Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 29, NUMBER 4, SUMMER 1985

A Glimpse at New Books by Faculty
Excerpts from Works by James B. White and Jerold Israel

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ARTICLES

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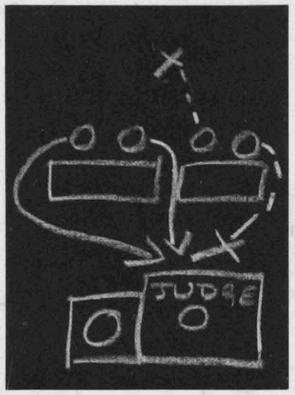

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Pornography—1980s style

Schauer appointed to Justice Department panel reviewing obscenity issue

A widely respected constitutional theorist whose early legal career included defending clients involved in pornography litigation, Frederick Schauer has been appointed by Attorney General Edwin Meese III to an 11-member committee to study the ramifications of sexually explicit material. The panel, which began a monthly series of public hearings in June, was formed to gather information on pornography and, if appropriate, recommend new ways to control it.

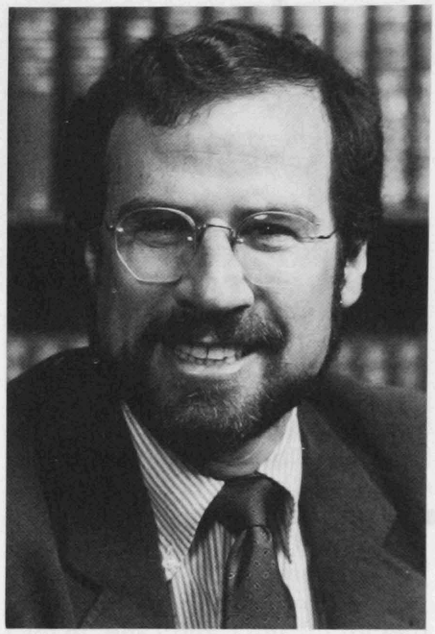
A similar commission, appointed by President Nixon in 1970, found little or no relationship between pornography and delinquent or criminal behavior. However, Meese told a press conference that "reexamination of the issue is long overdue." In the past fifteen years, he said, "the content of pornography has radically changed, with more emphasis upon extreme violence."

Schauer, a 1972 Harvard Law School graduate who has taught at Michigan since 1983, gained experience in the practical aspects of the issue as an attorney with Fine & Ambrogne of Boston. The experience sparked his interest in obscenity law, a field in which he specialized after joining the West Virginia Law School faculty in 1974. His writings have since broadened to include the full range of legal and philosophical problems related to freedom of speech and constitutional interpretation. His books, *The Law of Obscenity* and *Free Speech: A Philosophical Enquiry*, together with an extensive list of scholarly articles, have earned him a reputation as one of the nation's leading students of the First Amendment.

Though Schauer brings to the commission a philosophical scepticism about many of the traditional justifications for free speech, he describes himself as "someone who is open-minded, who wants to think about both sides, and who wants to consider all possible arguments." He explains, "In thinking about free speech—or speech in general—we must start with the assumption that speech, by and large, causes consequences — both good and bad. Now this does not necessarily mean that all speech causes all consequences, or that it automatically causes the ones that are being argued in this context. That's what I've got to find out."

Schauer was referring to some of the issues that are scheduled to be discussed at the various hearings, including behavioral, psychiatric and psychological evidence about the effects of pornography. These themes, as well as issues of law enforcement, free speech, the nature of the pornography industry, child pornography, and others will be covered as the hearings progress through the end of the year and move from Washington, D.C. on to Miami, Chicago, Houston, Los Angeles, and New York.

It is on the free speech issue that Schauer will bring his expertise to bear. "The First Amendment protects speech *despite* the consequences that speech may have," states Schauer. "It does not follow that just because speech has consequences, we can or should regulate it. But that's what makes it difficult to justify the free speech argument in the first place — trying to come up with some reason why, in spite of the consequences it has, we should treat it as partly or completely immune from government regulation. On the other hand, the Supreme Court has long said that hard core pornography is not speech in the First Amendment sense. I have written agreeing—that at least hard core pornography is outside the coverage of what the First Amendment is all about. That does not mean that it should be regulated—only that it would not be unconstitutional to do so."



Frederick Schauer

Addressing the need to reexamine the relationship between pornography and social behavior, Schauer said, "Regardless of the outcome of the issue fifteen years ago, it never hurts to reexamine something in an open-minded, relatively academic sense. The issue is obviously a pressing one."

After the conclusion of public hearings, the panel will present a written report to the attorney general in June of 1986. The commission is headed by Henry Hudson, commonwealth's attorney for Arlington County, Virginia, a Washington suburb. ◘

Speaking out:

Karen Ann Quinlan and the "right-to-die"

by Yale Kamisar

A decade after the Supreme Court of New Jersey granted permission to disconnect her mechanical respirator[1] and after years of "defying" the experts who testified that she could not survive without the assistance of that apparatus, Karen Ann Quinlan died last June. But it is plain that the landmark case which bears her name will live for a long, long time.

(I should point out that the New Jersey Supreme Court's opinion in the *Conroy* case (1985)[2] is more thoughtful and careful and, in my view, a good deal more honest than the one handed down nine years earlier in the *Quinlan* case. But the *Quinlan* case has a life of its own. It captured the world's attention, significantly influenced the law in other jurisdictions, and may have changed our way of thinking about involuntary euthanasia for many years to come. Thus, in this short piece I shall focus only on that celebrated case.)

When the decision in *Quinlan* was handed down a decade ago, and again when Ms. Quinlan died last June, front-page stories called the case a "historic 'right to die'" decision. And from the outset it has almost been universally reported and discussed as such. But look again: was it really a "right-to-die" case? I think not.

I believe it more accurate—albeit much more troublesome —to view it as what might be called a "power-to-let-some-other-die" case. (Keep in mind that Karen was supposed to die shortly after the respirator was removed, not many years later. The case should be read in that light.)

Many who shrink at the thought of "actively" causing the death of another, however pitiful that other's condition, may be willing to "rest that person in God's hands" or "leave that person to her fate"—that is to say, let that person die. But—however wide the difference psychologically—letting people die when you have a special relationship with them and an affirmative duty to care for them is the logical equivalent of killing them.

Up to the time that the *Quinlan* case caught the headlines and the covers of national magazines, there was general agreement that the most important safeguard in the various proposals to legalize one or more forms of euthanasia was the requirement that the patient personally request or consent to such a course of action (or inaction). This safeguard was obviously lacking in the *Quinlan* case. Karen did not and in her condition, of course, could not consent to her death or ask anyone else to let her die. Nor had she made a "living will" or executed any directive requesting that she be allowed to die without "medical intervention."

Karen's mother, Julia, has told the media that several years before her daughter slipped into a coma, Karen had told her that she "would never want her life prolonged unnecessarily by extraordinary medical treatment." It is hard to believe Karen used the term "extraordinary means." If one reads the book about the *Quinlan* case co-authored by Julia and her husband, one discovers that Karen's mother had "never heard" of the concept of "extraordinary means" until the Quinlan family pastor, the Rev. Thomas Trapasso, explained the doctrine to her—*after* Karen had slipped into a coma.

Finally, both the lower court and the Supreme Court of New Jersey agreed—although their conclu-

sions went largely unreported—that Karen's alleged *previous* expressions of her views on this issue, such as the time when a friend's father died of cancer, were so casual, impersonal, abstract and equivocal as to lack the requisite probative value.

As I read the opinion of the Supreme Court of New Jersey, it would have reached the same result if there had been no testimony whatever about Karen's previous conversations and remarks.

The key to the opinion, I think, is the reasoning that if Karen's constitutional right of privacy includes a right to elect to die and we cannot tell what choice she would have made as a particular individual, we may *surmise* that she would have chosen to die because we *presume* that the great majority of those in her situation would have so chosen.

Even if we accept the unexamined and undocumented assumption of the 1976 New Jersey Supreme Court that a majority of those in Karen's plight would wish to die, this is not, or at least should not be, the end of the matter. Even if only a very few patients in Karen's set of circumstances were determined to struggle on, is the fact that they are in the distinct minority a justification for defying them their *personal* right to struggle on? After all, comatose patients are not fungibles. Society's silent majority cannot, or at least should not, speak for all of those in *Quinlan*-type situations. Evidently, the 1976 New Jersey Supreme Court thought it could—all in the name of Karen's "constitutional right of privacy" which is the right of the *individual*.

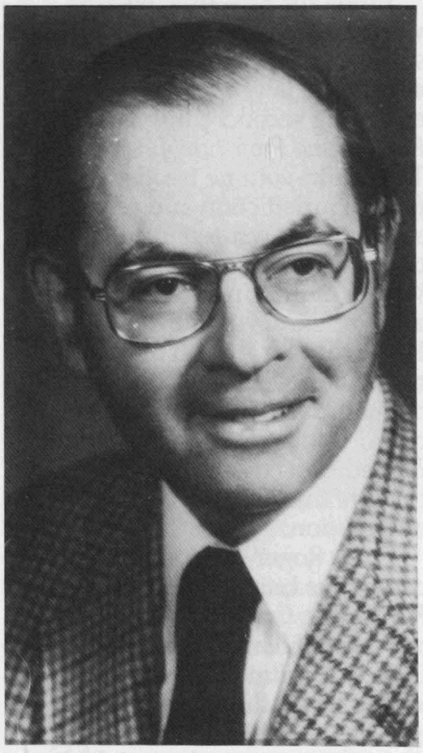
When I discussed this case some years ago with the late Harold Leventhal, a highly respected federal judge, he responded:

"It may well be that an unspoken element of the *Quinlan* decision is the interest of the family of being free of an unbearable emotional burden. Perhaps it is unarticulated because of our emotional history—as individuals and as a collective society. This leads us to formulate decisions in terms of the implication of the patient's will that she should die. This may be a fiction or construct, but it is the kind of transition that makes for survival.

"We inherit all kinds of unlogic," continued Leventhal. "But our human relationships depend on fragile balances. Sometimes they must be approached in a soft light, subdued by history, rather than in the bright spotlight of utmost analytic clarity."

There is, of course, something to be said for Leventhal's viewpoint. But sometimes, and this may be one of those times, "soft lights" are too seductive.

It cannot be denied that *Quinlan* presented a very appealing case for discontinuing life support. The case may arguably be limited to its extreme facts. But in my judgement the *reasoning* of the *Quinlan* opinion is not so limited.



Yale Kamisar

The *Quinlan* Court authorized the withdrawal of Karen's life-support system if and when the doctors concluded that "there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state." But there are many thousands of others—for example, severely mentally deficient and congenitally deformed children and adults suffering from senile dementia—whose tragic conditions may be as unequivocally described as "irreversible" as was Miss Quinlan's.

It is not a very long step from the *Quinlan* case for another court another day to use the *Quinlan* court's language as follows: "We have no doubt, in these unhappy circumstances, that if this Down's syndrome child (or senile old man) were himself miraculously lucid for an interval and perceptive of his irreversible condition, he could effectively decide upon death. The only practical way to prevent destruction of this person's 'right to die' is to allow his guardian and family to decide whether, if he could think and speak clearly, he would wish to exercise this right in these circumstances."

The *Quinlan* case, I fear, badly smudged, if it did not erase, the distinction between the right to choose one's own death and the right to choose someone else's. ⊠

1. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (Hughes, J.).
2. *Matter of Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985) (Schreiber, J.).

The above article is based on a shorter piece that appeared in The New York Times, *June 17, 1985. Copyright© 1985 by the New York Times Company. Yale Kamisar is the Henry K. Ransom Professor of Law at Michigan.*

Booked up

A vintage year for new volumes by Law School faculty

by Susan Isaacs Nisbett

In the 1960s, Law School faculty took up their pens to map out newly emerging fields of the law. The examples are easy to come by: Terrance Sandalow co-authored *Government in Urban Areas* (with Frank Michelman); Alfred Conard changed the way business law was taught in *Enterprise Organization;* Eric Stein developed teaching materials that defined international law; Theodore St. Antoine (with Russell Smith and Leroy Merrifield) developed *Labor Relations Law: Cases and Materials;* and Yale Kamisar produced *Modern Criminal Procedure* (joined by Jerold Israel and Wayne LaFave in later editions).

As they delineated new areas, Michigan's landmark casebooks also determined law school curricula. They were intellectual achievements with extraordinary classroom ramifications.

In the 1980s Michigan faculty are not only shaping their fields with important contributions to the traditional study of law, they are also breaking new ground through diverse interdisciplinary approaches to legal thought. The latter works are, for the most part, reflective volumes, written by lawyer-humanists who are also historians (Thomas Green, Joseph Vining), philosophers (Philip Soper), sociologists (Richard Lempert), and literary critics (James Boyd White). And they are written for an audience of humanists and scholars who may or may not be lawyers. Like their worthy predecessors, these books will have ramifications inside the classroom. But they are also likely to attract the attention of scholars in other disciplines.

In the area of "traditional" legal writing, Law School faculty are still developing and chronicling their fields with important casebooks and treatises. For example, *Criminal Procedure* (West Publishing Company), a new three-volume treatise by leading criminal law authorities Wayne R. LaFave and Law School Professor Jerold Israel, is the definitive work on all stages and aspects of the subject. Citing over 6,000 cases ("fortunately, LaFave read more of them than I did," Israel quips), the new treatise presents comprehensive coverage of pre-arrest investigation, pretrial and trial proceedings, appeal, and post-conviction remedies.

Professor Edward Cooper's work on justiciability, which represents a major contribution to this area of the law, appears in the emerging second edition of *Federal Practice and Procedure: Jurisdiction.* This multi-volume treatise on federal jurisdiction and related subjects was written in collaboration with Professor Charles Alan Wright of the University of Texas and Professor Arthur R. Miller of Harvard. The growth of this area of law has been so explosive that the justiciability materials, which comprised some 185 pages in the first edition (1975), were expanded to more than 900 pages in the second edition.

From Roger A. Cunningham comes *The Law of Property* (West Publishing Company, 1984), written with William B. Stoebuck and Dale A. Whitman. The book, available in both student and lawyer editions, fills the need for a comprehensive, up-to-date, single-volume "hornbook" on property law.

Last year also saw the publication of a fourth edition of the widely used casebook, *Basic Property Law,* which Cunningham edited in conjunction with Law Professors Emeritus Olin L. Browder and Allan F. Smith. Cunningham, together with Richard F. Broude, a practicing attorney, also published a substantially revised third edition of Penney and Broude's *Cases on Land Financing* (Foundation Press, 1985). A second edition of Mandelker & Cunningham's *Planning and Control of Land Development,* one of the most widely used casebooks in its field, is due from the Michie Company later this year.

But other books by Law School faculty—already on booksellers' shelves or due there soon—exemplify a reflective rather than a comprehensive mood, attributable, without doubt, to the breadth of the current faculty's interests, and perhaps also to an end-of-century need to probe the past and examine possible futures.

In *A Theory of Law* (Harvard University Press, 1984), legal philosopher Philip Soper tackles the central questions of political and legal theory: "Why should I obey the law?" "What is law?" A satisfying answer, Soper says, can be constructed only when the two questions are considered together.

Soper argues that a legal system—as opposed to one that is merely coercive—must aim at serving the interests of the community. What is essential to legal systems, according to Soper, is the claim by those in authority that they act in the interest of all. He shows how this official claim of justice explains existing concepts of law as well as the obligation to obey. Finally, he examines the implications of this definition of law for some jurisprudential puzzles: for example, the distinction between the court as lawfinder and the legislature as

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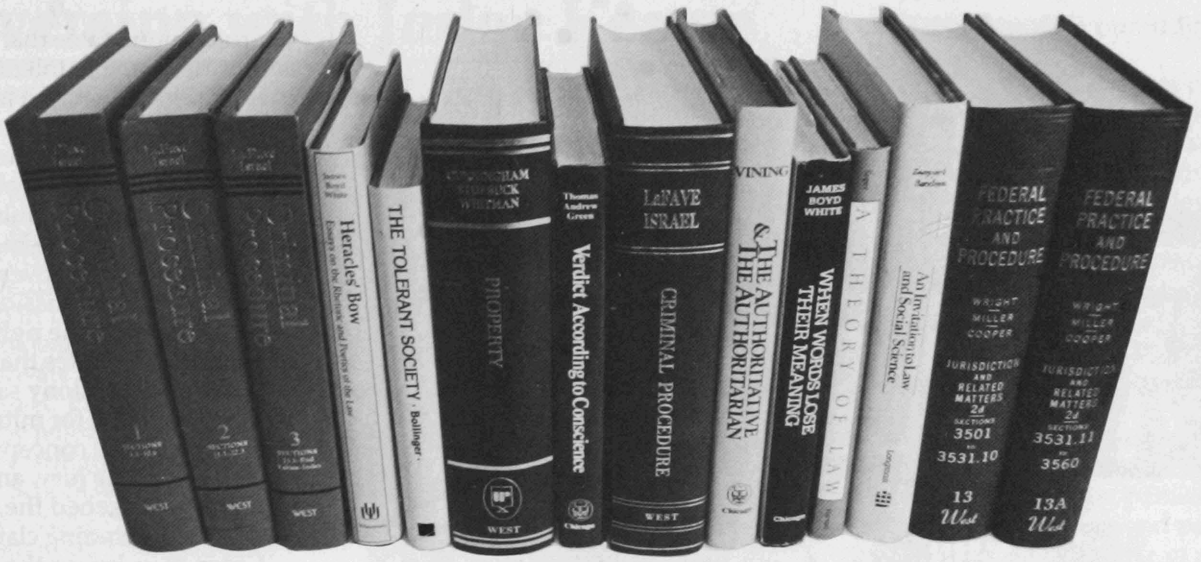


lawmaker, and the idea of natural, preexisting rights.

