Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 31, NUMBER 1, FALL, 1986

Bollinger on Tolerance and Extremist Speech

Miller Examines a Medieval Icelandic Text

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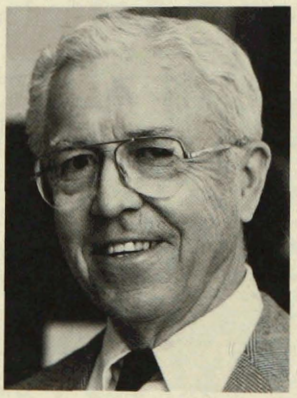

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ON THE COVER: *Jonsbok* is a collection of laws introduced in Iceland from Norway in the last decades of the 13th century. Pictured here is the beginning of the section dealing with theft from an illuminated manuscript dating from the first quarter of the 14th century. The text introduced by the illuminated initial contains a general prohibition against theft and then adds, "but there is this qualification: if, because of hunger, a person steals food who is not able to support himself and thereby preserves his life, the theft will be in no way punishable."

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Pornography and human dignity

A West German perspective

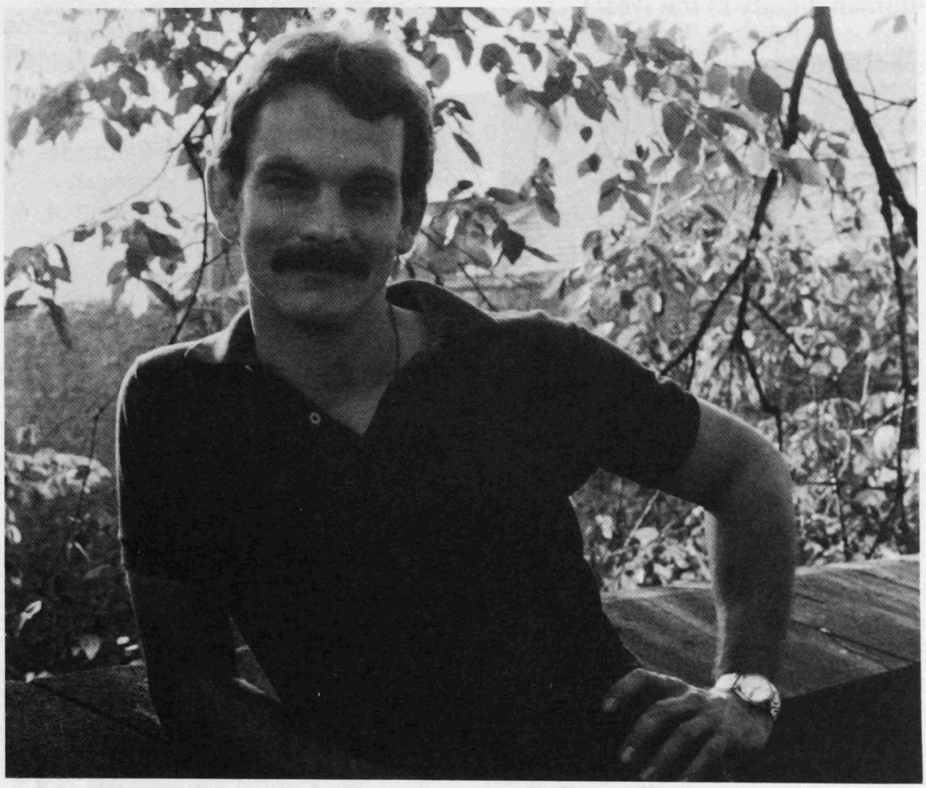
by Mathias W. Reimann

A new argument in the revitalized debate about the regulation of pornography in the United States has received considerable publicity recently. Feminist writers, in particular, have asserted that pornography is harmful to women, not only because it fosters violence against women, but also, and perhaps more importantly, because it degrades women by presenting them as mere objects of lust. While this concern about the degrading effect of pornography has even gained recognition by the Attorney General's Commission on Pornography, it is not an accepted legal argument for the regulation of pornography. A Minneapolis ordinance making the publication and distribution of sexually explicit and degrading material a civil rights violation was vetoed by the mayor. A similar ordinance enacted in Indianapolis was declared unconstitutional in federal court because it regulated speech on the basis of speech content and thus violated the First Amendment. American law has not yet ratified a view of pornography as a degradation of women, and perhaps never will.

In West Germany, however, this view has been recognized by courts and scholars alike since the early 1970s. This development is not surprising in light of the fact that the Basic Law, the West German constitution, declares in Article 1 that human dignity is the highest value in the constitutional order. Thus, German law offers an opportunity to look at a legal system that has endorsed the concerns about the degrading nature of pornography and to compare this approach with the American one.

Until the late 1960s, the German concept and regulation of pornography were not vastly different from those in the United States today. The production and distribution of obscene material was criminally punishable. Even the German definition of obscenity closely resembled the three-pronged test developed by the U.S. Supreme Court: appeal to the prurient interest in sex, offensiveness under contemporary community standards, and lack of socially redeeming value. This test is still used in the U.S. today.

In a 1969 case, the German Federal Supreme Court broke new ground. The decision is particularly interesting because it has an exact companion case in the United States. Only three years earlier, the U.S. Supreme Court had decided that John Cleland's 1749 novel *Fanny Hill* could not be prohibited. When the book came before the German judges, they agreed with their American brethren that the book could not be banned, but for entirely different reasons. The U.S. Supreme Court left open the question of whether the book was offensive, holding that it was saved by its socially redeeming, namely literary, value. The German Federal Supreme Court, by contrast, expressly found that the book was not offensive, regardless of its literary value.



Mathias W. Reimann

The German Court offered a new perspective on the problem of what it really is that makes pornography offensive. While the judges openly acknowledged the pervasive sexual explicitness of the book, they found it acceptable because the characters and their sexual encounters were described in a meaningful context of life and in a realistic manner. The heroine, the Court said, was portrayed as a person with feelings about, and lessons learned from, her adventures. She was not presented as a mere instrument for sexual arousal, but as an individual within her own world. What the Court was pointing to was that she was treated not like an object for sexual excitement, but as a human being. This distinction is deeply rooted in Kantian ideas about humanity (never to treat humanity as a means, but always as an end in itself) which have been very influential on the concept of human dignity in the West German constitution. The protection of human dignity means particularly that a person must never be degraded to an object, but always be respected as a human individual. While the Court was not expressly speaking in those terms and while its ideas were not yet so clearly articulated, its view was essentially that material becomes offensive not when it is sexually explicit, but when it degrades human beings to the level of mere objects and thus violates human dignity.

The year after this decision, the legislative debates began which led, in 1974, to the legalization of most pornography for consenting adults (while continuing to prohibit it for minors). A focal point of these debates was the problem of what pornography really is. One group endorsed and expanded upon the Federal Supreme Court's approach and wanted to define pornography as sexually explicit material that presents persons as objects and thus violates human dignity. Others, however, found the American test, as applied in the American *Fanny Hill* case, more persuasive and urged the adoption of the prurient interest standard. In the end, the legislature did not define pornography, but left the problem to the scholars and courts. As of now, the issue has not been clearly resolved and there is authority for both views. The adherents of the human dignity concept are probably in the majority. They achieved a widely debated triumph in a 1981 decision of the Federal Supreme Administrative Court which declared live "peep-shows" impermissible. These shows feature a nude woman on a stage, surrounded by individual viewing booths from which a coin operated mechanism opens the view onto the stage for a certain period of time. This, the Court held, presents women as objects and is therefore an unconstitutional violation of human dignity. The protests of the "peep-show" models against the decision which took away their jobs, however, also demonstrated a fundamental dilemma of the human dignity concept. The banning of "peep-shows" inevitably impairs another vital element of human dignity—the self-determination of those who choose freely to pose as models.

If we compare the two views on pornography, we discover significant differences. The prurient interest approach currently employed by the American courts considers sexually explicit materials offensive when they appeal to the prurient interest in sex more strongly than the community finds acceptable. It looks to the material's effect on the viewer. Its goal is to maintain a minimum level of sexual decency in society. The human dignity concept, by contrast, finds material objectionable if it degrades human beings. It does not look at the effect on the viewer but at the nature of material itself. It is not concerned with the enforcement of sexual morality, but with the protection of human dignity. These differences can have an impact on the practical results. Much of pornography will simultaneously meet the requirements of both tests. But the two approaches arrive at different conclusions in those cases where material appeals more strongly to the prurient interest than community standards allow but does so in a non-degrading manner.

The major advantage of the human dignity concept over the prurient interest approach is its broader notion of morality. By not focusing on sexual morality, it encourages inquiry into fundamental questions for which the prurient interest approach provides no room. The prurient interest view, for example, simply assumes that sexual immorality is a stronger ground for government interference than other forms of immoral behavior, like violence, but it does not offer any reason why. Once this assumption is no longer taken for granted, there is, beneath American pornography law, an appalling lack of reasoning about the question of what is really wrong with pornography. The human dignity concept, by contrast, encourages us to see pornography in comparison to other threats to human dignity, and thus to think about whether, and if so, why, sexual immorality is a special case. It does not necessarily provide answers for this and other questions it invites, but it does provide incentives to think more broadly and more contextually about pornography.

In this sense, the German human dignity approach to pornography can be helpful also from an American perspective. But it must be used cautiously because it

is rooted in a culture with different notions about law and morality. West Germany is not only more lenient in sexual matters, but it also provides a different constitutional framework for pornography laws. Regulation of pornography because of its degrading character is essentially regulation because of its message that persons are sexual objects. The content of this message may be abominable, but it is a message still. The First Amendment forbids regulation on the basis of content. The German constitution does not. It allows the limitation of speech for the protection of other constitutional values, and particularly of human dignity.

These differences are not mere technicalities; they express the different choices which the respective societies have made in the conflict between protection of speech and prevention of social damage resulting from harmful speech. American free speech doctrine endorses the choice that unrestricted exchange of ideas, including harmful ones, is so valuable that it justifies, in most cases, the risk of harm from speech. German constitutional law, reflecting the experience of inhumanity during the Nazi period, rests on the belief that some substantive values, like human dignity, are too precious to be put at risk, so that their protection requires some restriction of speech. As a result, regulation of pornography because of its degrading character looks entirely different under the two constitutions. From an American perspective, it poses a threat to free speech. From a German point of view, it is a legitimate measure to protect human dignity. ⊠

Mathias W. Reimann, who teaches comparative law at Michigan, is a graduate of the University of Freiburg Law School and the U-M (LL.M. '83).

Breaking new ground

Additions to curriculum reflect Michigan's involvement in difficult and exciting areas of legal scholarship

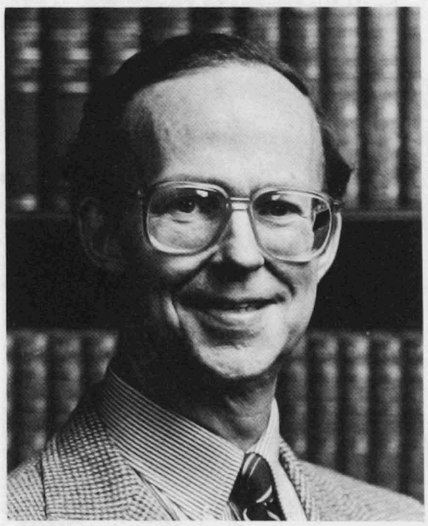
A look inside the new Law School *Bulletin* reveals that more than the cover has changed. Under the curriculum heading, over a dozen new courses and seminars are listed, reflecting the constant process of development that characterizes Michigan's curriculum. As Associate Dean Edward H. Cooper explains it, "new areas of law emerge, established areas take on new prominence, revolutions occur in the way of thinking about law." These changes also reflect the constantly evolving interests of the facility and the Law School's commitment to exploring some of the most difficult problems in the field of law and thus, the most exciting areas of legal scholarship.

A sample of some of the new course and seminar offerings follows.

Rebecca Eisenberg

Rebecca Eisenberg: Protection of Technology
As technology has become an increasingly important asset in areas of industry, the protection of intellectual property has ceased to be the exclusive province of a specialized bar and has increasingly commanded the attention of lawyers in general practice.

This course supplies a background in available strategies for the protection of technology under state and federal law. The course begins with an overview of available state common law theories with an emphasis on trade secret law and related business torts that commonly arise in trade secret disputes. The course then examines the federal patent laws and concludes with an overview of federal copyright protection of computer software.



Whitmore Gray

Whitmore Gray: Alternatives to Litigation
Because of the delays and expenses of litigation, numerous alternative ways of resolving

disputes have been developed in recent years.

This course focuses not only on arbitration, mediation, and conciliation, but also on such innovations as the mini-trial and the summary jury trial. Throughout, the course is concerned with the psychological factors underlying these methods of arriving at agreement and party satisfaction with the various results.

During the semester there are sessions with visitors who are active in the field, as well as simulated practical sessions. The popularity of the course can be seen in enrollment figures which increased from 45 the first year it was offered to 130 the second year.

Leon E. Irish:
Law of the Sea
This area of the law determines the powers of states and international organizations to regulate uses of the oceans and rights of all vessels and aircraft to extract oil and other minerals, the right to the fish and other living resources of the sea,

Leon E. Irish

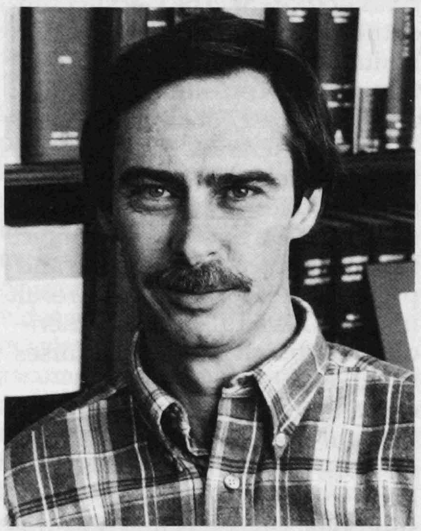
and rights to control pollution and conduct marine scientific research. The law of the sea sets the rules for determining maritime boundaries, territorial seas, economic zones, and continental shelves, and establishes the regime governing deep seabed mining.

The course examines the law of the sea, analyzes the new treaty regime and the negotiations that led to it, and considers numerous unresolved problems.

Irish's other new offering concerns a vastly different legal field, **Employee Benefits.** The subject matter in this course includes federal laws governing qualified and nonqualified pension, profit-sharing, stock bonus, and employee stock ownership plans, as well as consideration of stock option, restricted stock, unfunded deferred compensation, and other nonqualified deferred compensation mechanisms. The course emphasizes the theoretical and policy foundations of the law as well as technical rules and planning possibilities.

Jerold H. Israel

Jerold H. Israel:
White Collar Crime
Paul Borman, federal public defender in the Eastern District of Michigan, joins Israel in a seminar that examines procedural and substantive law problems relating to federal prosecution of white collar crime. The materials cover federal substantive criminal law (RICO, mailfraud, Hobbs Act), grand jury procedures, and the representation of grand jury witnesses, related administrative agency investigations (e.g.,IRS subpoena), and federal sentencing provisions relating particularly to white collar crimes. The materials consist largely of cases, statutes, and Justice Department memoranda.



James E. Krier

James E. Krier:
Legal Writing for a Lay Audience
The title of this seminar is self-explanatory. Students conduct research and interviews and write 10 short papers concerning technical legal matters for an audience of educated people who have no legal training. Most of the class time is devoted to workshops in which the students read each other's papers and react to them with constructive critical comments.

The focus of the course for the past two semesters has been the developmental history of downtown Ann Arbor. Students are expected to gather information from

secondary materials in libraries, from legal documents, and from interviews with faculty members, government officials, developers, planners, architects, people displaced by development, and others.

Working with Krier is Steve Cain, an investigative reporter with the *Ann Arbor News*, specializing in legal matters. Cain, who has 22 years of experience, is a former NEH fellow and has won a number of new writing awards.

Krier reports, "The students, to my surprise, have proved not at all bashful about tearing apart the work of their peers, and, just as surprisingly, take criticism remarkably well." The workshop environment, in particular, he feels, contributes to a solid learning program.

Margaret A. Leary:
Law Librarianship
Taught in the School of Library Science, this seminar on law library administration was designed to give those who already had a fundamental understanding of the sources and bibliography of the law more particular training in the administration of various types of law libraries: academic, firm, state, court, county, and corporate.

Margaret A. Leary

The seminar is part of an informal cooperative effort on the part of the Law Library and the School of Information and Library Studies to offer a curriculum plan for a specialization in law librarianship. Graduates of the program, including several who also graduated from the Law School, are now working in such libraries as those of the University of Chicago, Cornell, and the University of Pennsylvania, as well as the University of Michigan.

Jessica D. Litman:
Entertainment Law
The students who take this course represent (in simulated situations) people in the entertainment industry and negotiate contracts through every stage of exploitation of a hypothetical work.

Jessica D. Litman

Litman explains the progression of events, beginning with an idea for a novel: "First a contract is negotiated between an author and a publisher. Then the dramatic rights are sold, and a playwright and a composer are hired to dramatize it. Then we put it on Broadway as a musical, sell off the movie rights, hire a screen writer, star, and director, compose a sound track for the film, spin it off into a TV series, and so on."

Each of the 16 students in the class is required to negotiate and draft two contracts, with one hour devoted to live negotiating in front of the whole class. Litman hires actors from the acting school to play the parts of the writers, actors, publishers, and composers. In addition, visitors from the entertainment industry, such as a literary agent and a music industry lawyer come in to talk about what they do.

William I. Miller:
Blood Feuds
A description of this course is found on p.40, following Miller's article on exchange in medieval Iceland.

Sallyanne Payton:
Health Law
Medicine has traditionally been a self-governing profession; only within the past 15 years or so have legal disputes arising out of the practice of medicine come to the

Sallyanne Payton

courts in significant numbers. The legal issues that have emerged, however, raise the most interesting and difficult questions concerning the definitions of death and birth, the use of advanced technology to prolong life or to intervene in the life process, and the rights of patients and their families to participate in medical decision making.

Disputes over the proper allocation of decision making authority between physicians and patients have contributed to a general rethinking of public policy toward the delivery of health services. At the same time that public commitment to providing universal access to necessary health services is apparently undiminished, funding is steadily being withdrawn through limitations on reimbursement under Medicare and Medicaid.

The health law course is designed to introduce students to the interaction between medical decision making and legal standard setting. The course is taught jointly by Professor Payton and by Bettye Elkins of Dykema, Gossett, and is designed to be accessible to students from disciplines other than the law.

Beverley J. Pooley: Sports Law

This is another course that gives students an opportunity to synthesize skills gained from various specialized courses in law school and bring them to bear on some tough problems of professional concern and public interest.

As Pooley explains it, "a professional athlete's relationship with his employing club, and that club's relationship to the league of which it is a member are largely matters of contract law. Whether a high school student has a right to participate in athletics, and whether sports organizers can validly require players to submit to drug

Beverley J. Pooley

tests are questions for the constitutional lawyer. Similarly, other sports cases present problems of labor law or tort law."

It is the anti-trust principles which the courts have propounded over the past 15 years, however, which have had the greatest impact on sports, according to Pooley. Questions in this regard concern the NCAA's right to control the televising of football games, the validity of the various player "drafts," and the status of many other professional player restraints.

Other issues include the question of whether sports activities have reached such a quasi-religious dimension in our society that we easily tolerate in the sports arena practices which are almost unthinkable elsewhere (e.g., player restraints, hockey violence, the illiterate student-athlete).

Theodore J. St. Antoine: Individual Employee Relations

With less than 20 percent of the private sector nonagricultural work force now unionized, labor law teachers across the country recognize that it is no longer sufficient to teach students a basic labor relations law course dealing primarily with the Taft-Hartley Act. This is all the more true because the last two decades have seen both federal and state law increasingly intervene to regulate the employer-employee relationship directly, instead of leaving it to voluntary arrangements established through collective bargaining.

