Filing of Claims

Should the United States adopt measures aimed primarily at reducing the number of asylum claims? What is troubling about such a strategy is that aliens with bona fide claims may be deterred or prevented from applying and perhaps returned to likely persecution. The challenge, therefore, is to develop a set of

policies that creates burdens or disincentives great enough to deter frivolous claims but not so great as to deter bona fide claimants from applying. This appears to be the central aim of the new West German policies. As stated openly by the German Ministry of the Interior: "The sole objective of the [recent] measures taken . . . has been, and still is, to remove the incentives for those foreigners who are not politically persecuted to enter [West Germany] illegally for economic reasons by abusing the rights of asylum."

Not surprisingly, advocates of asylum seekers attack the West German strategy as overbroad. They assert that the visa requirement and housing program prevent true refugees from getting to Germany and cause bona fide claimants in Germany to abandon good claims or seek protection in another country. The response of the government is, in effect, that aliens will get to Germany and tolerate current policies if they have legitimate fears of persecution.

The obvious problem we face in fairly evaluating the German strategy—or any other similar set of policies—is our extraordinary lack of information regarding the motivations and actions of asylum seekers. In such a vacuum, a policy of deterrence runs a serious risk of incorrect calibrations that produce dire consequences.

The interdiction and detention policies in the United States, at least as they are directed against Haitians and Salvadorans, give no guarantee of deterring only frivolous claims. Could the United States do better by adopting the German deterrent policies? It is quite doubtful. First, this country already has two of the German measures in place: aliens need visas to enter the United States, and work authorization is only granted for asylum applicants with "non-frivolous" claims. These policies seek to deter asylum applications by preventing aliens from getting to the United States or by making this country a less attractive country in which to reside. Given a porous border and a healthy demand for undocumented workers, however, neither measure effectively deters unlawful entry. Thus aliens with frivolous claims still are likely to be able to enter and reside in the United States.

The German communal housing program, which requires asylum applicants to live in group facilities, could prove expensive to administer and would likely be ineffective. (*Short-term* detention in communal housing might be a reasonable policy, however, for aliens applying for asylum at the border. It would let them know that an asylum claim is not automatically a ticket for entry and residence in the United States. It should be stressed, however, that the current American policy goes far beyond the German housing program. Whatever deterrence the German policy brings about, long-term imprisonment—which too many asylum seekers in this country have suffered—runs a real risk of being inhumane and causing aliens to abandon legitimate claims.)

These considerations suggest that efforts to deter the filing of mala fide claims must proceed along two fronts. The first is improved border control and short-term detention of aliens at the border who present patently frivolous claims for asylum. The second is expedition of the adjudication of claims (without sacrificing accuracy). Expedition will diminish incentives to file a claim that merely seeks to gain an alien time and also will make acceptable a policy of detention at the border.

Procedural and Structural Reform

Development of a fair and expeditious process would have a substantial deterrent effect on frivolous claimants: would-be migrants in their home countries would see earlier voyagers who were stopped at the border returning home after only a short stay in the United States. An expedited process would also mean that filing an asylum claim would no longer be a way to put off deportation for a considerable period of time. Equally important, a reformed asylum adjudication process would restore confidence that the system is not being manipulated for political purposes and could obviate the need for intrusive judicial intervention, which has severely slowed the process. If we are willing to seriously reformulate the way asylum claims are adjudicated in the United States, the West German and French systems provide some extremely interesting possibilities.

1. The need for an independent federal agency to adjudicate asylum claims — Foremost is the need for the United States to create an independent federal agency to adjudicate asylum claims. As described in Part I, an alien may apply for asylum to an INS official or an immigration judge. Adjudicating asylum claims may be a small portion of these officials' duties. Moreover, few have specialized training in international law or refugee matters; they therefore almost universally rely upon "advice" received from the State Department. The involvement of the State Department creates opportunities for political considerations to affect decisions on the merits of the claim and adds another layer to the process.

The adjudication systems in West Germany and France suggest an alternative for the United States. Both countries have a centralized federal agency whose only mission is to adjudicate asylum claims. The existence of such an institution fosters the development of expertise and knowledge, the evenhanded application of rules and policies, and far less reliance upon the foreign ministries for information and advice. In both countries, decision makers can concentrate on particular countries and become thoroughly familiar with conditions, events, political parties, and social groups in those countries. This kind of expertise significantly improves the ability of the decision makers to judge the credibility of the applicant.

Adoption of this model in the United States could help ensure a similar expertise in decision making. Furthermore, the centralization of asylum adjudications would also end the present maldistribution of asylum claims among INS districts. It would also facilitate the creation of a library and documentation center which could be available to both decision makers and lawyers. Obviously some logistical problems would occur. But both Germany and France have recently opened up a few suboffices in other cities. That model could be adopted here, or adjudicators could conceivably "ride circuit."

The establishment of an independent agency to adjudicate asylum claims would have the additional salutary effect of decreasing the likelihood of court intervention in the processing of claims. Under the current system, courts have ordered intrusive injunctive relief when faced with evidence of massive violations of due process. The adjudication of Haitian asylum claims, for example, has been tied up by courts for nearly a decade. Independent agency adjudication of asylum claims would help alleviate this problem; courts would have increased confidence in the fairness and accuracy of decisions reached by an agency operating with a corps of professional, well-trained adjudicators who are removed from the enforcement side of the immigration system.

2. *The independence of the federal agency and the removal of the advisory role of the State Department*—A serious problem with the present American asylum system is the widely shared perception that it is politically biased. The German and French experiences demonstrate that no governmental agency is fully immune from political pressures. But the general perception in both countries is that the federal asylum agencies are *largely* free from political influence. No such perception exists in the United States. The relative ease with which Eastern Europeans and Cubans have been granted asylum as opposed to the extremely low recognition rates for Haitians and Salvadorans casts a long shadow on the proclaimed neutrality of the system. A major purpose of the Refugee Act of 1980 was to remove the political and ideological aspects of American refugee law, but many persons involved in the process are not convinced that this has occurred. Establishment of an agency outside the Department of Justice and not dependent upon the State Department would help eliminate the appearance of, and potential for, political influence in the asylum process. The agency could be run by a board of directors appointed for lengthy, staggered terms by the president with advice and consent from the Senate. The board would be responsible for selecting an executive director who would hire qualified adjudicators and other staff. The agency's independence could be further demonstrated by following Germany's example of permitting the UNHCR to have a permanent observer at the agency.

Crucial to the independence of the agency would be the termination of the State Department's "advisory" role. Officials in both the French and West German agencies openly talked about the problems of crediting information and advice from foreign service officers and ambassadors who have diplomatic roles to perform. The centralized, single-mission nature of both agencies has permitted each to develop sufficient expertise to make reliance upon the respective foreign ministry unnecessary.

Obviously, it would be a mistake to deny the State Department any role in the asylum process. It is perhaps the best source of information on conditions in other countries, and both the French and German agencies often seek information from their foreign ministries. But the independent asylum agency should use information from other sources as well, such as newspapers, Amnesty International, academics, and expert witnesses. In no case should the State Department be asked to render an opinion on whether or not the individual is entitled to refugee status; rather, the State Department should be seen as precisely what it is: one very good source of information, but not the decision maker.

3. *Limiting opportunities of review*—The French system has only one real level of judicial review of the administrative decision (although appeals to the *Conseil d'Etat* are technically possible). Germany has streamlined its judicial process considerably. The United States, however, has a system that guarantees multi-level review through several avenues. These opportunities for judicial review must be limited if any progress is to be made in speeding up the pro-

cess. Assuming a new agency is created with the requisite independence and expertise, judicial review should be restricted.