Like Soper's book, Richard Lempert's *An Invitation to Law and Social Science: Desert, Disputes and Distribution*, considers law's connection to other major disciplines. The book, written with colleague Joseph Sanders, of the University of Houston Law School, will be published by Longman's in late 1985 or early 1986. The volume is designed both to introduce students to the ways in which research in law and social science can enhance our understanding of law and the legal system and to offer legal scholars and social scientists a vision of this field as a unified area of inquiry. The book focuses on issues of responsibility or desert, as well as dispute settlement, and the effects and implications of using law to redistribute welfare. In each area, research in the field is synthesized and new theoretical perspectives are offered.

While Lempert seeks to reaffirm the connection between law and the social sciences, Joseph Vining, in *The Authoritative and the Authoritarian* (University of Chicago Press) places law squarely within the humanities. The book links the professional concerns of lawyers with individuals' concerns for authenticity and authority in personal life. As its title suggests, *The Authoritative and the Authoritarian* confronts the issue of law's authority, thus following Vining's earlier *Legal Identity* as the second "chapter" in his study of the phenomenon of personification in law.

Law's authority, Vining posits, is not an inherent quality; rather, it comes from the attitudes that citizens and lawyers bring to its materials—and which those materials may fail or succeed in sustaining. Vining also confronts the possibility that law's sister discipline remains theology—despite lawyers' efforts over the centuries to distance themselves from it. In the course of discussion, Vining addresses the use of illusion, self-delusion, and tricks in legal thought and method.

While Soper and Vining turn their attention to questions of authority, First Amendment scholar Lee Bollinger explores Americans' freedom to speak as they please in *The Tolerant Society: Free and Extremist Speech in America* (Oxford University Press). Dissatisfied with current theories concerning the modern concept of free speech, Bollinger has sought new explanations for the remarkable legal principle that protects even highly subversive and socially harmful speech activity from government regulation. One of the greatest failings of earlier theories, Bollinger says, is their inability to account for this "overprotection" of extremist speech or adequately to explain the benefit society derives from such protection.

Unlike previous theorists, who seek to justify the special protections afforded speech activity under the First Amendment by focusing on the *differences* between speech and other behavior, Bollinger focuses on the *similarities* between the problematic feelings we experience in both verbal and nonverbal encounters. Both "bad speech" and nonspeech behavior, Bollinger notes, can lead us to respond excessively or in undesirable ways, even in instances in which some punitive response is appropriate. From this perspective, the extraordinary self-restraint we practice toward speech under the free-speech principle can be justified, he contends, as a symbolic societal

In columns left to right: 1. Joseph Vining; 2. Lee Bollinger, Roger Cunningham, Edward Cooper; 3. Richard Lempert, James Boyd White; 4. Thomas Green, Jerold Israel; 5. Philip Soper.

statement of a commitment to exercise self-control over impulses encountered throughout all forms of social interaction (hence the association of free speech with "tolerance"), and not as a posture logically mandated by any special qualities of speech.

Lip-service tolerance is common in the free-speech area, and many Americans would doubtless favor stiffer penalties for those exercising their right to extremist speech than the ones actually imposed. But as one discovers in Thomas A. Green's *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (University of Chicago Press), Englishmen pressed into service as jurors often considered proposed sanctions extreme. They used their discretionary power, particularly in capital cases, to craft punishments they considered more appropriate to the crime. In other cases, they "nullified" (i.e. acquitted a defendant) because they found the activity justified in itself.

Analyzing trial records and legal commentary in the context of social and political thought, and raising essential questions about the moral balance among individual cases, general rules, and the preservation of society, Green documents the tensions that arose between fixed rules of law and popular notions of appropriate punishments. Throughout the book, he focuses on the phenomenon of nullification, the jury's unofficial—and often exercised—power to acquit a defendant who in legal theory, and on the basis of the facts known to the jurors, should have been convicted.

In this first unified, interpretive history of the English trial jury from its inception to the eve of the Victorian criminal-code reforms, Green demonstrates that judicial authorities came to tolerate, and even to depend on, the leniency that the use of nullification could bring to a trial. Over time, authorities reduced the scope of such discretion, but did not eliminate it. Indeed, 17th-century attempts to exert greater control over jury behavior led political dissidents to claim for the jury the right to find law. Green concludes that Victorian reform of felony sanctions reduced the need for mitigation, strengthened the concept of a mere fact-finding jury, and thus ultimately weakened the plausibility of law-finding claims.

Green thus brings the historian's perspective to *Verdict According to Conscience*. But it is the literary sensibility that marks the two newest books of James Boyd White, who is also a professor of English and classics at the University.

In *When Words Lose Their Meanings: Constitutions and Reconstitutions of Language, Character, and Community* (University of Chicago Press, 1984), White develops a way of reading and analyzing texts. He then applies it to poems, to essays, and to historical, philosophical, political, and legal texts. Casting his net over a broad sea of disciplines, White demonstrates that their apparently distinct concerns for truth, beauty, and justice are in fact deeply related.

In his forthcoming *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press), White applies his method of reading to a set of legal and nonlegal texts and problems. In the process, he develops support for his thesis that law—particularly in its practices—can be understood as an art of language, community, and ethics. ◘

Susan Isaacs Nisbett is the former editor of Law Quadrangle Notes.

Conversing with Judge Kearse

Distinguished alumna returns as a DeRoy Fellow

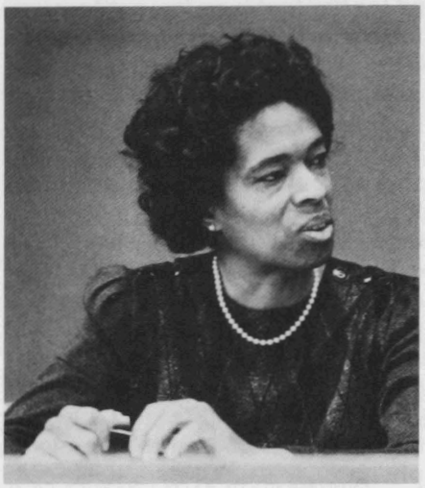
In early February, Federal Judge Amalya L. Kearse spent three days at the Law School as a DeRoy Fellow. The DeRoy fellowships were established in 1980 to give students contact with leading public officials and private attorneys.

Like John H. Pickering, who was a DeRoy fellow in 1984, Judge Kearse is a distinguished graduate of the Law School, which awarded her the J.D. degree cum laude in 1962. She attended Michigan after receiving her B.A. degree from Wellesley College in 1959. During her career at the Law School she was elected to Order of the Coif, served as a *Law Review* editor, and was winner of the freshman class moot court competition.

Upon graduating from the Law School, Judge Kearse accepted a position with the Wall Street firm of Hughes, Hubbard & Reed, where she engaged in general corporate litigation before state and federal trial and appellate courts and administrative agencies in matters involving antitrust, banking, real estate, securities, copyright, contract, commercial, trusts, administrative, criminal and constitutional law issues. She was a partner with the firm from 1969 to 1979, when she ascended the bench of the United States Court of Appeals for the Second Circuit.

During her stay at the Law School, Judge Kearse addressed students in sections of lawyers and clients, the administration of criminal justice, criminal procedure, civil procedure, contracts, and copyright. She also dined and met informally with students and faculty.

She took time from her busy schedule to sit down for an interview with former *Law Quadrangle Notes* editor Susan Isaacs Nisbett.



Amalya Kearse

LQN: What are your impressions of today's U-M Law School students?

ALK: So far, I've visited Yale Kamisar's criminal procedure class and also lawyers and clients. I had the slight feeling that the students of my era may have been a little bit more passive than today's students.

LQN: What types of questions are students posing to you?

ALK: How to get to be a judge; how the court operates; what my law clerks do for me.

LQN: What motivated your decision to go to Wall Street when you graduated from the Law School?

ALK: I wanted to be a litigator and I didn't have any particular substantive area I preferred to litigate over any other. I thought of Wall Street as the Big Leagues, and I wanted to see if I would make it in the Big Leagues.

LQN: How did your judgeship come about?

ALK: In 1978, Congress created a large number of new judgeships—35 court of appeals and 117 district court positions—with the Omnibus Judge Act. Previously, United States senators recommended people to the president. President Carter, however, managed to get fairly complete control of the court of appeals judge appointments. There are a number of states in each circuit, and therefore it was logical for the president, rather than the Senate, to handle this. So screening panels were set up for each circuit and panels recommended a number of people.

In the Second Circuit, there were two vacancies and eight recommendations. The panel was activated in January, 1979, and received applications and recommendations and solicited applications. When I saw the notice in the *New York Law Journal*, I sent in my resumé—I wasn't taking any chances that they wouldn't think of me.

LQN: Was being a judge a longtime career aspiration?

ALK: It wasn't a career path I thought about a lot. A few years before, I had been contacted about a district court judgeship; I thought I'd rather be on the court of appeals than on the district court.

LQN: Why was that?

ALK: There's quite a difference in the type of operation an appeals court judge engages in. It's more of a scholarly actitivty. You get a factual record from the parties in the district court, and you deal with that set of facts and try to figure out what the law is. It's research intensive and involves a lot of writing. I like to write and I like to do research, so the appeals court attracted me more.

LQN: What are some of the differences between the life of a litigator and a judge?

ALK: The pace of life is very different. I find I work just as hard as I used to on my busiest days as a litigator. Most of my deadlines are self-imposed—I can give myself an extension—but you end up with a backlog that grows if you're too lenient with yourself. The great difference is that we don't have any valleys to go with the peaks. The workload is inexorable.

LQN: What do you think is the best preparation for the bench?

ALK: I think that a litigation background is the most helpful. It helps to know about the litigation process and the courts. There are a lot of law professors who are appellate judges now, and that is also a good preparation. The ability to get into an area and become as expert as one needs to is very useful.

LQN: You're an expert bridge player and have written extensively about the game. Do you still play and do you have any more books in the works?

ALK: I haven't played much since I got on the bench, but I'm about to come out of hibernation. And I have no more books in the works since *Bridge Conventions Complete*, 2nd edition, which I completed last year, set me so far behind on my opinions that I'm just recovering now. Bridge is relaxing, but it is a second profession.

LQN: There were very few women in your Law School graduating class, weren't there?

ALK: Yes. Eight women started and four finished. A fifth finished at the University of Kansas.

LQN: Do you have any frustrations being a government employee?

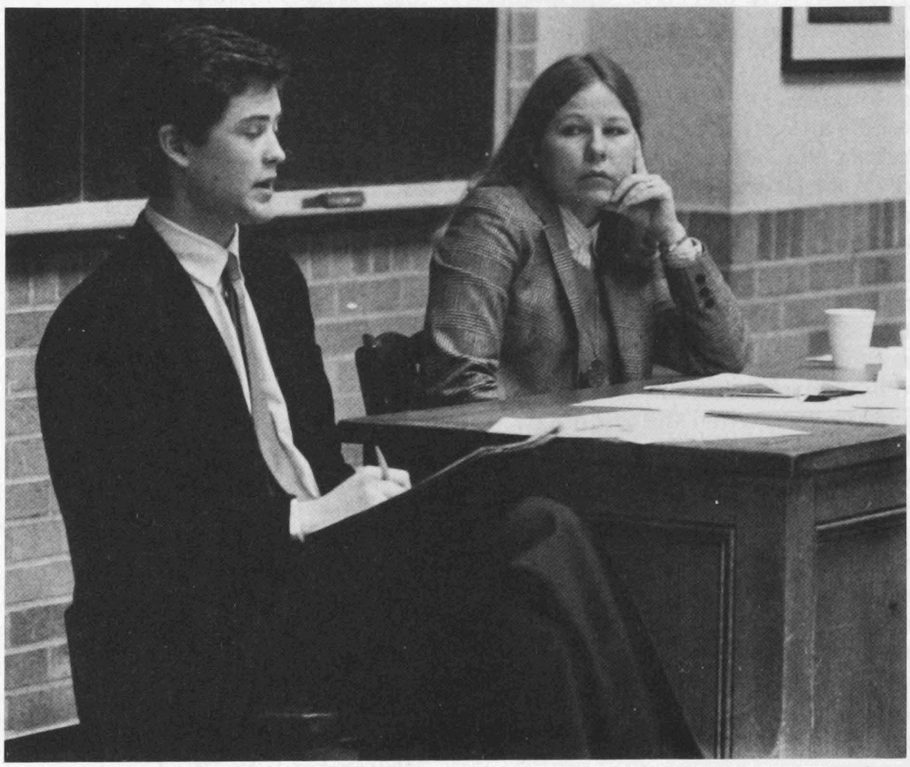
ALK: It's difficult to get the government to do things sometimes. And the bureaucracy is not the swiftest. But I actually think my job is the best job in the world. It wouldn't be for everyone, but it is for me. ◘

Preparing for the real world

Students flood clinic-type seminars

Two clinic-type seminars, offered for the first time in an intensive format last semester, were flooded by a deluge of students eager to gain practical legal experience. Both courses—trial practice and a non-credit negotiations workshop—saw students willingly forfeit free time to tackle a demanding schedule that left them exhausted, but with a new awareness of the legal and interpersonal skills required of successful practicing attorneys. Both programs were supported by a grant from the DeRoy Testamentary Foundation, one of several philanthropies founded by Helen L. DeRoy (1882-1977) in the greater Detroit area. The Foundation, headed by Leonard Weiner, a 1935 Law School graduate, has also supported other programs at the Law School. Most notable among these are the DeRoy Fellowships, which bring distinguished lawyers and public officials to the School for visits of several days to several weeks.

Trial practice, scheduled for the week of spring break to accommodate sixty students rather than the usual thirty-two, drew still another sixty who had to be turned away because of limited space. Taught by local attorney and Law School graduate Edward Stein for the past thirteen years, the course had always met one night a week for a three-hour session.



Judge Judith Wood listens to the testimony of a "witness" during one of the Saturday trials of last spring's trial practice course.

This year the format was changed to a week-long series of small group workshops (of twelve students each) that met from 8:30 a.m. to 5 p.m. Evenings were spent preparing for the next day's assignment. On Saturday, fifteen jury trials were held, with each student participating as part of a two-person team, and local attorneys serving as judges. The change was instituted both to make the class available to more students and to simulate the intensity, momentum, and stress of a real-life trial situation.

A special faculty of experienced trial practitioners was brought in by Stein for the week. Leading the workshops were Federal Judge Ralph Guy from Detroit and attorneys James Brady and William Jack from Grand Rapids, Allyn Kantor from Ann Arbor, and Robert Krause from Detroit. The daily sessions included lectures, discussions of simulated trial problems, and role-playing. During each session every student performed a trial task, such as direct examination, cross examination, opening statement, and closing argument. Performances were videotaped and critiqued by the small section instructor as well as by the other students and a communications expert, Morleen Rouse, of the University of Cincinnati.

Though most students found the workload heavy and the experience fatiguing, their comments on the course and the instructors rang with enthusiasm: "Fantastic instruction." "Best course I've had in law school." "Do it again. This should be a required course. I could not imagine being a litigator without first having had the benefit of this excellent learning experience." "I'm excited about being a lawyer again."

Encouraged by the outcome of the class, Stein plans to repeat the format next year with a further expanded enrollment and additional outside experts to head the increased number of small groups.

The other popular clinic-type seminar was a two-day, non-credit workshop aimed at developing negotiating skills. Held during the first weekend in March, the course attracted over sixty students, only twenty of whom could be accommodated in the small-group format. The workshop was organized by Professor James J. White, an expert in commercial law and Dr. Andrew S. Watson, a practicing psychiatrist who is a professor in the Law School. First-hand perspectives on negotiating were provided by Detroit attorneys Leonard D. Givens and Patrick J. Ledwidge, who each presented a lecture and led one of the small groups. Within each small group, the students were divided into two-person negotiating teams, each of which negotiated against the other.