The new course provides an overview of some of the most important legislation and judicially developed doctrines applicable to the relations between employers and their employees, whether or not a labor organization is

Theodore J. St. Antoine

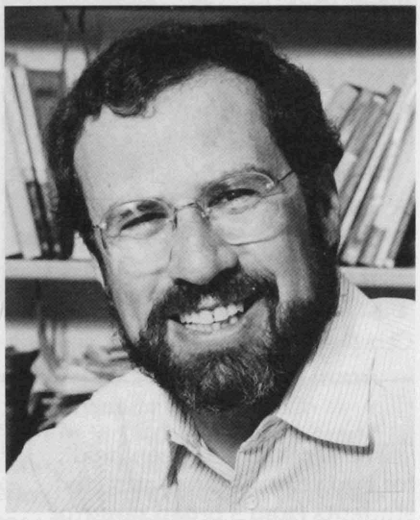
involved. A pervasive question concerns the appropriate spheres of private and public governance of the work place. The main theme concerns federal and state protection of the health, safety, and economic well-being of the worker.

Frederick F. Schauer: Legal Realism and the Critical Legal Studies Movement

"Law students, like most lawyers," Schauer claims, "become quickly adept at identifying what is *wrong* with a case, a judge, a law, or a theory. Part of the purpose of this course is to try to get students to

think about what is *right* about a perspective that might not at first engender their sympathy."

This course attempts to get students to view with at least some initial sympathy the kinds of claims



Frederick F. Schauer

that have been made against more formal approaches to the nature of law and the nature of adjudication. It also attempts to introduce students to literature that views law in more explicitly political terms.

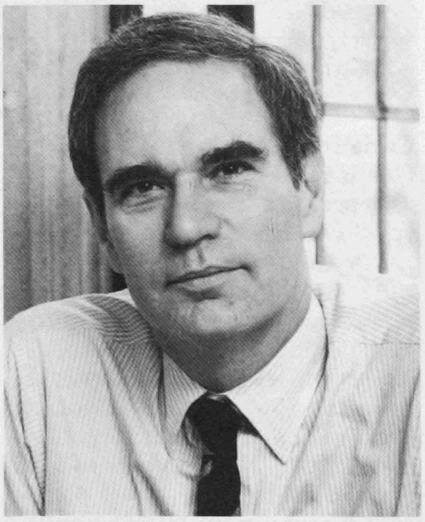
The students are encouraged to view the challenges at first sympathetically, so that they can see what is best and most important about these perspectives, and then, and only then, to engage in a process of seeing the weaknesses in these outlooks.

"By emphasizing the constructive rather than the destructive aspect of creative and analytical thinking," Schauer explains, "I hope to engage in my own somewhat idiosyncratic challenge to the conventional way in which law is taught, thought about, and written about."

Joseph Vining:
Law and Theology

This research seminar provides an opportunity for students to explore the methodological and conceptual connections between the disciplines of law and theology. The seminar begins by focusing heavily on methodological and institutional similarities and differences. It then explores shared problems of authority, authenticity, ontology, and "hermeneutics," or the problems of reading and interpreting texts.

The offering is non-sectarian, and attempts to embrace Judaic, Islamic, and Christian materials. Students' inquiries have ranged from a comparison of Mormon and secular judicial decision-making structures to the relevance to legal thinking of conceptual developments in artificial intelligence.

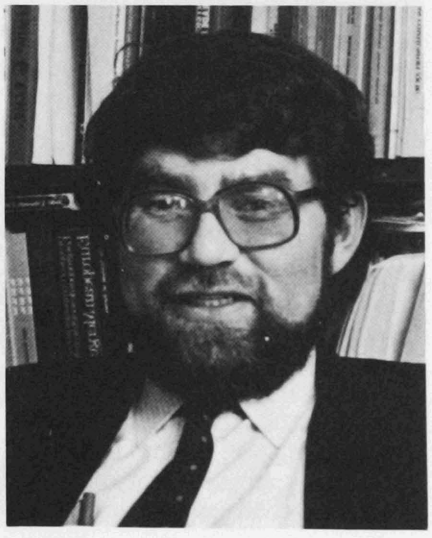


Joseph Vining

Vining's other new offering, **Corporate Criminality,** is structured around three main themes. One is the concept of condemnation of supra-individual entities. Relevant materials on this point are drawn from areas as apparently diverse as the Restatement of Agency and the Nuremberg Trials. A second theme is the control of bureaucracies. The dilemma of the individual within a bureaucracy, to whom the criminal law may be directly addressed, and the special problem of remedy are given particular attention. Finally, the course addresses the central question of the compatibility of quantified, objective, cost-benefit maximization, and the form of reasoning made necessary by the criminal law if a decision maker is to avoid criminal liability.

Joseph H. H. Weiler:
Legal Aspects of the
Arab-Israeli Conflict

The Arab-Israeli conflict is a phenomenon which has had, and continues to have, a profound effect on the international order. American involvement dates back to World War I: It was President Wilson who inspired the mandate system which marks one of the first milestones of the conflict. As Weiler points out, "it is sobering to recall that the only known instance of American forces being put on a



Joseph H. H. Weiler

world-wide nuclear alert occurred in the wake of the October 1973 (Yom Kippur) War."

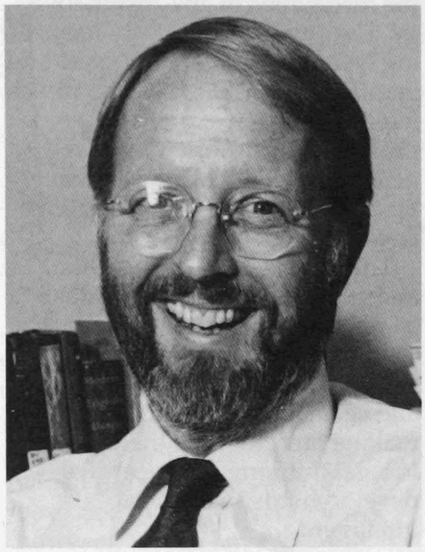
In legal terms, the Arab-Israeli conflict offers possibly the best "test case" of the international legal regime governing the permissibility of the use of force and the fragile institutional mechanisms of that regime. There are few, if any, legal issues in this area which have not been raised in the context of the conflict.

The seminar is structured on historical lines. It examines the legal dimensions of the major junctures of the conflict, from the Balfour Declaration to the war in Lebanon and the continuous cycles of aggression, terror, and counter-aggression and terror.

James Boyd White:
Rhetoric, Law and Culture

This course examines a series of legal and nonlegal texts, drawn from a variety of genres and contexts, asking of each two general questions. One is how the text functions as a cultural text, that is, how it reconstructs the systems of meaning that define its culture. The other is how it functions as a rhetorical text, that is, how it defines its various characters, how it gives meaning to its central terms of value and motive, what sorts of reasoning it exemplifies and holds out as persuasive, and what kind of community it establishes with its readers.

The texts read vary from year to year, but normally include both classic Greek texts (in translation) and English literary texts as well as legal material drawn from America and elsewhere. The texts have included such works as Sophocles' play *Philoctetes;* Plato's *Crito; Huckleberry Finn; Richard II; The Federalist Papers;* the Lincoln-Douglas Debates; and a series of individual opinions, varying from *Dred Scott* to *Bakke*. The ultimate goal is to work out a more adequate way of criticizing and composing legal texts.



James Boyd White

Christina B. Whitman:
Gender and Justice

This seminar explores the perspectives that feminism can bring to law and law to feminism. The class reads texts from law and from other disciplines, such as anthropology, philosophy, and sociology. The texts address topics of concern to lawyers and to women: abortion, affirmative action, racism, lesbian issues, power in families and over property, equality, sexual harassment, pornography.

The questions pursued through the term are larger than any single subject: Is there a uniquely feminine approach to moral issues, and, if so, is that approach consistent with the methods of the law?

Christina B. Whitman

The seminar has been held for two years and has attracted students from a broad range of interests, perspectives, and experiences—men as well as women. The students are asked to reflect upon how their legal education, as well as their experiences outside of law school, has shaped their thinking.

Professor Whitman remarks, "I have learned an enormous amount from these students. The first year that it was offered we simply kept on meeting through another seminar because we found that we had so much to explore."

Civil Rights, Whitman's other new course, concerns problems that arise in litigation over constitutional claims. The class addresses technical problems of litigating, as well as larger themes, such as: What does it mean to say that a governmental entity is responsible for an injury? How are constitutional injuries similar to or different from injuries redressed by the common law? Why is there hesitation about declaring and enforcing constitutional rights? ⚄

Comings & goings

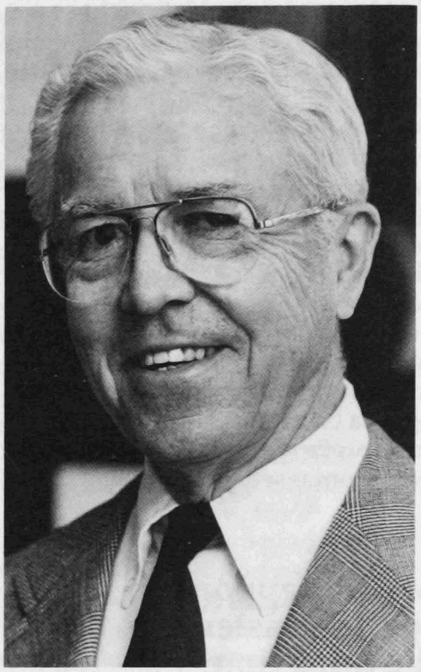
Proffitt's retirement: Michigan's loss

With deep feelings of nostalgia, Roy Proffitt wrote his final "Reading Between the Sheets" piece for the *LQN* summer issue, and turned the helm of the school's development and alumni activities over to Jonathan Lowe. After 30 years of dedicated service to the Law School, Proffitt has joined the ranks of other distinguished professors emeriti.

Hailing from Hastings, Nebraska, Proffitt earned a B.S. in business administration from the University of Nebraska-Lincoln in 1940. Soon after graduation, he enlisted in the U.S. Naval Reserve and over the years rose in rank from apprentice seaman to commander. After World War II, he enrolled in the Law School and received his J.D. in 1948.

Following a brief period in practice, Proffitt returned to academic life, first for a short time as a research assistant in international law at the University of Nebraska, and then as a member of the law faculty at the University of Missouri. In 1956, after a year as a Cook Fellow at Michigan, he joined the faculty as associate professor of law and the school's first assistant dean, later becoming professor and associate dean. With no "job description" for assistant dean, Proffitt participated in nearly all of the school's activities. He has described his responsibilities in those early years as similar to those of the executive officer of a navy vessel: "I kept things running, and if the dean suggested something be done, I was expected to see that it was."

This arrangement worked, and in his 14 years as assistant and associate dean he gained the respect and affection of thousands of students. Alumni across the United States and throughout the world still recall his sound advice, his genuine interest, and his willingness to assist them.



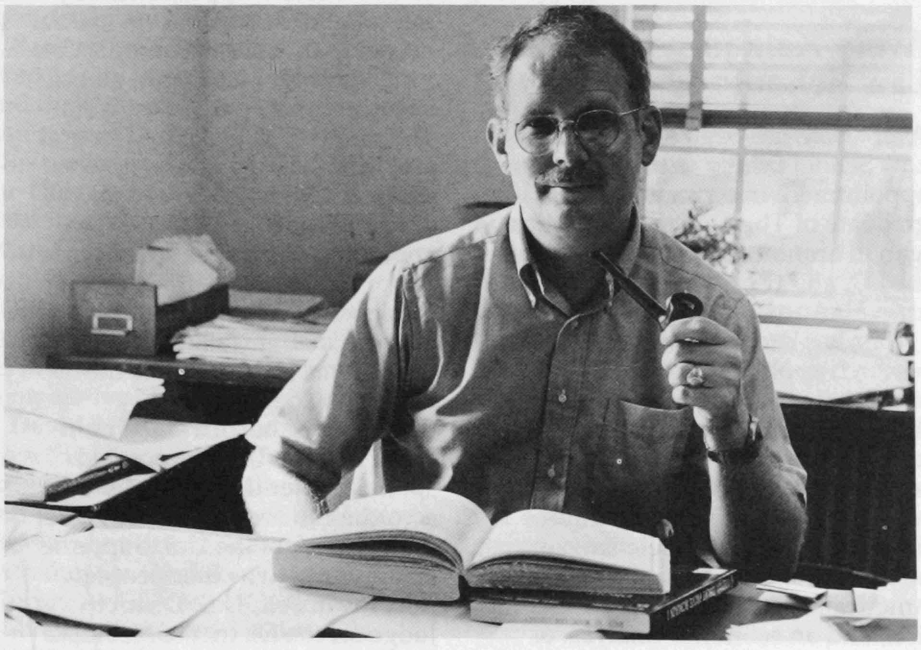
Roy Proffitt

Professor Proffitt's academic interests and writings were originally in criminal law and criminal procedure. During the last 15 years he has taught the admiralty law subjects. ◘

Roman law specialist joins faculty

Bruce W. Frier, currently a professor in the Department of Classical Studies at the U-M, has received a concurrent appointment as professor of law. Frier has for a number of years offered a seminar in Roman law at the Law School.

Frier is the author of *Landlords and Tenants in Imperial Rome* (1980), which won the American Philological Association's 1983 Good-



Bruce W. Frier

win Award of Merit, and *The Rise of the Roman Jurists: Studies in Cicero's Pro Caecina* (1985), both published by Princeton University Press.

A graduate of Trinity College who earned his Ph.D. in classics at Princeton, Frier came to Michigan as an assistant professor in 1969 and rose to associate professor in 1975 and to professor in 1983. During his years at Michigan, he has earned an international reputation as a scholar of the first rank in Roman law.

Most law students who take Roman law, Frier has found, are interested in obtaining a vantage point from which to view their own legal system—one that is both comparative and historical. "From this vantage point," he feels, "students can begin to develop a sense both of how relative law is to time and place, and of how it might be organized in a different fashion." Roman law is particularly relevant because it is the first of the three great Western systems of law, and it provides much of the intellectual basis for modern civil law as well. ⊠

Avery Katz joins Law School

Avery Katz has been added to the Law School faculty with a joint appointment in economics. A graduate of The University of Michigan in economics, he earned both the J.D. and the Ph.D. in economics at Harvard.

Katz has been involved in research applying economic analysis to civil procedure. His doctoral dissertation, *Essays on the Economics of Litigation*, consists of three separate essays on related topics: economic determinants of litigation expenditure, the relative merits of the English and the American rules for funding litigation, and an economic analysis of frivolous law suits. ⊠

Dean Sandalow to step down

Just as the present issue of *LQN* was going to press, Dean Terrance Sandalow announced that he had decided to step down from his position as head of the Law School next summer, one year earlier than originally planned. "After eight years as dean—nine by the time I relinquish the position next summer," Sandalow said, "I have decided that it is time for me to return to teaching and scholarship, the activities that drew me into an academic career. He added, "My years as dean have been immensely challenging, at times—as during the budget crisis several years ago—a bit more so than I would have preferred. But they have also been immensely rewarding." ⊠

McCree appointed special master for the third time

With the recent appointment by the U.S. Supreme Court as special master in the case of *Kansas v. Colorado*, Wade H. McCree, Jr. joins a small, elite company of lawyers. The former U.S. Solicitor General and federal judge who is now the Lewis M. Simes Professor of Law at Michigan was recently appointed to serve as special master for the third time. The role of the special master is to act as a trial judge in matters falling within the original jurisdiction of the Supreme Court.

McCree is one of a small number of persons to be appointed special master three or more times, according to Francis Lorson, chief deputy clerk of the U.S. Supreme Court. Only two other people, Robert van Pelt, U.S. District Judge for the District of Nebraska at Lincoln, and Albert J. Maris, U.S. Judge for the Court of Appeals, Third Circuit, have received the appointment more than three times. At the time of their appointment, both were U.S. judges who had taken senior status, as was Walter J. Hoffman, U.S. District Judge for the District of Virginia at Norfolk, who was appointed three times.

Lorson notes that McCree's three-time appointment, concurrent with his service as law professor, is unique in the history of the U.S. Supreme Court.

Professor McCree is still presiding over an earlier case, *New Jersey v. Nevada*, which concerns the issue of radioactive waste disposal. That case was preceded by the famous Howard Hughes case centering on the question of Hughes's domicile.

His latest appointment involves a suit between Colorado and Kansas concerning the rights of the two states to the waters of the Arkansas River, which originates in Colorado. The first hearing in the case was held this fall at the Law School. The trial is expected to commence within the next 18 months upon completion of pretrial discovery proceedings currently underway. ⊠

Visiting faculty

A number of outstanding visiting faculty are teaching at the Law School this year.

One visitor for the year has been here since May. **Richard B. Ginsberg,** visiting from the State Appellate Defender's Office, is teaching criminal appellate practice this fall. A graduate of the University of Pennsylvania in history and of the U-M Law School, Ginsberg is a former VISTA volunteer and staff attorney with the Washtenaw County Legal Aid Society.

B R I E F S

Four visitors are joining us for both the fall and winter semesters.

Peter Behrens is visiting from the University of Hamburg, where he has taught since 1984. From 1971 to 1984 he was a research associate at the Max Planck Institut. Professor Behrens earned an M.C.J. degree from N.Y.U. Law School after completing his undergraduate and law studies at the Universities of Hamburg, Lausanne, Freiburg, and Berlin. This fall he is teaching international law and international trade.

Richard Marcus, a visitor from the University of Illinois College of Law, is teaching civil procedure this fall. A graduate of Pomona College and Boalt Hall Law School (the University of California - Berkeley), Marcus worked with the litigation department of the San Francisco firm now known as Dinkelspiel, Donovan & Reder for five years. His spouse, Andrea Saltzman, is also visiting at Michigan this year.

Andrea Saltzman, who is teaching in the clinic, has been at the University of Illinois since 1984. She has had extensive and varied experience in the area of public legal assistance. Saltzman holds a B.A. in sociology from Bryn Mawr College, an M.A. in sociology from the University of California at Berkeley, and a J.D. from the Boalt Hall School of Law at Berkeley. She also studied sociology and criminology at the London School of Economics.

Joel Seligman, who is teaching courses on enterprise organization and securities regulation, has been on the faculty of the George Washington University National Law Center since 1983. He previously taught at Northeastern University Law School and worked as an attorney with the Corporate Accountability Research Group in Washington, D.C. A graduate of Harvard Law School and UCLA, Seligman has also served as a consultant to the Federal Trade Commission and the Department of Transportation.

Eight visitors are here for the fall semester only.

Robert C. Casad is a professor at the University of Kansas, where he did his undergraduate work, majoring in economics. An alumnus of Michigan Law School (J.D. '57), Casad received the S.J.D. at Harvard. This fall he is teaching a section of civil procedure, an area in which he has written extensively, and a seminar on federal courts.

Patrick O. Gudridge, who is teaching constitutional law and enterprise organization, is visiting from the University of Miami School of Law, where he has taught since 1977. Professor Gudridge earned both the A.B. and the J.D. at Harvard University.

Robert A. Hillman, from Cornell University, is a graduate of the University of Rochester and Cornell Law School. A specialist in contract and commercial law, he taught at the University of Iowa Law School for seven years. This fall he is teaching contracts and commercial transactions.

Basil S. Markesinis visited from Trinity College, Cambridge, and the University of London, where he is Denning Professor of Comparative Law. A graduate of the University of Athens (LL.B., Doctor Iuris) and Cambridge (M.A., Ph.D.), Professor Markesinis has published extensively in English, Greek, German, and French. This semester he taught an intensive six-week course in comparative contracts and torts.