At least two models of appellate review are worth exploring. The first would make decisions of the new agency reviewable in a federal court of appeals as part of a petition for review under present law from an exclusion or deportation order. To avoid holding the asylum process hostage to the burgeoning dockets of the federal appellate courts, however, a novel alternative, patterned somewhat after the French system, might be more advisable: appeals from the federal agency could go to a special tribunal for asylum appeals. The membership of the tribunal could include designated federal judges, distinguished members of the bar or nonlawyers knowledgeable in international and refugee affairs, and a representative of the UNHCR. No appeal beyond the tribunal would be allowed, although habeas corpus would—by constitutional necessity—be available to challenge the constitutionality of the proceedings. The tribunal could also be empowered to dismiss an appeal on the pleadings if the claim was determined by the agency to be "clearly without merit."

4. The need to accommodate foreign policy concerns: presidential granting of "safe haven"—Refugee and asylum issues are too wrapped up in fundamental issues of foreign policy and international relations to permit creation of an adjudication process that is entirely free of political influence. The creation of an independent federal agency that excludes the political branches from any *formal* voice would be an improvement, but it is not enough. It would also be advisable to create forums, quite distinct from the adjudication process, in which political considerations could legitimately be exercised.

One example of this is the authority of the *Laender* (state) governments in Germany to withhold expulsion of persons whose asylum claims have been denied. This is viewed simply as a political decision, and one that can be accomplished without putting pressure on the federal asylum agency to stretch the definition of "refugee" or to avoid deciding certain claims.

A similar distinction between adjudication and politics should be developed in the United States. Current practices evidence a confusion of adjudicative and political functions that undermines procedural credibility and effectiveness. This confusion is best evidenced in the government's use of "extended voluntary departure." Extended voluntary departure (EVD)—an inelegant phrase for an administrative practice supported by questionable statutory authority—is a technique used by the government to keep deportable aliens in the United States. Since 1960, the government has adopted EVD programs for nationals of 15 different countries. Some programs have lasted only a few months; others far longer. Presently, Ugandans, Poles, Ethiopians, and Afghanis benefit from blanket grants of EVD; they are not sent home even if found deportable.

The EVD programs have often served as a low visibility means for the accomplishment of American foreign policy objectives. Thus, Poles have been granted EVD as part of the United States' response to Soviet involvement in Poland, even though most of the Poles do not satisfy the definition of "refugee" in the INA. The government, however, has refused to grant EVD to Salvadorans. It has defended its decision on the grounds that "the degree of civil strife varies greatly in different parts of El Salvador," and that "a grant of EVD would probably constitute a magnet inducing members of the beneficiary nationality to enter the United States illegally."

The reasons cited by the government for denial of EVD to Salvadorans have been assailed as erroneous and disingenuous. Critics assert that the government's policy toward Salvadorans in the United States is part of its economic and military support for the regime in El Salvador. More importantly, the government's foreign policy objectives are said to account for the extremely low number of Salvadoran asylum claims that have been granted. Thus, the overall perception is that purportedly humanitarian programs—asylum and EVD—are being driven by political considerations. The perception is strengthened when one appreciates that EVD decisions and asylum adjudications are both joint decisions of the Departments of Justice and State.

What is needed are different channels that separate political decisions from the asylum decisions. The creation of an independent asylum agency would be an obvious start; but this must be supplemented by statutory changes in the immigration law that clearly locate EVD decisions for classes of aliens outside the asylum process. This could be accomplished by enacting legislation that expressly authorizes the president to grant "safe haven" to classes of aliens when he determines such action to be in the national interest. (The immigration laws presently give the president authority to suspend the entry of classes of aliens if he deems such entry to be detrimental to the interests of the United States.) A grant of "safe haven" would be a political decision conferring on the aliens no entitlement to remain in the United States beyond the life of the proclamation and should in no way influence the asylum process. Aliens afforded such protection should be able to apply for asylum and have their claims adjudicated. The federal

agency would not simply put all such claims on hold, as the INS presently does for aliens granted EVD.

This separation of adjudication and political concerns should leave the federal asylum agency more freedom to carry out its mandate irrespective of the political objectives of the Administration. It would thus help eliminate the appearance that the asylum process is being used simply to further American foreign policy objectives.

Conclusion

The proposals described here pursue a goal familiar to lawyers and public administrators: better decisions through a more independent, expert, and centralized process. The idea (and ideal) that institutions can be created to apply neutrally a shared conception of the public interest has been around at least since the early years of this century. Unfortunately, almost every part of this fantasy is denied by what we know about how the real world operates. Independent agencies may sometimes be "captured" by the interests they are supposed to be regulating; agency adjudicators may care more about meeting bureaucratic performance standards than deciding cases correctly; decision makers inhabit a world of values and political pressures; "the public interest" cannot be objectively identified or deduced from shared premises. The recent experience of the reconstituting of the "independent" Civil Rights Commission shows how far the real can deviate from the ideal.

What, then, is the value of "better process" in the asylum context? Perhaps it reduces to nothing more than the claim that greater expertise and independence are far better than what we have now. Centralizing the process, upgrading the expertise of the adjudicators, downplaying the role of the State Department, and creating a new avenue for political decisions should go far in removing the primary causes of concern about the present system. The French and German models provide some ground for cautious optimism here.

Yet "better process" will not solve all the problems facing the current asylum system. The best process in the world is worthless if it applies substantive legal standards that are intolerable. Thus, procedural improvements cannot permit us to ignore questions regarding the scope and meaning of our substantive asylum law or blind us to unacceptable policies currently in place.

"Better process" cannot guarantee perfect decisions, clarify underlying legal standards, or stop world events that create asylum applicants; but it can make a number of immediate, tangible improvements. In the search for such improvements, the German and French experiences offer some suggestions worth pursuing. ◘

Footnotes

1. The Carter Administration policy was largely ad hoc and incoherent. President Carter initially welcomed the Mariel Cubans with "an open heart and open arms," N.Y. Times, May 6, 1980, at A1, col. 1, but the Justice Department subsequently sought to prosecute over 300 persons who transported the Cubans between Mariel and Florida. (The indictments were later dismissed on the ground that the defendants' actions—which included openly presenting the Cubans to immigration officials upon arrival in the United States—were not condemned by the antismuggling provisions of the immigration laws, INA § 274, 8 U.S.C. § 1324 (1982). United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982). Similarly, although the Administration made human rights a mainstay of its foreign policy, the INS initiated a program of mass adjudication of Haitian asylum claims that seriously violated the due process rights of the applicants. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