Each team was presented with a set of facts regarding a simulated negotiating problem, representing the point of view of one of the parties and differing from that of their adversaries. The task, then, as Watson explains, was "to cross the barrier and negotiate successfully without falling prey to personal emotional responses, prejudices or other character-based behavior that might inhibit the process."

To facilitate greater insight and self-awareness, students were videotaped as they negotiated. Their performances were critiqued by their peers and professors with regard to such psychological elements as body language, ability to communicate, and interpersonal skills, as well as the logical, analytical, technical, and legal mechanics involved in reaching a satisfactory settlement. "We view this as the first step in a two-thousand-mile journey," said White of the workshop, which was viewed as a giant step toward the real world by those who took it. ⊠

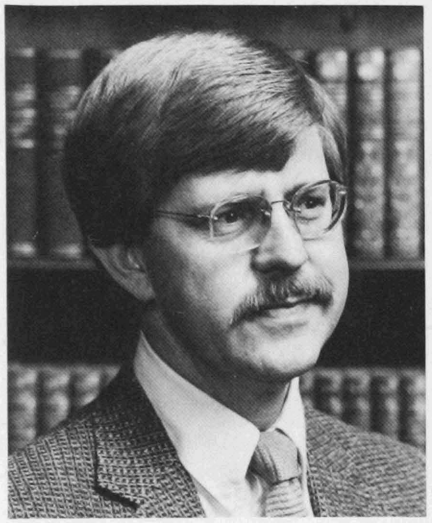
McCree honored at three spring commencements

Wade H. McCree, Jr.

Among Law School faculty, **Wade H. McCree Jr.** is one of the most popular commencement speakers and prolific recipients of honorary degrees from colleges and universities. Last spring, the former federal judge and U.S. Soliciter General who since 1981 has been Lewis M. Simes Professor of Law at the U-M, received three honorary titles: a Doctor of Humane Letters from Colgate University, a Doctor of Public Service from Northern Michigan University, and a Doctor of Law from Suffolk University.

Modest about his achievements, McCree has lost count of his awards and has to rely on his secretary for an accurate total of his honorary doctorate degrees, which now stands at 32 and growing. McCree, who in 1982 was appointed Special Master by the U.S. Supreme Court for a case involving the Howard Hughes estate, serves on the visiting committees of several law schools and is a member of a long list of professional, educational, and community organizations. ⊠

Social workers honor Duquette as Citizen of the Year



Donald Duquette

Citing "his unswerving commitment to children's welfare, his willingness to take risks to advance human conditions, and his commitment to an effective and just political process," the Huron Valley Unit of the National Association of Social Workers named **Donald Duquette** Citizen of the Year.

Duquette, who directs the Child Advocacy Clinic at the Law School, is a former social worker who decided to pursue a law degree as a more effective way of advancing child rights and protections. He received his J.D. from Michigan in 1974. As Project Director for the Juvenile Court Children at Risk Study and for the National Center on Child Abuse and Neglect, he designed programs to improve the representation of children affected by child abuse and child neglect cases. His present work as Director of the Child Advocacy Clinic involves a comprehensive trainir:g program for law students in child advocacy specializations. Duquette's research on improving *guardian ad litem* (GAL) services is described in detail in *Law Quadrangle Notes*, (Vol. 28, No. 3) pp. 1-2.

Besides serving on the Washtenaw County Board of Commissioners, Duquette is a member of the board of the National Association of Counsel for Children and the board of the Washtenaw County Child Care Coordinating and Referral Service. He was appointed by Michigan's Governor Blanchard to the Child Abuse Prevention Board, and served on a planning committee appointed by State Chief Justice Coleman to assess placement barriers for foster care. ⊠

Guest stars enrich faculty

A number of outstanding visiting faculty have enriched the Law School's curriculum and intellectual life this year.

Four visiting faculty members spent the fall and winter semesters on campus:

☐ **Wendy J. Gordon** taught torts and theory of intellectual property. A graduate of Cornell University and of the University of Pennsylvania Law School, she spent last year as a visiting professor at Georgetown and the previous year as a visiting associate at Weil, Gotshal & Manges in New York City. Gordon's academic studies include a year as a special student at Yale Law School, after which she served as clerk to the Honorable T. R. Newman, Jr., D.C. Superior Court.

☐ **Judith A. Lachman** visited from the University of Wisconsin Law School, teaching torts, taxation, and a seminar in constitutional law. Lachman pursued undergraduate studies at the University of California-Santa Barbara and at the University of Redlands. She holds an M.A. degree in mathematics and a Ph.D. in economics from Michigan State University in addition to her J.D. from Yale Law School, where she was editor of the *Yale Law Review*. From 1974 to 1979, Lachman was a professor of economics at Vanderbilt University. During the 1977-78 academic year she was a visiting professor of economics at the U-M.

☐ **William Ian Miller** visited from the University of Houston. His course offerings included property, trusts and estates, and a seminar entitled "Blood Feud: Dark Age Dispute." Miller is a graduate of the University of Wisconsin-Madison and of Yale University, where he received both his Ph.D. in English and his J.D. He has taught English at Weslyan University and, prior to joining the University of Houston law faculty, was an attorney with the Madison, Wisc., firm of Cullen & Weston.

☐ **Patricia D. White** visited from the Georgetown University Law Center, teaching several courses in taxation. White is thrice a Michigan alumna, having received her B.A., M.A. (philosopy), and J.D. ('74) in Ann Arbor. Prior to joining the Georgetown faculty in 1979, she practiced with the Washington, D.C., firms of Steptoe & Johnson and Caplin & Drysdale.

In 1976, she was a visiting professor of law at the University of Toledo.

Six faculty members visited for the fall term only.

☐ **Roger C. Cramton,** the Robert S. Stevens Professor of Law at Cornell University Law School, taught two sections of torts. Former dean of the Cornell Law School, Cramton served on the U-M Law School faculty from 1961 to 1973, during which time he was also chairman of the Administrative Conference of the United States and assistant attorney general in the U.S. Department of Justice. A graduate of Harvard, Cramton received his J.D. from the University of Chicago, where he also studied theology. Upon graduation, he clerked for the Honorable S. R. Waterman, U.S. Court of Appeals for the Second Circuit, and then for the Honorable Harold Burton of the U.S. Supreme Court. Cramton was the first chairman of the board of directors of the Legal Services Corporation and is editor of the *Journal of Legal Education.*

☐ **Rudolf Dolzer,** a specialist in international law, visited from the Max Planck Institute for Comparative Public Law and International Law. Dolzer holds a B.A. from Gonzaga University, a doctorate from the University of Heidelberg Law School, and an LL.M. and S.J.D. from Harvard Law School. He has taught at the University of Heidelberg and also at the University of Tubingen.

☐ **Daniel J. Gifford,** professor of law at the University of Minnesota, offered courses in antitrust and unfair trade practices. A graduate of Holy Cross College, Gifford received an LL.B. from Harvard University and a J.S.D. from Columbia University. Before beginning his teaching career at Vanderbilt University, Gifford practiced law in New York with Cleary, Gottlieb, Steen & Hamilton. His teaching assignments have included SUNY-Buffalo, England's Warwick University, France's Université Jean Moulin, and Belgium's Université Libre de Bruxelle.

☐ **Roger C. Park** also visited from the University of Minnesota. A pioneer in developing computer-aided instruction materials for law, Park taught courses in civil procedure and evidence. Park received both his undergraduate and law degrees from Harvard University, where he was editor of the *Harvard Law Review.* After clerking for the Honorable Bailey Aldrich, Chief Judge for the U.S. Court of Appeals for the First Circuit in Boston, Mass., he practiced with the Boston firm of Zalkind, Silverglate. He has taught political science at Wellesley and has been a visiting professor at Stanford Law School and Boston University Law School.

☐ **Steven Shiffrin,** professor of law at UCLA, taught courses in two of his specialties, First Amendment law and constitutional law and political theory. Shiffrin holds both the B.A. and J.D. degrees from Loyola University. After graduating from law school, he clerked for U.S. District Court Judge Warren Ferguson in Los Angeles and then joined the firm of Irell and Manella, where he is still of counsel. Shiffrin has also taught law at Boston University.

☐ **Aaron D. Twerski** taught courses in torts and products liability. Twerski is acting dean and the Sieben & Sieben Distinguished Professor of Law at Hofstra University. He received his undergraduate degree from the University of Wisconsin-Milwaukee and his J.D. from Marquette University. After a year as a trial attorney in the U.S. Department of Justice, he served as a teaching fellow at Harvard Law School before taking up an academic appointment at Duquesne Law School. He has served as a visiting professor at Cornell and at Boston University.

During the winter semester, five visiting faculty taught at the Law School.

☐ **Yehuda Blum,** Israel's ambassador and permanent representative to the United Nations from 1978 to 1984, visited from Hebrew University in Jerusalem, where he holds the Hersch Lauterpacht Chair in International Law. He taught courses in international law and international organizations.

Blum has served as assistant to the Judge Advocate General in Israel's Defense Forces and as assistant legal advisor in Israel's Foreign Ministry. He was a member of the Israeli negotiating team at the Camp David and Blair House talks in February and March 1979. He holds an M. Jur. from Hebrew University School of Law and a Ph.D. in international law from the University of London. The author of several books and numerous articles in English, Hebrew, and German, he has also served as the *Encyclopedia Hebraica's* law editor since 1973. He has been a visiting professor at the University of Texas and NYU law schools, and in 1969 spent nine months at the Law School as a senior research scholar.

B R I E F S

☐ **Trevor C. Hartley,** senior lecturer in law at the London School of Economics, taught Common Market law and international business. Hartley received his B.A. and LL.B. degrees from the University of Cape Town and his LL.M. from London University. His major academic interests are European Community law and conflict of laws/private international law; he is the author of four books in these areas. Prior to teaching at the London School of Economics, Hartley served on the faculty of the University of Western Ontario in London, Ontario.

☐ **John E. Nowak** visited from the University of Illinois, teaching courses on constitutional law and the Fourteenth Amendment. A graduate of Marquette University and the University of Illinois College of Law, Nowak served as clerk to the Honorable W. V. Schaefer of the Supreme Court of Illinois before beginning his teaching career at Illinois. He has written extensively about criminal and constitutional law.

☐ **Mathias W. Reimann** visited from the University of Freiburg Law School, of which he is a graduate. After receiving the LL.M. from Michigan in 1983, Professor Reimann spent last fall here as a research scholar. He was a research assistant at the Law School during 1983. During the winter term he offered a course in European civil codes.

☐ **Stephen Schulman,** professor of law at Wayne State University Law School, taught a course in corporations. Schulman holds a J.D. from Columbia Law School and an LL.M. from New York University Law School. Schulman practiced law in New York City for several years before joining the legal staff of the New York State Attorney General's Office, where he remained as an attorney for six years. He joined the Wayne State faculty in 1966.

During the summer term, three visiting faculty members taught on campus.

☐ **Stephen Calkins**, an associate professor at Wayne State Law School since 1983, taught torts. Calkins did his undergraduate work at Yale University, graduating in 1972 with majors in political science and economics. He received his J.D. from Harvard Law School in 1975. Prior to joining the Wayne State faculty, he practiced with the Washington D.C. firm of Covington and Burling for seven years, when he also was one of several lawyers teaching an antitrust practice seminar at the University of Virginia Law School.

☐ **David M. Phillips,** visiting from Boston University, taught commercial transactions. A graduate of Brandeis University, Phillips received his J.D. from Columbia in 1967. From 1968 to 1970, Phillips served as consultant to Dr. Carl Bartz, Jr., cultural attache to Korea. During the latter two years of this period, he lectured at the Graduate School of Law, Seoul National University. He has also taught in the Harvard University extension program, and served as a visiting professor at the University of Virginia School of Law.

☐ **Christopher D. Stone,** who is Roy P. Crocker Professor of Law at the University of Southern California, taught enterprise organization at Michigan this summer. A graduate of Harvard University and Yale Law School, Stone was Fellow in Law and Economics at the University of Chicago in 1962 before practicing at Cravath, Swaine & Moore in New York. He has written prolifically on legal rights for natural resources and on corporate misconduct. Stone has done research in various areas under the auspices of the National Institute of Mental Health, the National Science Foundation, and the Department of Energy.

☐ Still another visiting faculty member, **P.E. Bennett,** began a one-year appointment this summer, teaching criminal appellate practice. Bennett has been an assistant defender with the Michigan State Appellate Defender Office in Lansing since 1977. A 1976 Michigan Law School graduate, he also holds an M.A. in computer and communications sciences and a B.S. in mathematics from the U-M. Bennett brings to his alma mater extensive experience with indigent defendants convicted of felonies. ⊠

New chairs find occupants

The appointment of Professors Joseph Vining and James Boyd White to two recently established chairs at the Law School was announced by Dean Terrance Sandalow just as the present issue of *Law Quadrangle Notes* was going to press. Vining was named Harry Burns Hutchins Professor of Law, while White was appointed L. Hart Wright Professor of Law. Profiles of these two distinguished members of our faculty will be featured in the next issue of this publication. ⊠

Adjudicative law-making

Cooley Lectures analyze judicial reasoning

This year's Thomas M. Cooley Lectures, the thirty-third series since the lectureship was established in 1947, featured Melvin A. Eisenberg, Koret Professor of Business Law at the University of California, Berkeley. Professor Eisenberg has written extensively on the structure and control of corporations, on contract law, and on processes that are pervasive in the legal order. Before going to Berkeley, he served as Assistant Counsel of the President's Commission on the Assassination of President Kennedy and as Assistant Corporation Counsel for the City of New York. A graduate of Columbia College, Eisenberg received his LL.B. from Harvard Law School.

The three lectures, under the umbrella title of "The Theory of Adjudication," were presented on March 11 through 13. In them Professor Eisenberg analyzed the institutional principles that govern how law is made and changed in our society.

In his first lecture, "The Social Functions of Courts," Eisenberg discussed in detail four principles of adjudicative law-making: objectivity, prior support, replicability, and partial autonomy.

Eisenberg's second lecture, "Social Propositions in Judicial Reasoning," distinguished between social policies and moral norms. Social policies, he said, characterize states of affairs as good or bad, while moral norms characterize conduct as right or wrong. However, the basic criterion in deciding whether a policy may properly figure in adjudication is the same as the one applicable to moral norms—that is, substantial support in the community.

In his third lecture, "The Interaction Between Social and Doctrinal Propositions," Eisenberg sketched models of the body of common law from static and dynamic perspectives, as well as several models of the way in which the common law develops. Against this background, he considered four characteristic forms of judicial reasoning: reasoning from precedent, reasoning from principle, reasoning from analogy, and reasoning from legal theory.

Finally, he considered the way in which institutional principles of adjudication generate various paths of development. If a rule is congruent with applicable social principles and consistent with the body of law, each point of development will be consistent with and organically related to those before and after. On the other hand, rules that are highly incongruent with applicable social propositions will tend to generate jagged paths of development, in which the points of development are not consistent with and organically related to the basic rule. Eisenberg thus concluded that whether courts follow, reformulate, or reconstruct a rule announced in a precedent will turn ultimately on the degree of congruity between that rule and applicable social propositions.

Similarly, in common law cases where the governing principle is determined by morality, the relevant morality is neither the morality that best cohered with past institutional decisions, nor the critical morality of the court, but the social morality of the community. ◘

Professor Melvin Eisenberg, of the University of California-Berkeley, was the guest lecturer for last spring's Thomas M. Cooley Lectures.

Words to the wise

Speakers urge graduates to work for ideals

At last spring's Honors Convocation and Senior Day ceremonies, Law School graduates were urged to work for personal, professional, and global ideals. Excerpts from the speeches of Professor Andrew S. Watson, who spoke at the Honors Convention, and Dean Terrance Sandalow, Student Senate President James Lancaster, and U.S. Senator Carl Levin, all of whom who spoke at Senior Day festivities, follow in edited form.

Dean Terrance Sandalow

Sandalow: Intellectual autonomy

This is a joyous occasion. It marks the end of one stage of your lives and the beginning of another. For twenty years and more you have been students. Today, we celebrate the end of your schooling.

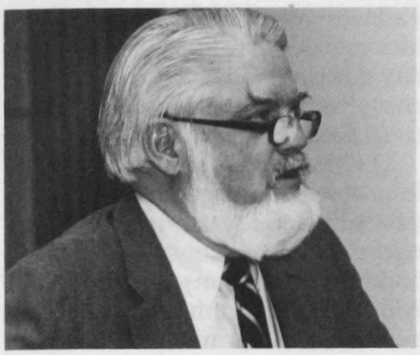
In the years ahead, you are not likely to encounter any more difficult problem than that of how to maintain intellectual autonomy. Lawyers are not alone in confronting that problem, but they do face special hazards. The propensity of lawyers to identify with their clients' causes is well known. Lawyers, like other humans, wish to believe in the rightness of their actions and, also like others, they often succeed in persuading themselves.