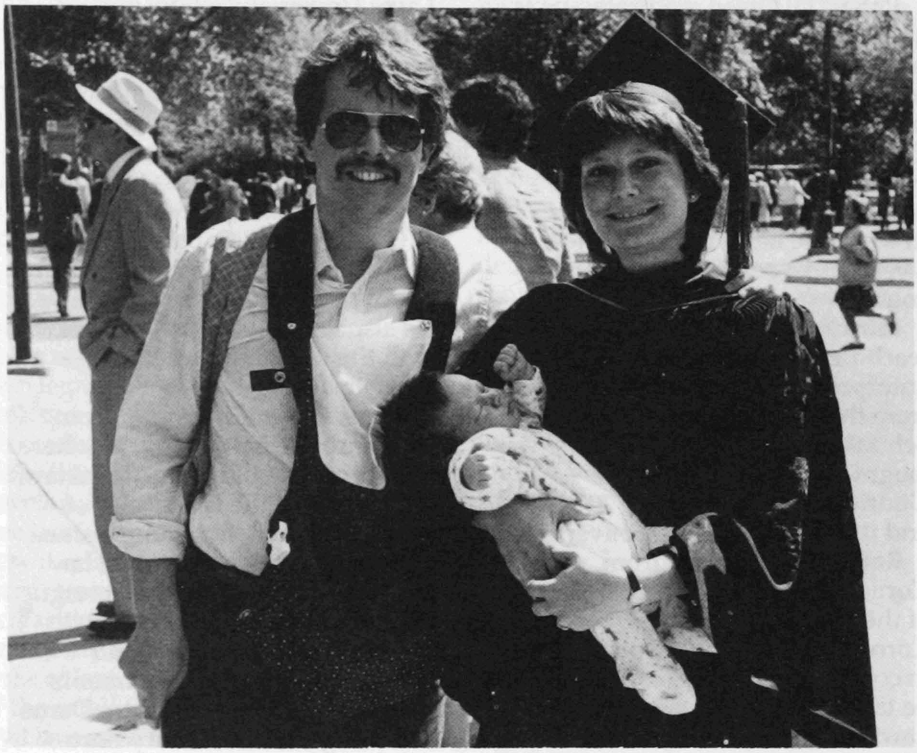
David M. Rabban is visiting from the University of Texas. A graduate of Wesleyan University and Stanford Law School, Rabban previously worked as an associate with the New York law firm of Murray A. Gordon, P.C., and as associate counsel and counsel for the American Association of University Professors in Washington, D.C. Professor Rabban is teaching a course on labor law and a seminar on American legal history.

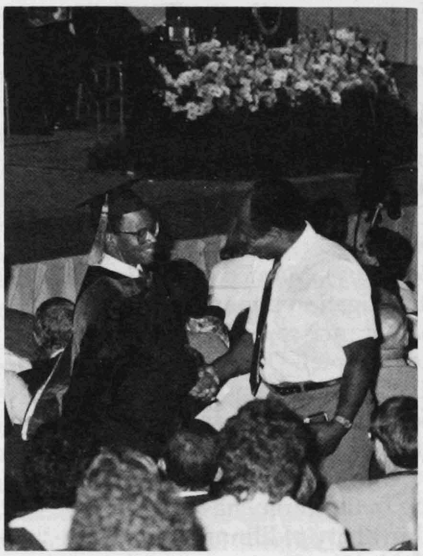
Richard L. Schmalbeck, of the Duke University School of Law, is teaching a section on tax and a seminar on federal tax policy this fall. Professor Schmalbeck received both the A.B. in economics and the J.D. from the University of Chicago. He was formerly an associate with the Washington, D.C. law firm of Caplin & Drysdale and with the Columbus firm of Vorys, Sater, Seymour & Pease. He also worked for a short time with the U.S. Office of Management and Budget.

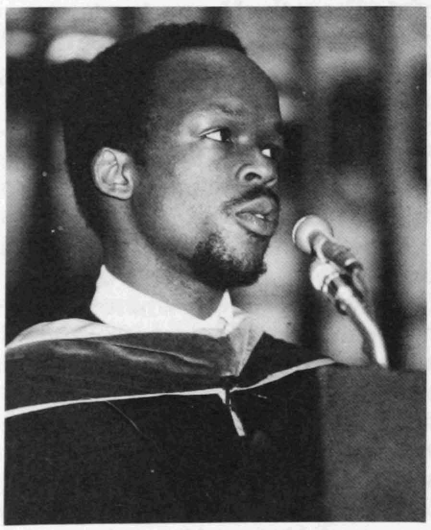
Bruno Simma is visiting from the Faculty of Law, Munich, where he is professor of international law. A graduate of the University of Innsbruck, Professor Simma since 1981 has taught international law to junior diplomats in the Foreign Ministry of the Federal Republic of Germany. His background includes teaching appointments with the University of Notre Dame and Creighton University European programs, the directorship of studies at the Hague Academy of International Law, and membership in the Court of Arbitration in Sports (CAS) of the International Olympic Committee. Professor Simma is teaching international protection of human rights.

Robert J. White is visiting from the Los Angeles firm of O'Melveny & Myers, where he has been a partner since 1980 and an associate since 1972. While studying for his B.S. in accountancy at the University of Illinois and his J.D. at the U-M, White served in the National Guard and the Army Reserves. A specialist in commercial law and bankruptcy, White is teaching bankruptcy reorganization this fall. ⊠

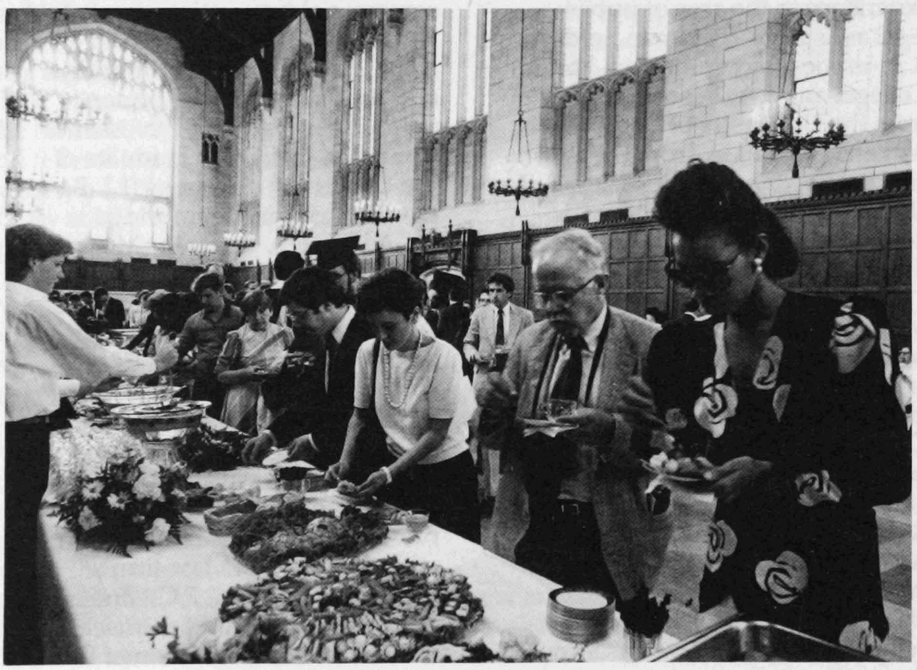
Senior Day







"We made it!" declared Student Senate President Russell F. Smith, who spoke on the responsibility that comes with graduating from one of the top law schools in the country.



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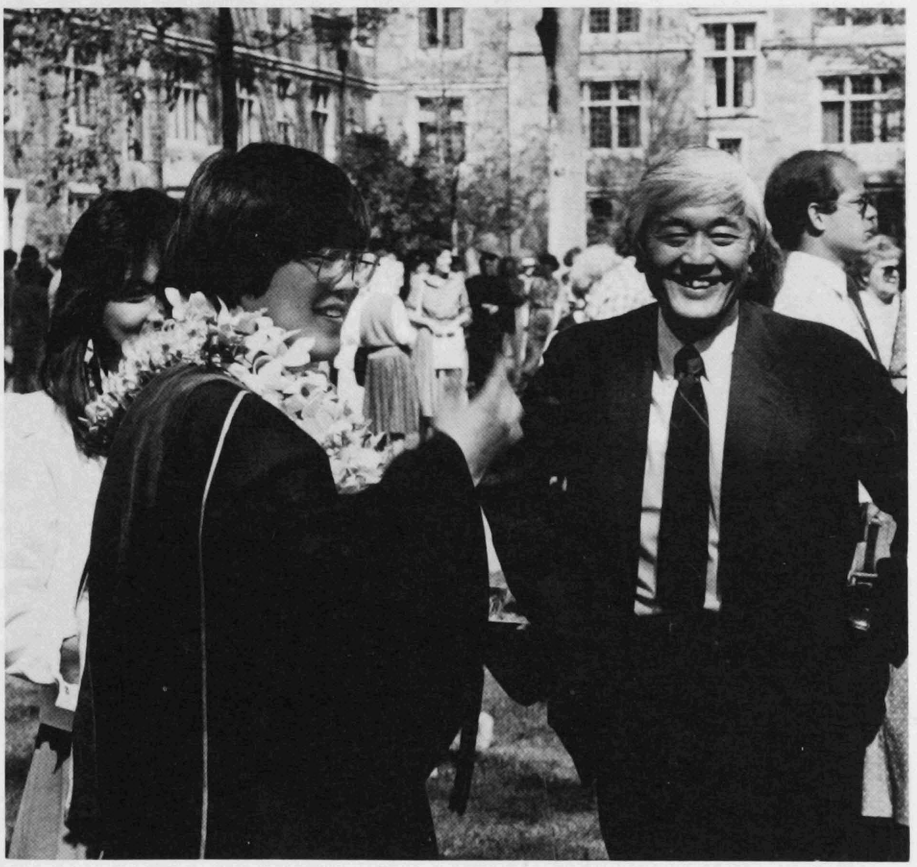
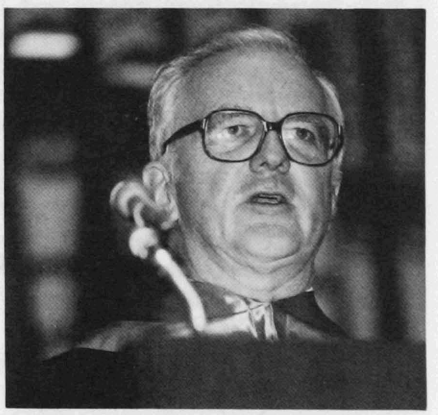




The Honorable James L. Oakes, U.S. Court of Appeals for the Second Circuit, presented the Senior Day address.

Back to the future

Alumni survey highlights areas of satisfaction, dissatisfaction for '86 grads

by David L. Chambers

Editor's note : The following article is an abridged version of a speech given at the Honors Convocation, May 9, 1986.

I want to share with you some of the results of an ongoing study of our own graduates five and 15 years after graduation. In our most recent survey, we asked the classes of 1976 to 1979 and the classes of 1966 through 1969 questions about their law school experience, their employment history, and their current work settings. We also asked the graduates about their satisfaction with their careers and several aspects of their careers.

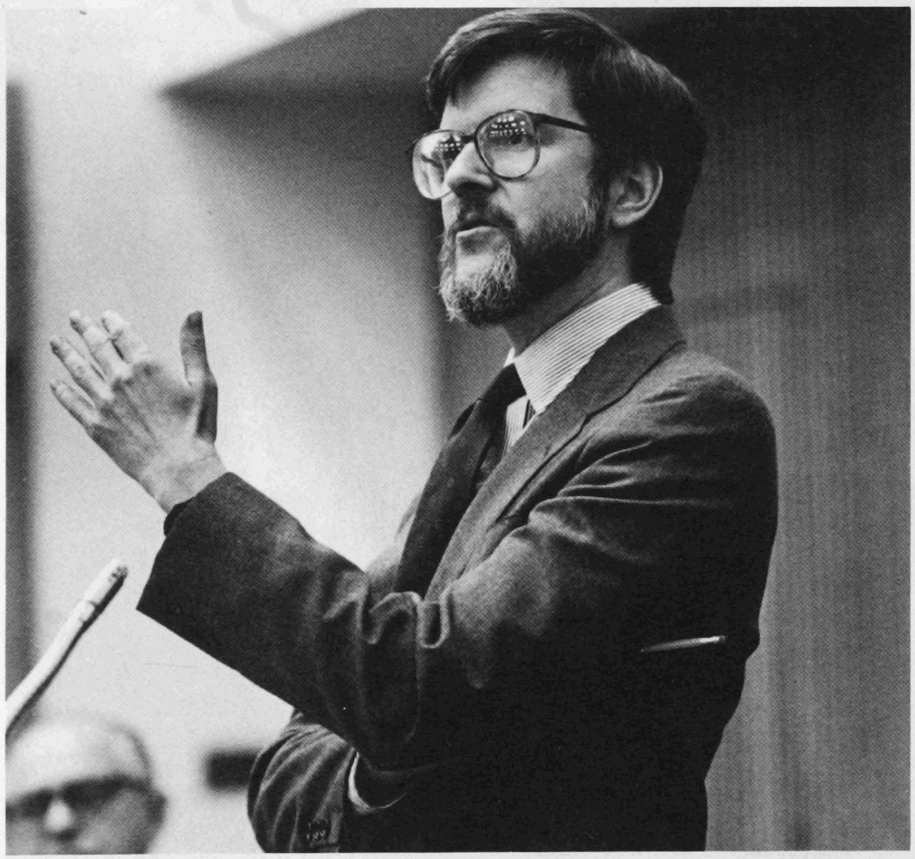
In terms of their overall career satisfaction, about half of our graduates are very satisfied at year five and about two-thirds are very satisfied by year 15. People in private practice tended to be especially satisfied with their incomes—and they ought to be because their incomes are, in general, very high. They are also satisfied with the intellectual challenge of their work, with their prestige in the community, and with their ability to solve problems and achieve results for clients. They take pride in the work they do and find it challenging.

For all this, however, large numbers of persons express dissatisfaction with two aspects of their lives. The dissatisfaction is especially acute for those in private practice.

One area in which people reported dissatisfaction concerned their ability to achieve social change. Five years out of law school, fewer than 10 percent of those alumni working in private practice express dissatisfaction with income, with the intellectual challenge of their work or with their prestige in the community. Forty-five percent, however, express dissatisfaction with their ability to achieve social change.

A high proportion of those in private practice who are dissatisfied with their ability to achieve social change came to law school with plans to work in government or legal services or public interest work. They now find themselves satisfied in many ways with private practice, but they experience this area of discontent, a discontent not expressed to anywhere near the same degree by those who are in fact working in government or legal services. . . . It thus appears that if you begin law school with a hope of using law to achieve social change, but end up entering private practice, you will not forget, five or 15 years later, that you had other dreams.

The second area of dissatisfaction for those in private practice concerns the interaction of their professional and their private lives. Five years out of law school, most people in private practice are not pleased with the balance of their career and their family lives. They are either dissatisfied with it or lukewarm about it. They are



David L. Chambers

considerably less satisfied with the balance of career and family than those who are practicing in non-firm settings. And the larger the firm in which a private practitioner works, the more likely he or she is to be dissatisfied with the balance.

In one sense, nothing is surprising about this finding. Everyone knows how demanding private practice is. What was a little surprising to me is that those who worked in private practice did not report themselves working significantly longer hours than those working in other settings. I suspect that what is hard on many people in private practice is not that their hours are longer, but that their hours are less predictable and that they feel in less control of their time than those in other settings.

The problems of balancing family and professional lives are especially acute for women. I mentioned earlier that fewer women than men work in private practice. When we did a special survey of the men and women in the classes of 1976 to 1979, we asked them what they thought explained our finding that fewer women than men were in private practice. The most common answer given by women was that women cared more than men about their personal lives and worked in other settings to protect those personal lives.

I do not want to make too much of the tension between personal and professional lives. The divorce rate among these young lawyers is no higher than it is in the general population. By 15 years after graduation, somewhat fewer of the graduates are expressing dissatisfaction with the balance of their family and professional lives than they were at five years. On the other hand, for both men and women, handling the competing demands of family and work is painful. Five years after law school most of the men and women in these classes are married, but 62 percent of all women and 57 percent of all men do not have children. For women but also for men in dual career families, the question of when to have children, or even whether to have children, is pressing.

My hope is that your generation of lawyers will insist on finding ways to have a satisfying career and satisfying family relationships. The firms use their bargaining power to demand large fees from clients. The firms need you. My hope is that, over time, you and your colleagues will use your own power to bargain for lives worth living. ◘

Law School Professor David L. Chambers directs the annual alumni survey.

Spring homecoming

Alumni reminisce at LARLF

The seventh annual Law Alumni Reunion and Law Forum (LARLF) last spring brought a record number of alumni back to the Law School to hear expert testimony on a current legal issue, to renew old friendships, and keep abreast of changes at the U-M.

It was a time to recall the feel of being a student again, to settle into a seat in Room 100 (avoiding the front row, of course) for the annual law forum. This year's panel discussion, "Hostile Takeover Bids: the Urge to Resist," was conducted by alumnus Simon M. Lorne (J.D.'70), Michael Bradley, a professor at the U-M business school and adjunct professor at the Law School, and Professor Michael Rosenzweig of the Law School.

During the course of the weekend, *LQN* talked to alumni about what it's like to come back to their alma mater. What were their most vivid memories as law students? "Playing frisbee and stickball on the law quad," Howard Frankenberger, '63, replied. "Edson R. Sunderland, in pleadings class, saying, 'I *think* that might be true,' (you learned never to be certain of anything)," answered G. E. Rogers, '36.

What changes are most apparent in the Law School? "The physical plant, particularly the library," was the most common reply. Lewis D. White, '31, even recalled the era when "the entire Law School, including the library, was encompassed in Haven Hall (since burned down)." White also added, "As to the students, it is my impression that today they may be a little more dedicated than in my time, but I cannot be sure of this. In my day, however, we certainly dressed better."

The question of what was the most enjoyable aspect of the weekend evoked replies similar to that of William A. Groening, '36: "Just having the opportunity to meet and talk with classmates, seeing some who come back every five years and some who had not come back for 50 years."

What was the most surprising part of the weekend? Most alumni replied, "How good my classmates and professors look—pretty much the way I remember them." Other notable answers: George J. Slykhouse, '51, "How *few* of my classmates are grandparents," and Frank R. Barnako, '36, "The fact that I was there." ◘

In the news for 40 years

G. Mennen Williams, '36, looks back at a career of challenges, triumphs, and controversies

G. Mennen Williams will have a lot to look back on when he retires this December. For nearly four decades the former governor, ambassador, and current chief justice of the Michigan Supreme Court, better known as "Soapy," has been in the headlines.

In Michigan he is known for revitalizing the state Democratic party, serving an unprecedented six terms as governor, and building the Mackinac Bridge. He is the "boy governor" who first came to power at the age of 37 by staging an upset victory in 1948.