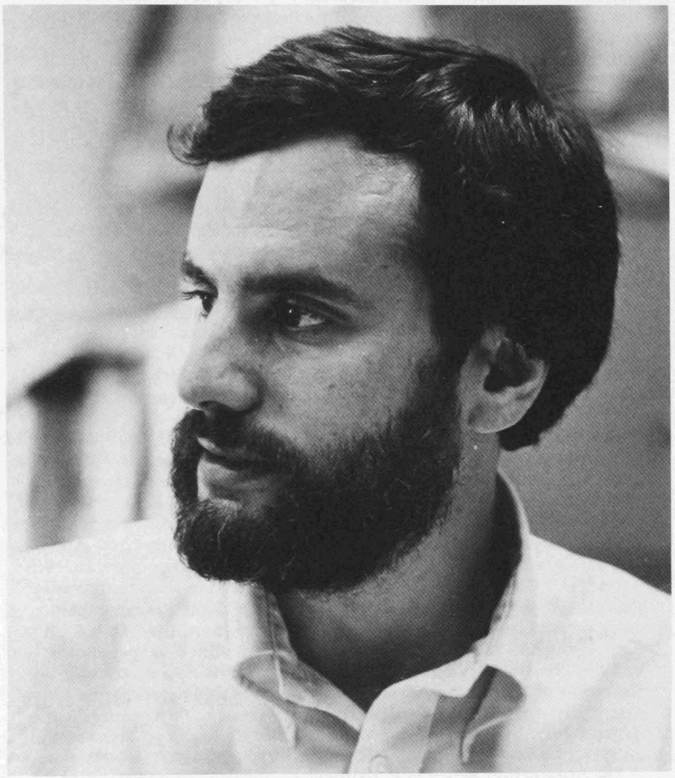
2. The Office of Legal Counsel of the Department of Justice (OLC), in a memorandum to the Attorney General, asserted that both the agreement with Haiti and the immigration laws provide legal authority for the interdiction program. Memorandum of Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to the Attorney General (August 11, 1981). It may well be, as the OLC memorandum argues, that the President has inherent authority to enter into executive agreements with a foreign nation to aid the enforcement of that country's laws. But what does it say about the United States when it acts to enforce the laws of one of the most repressive regimes in the Western Hemisphere? Furthermore, such a policy would seem to undercut American criticism of Eastern bloc nations who have similar laws restricting or burdening the right to emigrate. The second claimed source of authority—American immigration laws—is quite doubtful. The OLC memorandum relies upon 8 U.S.C. § 1182(f) (1982), which authorizes the President to suspend the entry of "any class of aliens" into the United States where entry "would be detrimental to the interests of the United States." It is hard to see how this provision, which appears aimed at suspending the entry of otherwise admissible aliens, authorizes the president to order the *return* of aliens stopped on the high seas. The Coast Guard's action essentially permits the executive branch to avoid the procedures established by the INA for determining the admissibility of an alien seeking entry.

   The interdiction program is pernicious. It raises serious questions about American compliance with the Geneva Convention, puts the United States in the role of enforcing the laws of a repressive dictator, and effectively nullifies congressionally mandated procedures for entry decisions. Its clear purpose is to stop asylum applicants *before* they can reach the United States and receive the benefit of counsel in requesting a status guaranteed by international convention and domestic law. *See* Taylor, *U.S. Aides Defend Interdiction of Haitians at Sea*, N.Y. Times, Oct. 29, 1981. Because the program occurs on the high seas, there is no way for courts to review the actions of the Coast Guard. It is time for Congress to put a stop to this dirty business.

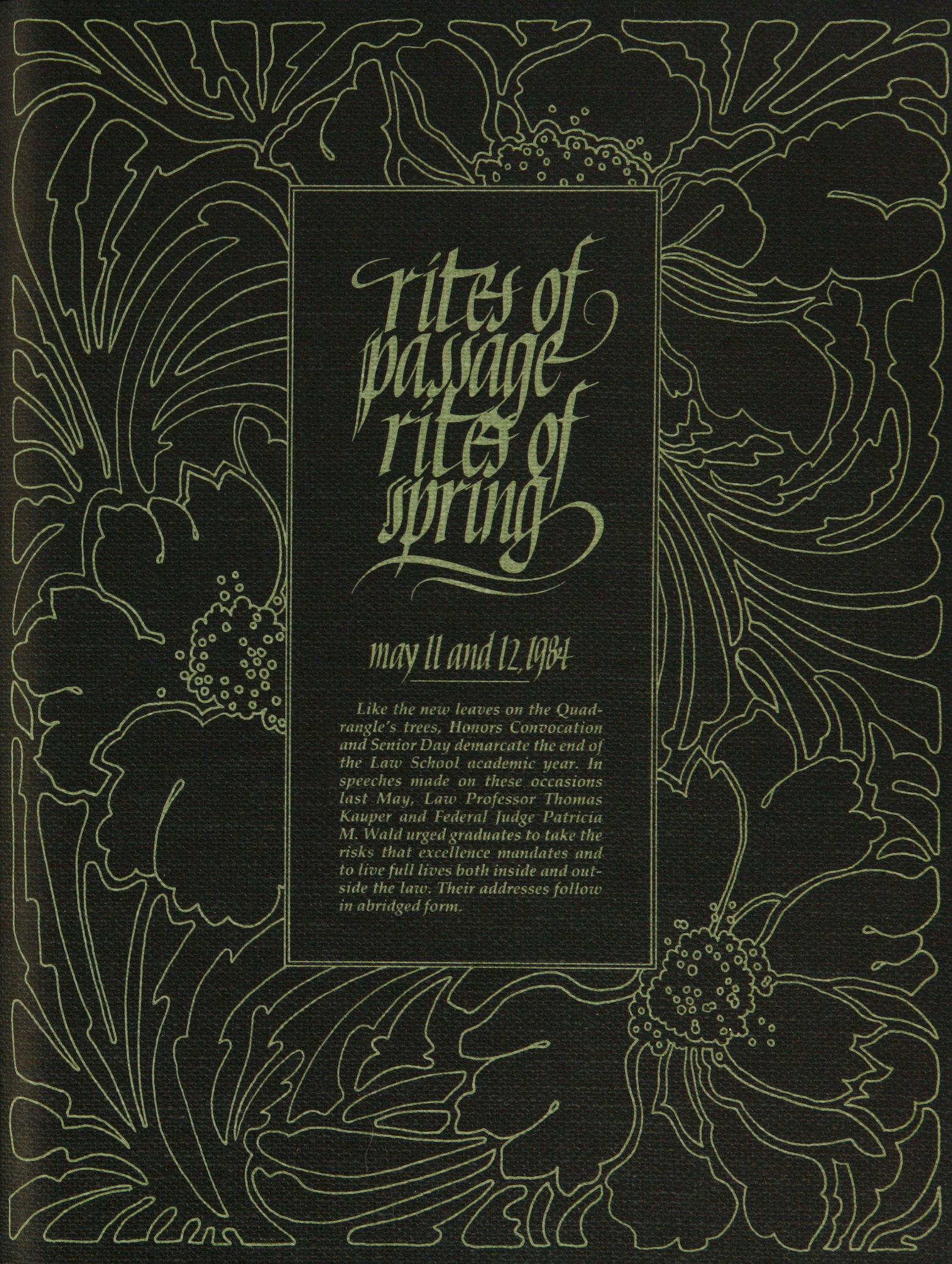
3. A generous asylum policy also raises issues of equity regarding overseas refugees waiting for resettlement. (I am indebted to Michael Teitelbaum for calling this point to my attention.) If there is a finite number of refugees the United States is willing to admit each year, then a huge increase in the number of aliens granted asylum may affect the willingness of the United States to select refugees from camps overseas. Is it rational for American policy to reward refugees who can make it to the United States on their own over refugees who cannot? There is no easy answer here.

   One response is that, given our accession to the Geneva Convention,

we have little choice but to recognize the claims of bona fide asylum applicants. But the Geneva Convention only mandates a policy of *non-refoulement* (nonreturn), not the granting of a formal residence. A second response is that our refugee law, as actually implemented, applies a stricter standard for asylum applicants than for overseas refugees. Finally, it may well be that any inequity that exists cannot be overcome until an international approach to asylum is agreed to by the receiving countries of the world. Under such a strategy, as conceived by Dale F. Swartz, President of the National Immigration, Refugee and Citizenship Forum, countries of first asylum would transfer applicants to an international holding center where claims could be adjudicated. Aliens recognized as refugees would then be resettled in a country which may or may not be the country in which the alien first claimed asylum. This proposal would go a long way toward ameliorating the present appearance of inequity.