Yet, the lawyer who comes to view the world only through the lens of the interests that he represents has to that extent lost the capacity for intellectual self-governance. His ideas are not his own, but a fortuitous consequence of the circumstances in which he finds himself.

I would not wish to deceive you by suggesting that there is an easy answer to the problem of maintaining intellectual autonomy. It is the product of a lifetime of continuous effort. My hope is that your years in higher education, and especially in the Law School, have contributed to your appreciation of the importance of the effort and to your ability to pursue it successfully.

Watson: Loving relationships

I suppose that some of my remarks will seem to be a bit unusual and if so, it is because I am something of a maverick. I am a physician and beyond that, a psychiatrist! Much of my professional interest as a teacher in the Law



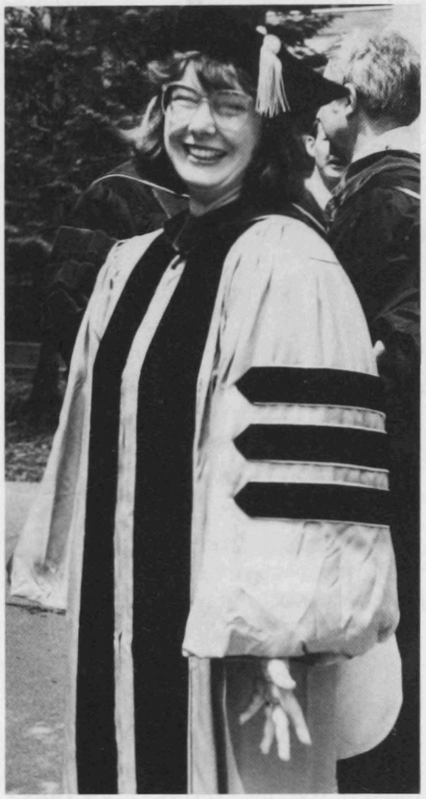
Andrew S. Watson

School has been focussed upon the psychological stresses and strains of legal education and how they affect the practice of law.

Today I would like to make a suggestion that could make everyone's career more exciting and satisfying—*if* you can follow it—that is, to grapple closely with the *people* aspects of the law in cases in which you become involved. If you do that, I can assure you that no two cases will ever be alike. Each may puzzle, perplex, aggravate, frustrate, thrill, or amaze but you'll never be bored.

Learn how to care. Care for yourself and for your own professional reputation. Care for your family and its needs and goals so that they may care for and love you. Care about your profession and how it is or is not fulfilling its purposes toward clients and society. This is the very essence of professionalism—that individual professionals will care to see to it that the group and its members perform according to its self-imposed ethical standards. And, finally, care about your fellow man and your country.

One of the crucial factors that determines whether or not we achieve our aspirations will be how well each of you succeeds in maintaining that fragile flower of altruism, alive and flourishing, at the center of your professional lives.



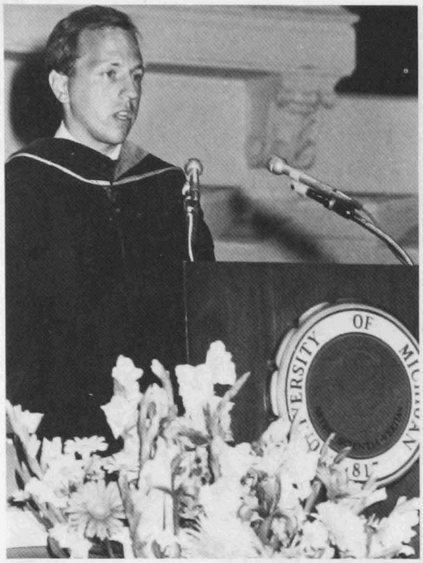
Christina Whitman, selected by students as one of two faculty recipients of this year's L. Hart Wright Teaching award for excelling "in her willingness to teach, to experiment, and to explore difficult concepts with students."

Lancaster: Professional ethics

If there is one thought I leave with you today; one question which I hope you will continue to ask yourself throughout your career, it is this: what should it mean to be a member of the legal profession?

It seems sometimes that these great powers of logical and legal reasoning we have developed allow us to rationalize any conclusion we want to reach. If a client seeks to use our counsel to commit a crime or engage in some type of borderline unethical activity, we can always say that if we don't represent them, someone else will. All we accomplish is losing a fee.

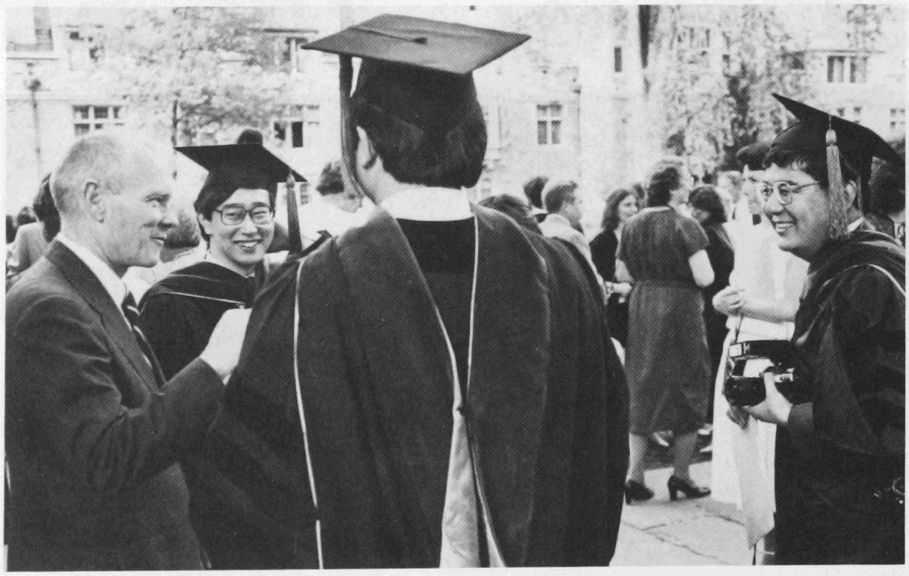
At what point does such a narrow view of our duty cause us to become mere technicians, indistinguishable from any other business? At what point are we no longer working for a more worthy goal than our own self-interest? At what point are we no longer a profession?



James Lancaster

Obviously we, as first year associates in a law firm, are not going to be able to shake the foundations of the legal profession. Nor will most of the day-to-day problems we deal with involve great moral and ethical issues. But, just as it may have been naive of me in my younger years to have an overly idealistic image of lawyers, so today it is irresponsible for us to shrug our shoulders and say, "I can't do anything."

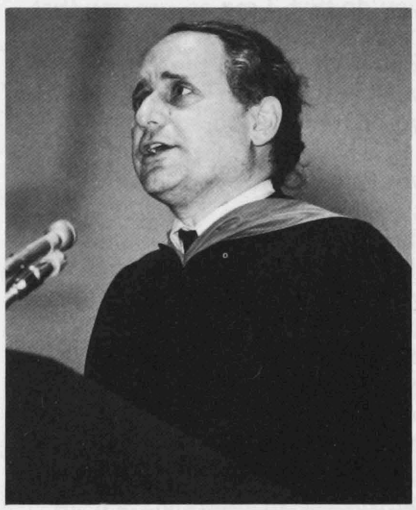
Ultimately, the profession we inherit will be judged not on the strength of the reasoning we use to reach our conclusions, as we were on law school exams. Instead, we will be judged on the result—a result *we* will determine.



James J. White, a recipient of this year's L. Hart Wright Teaching Award. "He asks the tough questions we law students don't want to hear, but that we know our clients will inevitably ask."

Levin: Nuclear disarmament

You are celebrating the fact that you have completed your formal legal education. You and your families made a commitment to complete that education based on the assumption that you would have decades left to practice your profession. I want to make sure that your assumption is correct—correct for you, for our country and for civilization. The only way to do that is to first control and ultimately eliminate nuclear weapons.



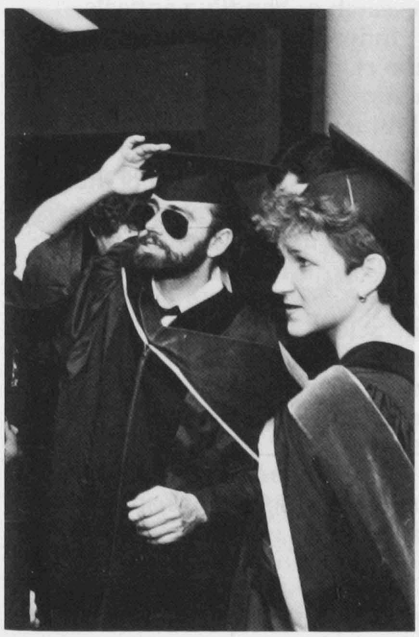
Senator Carl Levin

We must approach that task not with an abundance of trust in the Soviets but rather with an ample

distrust of nuclear weapons in the hands of fallible human beings. And our approach needs more than a desire to eliminate nuclear weapons—it must also be guided by an awareness of the need to achieve a balance, a *stasis* which will allow each side to be secure both during the process and at the end of the process. Otherwise, nuclear disarmament won't take place.

You have pledged your faith in the future over the past three years. But you have done more than that. You have pledged your faith in a future in which human relations are governed not just by power but rather by a purpose—to seek justice. The law assumes the inevitability of human imperfection and seeks to compensate for it by giving us guidelines to govern our behavior. In the same sense, nuclear arms control recognizes the inevitability of human imperfection and seeks to compensate for it by giving us a way to maximize the prospect of human permanence.

I hope you will devote part of your talent to the most bedeviling puzzle of our time—how to move two powers who don't trust each other but who can extinguish life on this planet—perhaps the only life anywhere and anytime in the universe—to back away from the abyss.



I urge you to join that effort, because, in the words of Justice Holmes, "there is a need to participate fully in the 'action and passion' of our times or risk the 'peril of being judged never to have lived.'" ◘

Protecting privacy

Campbell competitors confront rape shield law

The constitutionality of Michigan's recently enacted and controversial rape shield law was the focus of the 1985 Campbell Moot Court Competition. The purpose of the statute is to protect the victim, who must testify as a complaining witness in the trial of the alleged rapist, from unnecessary invasion into her private life. The Michigan rape shield law limits the extent of cross-examination of the victim on questions about her past sexual experiences. In addition, it allows the trial judge to order a closed hearing to determine whether evidence about the victim's past sexual activity should be allowed at trial.

The hypothetical case concerned Jane Doe, an aspiring thirty-year-old actress allegedly raped by Dan Daytime, an acquaintence of hers and the host of a nationally syndicated talk show. The incident occurred in Doe's apartment, where she and Daytime had gone after meeting at a party. The main issue centered on the admissability of evidence that Doe had consented to sex with three other talk show hosts under similar circumstances in the previous year.

In final oral arguments the teams of Sam Dimon and Michael McCarthy and Sheila Foran and Mark Berry were awarded first place, with the teams of Charles Boehrer and Rex Sharp and Mark Weinhardt and Raymond Rundelli taking second place. Boehrer and Sharp were awarded the prize for the best brief in both the final and the semi-final rounds.

This year's Campbell program moved toward becoming more of an educational rather than a competitive experience by sponsoring a lecture on brief writing by Professors Douglas Kahn and Theodore St. Antoine, and another on oral advocacy by practitioner Stephen Shapiro. Participants were offered opportunities for videotaped practice sessions of their oral arguments, and judges in the preliminary rounds were encouraged to comment extensively on briefs that were submitted.

The court for the final round of the competition included the Honorable Frank M. Coffin, Circuit Judge, U.S. Court of Appeals for the First Circuit; the Honorable Damon J. Keith, Circuit Judge, U.S. Court of Appeals for the Sixth Circuit; the Honorable Betty B. Fletcher, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit; Dean Terrance Sandalow; and Professor Frederick Schauer. Chairpersons for the competition were Joe Gunderson, Jon Frank, and Darrell Graham. ◘

As time goes by

How our alumni look, 5 and 15 years after graduation

by Susan Isaacs Nisbett

Pencils ready? It's time for the U-M Law School alumni quiz.

True or false:

☐ There is a positive correlation between recent graduates' incomes and their opinions of the Law School.

☐ A penchant for solo practice is a good predictor of future participation in electoral politics.

☐ Most recent Law School graduates spend a majority of their time serving large businesses.

Done? You can check your answers by looking at the key at the bottom of the page. But unless you were among the 1,034 alumni in the classes of 1966, 1967, 1976, and 1977 to participate in the School's survey of their classes five and 15 years after graduation, we probably stumped you on the last question. Under close scrutiny, the stereotype of the Michigan graduate who passes the day serving megaconglomerates just doesn't hold up. Only about 34 percent of the graduates of these classes report spending half or more of their time serving large businesses. Collectively our graduates spend more time serving individuals and small businesses than serving large corporations.

Do they at least work in the large law firms that are supposedly home to Michigan alumni? Well, some do. Roughly a quarter of the 15-year graduates surveyed and a third of the five-year graduates work in law offices with 50 or more lawyers; indeed, five percent work in offices of more than 200 lawyers. But one in eight graduates in these classes is not practicing law at all, but is teaching or working in non-practice jobs for the government or in private industry, and almost exactly half the remainder practice in offices with ten or fewer lawyers.

Surveying the School's alumni five and 15 years after graduation has been a longstanding Law School practice. It allows the faculty to follow up on former students' career trajectories; it allows alumni to tell their former mentors what parts of the law school experience have been most—or least—relevant to those careers and what parts of the curriculum they ought to change.

Alumni in the classes of 1966, 1967, 1976, and 1977 received a substantially revised and expanded survey; their answers were subjected to extensive analysis by Law Professor David Chambers, who heads the survey effort, and his collaborator, Terry K. Adams, a '72 Law graduate employed by the U-M's Institute for Social Research. Both the extremely high return rate—75 percent—and the lack of significant differences between respondents and nonrespondents provided Chambers and Adams with a large, random sample from which to prepare a detailed report, distributed to faculty and to members of the four classes.

Not all the survey's findings are as surprising as those that erode Michigan graduates' big-firm, corporate image. Few jaws will drop at the news that only 5 percent of our graduates are generalists. It is interesting, however, to discover how diverse recent graduates' practices are. Defining a specialty as an area of law occupying over 25 percent of a practitioner's time, Chambers and Adams found 23 substantive areas that were specialties for at least one percent of the respondents. Moreover, there were only three areas—commercial and corporate, real estate, and tort and personal injury—that 10 percent or more listed as a specialty.

This diversity, Chambers noted in a report to the law faculty, "makes tailoring the curriculum to respond to the specialties of our graduates problematic. Not only are their areas of work remarkably diverse, but a high proportion of our graduates indicate that they are not now doing the sort of work they foresaw for themselves on graduation."

On the other hand, the survey does help explain why some alumni and faculty favor increasing the curriculum's skills-related courses. On a daily basis, our graduates spend the greatest proportion of their time drafting legal documents other than pleadings, counseling clients, and negotiating. Few spend substantial amounts of time on library research or handling appeals.

Indeed, a substantial proportion of the respondents recommended expanding offerings in clinical law, negotiation, trial techniques and legal writing. But like the School's faculty, few of these same respondents wanted to see offerings in other areas of the curriculum decreased. For those of our graduates who look back on the School with fondness—a clear majority, the report proudly notes—intellectual stimulation ranked high among law school's pleasures.

Which courses did they find the most stimulating? Constitutional law courses were the most frequently cited, as were courses in

Key: False; True; False.

civil procedure, estate planning, and criminal law. Corporate law, commercial law, and taxation headed the list of courses most valuable to their careers. Only two sorts of courses—civil procedure (including evidence) and estate planning—made the "hit parade" in both categories with 10 percent or more of the respondents.

If our graduates split their ticket between "most stimulating" and "most useful" law school courses, they nonetheless cast a near-unanimous ballot for the most important skill acquired in law school. Thinking like a lawyer, our alumni agree, is a skill that can be taught. Thirty-one percent rated it as their most significant accomplishment during law school; 56 percent hail it as the School's greatest contribution to their abilities as a lawyer.

In general, members of the five-year classes were somewhat less satisfied with law school, their careers, their incomes, and the balance between their personal and professional lives than were members of the 15-year classes. Regarding their political views, the members of the 15-year classes were about evenly split between persons who regarded themselves as liberal and persons who regarded themselves as conservative. In the five-year classes, there were three liberals for every two conservatives.

On public policy issues such as environmental protection, ERA, welfare, and the legalization of marijuana, the five-year graduates overwhelmingly endorsed the liberal position, but so also did a majority of the 15-year class members. Among both classes, support for affirmative action was strong, but less overwhelming.