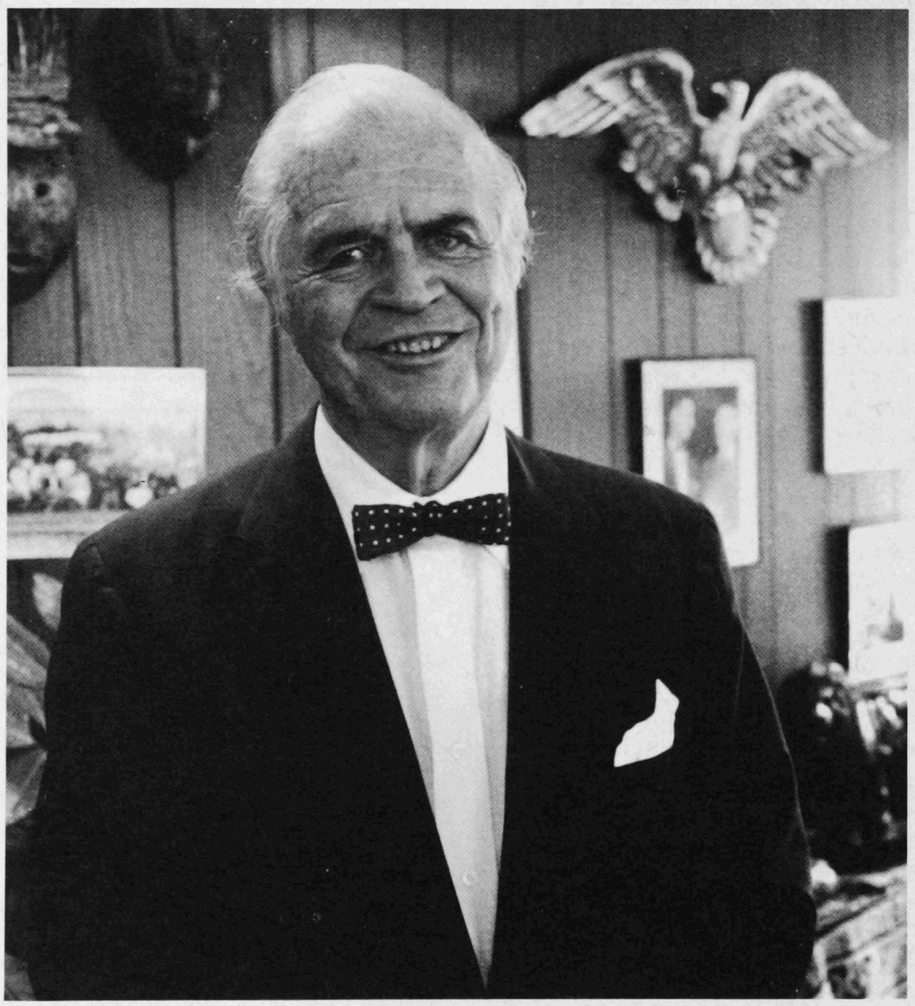
In Africa, he is remembered as the controversial diplomat who angered many white Africans when, in Kenya in 1961, he declared that he favored "Africa for the Africans."

In the Philippines, he is known as the ambassador who visited remote villages, adopted native dress, participated in native dances, and once rode a water buffalo.

Born into a prominent Detroit family, Williams earned the nickname "Soapy" through his mother's connection to the Mennen toiletries company. (His maternal grandfather, Gerhardt Mennen, went from a tiny drugstore in Newark, NJ, to found the Mennen Company.) Williams attended a Connecticut boarding school and Princeton University before earning a law degree at the U-M.

After a four-year stint in the navy, he was appointed to the Michigan Liquor Control Commission in 1947. One year later, Williams forged a new and vital alliance within the then-moribund state Democratic party. Brought up as a Republican, Williams cites law school as a turning point in his political affiliation. "I had friends who were Democrats and I had tremendous admiration for Franklin Roosevelt," he told *LQN* in a phone interview. "I decided on a career in public service in prep school, and at Princeton I decided that the best way to do it was to be governor of Michigan. I tried to be a liberal Republican, but I just couldn't make that work."

Though Williams had considerable support from both labor and from dissident Republicans unhappy with incumbent Governor Sigler, he was short of funds, not yet having inherited his fortune. To get the $16,000 he needed for his campaign, he mortaged his home and traveled the state with his wife, Nancy, in a beat up old DeSoto, talking to voters, dressed in rumpled clothes and



The Hon. G. Mennen Williams

the bow ties that eventually became his political trademark.

As the state's most vital and visible figure for many years, he was re-elected for five two-year terms, the most in Michigan's history.

Despite the prominence of his family background and his eastern prep school grooming, Williams developed a folksy manner in his years of campaigning. His ability to call square dances was legendary in rural parts of the state. Later as a diplomat, he found that teaching others the dance and learning theirs was a "way of showing respect" for their cultures.

As governor, he attracted national attention because of his continued popularity with voters and his liberal programs. He went to the 1952 and 1956 Democratic National Conventions as the state's favorite son candidate. Though he planned a nationwide drive for the 1960 Democratic presidential nomination, he abandoned his plans in the light of Kennedy's insurmountable lead.

Under the Kennedy administration, Williams was given the African post at the State Department. He served in this position until 1966, when he returned to Michigan to run for the U.S. Senate. His unsuccessful bid for this office was followed by a year as ambassador to the Philippines.

The legends surrounding Soapy Williams are legion. They depict him as an uncompromising politician, a risk-taking liberal, and an exuberant diplomat. In 1948, when he won the three-man race for the Democratic gubernatorial nomination, he did so by bucking the party leadership. According to one story, Teamsters' President Jimmy Hoffa, who had backed one of his primary opponents, threatened to have Williams's campaign manager, Larry Farrell, "rubbed out" if Williams refused to back Hoffa's choice for attorney general. Williams refused, and Farrell went on to serve a lengthy tenure in the Williams administration.

On another occasion, Williams fought off a knife-wielding inmate at the Marquette State Prison, where he had gone to check on complaints about food. As Williams held the assailant's wrist in the air, his bodyguard shot and killed another attacking inmate, thus foiling their attempt to take the governor hostage.

One night in the early 1960s, still another legend goes, a startled Secretary of State Dean Rusk nearly choked on a cookie when he entered the dining room atop the State Department and saw robed African diplomats swirling around Williams as he called square dances. Rusk retreated hastily but later called Williams "one of the best appointments that President Kennedy ever made."

Williams was elected to the Michigan Supreme Court in 1970 and re-elected in 1978. He has been chief justice for nearly four years. In recent years he has devoted much of his energy toward establishing a uniform state court system. ◘

Attorney Roger Chard, J.D. '72

The ability to compensate, the persistence to excel

by Scott Shugar

The afternoon light pours into Roger Chard's downtown Ann Arbor law office and bounces off a brass baseball paperweight on his desk up into the muted blues and greys of his sportcoat. Being blind, Chard doesn't see any of this, but the Berlioz lightly wafting from his radio indicates it's just as beautiful a day for him.

"I haven't overcome my handicap," the 37-year-old Chard remarks, breaking into a smile. "If I'd done that I'd be able to *see*. What I've done is learn to *compensate*." Born with a form of cancer that destroys the infant retina, Chard has steadfastly gained not just mere independence but also sheer excellence in a number of different directions.

He's one of the city's outstanding trial attorneys, and he has an active classical singing career. He also serves as an energetic advocate for the disabled, frequently counseling people who are going blind or who have blind family members.

Chard and his wife, Lynn, also an attorney, have two young sons. Whatever time remains in Chard's overstuffed days is given to sports. He has a near-consuming passion for baseball. "That's my favorite sport," he remarks. "One of my big frustrations about growing up blind is not being able to hit a baseball that's pitched to me."

He also likes to bicycle. He owns a tandem which he and a friend ride out into the country early on summer Sunday mornings. And one of the first things Chard did when he and his family moved into their two-story 1920s farmhouse in Ann Arbor was to put up his basketball hoop. He shoots baskets by hanging a radio behind the backboard and aiming at the music.

Chard attended the Michigan School for the Blind in Lansing, where his father, also blind, was

for many years the director of music. After that, he was a political science and sociology major at Michigan State and then came to the U-M for his law degree. Chard was the first blind student to attend the Law School in a number of years, but he negotiated its intricacies with characteristic persistence.

"Initially, it was assumed that I would just type my exams," he recalls. Although Chard has touch-typed since elementary school, he "felt uncomfortable doing that because if I was trying to think about an answer, I would frequently forget what I had just typed. Having a reader wasn't the answer either, because the exams tended to be so long that you needed to go back and forth constantly to study the question. Finally what happened was that exams were sent ahead of time to a certified Braille transcriber who would prepare them for me to take. I would write out my answers on a Braille-writer [a special six-keyed machine that punches out the raised dots] and then speak them onto a dictating machine. The Law School secretaries would type them up for me."

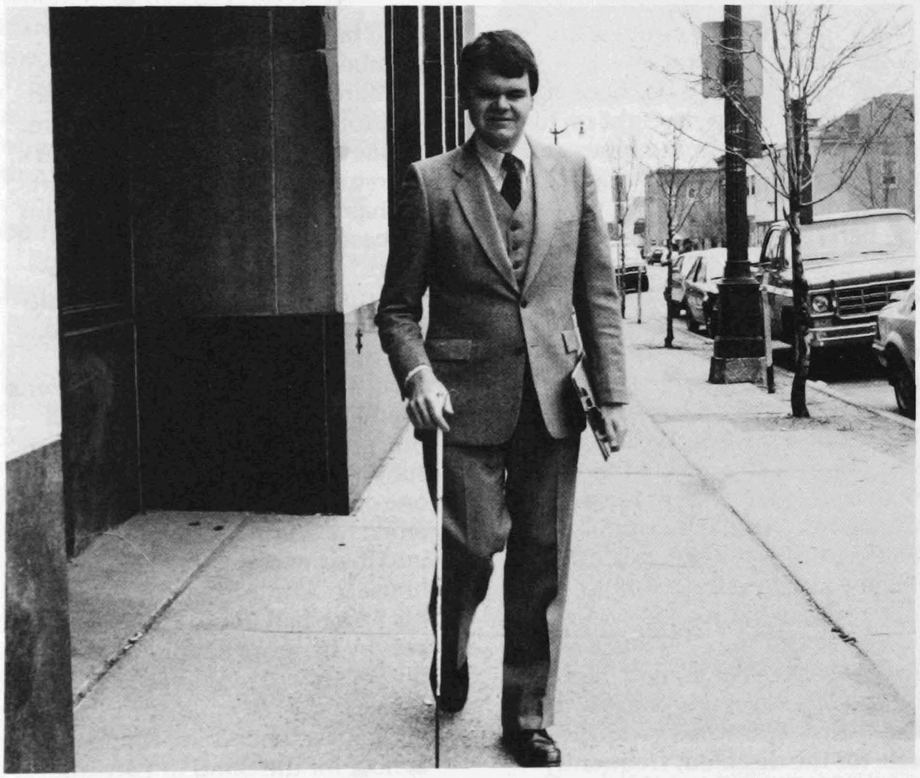
In class, Chard took notes by punching Braille characters one at a time onto paper with a slate and stylus. This method of transcription can be very fast; Chard still uses it in courtrooms. It is most notable for requiring one to write *backwards*.

Chard's progress through law school was additionally complicated when he got a rare glandular cancer. Despite missing most of a year of course work due to radical neck surgery, Chard still managed to get his degree only one semester late. Right after graduation, he started work at Legal Services of Southeastern Michigan, a publicly funded agency that provides legal services to people who can't afford them. On that job it wasn't unheard of for him to carry 120 cases at once. Originally a VISTA volunteer there, he stayed 10 years, spending the last five as the four-county program's director.

Since then Chard has set up a private practice, primarily oriented towards real estate and landlord-tenant work. He plows through the paperwork with the aid of clerk-readers and tape recorders. His best technical aid is the high-speed, variable pitch recorder he keeps at home. With it, he can listen to information speeded up to two-and-a-half times the rate of normal speech. He uses the machine heavily to listen to novels, as well as for legal work.

"My favorite parts of a trial are cross-examination and the closing statements," Chard reveals. "Oral advocacy is one of my strengths." There are few courtroom situations where he feels any particular disadvantage. "It's incumbent on me to anticipate certain situations that may pose difficulty. If I know that we're going to deal with some exhibits that I have yet to see, then I'll have someone with me who can help me with printed material, pictures, or other evidence. And I'm not entirely shut out from body language. Surprisingly, some of those things can be picked up through hearing. I *do* get an impression—by sighs, or breathing patterns."

Chard has never worried that opposing lawyers might openly read confidential material lying on his desk. "I feel," he says, his voice quickly overtaken by his infectious giggle, "that if they can read my Braille notes upside down, then more power to them!" ◘



Roger Chard

The above article is an abridged version of a piece that appeared in the June, 1986 Ann Arbor Observer

Legal longevity

Three more alumni report back-to-back 50-year careers

by Roy F. Proffitt

LQN recently recounted the chronology of the Baker family of Bay City, MI (Summer, 1985). We reported that Oscar W. Baker, Jr., J.D.'35, had completed 50 years of practice, successfully following the pattern set by his father, Oscar W. Baker, Sr., LL.B. '02, who also had practiced for 50 years. We invited our readers to tell us of other parent and child combinations that would match or exceed the Baker and Baker record.

Three alumni responded with information of other 50-year back-to-back situations. We are happy to recognize these new additions to our still very small list of special families—special because of their longevity, and also because of their contributions to the bar and their communities.

R. William Merner, J.D. '58, of Cedar Falls, IA, wrote that three generations of the Merner family have been providing legal services to the citizens of Cedar Falls since 1894. His grandfather, William Henry Merner, after graduating from the Law School in 1894, returned home and practiced there until his death in 1945. Bill's father, Roland Frederick Merner, graduated in 1920 and practiced until his death in 1974. Both Merners were active in local affairs, and each served as the mayor of Cedar Falls.

Like the Bakers, this family has a potential for three generations of consecutive 50-year careers. Bill is already on his way with 28 years of practice. We wish him a long and productive career.

R. William Merner

Three members of the **Milliken** family of Bowling Green, KY, have had long and interesting careers, and may have the distinction of having the most (156 years to date) cumulative years of service to their clients. George Duncan Milliken, Sr., '05, practiced in Bowling Green until his death in 1967. Two sons are also Michigan law degree holders. George Duncan, Jr., received his degree in 1931, and John M. graduated in 1947. Both are still active partners in the firm of Milliken & Milliken. All three lawyer members of this family have served one or more terms as judge of the Warren County (Ohio) Court.

Walter P. North

The 50-year back-to-back careers of **Walter P. North,** J.D. '30, and his father, Walter H. North, LL.B. 1899, ran a somewhat different course. Each began his practice in Battle Creek, MI, but then moved on. Walter H. North was named associate justice of the Michigan Supreme Court in October, 1927, and served that court until his death in July, 1952. On four separate occasions he was selected by his colleagues on the court to serve as its chief justice. After seasoning in Battle Creek for several years, Walter P. North went to Washington, D.C., where he served the last 16 years of his active practice in the office of the general counsel of the Securities and Exchange Commission. Few attorneys of any age could match his experience of arguing one or more SEC cases in every U.S. court of appeals and three such cases in the U.S. Supreme Court. He has retired and is living in San Diego, CA, but he is still a member of the State Bar of Michigan. ◘

Roy F. Proffitt is Professor Emeritus of Law and former Director of the Law School Fund.

Elmer Cerin, '40

A Washington lobbyist who works for free

At the age of 67, following a series of successful careers in the Roosevelt and Truman administrations, with the postal service, and in private law practice, Elmer Cerin began a new career as a lobbyist. Even more remarkable than his age when he began his new profession is the fact that Cerin works free of charge.

Nine years ago, Cerin's wife, Sylvia, was diagnosed as having amyotrophic lateral sclerosis, a usually fatal degenerative disease of the nerve cells commonly known as Lou Gehrig's disease. Elmer Cerin, frustrated at his powerlessness to help her, became vice president of the Amyotrophic Lateral Sclerosis Association for the Washington area and began lobbying for research money.

Since that time, Cerin has raised several hundred thousand dollars for the association and has become a kind of all-purpose health lobbyist. Among the issues he works to support are Medicare and Medicaid, hospice care, and home health care for the elderly and victims of neurological disorders.

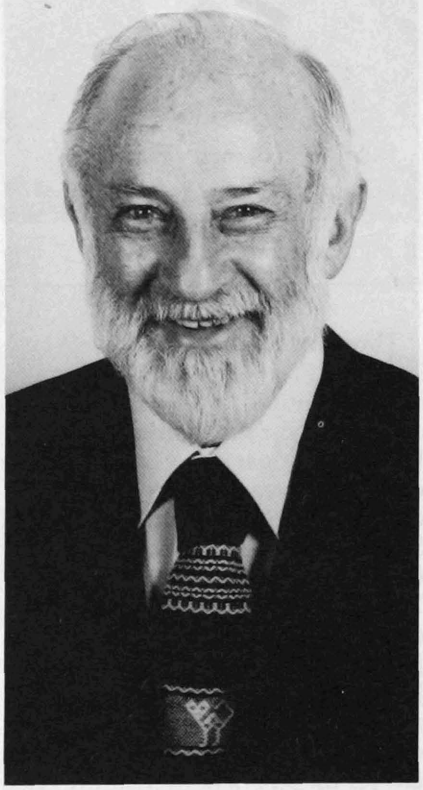
Cerin, who stands five feet, three inches tall, with a white beard and white hair, is said to be in constant motion. He has been described by various Congressmen as "a tiger," "sincere and knowledgeable," and "a rare breed, a man who does what he does not for public recognition, but because he believes in it."

Among Cerin's recent victories was his effort to help produce the law requiring rotating warning labels on cigarette packets. In the last legislative session, he focused on bills to restrict the advertising and sale of smokeless tobacco and to restrict smoking in government buildings to specific areas.

Cerin also continues to support other victims of the disease that ultimately killed his wife. About 4,600 people in the U.S. are affected by the disease each year.

With no plans to slow down in the years to come, Cerin states that if he can help to reduce suffering, his efforts will be more than rewarded.

Why does he work for free? "I was a good lawyer," he says. "I don't need the money."



Elmer Cerin

Calling all alumni

The Admissions Office is compiling a list of alumni willing to answer questions from perspective students about the Law School and the practice of law. With such a list available, the office will be able to provide advance notice when a call or a letter is coming. Questions often come from applicants who have been admitted to several law schools and who are deciding which offer to accept.

Garrett Heher, '59, in recent years has helped greatly by holding a reception for admitted students in Princeton, NJ, in late March, just before the first national law school deposit deadline. We need volunteers from the New York/New Jersey/Philadelphia area to join him for a late afternoon gathering in March, 1987, on the Princeton campus to talk to Princeton students about their life at the Law School and in practice. Hosts for receptions would also be welcome in the following areas: New York City, Boston/Cambridge, Chicago, San Francisco/Berkeley/Palo Alto, Philadelphia, New Haven, and Detroit. Alumni near our principal feeder schools could be of assitance, especially anyone in the immediate vicinity of Amherst, Dartmouth, Williams, Duke, Brown, Oberlin, or Wesleyan.

Of course, we hope to capture every U-M graduate offered admission. LS&A alumni in Michigan and throughout the country are needed. If you are willing to lend a hand, write to Dean Allan T. Stillwagon or call him at **(313) 764-0537.**

Stand up and be counted

The University urges all U-M alumni to join the 105,000 graduates who have responded to the Michigan Alumni Census 1986. Please call 313/764-9238 to request a form.

Alumni News

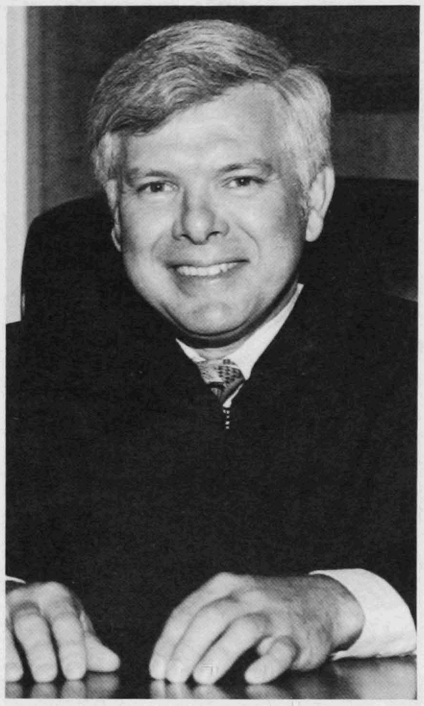
Alfred W. Blumrosen

Rutgers University faculty member **Alfred W. Blumrosen,** J.D. '53, has been appointed the Thomas Anthony Cowan Professor of Law by the Board of Governors of the State University of New Jersey. In receiving this honor, Blumrosen joins a prestigious group of only three "named professors" on the law faculty at Rutgers.