T. Alexander Aleinikoff, a specialist in constitutional law and immigration and nationality, has taught at the Law School since 1981. He is a graduate of Swarthmore College and of Yale Law School, where he was an editor of the Yale Law Journal. *After a clerkship with United States District Judge Edward Weinfeld in New York City, Aleinikoff spent three years as an attorney in the United States Department of Justice, where he worked in the Office of Legal Counsel, as counselor to the associate attorney general, and as a trial attorney in the wildlife section of the Lands and Natural Resources Division. He is co-author, with David Martin of the University of Virginia Law School, of a casebook on immigration and nationality to be published by West Publishing Company in 1985.*



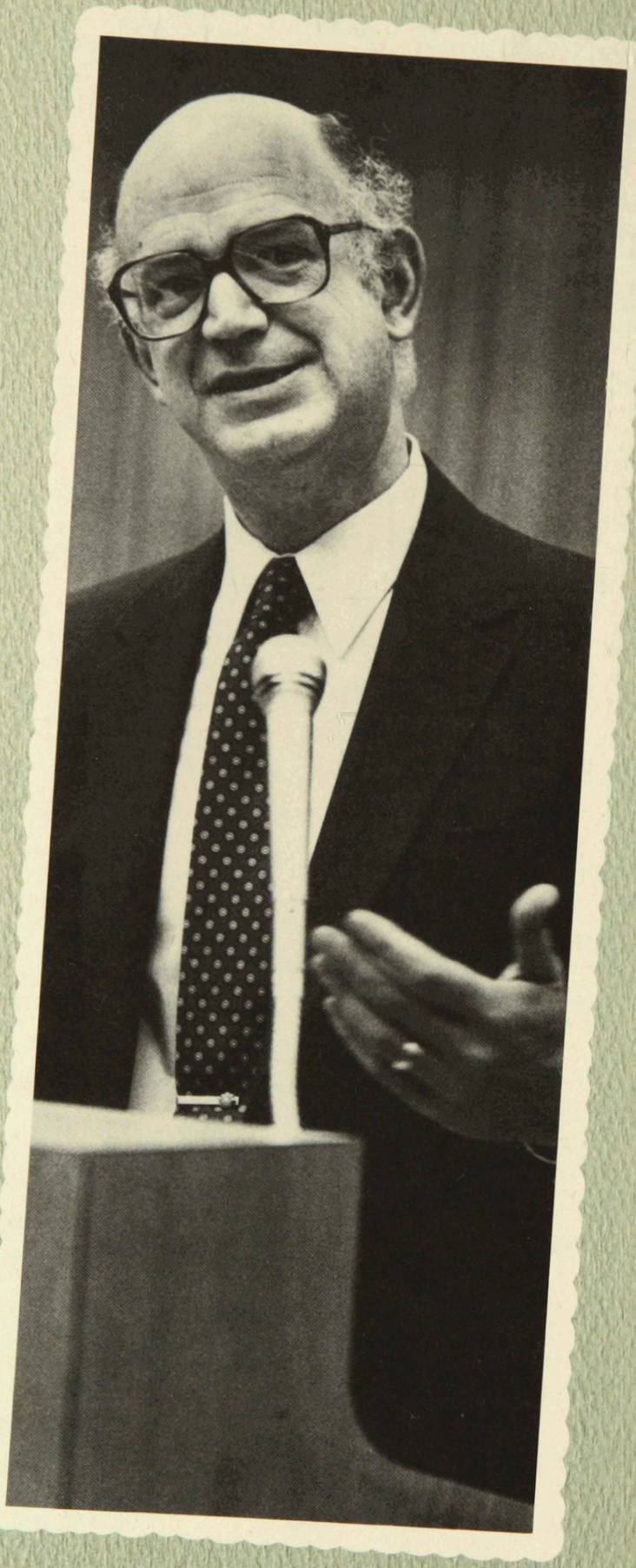
rites of passage rites of spring

may 11 and 12, 1984

Like the new leaves on the Quadrangle's trees, Honors Convocation and Senior Day demarcate the end of the Law School academic year. In speeches made on these occasions last May, Law Professor Thomas Kauper and Federal Judge Patricia M. Wald urged graduates to take the risks that excellence mandates and to live full lives both inside and outside the law. Their addresses follow in abridged form.

the rewards of excellence

by Thomas E. Kauper
Henry M. Butzel Professor of Law
University of Michigan Law School



I was confident that I was asked to speak this afternoon to explain to all of you the extraordinary benefits to American society of the breakup of AT&T, a subject dear to my heart. And seldom do I get such a captive audience. But when I called the Dean's office to suggest a topic, my telephone didn't work. Clearly the subject must be saved for another day. Then I thought we might reconsider *Pierson* v. *Post*, the infamous dispute over the corpse of a fox, or the *Rule* in *Shelley's Case*. But bright as this group is, I doubt that many remember who got the fox, or what a vested remainder is. While these deficiencies will undoubtedly haunt you the rest of your lives, they suggest a lack of common ground upon which to base these remarks. So I turn to something more traditional for such an event.

I begin, therefore, with congratulations to those we honor today for academic excellence and leadership in the Law School community. I think I can speak safely for the entire faculty (although even here I recognize a certain degree of peril) in expressing our pride in your accomplishments. Yes, we are proud, though expression of such sentiment from a member of the faculty may come as a shock to some of you. And particular congratulations to those who have supported these we honor, for you can legitimately share in their awards. For those whose daughters, sons, and spouses have finished the course, an envious hurrah! You have taken a big step toward financial independence.

Today we honor excellence. The honors we confer are but one of the rewards for ability, diligence, and accomplishment. Measured against a lifetime, these awards may seem small. Indeed, in one sense they are. There are greater rewards, as I want to discuss in my further remarks. But in another sense, these rewards are great indeed. They are the measure of a particular accomplishment. Seen through the eyes of the Law School as an institution, such convocations are an important ritual permitting us to make clear what we are all about. We today identify, and reemphasize, what we truly value.

For many of you, gatherings such as these are both accepted and expected. Most of you have been in school most of your lives, and recognition has come in the form of offices, grades, ribbons, plaques, and certificates bestowed in such solemn gatherings from at least junior high school on. They have been the measure of your success, the sought-for judgment of those who, we hope, have the ability to evaluate and to motivate. But for most of you, the days of ribbons and plaques are over (or nearly over). Professional life contains no such annual ceremonies. There are no grades, no prizes, and few public honors.

Excellence has its rewards, of course, and they will continue into the future. But the rewards, and the measures of success, are not as obvious as one might think. They include, among other things, high expectations, ever-increasing responsibilities, and the opportunity to accept new challenges. These are the "rewards" I will address, not only from the perspective of an academic but as one who has dabbled in a number of other careers. Lacking a single career, I hope to have something to say drawn from several.

To many in this room, the immediate rewards seem self-evident—a challenging job, a high salary, financial independence, the American dream in its material form. Those who have contributed to your support these many years will also view such rewards with approbation. You are, of course, right, at least in the short run—law school achievement brings obvious financial gains. Indeed, some of these immediate gains in the eyes of a few of us are extreme. And, as time goes along, financial gains and professional promotion provide some further measure of professional excellence. Such "paycheck recognition" is a time-honored method of giving excellence its due, and of stimulating even higher levels in the future. But for many—I hope most—it is not enough to provide individual satisfaction.

It is not enough because too often financial advancement measures longevity, not merit. It is a reward for loyalty, not achievement. Nor does it have the public or personal acclamation to which those nurtured in a system with regular grades, offices, and honors have become accustomed. One of the most common laments I hear from young lawyers is "I don't know how I'm doing." Superiors say little affirmative. Peers may not be able or willing to evaluate: they, after all, view you as competitors. Clients seldom say well done, even when you are successful in their behalf. They are more likely to complain about your bill! Even those who speak well of you to others will seldom say it to you. The lack of applause, of approval of superiors and peers, plants seeds of doubt, and breeds insecurity. You will of course know when you have done poorly; there will be no lack of criticism. But without the plus, confidence may wane.