On professional legal issues, substantial majorities favored mandatory continuing legal education, specialty certification, funding of nonprofit legal services programs, and no-fault insurance. The alumni surveyed turned thumbs down on compelling attorneys to perform pro bono work without compensation.

Among the survey's other interesting findings:

—The proportion of students who took at least one year off between college and law school nearly doubled—from 23 to 43 percent—between the mid-sixties, when the 15-year classes started law school, and the mid-seventies, when the five-year classes began.

—Only 45 percent of the graduates surveyed still live in the region of the United States where they grew up. Most graduates now live and work in communities that are substantially larger than those in which they grew up.

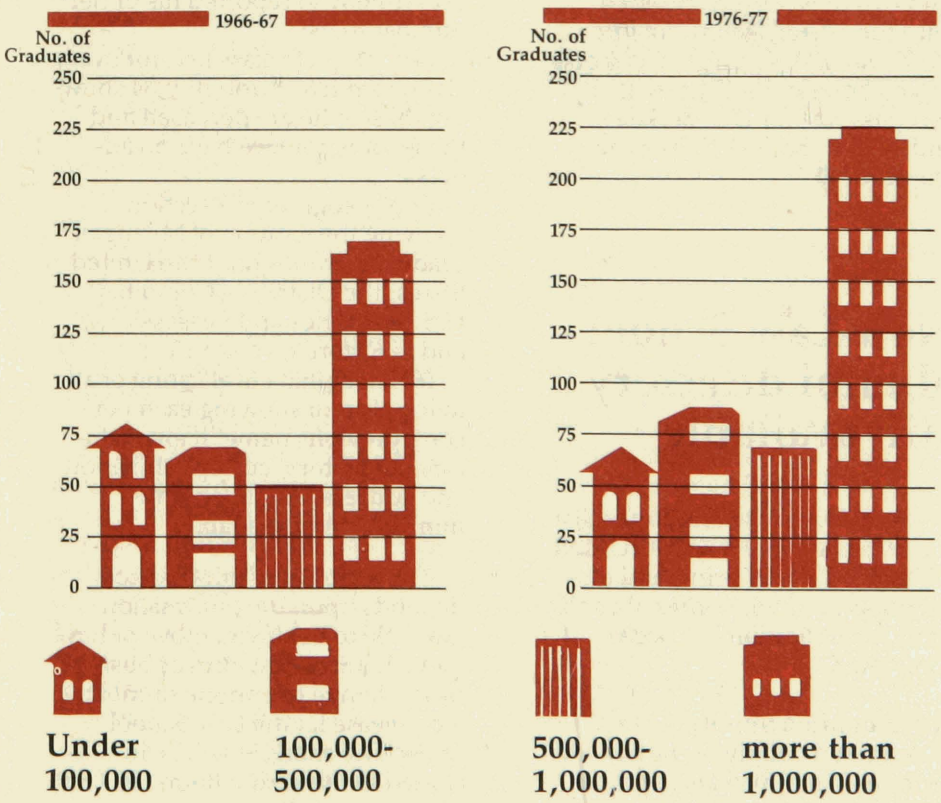
—In every class, at least 70 percent rated their family life as quite satisfactory.

—Most of the graduates have changed jobs at least once, usually in the early years of practice.

—Our typical lawyer reported working 2179 hours per year (billable and nonbillable time), for an average of almost 44 hours per week, 50 weeks per year. There were no significant differences in hours-on-the-job based on work setting, job status, time in law practice, or staff size.

—Law School graduates are well compensated for their work. Lawyers in the classes of 1966 and 1967 averaged $87,230, and non-lawyers (i.e., law professors, busi-

Location of Graduates by City Size



ness executives, government employees) $69,813. Lawyers in the 1976 and 1977 classes averaged $41,790; nonlawyers averaged $33,173. Thirty-seven percent of the 1966 and 1967 classes reported incomes of over $100,000. (Respondents were not asked to report exact earnings but to check a box corresponding to ranges of earnings. The top range was "$100,000 or more." If substantial numbers of "top range" alumni in the classes of 1966 and 1967 earned over $125,000 a year, the averages computed for their classmates are too low, Chambers notes in his report.)

—In all classes, both city and office size (measured by number of attorneys) were positively correlated with earnings. On the average, persons working in cities with populations over one million earned about 40 percent more than persons working in cities of under 100,000.

—In the 1976 and 1977 classes, where women constituted a substantial portion of the class, men on average earned about 12 percent more than women. After taking into account the effects of other factors—work setting, city size, hours worked—some, but not all, of the difference disappears. Even with adjustments, men still earn about six percent more than women. Chambers has begun a new study to compare the experiences since graduation of our recent men and women graduates; he expects to complete his report within the next year.

—In general, respondents claim to have few potential ethical problems arising within their practices. Despite a high opinion of the ethical quality of other attorneys, however, they believe that agencies set up to enforce ethical standards are not sufficiently vigorous.

The surveys from the classes of 1968, 1969, 1978, and 1979 have been analyzed and preliminary results have been sent to the alumni of these classes. However, these reports have not yet been analyzed closely as a group. ◘

Susan Isaacs Nisbett is the former editor of Law Quadrangle Notes.

U-M graduates shine on California Bar exam

U-M Law School graduates stood head and shoulders above the average law school graduate on the California Bar exam taken in July, 1984. According to an article that appeared in the *Los Angeles Times* several months ago, Michigan grads had one of the two highest pass rates, 78%, compared with the overall average of 41%. Even major California law schools lagged behind the U-M, with a 76.1 pass rate for U-C Berkeley, and 74.4 for both U-C Davis and Stanford. ◘

New Law School alumni directory still available

We are happy to announce that the 1985 LAW SCHOOL ALUMNI DIRECTORY is in print, and distribution to all who ordered copies prior to publication has been completed.

Still a Limited Supply

A limited supply of the new directories is still available and can be purchased on a first-come first-served basis. The price, including postage, is $25. To purchase a 1985 directory, please send your request and your check (payable to University of Michigan Law School Directory), to Law School Fund, Hutchins Hall, Ann Arbor, MI 48109-1215.

Because directories rapidly become dated, and the information soon contains inaccuracies, the School expects to publish a new edition every three or four years. In the course of things, each becomes bigger and better than the last. Features of the 1985 directory include:

(1) New and updated addresses for approximately 7,000 — nearly one-half — of the graduates listed in the previous edition;

(2) Names and addresses of the 1,200 alumni who have graduated since 1981;

(3) A telephone number for everyone who reported his or her number to us;

(4) Complete class lists for every class from 1860 through 1984 showing those who are deceased and those for whom we have no address;

(5) A geographical section showing the location of Michigan graduates throughout the United States, the District of Columbia, U.S. territories and possessions, and in 63 foreign countries;

(6) An alphabetical listing of all living alumni showing each person's previous name, if any, educational history, current affiliation and address, and telephone number, when available.

The accuracy of our directory depends upon the information available to us. If you move or have moved, join a new firm or business, change telephone number, etc., please let the Law School know. The changes will be included in our next edition. ◘

Taking a non-traditional path enroute to legal career

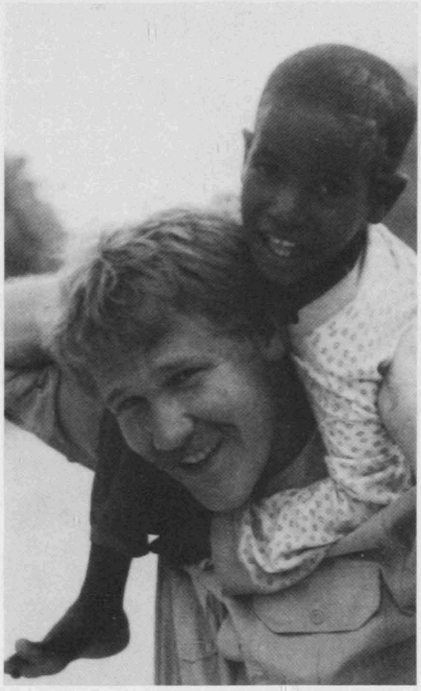
Recent graduate works in Ethiopian refugee camp

Months after returning from an Ethiopian orphan camp in Somalia, what Gare Smith remembers most is not the oppressive heat, nor the bleak Somalian landscape, nor the desperate poverty—but the children. "Once you spend more than five minutes with one, he or she becomes permanently affixed upon your life," he recalls. "You couldn't help but want to care for them and share yourself with them."

Smith spent six weeks last spring working with five other volunteers at a camp housing over 200 Ethiopian children, some of whom had been abandoned in the desert, others whose parents had died on the long journey from famine-stricken Ethiopia to Somalia. Days were spent feeding and comforting the refugees, and helping them walk again. At night, Smith and the other volunteers slept on the floor of the concrete barracks. The children aged 3 to 16, slept on the floor, too, or outside, on the sand. Because of the limited capacity of the camp, older children were urged to leave to make room for the younger, more helpless children who were being brought in almost daily.

"The weather was unspeakably hot — always over 100 and very humid," Smith recalls. "And living conditions were extremely unhygienic. Our running water was just rain collected in a tank on the roof of one of the cement barracks. The flies were so bad, they encrusted the lips and eyes of the children."

A 1983 graduate of the Law School, who served as editor-in-chief of the *Journal of Law Reform* during his senior year, Smith clerked on the Fourth Circuit for Judge K.K. Hall. He spent a year working in South Asia with the Department of State under the Law School's Belfield-Bates Fellowship. His work involved analyzing international legal aspects of water-sharing between India, Nepal, and Bangladesh in the Ganges Basin. On his way back to the United States, he took a detour to Somalia after news of the famine reached him, stopping at the camp run by the Toronto-based Families for Children. Though Smith had intended to go directly to Ethiopia, the Ethiopian government refused to issue him an entry permit.



Gare Smith gives a boost to an Ethiopian orphan at a refugee camp in Somalia.

When asked why he went to Africa, Smith replied, "Really, the question seemed the other way around to me: Why, with all the advantages you have already had, *shouldn't* you go and lend a hand to someone who needs it? Aside from wanting to help out, though, I felt a need to educate myself: I wanted to confront myself with the desperateness of the everyday reality that faces such a large percentage of the world's population. I'd been coddled for twenty-seven years and for most of those years I had never even known it. As it turned out, my work in the camp was, I'm sure, far less valuable to the people I worked for than it was to me."

Smith feels that the greatest value of the Western aid programs has been "in the way they have raised our social consciousness and alerted the public to the immensity of the problem." The long-term solution, involving a change in the attitude of North African people toward population growth and land use, Smith fears, "won't be able to be viewed over television and, accordingly, won't provide donors with immediate satisfaction. Nonetheless, aid directed toward these goals is the only thing that will make a difference in ten, a hundred, or a thousand years."

Hoping to return to work with the government in the area of international relations — particularly human rights, Smith urges other young lawyers who have the urge to pursue non-traditional paths toward their careers to do so, rather than to adopt circumscribed, narrowly tailored lives. "Young lawyers really needn't feel as locked into their professional roles as they seem to think," Smith states. "My marketability certainly hasn't been destroyed by my exploring some non-traditional paths." ⊠

Back home again

Alumni return for annual reunion and law forum

Since its inception six years ago, the Law Alumni Reunion and Law Forum (LARLF) has developed into a popular annual tradition that draws an ever-growing number of Law School graduates and spouses back to the Quadrangle each spring.

This year's gathering, held May 17 and 18, was the largest to date, with nearly three hundred people attending. In addition, a number of individual class reunions were held. The weekend commenced on a social note in the Lawyers Club, where an elegant Friday evening reception and buffet dinner were attended by faculty and graduates of more than twenty classes.

The next morning it was back to Room 100 of Hutchins Hall for the educational focus of the weekend—the law forum. Dean Terrance Sandalow, welcoming the group, noted that, "the return of alumni serves to remind us that we are the current inheritors of a tradition of excellence, which we have an obligation to maintain." Sandalow then introduced the panelists who had been invited to speak on the proposed changes in the tax law then under consideration by Congress: Law School Professor Douglas A. Kahn, and alumni Leon E. Irish ('64) and Jerome B. Libin ('59).

Douglas A. Kahn

Leon E. Irish

Kahn, a nationally recognized authority on federal taxation, discussed the goals of tax reform and the unpredictability of the effects of certain changes. Irish, a partner in the Washington, D.C., firm of Caplin & Drysdale who joins the U-M Law School faculty this fall, spoke on the problem of lowering taxes without reducing revenues. Libin, a partner in Sutherland, Asbill, & Brennan, of Washington, D.C., with extensive experience in corporate taxation, charted the implications of certain tax reform proposals on business. The morning ended with a lively question-and-answer session between audience and panelists.

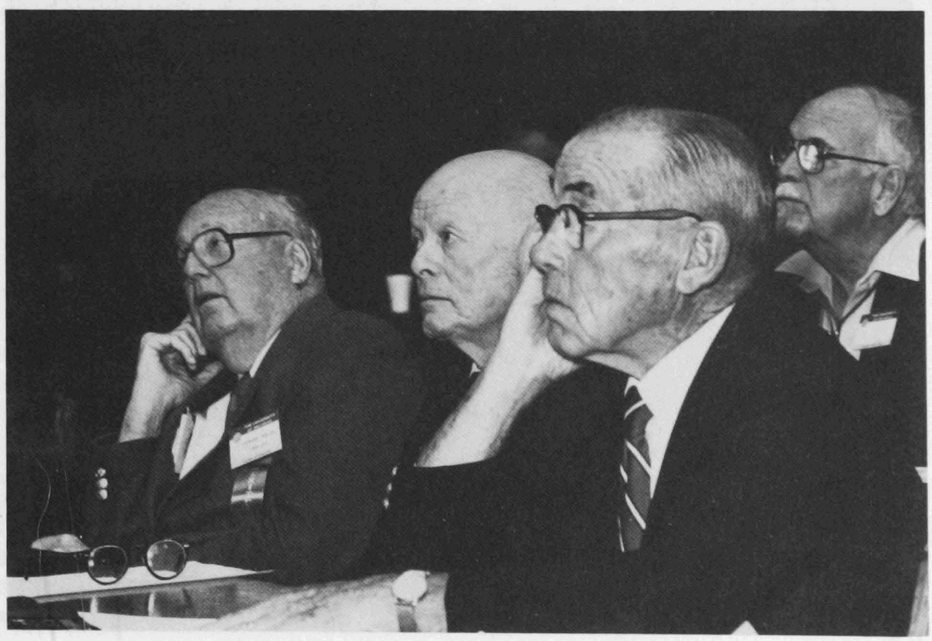
After an all-class luncheon in the Lawyers Club, alumni were offered a choice of tours, including treks through the legal research library and new library addition, the U-M Museum of Art, and the new $285-million University of Michigan Replacement Hospital.

Next year's reunion, scheduled for May 16 and 17, is already being planned. Early in 1986 all graduates will receive a brochure describing the reunion weekend; those in reunion-year classes ('36 and '61) will also hear from class reunion coordinators. We encourage other classes to hold their reunions during LARLF, and we cordially invite all of our alumni back to the Law School next spring. For information, contact Jonathan D. Lowe, Director, Law School Relations, U-M Law School, Ann Arbor, MI, 48109-1215. ◘

A L U M N I


MICHIGAN


THE UNIVERSITY OF MICHIGAN
EMILY HALL-ALLEN
ALUMNI ASSOCIATION



Baker and Baker (and Baker)

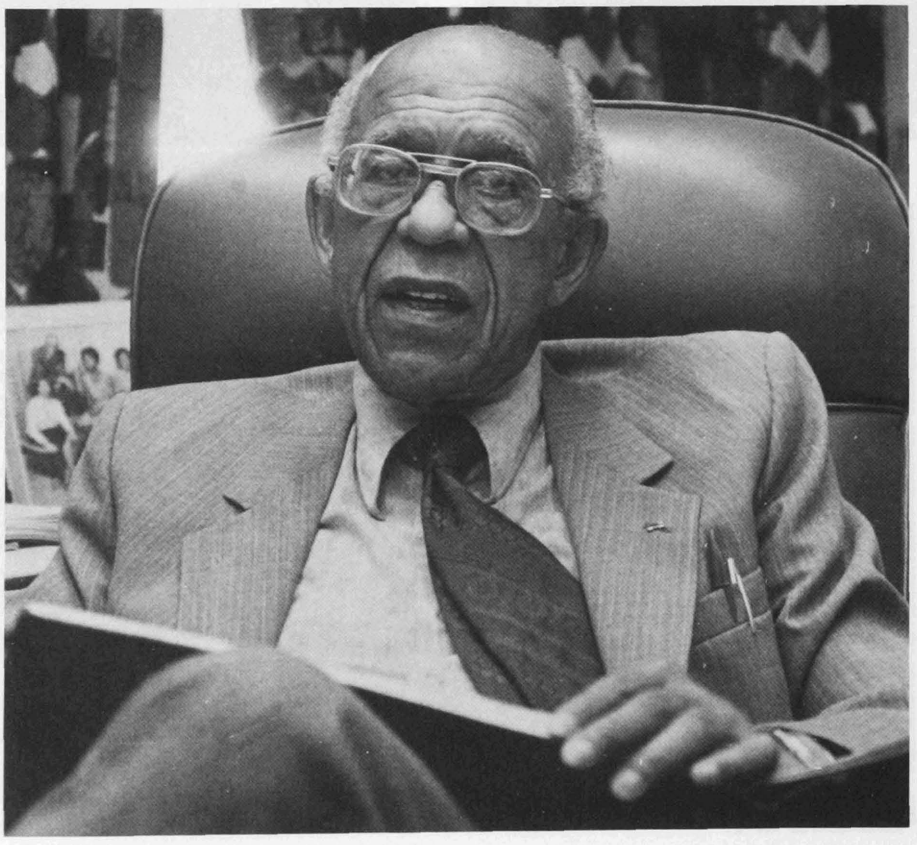
50-year careers run in family

We may be reporting a "first," but if not a "first" certainly a rarity. Oscar W. Baker, Jr., J.D. '35, has completed his first 50 years as a busy trial lawyer in Bay City, Michigan, and admits that he's beginning to ease up. These facts alone hardly make news, since more than 90 of the 142 graduates in '35 Law are still alive and well, and many are still in practice. What does make this newsworthy is that Oscar, Jr. has successfully followed the 50-year pattern set by his father. Oscar W. Baker, Sr. graduated from the Law School in 1902, and was a vigorous practitioner in the Bay City firm now known as Baker & Selby until his death in 1952.