Blumrosen is respected internationally in the field of employment discrimination law. Specializing in individual employee rights, he has been in the forefront of legal developments concerning race and sex discrimination, affirmative action, and labor unions' duty of fair representation. Blumrosen has written extensively in all of these areas and his works have been frequently cited by other scholars as well as by the U.S. Supreme Court in several of its decisions.

The Cowan professorship honors Thomas Anthony Cowan, who was a professor of law at Rutgers from 1953 until his retirement in 1972. Cowan's fields of scholarship and teaching included jurisprudence and torts.

After eight years of service as an associate justice of the New Hampshire Supreme Court, **David A. Brock,** LL.B. '63, was appointed chief justice by New Hampshire Governor John Sununu. His appointment took effect on October 8.



David A. Brock

Chief Justice Brock received his A.B. from Dartmouth College in 1958. Before beginning his law studies at Michigan, he served as second lieutenant in the U.S. Marine Corps and attended the U.S. Army Intelligence School, graduating with honors.

Following six years in private law practice, Brock became a U.S. attorney for New Hampshire, serving from 1969 to 1972. He returned to private practice in Concord, NH, for four more years, and was appointed to the New Hampshire Superior Court in 1976 and the state supreme court in 1978.

William A. Cockell

William A. Cockell, Jr., of the class of 1959, was recently appointed by President Reagan to the post of deputy assistant for national security affairs (defense policy).

Cockell previously served as deputy under secretary of defense for research and engineering. He has also been an active naval duty officer, retiring in the grade of rear admiral on January 1, 1986. While in the navy, he served in Washington and on major staffs in Europe and the Pacific in a variety of positions dealing with strategic planning, politico-military affairs, and arms control matters.

Immediately prior to his retirement, he headed the Pacific Fleet Training Command, headquartered in San Diego.

The Alumni Association of The University of Michigan has selected **J. Kay Felt,** a 1967 Law School graduate, alumna-in-residence for the fall, 1986 term.

J. Kay Felt

Felt, the first woman to become a partner with Dykema, Gossett, Spencer, Goodnow & Trigg, coordinates the firm's rapidly expanding health care practice. She was named last year as one of the most prominent health care lawyers in the United States by *The National Law Journal*.

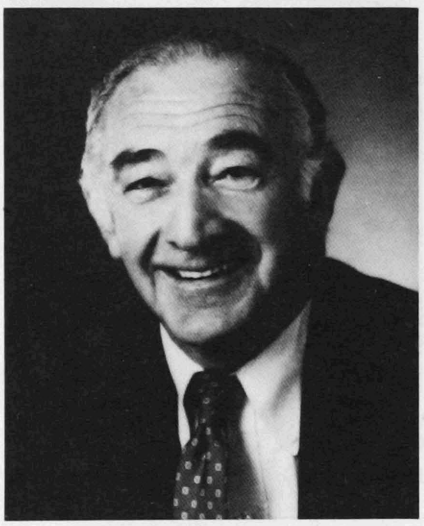
An adjunct professor at Wayne State University, Felt is president of the 2,600 member American Academy of Hospital Attorneys.

As alumna-in-residence, Felt spent a week this November teaching classes and meeting informally with students in the schools of social work, medicine, nursing, public health, and law at the U-M.

Stanley M. Fisher, J.D. '53, has been named president of the Federal Bar Association for fiscal year 1987. Fisher is of counsel with Arter & Hadden, Cleveland, Ohio, with offices in Canton, Columbus, Dallas, and Washington. He has practiced extensively before the federal courts and agencies during his 33-year career.

Fisher is admitted to practice before the U.S. Supreme Court; the U.S. Court of Appeals for the 3rd and 6th Circuits; the U.S. District Court, N.D., S.D. Ohio; S.D. Florida; and E.D. Michigan.

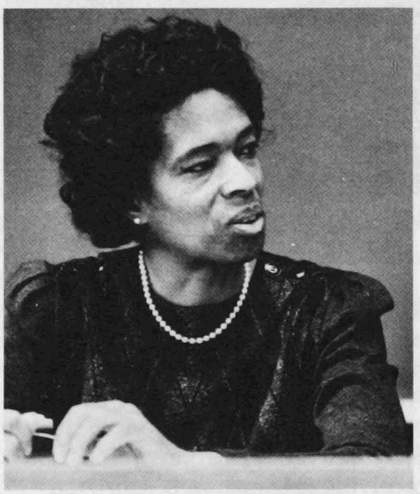
The Federal Bar Association has served the federal legal profession for 66 years. The FBA is comprised of approximately 14,000 members and includes attorneys who are or have been in the employ of the federal government, the federal judiciary, and other lawyers with an interest in federal law.



Stanley M. Fisher

With an armload of briefs beside her to prepare for the coming week's cases, **Judge Amalya L. Kearse** of the U.S. Court of Appeals for the Second Circuit emerged victorious in the World Women's Pair Championships recently. During the first half of the bridge tournament, while her partner, a full-time player, was competing in another event, Kearse reviewed 21 briefs and consulted with her law clerks by telephone.

In her "spare time" at the Miami Beach event, she participated in several committee meetings dealing with the rules of bridge tournaments. An authority on the theory of the game and the author of two books on the subject, Kearse edited the third edition of *The Official Encyclopedia of Bridge*. In a *New York Times* article on her triumph, Kearse said that she has managed to find time for her avocation only by "sleeping less and totally cutting out spectator sports."

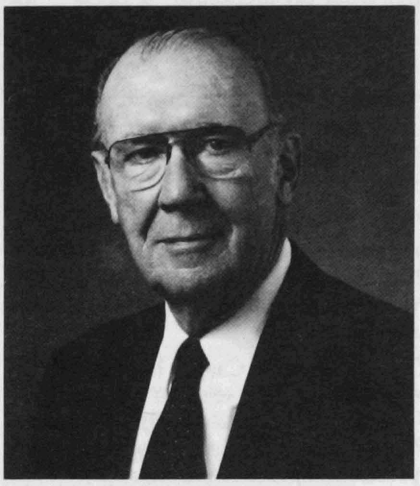


Amalya L. Kearse

Judge Kearse, a 1962 graduate of the Law School, was the first woman to sit on the federal appeals court in Manhattan. She was only the second black in the court's history and was considered for a Supreme Court seat in 1981.

Known for his efficient, fair, speedy administration of justice and his innovations in the courtroom, **Judge James L. McCrystal** is retiring from the bench effective January 1, 1987. McCrystal, a 1953 graduate of the Law School, has been a judge of the Erie County, Ohio Common Pleas Court since 1951.

During his long career, Judge McCrystal earned a reputation



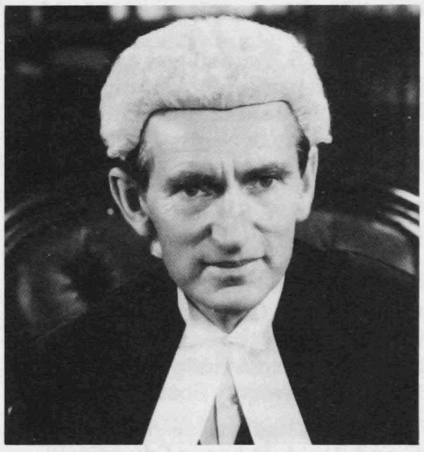
James L. McCrystal

for his quick disposition of cases. Over the past 15 years, he has received national recognition for his initiation of courtroom use of videotaped testimony. Since 1972, he has made dozens of presentations to bar associations, judicial conferences, and trial lawyers' institutes on the subject of the prerecorded videotaped trial. In 1982 he received the Ohio State Bar Foundation's Ritter Award for his outstanding contributions to the administration of justice.

Winston S. Moore, J.D. '70, has recently been appointed executive director of the Federal Trade Commission. In this post, Moore will supervise the commission's budgetary, personnel, and other administrative functions and will assist in formulating legal and economic policy.

Moore has been the assistant director for planning in the FTC's Bureau of Competition since 1982. While serving in that office, he directed the commission's antitrust policy planning office, including the planning and evaluation of new initiatives in antitrust enforcement. From 1975 to 1982, he was the director of legal policy studies at the American Enterprise Institute for Public Policy Research.

Ivor Richardson, LL.M. '55, S.J.D. '55, who has been a judge of the New Zealand Court of Appeal since 1977, has been made a knight bachelor in the Queen's Birthday honors list. A former dean of law at Victoria University, Richardson is now the university chancellor and a chairman of the council of legal education.

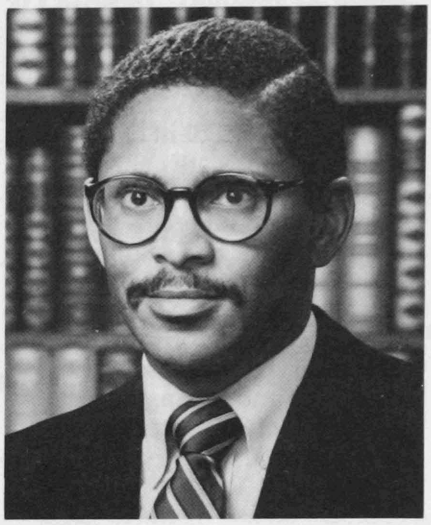


Sir Ivor Richardson

Walter L. Sutton, Jr., J.D. '70, corporate counsel for Texas Instruments, Inc., of Dallas, TX, was sworn in as president-elect of the National Bar Association (NBA) during the 61st annual meeting of the association.

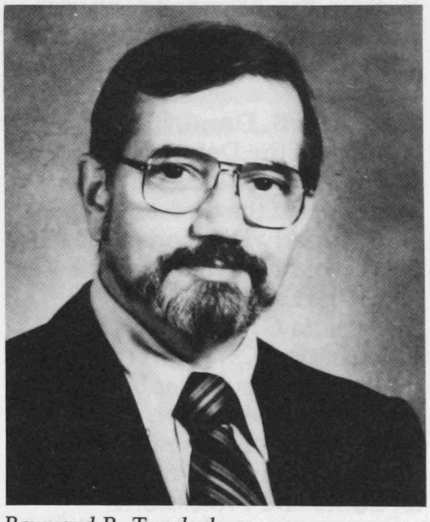
The NBA, the nation's oldest and largest association of minority attorneys, judges, and law students, has a professional network of 10,500 members in the U.S. and the Virgin Islands.

Upon assuming the role of president in July, 1987, Sutton plans to emphasize activities to enhance the progress of black lawyers in the practice of law, in the corporate board room, on the federal bench, and in the upper echelons of the federal government.



Walter L. Sutton

A native of Marshall, TX, Sutton specializes in environmental and real estate law. Prior to his position with Texas Instruments, he was employed by the Tenneco Oil Company and by the Ford Motor Company.



Raymond R. Trombadore

Somerville attorney **Raymond R. Trombadore,** who received his J.D. from the Law School in 1954, has become president of the New Jersey State Bar Association.

Trombadore, a partner with his wife, Ann (a Law School alumna, J.D. '54), in the law firm of Raymond R. and Ann W. Trombadore, will serve as president of the 15,000-member state bar association until May, 1987.

Trombadore served as trustee to the state bar for five years and has also served as its secretary, treasurer, and vice president.

Before entering private practice, he served as an assistant prosecutor and first assistant prosecutor of Somerset County for 11 years. ⊠

Alumni head ABA posts

A number of Michigan alumni have been appointed to key positions at the American Bar Association.

Allan L. Bioff, J.D. '58, a partner in the Kansas City law firm of Watson, Ess, Marshall & Enggas, has been elected chairman of the ABA Section of Labor and Employment Law.

William B. Dunn, J.D. '64, a member of the Detroit law firm of Clark, Klein & Beaumont, has been elected the director of the Real Property Division of the ABA Section of Real Property, Probate, and Trust Law.

Cornelia G. Kennedy, J.D. '47, Judge of the U.S. Court of Appeals for the 6th Circuit, has been appointed chairperson of the Judges Advisory Committee to the ABA Standing Committee on Ethics and Professional Responsibility.

John A. Krsul, Jr., J.D. '63, a partner in the Detroit law firm of Dickinson, Wright, Moon, Van Dusen & Freeman, has been reappointed chairman of the ABA Standing Committee on Membership. ⊠

Class notes

'26 Wendell Brown (aka R. Wendell Brown & Robert W. Brown) has been listed in *Who's Who in America,* vol. 39 1975 forward), *Who's Who in American Law,* vols. 1-4, and *Who's Who in the World,* 4th edition, 1978/79, and all subsequent editions.

'39 Leonard D. Verdier, Jr. is now of counsel to Warner, Norcross & Judd.

'40 John S. Pennell was a senior lecturer on partnership taxation at the law schools of Duke University and the University of North Carolina at Chapel Hill last spring.

'47 Leslie W. S. Lum is now presiding as a judge in Honolulu, HI.

'49 Thomas W. Ford, who operates the Ford Land Company, a real estate investment firm in Portola, CA, was recently elected a vice president of the Stanford University Board of Trustees.

Don Souter has been re-elected to the Grand Rapids Board of Education.

'50 Robert J. Danhof was unanimously re-elected by the judges of the Michigan Court of Appeals to another three-year term as chief judge. Judge Danhof is only the second chief judge in the 21-year existence of the Michigan Court of Appeals, and has served on the Court since January 1, 1969.

William L. McKinley is now chairman and chief executive officer of the Gerber Products Co., Fremont, MI.

'51 Herbert Balin has announced the merger of the New York City law firm with which he is associated, Wofsey, Certilman, Haft, Lebow, Balin, with Charles P. Buckley, Jr. and Arthur J. Kremer. The latter two are founding partners of the Mineola-based firm of Buckley, Kremer, O'Reilly, Peiper, Hoban and Marsh. The new firm will be known as Certilman, Haft, Lebow, Balin, Buckley and Kremer, with offices in Manhattan, Long Island, and Boca Raton, FL.

'53 Dean E. Richardson, chairman and president of Manufacturers National Corp., has been elected vice-chairman of the board of AAA Michigan.

'57 George J. Caspar has been elected corporate secretary of The Travelers Corporation in Hartford, CT. He previously served as senior vice-president of Heublein, Inc.

David P. Van Note is vice-president and general counsel for the Michigan Consolidated Gas Co., Detroit, MI.

'58 Robert James Henderson is managing partner of the law firm of Luce, Henderson, Bankson, Heyboer and Lane, in Port Huron, MI.

'59 Richard Z. Kabaker has been elected to the board of regents of the American College of Probate Counsel.

Mark Shaevsky, a partner in the Detroit-based law firm of Honigman Miller Schwartz & Cohn, has been elected a director of First Federal of Michigan, the largest savings and loan association in Michigan.

Hilary F. Snell, a Grand Rapids, MI, attorney, has been elected chairperson of the board for Blodgett Memorial Medical Center in that city.

'61 James J. Schiller, a Cleveland, OH, attorney, is a trustee of the Greater Cleveland Regional Transit Authority.

'62 Joel M. Boyden, of the law firm of Dykema, Gossett, Spencer, Goodnow & Trigg, in Grand Rapids, has been elected president of the International Society of Barristers.

'63 Richard A. Solomon, senior partner in the law firm of Solomon, Foley & Moran of Detroit, Houston, Texas, and Washington, D.C., spoke at the International Franchise Association's Nineteenth Annual Legal Symposium, "Toward the Year 2000: The Future of Franchise Law," in Washington. Solomon spoke on a panel regarding contract enforcement issues.

'67 **Hope K. Blucher** is the principal of an alternative school for gifted students in Danby, VT.

Theodore J. Floro is the elected state's attorney of McHenry County, IL. He and 10 other attorneys prosecute crimes and handle civil matters for the area surrounding Woodstock, IL.

Stephen S. Grace, a manager in Dow Chemical Company's patent department, is completing his 18th year with the company, which recruited him off the U-M campus during his senior year.

Richard Halberstein is a sole practitioner tax attorney in Washington, D.C.

Richard Mandell is a hearing examiner for child support cases in Orange County, NY.

Albert D. McCallum negotiates contracts for Consumers Power Co. This is his 15th year with the Jackson, MI, utility.

Eli J. Segal is president of American Publishing Corp., in Watertown, MA. The firm manufactures toys and games for children and puzzles for adults.

Natalie A. Smith is an attorney with the Wisconsin Public Service Commission in Madison.

John Alan Truesdell is a real estate developer in Boca Raton, FL.

Donald E. Zerial, of Grand Rapids, is in his 18th year with the Kent County (Michigan) prosecutor's office.

'73 **Stephen M. Silverman** has been promoted to assistant general counsel at Northwestern Mutual Life Insurance Co., Milwaukee, WI.

'77 **Bruce Kelly** has become a partner in the Wall Street firm of Hughes Hubbard & Reed.

'78 **Arthur R. Block** was named a partner in the Philadelphia-based law firm of Wolf, Block, Schorr and Solis-Cohen.

'79 **Ford H. Wheatley,** a partner in Porterfield & Wheatley, was recently re-elected to the city council and unanimously appointed as mayor pro tem of Glendale, CO.

Yves P. Quintin had a law review article published in the French *Revue Critique de Droit International Prive* in early 1986. It is about the recognition of foreign judgments in the U.S.

'81 **John C. Grabow** has left his position as assistant legal counsel to the U.S. Senate to return to the Washington, D.C. law firm of Ginsburg, Feldman and Bress, Chartered.