A proven record of excellence has a high degree of expectation as one of its primary rewards. Professional excellence brings few plaudits precisely because it is expected. Law firms, public interest groups, corporate enterprises, and government agencies which reward achievement through the employment process, and are willing to pay very substantial salaries, justifiably contemplate a high level of performance; they are not likely to be overwhelmed when their contemplations are met. Some will draw praise, but others will not, even though it is earned. For some, financial reward will be sufficient. For others, such rewards even if forthcoming will not satisfy.

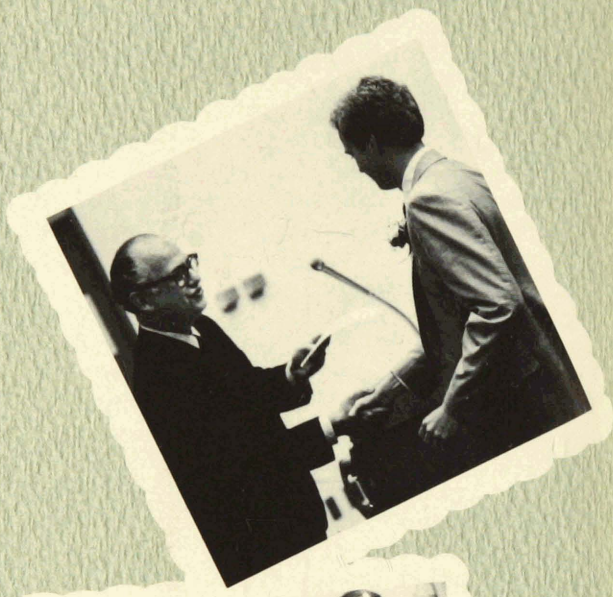
In the end, then, excellence may have to be its own continuing reward, and it must be adjudged less by the views of others than by a developed set of internal standards. If there are no prizes to win, no accolades to be given, you must at least satisfy yourself. Whether preparing a brief, making an argument, or counseling a client, do not perform at a level which is simply adequate, although there often is the temptation to do so. Time is always short, and tasks may begin to seem routine. Professional life is also

lonely. No one may even know what you do every day. In these circumstances, it is your own view of yourself which will ultimately remove self-doubts. The final satisfaction lies in meeting your own expectations, not the expectations of others.

If high expectations by others are one part of your reward, added responsibility is another. Some of you will constantly strive for it. Others, assuming that this group is typical of others like it, will work hard to avoid it. My own experience with government brought me into constant contact with many for whom responsibility avoidance had become a consummate skill, if not an art form. I do not speak here of social responsibility, about duties to society at large. Clearly such responsibilities exist, and are the right of a society which has sought and nurtured excellence to demand. But that is a complex subject for another day. I refer today to professional respon-

sibility in a more limited fashion, what might simply be characterized as accountable decision making, decision making which affects someone other than one's self. And I address it today as a measure of and reward for excellence, for it is to those who excel that greater responsibility of this sort comes most quickly.

Many are those who want responsibility offered; the offer itself is a coveted accolade, and to turn it down may be highly disadvantageous. Fewer are those over the years who want to take the responsibility tendered, for added responsibility means greater burden. And fewer yet are those who carry

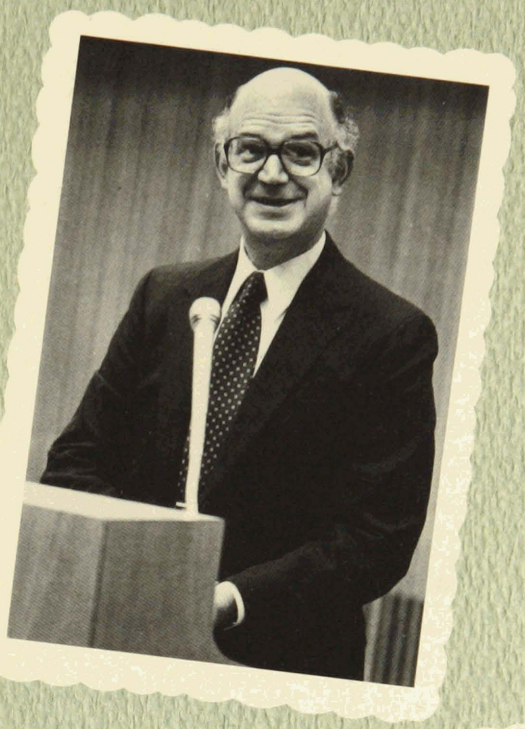


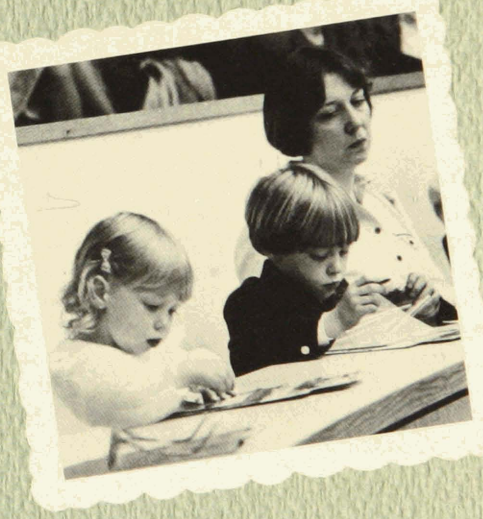
those burdens easily. Let there be no doubt. Professional excellence brings responsibility in ever increasing measure. From your first brief to your first sole client to supervision of others, from responsibility for your first motion to your first little case to your own multi-million dollar case, responsibility grows. Some will thrive on it, and find it the most satisfying element of professional life. But for many of you, added responsibility will be at best a mixed blessing.

Responsibility brings burdens; not the burden of added work, for in many cases it is those with least responsibility who put in the longest hours. Some of you will learn that lesson immediately. But direct and final responsibility cannot be left at the office. As my wife put it during our deliberations over the AT&T case, "Even when you're at home, you're not here." The greater the responsibility, the more it is likely to be an abiding presence. The greatest fear of responsibility, however, is the fear of failure, of being unable to do what is asked and of censure as a result. Of greater public consequence, your failure may bring losses to others, whether that be clients, taxpayers or associates. The decision to file the *AT&T* case posed such risks, and some believe the jury is still out!

There is a clear dilemma here for the professional. Professional life without a significant degree of responsibility is likely to be less than satisfying, and, indeed, marks a failure to achieve the promise with which you have entered the "real" world. At the same time, the assumption of responsibility for which you are unprepared, or which is clearly beyond your ability, is itself unprofessional. It is not only unfair to yourself, openly inviting failure, but may cause untoward harm to others.

The secret, of course, is to find the level of responsibility which truly reflects the maximization of your





ability. To stop short will bring work which is increasingly routine, work which will not over time keep your interest or bring forth your best effort. The temptation for many—a temptation created by professional ambition or the lure of monetary reward—is to go beyond, to act out of impatience, without careful self-evaluation. You may win big; you may lose even bigger. In the end, you must find your level of responsibility on your own. Just as you must act in accord with internal standards of excellence, you must come to know the degree of responsibility you can assume consistent with those standards.

Finally, let me stress one additional reward of excellence—what might be called the opportunity for a wide variety of professional experience. You will leave one of the nation's finest law schools with an outstanding record of achievement. For many of you, opportunities for significant and rewarding professional lives already exist. But beyond what might be called first-time opportunity, continued excellence may result in further opportunities, not simply to advance but to broaden experience in a variety of other ways. And many of you, I am afraid, will forgo them, depriving yourselves of a large measure of satisfaction and the broadening a different professional experience provides, and depriving others of the benefit of your talent.