We are not aware of any similar back-to-back careers of this duration, but if there are other parent and child combinations that equal or exceed this record, we would like to know about them so that they, too, may be recognized.

This may not be the end of the remarkable Baker family story because James W. Baker, J.D. '51, joined his father and brother in practice in Bay City immediately after graduation, and already has 34 years before the bar. We look forward to reporting this back- to-back- to-back happening to you in 2001. ◘

—Roy F. Proffitt

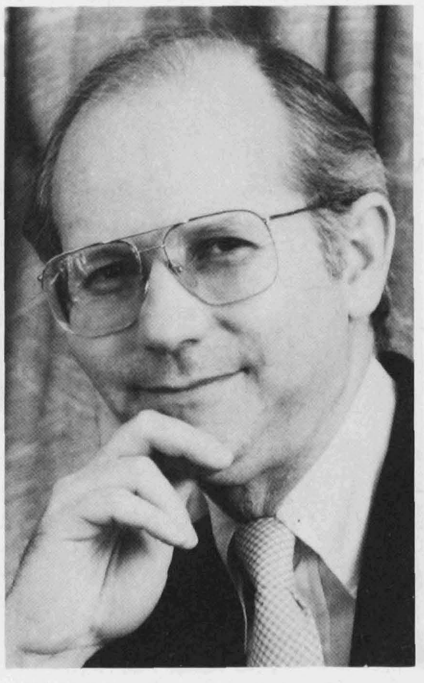


Alumni Association honors Nederlander

Robert E. Nederlander (B.A. '55, J.D. '58) a Detroit attorney and a U-M regent, has received the Distinguished Alumni Service Award, the highest honor bestowed upon an alumnus by the U-M Alumni Association. The award citation noted:

"Despite the heavy demands of an eminently successful career in law, he was twice elected Regent of the University, serving with exceptional distinction for 16 years. Among his noteworthy contributions was chairmanship of the Presidential Selection Committee for the 10th president of the University, Dr. Harold Shapiro, which he exercised with admirable skill, patience and tact."

Nederlander is national chairman of the Campaign for Michigan, the largest development program sponsored by any public university.



Raising money

Be 'persistent just short of being obnoxious'

We were certainly not the first law school to undertake an annual fund-raising program, but I believe we were probably the first publicly supported law school to do so. We also were the first, and to my knowledge, the only publicly supported law school with participation by over 40 percent of its current alumni.

With the possible exception of Wesley Bevins at Harvard, who has resigned from directing the annual fund, I expect I have been directly involved with one school's fund-raising and alumni activities longer than anyone else still active in the business.

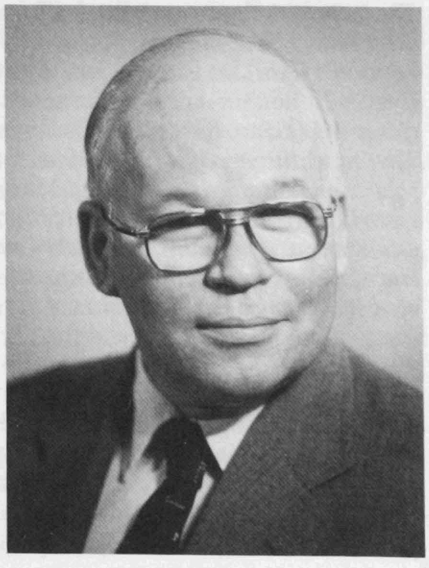
It has not been a closely guarded secret that one goal I hoped to reach during my tenure as director was a million dollar year. The greatest satisfaction for me, since we have been raising $1.4 to $1.5 million in recent years, is to think of having established an unseen endowment fund "out there" from which we reap the annual earnings. Of course, a large part of that endowment fund is the goodwill we think we have established, and each alumnus is a manager of his or her own little part.

In annual campaigns, there is rarely the thrill of a half-million-dollar gift to relish, but you get a great deal of satisfaction. Asked to give a short explanation as to why our annual giving program was so successful, one alumnus said we were "persistent just short of being obnoxious." I think he put his finger on it. ◘

—*Roy F. Proffit*

The above article is an excerpt of one that appeared in the June, 1985 issue of Syllabus, *a publication of the American Bar Association. Roy F. Proffitt has been director of Law School Fund activities since 1963.*

Thomas Roach heads "special gifts" phase of capital campaign



Thomas A. Roach (A.B. '51, J.D. '53) has been named chairman of special gifts of the U-M's Campaign for Michigan. A Regent of the University since 1975, Roach is a senior member of the Detroit law firm of Donovan Hammond Ziegelman Roach and Sotiroff, P.C.

The Campaign, launched in 1983, seeks to raise $160 million in private gifts and is the largest such effort ever undertaken by a public university. Its goals are to increase the University's endowment for faculty support and student financial aid, and to fund renovation and construction for teaching, research, and service.

The initial effort of the campaign, targeted at "major gifts" (totalling $100,000 or more), has already brought in more than $95 million, or 56 percent of its goal. The second phase, which Roach now heads, focuses on "special gifts" of $10,000 or higher. It will continue through the close of the Campaign in 1987. The final phase, beginning in 1986, will consist of direct solicitation of all U-M alumni and friends. ◘

The Conversational Process of the Law

by James Boyd White

editor's note: This article is adapted from part of the final chapter of Professor White's book, When Words Lose Their Meaning, *published by the University of Chicago Press in 1984. In this book, the author works out a method of analysis, or what he calls a "way of reading," which he exemplifies in his interpretation of a wide range of texts, drawn from different historical periods and representing different generic types. The texts include Homer's* Iliad, *Thucydides'* Peloponnesian War, *Plato's* Gorgias, *Swift's* Tale of a Tub, *Samuel Johnson's* Rambler Essays, *Jane Austen's* Emma, *and Burke's* Reflections on the French Revolution. *The book closes with an analysis of The Declaration of Independence, The Constitution of the United States, and Chief Justice Marshall's opinion in* McCulloch v. Maryland. *In this section reproduced below, which is part of the conclusion of the book as a whole, Professor White sketches out his conception of the law as a rhetorical and literary process. In it references are occasionally made to other parts of the book.*

The most prominent feature of the judicial opinion is that it is not an isolated exercise of power but part of a continuing and collective process of conversation and judgment. The conversation of which it is a part is not a political conversation of the usual sort, proceeding as such conversations ordinarily do—by a kind of jostling and compromise, focusing mainly on the problem of the immediate present—but a highly formal one, in which authoritative conclusions are reached after explicit argument. These decisions in their turn become the material of future arguments leading to future decisions, and so on in a continuing process of opening and closure, argument and judgment, of which no one can claim to foresee the end.

This is a way of saying that judicial opinions incorporate within their world both the past (to which the court looks for its authority) and the future (to which it speaks as an authority). The opinion reaches its judgment by elaborating what has gone before—in *McCulloch v. Maryland* mainly the language of the Constitution and the experience supporting the necessity of the Bank—but is itself left open to elaboration by others. This process establishes connections across time of the sort that Burke celebrates, but these judicial connections are not merely attitudinal but systematic and reliable. The judicial process at once acknowledges the necessity of cultural change and creates a method for effecting it.

The way a court works is deeply affected by the kind of question it addresses. A court normally avoids deciding hypothetical questions; it waits, inactive, until a case is brought before it, which it is asked by others to decide. Under our Constitution, indeed, the federal judicial power is limited to "cases arising" under certain circumstances, and the Supreme Court has elaborated a complex body of law defining those terms of limitation. It requires, for example, that a dispute be brought by parties with genuinely adverse interests and that it be neither premature (hence imperfectly focused) nor stale. It is only when these conditions have been met that the Court has claimed the power to determine the constitutionality of acts of the national legislature.

The Court's claim to decide a constitutional question of this kind to a large degree rests on the fact that it is better situated to decide it than the legislature that passed the statute would have been. Suppose, for example, that Congress passed a statute and then immediately sought from a federal court an advisory opinion on its constitutionality. What claim could the court properly make that it had the power to do what it was asked? It could claim some legal expertise, no doubt, but legislatures do not lack that; some sense of the world and its demands, but surely no more than the legislature; some degree of removal from the contemporary political process, but the timing of the judgment sought would tend to blur that distinction, for judges are not immune to public opinion, and, in a case like this one, the judge, like the legislator, would mainly see the present need, since that is what would be before him. But the situation would be quite different when time had passed and a conflict had actually arisen, in the ordinary course of life, which one party cared enough about to bring before the court, the other to resist, and when the particular statute had been seen in operation with other bodies of law and with other expectations and demands rooted in other patterns of need and desire, arising in other times. Now the judge could make another kind of claim altogether: that he occupies a position for making a constitutional judgment that is inherently superior to that of the legislature passing the statute and superior also to what his own position would have been had he granted an advisory opinion.

Cases are often not neatly packaged in the categories established by legislative or judicial rules but exhibit surprising configurations of their own, bringing to the surface hitherto unseen tensions and contradictions in our social life and culture. The legal case is always a narrative; and a narrative, as we saw in the *Iliad,* can always be a way of testing the presuppositions of the culture, forcing to the bright center of the mind difficulties we wish to push back into the twilight. This means that the case is always an invitation to the reconstitution of the language in the light of new circumstances and new intractabilities.

The fact that the case is always a narrative means something from the point of view of the litigant in particular. For him the case is, at its heart, an occasion and a method in which he can tell his story and have it heard. He has the right to a jury, to ensure that he will have an audience that will understand his story and speak his language. The presence of a jury requires that the entire story, on both sides, be told in ordinary language and made intelligible to the ordinary person. This is a promise to the citizen that the law will ultimately speak to him, and for him, in the language that he speaks, not in a technical or special jargon. This, in the terms that Marshall has taught us, is a continuing acknowledgment of the supremacy of "the People" who are for us the ultimate source of law and authority. It is our law, and it must make sense to us. In addition, by its very structure the legal hearing achieves, at least for the moment, a performed equality among the speakers; this, as we learned from Thucydides, is the essential premise of the social practice of argument, as it is of compassion, gratitude, and indeed of all the social and political activities of free people. Here equality is not only the condi-

tion of the legal process but its product—perhaps, indeed, its finest product: equality under law.

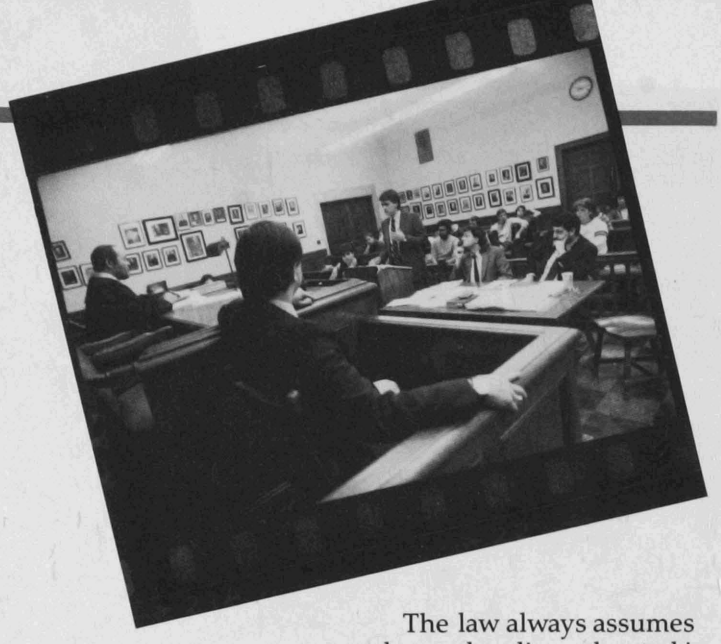
The judicial process not only recognizes the individual but compels him to recognize others. For the litigant, the lawyer, and the observer alike the central ethical and social meaning of the practice of the adversary hearing is its perpetual lesson that there is always another side to the story, that yours is not the only point of view. For the actors as for the judges, the juxtaposition of the two incompatible stories makes us ask in what language the story should be told again and a judgment reached; it compels what George Eliot, in describing the function of art, has called an "extension of [our] sympathies" into an "attention to what is apart from [our]selves," which, as she says, is the "raw material" of moral life.

The law can thus be seen as a discipline in the acknowledgment of limits, in the recognition of others, and in the necessity of cooperation. It is a method of individual and collective self-education, a way in which we teach ourselves, over and over again, how little we can foresee, how much we depend on others, and how important to us are the practices we have inherited from the past. It is a way of creating a world in part by imagining what can be said on the other side. In these ways it is a lesson in humility.

For the litigant, the lawyer, and the observer alike the central ethical and social meaning of the practice of the adversary hearing is its perpetual lesson that there is always another side to the story, that yours is not the only point of view.

But it is more even than this: it is the constitution of a world by the distribution of authority within it; it establishes the terms on which its actors may talk in conflict or cooperation among themselves. The law establishes roles and relations and voices, positions from which and audiences to which one may speak, and it gives us as speakers the materials and methods of a discourse. It is a way of creating a rhetorical community over time. It is this discourse, working in the social context of its own creation, this language in the fullest sense of the term, that *is* the law. It makes us members of a common world.

This is not a language of social policy and political philosophy, though there are of course some (often rather exaggerated) continuities between these realms of discourse; for in the law questions are never addressed abstractly, and statements are never made to the air. Every legal speech is made from a defined position, to a defined audience, in a defined language.

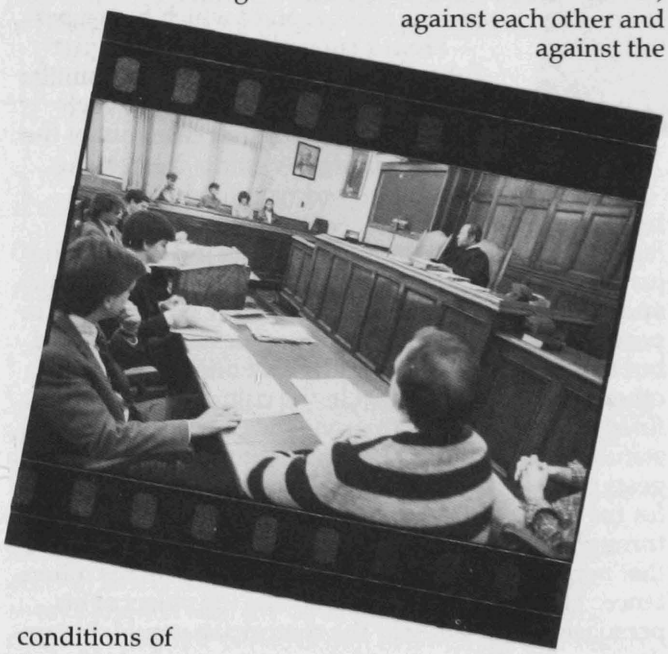


The law always assumes a speaker and audience located in the context it defines. This is how it makes a world and makes it real.