'81 **Douglas B. Levene** has recently been appointed to the Professional and Judicial Ethics Committee of the Association of the Bar of the City of New York. ⊠

Alumni Deaths

'07 **Roland M. Shivel,** October 29, 1983, in Grand Rapids, MI

'10 **Alexander J. O'Connor,** July 7, 1985, in Wenatchee, WA

'14 **Ray E. Anderson,** January 14, 1986, in Duluth, MN
Rockwell T. Gust, April 10, 1986, in Detroit, MI

'16 **Walker Peddicord,** March 6, 1986

'17 **Glenn A. Howland,** April 23, 1986, in Pontiac, MI

'19 **Charles L. Goldstein,** June 25, 1986

'22 **Norton L. Goldsmith,** December 6, 1985

'23 **Glenwood W. Rouse,** September 10, 1986, in Philadelphia

'24 **Edmund A. Cummiskey,** December 28, 1985

'25 **Carl E. Enggas,** July 12, 1985
John T. Inghram, June 10, 1986

'26 **Ransom Pratt,** April 11, 1986, in Elmira, NY

'27 **William A. Belt,** May 1, 1986, in Toledo, OH
Hjalmar S. Hansen
J. P. Mikesell, March 24, 1986, in St. Clair Shores, MI
Frank T. O'Brien, December 11, 1985, in Amarillo, TX

'28 **Paul Findley,** May 8, 1986

'29 **Gordon B. Wheeler,** February 15, 1986, in Grand Rapids, MI
Myron Winegarden, February 19, 1986, in Flint, MI

'30 **Joseph A. Navarre,** June 30, 1986

'31 **Edward H. Benson,** July, 1986
Henry R. Bishop, August 18, 1986
Paul S. Bryant
J. Kingsley Chadeayne, April 3, 1986

'32 **Charlotte C. Dunnebacke,** March 15, 1986
Forrest E. Washburn, April 9, 1986

'33 **Howard J. Youngman,** May 4, 1986

'34 **Charles H. Miltner,** May 21, 1986

'35 **George F. Fisk,** May 23, 1986
Carl S. Forsythe, August 7, 1986
Douglas H. Hoard, May, 1986
Charles A. Jens, February 28, 1986

'36 **Robert H. Watson, Jr.,** April 24, 1986, in Grosse Pointe, MI
James S. Wilson, Jr., December 9, 1985

'37 **Wilfred G. Bassett,** February 5, 1986, in Horton, MI
Harry T. Tillotson, June 25, 1986

'38 **Walter A. Guthrie,** April 20, 1986
George H. Keough, March 11, 1986
James S. Miner, February 25, 1986

'39 **William R. Hunter,** February, 1986
William Lee Soboroff, April 29, 1986

'40 **John J. Owens,** April 17, 1986

'41 **Robert S. Glass**
Charles M. Lovett, March 18, 1986, in Portland, OR
Peter M. Westra, May 7, 1986

'42 **James P. Clancey,** March 29, 1986, in Ishpeming, MI

'48 **James R. D. Charron,** May 2, 1986

'49 **David H. Morton,** May 17, 1986
James J. Robison, July 17, 1986, in Toledo, OH

'50 **Wayne A. Anderson**

'51 **Harold W. Nickelsen,** February 8, 1985
Howard E. Owens, July 26, 1986

'52 **Howard D. Brown, Jr.,** May 15, 1986
James R. Mitchell
Richard P. Nahrwold, October 9, 1981
John H. Witherspoon, Jr., March 26, 1986, in North Palm Beach, FL

'53 **Gilford H. Mayes, Jr.**

'56 **Clarence R. Hallberg**

'57 **Murray N. Shelton, Jr.,** in Rhode Island

'63 **Clifford J. Madden,** November 3, 1982

'69 **Peter H. Chester**

'74 **John U. Damian, Jr.,** May 14, 1986 ⊠

Enslaved to Freedom?

by Lee C. Bollinger

Editor's note: The following article is an abridged version of the first chapter of Professor Bollinger's book, The Tolerant Society: Freedom of Speech and Extremist Speech in America. *Copyright © 1986 by Oxford University Press, Inc. Reprinted by permission. Recent reviews in* The New Yorker *and* The New York Times *have applauded the book's thoughtful, imaginative perspective on the role of freedom of speech in our society. A paperback edition is expected to be available in fall, 1987.*

There is a curious disjunction in our attitudes about the degree to which we should tolerate the speech of others. When we compare our reluctance to impose *legal* restraints against speech with our readiness to employ a host of informal, or *nonlegal*, forms of coercion against speech behavior, the paradox is striking. If a person expresses some view we find deeply offensive—say, for example, by making a racially derogatory comment—we will probably insist on censure of some kind, and feel guilty if none occurs. To be told that we ought to restrain ourselves from ever, in any way, coercing or penalizing any person for what that person says would strike us not only as bizarre but as plainly wrong.

Within the special realm of the constitutional right of free speech, on the other hand, our response is quite different. As soon as someone proposes making it unlawful to say something offensive, and to assess criminal or civil penalties for any violations, the general free speech principle will be invoked, and in all likelihood the whole plan will be tossed aside as unacceptable.

Under the principle of free speech, we celebrate self-restraint, we create a social ethic of tolerance, and we pursue it to an extreme degree. At the same time, for many people it is, and has been, this extremeness that is the most inexplicable and troublesome feature of free speech in the United States. They can readily understand the sense of limiting the use of governmental power to regulate general discussion within the society. But they also have the sense that there must be limits to any principle and that somehow free speech has been taken far beyond those limits.

This was revealed for us with painful clarity just a few years ago in a widely publicized case involving a Nazi group that claimed the "right" to conduct a march in a suburb of Chicago called Skokie. At the time, the population of Skokie included some 40,000 Jews, several thousand of whom were direct survivors of the World War II concentration camps. This, of course, was not lost upon the self-proclaimed Nazis. Nor was their purpose lost upon those who stood witness to the projected event. It was perfectly clear to everyone that a primary aim of the Nazis was to inflict as much insult and fear as they could on the Skokie residents, and no doubt on other Jews as well. And yet, the results reached by the two highest courts that considered the issues—a federal court of appeals and the Illinois Supreme Court—were the same: This "speech activity" was protected by the First Amendment to the Constitution.

Few legal disputes in the last decades caught the public eye with such dramatic power as did that case. For well over a year, as the case moved ponderously through the courts, it was seldom out of the news and often on the front pages of newspapers when it was in the news. When the American Civil Liberties Union (ACLU) took up the legal defense of the Nazis, its membership rolls gave telling evidence of the public dissatisfaction, even incredulity, at the free speech position in the case. Thirty thousand members resigned their membership, at an annual cost in lost revenues to the organization of half a million dollars. To many people this was not freedom of speech, it was the abuse of a liberty, the license to inflict harm on other people. Even if one viewed the Nazi aims in more modest terms, as that of only establishing a fascist regime, the assertion of a free speech right seemed only to raise a profound paradox: Why, after all, should a free speech principle be extended to those who would use it to advocate the destruction of that liberty?

Actually, these reservations about the extension of the free speech principle to cover this kind of extremist speech were but echoes of a similar indictment heard at the very inception of the modern free speech principle. The attack was by John Wigmore, a law professor and dean at Northwestern University Law School and a scholarly figure of major stature. The object of Wigmore's indictment was Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*—a dissent that was to provide the underpinnings of the contemporary free speech principle.

Abrams involved a prosecution of five Russian aliens for distributing leaflets in New York City in August, 1918. These leaflets praised the Russian Revolution, denounced President Wilson for attempting to intervene and reverse the successes of the communists, and

urged the workers in the United States (particularly munitions workers) to protest by engaging in a general strike. The Russians were prosecuted under the Espionage Act, a World War I piece of legislative handiwork that proscribed a variety of activities that the Congress had deemed potentially harmful to the war effort.

A majority of the Supreme Court upheld the convictions, finding no violation of the First Amendment. For precedent, these justices relied heavily on three cases decided earlier the same year, which ironically had been authored on behalf of the Court by Holmes himself. The first of that trilogy (and the first important Supreme Court decision on the First Amendment since its adoption), *Schenck v. United States*, was in many important respects seemingly very similar to *Abrams*. Schenck had been the general secretary of the Socialist Party, and he, along with another member of the party's executive board, was charged with having distributed some 15,000 leaflets in which it was argued, in "impassioned language," that the conscription law was immoral and unconstitutional and that people should resist.

Under the principle of free speech, we celebrate self-restraint, we create a social ethic of tolerance, and we pursue it to an extreme degree. At the same time, for many people it is, and has been, this extremeness that is the most inexplicable and troublesome feature of free speech in the United States.

This prosecution was also under the Espionage Act. Holmes dealt with the case by pointing out the necessity of drawing some limits on the free speech principle. While, he said, the Court was prepared to "admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights," the actual scope of the protection afforded by the First Amendment depended upon the exact context in which the speech occurred. Thus, in words now immortalized: "[T]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." The guiding principle for Holmes, therefore, was "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." To Holmes "[i]t was a question of proximity and degree."

Applying this principle to the *Schenck* prosecution, Holmes appeared to have little difficulty in finding for the government. "When a nation is at war," he cautioned, "many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

The majority in *Abrams* seemed to think similarly. Holmes, however, now did not, and the reason for his seeming turnabout has been a matter of controversy and speculation ever since.

In his *Abrams* dissent, Holmes set forth, in memorable words, his primary argument for free speech:

> [w]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Within the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech. And the scope of the shelter it extends to speech activity is very wide indeed, for under it the First Amendment protects against legal interference all speech activity until the point at which it "so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

To this definition of the scope of free speech, Wigmore took strenuous objection in an article published in the *Illinois Law Review* shortly after the *Abrams* decision. Much of Wigmore's concern in the article is with the specific facts involved in the *Abrams* case. By August, 1918, he says, the outcome of the war depended greatly on the still uncertain capability of the country to produce the munitions needed to supply the soldiers then in the trenches in France—which, of course, it had been the aim of the *Abrams* defendants to disrupt.

In Wigmore's view, however, Holmes's principal failing was the manifestation of a generally misguided and distorted social vision posturing under the banner of freedom of speech. "And so the danger now is," Wigmore wrote, "rather that this misplaced reverence for freedom of speech should lead us to minimize or ignore other fundamentals which in today's conditions are far more in need of reverence and protection. Let us show some sense of proportion in weighing the several fundamentals."

While Wigmore conceded that the defendants' acts by themselves were unlikely to harm the war effort, he pointed out that ordinarily the society is not denied the power to punish those who set out to commit crimes, but for one reason or another fail in the effort.

For Wigmore, the other side of the coin was the ten-

dency to overemphasize the need to secure the liberty of speech against restriction:

> After all, is not this tenderness for the right of freedom of speech an over-anxiety? . . . Do we not really possess, in the fullest permanent safety, a freedom and license for the *discussion* of the pros and cons of every subject under the sun? Simply as a matter of "free trade in ideas," is there not in Anglo-America today an irrevocably established free trade in every blasphemous, scurrilous, shocking, iconoclastic, or lunatic idea that any fanatical or unbalanced brain can conceive? And is there any axiom of law, constitution, morals, religion, or decency which you and I cannot today publicly dispute with legal immunity?

As Wigmore set about defining the proper limits of the free speech principle, he sought to minimize the disjunction to which I referred at the outset between our personal and our constitutional thinking about those limits, trying to bring the latter more in line with the former. In the "abnormal" situation of wartime, which was true of the *Abrams* case, Wigmore found the proper line by defining what was an appropriate "moral" response to the *Abrams* type of expression. He found that the "moral right of the majority to enter upon the war imports the moral right to secure success by suppressing public agitation against the completion of the struggle." To believe otherwise, in Wigmore's view, is to favor freedom at the expense of a nation's inherent right to govern itself and to ensure its own survival.

Within the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech.

Wigmore's charges against Holmes's position on the scope of the First Amendment have been repeated in the subsequent decades, whenever First Amendment protection for extremist speech has been sought. Free speech has become such a fixture of the American identity that our critical faculties may be unconsciously suspended when we are in its presence, an ironic result given the commonly understood purpose of the principle to remove the shackles on dissent and to encourage openness of mind.

Have we, it must be asked, fallen victim to what the intellectual historian Isaiah Berlin called the "suffocating straightjackets" of "great liberating ideas"?

> The history of thought and culture is, as Hegel showed with great brilliance, a changing pattern of great liberating ideas which inevitably turn into suffocating straightjackets, and so stimulate their own destruction by new, emancipating, and at the same time, enslaving conceptions.

This was certainly the uneasy sense, however inarticulate, many people had about the free speech position in the *Skokie* case—the sense of loss of judgment and of the ability to draw reasonable lines, to assess fairly the risks and costs of speech and the risks and costs to free speech of imposing limits. As it had for Wigmore in 1920, the disjunction became too great: the free speech position appeared unjustified, and it raised disturbing implications.

The controversy began in the spring of 1977 when Frank Collin, the leader of the Chicago-based National Socialist Party of America (NSPA), requested a permit to march in front of the Skokie village hall. The proposed march was to be held in the mid-afternoon, to take about half an hour, during which time approximately three dozen members would march in single file in front of the village hall. The group, according to Collin, would be wearing Nazi-style uniforms, which he described in chilling detail: "We wear brown shirts with a dark brown tie, a swastika pin on the tie, a leather shoulder strap, a black belt with buckle, dark brown trousers, black engineer boots, and either a steel helmet or a cloth cap, depending on the situation, plus a swastika arm band on the left arm and an American flag patch on the right arm." Collin's request came in March, 1977.

After receiving this notification of the intended demonstration, Skokie filed suit in the local circuit court, seeking an injunction against it. As this litigation worked its way up and down the line of state courts, another suit was reaching the federal courts. On May 2, 1977, the march having been temporarily forestalled by the state court suit, the city enacted three ordinances purporting to cover all marches and demonstrations.

The first provided various requirements for the issuance of any permit for parades and marches in excess of 50 persons. Insurance had to be obtained ($300,000 in public liability and $50,000 in property damage) and assurances given that the group "will not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation."

The second and third ordinances were specifically criminal laws, violation of which could be punished by a fine of up to $500 or imprisonment of up to six months. One forbade the "dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so." "Dissemination of materials" was defined to include "display . . . of signs" and "public display of markings and clothing of symbolic significance." The final ordinance prohibited the wearing of "military-style" uniforms during any public demonstration.

Following the enactment of these ordinances, Collin applied for a permit to engage in a march similar to

that proposed earlier but now rescheduled for the Fourth of July. The Skokie authorities denied the permit, indicating that the march would violate the last of the three ordinances. At this point, the American Civil Liberties Union filed suit on behalf of the NSPA in the federal district court, contending that all the ordinances were unconstitutional under the First Amendment and seeking declaratory relief to that effect. By the time the case reached the Court of Appeals for the Seventh Circuit, however, Skokie had conceded that the insurance requirement (at least as applied to the proposed march here) and the anti-uniform prohibition were unconstitutional. At issue in that court, therefore, was the city's attempt to prohibit the promotion or incitement of hatred "against persons by reason of their race, national origin, or religion."

The Illinois Supreme Court, on the other hand, which was the ultimate state court to rule on the lawsuit originally filed in the state circuit court, was presented with a general claim by the city of Skokie that it had a right to stop the proposed march without regard to any particular ordinance provision. Following decisions by both courts, both adverse to the city of Skokie, a petition for review was filed in the United States Supreme Court. That Court, however, declined to take the case for decision (two justices, Blackmun and White, dissented from the refusal).

One of the striking characteristics about the *Skokie* case is that one encounters confusion and uncertainty wherever one turns. Take first the parties. The "Village" of Skokie is not a village in any meaningful sense of the term, though it was obviously to its advantage to portray itself as such to enhance our sense of the intrusion into the community by the proposed march. It is, simply, a Chicago suburb. Even the question of whose "turf" it is is a matter of some uncertainty. Before World War II, Skokie had primarily been a German community, known as "Little Germany," and the home of the German-American bund.

On the other side, the National Socialist Party, with its few dozen members, was hardly a "party" at all, though it too no doubt regarded the self-depiction as advantageous for its public relations. Nor was the extent of its identification with the policies of the Third Reich entirely clear. Even the real identity of its leader, Frank Collin, was a matter of doubt. Symbolic of the deeply confusing nature of the dispute, it appeared that Collin's father was a Jew and a survivor of Dachau.

This problem of fixing one's vision on the true reality extended to the legal issues. Was this a march to proclaim religious and racial hatred, or even genocide? No, said the Nazis quite explicitly from the beginning. It was to protest the denial of their "free speech rights." The placards they proposed to carry were to be inscribed with the words "White Free Speech" and "Free Speech for White America," a protest against the demands for an insurance policy as a prerequisite to obtaining a march permit. On the other hand, it was possible, and not implausible, to read a negative implication into the slogans, to the effect that only "whites," and then only *some* "whites," should be accorded First Amendment rights. Furthermore, the placards were not the only communicating objects that would be present; there was also the storm trooper regalia Collin's group would be wearing with its own deadly messages.

Finally, beneath this dispute about what the group intended to say was yet another source of confusion, namely whether the asserted desire to march was itself fictitious. At times it seemed that the object was not to march but to be opposed in the effort. In fact, the Nazis never did march in Skokie, even after they had secured the right to do so; instead, they chose to make a brief appearance at the plaza of the Daley Center in downtown Chicago.

This problem of determining who these people were and what they were fighting about, of separating appearance and reality, is endemic to the case as a whole. This is certainly true when one attempts to decipher the judicial opinions in order to discover their motivating rationale.

On one issue, at least, the opinions are unmistakably clear, namely, that the judges wished it known that

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they personally repudiated the ideas held by Collin and his group. Virtually every opinion written in the case contains somewhere within it such a personal statement by the judges. These denouncements are unqualified. They unambiguously proclaim the Nazi ideology a collection of monstrous errors. The opinion of the federal court of appeals begins with the statement: "We would hopefully surprise no one by confessing personal views that NSPA's beliefs and goals are repugnant to the values held generally by residents of this country, and, indeed, to much of what we cherish in civilization."

At the very end of the opinion the judges return to the same theme, with an even stronger denunciation:

> Recognizing the implication that often seems to follow over-protestation, we nevertheless feel compelled once again to express our repugnance at the doctrines which the appellees desire to profess publicly. Indeed, it is a source of extreme regret that after several thousand years of attempting to strengthen the often thin coating of civilization with which humankind has attempted to hide brutal animal-like instincts, there will still be those who will resort to hatred and vilification of fellow human beings because of their racial background or religious beliefs, or for that matter, because of any reason at all.

In this way, then, the designated "legal" analysis of the case is bracketed by these clear, uncomplicated, "personal" resolutions of the same issues.

There is more to these personal proclamations, however, than first meets the eye. To most of us these statements would no doubt appear perfectly unremarkable; indeed, their absence would have been regarded as cause for concern, since an indication of personal neutrality on the ideas of Nazism, which might arise from that silence, would have presented a shockingly unexpected state of affairs. But that is only because we agree with the conclusion that Nazism is horrendously evil. Believing so, we are less sensitive to seeing how coercive and threatening such judicial denigrations of the speech protected can be. What we see, instead, is the satisfaction of the individual needs of the judges to dissociate themselves from the beliefs they are in the name of the First Amendment about to protect, and perhaps the reinforcement and reaffirmation of the general norm, which rejects those beliefs and with which we are ourselves in accord. It is in both functions that the coercion occurs. For the judges' statements make clear that those who hold these views, and act on them in the ways that Collin's group was about to, are deserving of our reproach; the words of the judges themselves constitute a form of official censure and thus a kind of coercion and punishment, as well as the threat of other punishments.

At least on the ultimate question whether legal coercion was constitutional, however, the courts were quite emphatic that it was not. They were less clear, on the other hand, on the score of whether this was a desirable result and of what precisely were the justifications for it. The opinions convey a strong sense of helplessness on the part of the judges. The dominant image suggested by the opinions is that of judges compelled to reach the results they did.

This sense of a predetermined result was created in several ways. There was the usual invocation of "the First Amendment" itself, or "the United States Constitution," as if these words and texts constituted something firm and specific on the issue before the courts. The judges also seemed to intimate that they would arrive at a very different resolution if they were deciding the case on a clean slate, but that such a resolution was foreclosed by standing precedents of a higher court, the Supreme Court.

Thus, the Illinois Supreme Court opened its opinion by declaring it was "bound by the pronouncements of the United States Supreme Court in its interpretation of the United States Constitution," pronouncements that "compel us to permit the demonstration as proposed, including the display of the swastika," and closed with the statement that the result had been reached "albeit reluctantly."

The federal court of appeals, after making its opening declaration of sympathy with the beliefs of the Skokie community, then changed ground rapidly and pronounced its own personal views as irrelevant to its assigned judicial task: "As judges sworn to defend the Constitution, however, we cannot decide this or any case on that basis. Ideological tyranny, no matter how worthy its motivation, is forbidden as much to appointed judges as to elected legislators." The form in which the court stated its conclusion, "[W]e find we are unable to deny that the activities in which the appellees wish to engage are within the protection of the First Amendment," demonstrates the utility of the negative form in our language as a means of conveying a certain reluctant state of mind and, additionally in this instance, the untouchable nature of the beliefs being protected.

On one issue, at least, the opinions are unmistakably clear, namely, that the judges wished it known that they personally repudiated the ideas held by Collin and his group.

This theme of predetermination was executed primarily through the methodology of analysis of precedent, a process involving the comparison of various details of this case with earlier decisions. In the *Skokie* case, this process—wooden and uncritical as it was—at least offered a virtually complete description of the doctrinal architecture of the First Amendment that has been built up during the last five decades.