Let me be more specific. Most of the young people in this room have spent many hours in the placement process. I have spent many hours talking with some of you about career decisions. What has distressed me time and again is the extent to which students stress the urgency of joining firms or institutions where they will advance and be satisfied throughout their professional lives. The initial job decision is viewed not as a first step into professional life but, assuming a modicum of success, as the final step as well. There seems to be a general assumption that career choices are made but once in a lifetime, and, moreover, that one needs to get about it as rapidly as possible.

Some will protest that this is not so, that they are taking public interest jobs, clerkships or government positions to broaden their outlook at the outset. I grant that this is so. But most with such plans have already decided to stay at such posts for a limited period, and to then enter into their real career. Those with such plans contemplate a two-stage, rather than a one-stage, career. Yet plans are largely made now. I applaud the variety of experience this represents, but such initial experience is not really what I am talking about. I am speaking of a new opportunity not three years from now but in fifteen or twenty years, of viewing one's professional career as a series of segments, each with its own rewards and satisfac-

tions. Not all choices need be made now. It may be better to proceed without "a lifelong plan," and to take opportunity as it comes. To simply use your achievements and degree as a first time entree, to be left on the shelf thereafter, may be to deprive yourself of a substantial part of what you have earned. The future effect of your degree may be little more than guaranteed membership in the University of Michigan Alumni Association, and an assured place on the solicitation list for the Law School Fund.

The clearest illustrations of my concern relate to public service. In 15, 20, or more years, some among this group will be asked, by virtue of a record of achievement, to ascend the bench, take a high government position or seek major public office. The opportunity might take a different form—to become corporate general counsel, or to head a public interest organization. Obviously not all such opportunities should be seized. But some should, and more should be at least seriously considered. Often they are not. The reasons are common, and are heard repeatedly. "I can't afford it; I'll lose my place in my firm; I'll lose clients; I can't shift my family." Each of these may be true, but are they as important as the speaker suggests? If you are really good, what matter that you leave your firm, or lose money for a few years (usually of course made up later)? Are family concerns really a justification? Have you even discussed it? Or are you simply sticking to a preconceived plan which brooks no adventure and no risk? Worse yet, are you simply comfortable in what you are doing, and perhaps fearful that a new challenge will result in failure?

There are no simple answers to these questions, even if notions of a duty to serve the public are set aside. As with the assumption of responsibility, the answers rest upon self-evaluation and confidence. Too often, however, the negatives appear first. The preconceived plan places the burden of persuasion on the new opportunity, which, because its benefits are unclear, will generally fail to carry it. There is much to be said for the opposite approach. Fifteen or twenty years in one place ought to bear the burden of justification, in terms of continuing learning, self-satisfaction, and ongoing challenge. The first question perhaps should be: "Why should I stay where I am?" Judge Learned Hand, in a passage from the *Alcoa* case which some of you may recall, asserted that:

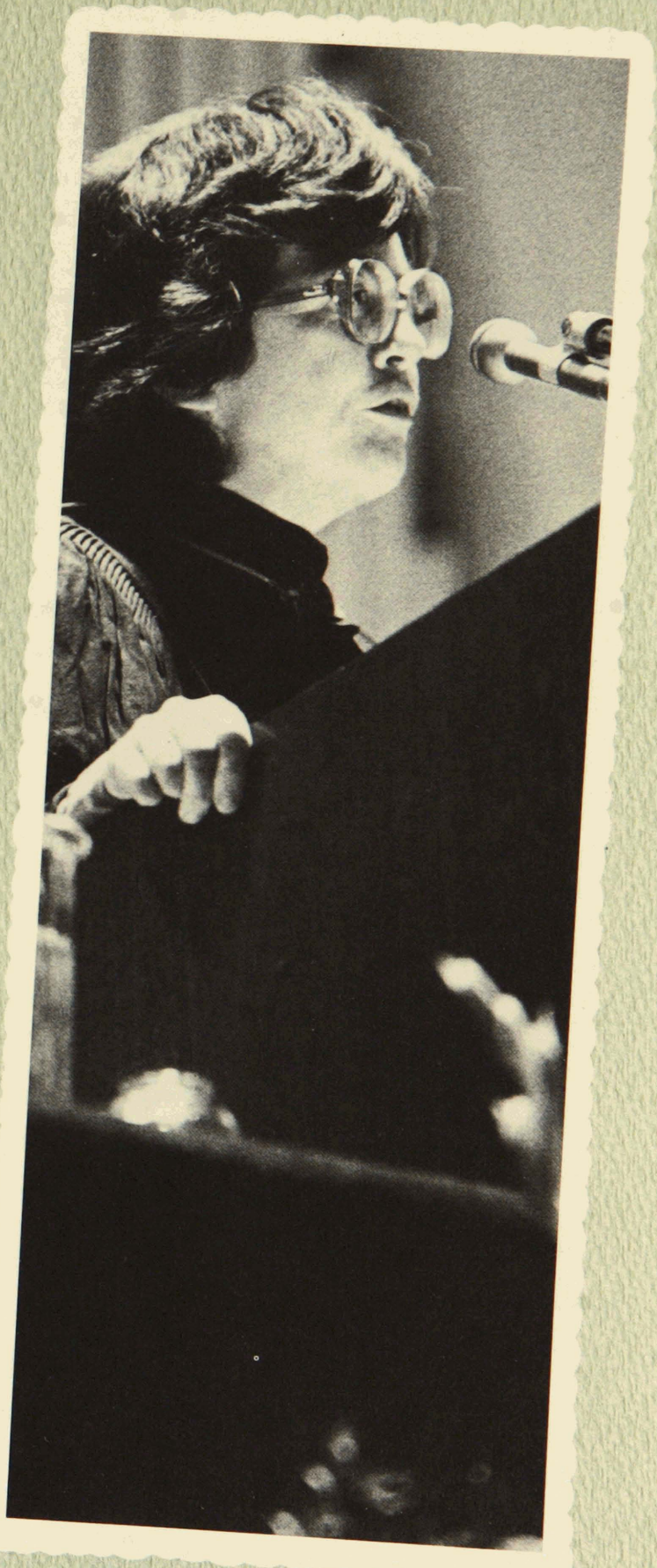
> Unchallenged economic power deadens initiative, discourages thrift and depresses energy; . . . the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.

This description of the quiet life of the monopolist may well describe the life of many at the midpoint in their careers, whether those careers be in practice, government or, yes, even teaching. What may well be needed to provoke their very best is interjection of a new source of stress. Continued excellence, and the self-satisfaction which accompanies it, needs stimulus. For some, this will require a willingness to take calculated risks, to engage in what may at first seem gambles. But for those with talent, the deck is stacked in their favor. Too seldom, however, do they realize it.