The legal text, for example—whether constitution, trust, statute, or contract—always requires that one who claims a meaning for it answer the question, "Who are you when you speak as you do?" What you wish to say, what you can say, and how what you do say will be understood will all vary dramatically with your answer, which might be, for example: "I am the manager of the condominium established in this agreement, and I say. . ."; "I am the tenant under this lease, and I say. . ."; "I am a Justice of the United States Supreme Court, given authority to decide certain cases of which I assert this is one, and I say. . . ." Similarly, the lawyer or judge presented with a question about the meaning of a contract, statute, or judicial opinion or about the wisdom of a particular course of action—the commercial development of certain natural resources, for example, or cross-city busing to desegregate schools—will as a matter of second nature ask himself not only about the merits of the substantive question but who it is in our system that ought to have the authority to decide that question and under what procedures. The law creates a world by distributing authority within it. To speak as if all questions could be reduced to matters of substantive policy determined by what "we" think best would destroy the constituted "we" that is the great achievement of the law and substitute for it a community divided into two parts: a "we" that talks about and determines the policy and those others whose lives are to be affected by it.

The law is best regarded not so much as a set of rules and doctrines or as a bureaucratic system or as an instrument for social control but as a culture, for the most part a culture of argument. It is a way of making a world with a life and a value of its own. The conversation that it creates is at once its method and its point, and its object is to give to the world it creates the kind of intelligibility that results from the simultaneous recognition of contrasting positions. This recognition is necessary to the rational definition and pursuit even of the most selfish ends. Without it, neither reason nor ambition can have form or meaning.

The fact that the conversation of the law is largely argumentative has important consequences of its own. Legal argument exposes in clarified and self-conscious form—in slow motion, as it were—the processes of agreement and disagreement—of persuasion—by which this part of our culture, and our culture more generally, are defined and transformed. For in legal argument the state of the discourse itself—how we should think and talk—is a constant subject of conscious attention and debate. This means that the contours of the culture are pushed to their limits and marked with extraordinary distinctness. As the argument proceeds, each speaker tests the limits of his language, subjecting its every term and procedure to all the strain that it can take—that we can take—in order to make things come out his way. And since he must always operate within strict limits imposed by time and the interest of his audience, he is constantly forced to discriminate among the arguments he might make, putting forward what seems best, holding back what is weak or unimportant, and so on. As the materials of the legal culture are tested in this manner, against each other and against the



conditions of the world—as they are put to work—they are defined and reorganized in especially clear and reliable ways. This makes it possible to think clearly about their transformation.

Consider this point in the life of the modern lawyer. When he writes a brief or makes an argument, in court or in a negotiation, he offers us his best performance of the state of his art, as does the lawyer who opposes him. Between them they provide a momentary definition of the resources and limits of their legal culture. When the lawyers have done all they can and their capacities for argument are spent, we see where we are in a new way, a way that the unused materials of argument, lying about without order, arrangement, or force—mere sets of cases, rules, and commonplaces—would never allow. Each lawyer has made every proposal for change he thinks possible and has had to accept what he cannot change. In argument of this kind the speakers are forced to perform an allegiance to their common language, to the ways of talking that make the dispute intelligible and the community possible. One of the functions of a culture of argument, the law among others, is to provide a rhetorical coherence to public life by compelling those who disagree about one thing to express their actual or pretended agreement about everything else. Argument functions by agreement, and by agreement under stress, and is thus constitutive of the changing culture that even the opponents share. In compelling this kind of agreement, the law makes disagreement at once intelligible, limited, and amenable to resolution.

Legal argument by its nature contrasts one way of talking with another, one version of a narrative with another, and in this way gives its users (and their community) the benefits of contrast and tension. The lawyer speaks from and to various parts of the self, in various modes, and is always subject to the double duty of making sense both in ordinary English and in the specialized language of the law. It is in fact the inconsistencies among the lawyer's ways of talking that gives him the purchase necessary to propose, and to resist, changes in his discourse.

The law is best regarded not so much as a set of rules and doctrines or as a bureaucratic system or as an instrument for social control but as a culture, for the most part a culture of argument.

Argument of the legal kind thus defines a place that is part of a larger world yet distanced from it, at once representative and critical. It is a place something like the place occupied by Achilles in Book 9 of the *Iliad*, on the edge of his world, but here the actors have something to say about their language and can propose changes in it. Legal argument is an organized and systematic process of conversation by which our words get and change their meaning.

If a judge is to respond to the demands and possibilities presented by a legal case as I have outlined it, he or she will have to speak in an extraordinarily rich and complex way, not in a voice that is merely bureaucratic and official. To be true to the actual difficulties of a real legal case, an opinion must be full of the kind of life that comes from a set of acknowledged tensions: between the two versions of the story before the court; between the stories so told and the language of legal

conclusion; between the demand that like cases be treated alike and the recognition that cases never are "alike"; between the fidelities owed to the past and the future and those owed to the present; between an awareness that the case is a particular dispute between individual persons and a sense that it is typical as well; and so on. That the judge's voice is an individual voice, speaking to individuals—to the parties and their lawyers,

to future parties and lawyers and judges—is a performance and validation of our claim to be a government by "the People," for it is always one of us speaking to another one of us. And because legal cases arise in new configurations, full of surprise, both argument and judgment require more than a mechanical comparison of case with case; one must always be prepared to make active all that one knows. In the complexity and formality of his speech, its metaphoric character and its openness to uncertainty, in its tension between the general and the particular, the judge must indeed be something of a poet. He must speak as one who has something to learn.

I earlier suggested that it was a mark of the excellence of Samuel Johnson's moral thought, and of its truth, that in it he struggled toward the comprehension of contraries, and one can regard the law as an institution established on that very principle. For the legal process of adversary thought and argument tests each position by its opposite, each truth by an opposite truth. In the law, as in Johnson and Jane Austen, we find that "principles" are not merely generalities to be applied to particular cases but complex and disciplined attitudes of the mind and self, educated positions from which difficulty (in Burke's sense) can be acknowledged and addressed.

Honesty requires the judge to acknowledge that his own acts of choosing cannot be wholly explained or justified. The good judge thus speaks in a double voice, as one who has brought to bear as well as he can the sources of authority external to himself, and as one who makes a choice for which he is responsible. An opinion is not merely an organized defense of his decision, the "best case" for the result reached, but an articulation of what he really thinks the case should mean, including an expression of his doubts. The best judge, like Socrates, exposes himself to refutation. The most important achievement of judicial writing, indeed, is ethical and intellectual: the manifestation in performance of a serious, responsible, and open mind, faithful to the sources of authority external to the self even while contributing their transformation. Excellence measured in this way is far more important than excellence measured by our agreement with the votes a judge happens to cast, for by definition many of the cases that he decides will be hard ones, with much to say on both sides, and our own positions are themselves always subject to change. His most significant legacy by far is his definition of his own role and the institution of which he is a part.

From a lawyer's point of view, the future offered by *McCulloch* and similar cases is a life of argument in which he puts together cases out of the materials of the world, addressing the tensions between ordinary language and legal language and among various strains within legal discourse, and then offers to the judge, or to the jury, an ideal version of the case for their consideration and persuasion. The task of the lawyer is not simply to persuade, using whatever cultural devices lie at hand, but to persuade a judge or jury that one result or another is the best way to act in the cultural situation defined by these facts or this evidence and by this set of statutes and opinions and understandings. This suggests the beginnings of a response to Plato's *Gorgias*, for the lawyer is not committed simply to power through persuasion but to persuasion of a special kind that perpetually recreates an ideal version of his inheritance. The lawyer does become like the object of his persuasion, as Plato said the rhetorician would; but under our conventions—and the same could be said of those by which Corcyra and Corinth addressed Athens in Thucydides' *History*—the lawyer's audience is always ideal as well as real: he speaks to the judge or jury not as they are defined by their individual interests, passions, and biases but as they are defined by their role, which is to do justice. He thus speaks to, and becomes like, his own view of the best judge or juror he can imagine, and this is one form of the best version of himself.

The law is a set of social and intellectual practices that have their own reality, force, and significance. It provides a place that is at once part of the larger culture and apart from it, a place in which we can think about a problematic story by retelling it in various ways and can ask in a new and self-conscious way what it is to

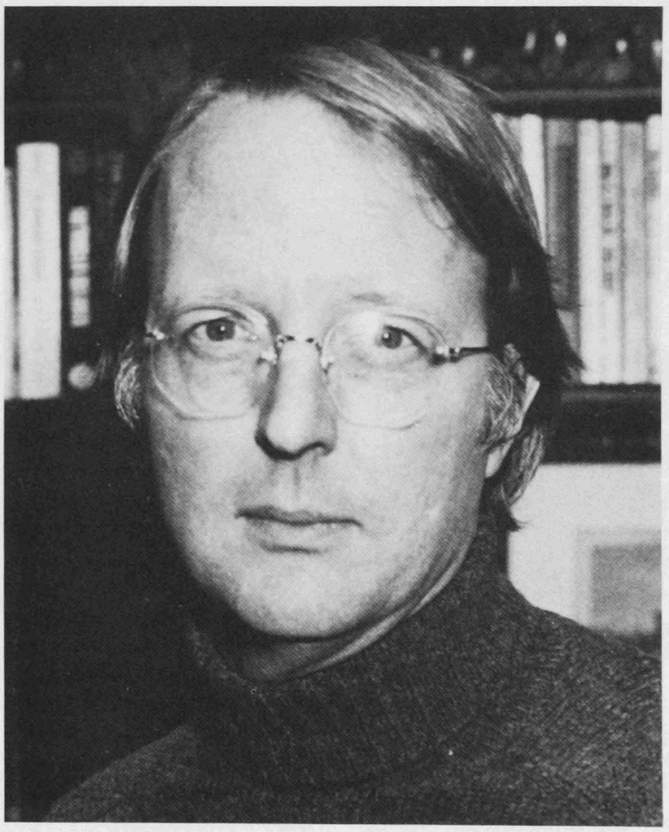
mean. Law works by a process of argument that places one version of events against another and creates a tension between them (and between the endings appropriate to each); in doing so it makes our choice of language conscious rather than habitual and creates a moment at which controlled change of language and culture becomes possible. The rhetorical structure of the law makes a place for each party and defines a relation between them by establishing the ways they may talk; in doing this it suggests a conception of justice as equality, for a person may find himself in any of these roles. The method of criticism most appropriate to the law as such is concerned less with the wisdom of a particular policy choice or the rightness of a particular rule or result than with the character that a court, legislature, or other legal speaker gives himself and his institution, the place it defines for others, and the relation it establishes between them. The law is less a branch of the social sciences than of the humanities in that it seeks not to be a closed system but an open one. It learns from the past and seeks new terms for the expression of motives, new forms for the establishment of relations; it is a method of learning and teaching;

...the heart of law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality, is tested against another.

and its central concern is with the kind of relations that we establish with our inherited culture and with each other when we speak its language.

To conceive of the law as a rhetorical and social system, a way in which we use an inherited language to talk to each other and to maintain a community, suggests in a new way that the heart of law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality, is tested against another. The multiplicity of readings that the law permits is not its weakness but its strength, for it is this that makes room for different voices and gives a purchase by which culture may be modified in response to the demands of circumstance. It is a method at once for recognizing others, for acknowledging ignorance, and for achieving cultural change.

This account of the law is of course not a description of the way every lawyer and judge in fact goes to work or how he conceives of himself, nor is it meant to justify the actual operation and effect of our legal system, let alone our economic system, both of which in fact suffer from disgraceful injustices. Rather, I mean to suggest a set of possibilities implicit in the institution and its practices, to define the kind of aim that the lawyer can have for himself. And these possibilities and aims are remarkable. The "case arising" can be seen as a place for cultural definition, testing, and change; as a way of assuring continued congruence between our languages of justice and expediency; as a means for complicating clichés and first attitudes into deeper understanding and for extending imaginative sympathy to those differently situated from ourselves; and, finally, as a way of making a place of coherence in a process of cultural change. Even more: the case establishes an essential equality between people, making this value real; and it proceeds by a method of argument and conversation that both recognizes the individual's view of his own situation and complicates that view by forcing him to recognize the claims of another. It is like dialectic in that it is refutational, and it is a kind of friendship in its insistence on the reality and validity of others. It proceeds by a conversation in which each speaker is invited to present an ideal version of himself, speaking to an ideal audience. ◘



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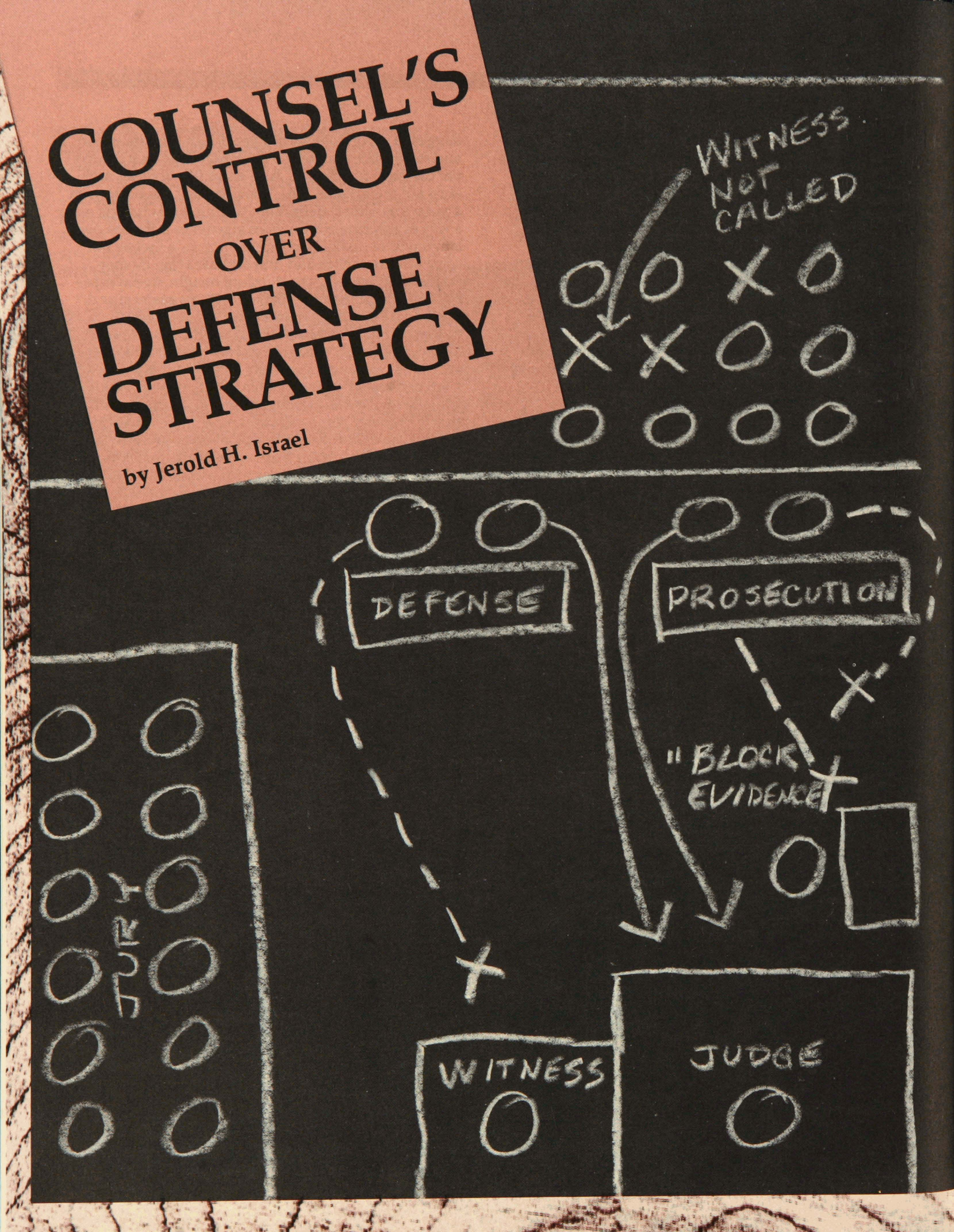
COUNSEL'S CONTROL OVER DEFENSE STRATEGY

by Jerold H. Israel



editor's note: The article that follows is a condensation of a section of Criminal Procedure, *a hornbook co-authored by Professor Israel and Wayne R. LaFave, and published by West Publishing Co. in 1985. That hornbook, in turn, is a condensation of the authors' three-volume treatise by the same title.*

Prior to *Faretta*,[1] a long line of cases had held that defense counsel had the authority to make various defense decisions on his own initiative. These decisions, commonly characterized as relating to matters of "strategy" or "tactics," were said to be within the "exclusive province" of the lawyer. Counsel had no obligation to consult with the defendant,[2] and if he did consult, had no obligation to follow the defendant's wishes.[3] Other defense decisions, however, were said to rest in the ultimate authority of the defendant. As to those decisions, commonly said to require the "personal choice" of the defendant, counsel had to advise the client and abide by his directions.