The city structured its legal argument to locate this case within the established exceptions to the First Amendment rules, any one of which could independently have supported the city's position. It argued that the Nazi speech would constitute "fighting words," which the Supreme Court had declared in *Chaplinsky v. New Hampshire* to be unprotected, on the ground that certain types of speech lacked sufficient "social value" to justify protection.

In *Chaplinsky* the state had convicted a member of the Jehovah's Witness sect for calling an arresting officer a "damned fascist," among other things. Such "fighting words," the Supreme Court held, were not within the doctrine of free speech, as was also true, it added, of libel, indecent language, and obscenity. Naturally, in light of this, Skokie also argued that Collin's messages constituted "false statements of fact," which, like libel, were therefore unprotected. The city extended this line of argument by calling the speech "group libel," involving as it did the defamation of Jews, which in the 1952 case of *Beauharnais v. Illinois* the Supreme Court had said could also be prohibited constitutionally. Skokie further contended that what Collin and his group had to say was "obscene" and therefore, unprotected under established precedents dealing with pornography.

Following on Holmes's test from *Schenck* and *Abrams*, the city claimed that there was a "clear and present

danger" of a serious social harm likely to result from the march. The speech, it said, was especially offensive to the Jewish members of the community—in fact, the psychic equivalent of a physical assault. Finally, the city argued that its regulation was not really a prohibition of speech at all, but only a regulation of its "time, place or manner," a category of regulation the Supreme Court had repeatedly held subject to a less stringent form of First Amendment review.

As to all these claims, the courts found fatal flaws. The "fighting words" doctrine of *Chaplinsky* was said to apply only to certain personally insulting epithets spoken in a face-to-face encounter. Here the speech, however obnoxious, was about "political ideas," and it could be avoided simply by not showing up at the village hall on the afternoon of the march. Similarly, as to the argument that this was libel, it was answered that these were not *factual* assertions, which could be

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gauged as true or untrue, but political ideas, as to which the Supreme Court had pronounced: "Under the First Amendment there is no such thing as a false idea." The *Beauharnais* decision, upholding a group libel law that was not limited to factual falsehoods, was now of doubtful validity but, in any event, was distinguishable because it had involved a statute that had been interpreted to apply only to instances where there was a likelihood of violence; Skokie had by this time withdrawn its claim that the Skokie community was likely to respond violently to the Nazi march. Nor could the Nazi speech be deemed "obscene," since it lacked the requisite quality of the erotic.

The courts said further that this was not a case for the "clear and present danger" exception. According to more recent Supreme Court decisions, in particular the 1968 opinion of *Brandenburg v. Ohio*, involving racist rhetoric at a Ku Klux Klan rally, speech could only be prohibited on the basis of its dangerousness when it sought to incite others to serious unlawful behavior and persuasion was imminent. In Skokie it was, of course, implausible that anyone likely to listen to the Nazi speech would be immediately persuaded; the only violence that might arise would be from spectator hostility, which, again, the city had refrained from urging as a likely reality justifying prohibition and which, in any event, the Supreme Court had severely limited (perhaps even eliminated entirely) as a relevant consideration in free speech cases in various decisions denying "hecklers" any "veto" over unwanted speech.

Finally, as to the time, place, or manner claim, this went afoul of a now firm distinction between regulations that sought to limit speech because of the content of its messages and those that limited it incidentally in the pursuit of other concerns; the exception applying only the latter. The Skokie regulation which limited speech because of its harmful impact on, or its offensiveness to, others, was quite clearly directed at the content of the speech and hence subject to the severe strictures of the First Amendment.

And so it went with the courts' doctrinal interpretation. Obviously, such a method of treatment and analysis of the issues raised by the *Skokie* case did not provide any prescriptive justification for the result reached.

In the *Skokie* opinions, however, one argument for protection, while also drawn from the precedents, yields an attempt at positive justification. Like the claims from precedent and higher authority, it is an argument that implicitly portrays the judges as being in a somewhat helpless position with respect to determining the outcome of the controversy.

This justification was simply the inability to draw any line that would effectively exclude this kind of speech while not intruding on speech that everyone believed valuable and worthy of protection. Of all the arguments advanced in the *Skokie* case, that heard with the greatest frequency was this claim: to permit this speech to be restricted would jeopardize the entire structure of free speech rights that had been erected. According to the most commonly used illustration of this argument, to permit Skokie to ban this speech because of its offensiveness would mean that Southern whites could ban civil rights marches by blacks.

The principal case used to support this proposition was *Cohen v. California*, in which the Court had said that California could not prohibit, on grounds of its offensiveness, a person from wearing in public a jacket inscribed across its back "Fuck the Draft." To extend to the state the power to limit "indecent speech," said the Court, "would effectively empower a majority to silence dissidents simply as a matter of personal predilections." No "readily ascertainable general principle exists" for drawing such lines, "[f]or, while the particular four-letter word being litigated here is perhaps more distasteful than others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."

Such statements as these became the bulwark of the decisions in *Skokie:* "The result we have reached," said the federal court of appeals, "is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises."

Given the premises or social reality offered in the *Skokie* opinions, it is difficult to believe that some workable rule could not have been arrived at for the speech at issue in that case. Speaking personally, I do not

believe that my own liberty of speech (or the speech I think it reasonable to value) would have been threatened by grafting such an exception onto the First Amendment, just as I do not now feel threatened by the constitutional dispensation for obscenity laws. Nor do I find it difficult to distinguish in my own mind between the type of "offense" caused by blacks marching in the South for their civil rights and that brought about by Nazis who would advocate the murder or enslavement of a segment of the community.

Of all the arguments advanced in the *Skokie* case, that heard with the greatest frequency was this claim: to permit this speech to be restricted would jeopardize the entire structure of free speech rights that had been erected.

Of course, such personal viewpoints ought not to be regarded as dispositive of the general issue; but they certainly are relevant and a worthwhile starting point, and by stating my own I hope to invite others to arrive at their own honest judgment. It seems a significant piece of corroborating evidence that virtually every other western democracy does draw such a distinction in their law; the United States stands virtually alone in the degree to which it has decided legally to tolerate racist rhetoric. This distinctive feature of American

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society in the world community is highlighted by the fact that the United States has yet to ratify either the Convention on the Prevention and Punishment of the Crime of Genocide (which prohibits, among other things, the "direct and public incitement to commit genocide") or the International Convention on the Elimination of All Forms of Racial Discrimination (which prohibits, among other things, the "dissemination of ideas based on racial superiority or hatred"), in part because of concerns about potential conflicts between the conventions and the First Amendment.

In the remainder of the book, Professor Bollinger first provides a summary and critique of the established theoretical understanding of the First Amendment, especially as it is commonly applied to cases involving extremist speech, and then develops an alternative conception of the social role of free speech. This alternative conception, he argues, better explains the shared intuition that protection of extremist speech can strengthen the society. His theory, which he calls the general tolerance principle, emphasizes the common difficulties involved in arriving at an appropriate response to bad speech and nonspeech behavior and, because of this important shared feature, the good sense involved in choosing to designate one area of social interaction—that involving speech—as open for extraordinary self-restraint.

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Buying and Plundering: Exchange in Medieval Iceland

by William Ian Miller

Editor's note: The following article is an abbreviated version of "Gift, Sale, Payment, Raid: Case Studies in the Negotiation and Classification of Exchange in Medieval Iceland," in Speculum *61 (1986), 18-50. Reprinted by permission.*

Near the end of *Eyrbyggja saga* Thorir asks Ospak and his men where they had gotten the goods they were carrying. Ospak said that they had gotten them at Thambardal. "How did you come by them?" said Thorir. Ospak answered, "They were not given, they were not paid to me, nor were they sold either." Ospak had earlier that evening raided the house of a farmer called Alf and made away with enough to burden four horses. And this was exactly what he told Thorir when he wittily eliminated the other modes of transfer by which he could have acquired the goods. There is no question of thievery here. An Icelandic thief had to conceal the taking, and Ospak was not so craven. His taking was open and notorious, and Thorir did not fail to conceive his meaning. This was a *ran*, an open, hostile taking.

Ospak is also saying something about modes of exchange in medieval Iceland. He is listing, apparently in descending order of probability, just how goods were likely to be transferred between two people of roughly equal social standing: as a gift, as a payment (presumably by way of compensation in the settlement of a claim), or as a purchase. Last comes *ran*, unmentioned because it was unsociable.

The domestic economy of medieval Iceland was not to be found in towns and villages, which did not exist until the early nineteenth century. The basic unit of residence and production was the household farm. These farms were largely self-sufficient, but this did not preclude internal trade. Peddlers and beggars wandered from farm to farm bearing both gossip and goods. The *things*[1]—the *Althing* in the summer and local *things* in spring and fall—also provided regular meeting places where various types of exchanges and the settling of debts could occur.

Under usual circumstances, when harvests were adequate and the weather bearable, the household was able to provide itself with basic necessities. There were regular exchanges of tangibles between households, but these exchanges were submerged in social relations rather than undertaken for purely economic reasons. Friends, kin, and affines exchanged invitations to feasts and sent their guests away with gifts. These exchanges were domesticated by habit and ritual. This is not to say they were free of conflict. Feasts were the occasion for insult and slighted sensibility no less than for conviviality, for renewing and reaffirming bonds of blood and alliance. Gift exchange, though sociable, was hardly disinterested and could mask strategies not so amiable. But the gamesmanship and tactics of sociable exchange had the virtue of familiarity and regularity. Overt conflict was euphemized or even suppressed entirely by densely hedging the transaction with safeguards of peacefulness. Shows of generosity were to be met with shows of gratitude.

When transfers of goods were sought which were not already regularized by well-defined norms or habit, and especially when they were not initiated by the present possessor, tensions and uncertainties surfaced. This did not mean that there would be no transfer, but it put the parties to the burden of defining the transaction. If food and fodder were consumed at another's farm, if the host's horse or cloak left openly with the visitor after a meal, the transfer was unambiguously by way of gift; this was true even if the gift was a thinly disguised payment for support, or a kind of enforced hospitality. But if food and provisions were taken away uneaten, if swords and horses were removed secretly or without a meal having first been taken, the nature of the transaction was uncertain unless the parties first actively defined it. The uncertainty made for irritated sensibilities and could lead to misunderstanding and easy offense. The transfer still might be by way of gift, but it could be a purchase, or a payment in settlement of some prior wrong, or, to recall Ospak, an open expropriation.

Each mode of exchange had its norms and vocabulary. When a party sought to *fala* or *kaupa* something, he typed himself as a buyer. If the other party in response to this sold or gave for a price, there was a bargain or purchase (*kaup*). In this mode, the amount of return and the time and place of payment were bargained over and specified. A significant feature of this arrangement was that it purported to relate only goods to each other, not people, and as such was a denial of continuing social relations between the principals.

Gift giving, by contrast, gave rise to social relations and adjusted the status of the parties in relation to each other. The giver gained prestige and power from the exchange. He exacted deference from the receiver and obliged him to reciprocate. But the amount and place of return, and above all its timing, were left open and to the discretion of the recipient. In gift exchange, time was not something that burdened the debtor with exponential increases in the value of his obligation; time was his to manipulate, so as to readjust and redefine the relations between himself and the giver. He could choose the insult of the too hasty return, the sullenness of excessive delay, or no return at all, which, depending on the circumstances, could signal utter contempt for the giver or permanent subordination to him. Social relations, their definition, and the determination of status were much of what motivated gift exchange.

Ran, like gift exchange, admitted reciprocity and defined social relations. But it inverted the movement of property as against the duty to make return. It was now the prior possessor who owed a response, not the raider; and it was the raider who achieved social dominance from the transfer, not the prior possessor. Here too the timing and quality of return were left to those who had the return to make. And timing was no less significant here than in the world of gift exchange: "Only the slave avenges himself immediately, but the coward never does." The meaning of the mode of exchange, whether *ran*, gift, sale, or payment, was dependent on a host of variables which the context provided and which I will return to in more detail later.

In the case that follows and in others discussed in a longer version of this article, the parties were forced to deal with each other outside the regularized convivial channels and outside the boundaries of a place clearly designated as a marketplace. At times the pressing need of famine and hay shortage brought them together, at times the desire for a specific prestige good, like fine horses or fine swords, and at times the demands of liability in law and feud. The cases reveal how, in the absence of a market economy and its accompanying mercantile assumptions, parties went about defining the nature of a transaction. We find that the completion of a transaction did not depend on the determination of a mutually acceptable price, but rather on the determination of the mode in which the transfer, if there was to be one, would take place. We also see that there was a resistance to transfers by sale between members of the same social rank.

This paper is not intended to be a definitive study of Icelandic exchange. I have confined myself to cases in the sagas that show members of the *bondi*[2] class dealing with each other explicitly about goods. The sagas are the only sources that preserve circumstantial accounts of these kinds of transactions, although the early laws, collectively known as *Gragas*, also provide relevant information. The cases reveal the extraordinary political and social complexity of such transactions and the significance of the sagas as valuable sources of historical evidence.

Gunnar v. Otkel: Hallgerd's Theft

The facts below are a summary of a failed transaction and the consequences of its failure, as recorded in *Njals saga*, chs. 47-50. These events represent the initial phase of a dispute that expanded into a complex and bitter feud. It will lead to the death of Otkel and his close kin and to the death of Gunnar as well.

Gunnar is a *bondi* and a great warrior; he keeps good kinship; he is a loyal friend, and generous too. Although not a chieftain,[3] he is looked to as the leader of his own formidable kin group and as a "big man" in the district in which he lives. Because of famine conditions and his own generosity, Gunnar runs short of

hay and food. He seeks out Otkel, a wealthy farmer, who is apparently well stocked in spite of the famine. Gunnar offers to buy hay and food from Otkel. Following the counsel of his friend Skammkel, who is described as ill-willed, a liar, and also unpleasant to deal with, Otkel refuses to sell, and also refuses Gunnar's request for a gift. Tempers start to get hot among the members of both parties but nothing comes of the encounter, except that Otkel offers to sell Gunnar a slave, which he buys. The slave falls well short of contemporary standards of merchantability, but Otkel makes no effort to inform Gunnar of the slave's defects.

Later in the summer, while Gunnar is attending the *Althing*, Hallgerd, his wife, orders the slave to steal enough butter and cheese from Otkel's farm to load two horses and to burn the storehouse so that no one will suspect a theft. Gunnar returns to discover the theft, knowledge of which Hallgerd does not try to keep from him. Eventually it becomes general knowledge, and Gunnar decides to make an offer of compensation to Otkel. Otkel, again heeding Skammkel's counsel, refuses several very generous offers of settlement, choosing instead ultimately to summon Hallgerd for theft and Gunnar for illicit use of another's property. Once at the *Althing* the lawsuit never gets off the ground, because Otkel's supporters abandon him. Gunnar is granted self-judgment—the right to arbitrate the case to which he is a party—and ends up paying nothing.

We are never told why Gunnar initally sought out Otkel, but it can be assumed that the state of Otkel's stores was not unknown. The saga describes the encounter thus:

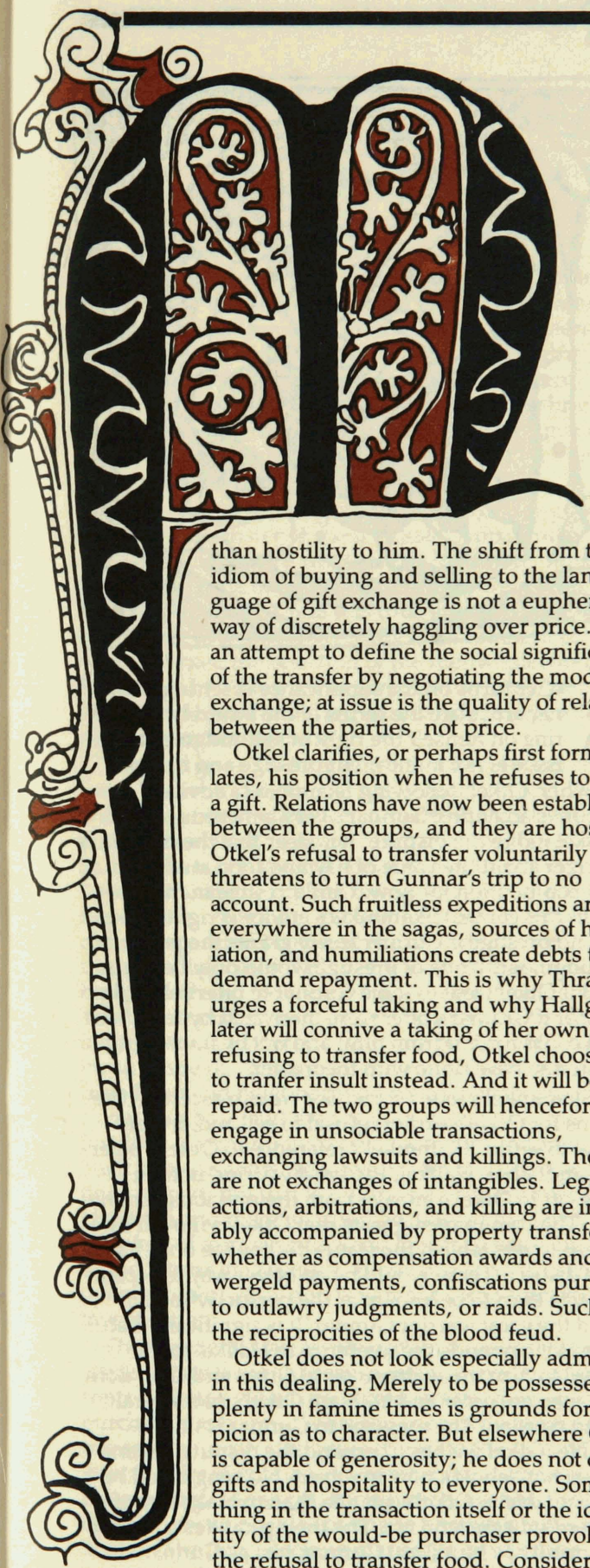
> Gunnar then summoned Kolskegg [his brother], Thrain Sigfusson [his mother's brother], and Lambi Sigurdarson [a first cousin] to go with him on a journey. They travelled to Kirkby and called Otkel out. He greeted them and Gunnar took the greeting well.
>
> "It so happens," said Gunnar, "that I have come to ask to buy hay and food from you, if there's some available."
>
> "There's both," said Otkel, "but I will sell you neither."
>
> "Will you give it to me then," said Gunnar, "and leave it open as to how I'll reward you?"
>
> "I don't wish to," said Otkel (Skammkel was contributing bad counsel).
>
> Thrain Sigfusson said, "It'd be fitting if we took it and left what it was worth in its place."
>
> "The Mosfell men will have to be dead and gone," said Skammkel, "before you Sigfussons will be able to plunder them."
>
> "I won't take part in a raid," said Gunnar.
>
> "Do you want to buy a slave from me?" said Otkel.
>
> "I won't refuse to," said Gunnar. He bought the slave and then they went on their way.

The passage shows the parties raising three ways of transferring the food and fodder: (1) sale for a price; (2) gift with the prospect of a return gift in the future; and (3) *ran* with an immediate return dictated by the taker. All three modes are rejected. Otkel does not want to sell or give; Gunnar does not want a *ran* even though supporters of both principals were willing to agree on this mode. Skammkel, in fact, by doubting the ability of Gunnar and his companions to succeed in a violent taking, is challenging them to do so and thereby accepting Thrain's "offer" to raid.