The days of blue ribbons are about over. In the end, professional life requires internal standards, not only of right and wrong but of excellence as well. These will not come easily, as you leave a system which has always measured you against *its* standards. Hopefully, internal standards have come in the process. So now you must grade yourselves. I hope 30 or 40 years from now, you can give yourself all "A's." And maybe, from time to time, you can even give yourself a ribbon. ◘

Thomas E. Kauper, the Henry M. Butzel Professor of Law, has taught at the Law School since 1964. Twice a graduate of the University of Michigan (J.D. '60, A.B. '57), he began his career with a clerkship to Supreme Court Justice Potter Stewart, and, in recent years, has twice served in ranking positions with the United States Department of Justice, first as deputy assistant attorney general in the Office of Legal Counsel (1969-1971) and then as assistant attorney general in charge of the Antitrust Division, the chief enforcement officer in that field.

a senior day address



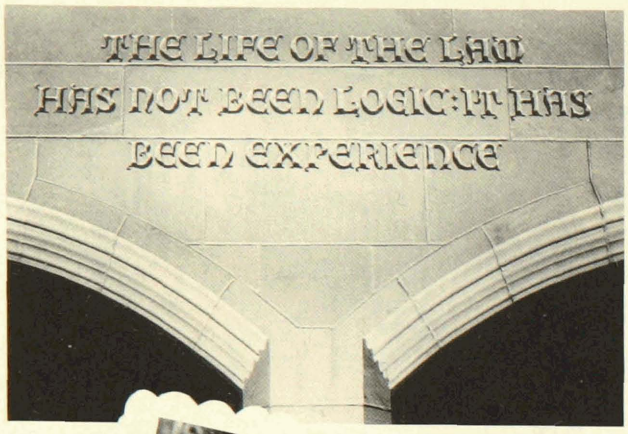
by the Honorable Patricia M. Wald,
Circuit Judge, United States Court of Appeals
for the District of Columbia Circuit

Graduation speeches are the toughest. I'm unsure what is really relevant to a new law graduate these days but I'm *not* going to talk much about "the law." The last three years must certainly have taught you as much about "the law" as can be taught at any one point in time. But however cynical it may sound, I doubt whether your future or the future of our country or of our civilization depends on what you have specially learned here. The great artist Pablo Picasso once referred to work as "the ultimate seduction"; my first piece of advice to you is, Do not let yourself be seduced and then abandoned by the law. If—belaboring the metaphor—the law is a jealous mistress, she is not enough. One's faith, one's character, one's family, the times one lives in and how one lives them, are more important.

While the law ideally provides a process for dealing with disputes fairly and in an orderly manner, the values it imposes on the disputants come from a deeper societal spring. And these values change within our lifetimes. Torts, contracts, real property, environmental law, labor law, antitrust, family law, discrimination law, all of them today bear little resemblance to what I learned 30 years ago and 30 years from now will have changed again.

Yet most of you will live your full public lives as lawyers—once committed, few have the luxury of career changes. The fact is—face it—that none of you are likely to become Walter Murphy's Vicar of Christ, the Michigan law graduate who became successively Infantry Captain in Korea, Dean of the Law School, Executive Assistant to the President, Chief Justice of the Supreme Court and finally Pope. But don't despair; there will be many great opportunities for you between this day and the day you retire to Golden Pond. So it's not a bad idea now to think about what you want from your life in the law, and what you are willing to give in return.

You do have a basic choice—whether to be an initiator of legal and social change in your lifetime or merely a receptor, applying and reflecting other people's values and choices. Some lawyers do very well



at the latter; they are legal exemplars of T. S. Eliot's "hollow men," waiting to be filled. I hope you will be more than that. The crucial thing is to play your lawyer role on as big a stage as you can, against as broad a backdrop as you dare, prepared to move in and out of different parts in different scenes, to be content as a supporting player on occasion, never to underrate the bit parts, especially while you're learning, but to be ever alert to move into a major role when your time comes. But don't be typecast. And get off the stage occasionally. Have a life outside the law—in your neighborhood, your community, the region, perhaps your nation. You will be the better lawyer for it.

For the Life of the Law—as Holmes said—is Experience. The Death of the Law—I think—could be Dogma, untempered by experience; dogma from the Right, the Left, even the Center; dogma from strict, rigid ideologies of any stripe. If the law is to survive and flourish, it must change and develop through experience, application to new situations, testing in new circumstances, infusion of new knowledge. And where is that knowledge, experience, and perception to come from, if not from the world where the law is put to use by lawyers, aware of the world about them, concerned about the way law works for or against individual people, communities, and even something called the "public interest"?

We hear much about the disenchantment of students in law school—their sense that they have few options. In the words of Calvin Trillin's recent *New Yorker* article on Harvard Law School—the Michigan of the East: "The van is waiting outside the law school door, but few whistle as they enter it." That view, if pervasive, is depressing; I for one am not prepared to buy it.

I am increasingly convinced that the practicing lawyers in this country must help to supply the answers to the most troubling legal questions facing our profession and our nation: the ethical dilemmas between private gain and public good that businessmen and their counsel face every day; whether to change a defective product design even if it grants a tactical advantage to plaintiffs in pending product liability cases; ways to speed up court processes and cut down litigants' costs; what kind of out-of-court dispute resolution mechanisms really work and in what circumstances; redefining the relationship

between attorneys' fees and the prohibitively high cost of justice in our courts today; recognizing and rectifying the second, more subtle, wave of discrimination against minorities and women in the marketplace; evaluating whether voluntary *pro bono* programs are an alternative to legal services for the poor or a self-serving delusion advanced by those who do not think the poor should have legal services.

Most people—lawyers certainly included—don't get their druthers in life. Only a rare few get to argue Supreme Court cases for a living. The rest have to

make a more prosaic living, pay for the groceries, meet mortgage payments, send their kids to college. The bright fact is that so many do find some time in their careers to rise to great moments, to participate in the great debates of their time—on the environment, civil rights, war or peace, nuclear survival. They do enlist when the need arises—to defend demonstrators or poor people, to investigate frauds and corruption, to lobby for new laws, to work for improvements in the justice system for all litigants, not just for themselves.

We hear more and more about "burnout" among our most talented lawyers: "I'm bored with my law practice," or "fed up" or "eaten up." The tone is casual, resigned, or in some cases, desperate. A psychiatrist specializing in lawyers' problems recently wrote in the *National Law Journal* that long hours, high overhead, escalating competition are the gripes; diminished work satisfaction, emotional numbness, fatigue and exhaustion are the symptoms. Burnout used to be the province of air traffic controllers or brain surgeons—now it has spread inexorably to lawyers. In a survey of young lawyers, one to five years out of law school, 50 percent displayed the signs. Ironically, it is those who have been most involved in and most successful in their profession that are the hardest hit. "In order to burn out, a person needs to have been on fire at one time," the psychiatrist says. The root causes of legal burnout, he found, go all the way back to law school, specifically its emphasis on verbal dexterity, neutral principles, competition, its elevation of formulaic principles and rules over natural human values that are intrinsically vague and imprecise. The hard analytic view that doesn't care about the outcome is king; gropings for justice are suspect. Dropouts were highest in the first year of law school among students who continued to long for human contacts, stayed concerned with people as people, and were considered by their peers "friendly and sympathetic." (These days we all dread being labeled a bleeding heart, or soft or sentimental.) Apparently no lawyer wants such an epitaph. At least, not anymore. Writing on "The Big-Law Business," *Newsweek* quoted the manager of one of the nation's leading firms:

> He does not pretend to be running anything but a business. His rules: there is only one leader, and "no place for democracy."

Another manager is described as follows:

> He makes no apologies for his unabashed interest in the bottom line, even though his produce-or-perish policy leaves little room for free *pro bono publico* work. The ambience of the firm . . . is high pressured; "more like a cockfight."

If that is what is truly waiting for you out there, I am glad that I am not starting out. But somehow I refuse to accept that kind of legal macho as the ultimate destiny of our profession. I agree with the older, unregenerate liberal lawyer, quoted in the same article, who said:

> when [lawyers] throw down the concept of fraternity and collegiality, they fling away their birthright.

I believe you can and should insist on bringing civility, decency, even compassion into your practice. And it may even be good business to do so. People who appear early in your career—in modest roles—reappear later in major ones. When they are in a position to affect your life, they will remember.