The Supreme Court's decision in *Faretta* was thought by some to have altered this basic division between strategic and personal decisions. The *Faretta* opinion had referred to the "law and tradition" that granted counsel ultimate authority to make "binding decisions of trial strategy in many areas." Indeed it had cited that law and tradition as a factor pointing towards the recognition of an alternative of self-representation where defendant wanted to control his own destiny. The argument was advanced, however, that the overall perspective of the *Faretta* opinion also required that the attorney's ultimate authority be limited, perhaps only to "on-the-spot" decisions where timing considerations precluded consultation with the defendant. *Faretta*, it was argued, was "predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide what tactics will be most effective."

In *Jones v. Barnes*,[4] a divided Supreme Court rejected this view of *Faretta*. *Jones* held that appellate counsel did not have to present a nonfrivolous claim that his client wished to press if counsel believed that the better strategy was to limit his argument and brief to other issues. Counsel was free to follow the time-tested advice of countless advocates that inclusion of "every colorable claim" will "dilute and weaken a good case and will not save a bad one." It was for counsel to decide which claims were strong enough to be presented consistent with this strategy. *Faretta* gave the defendant an opportunity to control the presentation of his case by proceeding pro se. Neither it nor decisions defining the obligation of appointed appellate counsel had altered counsel's right to act upon his best professional judgment as to matters of strategy.

The issue of client control was raised in *Jones* through a claim of ineffective assistance of counsel. While that is probably the most common avenue for presenting that issue, questions of client control also may be raised in other procedural settings. An indigent defendant may claim that he has a right to appointment of new counsel because his current attorney refuses to accept his directions on an issue that should be within defendant's control. A defendant may seek a continuance for the purpose of replacing retained counsel on the same ground. A substantial number of the leading opinions on client control have involved collateral attacks raising constitutional claims that were not presented at trial. When the state has argued that the claim was "waived" by counsel's failure to raise it at trial, the petitioner has responded that a valid waiver of that claim required his personal decision and that counsel had not even consulted with him in deciding not to raise the issue. *Jones* left open whether counsel's strategic decision not to raise on appeal a constitutional claim urged by defendant would bar consideration of that claim on collateral attack. However, various other Supreme Court decisions have held that a counsel's deliberate decision not to raise a particular claim at trial did bar review on collateral attack, provided that decision dealt with a matter subject to counsel's control over strategy. Taken as a whole, the cases indicate that, in piecing together the overall distribution of decision-making authority, one usually can assume that rulings on that subject made in one procedural setting ordinarily will be carried over to other settings as well.

Though the various rulings on client control are not entirely consistent, they recognize several decisions as to which defendant's "personal choice" clearly is required. The Supreme Court has stated, in dictum or holding, that it is for the defendant to decide whether to take each of the following steps: plead guilty or take action tantamount to entering a guilty plea;[5] waive the right to jury trial; testify on his own behalf; or forego an appeal. On the other side, the Supreme Court has indicated, in dictum or holding, that counsel has the ultimate authority in deciding whether or not to advance the following defense rights: barring prosecution use of unconstitutionally obtained evidence; obtaining dismissal of an indictment on the ground of racial discrimination in the selection of the grand jury; wearing civilian clothes, rather than prison garb, during the trial; striking an improper jury instruction; and including a particular nonfrivolous claim among the issues briefed and argued on appeal. Lower court rulings have added to this list a variety of other determinations, including the following: whether to request, or object to, the exclusion of the public from the trial; whether to seek a change of venue, continuance, or other relief due to prejudicial pretrial publicity; whether to seek a continuance and thereby relinquish a statutory right to trial within a specified period; and whether to call a certain witness.

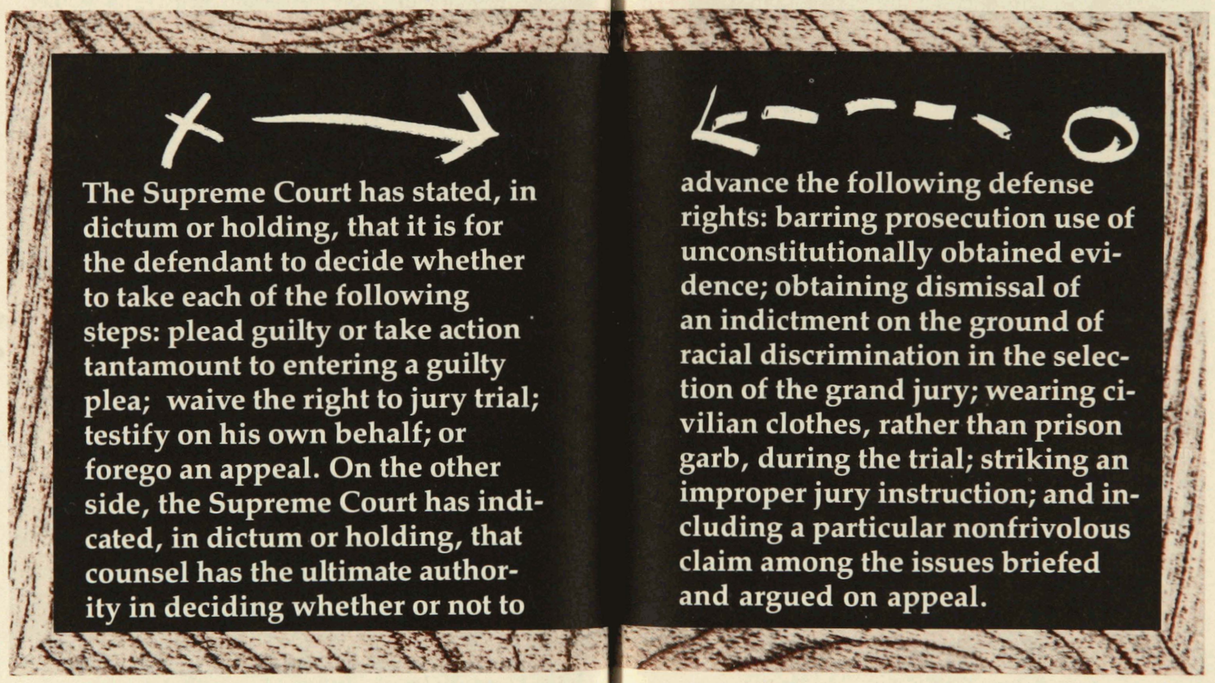
Taken together, the various rulings produce a picture that is clear at many points but clouded at others. General agreement exists that the decisions as to guilty plea, jury trial, appeal, and the defendant testifying

are for the defendant, and that decisions on a substantially larger group of matters, such as objecting to inadmissible evidence, are for counsel. As to various other decisions, however, the courts either have not spoken or are divided. Thus, Justice Brennan, dissenting in *Jones*, was on uncertain ground when he suggested that a defendant would have the right to insist that his counsel forego other strategies more likely to produce a dismissal and rely exclusively on a claim of innocence. That assumption, though it relates to an issue basic to the division of responsibility between lawyer and client, is hardly clear under the precedent. Of course, one cannot expect a ruling on each and every decision on which lawyer and client are likely to disagree. The problems of uncertainty are exacerbated, however, by the absence of any well-reasoned guidelines for distinguishing between those decisions requiring defendant's personal choice and those subject to counsel's control over strategy.

The Supreme Court's explanations of why particular decisions are for counsel or client have been brief and conclusionary. Decisions within the client's control are simply described as involving "fundamental rights," while those within the lawyer's control are said to involve matters requiring the "superior ability of trained counsel" in assessing "strategy." While the rights subject to defendant's "personal choice" clearly are "fundamental," the Court has not explained why various rights subject to counsel's authority are not equally fundamental. Arguably, the decision to plead guilty has a special quality because it involves the relinquishment of so many basic rights. But it is more difficult to distinguish the right to be tried before a jury, for example, from the right to present a particular witness or to cross-examine an opposing witness. If the fundamental nature of a right is measured by its importance, its historic tradition, or its current status in constitutional or state law, those rights would appear to be on the same plane.

The Court's emphasis upon the strategic element in those decisions subject to counsel's control also fails to fully explain the distinctions that have been drawn. Certainly the decisions to waive a jury or not have the defendant testify also involve substantial strategic considerations. It may be argued that the elements of strategy involved in such decisions are more readily understood by the layman because they do not as frequently rest on technical concerns as many of the tactical decisions made by counsel. But they are hardly distinguishable in this regard from still other decisions made by counsel. For example, counsel's decision not to have a particular witness testify often rests on considerations of the same kind that would lead counsel, if he had such control, to keep the defendant from testifying. Similarly, much the same type of judgment is involved in deciding that a jury should be waived because the trial judge is likely to be the more sympathetic factfinder as in deciding that an unconstitutionally composed jury should not be challenged because discriminatory jury selection has produced a more sympathetic group of jurors. In sum, just as the fundamental rights characterization could be applied to many of the rights subject to counsel's control, so could the characterization of a decision as strategic and requiring counsel's expertise be applied to certain basic determinations subject to defendant's control.

As various lower courts have noted, the determination that particular decisions do or do not require defendant's personal choice has obviously rested on a balancing of several factors. The fundamental nature of the right involved and the significance of strategic considerations obviously are two important considerations. Other factors given substantial weight appear to be the objective of avoiding the disruption of the litigation process, the "inherently personal character" of the particular decision, and the need to maintain a strong defense bar.



The court's concern with the possible disruption of the litigation process is manifested most clearly in opinions stressing the timing of the particular decision. The exercise of defendant's personal choice requires an opportunity for meaningful consultation that often is not consistent with the exigencies of litigation. Thus, Justice Brennan, who would grant defendant far more control than the Supreme Court majority, nevertheless acknowledges that defense counsel must be given "decisive authority. . .with regard to the hundreds of decisions that must be made quickly in the course of a trial."[6] Still another concern of judicial administration is that the trial judge be able to establish on the record, without a lengthy, disruptive procedure, that the decisions subject to defendant's control were actually made by the defendant. Without such a record, convictions could readily be subject to challenge by defendants claiming that counsel usurped the defendant's authority. The trial judge can readily determine that decisions requiring the explicit waiver of rights (such as the guilty plea) were made by the defendant himself, but he is hardly in a position to "continually satisfy himself that the defendant was fully informed as to, and in complete accord with, his attorney's every action or inaction that involved any possible constitutional right."[7]

Still another factor that has apparently influenced the balancing process, though it tends to be cited more frequently by commentators than courts, is the probability that defendant's interest in the particular decision extends beyond simply presenting a successful defense. The client, it is often said, must be able to control the "end," while the lawyer determines the "means" for reaching that end. Where, as is usually the case, the client's primary objective is to gain an acquittal, the lawyer is only controlling the means to that end when he decides whether or not to advance certain claims or raise particular objections. However, as to the exercise of a few rights, the client may often have a different or additional objective in mind. For example, a defendant may have an interest in testifying himself even though he recognizes that doing so may hurt his chances for acquittal (perhaps because cross-examination will reveal his prior convictions). He may view as more important his opportunity to "tell his story to the public." Similarly, a defendant may want a prompt trial, to relieve his anxiety, even though he recognizes that delay might weaken the prosecution's evidence. Decisions of this type are said to more appropriately rest with the defendant because they have an "inherently personal" quality, reflecting defendant's interest in controlling objectives rather than simply tactics. Of course, a wide variety of decisions may have this quality under the circumstances of an individual case. The courts have indicated, however, that they will judge the decision in terms of the general nature of the interests protected by the particular right. None have suggested, for example, that counsel will lose his control over whether a suppression motion should be made when the particular defendant's political beliefs make it so important to him that police illegality be revealed that he insists on the motion even though it might work against the possibility of an acquittal.

Finally, the line drawn between "personal" and "strategic" decisions probably also reflects some concern that lawyers not be placed in a position so inhibiting or embarrassing, as it relates to their professional expertise, that they are discouraged from engaging in criminal defense work. A lawyer is not placed in a professionally embarrassing position when he is reluctantly required to try his case to a jury rather than a judge. Neither should he be embarrassed because he is required to go to trial in a weak case, since that decision is clearly attributed to his client. The situation would be somewhat different, however, were a lawyer required to raise a "colorable" procedural objection simply because his client insisted that he do so. An objection may be "nonfrivolous" yet so unlikely to succeed that the lawyer who raises it will be viewed as wasting the time of the court. If the lawyer were forced to raise such a claim because of his client's insistence, he could hardly inform the court that he was presenting the claim only because he was required to do so. So too, if forced to present the testimony of an exceptionally weak witness, the lawyer could hardly inform the jury that the witness was called at his client's direction. In the end, this concern that the lawyer not be forced to sacrifice his professional reputation while providing no true assistance to his client may explain, as well as any other factor, the narrow range of decisions assigned to the control of the client.[8] ⊠

Footnotes

1. Faretta v. California, 422 U.S. 806 (1975). Faretta held that a defendant has a constitutional right to proceed pro se that cannot be conditioned on his capacity to perform at the level of a skilled attorney. Defendant is entitled to represent himself provided he "knows what he is doing [in giving up his right to counsel] and his choice is made with eyes open." While the framers of the Constitution recognized the value of representation by counsel in as-

suring that the defendant received a fair trial, they placed on a higher plane the "inestimable worth of [defendant's] free choice."

2. Our discussion deals only with those obligations of counsel that may require reversal of a conviction when violated. Thus, though it is said in this regard that the lawyer has no obligation to consult with his client as to those decisions over which counsel has exclusive control, he may nevertheless have such an obligation to consult under standards of professional responsibility. See ABA Model Rules of Professional Conduct, Rule 1.4 (Approved Draft, 1983). Consider also §20.3(b) as to the special obligations attending counsel's advice on the entry of a guilty plea.
3. Of course, a defendant with a retained attorney can discharge his attorney and look for another who will abide by his wishes. The indigent defendant has no right to a substitute counsel where the disagreement with counsel relates to a matter within the exclusive province of the lawyer. See §11.4(b). Thus his choice commonly is either to keep the counsel or proceed pro se. See §11.4(d). The courts have not seen this distinction in the ability of the non-indigent and indigent defendant to "control counsel" as raising a significant equal protection problem. Many non-indigents are not in a positon to "shop around" for a lawyer more willing to accept the defendant's judgment on matters of strategy. If the disagreement between counsel and client arises at a point where substitution of new counsel can be achieved only with a continuance, the non-indigent, like the indigent, may face the choice of proceeding pro se or retaining his current counsel and accepting counsel's decisions. See §§11.4(c), (d). Moreover, just as equal protection has never been thought to guarantee to the indigent a lawyer as experienced or skillful as the best that a non-indigent might obtain, neither does it require a lawyer as compliant in his relationship with his client as the most submissive attorney a non-indigent may retain. See generally, State v. Superior Court, 2 Ariz. App. 458, 409 P.2d 742 (1962).
4. 463 U.S. 745.
5. See Brookhart v. Janis, 384 U.S.1 (1966). *Brookhart* held that defense counsel could not enter an agreement, without defendant's informed consent, "that all the state had to prove was a prima facie case, that he would not contest it, and that there would be no cross-examination of witnesses." The Court noted that the defendant had desired to plead not guilty, but the counsel had accepted a procedure largely inconsistent with such a plea. That procedure was characterized by Justice Harlan, in his concurring opinion, as having "amounted almost to a plea of guilty or nolo contendere."
6. See Jones v. Barnes, supra note 4 (Brennan, J., concurring). Justice Brennan has argued against "a constitutional rule that encourages lawyers to disregard their clients' wishes without compelling need." It is not clear what factors other than the exigencies of litigation would establish such "compelling need."
7. Winters v. Cook, 489 F.2d 174 (5th Cir. 1973). This is not to say, of course, that a decision will be held to be within counsel's control simply because a record of defendant's personal participation in the waiver is not easily established. Whether to appeal is a decision for the defendant to make, though the failure of counsel to file an appeal hardly indicates in itself (or readily permits a court to establish on the record) that defendant participated in that decision. So too, while the exigencies of the trial process will contribute to the assignment of certain decisions to counsel's bailiwick, the presence of ample opportunity for consultation does not necessarily mean that the decision will be assigned to defendant's control. See e.g., *Jones v. Barnes*, supra note 4, where, as Justice Brennan stressed in the dissent, there was ample time for consultation. Defense counsel also would have had ample time before trial to discuss with defendant the possibility of raising many of the objections considered in the cases cited in the sentence in the text following note 5.
8. Even where an objection has a good chance of success, it might be viewed as "wasteful flyspecking" when it relates to a point that will be of no tactical benefit to the accused in the context of a particular case. Courts more often stress the lack of benefit to the client than their concern for the lawyer's reluctance to serve in a capacity in which he cannot exercise his professional judgment. See Jones v. Barnes, supra note 4. But the two interests run together. See Nelson v. California, 346 F.2d 73 (9th Cir. 1965) (noting that "few competent counsel would accept retainers or appointment***if [required] to consult the defendant and follow his views on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right").

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