Just why the transaction failed is complicated and requires a rather full discussion, but we can dismiss at the outset several propositions. Otkel did not refuse Gunnar's requests because he feared inadequate compensation. There is absolutely no discussion about price here. And to object that there would be no point in discussing price because in famine times the value of food reaches infinity in relation to noncaloric money substances does not account for Otkel's lack of concern later when he hears about the fire and loss of food: "He took the loss well and said that it probably happened because the storehouse was so near the kitchen." Otkel is not worried about depleting his own supplies. Something else is motivating him, and it is not merely a matter of Skammkel's malice, although, at one level, this is what the author apparently would have us believe. Otkel is also the recipient of much good counsel from his brother Hallbjorn, but he chooses to reject it.

When Gunnar arrives at Kirkby he calls Otkel out. This is the usual procedure and it gives no occasion for insult. Otkel's greeting and Gunnar's friendly acceptance of it show as much. Gunnar gets to the purpose of his visit immediately by asking to buy hay and food. The quickness with which the request is made indicates that Gunnar does not wish to stay; he is not a seeker of hospitality. The haste could have been motivated by a desire to signal his own sense of social superiority or by polite concern not to impose himself and his followers without having first been invited. Either interpretation implies a sense of social distance, one benign and one less so. Otkel's reading of Gunnar's motivation would have depended on the accompanying manipulation of other codes of sociability—like body language, the significance of visits at certain times of the day or seasons of the year, the number of companions, how they are dressed, the arms they bear, and their relationship to the principal, among many other things.

Each party appears to misread the other's intentions. Gunnar's expedition is not as hostile as Otkel suspects it might be, and Otkel is not as amenable to supplying him with food as Gunnar thinks he will be. So it is that Gunnar construes Otkel's remark—"there's both, but I will sell you neither"—as a hint to ask for a gift rather than as the statement of defiance it soon proves itself to be, that is, as an indication of hostility to selling rather



than hostility to him. The shift from the idiom of buying and selling to the language of gift exchange is not a euphemistic way of discretely haggling over price. It is an attempt to define the social significance of the transfer by negotiating the mode of exchange; at issue is the quality of relations between the parties, not price.

Otkel clarifies, or perhaps first formulates, his position when he refuses to make a gift. Relations have now been established between the groups, and they are hostile. Otkel's refusal to transfer voluntarily threatens to turn Gunnar's trip to no account. Such fruitless expeditions are, everywhere in the sagas, sources of humiliation, and humiliations create debts that demand repayment. This is why Thrain urges a forceful taking and why Hallgerd later will connive a taking of her own. By refusing to transfer food, Otkel chooses to tranfer insult instead. And it will be repaid. The two groups will henceforth engage in unsociable transactions, exchanging lawsuits and killings. These are not exchanges of intangibles. Legal actions, arbitrations, and killing are invariably accompanied by property transfers, whether as compensation awards and wergeld payments, confiscations pursuant to outlawry judgments, or raids. Such are the reciprocities of the blood feud.

Otkel does not look especially admirable in this dealing. Merely to be possessed of plenty in famine times is grounds for suspicion as to character. But elsewhere Otkel is capable of generosity; he does not deny gifts and hospitality to everyone. Something in the transaction itself or the identity of the would-be purchaser provokes the refusal to transfer food. Consider the events from Otkel's point of view. Otkel and Gunnar, though resident in the same district, are not mentioned as having had any relations prior to the present incident. No ties of kinship or affinity bind them or any members of their kin groups. But Gunnar's request forces the parties to establish relations that will extend beyond this one occasion unless Otkel is willing to deal in the buy/sell mode, where obligation is specific as to amount and time, and future dealings are not intended unless explicitly agreed to. Once Gunnar initiates the dealings, Otkel cannot refuse to deal without insulting the other party. A refusal to sell or give might be taken as a challenge to take forcefully; and it was so construed by Gunnar's uncle, Thrain. The three men accompanying Gunnar are at all times a potential raiding party. Gunnar seems to have anticipated Otkel's anxieties. He limited his entourage well below the saga norm of six to twelve, trying to avoid the aura of intimidation that a larger party would bring with it. Gunnar's sensitivity about the size of his party suggests a general knowledge of the intimations of insult, intimidation, and violence that attached to going to another's home with the intention of bearing away provisions undigested on horseback rather than digested, as a gift of hospitality. If Otkel were a fisherman at a fishing station, Gunnar's arrival would be regularized and insignificant, but Otkel is not a dealer in foodstuffs.

Otkel is not alone among reluctant sellers in the sagas. Accounts are uniform in showing sellers to be defensive about what they perceive as aggressive acts. And buyers are only too ready to confirm their fears. In one case an offer to buy food is undertaken specifically for the purpose of harassing the other party. The refusal is not only anticipated but wished for, so as to provide the pretext for even more aggressive action.[4] The case illustrates some of the darker significances of buying that were consciously manipulated in the strategies of the disputing process.

Gunnar's failed attempt to buy hay and food ends up, strangely, with Otkel offering to sell Gunnar an extra mouth to feed, a slave whom Gunnar buys. In a nice ironic turn, it is the slave, Melkolf, who is the means by which food gets transferred from Otkel to Gunnar; it is he who carries out Hallgerd's command to steal the food from Otkel and fire his storehouse. Theft, in Iceland and elsewhere in early Germania, was a contemptible deed, sharing with murder (the unannounced killing) the shame of secretiveness. Even the good-for-nothing Melkolf must be threatened with death before he will steal. The successful theft is not within the system of reciprocities. Because it is a secret crime with the thief unknown, theft does not invite reprisal. Thus, unlike *ran*, theft denies all social relation. But Hallgerd is not completely secretive about the theft. She ostentatiously lets Gunnar know about it in front of visitors, proud that she has avenged her husband's humiliation. Once the theft becomes general knowledge, it prompts another attempt at exchange between Gunnar and Otkel. Gunnar again rides to

Kirkby and indicates his willingness to compensate Otkel for the losses he has suffered. This time, however, Gunnar is accompanied by eleven others, and we may presume that the significance of the increase in numbers was not lost on Otkel. As before Gunnar calls Otkel out and as before Otkel and his companions greet him. Then the following negotiations take place, and they hold the clue as to why Otkel refused Gunnar's requests earlier:

> Otkel asked where Gunnar was travelling to. "No further than here," said Gunnar. "My purpose is to tell you that the terrible damage that occurred here was caused by my wife and the slave I bought from you."
>
> "That was predictable," said Hallbjorn.
>
> Gunnar said, "I wish to make a good offer: I propose that the men of the district decide the matter."
>
> Skammkel said, "That sounds good, but it's not fair; you are popular with the farmers and Otkel is unpopular."
>
> "I will propose this," said Gunnar. "I will judge the case myself and conclude the issue right here: I offer my friendship, to pay you a twofold compensation, and to pay it all now."
>
> Skammkel said, "Don't take it. That would be demeaning if you were to grant him self-judgment when you should have it."
>
> Otkel said, "I won't give you self-judgment, Gunnar."
>
> Gunnar said, "I notice here the counsel of those who will eventually get their just deserts. Anyway, judge yourself then."
>
> Otkel leaned toward Skammkel and asked, "How should I answer now?"
>
> Skammkel answered, "Call it a good offer, but submit your case to Gizur the White and Geir the chieftain; then many will say that you are like your father's father, Hallkel, who was the greatest of warriors."
>
> Otkel said, "That's a good offer, Gunnar, but, still, I want you to give me the time to meet with Gizur the White and Geir the chieftain."
>
> Gunnar said, "Have it your way, but some would say that you can't see where your honor lies if you don't accept the opportunity I have offered you."

This passage offers a nutshell exposition of the procedures for both reaching a settlement without going to law and for determining payment (damages) after possession has been transferred. But just as did the earlier negotiations over the purchase of food, these also break down. Here too price is not at issue, although Gunnar mistakes the rejection of his offer to submit to the arbitration of the local farmers as expressing such a concern. This is why, it seems, his next offer stipulates double compensation. The rejection of this offer turns on the significance of letting Gunnar articulate the terms of the award by conferring on himself the right of self-judgment. The issue is not money, but prestige and honor. And when Otkel, following Skammkel's advice, postpones accepting Gunnar's very generous offer to let Otkel judge the dispute, it is clear that the dispute is no longer about the value of hay and food at all, but about competition for power and prestige in the district. In this context Skammkel's advice is right. Otkel gains no prestige if Gunnar freely grants the power of self-judgment. Units of prestige would only be transferred if Otkel were to force Gunnar to offer self-judgment, or if Gunnar's offer were motivated by fear that Otkel could force it from him, and not by impatient irritation to have done with the matter.

In Skammkel's *sotto voce* advice we can ascertain the reasons for Otkel's earlier refusal to sell and present refusal to settle. Skammkel's reference to Otkel's paternal grandfather, Hallkel, the great warrior, notes a falling-off in Otkel's lineage from the previous generations. The comment suggests that Otkel is moved by a concern to reestablish the status his lineage once had in the district. There would be no better way to accomplish this than to be known as the person who had bested the great warrior Gunnar. It is significant that Skammkel appends the reference to Hallkel to his counsel to turn the matter over to Gizur and Geir. Both these men are *godar* and both are Otkel's patrilateral second cousins. The message to Gunnar is unmistakeable. Otkel wishes to expand the dispute beyond the two households now involved. Nothing could be more suitable to Otkel's agenda than to make hay of Hallgerd's disgraceful act. The theft provides a perfect opportunity to humiliate Gunnar, just as Gunnar's shortage of supplies had provided earlier. Otkel does

not mean to lose this opportunity and so chooses to initiate legal action against Hallgerd and Gunnar. This can be his only motive, since in terms of the dispute as narrowly conceived—that is, as a case of reparation for theft and fire—there was little more Otkel could realistically achieve once Gunnar offered him self-judgment. . . .

The impediments and difficulties which seem to attach to the transfer of food and hay contrast rather drolly with how easily property in humans is transferred. Melkolf, the slave, was the object of a gift,[5] a sale, a payment pursuant to an arbitration award, and even a *ran*. His Celtic name, coupled with the brief notice that Hallbjorn brought him to Iceland, makes it highly probable that he was introduced into the stream of commerce as the spoil of a Viking raid.

Only rarely do the sagas show offers to buy goods leading to a transfer of them by sale. Apparently everyone knew there was more likelihood of transfer in another mode of exchange, and they negotiated with this in mind. There was thus little time spent bargaining over price, the hasty abandonment of which marked the rejection of the mercantile mode. Resistance to selling led to requests for gifts, offers of gifts from second and third parties, and to open and secretive expropriations.

The case gives a strong sense that buying and selling was a hostile transaction; it was something one did with those from a distance, either spatial distance, as with Norwegians, or social distance, as with peddlers and hawkers of marginal social status. In any event, it was not something a *bondi* went to another *bondi*'s house to do. Attempts to trade with equals within the community often produced the disturbing results of the preceding cases. This is not to deny that *boendr* bought and sold from each other without incident. Yet these transfers were often accompanied by hints of intimidation and duress, with one party clearly cashing in, so to speak, on his greater power. The bonds of friendship and neighborhood could tolerate an occasional purchase, but the sagas do not show *boendr* involved in continuous trading activities at home. Such arrangements were regular for trading expeditions abroad, but that is a different issue entirely. Gift exchange and the structured hostility of the feud, with transfers of compensation and lawsuits, were the preferred means of exchange. It was bad form to seek openly to bear away goods without some attendant mystification.

These general statements pertain to only a narrow range of transactions because our case evidence represents a very specific type of transaction: the request to purchase provisions. What the party who initiated the transaction was seeking was crucial to the level of tension and the likelihood of a conflict-free conclusion to the meeting. The sagas, for instance, are filled with descriptions of people coming to another's farm or booth at the *thing*, seeking marriages or fostering arrangements, support for lawsuits, arbitrations, and vengeance expeditions. To be sure, these transactions could also lead to insult and bitterness, but the impression is that they were distinctly less troublesome, less anxiety-provoking, because they are more familiar and regular than requests for goods.

The comfort of the familiar was obtained when goods moved as an incident to the establishment and maintenance of social relations. People undertook to foster children and transferred property to the child giver in exchange for support. A friend would give food if he had some to spare because that was what friendship meant. The familiar meant dealing directly in humans and about social ties, and only secondarily in the products of human labor. Social relations meant that human bodies moved between groups for various lengths of time. Marriage and fostering sent live bodies for relatively long periods to other households. Friendship meant bodies went back and forth regularly between households. Even outright purchases of support, a frequent saga practice, represented the transfer of human capital, albeit briefly, from one household to another. All these relations were characterized by positive or at least neutral sociability. Bodies also moved between households in modes of low sociability, but they were maimed or lifeless. In feud the exchange was in injuries and corpses. But all movements of bodies, living or dead, between households were accompanied by exchanges of goods: by gift and hospitality at the sociable end, by wergeld, compensation, and *ran* at the other end.

The mercantile mode inverted the relation between goods and bodies. Bodies moved as an incident to the transfer of goods. Buyers and sellers came together only to exchange, preferably at a neutral place designated as a market, after which each returned to his producing unit. The goods, not the buyer and seller, were to be related to each other, and the relationship was openly expressed as price. This is, of course, an idealized representation. The mercantile exchanges of two *boendr* could never be those of the faceless market. People already knew about each other, and they were likely to see each other again. Still, to seek to exchange by purchase and sale carried with it a message of low sociability. Buying and selling denied accountability by failing to establish the social relations that held people to account. Perhaps nothing confirms the strangeness of mercantile exchange, with its inversion of the relation of goods to bodies, more than the fact that the one good which flows smoothly in the stream of commerce does so because it mimics the "right" order by sending bodies permanently to other households. Selling a slave was not as irregular as buying hay.

A different set of values accompanied the transfer of land, at least during the period of colonization. Gifts of food and hospitality could be quitted with return invitations, and prestige goods like cloaks, weapons, and fine animals could requite hospitality and each other. A gift of land, however, some feared, might indicate a long-term subordination of the recipient to the giver

because nothing but a return gift of land could extinguish the obligation.

Instead of disfavoring the mercantile mode, prospective recipients tried to shift the classification of the transfer to purchase and sale, or to expropriatory modes in which the act of taking clearly indicated the taker's dominance. The social distance of purchase was just what Steinunn the Old wanted: "Steinunn the Old, a kinswoman of Ingolf, went to Iceland and stayed with Ingolf the first year. He offered to give her Rosmhvalaness . . ., but she gave a spotted cloak for it and wished to call it a purchase; it seemed to her there would then be less chance of undoing the transfer." Others preferred duelling for land, while some thought it better to be beholden to no one: "Hallstein Thorolfsson thought it cowardly to accept land from his father and he went west over Breidafjord and took land there." But with land as with movables, what the sources show is concern not about price or discussions of it, but about the classification of the transfer, the mode of exchange.

There is a lesson in Hallstein's sensitivity. It reveals that no exchange was just a two party affair. The community passed moral and social judgment on a transaction, allocating in the process honor and prestige between the parties. And if no third parties were there to pass judgment, the principals would hypothesize the judgment anyway. A person risked some part of his reputation in every social interaction, even in exchanges, as we gather from Hallstein, between father and son. All knew that in the process of defining social relations between the parties there would necessarily be an adjustment in the standing of the two relative to each other. And because this adjustment was figured in units of prestige and honor, its effects would also determine the quality of one's relations with others.

The skillful participant in exchange was the one who knew how to manipulate the multitude of signs that attended the classification of a transaction to the increase of his honor, not his net worth. The adept players in this game, that is, the honorable men and women, were those who knew whether and when to pay and to pay back, to give and to receive, or to take a thing and leave behind what they thought it was worth. Our cases suggest that they were more likely to exchange goods and services in the forums of dispute processing and in the festive hall, by compensation payment or gift, than in a marketplace or the countryside, by sale and purchase. And whether the exchange was to be by feud or feast was what they bargained over. ⊠

FOOTNOTES

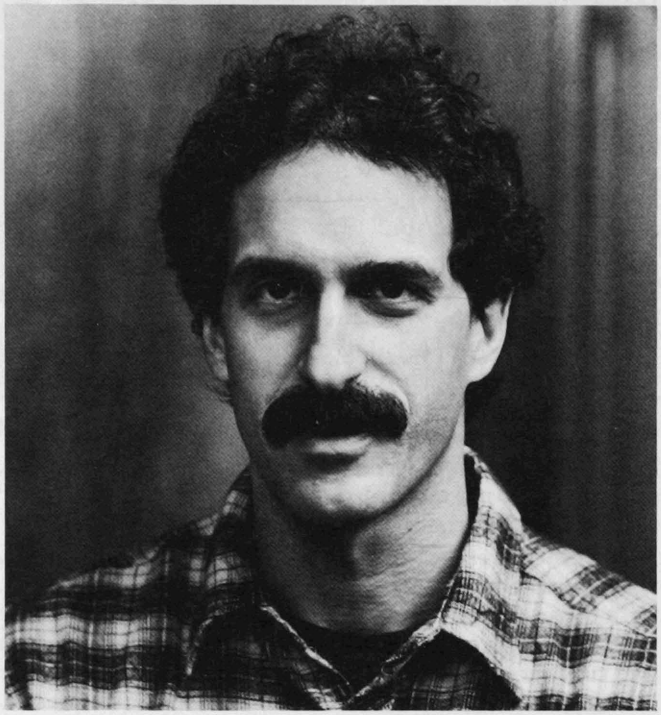
[1]A meeting where formally inaugurated courts were held. There were local *things* meeting in the spring and fall and a *thing* for all of Iceland, called the *Althing*, which met for two weeks at midsummer.

[2]*Boendr*, a free farmer who qualifies as a householder.

[3]A chieftain owned a chieftaincy. It was freely transferable. The office carried with it certain judicial and administrative responsibilities. All free men had to be attached to a chieftain for purposes of *thing* attendance. Thingmen could transfer their allegiance fairly easily. At the time of the events related here there were thirty-six chieftains in Iceland.

[4]An imaginative disputant like Hvamm-Sturla could expropriate food by forcing an extra mouth on the seller. After Thorvard sold some meal of low quality to Sturla, Sturla gave him a choice of being sued or fostering Sturla's son. Thorvard chose the latter.

[5]The slave had been given to Otkel by Otkel's brother, Hallbjorn, at the chapter's start.



William I. Miller received his undergraduate degree from the University of Wisconsin and a Ph.D. in English and a J.D. from Yale University. He taught medieval English literature at Wesleyan University, Connecticut, and was an associate professor of law at the University of Houston before joining the Michigan law faculty in 1985.

Professor Miller's course on bloodfeuds examines medieval Icelandic sagas and laws in translation to attempt a reconstruction of the systems of social control. Attention is paid to the obligations, claims, and sanctions imposed by various systems of exchange: the blood feud, gift exchange, marriage, and fostering.

The medieval Icelanders managed to confer some sense of legitimacy by resolving disputes by legal adjudication, arbitration, and by blood revenge. The interrelation of these modes of resolution and the forces that led people to pursue one mode rather than another are just some of the issues that occupy the class. Source readings are supplemented with recent anthropological descriptions of bloodfeuding cultures.

An Invitation to the Alumni from the Dean Search Committee

Dean Sandalow has recently announced his retirement as dean, effective at the end of the current fiscal year, in order to resume his duties as a full-time teaching member of the law faculty. The selection of a successor to Dean Sandalow is the most important task now facing the University of Michigan Law School.

A dean search committee has been appointed by the president of the University. The committee hopes to complete its work early in the winter term of 1987. Suggestions from alumni about possible candidates for the deanship and other comments relevant to the dean search will be warmly welcomed by the committee. They will be given careful consideration. Michigan is of course an equal opportunity/affirmative action employer.

Since the committee hopes to move forward rapidly, communications should be addressed to it as soon as possible. Please send them to Professor Theodore J. St. Antoine, University of Michigan Law School, Ann Arbor, Michigan 48109-1215.

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