Sure, for most of you, it will take endurance, stamina, good sense, decency, and the support of "significant others" to end up feeling good about a lifetime of law practice. I think maybe we have it harder than other professions. Lawyers spend so much time battling each other, rather than disease, urban blight, profits and losses. Every substantial victory for one lawyer is a substantial defeat for another—and often there is a real question as to whose side would have contributed more to the greater good. But those who lead at the end of the

first lap don't always carry through to the finishing line. A satisfying legal career is for the long distance runner, not the early sprinters.

I am not naive about the selfishness and insularity of segments of our profession—the obsession with money, power, and competition, the deliberate self-blinding to signs of corruption or even crime among corporate clients. It's all there, but *you* don't need to be part of it any more than public officials have to take payoffs, or merchants have to sell schlock goods, or doctors have to practice quack medicine.

Work within your firms, big or small, within your bar associations, local, state, and national, to set higher standards for the ethics in our profession, to devote more lawyer resources to streamlining the legal process and improving the institutions we work with and in. It may sound laughable—maybe it is—to suggest that an associate in a major Wall Street or Detroit firm can make a difference in the ethics of big firm practice or corporate client decisions, but in my experience if she is a *valuable* associate, she *can* influence particular decisions, and if, after a few times she doesn't, she can put her conscience on the line and leave; she can do the same thing in government, and maybe more of my generation should have. When I was a government lawyer years ago, a wise old-timer told me, "You can't do the job right unless you are prepared to go if it sticks in your craw—but you can't go until the day after tomorrow. Tomorrow, you try to bring the so-and-so's around."

It is possible—although hazardous to your career—to refuse to work on a particular case that troubles you personally, or to decline to argue a particular position that conflicts with your deepest beliefs. It only takes guts—and a belief that an individual conscience *can* make a difference. That is an article of faith that too many of my generation have renounced. I hope yours will embrace it.

Of course, I do not speak of Michigan, but I think some of our finest law schools do not offer the student enough sense of the breadth of choice within a "traditional" legal lifestyle. Students need role models for how to practice law, not just how to teach it or write about it. My advice is, Expose yourself to as much front-line contact with clients, courts, and life as you can, and recycle that experience into your practice. Have another life—in community service, politics, most importantly in your family. And take some *risks*—whether declaring your unorthadox views inside the law firm about *important* matters, or taking a job that doesn't pay as much but is more interesting than another, or spending time on a non-paying cause for the good of your soul. You're too young, too talented, too energetic, too important, to act like old folks before your time.

And, if I may, a special word to you young women graduates on risk taking. Most of you will marry and have children. The time you take off from your career to bear and raise them should not be, but too often still is, a liability on your professional balance sheet.

Each of us, in our personal life, has choices to make. We are not likely to get back more than we put in. Neither families nor careers flourish on neglect, and everyone strikes the balance differently. It will take some time yet for the conflicts between career nurturing and child nurturing to disappear altogether. But I am convinced that if women lawyers want greater harmony between their career patterns and family life, they *can* achieve it. We don't reflexively have to ape our brothers and fathers in the scramble up the career ladder. In a profession in which women may—in your lifetime—become the majority, we ought to be able to set the pace for ourselves and for other professions in career phasing, in balancing our time between family and work.

The women's movement will leave a barren legacy if all it produces is a roster of superstars who have made it in a man's world by reinforcing a male-dominated culture. If our nation truly does revere the family, as our leaders endlessly proclaim, then women should not rest until they achieve a true con-

ciliation of career and home. In the meantime, however, for those who choose to drop out for a while, great patience, tolerance, and self-subordination are required. My only words to those of you who choose that course are: It can be done; it has been done; and I believe it worth doing. I know few women who consciously made the choice who have not caught up with their peers; more significantly, few who regretted the choice. The time is not wasted from a professional view, and certainly not from a human point of view. There are new career patterns and personal relationships your generation has to forge to conserve the gains women have made in the last decade without sacrificing the best parts of family life. You can build your own career ladders; you need not always climb the ones others have left in place.

Because of the accident of your birthdates, few of you young men and women were old enough in the turbulent decades of the 60s and 70s to watch the law and lawyers—not just a small group of cause-oriented lawyers, though they were important too, but lawyers in cities and towns all over the country—play pivotal roles in expanding a national vision of a fair and humane society. You did not witness the transition from a society where segregation was defended as being *required* by law to one where the courts became the frontline bulwark against it; you did not cheer as the ancient and creaky processes of the criminal law and the United States Congress dealt with the perversions of Watergate; you did not have the opportunity to help the legal untouchables—the poor, juveniles, prisoners—attain entitlement for the first time to legal processes before they could be evicted, cut off from welfare, denied public housing, or placed in isolation cells. You didn't plan peaceful and principled demonstrations against major and mistaken wars, or defend individual rights in the mass arrests and riots that characterized the not-so-peaceful demonstrations. You have read mainly in history books of the profound social, political, and cultural movements that legitimatized the rights of women, minorities, youth, handicapped, aged. You weren't there to midwife minor legal miracles like bail reform or right to counsel. You are the victims of idealism deprivation; you have been denied a sense of what a powerful instrument the law can be for generous, not selfish, ends.

But you have much time yet to make up for all of that. At the end of your legal careers, I hope you will be able to look back upon the thrill of camaraderie, the headiness of participating in some important movement or cause, the achievement of some change that you believe in and that you have struggled for, the intellectual high of solving a complex social problem, the satisfaction of expanding the law to its limits for a good cause, the exhilaration of a well-planned legal strategy, the uplifting sense of being an agent of justice and of combatting injustice, the empathy of serving real live people. If you do all this, you will have enriched yourself and honored the law.

At the end of a long and profoundly influential career, Jean-Paul Sartre pondered with his soulmate Simone de Beauvoir whether, after all, he had done anything worthwhile. In her account of his last years, *Cérémonie des Adieux,* de Beauvoir told of how the healing words finally came, amid all the doubts and regrets:

> "And yet we've lived," Sartre concluded. "We feel that we've taken an interest in our world and that we've tried to see and understand it."

I hope that you, too, will feel as much. Godspeed and good luck. ◘

Judge Wald is a 1948 graduate of Connecticut College for Women and a 1951 graduate of Yale Law School, where she was elected to the Order of the Coif and was case editor of the Yale Law Journal. *Her legal career, which began with a clerkship with the Honorable Jerome Frank, United States Court of Appeals for the Second Circuit, has included practice with the firm of Arnold, Fortas & Porter; membership on the National Conference on Bail and Criminal Justice and on the President's Commission on Crime in the District of Columbia; consultancies for the National Conference on Law and Poverty and for the President's Commission on Law Enforcement and Administration of Criminal Justice; and work as an attorney for the Neighborhood Legal Services Program, the Center for Law and Social Policy, and the Mental Health Law Project. Prior to ascending the bench, she was assistant attorney general for legislative affairs in the United States Department of Justice. In 1966-67, she served as an attorney in the Department of Justice's Office of Criminal Justice.*

Judge Wald has, in addition, served on numerous ABA committees and commissions, on the Board of Governors of the District of Columbia Bar, on the editorial boards of several legal journals, and on the boards of trustees of the Vera Institute of Justice, the Meyer Foundation, Connecticut College, Exeter Academy, and the Ford Foundation. She has written extensively about bail and bail reform, advocacy for the mentally retarded offender, and the juvenile justice system. She has been the recipient of honorary degrees from Mt. Vernon Junior College, George Washington University Law School, and the John Jay College of Criminal Justice. In 1984, she was honored as Woman Lawyer of the Year by the Women's Bar Association of Washington, D.C.

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